

Hearing: Operation Mantus

Before the Hon P Johnson SC, Chief Commissioner

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

On Tuesday, 4 April 2023 at 10.20am  
(Day 3)

**WITNESS INDEX**

<b>Anthony Paul Crandell</b>	<b>87</b>
<b>Peter Norman Cotter</b>	<b>118</b>

1 THE CHIEF COMMISSIONER: Yes, Mr Fernandez?

2

3 MR FERNANDEZ: Chief Commissioner, can I let all parties  
4 know what's to take place today. I will shortly tender two  
5 additional exhibits.

6

7 Assistant Commissioner Anthony Crandell will give  
8 evidence in relation to the use of body-worn video. I will  
9 ask to take his evidence to a point, if you consider it  
10 appropriate, for parties to be allowed to ask him  
11 questions, but then for Assistant Commissioner Crandell to  
12 return on Thursday to deal with one discrete aspect of  
13 evidence.

14

15 After Assistant Commissioner Crandell, we have  
16 Assistant Commissioner Peter Cotter, who is going to give  
17 evidence about matters relating to custody management.  
18 With Assistant Commissioner Cotter is Sergeant Stuart  
19 Edgell. He's the lead educator in the custody crime  
20 prevention training unit and he will give evidence after  
21 Assistant Commissioner Cotter about specific aspects of  
22 training. I expect that evidence will take a good part of  
23 the day.

24

25 I start, Chief Commissioner, by tendering the  
26 following exhibits. I tender a case called, for the  
27 purpose of these proceedings, *GHI*. This is a transcript of  
28 Judge Johnstone, the president of the Children's Court, on  
29 7 August 2019. It contains rulings as well as submissions,  
30 so it is a transcript of a discrete part of the proceedings  
31 on that date. The barcodes are 8533486 through to  
32 8533491.

33

34 **EXHIBIT #MTS93 TRANSCRIPT OF PROCEEDINGS ON 7 AUGUST 2019**  
35 **BEFORE HIS HONOUR JUDGE JOHNSTONE, THE PRESIDENT OF THE**  
36 **CHILDREN'S COURT, BARCODED 8533486-8533491**

37

38 MR FERNANDEZ: I tender a statement of Assistant  
39 Commissioner Peter Cotter dated 30 March 2023. The  
40 barcodes for this statement are 8620378 to 8620388. The  
41 date of the statement is 31 March.

42

43 **EXHIBIT #MTS94 STATEMENT OF ASSISTANT COMMISSIONER**  
44 **PETER COTTER DATED 31 MARCH 2023, BARCODED 8620378-8620388**

45

46 MR FERNANDEZ: I call Assistant Commissioner Anthony  
47 Crandell.

1 <ANTHONY PAUL CRANDELL, affirmed: [10.22am]

2

3 MR COFFEY: Chief Commissioner, I can indicate that this  
4 Assistant Commissioner doesn't require a declaration.

5

6 THE CHIEF COMMISSIONER: All right. Thank you.  
7 Thank you, Mr Fernandez.

8

9 <EXAMINATION BY MR FERNANDEZ:

10

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

12 A. My name is Anthony Paul Crandell, C-R-A-N-D-E-L-L.

13 I'm an assistant commissioner of police attached to  
14 technology command in the NSW Police Force.

15

16 Q. You are, as you have just described, responsible for  
17 IT infrastructure and assets, development of technology for  
18 policing operations; is that correct?

19 A. That's true and correct.

20

21 Q. Use of body-worn video is something that ultimately  
22 you are responsible for?

23 A. Yes, I'm the corporate sponsor for body-worn video.

24

25 Q. Previously you have been a commander in a number of  
26 different areas of NSW Police; is that correct?

27 A. Yes, that's true.

28

29 Q. You are the corporate spokesman for sexuality, gender  
30 diversity and intersex?

31 A. I was. I am no longer.

32

33 Q. You were the project lead or commander responsible for  
34 the introduction of body-worn video; is that correct?

35 A. So body-worn video was first introduced in a trial  
36 phase, phase 1, from about 2014, and then I took over from  
37 phase 2 in about 2017.

38

39 Q. Operation Mantus is an investigation into an incident  
40 that took place in northern New South Wales in September of  
41 last year. Are you aware in general terms of what this  
42 investigation is about?

43 A. Very general terms, yes.

44

45 Q. Are you aware that at a time when a police officer  
46 apprehended a young person, that police officer was in  
47 plain clothes?

1 A. Yes.  
2  
3 Q. And are you aware that there was no body-worn video  
4 worn by that police officer or any other police officer on  
5 this night --  
6 A. Yes, I believe so.  
7  
8 Q. --- involved in that particular operation? And are  
9 you aware that there is a dispute about what happened - the  
10 young person says he was picked up and thrown to the ground  
11 and then punched by the apprehending police officer, and  
12 the apprehending police officer denies that.  
13 A. I understand.  
14  
15 MR COFFEY: Could I just indicate in fairness, the  
16 characterisation that no police officer was wearing footage  
17 on the night is a slightly misleading one, in that I accept  
18 that during the course of the interaction with the young  
19 person there was no body-worn, but there is, at a later  
20 point in time, after a number of police and fire rescue  
21 arrived. That needs to be put.  
22  
23 THE CHIEF COMMISSIONER: Yes, that's certainly the case.  
24 After the event, uniformed police were there  
25  
26 MR COFFEY: Most certainly.  
27  
28 THE CHIEF COMMISSIONER: That tends to illustrate part of  
29 the problem, I think, that the critical phase is not the  
30 subject of any electronic evidence, and that's the aspect  
31 I think to which we will be moving shortly  
32  
33 MR COFFEY: Thank you, Commissioner.  
34  
35 THE CHIEF COMMISSIONER: Yes, Mr Fernandez.  
36  
37 MR FERNANDEZ: Q. I did indicate that the police, as  
38 part of this particular operation, were not wearing  
39 body-worn video. Are you aware that one police officer,  
40 the senior police officer on this night, as part of this  
41 particular plain clothes operation, did have body-worn  
42 video with him, but in fact left it in the police car and  
43 never used it?  
44 A. Yes.  
45  
46 Q. Is that something you are aware of?  
47 A. Yes, it is.

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Q. Evidence was given by police officers during private examinations, and I can summarise one particular aspect as being there seems to be different understandings between police officers, even within the same command, as to when body-worn video is to be worn or not. That's particularly as it relates to being in plain clothes. Would you accept that as a broad summary of the evidence?

A. Yes, I would.

Q. I'm going to start by asking you questions about body-worn video and what training police are actually given about its use. Can you describe the training?

A. So every user of body-worn video must attend a two-hour face-to-face training lecture. That's guided by a number of principles and it deals with policy, the standard operating procedures, the equipment, uploading procedures, tagging procedures, and then how to prepare body-worn video for evidence.

Three categories of body-worn video need to be tagged, that being evidence, complaint or a potential complaint, or if it relates to a workplace health and safety issue. So all of that is covered in that training.

There is body-worn video supplied to the NSW Police academy and it is used in training those police as well. There is also a MicroLearn package that deals with using body-worn video for domestic violence and substituting the body-worn video for domestic violence evidence camera.

There are other educational pieces of information that are disseminated, sometimes from my office and other times from education and training command, that deals with certain changes to the policy and standard operating procedures as we move through different phases and different times.

Q. You said that every user of body-worn video gets training in it?

THE CHIEF COMMISSIONER: Yes, Mr Coffey?

MR COFFEY: I must indicate, I don't intend to stand up very often in the process, Chief Commissioner, could I just inquire if maybe the Commission staff could turn the amplifier on, it is difficult to hear the witness, because

1 it doesn't seem to be coming through the microphone, for  
2 the gallery.

3

4 THE CHIEF COMMISSIONER: All right. Can we see if we can  
5 boost the amplification?

6

7 The microphone, I think, is in the usual position  
8 close to you, Assistant Commissioner, so that shouldn't be  
9 the problem. Let's see how it goes now.

10

11 THE WITNESS: I'll try and speak up.

12

13 MR COFFEY: Much better.

14

15 THE CHIEF COMMISSIONER: Someone's pushed the right  
16 switch, I think.

17

18 THE WITNESS: Thank you.

19

20 MR FERNANDEZ: Q. You said that every user of body-worn  
21 video gets training in it?

22

23 A. Yes.

24

25 Q. I'm shortly going to take you to the standard  
26 operating procedures and the difference between police in  
27 uniform as opposed to police who are not in uniform, so,  
28 for example, conducting plain clothes duties.

29

30 A. Yes.

31

32 Q. When you say every user of body-worn video gets  
33 training, does that cover all police?

34

35 A. Yes. So the body-worn video SOPs indicate that every  
36 user of body-worn video must receive the two-hour  
37 face-to-face training.

38

39 Q. That training relates to a number of topics about  
40 functionality, actual use?

41

42 A. Yes.

43

44 Q. What training is there on the times or the  
45 circumstances in which body-worn video should be used?

46

47 A. So that is covered in the face-to-face training  
outline. It's also covered in the standard operating  
procedures. Sorry, the standard operating procedures talk  
about using best judgment, and takes officers to different  
scenarios where it would be appropriate to activate  
body-worn video.

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Q. What role do the standard operating procedures have for police in their day-to-day duties? Are they available, the SOPs, standard operating procedures, on a number of different topics - are they available for police to access?  
A. Yes, they're available for police to access as well as their supervisors and managers, and obviously able to refer to them at any time.

Q. Ongoing training - is that provided in relation to body-worn video?

A. There's reminders sent out, but in relation to the training, it really takes the form of changes to the standard operating procedures, where there might be other procedures introduced - for example, using body-worn videos at search warrant operations and then also for the domestic violence capability.

The refresher training is really probably around the initial training that's provided for the two-hour sessions.

Q. When you talk about "domestic violence capability", are you referring there to the use of an interview with a complainant in a domestic violence matter recorded on body-worn video as evidence-in-chief at later court proceedings?

A. Yes, that's correct.

Q. In terms of the standard operating procedures that you just referred to and changes being introduced, how does that, in fact, take place, that there are changes to the standard operating procedures?

A. So minor changes - for example, changing it to police area command instead of local area command, I can authorise those. If there's changes that move from the spirit and intent of the Commissioner's executive team, then any changes or any amendments must then go back through to the Commissioner's executive team for endorsement.

Q. I want to ask you now about access to body-worn video by police. How is that done? Is body-worn video kept in a certain part of a station? How is that accessed?

A. Yes. So when a user wants to sign out a body-worn video, and it's called a palm vein scanner, the officer will put their hand on to that scanner and then a body-worn video camera will be allocated.

1           Once it's returned, there will be an automatic upload  
2 of any material that's on that body-worn video and it goes  
3 into the body-worn video system.  
4

5           If an officer - an officer must then create an event,  
6 which is then able to be tagged into the body-worn video  
7 product, and then the officer determines what is evidence,  
8 workplace health and safety, or a potential complaint, and  
9 then tags that body-worn video product into that event.

10           That then moves the body-worn video from the body-worn  
11 video system into the View IMS system, which then creates  
12 a greater time for retention of that file. If the file is  
13 not tagged, then it will be held on hand for the next six  
14 months and then it will be deleted after that period of  
15 time.  
16

17  
18 Q.   When you use the word "tagged", what do you mean by  
19 that?

20 A.   So that's just a - we call it "tagged", because in the  
21 system it just identifies the body-worn video product or  
22 the images, and that then gets allocated to the event.  
23

24 Q.   Do all police have access to body-worn video?

25 A.   Not all police. So you have to be a registered user  
26 on the body-worn video system, and you need to go in and -  
27 there's a multifactor identification to make sure that we  
28 know who the users are. There would be police that would  
29 not be in that body-worn video system. It really is for  
30 operational use.  
31

32 Q.   "Operational" is a word that comes up a number of  
33 times in the standard operating procedures. Can I ask you  
34 now, just before I go to the detail of those procedures,  
35 what does "operational" mean?

36 A.   So "operational" is generally in uniform but not  
37 necessarily, and responding to calls for assistance from  
38 members of the community. It does not necessarily include  
39 police officers that may well be performing duties inside  
40 a police station, but certainly when they're outside  
41 performing duties, interacting with the community, whether  
42 for the purposes of investigation or other policing  
43 functions, then that would be considered "operational".  
44

45 Q.   The subject matter of this investigation involved  
46 proactive policing at night-time in plain clothes with cars  
47 not identified as police cars, with the goals including to



1 observe if anything took place, any criminal offences, and,  
2 if necessary, to arrest people involved.

3 A. Yes.

4  
5 Q. Does that come within the definition of "operational  
6 policing"?

7 A. Yes.

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19  
20 MR COFFEY: I'm sorry to interrupt, Chief Commissioner.

21  
22 I would ask that your Honour consider making  
23 a non-publication order over this aspect in terms of the  
24 technology and the resources for a number of reasons. The  
25 first is that it is still being considered and developed,  
26 and although the community might have an understanding from  
27 the television media, et cetera, about the capabilities of  
28 the police force, the confirmation precisely presents some  
29 difficulties. Certainly it is relevant for you, Chief  
30 Commissioner, to hear this evidence, though.

31  
32 MR FERNANDEZ: There is no difficulty with that, I was  
33 just going to adduce the evidence.

34  
35 THE CHIEF COMMISSIONER: Ms Lee is just --

36  
37 MS LEE: Your Honour, I can't see why this information  
38 can't be on the record. I mean, it is an issue of public  
39 interest. It is not actually referring to anything in  
40 terms of police investigations but just in terms of the  
41 process and difficulties with implementation.

42  
43 THE CHIEF COMMISSIONER: Mr Fernandez, do you want to say  
44 anything further about this?

45  
46 MR FERNANDEZ: Yes, I support a non-publication order  
47 about this particular aspect because matters such as

1 availability, roll-out and resources are legitimately  
2 matters that are solely for the NSW Police. They don't  
3 need to be publicly available.

4  
5 THE CHIEF COMMISSIONER: I propose to give some short  
6 reasons.

7  
8 The Commission is currently holding a public hearing  
9 as part of an investigation. This is not a court case or  
10 a trial. From time to time, there may well be matters  
11 raised which attract sensitivity because of operational or  
12 technical reasons associated with contemporary policing.

13  
14 The current witness is giving evidence about body-worn  
15 video. This is a developing area, both in this state and  
16 in other jurisdictions.

17  
18 I am satisfied that it is appropriate to make  
19 a non-publication order with respect to that part of the  
20 evidence which has recently been given which concerns areas  
21 of technical development with respect to this facility.

22  
23 I would request those appearing to have regard to the  
24 fact that this order is about to be made, with respect to  
25 further areas of questioning. If there are areas of  
26 questioning which are relevant to this investigation but  
27 which may attract the same application, I will consider  
28 that application at the time.

29  
30 This is, in a sense, a variation on a form of public  
31 interest immunity claim well known to the courts.

32  
33 The extent of the application, Mr Coffey, is to seek  
34 a non-publication order with respect to the last question  
35 and answer; is that so?

36  
37 MR COFFEY: That's so, Chief Commissioner.

38  
39 THE CHIEF COMMISSIONER: That's the question that starts,  
40 "Are there sufficient body-worn video", and ending in the  
41 answer given by Assistant Commissioner Crandell "hand-held  
42 devices"?

43  
44 MR COFFEY: Yes, Chief Commissioner.

45  
46 THE CHIEF COMMISSIONER: I make a non-publication order  
47 with respect to the question of counsel assisting

1 commencing, "Are there sufficient body-worn video", and  
2 ending in the answer with the words "hand-held devices".  
3 That non-publication order is made for the purpose of this  
4 investigation. That part of the transcript will be excised  
5 before the transcript is made public.  
6

7 I should indicate that the Commission is well aware of  
8 the developments being undertaken by the police in this  
9 area, and these developments include areas of technical  
10 sensitivity and, in due course, no doubt, there will be  
11 public information revealed with respect to these  
12 developments, but it is not appropriate that there be  
13 incidental revelations of what is a work in progress for  
14 the moment, and that is further explanation for the order  
15 which I have made.  
16

17 Does that cover it, Mr Coffey?

18  
19 MR COFFEY: May it please the Commission, thank you.  
20

21 THE CHIEF COMMISSIONER: All right. Yes, Mr Fernandez?  
22

23 MR FERNANDEZ: I'm going to ask for MTS81 to be placed up  
24 on the screen, which is the body-worn video standard  
25 operating procedures as at November of 2022. The barcode  
26 for the first page is 8620182. I'm going to ask for  
27 page 4, which ends with the numbers 185, to be turned up,  
28 please.  
29

30 Q. Assistant Commissioner Crandell, can you see before  
31 you the Commissioner's foreword to the standard operating  
32 procedures?

33 A. Yes, I can.  
34

35 Q. The second paragraph refers to a requirement to wear  
36 body-worn video cameras on a mandatory basis where  
37 practicable when operationally deployed in uniform to  
38 perform a response policing role.

39 A. Yes.  
40

41 Q. Does that indicate that it relates particularly to  
42 uniformed police who are called out to investigate  
43 complaints of whatever nature they may be?

44 A. Yes.  
45

46 Q. In the next paragraph, the third paragraph on that  
47 page, the foreword notes that activation of body-worn video

1 cameras is required when circumstances to commence  
2 recording are anticipated, evolving or actually occurring.  
3 There is some later description of the appropriate times to  
4 use body-worn video; is that correct?

5 A. Yes, that's correct.

6

7 Q. I'll take you to that. In the fourth paragraph on  
8 that page, the first sentence refers to:

9

10 *It is clear that [body-worn video]*  
11 *recordings support operational policing*  
12 *activities ...*

13

14 Can you see that?

15 A. Yes, I can.

16

17 Q. Now, that term "operational policing" is mentioned  
18 a number of times in the standard operating procedures.  
19 You have given an answer in response to a situation that  
20 I put to you stating that, in that situation, there would  
21 be operational policing. Is there a definition in the  
22 standard operating procedures about what "operational  
23 policing" means?

24 A. I don't believe so.

25

26 Q. Would it be useful to --

27 A. Oh, sorry. I'm sorry to interrupt you. There is  
28 a footnote that indicates what operational policing is in  
29 accordance to be consistent with the taser SOPs, as  
30 I recall.

31

32 Q. Perhaps I can have the page with the barcode ending 87  
33 brought up, please. Could we go to the very bottom of that  
34 page to the footnote.

35 A. Yes.

36

37 Q. I wonder if that could be zoomed in, please. You can  
38 see there is a footnote that refers to, "Operational  
39 response"?

40 A. Response, yes.

41

42 Q. Is that what you were referring to?

43 A. Look, I think - yes, it was, yes.

44

45 Q. Just in terms of that term "operational policing", and  
46 "operational police" is used elsewhere, isn't there  
47 a benefit to actually defining what "operational policing"

1 is?

2 A. Yes, I think so. I think "operational response" is  
3 more restrictive than "operational policing", I think  
4 that's a broader term. I think "operational policing" is  
5 used in the SOPs because that's a term that's commonly used  
6 in policing, but I think it would be helpful to have  
7 a "Definition" section.

8

9 Q. Is that something that could be considered?

10 A. Certainly.

11

12 Q. Particularly as later on in the standard operating  
13 procedures there's reference to "overt policing", which  
14 would be clearly understood as "operational policing", but  
15 there's also mention of being in plain clothes, which might  
16 not be understood in that same way?

17 A. Yes.

18

19 Q. Do you agree with that?

20 A. Yes, I do.

21

22 Q. Could the next page be turned up, please, ending with  
23 the barcode 186. This is page 5 of the standard operating  
24 procedure. Are you able to read there in the second  
25 paragraph that there's reference to body-worn video cameras  
26 supporting operational policing activities?

27 A. Yes.

28

29 Q. If you go to the fourth paragraph on that page,  
30 there's a reference to the use of body-worn video cameras  
31 being incident specific?

32 A. Yes.

33

34 Q. And looking at the next line:

35

36 *... the cameras will be worn on a police*  
37 *officer's uniform/clothes in an overt*  
38 *manner.*

39

40 A. Yes.

41

42 Q. Can you see that?

43 A. Yes, I can.

44

45 Q. There is a difference between - a practical difference  
46 between a uniformed police officer wearing a body-worn  
47 video camera as opposed to a police officer undertaking

1 duties in plain clothes, wearing a body-worn video; is that  
2 right?

3 A. Yes.

4

5 Q. You might be asked some questions a little later about  
6 this, but has any issue ever been brought to your attention  
7 about the practicality of wearing a body-worn video camera  
8 for a police officer in plain clothes?

9 A. Yes. So the expectation, as I understand it, would be  
10 that a plain clothes officer would not be expected to wear  
11 it on their suit or in plain clothes because that would  
12 defeat the purpose of the undercover nature of the duties  
13 that they're perhaps performing. But there is reference in  
14 the SOPs to using the camera. So the use of the camera  
15 would require an overtness about it, whether that be worn  
16 or that be held, to make it known that the body-worn camera  
17 is in use.

18

19 Q. If a police officer in plain clothes did not want to  
20 make it overt, for operational reasons --

21 A. Yes.

22

23 Q. -- the camera can be carried in a pocket or somewhere  
24 else --

25 A. Yes.

26

27 Q. -- is that right?

28 A. Yes, it can.

29

30 Q. And then it can be taken out and then activated?

31 A. Yes. And that would be the process, I think, that  
32 would be appropriate.

33

34 Q. At the bottom of that page, in terms of the  
35 introduction, there are a number of references to body-worn  
36 video camera equipment being used in a number of different  
37 situations. The first one is being used by NSW Police  
38 officers in the lawful execution of their duties, but that  
39 would entail everything an officer does in the course of  
40 his or her work day in an operational aspect, wouldn't it?

41 A. I think that needs to be read in conjunction with the  
42 comment that you made before in relation to incident  
43 specificity.

44

45 Q. It goes on, in that first note, to say police will use  
46 their judgment when deciding to use it; is that correct?

47 A. Yes, that's correct. And there's further guidance in

1 relation to that later in the SOPs.

2

3 Q. Can I ask you to turn to the third matter on that  
4 page. It says:

5

6 *[Body-worn video] supports conventional*  
7 *forms of evidence gathering; it does not*  
8 *replace them.*

9

10 The first sentence is:

11

12 *[Body worn video] devices operate as*  
13 *a modern-day equivalent of a police*  
14 *notebook and provide a contemporaneous*  
15 *record of observations and events in the*  
16 *field.*

17

18 Is there a potential difficulty there that instead of  
19 making a note, police are taking out body-worn video  
20 cameras for all sorts of reasons that wouldn't otherwise be  
21 considered as appropriate?

22 A. I think the context is in terms of evidence gathering.  
23 So, for example, you wouldn't use a body-worn video to  
24 record something and then not necessarily seize it. It may  
25 well be appropriate for a police officer to indicate  
26 circumstances on to the record as to why they exercise the  
27 power or why they reacted in the way that they did or, in  
28 fact, they could use their standard notebook to make  
29 entries in relation to those reasons.

30

31 Q. I'll later take you to evidence in these proceedings  
32 about the use of, in one case, one specific case, of  
33 a body-worn video camera to conduct an interview with  
34 a young person and to obtain admissions. But if there is  
35 a process whereby a police officer makes a note in a  
36 notebook that a child doesn't wish to be interviewed, is it  
37 possible that that part of the standard operating  
38 procedures might encourage police to put a young person on  
39 a body-worn video camera to note a refusal?

40 A. I don't know whether I would say "encouragement".  
41 I think that if a police officer has the body-worn video  
42 activated, for example, there may be reasons to continue  
43 that activation; there may be reasons not to. And I think  
44 this guidance is really saying that, you know, if you think  
45 of when you use your notebook, you use your notebook to  
46 record details of incidents, particularly when you're  
47 talking to people in relation to criminal matters, or

1 recording crime scenes or other policing functions, and  
2 we're simply saying that this is an acceptable way to  
3 record those matters.

4  
5 I don't believe it would encourage police to  
6 necessarily use the body-worn video when they don't need  
7 to, but it certainly is - when we equate it to a police  
8 notebook, we are saying, "If you think about what you use  
9 your notebook for, you may well then think about what you  
10 use your body-worn video for."

11  
12 Q. I will ask for the next page of the standard operating  
13 procedures to be brought up, please, and I wonder if we  
14 could go to the middle of the page and zoom in on that text  
15 about when to wear body-worn video. In that first  
16 paragraph under that heading, you can see in the second  
17 sentence, once again there is reference to:

18  
19 *All operational police will be trained in*  
20 *the use of [body-worn video].*

21  
22 Can you see that?

23 A. Yes, I can.

24  
25 Q. In the second paragraph under that heading there is  
26 a reference to:

27  
28 *All police officers wearing police uniform,*  
29 *whilst engaged in duties of operational*  
30 *response, must, where practicable, wear as*  
31 *part of their uniform, a [body-worn video]*  
32 *camera ...*

33  
34 A. Yes.

35  
36 Q. Is that correct?

37 A. Yes, it is.

38  
39 Q. The next sentence is as follows:

40  
41 *Police engaged in proactive and/or*  
42 *investigative duties should also take and*  
43 *use [body-worn video] cameras in support of*  
44 *their policing activities.*

45  
46 Can you see that?

47 A. Yes, I can.



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Q. Does that include the situation of police engaging in proactive or investigative duties while in plain clothes?

A. Yes.

Q. Now, if you look at the next paragraph, there's reference to use of body-worn video camera worn by a police officer wearing uniform or plain clothes, and in that case it being an overt wearing of the camera.

Can I take you back to the second paragraph. Given that last sentence about police being engaged in proactive and/or investigative duties, would you consider that there would be some benefit in making clear in the standard operating procedures that police engaged in proactive and/or investigative duties, including being in plain clothes, should also take and use body-worn video cameras? Would that be a useful clarification?

A. Yeah, look, I can certainly consider that clarification, albeit the understanding in the organisation, at an operational level, of proactive and investigative duties, would draw that conclusion, but to be crystal clear, I see no problem in adding that clarification.

Q. When you say "the understanding in the organisation" - there's about 17,000 police or thereabouts; is that right?

A. Yes.

Q. There are going to be different understandings between different police about what is required, in terms of the use of a body-worn video camera; would that be correct to say?

A. There's inevitably differences of interpretation. The body-worn video SOPs have been carefully constructed after a great deal of consultation to make it as clear as possible.

Q. Is that a clarification that you take on notice to consider its benefit?

A. Yes, I will, yes.

Q. Turning to the next page, ending in the barcode 88, I'll just note - if the bottom part of the page could be zoomed in on, please - there is guidance set out in the standard operating procedures about when body-worn video cameras should be used?

1 A. Yes.

2

3 Q. And if I can ask for the page ending in the barcode  
4 190, which is page 9 of the standard operating procedures,  
5 what's evident from that page is there's also guidance  
6 about when not to use body-worn video cameras, and when it  
7 may not be appropriate to use the equipment; is that  
8 correct?

9 A. Yes, it is.

10

11 Q. I'm going to take you now to evidence that has been  
12 received in this investigation about different ways that  
13 body-worn video has been used. I'm firstly going to take  
14 you to - I'm going to ask for exhibit MTS86 to be put on  
15 the screen. The barcode is 8620251. If that can be zoomed  
16 in on, please. Could I just give you a moment to read that  
17 to yourself.

18 A. Yes.

19

20 Q. This is a part of a police statement of facts relating  
21 to a child, where the child was given advice and declined  
22 to take part in a recorded interview, but it appears that  
23 the interview was conducted on body-worn video instead and  
24 information obtained. The evidence before this  
25 investigation is that that is not an unusual occurrence; it  
26 has happened more than once.

27

28 Just looking at that entry there about police using  
29 body-worn video to question a child after the child has  
30 declined to participate in an electronic interview, would  
31 you accept that that is an inappropriate use of body-worn  
32 video?

33 A. Yes. The protections afforded prior to being  
34 interviewed would preclude the recording in any fashion,  
35 I would think.

36

37 Q. Bearing in mind the evidence before this  
38 investigation, which is this is not uncommon, that this  
39 does happen, would you consider there to be a benefit in  
40 including in the standard operating procedures that this is  
41 a specific situation where body-worn video cameras should  
42 not be used?

43 A. Yeah, unless, of course, the protections are being  
44 afforded to them. So I don't think the medium of use -  
45 this is my personal opinion. I don't think the medium of  
46 recording is necessarily an issue, but certainly the  
47 protections and the advice that's provided and the

1 permissions required for young people would need to be  
2 covered prior to any recording being undertaken.

3

4 Q. What it appears took place here is the particular  
5 police involved knew that the young person would not take  
6 part in a recorded interview --

7 A. Yes.

8

9 Q. -- and instead have then used their body-worn video  
10 camera. That would not be an appropriate use of the  
11 body-worn video camera

12 A. That would be a - yes, it would.

13

14 Q. Is there a benefit, then, in that being stated clearly  
15 in the standard operating procedures?

16 A. Yes, I think the processes can certainly be clarified.

17

18 Q. I'm going to take you to another exhibit in these  
19 proceedings. That's MTS67, which has the barcode 8543606.  
20 I will give you the opportunity, Assistant Commissioner, to  
21 read these emails, but I will ask you to read the bottom  
22 email first. Let us know when you would like the  
23 page turned over.

24 A. Yes, if that could.

25

26 Q. Could the next page be brought up, please. I will ask  
27 for the previous page now to be brought up, to the email at  
28 the top of that page, and I will ask for that to be zoomed  
29 in on for you to read that to yourself, please.

30 A. Yes.

31

32 Q. Previously you mentioned that the medium was not  
33 necessarily important - the medium for the recording of the  
34 information from the child. You'll see at the very bottom  
35 of that page, this is an email from a solicitor which  
36 referred specifically to the child in that case not wishing  
37 to provide a statement of any description, either  
38 handwritten or to record a refusal on, in front of the  
39 interview machine or a video recorder or body-worn video.  
40 Can you see that?

41 A. Yes, sir.

42

43 Q. What you can also see is a response from one  
44 particular police officer, who has a different view of the  
45 use of the body-worn video camera and how it applies in  
46 that particular situation.

47 A. Yes.

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Q. Just to come back to a question I asked you earlier, this illustrates, doesn't it, that different police have different understandings about when it's appropriate to use the body-worn video camera?

A. Yes.

Q. And it's preferable not to have an operational understanding but to make it clear in the standard operating procedures what the situation should actually be?

A. Yes.

Q. Would you agree?

A. Yes, I would agree.

MR FERNANDEZ: Chief Commissioner, there's one other aspect of evidence from Assistant Commissioner Crandell that I've only put the Assistant Commissioner on notice of this morning and I would ask for him to return on Thursday to give that evidence, which the Assistant Commissioner has agreed to. For the time being, that completes my questions.

THE CHIEF COMMISSIONER: Q. Could I just ask you this: it has sometimes been said by police in the field who have not turned on their body-worn video in a particular situation - and I'm talking here about uniformed officers - that it's a cumbersome process to turn it on, it takes time to move from the switch-on to when it will start recording, and matters of that sort are put forward. I'm speaking quite generally, partly to avoid the type of issue which has been raised, but are practicalities of that sort real or realistic in your own experience in this field?

A. No, I don't believe so, your Honour. I don't see - I haven't heard of many - without a malfunction occurring, I haven't heard of difficulties with activating. I mean, it's a very large button in the middle of the camera that's required to be depressed, which changes it from stand-by mode to recording mode. The light turns from green and flashes red to indicate to everybody that it is recording and there's a 30-second back-capture on that. So I haven't heard of that before unless there has been a malfunction.

Q. In a situation distant from the present one, in the sense that the officers in the field did not actually have body-worn on them, but if a uniformed officer in the field was becoming involved in a conversation with, and perhaps

1 a pursuit and interaction with, someone who may be  
2 perceived to be a suspect, then there's no practical  
3 impediment to the body-worn being activated to capture what  
4 happens?

5 A. No, not at all.

6  
7 Q. And in fact, that's what should happen under the SOPs,  
8 isn't it?

9 A. I would think so, if there is a suspect in relation to  
10 a criminal activity, absolutely best practice is to record  
11 it.

12  
13 Q. And if that's done, of course, if there's some  
14 interaction, physical interaction or other interaction, it  
15 will be captured on the body-worn?

16 A. Yes.

17  
18 Q. And then that's one of the invaluable aspects of  
19 having it in the first place?

20 A. That's one of the benefits that we outlined, to better  
21 control behaviour of not only police but also perpetrators  
22 and reduce aspects of violence, which has been shown.

23  
24 Q. What the courts have certainly recognised, and I'm  
25 sure many in the field would recognise, is that what in the  
26 past were often protracted court hearings involving  
27 incidents with people where charges may be laid for  
28 offensive conduct, resist arrest, assault police,  
29 et cetera, and you might find several police officers and  
30 possibly several witnesses on the defence side giving  
31 evidence with a magistrate usually, being called upon to  
32 sort out and make findings, that rather protracted scenario  
33 can be, if not avoided completely, certainly greatly  
34 assisted by contemporary film evidence of what happens?

35 A. Absolutely. It assists not only the court processes  
36 but also guilty pleas where appropriate or not guilty pleas  
37 where appropriate.

38  
39 Q. It ultimately operates to assist and protect  
40 individual police officers who are doing the right thing?

41 A. Yes, it does. We've seen significant decline in  
42 complaints over the time, because of body-worn video.

43  
44 Q. And it assists the community as well by fostering  
45 greater confidence in what's happening with policing  
46 because it's a form of immediate electronic evidence to  
47 indicate what happened?

1 A. Yes. It provides confidence in the community not only  
2 for the actions of perpetrators but also actions of police  
3 that they know are being recorded and police behaviour is  
4 appropriate.

5  
6 THE CHIEF COMMISSIONER: Yes. All right. Did you have  
7 any questions arising?

8  
9 MR FERNANDEZ: No, Chief Commissioner.

10  
11 THE CHIEF COMMISSIONER: Does anyone wish to ask any  
12 questions at this stage, bearing in mind what has been  
13 proposed by counsel assisting?

14  
15 MR COFFEY: Only just one question to clarify with this  
16 witness, Chief 6 L Commissioner, about a question that you  
17 raised about in the use with the ability to activate the  
18 device easily.

19  
20 <EXAMINATION BY MR COFFEY:

21  
22 Q. If I could just ask you to clarify that there's  
23 a 30-second back-capture feature, maybe the Chief  
24 Commissioner might be assisted by understanding how that  
25 technology works?

26 A. Yes. So upon activation, 30 seconds back from the  
27 moment of activation will be captured, which assists. If  
28 there is, say, a physical altercation or something similar,  
29 then that feature allows us to back-capture evidence that  
30 would not normally have been captured if it was consistent  
31 with only the button press.

32  
33 THE CHIEF COMMISSIONER: Q. Does the back-capture catch  
34 both video and sound or just video?

35 A. Yes, both video and sound.

36  
37 Q. Captures both?

38 A. Yes.

39  
40 Q. So if an officer activates it by pressing the button,  
41 it will operate to capture the past 30 seconds as well as  
42 everything that's happening thereafter?

43 A. Yes.

44  
45 THE CHIEF COMMISSIONER: Thank you.

46  
47 MR COFFEY: I might just clarify this one part, Chief

1 Commissioner.

2

3 Q. And those persons that are present at the time at  
4 which the camera has been activated, both the police  
5 officers but, for example, the members of the public who're  
6 there, they become aware that the camera has been activated  
7 by two loud beeps or alerts that come from the device, and  
8 also in relation to a light that's shone, a different  
9 coloured red or green light?

10 A. Yes, so it moves from a green light to a solid light  
11 to a flashing red light to indicate that it's recording and  
12 there will be beeps that'll indicate that the recording has  
13 happened, which is really the time that the officer, if  
14 able, should then be issuing the warning that anything they  
15 say or do can be - will be recorded by body-worn video.

16

17 Q. And, Assistant Commissioner, one of the reasons why  
18 there both is a green light to indicate stand-by and a red  
19 light to indicate recording and these audible sounds is  
20 because body-worn video is an overt system and the people  
21 that are being recorded are to be aware that in fact they  
22 are being recorded by this device?

23 A. Yes, and body-worn video should never be used for  
24 covert purposes.

25

26 MR COFFEY: Thank you, Chief Commissioner.

27

28 THE CHIEF COMMISSIONER: Q. There is a section in the  
29 Surveillance Devices Act, which was inserted when body-worn  
30 video was introduced to directly deal with that aspect, was  
31 there not?

32 A. Yes. I think the legislation indicated that it is to  
33 be worn overtly, but we expanded upon that in the policy,  
34 in the standard operating procedures, to say that it's not  
35 to be secreted, it's not to be hidden, it's to be overt,  
36 which means clearly being able to be seen, and then there  
37 should be some acknowledgment of the device from the person  
38 being recorded.

39

40 Q. And the common scenario is the officer should say to  
41 a person - for example, someone pulled over at the side of  
42 the road, should say, after identifying themselves, that  
43 "This conversation is being recorded by body-worn video",  
44 and that's part of police procedure in that setting, at  
45 least?

46 A. Absolutely. It's almost an introduction to a caution  
47 to say that, "Whatever you say or do will be recorded", and

1 that warning must be given upon activation, upon any  
2 body-worn video activation.

3

4 MR COFFEY: I've only got one small additional topic about  
5 plain clothes that I think might assist the Commission.

6

7 THE CHIEF COMMISSIONER: Yes.

8

9 MR COFFEY: Q. Assistant Commissioner, you were asked  
10 some questions by counsel assisting in relation to the  
11 policy position around plain clothes policing officers in  
12 terms of wearing body-worn cameras. Firstly, I want to  
13 make the distinction, there is a distinction between, say,  
14 for example, undercover police officers who might be those  
15 persons working in controlled operations deploying, for the  
16 purposes of engaging under the Controlled Operations Act  
17 and wearing covert surveillance items?

18

A. Yes.

19

20 Q. That's a difference to those, for example, plain  
21 clothes policing officers who might work at a police area  
22 command, a police district or a regional enforcement squad,  
23 who might be known as the "Cargo shorts and T-shirt gang"?

24

A. Yes, absolutely.

25

26 Q. Accepting that the policy currently mandates the use  
27 of body-worn footage for uniformed police officers who are  
28 performing operational duties outside of the police  
29 station, moving to plain clothes police officers or  
30 criminal investigators, detectives who might wear a suit,  
31 certainly it's the case that the Commissioner of Police  
32 expects that, where appropriate, they should utilise  
33 body-worn footage; is that correct?

34

A. Yes.

35

36 Q. That doesn't necessarily mean that if I'm a plain  
37 clothes police officer in, say, cargo pants and a T-shirt,  
38 patrolling a particular area in my command, that I would  
39 need to have the body-worn camera on my clothes, but at the  
40 time that I maybe stop and speak to someone and exercise  
41 a power, there's no reason that the camera couldn't be  
42 either pulled out and put on to my clothes or held to  
43 record my interaction?

44

A. Yes, that's correct.

45

46 Q. Do you agree that as a result of this particular  
47 inquiry, Operation Mantus, that it's clear that the



1 body-worn standard operating procedures could be clarified  
2 to provide greater levels of examples to the police force,  
3 particularly plain clothes officers, to demonstrate that  
4 expectation, that they don't need to actually wear it  
5 walking around, but as soon as they exercise a power, there  
6 is an expectation that where the device is available, that  
7 they should be using it?

8 A. Yes, I think that would be very fair to do that.  
9 I think that the SOPs were heavily concentrated towards  
10 uniformed officers, and I think there does need to be  
11 a level of guidance for officers in plain clothes -  
12 officers in plain clothes as you have announced the  
13 distinction between them.

14  
15 MR COFFEY: Thank you. That's my plain clothes gang,  
16 your Honour, not the police force's.

17  
18 THE CHIEF COMMISSIONER: Q. Does that amount to this,  
19 that if officers in the field who are plain clothes but who  
20 may well interact with members of the public, whether for  
21 the purpose of questioning, arrest, and in that sense  
22 change from covert to overt - that when that point is  
23 reached, it is more than highly desirable that the officer  
24 extract the body-worn video if it is in the pocket, attach  
25 it and turn it on?

26 A. Yes.

27  
28 Q. Which will immediately back-capture the past  
29 30 seconds as well as what follows?

30 A. Yes.

31  
32 Q. And in that way, there's no compromise of the covert  
33 phase, but there's the benefit of the camera for the overt  
34 phase. And an issue in this particular investigation, of  
35 course, is a physical interaction between a plain clothes  
36 police officer and a young person is not assisted by any  
37 electronic evidence, and that's a difficulty in itself.

38 A. Yes. I think, your Honour, there could be occasions  
39 where they may, for whatever reason, not wish to record  
40 something, but if that's the case, then there needs to be  
41 reasons provided as to why they have chosen not to do that.

42  
43 Q. This is perhaps an issue that we'll come back to, but  
44 the use of body-worn video in other jurisdictions has been  
45 considered and it's an ongoing policing issue, I think,  
46 throughout the world, not just in this state or in  
47 Australia, but what consequences there may be or what

1 expectations there may be if it is not activated is  
2 something itself which is under consideration.  
3 A. Yes.

4  
5 THE CHIEF COMMISSIONER: Perhaps I will leave it at that  
6 for the moment.

7  
8 Mr Fernandez, the Assistant Commissioner has very  
9 helpfully attended this morning, but what is proposed?

10  
11 I'll come back to Ms Lee in a moment but I will just  
12 hear what Mr Fernandez wants to say.

13  
14 MR FERNANDEZ: After any other questions, Chief  
15 Commissioner, if Assistant Commissioner Crandell could be  
16 excused until Thursday morning at 10am, please.

17  
18 THE CHIEF COMMISSIONER: Thursday, all right. Yes,  
19 Ms Lee?

20  
21 MS LEE: Yes, I have some questions for the Assistant  
22 Commissioner, Chief Commissioner.

23  
24 THE CHIEF COMMISSIONER: Are they dealing with the  
25 specifics that counsel assisting has raised or more general  
26 matters as to which there will be an opportunity on  
27 Thursday?

28  
29 MS LEE: They are dealing with tagging, Chief  
30 Commissioner, the discretion, and recording.

31  
32 THE CHIEF COMMISSIONER: All right. Let's ask them. If  
33 you'd like to proceed - I want to avoid duplication, that's  
34 the main point.

35  
36 MS LEE: Yes, of course.

37  
38 THE CHIEF COMMISSIONER: Bearing in mind he will be coming  
39 back.

40  
41 **<EXAMINATION BY MS LEE:**

42  
43 MS LEE: Q. Thank you for your time, Assistant  
44 Commissioner, my name is Sam Lee. I work at Redfern Legal  
45 Centre, representing the young person, [YPM1].

46 A. Thank you.  
47

1 Q. You mentioned that body-worn video footage is used for  
2 the purpose to also reduce complaints. Do you also agree  
3 that it's used for the purpose of potential civil  
4 proceedings against police?

5 A. Yes.

6  
7 Q. In regards to my particular client where there's an  
8 allegation of excessive force used by a police officer,  
9 there were four officers involved in this operation and  
10 none of those officers had body-worn video footage on them.  
11 There has been discussion this morning about the use of  
12 judgment of police to turn on or use body-worn video  
13 footage. In this situation before the court, do you think  
14 the judgment has been used correctly?

15 A. I don't really know the full circumstances of this  
16 case. I know at a high level, which counsel assisting sort  
17 of took me through, but I haven't actually read the details  
18 of it. So it's difficult - I'm happy to do that if you  
19 would like me to.

20  
21 THE CHIEF COMMISSIONER: Do you mean "correctly" in  
22 accordance with the standard operating procedures or what  
23 they should be, Ms Lee? This is one of the difficulties,  
24 you see. That's why I think that question may be the  
25 subject of waiting to hear what further evidence there is.  
26 It has been answered, in any event.

27  
28 MS LEE: Yes.

29  
30 THE CHIEF COMMISSIONER: Next question, thank you, Ms Lee.

31  
32 MS LEE: Yes, thank you, Commissioner.

33  
34 Q. In regards to the tagging procedure, as you've said,  
35 one, it is the discretion as to whether the officer has the  
36 body-worn video footage on them, the actual device; and,  
37 two, it's whether they turn it on?

38 A. No, I haven't actually said that.

39  
40 Q. Okay, I'll ask you a different way. In terms of  
41 body-worn video footage, for it to operate, they must have  
42 it on them; is that right?

43 A. Yes. It needs to be worn by a --

44  
45 Q. Yes. And then it needs to be turned on?

46 A. Yes.

47

1 Q. And then, even if it is turned on, when they get back  
2 to the police station, they are required to tag it if the  
3 officer thinks it's of evidentiary value; is that correct?  
4 A. That's correct.  
5  
6 Q. If it is tagged, if I could just clarify, how long is  
7 that body-worn video kept for?  
8 A. If it's tagged?  
9  
10 Q. Yes.  
11 A. Then we have a platform that allows us to retire  
12 body-worn video in relation to the offences that it relates  
13 to in accordance with the relevant Acts.  
14  
15 Q. And if it is tagged, is there anything they have to  
16 input on the COPS system?  
17 A. Yes. So they have to create an event so that the tag  
18 can go to an event, and then that body-worn video footage  
19 then goes to a different system to activate the retention  
20 for longer periods of time.  
21  
22 Q. And is it mandatory to tag body-worn video footage if  
23 force has been used?  
24 A. I can't recall whether that's written down somewhere.  
25 I would think that would be appropriate.  
26  
27 Q. If that's not in the current SOPs, do you think it  
28 should be in SOPs?  
29 A. I think we have given some guidance in relation to use  
30 of force and when body-worn video ought to be activated.  
31  
32 Q. For those body-worn video footage that is not tagged,  
33 what happens to that? You say it's deleted. When is it  
34 deleted?  
35 A. Six months.  
36  
37 Q. Does anyone check that untagged body-worn video  
38 footage?  
39 A. Yes. So there is a requirement for a supervisory  
40 inspection of uploads at each command. I believe it's  
41 1 per cent of the total uploads. And that would include  
42 body-worn video footage that is and is not tagged.  
43  
44 Q. And, sorry, who actually looks at that body-worn video  
45 footage?  
46 A. It's a requirement for each - for supervisors, as  
47 a collective, at each individual command.

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Q. So, for example, if a supervisor looks at a body-worn video footage and sees a possible incident or an issue around use of force, that person is then required to do what?

A. Well, that person would either report that for --

Q. To whom, sorry?

A. Report that through the chain of command, so to duty officer or the commander, to indicate there is an issue, whether that be on tagged or untagged footage. I think there is guidance in the standard operating procedures that says that if you don't tag something that ought to be tagged, then there may well be consequences for that as well.

Q. In regards - just to go back to that point of civil proceedings and body-worn video used for that, what is your understanding - or, I should say, the limitation period for civil proceedings is six years to bring a potential case against the police, for example, excessive force. Do you think the keeping of body-worn video footage should be in line with that?

A. With potential civil cases?

Q. Yes.

A. I think that would mean we would be retaining just about all body-worn video footage, which would be untenable.

Q. But wouldn't that just be the tagged body-worn video footage?

A. Not necessarily. There may be instances where civil claims are brought that the officer hasn't seen that there is a criminal offence or paid it any attention. In that case, it could be any body-worn video. But once it's tagged, though, it is in alignment with the archives requirements. So it's actually retained for quite an extensive period of time once it's tagged.

Q. What period of time is that, sorry?

A. Well, it depends on the offence. So if it's a homicide it will be retained forever. If it's an assault, it may well be seven years. If it's a sexual assault, it may well be 25 years. And it depends on the schedules.

1 Q. That's based on criminal proceedings, is that right,  
2 not civil proceedings?  
3 A. No, that's right. It's related to the actual offence,  
4 as I understand it, the offence that has been investigated.

5  
6 Q. Just in terms of the uniformed and un-uniformed  
7 police, could you just explain the distinction, I guess, in  
8 work of uniformed and un-uniformed police? Is there  
9 a different type of work those who aren't in uniform do?

10 A. Yes. So police that aren't in uniform could be  
11 performing what they - what we call proactive duties, so  
12 that could be, you know, jeans and a T-shirt, watching  
13 people at hotels or whatever; or it could be officers that  
14 wear suits each day, which are predominantly  
15 investigations, so they're the detectives.

16  
17 You also have other areas, for example, specialist  
18 areas in State Crime Command, you have an undercover  
19 branch, which is what Mr Coffey referred to before, and  
20 there's also surveillance branches, there's also other  
21 areas where officers would necessarily be not in uniform  
22 and would be in different various dress.

23  
24 Q. Would you say, then, that the type of work those who  
25 aren't in uniform do are kind of higher up in the  
26 seriousness of policing work?

27 A. Sometimes, yes. I think the uniform officers, if  
28 I could categorise it generally, have more interaction with  
29 members of the community and less of a - less of  
30 a planning, I suppose, for incidents to occur; less  
31 awareness of an incident that might occur. Whereas police  
32 officers in plain clothes or investigations have more of an  
33 opportunity to see when there may be an exercise of powers,  
34 an arrest made. And when you say "more serious", as  
35 a generalisation, you could say that in investigative  
36 field; the proactive team potentially not, it just depends  
37 on what they get called to.

38  
39 Q. Do police officers who are not in uniform wear guns?

40 A. Yes. They must.

41  
42 Q. They wear badges?

43 A. Yes.

44  
45 Q. So what is the difficulty in wearing body-worn video  
46 footage?

47 A. I don't - well, the gun and the badge can be

1 concealed, whereas the body-worn video should not be  
2 concealed if it's being used and activated. Carrying the  
3 body-worn video - I don't see that as an issue,  
4 necessarily, but the actual activation I would not want to  
5 see police officers in suits or plain clothes, in jeans and  
6 T-shirts, with a body-worn video on, because obviously that  
7 would indicate to anybody that they are police officers.

8  
9 Q. But don't they have to tell people that they're police  
10 officers when they are chasing someone, for example?

11 A. No. If they're to use the body-worn video, then they  
12 should identify themselves as a police officer and provide  
13 evidence that they are a police officer. But not if  
14 they're in pursuit or anything like that, I wouldn't have  
15 thought.

16  
17 Q. Sorry, just a couple more questions. Sorry, I'll just  
18 ask you one final question, just in terms of  
19 identification. During this examination, we heard evidence  
20 about body-worn video footage being used to identify young  
21 people. Do you see that as an appropriate use of body-worn  
22 video footage?

23 A. It would depend on the circumstances, I suppose.

24  
25 Q. If, for example, the person has not committed a crime  
26 or there is no incident, as it says on the SOPs, is  
27 identification a reason to use body-worn video footage?

28 A. Well, it may well be that the police need to identify  
29 the person as a missing person, for example.

30  
31 Q. If it's not a missing person?

32 A. You would have to give me the circumstances. I'm  
33 speculating and I don't wish to do that.

34  
35 THE CHIEF COMMISSIONER: But wouldn't you need to identify  
36 the stated purpose here, Ms Lee? Was it not that the  
37 uniform police were doing bail checks, and if the young  
38 persons were at home and they're spoken to by police, then  
39 I would imagine the body-worn would be going and would  
40 capture their clothing, which may assist in identifying  
41 them later on. Is that your understanding, Ms Lee, of what  
42 was said to be the case here?

43  
44 MS LEE: That's correct, Chief Commissioner.

45  
46 THE CHIEF COMMISSIONER: Q. What do you say about that  
47 scenario, Assistant Commissioner?

1 A. I think that's entirely appropriate. I think police  
2 officers use body-worn video for intelligence purposes.  
3 But I don't think they're even using it for an intelligence  
4 purpose. It's appropriate that they put the body-worn  
5 video on at the time of checking on bail and if that allows  
6 a police officer to see what clothing a young person is  
7 wearing and they become a suspect in another case, then  
8 I think that's good police work.  
9

10 MS LEE: Q. Sorry, just one final question. You  
11 mentioned when Mr Fernandez asked you about the use of  
12 body-worn video footage recording at the police station -  
13 you said that you had no problem with the recording itself;  
14 it's about the issue that they're talking about. But  
15 body-worn video footage can be used not in a particular  
16 room. Is that an issue? It could be out in the cells?

17 A. No, I guess what I'm saying is that when the formal  
18 interview process goes through and all the questions are  
19 asked by the custody manager, if, for example, there was  
20 a malfunction of an ERISP machine or some other way to  
21 record, I don't see now, or certainly into the future, any  
22 problem with actually using the body-worn video camera as  
23 a recording device in certain circumstances. That's what  
24 I'm saying. I don't think it should be, "Well, the ERISP  
25 machine isn't available" or for whatever reason,  
26 "therefore, we can't conduct an electronic interview."  
27 I think you probably could. That's not necessarily in the  
28 SOPs as it stands but I'm just thinking into the future,  
29 given my current position, I would like to see the  
30 platforms more agnostic.  
31

32 Q. So they would then have discretion whether to tag that  
33 or not?

34 A. No - well, it would be very unusual for that not to be  
35 tagged, if they're interviewing somebody.  
36

37 Q. But they still have discretion?

38 A. There's not --  
39

40 Q. That's what's in the SOPs at the moment?

41 A. Well, no, it doesn't say "discretion" in the SOPs, it  
42 says to use your judgment, and I would think that a police  
43 officer would use their judgment in favour of retaining  
44 something where they have interviewed somebody on body-worn  
45 video.  
46

47 Q. Well, in my case, four officers didn't wear body-worn



1 video footage and used their judgment not to.  
2 A. Yes, but you're talking about a different set of  
3 circumstances. You've just put circumstances to me where  
4 an officer has used their body-worn video to record an  
5 interview. That's a different situation, with respect.  
6

7 Q. But they could still have judgment not to tag?

8 A. There's no judgment in the SOPs. They've got to -  
9 need to use - sorry, there's no discretion in the SOPs.  
10 They need to use their good judgment.  
11

12 MS LEE: Okay, thank you.  
13

14 THE CHIEF COMMISSIONER: Yes, thank you, Ms Lee.  
15

16 Any further questions before the Assistant  
17 Commissioner is stood down and we take the mid-morning  
18 break?  
19

20 MR FERNANDEZ: No.  
21

22 THE CHIEF COMMISSIONER: All right. Thank you, Assistant  
23 Commissioner. If you're in a position to return on  
24 Thursday morning, there will be some further questions at  
25 that point. You can step down for the moment, thank you.  
26

27 THE WITNESS: Thank you.  
28

29 <THE WITNESS WITHDREW  
30

31 THE CHIEF COMMISSIONER: What time do you suggest we  
32 resume?  
33

34 MR FERNANDEZ: Twenty minutes, please, Chief Commissioner.  
35 5 to 12, please.  
36

37 THE CHIEF COMMISSIONER: All right. The Commission will  
38 adjourn until 5 to 12.  
39

40 **SHORT ADJOURNMENT**  
41

42 THE CHIEF COMMISSIONER: Yes, Mr Fernandez?  
43

44 MR FERNANDEZ: I call Assistant Commissioner Peter Cotter.  
45

46 THE CHIEF COMMISSIONER: Yes, if you could come forward,  
47 thank you, Assistant Commissioner.

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<PETER NORMAN COTTER, sworn: [11.58am]

MR COFFEY: No declaration, thank you, Chief Commissioner.

THE CHIEF COMMISSIONER: Yes, thank you, Mr Coffey.

<EXAMINATION BY MR FERNANDEZ:

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

A. Peter Norman Cotter, surname spelt C-O-T-T-E-R.

Q. Are you presently an assistant commissioner of police?

A. I am.

Q. Are you the region commander for the southern region, a region which goes right down to the Victorian border?

A. Yes, I am.

Q. Have you previously served in the NSW Police Force for about 39 years?

A. That's correct.

Q. Among a number of appointments that you have had, were you the Commissioner of the New South Wales Crime Commission for a period of just under two years?

A. Yes.

Q. Assistant Commissioner, are you the corporate spokesperson for the NSW Police Force for custodies and corrections?

A. I am.

Q. You have attended to give evidence about particular aspects of this investigation, as you understand are systemic issues relating to NSW Police, particularly with young people; is that correct?

A. Yes.

Q. You have provided a statement to the Commission, which is now an exhibit, that's going to be called MTS94. Do you have a copy of your statement there with you?

A. I have one in my bag. I can --

Q. Would you like access to that statement?

A. Yes, I didn't bring it up, I wasn't sure, but I thought it might come up on the screen.

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THE CHIEF COMMISSIONER: Yes, that's all right. There's no problem with that

THE WITNESS: I can get it.

THE CHIEF COMMISSIONER: I think it is going to be brought up to you by Mr Coffey giving you your bag.

THE WITNESS: That will be fantastic.

MR FERNANDEZ: Q. Do you also have the standard operating procedures which you have marked up for your own use?

A. Yes, I've got a - I haven't marked them, it's a clean copy, but I have them with me, yes.

I will bring out my statement. I've got the charge room SOPs, for example, and a copy of the handbook as it relates at the moment, and other material in my bag if required.

Q. Assistant Commissioner, I'm going to be asking you questions about systemic issues that have been identified in this investigation and specifically the situation when children are interviewed by police after they've had legal advice and have accepted that legal advice not to be interviewed, and that legal advice has been provided to investigating police. Do you understand that?

A. Yes, I do.

Q. I'm also going to be asking you about the role of the custody manager in some specific respects. Do you understand that?

A. Yes, I do.

Q. Just in terms of training of custody managers, is that an aspect which you've asked Sergeant Edgell to be available to give specific evidence about?

A. Yes, I have, and he is here today before this hearing. I thought it was most appropriate that somebody engaged on a daily basis in the formation of the education packages, who lives and breathes it way more than I do, in those specifics, come and give the most relevant evidence to this hearing.

Q. I'm also going to be asking you about a number of

1 parts of the statement which you've prepared addressing  
2 a number of matters relevant to this investigation. Do you  
3 understand that?

4 A. Thank you.

5

6 Q. Assistant Commissioner, can I start by indicating the  
7 evidence in general terms by both Legal Aid NSW and the  
8 Aboriginal Legal Service is that many police are acting  
9 properly, although there are a number of exceptions to  
10 those police acting properly. I'm going to be asking you  
11 about those exceptions which appear to be systemic issues  
12 within NSW Police. So the starting point is many police  
13 are acting properly. I'm going to be asking you questions  
14 about where that's not actually taking place.

15

16 I'm going to start with the issue of children being  
17 interviewed after legal advice when children have accepted  
18 that legal advice not to be interviewed. Do you understand  
19 that?

20 A. Yes.

21

22 Q. I'm going to ask for the - there's a memorandum which  
23 is in force between NSW Police and Legal Aid NSW, which has  
24 been in force since about 2004. That's a memorandum you  
25 refer to at paragraph 45 of your statement; is that  
26 correct?

27 A. Yes, I'm aware of it.

28

29 Q. What I'm going to do is I'm going to ask that the  
30 relevant part of that memorandum be placed up on the  
31 screen. This is a page with the barcode 8543569. This is  
32 from the Legal Aid NSW submission to the Commission, which  
33 you've had a chance to read. I'm going to refer to  
34 paragraph 4.1, which sets out a protocol between NSW Police  
35 and Legal Aid NSW, and it says as follows:

36

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

44

45 Can you see that?

46 A. Yes.

47

1 Q. You are aware that that is the position of the  
2 NSW Police Force in relation to that particular  
3 circumstance described there; is that correct?

4 A. Yes.

5

6 Q. This has been the position for about the last 19 years  
7 or so?

8 A. Yes.

9

10 Q. Is that correct?

11 A. Yes, yes.

12

13 Q. I'm going to ask for an additional document to be  
14 placed up on the screen. It is a circular from 2005. I'm  
15 going to ask for MTS91 to be placed up on the screen,  
16 please. The barcode is 8620261. Could the right-hand side  
17 of that page be zoomed in on, please. I'm just going to  
18 ask you - this is a police circular from March of 2005  
19 relating to the recording of refusals by suspects to  
20 participate in an ERISP. The relevant part of the circular  
21 is this:

22

23 *... you do not have the power to compel or*  
24 *intimate to the suspect that they must*  
25 *participate in an electronic recorded*  
26 *interview for the purpose of recording*  
27 *their refusal. Record the refusal in your*  
28 *notebook and if appropriate, on the facts*  
29 *sheet.*

30

31 Can you see that?

32 A. Yes, I've read that, thank you.

33

34 Q. That represents the position of the NSW Police Force  
35 in terms of recording of refusals; is that correct?

36 A. Yes.

37

38 Q. Could I ask you to turn to page 45 of your report,  
39 please - sorry, paragraph, I should say, paragraph 45.  
40 I wonder if that might be brought up. The barcode for that  
41 page is 8620387. If paragraph 45 could be zoomed in on,  
42 please. Assistant Commissioner, it may be an incomplete  
43 sentence, but this paragraph starts as:

44

45 *As identified in the Legal Aid Submissions,*  
46 *the status of: ...*

47

1 And then there's a reference to the memorandum of  
2 understanding or the protocol, which I have just taken you  
3 to; the protected admissions protocol, that's a separate  
4 position; the police circular that I've just taken you to  
5 about recording refusals; the code of practice, CRIME; and  
6 the police handbook amendments. Are there some words  
7 missing there? You have made a reference to them.

8 A. It's probably more brevity rather than words missing.  
9 That paragraph in totality at 45 and the (a), (b), (c), (d)  
10 that follow are areas that I/we the organisation consider  
11 that need to be taken away from this hearing and really  
12 pulled apart and examined in a collegiate way with some of  
13 the people in this room as well, to understand what the  
14 position is, what it should look like, and to articulate in  
15 very clear fashion, perhaps in some cases in a way better  
16 way, for both sides - the police officer and equally the  
17 vulnerable person or the suspect - so there's an enormous  
18 clarity around what the rights are, what we can ask people  
19 to do and equally what they are obliged to do, versus what  
20 they may wish to do, versus what is totally out of scope.

21  
22 Q. Isn't there clarity about those two documents that  
23 I've placed up on the screen for you? There's the  
24 memorandum of understanding, which refers to the recording  
25 of an interview declined by investigating police and the  
26 custody manager - is there not clarity about that situation  
27 there?

28 A. I think there needs to be more clarity, and I can go  
29 to it.

30  
31 Q. Yes. What would you say?

32 A. Well, you put up two documents to me. The first one  
33 was around the right to silence. Now, the right to silence  
34 clearly, as we know, goes back way more than 19 years or  
35 any other years for that matter - centuries.

36  
37 But we're talking about - yes, that paragraph, the  
38 first paragraph, delineates between right to silence and  
39 legal advice and instructions and also the wishes of the  
40 person and the role that perhaps the vulnerable person's  
41 support person or guardian might have in that process. So  
42 if I step through it, there is a number of points to that  
43 triangle that make up, "I want to exercise my right to  
44 silence". Part 1 of it is clearly cogent and appropriate  
45 legal advice from a practitioner.

46  
47 Secondly, in the case of a vulnerable person, if we

1 stick into those parameters, because I know that's  
2 fundamentally the scope of this hearing, then it is the  
3 vulnerable person's support person, whether that be  
4 a family member or some other member of the community,  
5 respected, that falls within that ambit, comes along and  
6 there is discussions, particularly if it's around youth  
7 conferencing or the Young Offenders Act and protected  
8 admissions and things like that, depending on the scope of  
9 the crime.

10  
11 And then, notwithstanding, clearly, the vulnerability  
12 of the child, whether it be just through pure age or their  
13 cultural background or a physical or intellectual  
14 impairment - and obviously I include in that Aboriginal and  
15 Torres Strait Islander - there is the individual decision  
16 of the child, the vulnerable person, as well. So there are  
17 three points to that triangle that make up the right to  
18 silence, not solely the legal advice is "Don't talk". So  
19 I think we need to step through that; instead of just one  
20 overarching paragraph, we need to step through each of  
21 those things in my opinion.

22  
23 Q. That's the police position on the right to silence, is  
24 it, that there are three parts - legal advice, young  
25 person, support person?

26 A. Well, the right to silence is exercised by the person,  
27 yes.

28  
29 Q. Exercised by the young person?

30 A. Correct.

31  
32 Q. I wonder if the document with the barcode 8543569  
33 could be put up on the screen again, please. I wonder if  
34 we can just focus on 4.1, paragraph 10 there, if that could  
35 be zoomed in on. What you've referred to is the role of  
36 the support person. You would expect that, in almost every  
37 case, the support person is going to be a person who has no  
38 legal training. Would that be correct?

39 A. Most probably, yes.

40  
41 Q. Have you yourself ever heard of a support person,  
42 a person who is present at an interview supporting a child,  
43 who is legally trained?

44 A. No, I'm not aware of it, no.

45  
46 Q. Why is the NSW Police Force position that the support  
47 person needs to be factored in, in terms of the child's

1 understanding of the right to silence?

2 A. They play an integral role in providing that support  
3 role to the person, whether it be a family member, most  
4 often or quite often a parent, or alternatively some other  
5 member of the - respected member of the community.

6  
7 Q. But as you can see, the relevant part of the  
8 memorandum of understanding, what this envisages is that  
9 the child receives legal advice from a solicitor?

10 A. Yes.

11  
12 Q. If the child wishes to accept that legal advice --

13 A. Correct.

14  
15 Q. -- and that legal advice is communicated to police,  
16 that investigating police and the custody manager should  
17 make a recording in the COPS event and the custody  
18 management records that the interview is declined. Can you  
19 see that?

20 A. Yes. I agree in totality with that. But all I was  
21 saying is that there is another side to this, particularly  
22 with a parent.

23  
24 Q. I'm just not understanding what that other side is.  
25 The child has had legal advice from a solicitor, and the  
26 legal advice has been communicated, and the memorandum  
27 relates to what notes are made by police of the child's  
28 wishes.

29 A. This is the child exercising their right to silence,  
30 accepting that advice and their instructions, being,  
31 "I wish to exercise my right to silence and not be  
32 interviewed."

33  
34 Q. Yes. What's the problem with that?

35 A. There is no problem with that.

36  
37 Q. You've brought in the idea of the support person. Can  
38 you just explain what you see as the relevance of the  
39 support person to this part of the memorandum of  
40 understanding?

41 A. Not specifically to that, no, but it is part of the -  
42 it is part of the picture.

43  
44 Q. Assume a situation where a child speaks to a support  
45 person and there might be a change of mind or a change of  
46 circumstances. You would accept that what should take  
47 place then is the young person should be given another



1 opportunity to speak to a solicitor. Do you agree with  
2 that?

3 A. Yes, I think that's - I think that has got some  
4 fairness to it.

5

6 Q. It should happen, though, shouldn't it?

7 A. Oh, yes, it most definitely should happen. And  
8 that's - when I say that's the status of this, that we need  
9 more prescription around it, more clarity, to step  
10 absolutely everyone through, so everyone knows their  
11 rights, both the young person, the vulnerable person,  
12 clearly, and there is nothing wrong I think - and sometimes  
13 this - you know, your questioning is not allowing that  
14 sometimes people do change their minds, and this is  
15 accepting that there has to be another step in this  
16 protocol, that if there is going to be a change of mind,  
17 I am 100 per cent behind that further legal advice is  
18 provided.

19

20 Q. You are aware, aren't you, that Legal Aid NSW and the  
21 Aboriginal Legal Service frequently write letters or send  
22 emails to investigating police and/or custody managers  
23 about the legal advice that they've given to the children,  
24 whether it's been accepted?

25 A. Yes.

26

27 Q. And you're aware that both organisations specifically  
28 refer to being available to provide additional legal advice  
29 if circumstances change; is that correct?

30 A. Yes. Yes, I'm aware of that.

31

32 Q. Is one way of providing clarity to the particular part  
33 of the memorandum of understanding which I've taken you to,  
34 instead of using the word "should", as in "the  
35 investigating officers should record interview declined",  
36 and "the custody manager should also record", is replacing  
37 the "should" with "must" - do you agree with that?

38 A. Yes, I think - I believe, me, but I also think the  
39 organisation would accept that, at first blush, if the  
40 advice comes back, "Going to exercise right to silence",  
41 then it must be recorded. I do agree with that. And  
42 thereafter, if it's changed and then there's further legal  
43 advice and that changes, clearly that outcome must be  
44 recorded. And with enormous prescription. Even the  
45 "I saids", the "He saids", and so forth.

46

47 Q. I'm going to take you shortly to the fact that what is

1 contained in the memorandum and the police circular is not  
2 contained in the standard operating procedures. Can you  
3 see a benefit in these very agreements that I've taken you  
4 to - memorandum of understanding and the circular - the  
5 contents being placed into the standard operating  
6 procedures?

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

15  
16 Q. In terms of the review of these documents and the  
17 standard operating procedures, is it your evidence, then,  
18 that you do support the changing of the word "should" to  
19 "must"? Is that correct - for clarity?

20 A. I sit here personally and say it should be "must".  
21 Like anything in this, when we take away our homework from  
22 this hearing, we will scrutinise all of the  
23 recommendations, and clearly the evidence of people like  
24 me, and discuss what those words should look like. But  
25 I have no issue, myself, with the word "must."

26  
27 Q. You'll also take away that the standard operating  
28 procedures are silent in respect of both of those aspects  
29 that I've just taken you to; is that fair?

30 A. Yes. I think they're insufficient and they need some  
31 work.

32  
33 Q. Can that be done now, given that the memorandum of  
34 understanding and the circular are in force now - that is  
35 the position of the Commissioner of Police. Can the  
36 standard operating procedures be amended now so that they  
37 are included in those procedures?

38 A. I think at the completion of this hearing, it can be  
39 taken away as one of the priority areas for us to look at  
40 and no doubt amend and put more prescription down. What  
41 exact words go in there, I'm not going to commit to that,  
42 but let me be clear and say that I support every assertion  
43 that you have put to me.

44  
45 Q. Wouldn't the starting point for what the words would  
46 be be the words that are in operation as we speak now?  
47 Wouldn't that be the starting point?

1 A. Yes, no, that's what I said - that's exactly what  
2 I said. I am 100 per cent supporting what you are saying.  
3 But let's define "now" and let's take it back as a body of  
4 work at the completion of this hearing and we'll work on  
5 that as a priority. That's the best "now" I can give you.  
6

7 THE CHIEF COMMISSIONER: Q. What counsel assisting is  
8 raising with you, Assistant Commissioner, I think, at risk  
9 of intervening, is that the evidence indicates there is  
10 a problem right now - I think you've used the word  
11 "slippage"?

12 A. Yes.  
13

14 Q. Both the ALS and Legal Aid have said that the majority  
15 of police, when asked, when told the client doesn't wish to  
16 be interviewed, comply with that and it gets recorded, but  
17 there is what appears to be a significant minority where  
18 that doesn't happen and where there are practices of  
19 various types which have occurred and which have led to  
20 repeated rejections by courts using various powers under  
21 the Evidence Act.  
22

23 So is there not need for some clarity right now,  
24 rather than waiting until the process is undertaken,  
25 perhaps a process which may take months, to guide those  
26 police officers who are engaging in slippage in this area,  
27 with ongoing work to be done by courts as a result? Is  
28 there not some logic in a statement, police force wide,  
29 that the 2004 and 2005 indications, one of them made by  
30 then Commissioner Moroney in 2004, is the position and  
31 ought be complied with, unless and until there is some  
32 amendment to that? In other words, that's the status quo.  
33 Isn't that the appropriate way forward at this stage?

34 A. As I said, at the completion of these hearings. But  
35 if - and I don't know when this is due to close, these  
36 hearings, by the way, but with the recommendations,  
37 I wasn't thinking months, Chief Commissioner; I was  
38 thinking much more quicker than that.  
39

40 Q. And I'm conscious, you are here as an assistant  
41 commissioner of police, but as a spokesperson for the  
42 police force in that sense. But often one can have  
43 a situation where there may be occasional problems  
44 identified where there may need to be a working through?

45 A. Yes.  
46

47 Q. An assessment of the pros and cons. But here there

1 seems to be a very solid pro, and the cons are really  
2 slippage. They're outliers. Isn't this a clear situation  
3 that calls for some decisive statement now, reinforcing  
4 what Commissioner Moroney said in 2004 as being the status  
5 quo, reinforced by the 2005 circular pending any further  
6 developments? It could be said this is an unusual  
7 situation where, in the absence of that, these events will  
8 keep recurring from day to day with Legal Aid and the ALS  
9 having to grapple with it.

10 A. I agree with you, Chief Commissioner.

11  
12 THE CHIEF COMMISSIONER: I will hand back to Mr Fernandez.  
13 Thank you, Assistant Commissioner.

14  
15 MS LEE: Excuse me, we don't seem to have the ongoing  
16 wording coming through.

17  
18 THE CHIEF COMMISSIONER: The transcript? It is still -  
19 yes, if we could go back to the live-stream transcript,  
20 thanks.

21  
22 MR FERNANDEZ: I'm going to ask for the police circular,  
23 this document, MTS91, barcoded 8620261, to be placed up on  
24 the screen.

25  
26 Q. Could we zoom in, please, on the right-hand side.  
27 This is the part I took you to previously, Assistant  
28 Commissioner. What it tells police very clearly is that  
29 they do not have the power to put a suspect in front of  
30 a camera to record a refusal of interviews. You are aware,  
31 aren't you, that that practice exists even up until now?  
32 Police are putting suspects, including children, in front  
33 of cameras to record refusals?

34 A. Yes. The last week has given me some clarity around  
35 that, that's for sure.

36  
37 Q. Are you able to explain how that could be, given the  
38 very clear direction from NSW Police about that practice  
39 not being permitted?

40 A. No, I can't answer generically or specifically. All  
41 I can say is that clearly, there has been some custom and  
42 practice which has moved away from this clear direction,  
43 and it's - and through custom and practice it's got a bit  
44 of momentum.

45  
46 Q. At your level, at assistant commissioner level and in  
47 terms of commanders and superintendents reporting up to

1 you, is this being discussed, this practice, or custom and  
2 practice as you described it, of police going ahead with  
3 recording refusals on tape?

4 A. No, it has not been discussed with me. But again,  
5 I take you to some of the opening points in one of your  
6 opening questions around many people do the right thing,  
7 and there's some people clearly, through custom and  
8 practice, that are taking some liberties with some very  
9 clear directions.

10  
11 Q. Thank you. That can be taken off the screen, please.

12  
13 Having read the Legal Aid NSW submission, you are  
14 aware that what has been addressed specifically is the  
15 situation where police say to young people that "in  
16 fairness" they are going to put the allegations to the  
17 young person in a recorded interview. You are aware of  
18 that?

19 A. Yes, I am.

20  
21 Q. You're aware of that practice actually taking place?

22 A. Well, I'm not - I'm aware of it from reading the Legal  
23 Aid submission. I'm not aware of it specifically in my  
24 day-to-day operations.

25  
26 Q. I'm going to ask you to explain, if you can, what  
27 stands behind that notion of fairness to the child in  
28 putting allegations on tape. I'm going to ask you the  
29 position of the NSW Police Force. What is the element of  
30 fairness involved in putting a child in front of a camera  
31 to put allegations to them?

32 A. It's hard to identify that it aligns with the word  
33 "fair", given the previous clarity of the direction. So  
34 I would suggest that it perhaps has an element of  
35 unfairness to it. Again, without specifics, and even if  
36 you did give me specifics, I can't get behind the minds of  
37 the investigator or the minds of anyone that did such an  
38 interview. All I can say is that there needs to be clearly  
39 some more education and there clearly needs to be more  
40 prescription. And when I say "more prescription", that is  
41 pretty prescribed, but perhaps even broken down with  
42 greater clarity point by point about what can be done and  
43 can't be done, and that needs to be published throughout  
44 the organisation, both in a publication sense and also in  
45 an education sense.

46  
47 Q. You're aware that what frequently happens is, once

1 a child is in front of the camera in an interview room  
2 surrounded by at least two police, that the interview then  
3 proceeds and the child is actually asked questions: you  
4 are aware of that situation; is that correct?

5 A. Yes, I'm again, aware of it from the submission, and  
6 I don't have any contest with the Legal Aid submission on  
7 those points. The reason why they are declared vulnerable  
8 people and there are extra protections, legal protections  
9 as well as welfare protections, is for this very - the very  
10 core and essence of what we're talking about, is to protect  
11 their rights.

12  
13 Q. I'm going to take you to a NSW Police Force document.  
14 This is exhibit MTS79. The barcode for this document is  
15 8544525. I wonder if we could go about three-quarters of  
16 the way down the page to the paragraph starting "Once  
17 a suspect". I wonder if that paragraph could be zoomed in  
18 on. This is a chapter from the NSW Police Force intranet  
19 on questioning of suspects. The part I wanted to take you  
20 to, Assistant Commissioner, are the two paragraphs as  
21 follows. Firstly:

22  
23 *Once a suspect makes it clear that they*  
24 *will not answer any more questions, as*  
25 *a matter of fairness to them, put the*  
26 *details of the allegations to them (eg:*  
27 *"In fairness to you I am going to put the*  
28 *allegation to you. Do you understand*  
29 *that?").*

30  
31 The next paragraph, for completeness, goes on to refer to:  
32 if the suspect comments and gives answers, questions can  
33 continue to be asked. You can see that there in front of  
34 you?

35 A. Yes.

36  
37 Q. The question I'm going to ask you is about this.  
38 I put a situation to you that it is taking place where  
39 children are being told, in fairness to them, they're going  
40 to have allegations put to them. What you can see in a  
41 slightly different situation - not relating to children but  
42 relating to suspects - is this view in a document by  
43 NSW Police that even if the suspect makes it clear they  
44 won't answer any more questions, as a matter of fairness,  
45 the allegations should still be put to them. Can you see  
46 that?

47 A. I can see the words in front of me. Yes, I can see

1 what you're saying, yes.

2

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

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

10

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

15

16 Q. That's something that you will do; is that correct?

17 A. No, well, hang on. Let me --

18

19 Q. Sorry, I'll be specific with my question - which  
20 I should have been. You will take that away and you will  
21 consider that together with other people --

22 A. When you say "me", I'm not sure if I will be in charge  
23 of - anything that falls out of this hearing, as far as  
24 internal policy change or that, may or may not have me over  
25 the top of it. There are many things here that will fall  
26 within the realm of education and training, our prosecuting  
27 area, our legal world, and clearly, custody and correction  
28 world. But I dare say that a group of people will come  
29 together with influence in the organisation and  
30 learnedness, to look at this in a very - all the things  
31 that fall out of this, not just specifically these two  
32 points here, all of the things, to make sure that we, if  
33 there is any slippage or anything else, that it is  
34 certainly tightened up.

35

36 Q. I'm going to ask for a page from your statement to be  
37 placed up on the screen. This is MTS94. The barcode is  
38 8620383. I'm going to ask for paragraph 36 to be zoomed in  
39 on, please.

40

41 In this part of your statement, Assistant  
42 Commissioner, you refer to preliminary observations about  
43 the Legal Aid submissions. What you state at paragraph 36  
44 is that Legal Aid correctly identify that a child or young  
45 person is within their rights to reject legal advice and to  
46 participate in an interview:

47

*However, it is --*

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if we go to the next page, please --

*clear that greater guidance and direction for both investigating police and custody managers is necessary to ensure that young persons completely understand and are able to give effect to their rights.*

Are you referring there at paragraph 36 to young people being given the opportunity for a further consultation with a solicitor for legal advice if they change their minds on whether to give an interview or not?

A. Yes.

Q. Will that be something that can be considered to be placed into the standard operating procedures?

A. Certainly. I think it has a lot of merit.

Q. Thank you. That can go off the screen. This investigation has heard evidence of ways in which children can be interviewed not in front of a camera but by way of use of a body-worn video camera. Is that something that you are aware of, that there are police who are using body-worn video camera to interview children and to get admissions from them when the children don't agree to be interviewed on tape?

A. I think there's a continuum or a line there of the interview. I think - I mean, I've sat in the back of the courtroom today and heard some of the questions and evidence. There does seem to be clearly a tension point between we are almost criticised when we turn on the video and then at other times we are criticised when we don't turn on the video. I just put there as a general observation. And I think any police officer would give that sort of tension point.

In our interactions up-front with any person, and without going through some of the doctrine this morning, the body-worn video should be put on. Any time we engage and converse, whether it be with a - and particularly, even, with a vulnerable person. That's not to say that the evidence will be admissible, clearly. But if we arrest someone out in the field, out in a public place, we go to their house, we execute a search warrant, it is most appropriate, per the doctrine that we've looked at this morning, that the body-worn video of the attending police



1 is put on and that everything and anything that is done is  
2 recorded.

3

4 Whether there is an issue or whether that is  
5 admissible or not because of legal advice, vulnerable -  
6 sort of a support person being there or anything else,  
7 that's another matter. But that's not the - but legal  
8 admissibility is not the only reason, of course, for  
9 body-worn video, as we have discussed this morning. So it  
10 is only fair and appropriate that body-worn video is taken  
11 on. And during the course of that search warrant or arrest  
12 or the foot pursuit, whatever it is, there might be words  
13 said and there might be actions done, and I think that  
14 needs to be recorded.

15

16 We then project forward to the apprehension and to the  
17 police station, the meeting with the custody manager,  
18 understanding, you know, their rights, the opportunity to  
19 get legal advice and then exercising potentially their  
20 right to silence, and "No, I don't want to be interviewed  
21 on an ERISP machine", for example. That is all very clear.  
22 Everything up to now I think is absolutely kosher.

23

24 If then there's going to be some movement towards the  
25 officer approaching the person in an interview room or,  
26 alternatively, in a cell complex and switching on and  
27 doing - in other words, trying to usurp the ERISP and the  
28 right to silence, I agree with you, and I think the  
29 organisation would equally take the position, that that is  
30 not fair.

31

32 Q. Let me take you to specific evidence before this  
33 versus obligation. Can I ask for MTS86 to be placed up on  
34 the screen, please. The barcode is 8620251. If that could  
35 be zoomed in on, please, to the text.

36

37 Now, Assistant Commissioner, you saw this  
38 exhibit placed on the screen earlier because I asked  
39 Assistant Commissioner Crandell about it. What you can see  
40 here seems to be the very thing you have just described,  
41 the usurping of the use of the recorded interview with the  
42 use of body-worn footage. Just looking at this particular  
43 case, you accept, don't you, that what took place here is  
44 not an appropriate use of the body-worn video camera?

45 A. Can I just - I just need to make a couple of points  
46 before I answer that, and I'm very happy to answer it. On  
47 reading that there - is this from this particular matter,

1 Mantus?

2

3 Q. No, this is a particular case --

4 A. Oh, it is a particular case.

5

6 Q. -- which has been provided by Mr Frankham from Legal  
7 Aid NSW.

8 A. Okay. In fairness there, when I read that, I don't  
9 know what comes first, that body-worn video is equally -  
10 I can interpret that both ways. In other words, the  
11 body-worn video happened before legal advice, or, legal  
12 advice about not going on ERISP and then there was  
13 a body-worn. Now, unless you can give me the specifics,  
14 I can't answer that totally. But I will stick with my  
15 previous statement, as I said, that once ERISP is declined,  
16 right to silence is accepted and communicated as the  
17 instructions of the suspect, or the young person in this  
18 case, and then if there was something else like body-worn  
19 video used as a quasi-interview process, then I would deem  
20 that to be unfair in a generic fact situation. I can't  
21 really comment more about this because I don't know what  
22 came first.

23

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

27 A. I do.

28

29 Q. I'm going to take you to another exhibit that you saw  
30 me take Assistant Commissioner Crandell to. May I ask for  
31 exhibit MTS81 to be put up on the screen, please. I'm  
32 sorry, it's not 81. Excuse me.

33

34 Assistant Commissioner Cotter, I'm going take you to  
35 another part of your statement now, and could I ask you to  
36 turn to paragraph 38, please. I wonder if this could be  
37 put up on the screen from MTS94, this is the barcoded  
38 page 8620384. I'm going to take you to what you have  
39 stated there at paragraph 38. In summary, you encourage  
40 legal practitioners to contact a police area commander or  
41 a police district commander to raise those issues. Can you  
42 see that?

43 A. Yep, yep.

44

45 Q. What I'm going to do is I'm going to take you to  
46 evidence before this investigation. Can I ask for MTS68,  
47 please, to be put up on the screen. The barcode

1 page number is 8543609. Could we go to the bottom of the  
2 page, please. I'm just going to ask you to read that  
3 email, which initiates the emails, and then I'll take you  
4 to the next one. This is an email sent to a superintendent  
5 of a police district by a solicitor from the Aboriginal  
6 Legal Service.

7 A. Thank you. I have read that.

8

9 Q. Can I now go to the top of the page, please. This is  
10 the response from the superintendent. Could I ask you to  
11 read that, please.

12 A. Thank you, I've read that.

13

14 Q. This is an example, Assistant Commissioner, of what  
15 you described at paragraph 38 where a solicitor on behalf  
16 of the Aboriginal Legal Service raised the specific issue  
17 with the superintendent, and you can see the  
18 superintendent's response there. Is that correct?

19 A. Yes.

20

21 Q. There is one particular part of the response I will  
22 come to later, but could I ask you to note that the  
23 superintendent refers in that very first paragraph to this:

24

25 *Ultimately the Court determines Fairness of*  
26 *admissions at that time in a relevant*  
27 *forum.*

28

29 In the next paragraph there is a reference to "police  
30 district reviews" - that the police district reviews court  
31 outcomes and makes reports on individual officers. Can you  
32 see that?

33 A. Yes.

34

35 Q. What you have set out in your statement at  
36 paragraph 38, which I took you to, was, in fact, this exact  
37 situation, where the police area commander was approached  
38 and has given an answer indicating essentially the court is  
39 going to determine things. Do you accept that?

40 A. On the words here on the page I accept what you have  
41 said.

42

43 Q. Going back to what you have said at paragraph 38,  
44 would you accept that issues such as this or issues that  
45 lawyers experience are really matters that need to be taken  
46 up with the upper levels of management with NSW Police?

47 A. Yes.

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MR COFFEY: Can I clarify, sorry, just to seek what is "the upper levels of management" in circumstances that we know that that email was from a superintendent within a command so that that is the most senior person within that command.

THE CHIEF COMMISSIONER: Yes, if you'd like to clarify.

MR FERNANDEZ: Q. Can you see the benefit of issues that are encountered by lawyers such as this one being able to be taken up with yourself as the relevant assistant commissioner?

A. I think that letter from the ALS and the respective solicitor was very fair and reasonable and asking for an open opportunity, without referring to a specific case, if I've got it right - it is the first time, again, I've seen the document - but again talking about whatever their arc of fire was for their patch of legal representation, that there was what they deemed to be - what they deemed to be, I will reiterate that - a systemic issue. And so I think it was a very fair and open letter to the superintendent.

The superintendent's response, I think, only half answered the question. So when it comes to the substance and the admissibility of the evidence, technically, he is correct. However, what the superintendent - he or she - has perhaps failed to address in their submission back was, well, what was done? Was it done in accordance with policy and protocols. So is there a breach of policy? Whether it be bona fide, slippage, legitimate, custom and practice, is it something that we can nip in the bud through education and training on a local level or on a more conglomerate level?

So I think the best approach there, without pulling apart what was exactly in the mind, or the history or the tensions, perhaps, between those two parties - I don't know anything about them - would have been to open up his or her doors to the equivalent from ALS and to at least, at the very first blush, sit down and discuss and get out on the table what it is, because it is not clear to me what the issue was. And then, from there, work through what an appropriate action would be for educating or correcting some of the issues raised by ALS in this case, and then the best case, the platinum example of a superintendent here, would be to think very corporately and say, "Well, if it's

1 perhaps happening in my patch, then it might be happening  
2 in a neighbouring patch or even across the organisation",  
3 and to push it up through the chain of command to someone  
4 like an assistant commissioner to then on-forward.

5  
6 I think the appropriate level of management that you  
7 are asking me to answer is at that superintendent level,  
8 which then provides buffers above that to then further  
9 adjudicate. Perhaps in this process, you know - we can't  
10 educate every superintendent how to open their doors, but  
11 let's just hope by the time they do get there, they are  
12 pretty open in communicating with their community, whether  
13 it be any part of their community, inclusive of the legal  
14 community.

15  
16 So there is a lot more there that could have been  
17 done, perhaps even more said in the specifics by the ALS  
18 lawyer in writing, but I'm not going to criticise anyone  
19 else to say that I think it's at the right level but more  
20 could have been done.

21  
22 Q. I'm going to take you back to your statement now.  
23 Could we go to MTS94, please, to page 8620384. I'm going  
24 to take you, Assistant Commissioner, to paragraphs 39  
25 through to 41. I wonder if we could just zoom in on those  
26 paragraphs, please. I want to ask you about what you mean  
27 by what you have set out in paragraphs 39 to 41. The  
28 content of these paragraphs is about inquiries by lawyers  
29 with the custody manager about the attitude of police to  
30 bail. Can you see that?

31 A. Yes. I can.

32  
33 Q. What you refer to at paragraph 40 in particular is  
34 a presupposition about whether a decision about bail has  
35 been made. I want to ask you about the second part of  
36 paragraph 40 and the last sentence. What you say there is:

37  
38 *It may in fact cause a young person to miss*  
39 *an opportunity for diversion and entering*  
40 *the criminal justice system.*

41  
42 Can you explain how a lawyer asking a custody manager about  
43 what the police attitude to bail is might cause a young  
44 person to miss an opportunity for diversion?

45 A. Well, first of all, I don't understand the question  
46 from the legal fraternity asking about bail. So let me -  
47 that's my first point. As I said there in the statement,

1 it presupposes that there is going to be an outcome of  
2 legal action, let alone bail. So I can't get into the  
3 minds of the legal fraternity as to why they ask about  
4 bail. So all I can say is just raise it and I can't add  
5 any more to that.

6  
7 Paragraph 40, and particularly the last sentence  
8 you're talking to, goes more generally to the whole,  
9 I suppose, admission, which is one of the pillars of the  
10 Young Offenders Act and triggers, essentially, diversion to  
11 occur, whether that be through, you know, the warning, the  
12 cautioning or ultimately the youth conferencing where  
13 clearly there is, you know, reflective pieces, and so  
14 forth. So another form of justice is delivered in that  
15 softer and at times very, very appropriate way.

16  
17 But of course, to get to that diversion, the whole  
18 intent of the Young Offenders Act and the whole intent of  
19 the policy - not just in this state but if not the world -  
20 requires that there is a gateway that goes through first,  
21 and that is, admissions are made to the offence. So that's  
22 what I mean, that perhaps - I'm not here to tell the legal  
23 fraternity how to frame their questions to the police or to  
24 frame their advice, except to say that without an  
25 admission - and there is a real tension point for police  
26 and the world and the legal fraternity - without the  
27 admission or the confession or the admission of guilt,  
28 clearly, there are opportunities that are not being  
29 delivered for diversion in the criminal - and the only  
30 other alternative, if legal action is taken, then, is to  
31 progress by charge.

32  
33 Q. My question was about the link you have drawn between  
34 the question asked by a lawyer about what the attitude is  
35 to bail and a young person missing an opportunity. So I'm  
36 not asking about admissions, I'm referring to what you set  
37 out in paragraphs 39 and 40. Is there a link between  
38 a lawyer asking the question, "What is the police attitude  
39 to bail" and a young person possibly missing out on an  
40 opportunity for diversion?

41 A. I don't know the answer to that. I can't answer that  
42 question. And I will rely on my previous answer, which was  
43 perhaps longwinded, that the correlation between clearly -  
44 admitting the offence, what I'm really trying to say there  
45 is that the correlation between not admitting the offence  
46 might clearly put the shutter door down on diversion under  
47 the Young Offenders Act. That's what I'm saying.

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Q. When you say at paragraph number 41 that "I flag that this is an area that NSW Police will communicate to Legal Aid". What does that mean?

A. Sorry, paragraph 41, did you say?

Q. Forty one, the second-last line and the last line:

*I flag that this is an area that  
[NSW Police Force] will communicate to  
Legal Aid.*

A. I think anecdotally again in my preparation for this, and clearly being around - not in but around the youth portfolio and the - I think the anecdote or the age-old tensions around exactly what I've just been speaking to in the last couple of answers is without the admission, then there are many opportunities that are missed in the diversion process under the remit of the Young Offenders Act, and I think that's a fair statement. I think that has been reiterated once, twice, perhaps a hundred times between all sides, whether it be police, Aboriginal Legal Service and Legal Aid, over the years. I think I could probably safely say that that is a fair anecdote.

Q. The evidence before this investigation is that both Legal Aid NSW and the Aboriginal Legal Service, as part of their standard questions, ask police about Young Offenders Act diversions, cautions and warnings. Can you accept that?

A. Yes.

Q. So accepting that that's at the forefront of mind of both Legal Aid and ALS solicitors, is there any problem with those solicitors then asking police what their attitude to bail is?

A. I don't understand the question, because that's a decision made by the custody manager on understanding the facts and being briefed and reading the charges and so forth, and then understanding all the antecedents and reading the facts sheets and everything.

That question there, I think, is way too early, if I just give my personal opinion on it, in this process. That's the only evidence I can give on that matter.

MR FERNANDEZ: I wonder if that might be a suitable time,

1 Chief Commissioner.

2

3 THE CHIEF COMMISSIONER: Q. Just before we do adjourn,  
4 in evidence there is the Legal Aid Youth Hotline document,  
5 which is an electronic field of topics raised, it is  
6 annexure B to the Legal Aid submission, it is also  
7 a freestanding exhibit, MTS90, and there is an ALS  
8 equivalent, and what they show is a rather systematic  
9 process of going through topics with the police officer and  
10 then the young person and covering in some detail the  
11 possibility of application of the Young Offenders Act. And  
12 as I understand the evidence given by the solicitors from  
13 Legal Aid and the ALS who have given evidence, this is  
14 a significant area, so it's not left untouched, it's, in  
15 fact, dealt with on the evidence. Have you taken that  
16 aspect into account in expressing what you've said at  
17 paragraphs 39 and 40? And by that, I mean expressly the  
18 risk of a lost opportunity to use the Young Offenders Act?  
19 A. Yeah, I have. Yeah, I understand that it is clearly -  
20 it's front and centre in a lot of areas, I think,  
21 anecdotally. Again, I don't - I'm not out in the charge  
22 rooms, I'm not out in the field. So it's been 20 years  
23 since I did this type of work --

24

25 Q. Yes.

26 A. -- in fairness. But anecdote - and it has been  
27 expressed I think in this hearing no doubt, that there is  
28 perhaps a very clear, "Don't talk to the police", and  
29 that's fine; but of course, with that comes some corollary  
30 of opportunities missed. I think that would be fair to  
31 say.

32

33 THE CHIEF COMMISSIONER: All right. We will stop -  
34 Mr Coffey?

35

36 MR COFFEY: Sorry Chief Commissioner, there is something  
37 I should have put on the record earlier this morning.

38

39 As a result of some matters that were raised with me  
40 on behalf of the Commissioner of Police during the private  
41 examinations, which, just to be clear, won't cause any  
42 problems for the non-publication orders, I'm pleased to  
43 report the Commissioner of Police has caused for contact to  
44 be made with the Legal Aid Commission and also the Director  
45 of Public Prosecutions, to both work through the memorandum  
46 of understanding and have a meeting with the Legal Aid  
47 Commission but also to work with the Director of Public



1 Prosecutions office to consider whether or not a memorandum  
2 of understanding should/could be put in place in  
3 circumstances where matters prosecuted by the director, and  
4 there are issues that are identified by judicial officers  
5 or evidence excluded, is somehow reported through to the  
6 Commissioner. So those contact and preliminary meetings  
7 have already commenced since the last public examinations.

8  
9 THE CHIEF COMMISSIONER: Yes. Well, I can understand the  
10 Director of Public Prosecutions desiring some action on  
11 that front. As I've indicated already, in the early part  
12 of this year the Director of Public Prosecutions raised  
13 a number of these matters which came from both metropolitan  
14 and country areas of New South Wales - it's not confined to  
15 one area - as a matter of concern.

16  
17 So when the senior prosecutor in the state raises  
18 these matters, against the background that the Commission  
19 was already seized of this issue in Operation Mantus and  
20 was hearing from other quarters as well of what was said to  
21 be a problem.

22  
23 You heard what I raised a little earlier with  
24 Assistant Commissioner Cotter. I understand he is the  
25 person who has to answer the questions here and now and  
26 it's not an easy task, but an issue which certainly is  
27 apparent is that, from the Legal Aid and ALS solicitors,  
28 these events are occurring from day to day - I'm not saying  
29 daily, but we have had reports, for example, in the private  
30 examination, that there had been yet another event of this  
31 type the night before.

32  
33 So there is a question as to whether there ought be  
34 something done promptly, and I have raised with Assistant  
35 Commissioner Cotter, and I raise with you, the question of  
36 whether Commissioner Moroney, then the Commissioner of  
37 Police, 19 years ago signed up to a position, which has not  
38 been revoked or abandoned since.

39  
40 In 2005, there was a circular that put a further gloss  
41 on that area. The fact that that protocol was between the  
42 Commissioner of Police and Legal Aid at that time is not to  
43 reduce or limit its operation; it really reflects, on one  
44 view of it, the status quo which has been departed from  
45 since.

46  
47 The question then is whether there ought be a formal

1 indication that that remains the status quo, subject to  
2 further developments. Assistant Commissioner Cotter has  
3 raised some. You have mentioned further a discussion with  
4 the DPP and Legal Aid, and I would think the ALS too. But  
5 this is not a process kicking off de novo.

6

7 MR COFFEY: No.

8

9 THE CHIEF COMMISSIONER: This is against the background of  
10 19 years where the majority of police, and what sounds like  
11 a solid majority of police, are complying with what  
12 Commissioner Moroney indicated should be the position all  
13 those years ago. But there has been a departure from it in  
14 ways that have led to courts having to decide and making  
15 findings from time to time of impropriety involving police  
16 officers, which raises the further question of whether, if  
17 the same officer did the same thing more than once, whether  
18 that may end up with disciplinary consequences for repeated  
19 impropriety.

20

21 Now, I'm perhaps making that general observation in  
22 response to what you have said, but there does seem to be  
23 a need for a clear position being formed now, making all  
24 due allowance for there being some perhaps more detailed  
25 attention given to these matters.

26

27 I'm now at the risk of saying everything more than  
28 once, so I will stop there, seeing it's now lunchtime.

29

30 If you could step down for the moment, thank you,  
31 Assistant Commissioner, and your evidence will continue  
32 at 2.

33

34 **LUNCHEON ADJOURNMENT**

35

36 THE CHIEF COMMISSIONER: Thank you, have a seat, thanks,  
37 Assistant Commissioner.

38

39 Yes, Mr Fernandez?

40

41 MR FERNANDEZ: Q. Assistant Commissioner, the Commission  
42 has in evidence before it judgments of the Supreme Court,  
43 District Court and Children's Court going back to the early  
44 2000s, where courts have excluded interviews where young  
45 people, and sometimes adults, have refused to be  
46 interviewed but are subsequently interviewed by police.  
47 These cases include cases involving murder and other very

1 serious offences.

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1 carnage or human carnage around it, massive complaints by  
2 the DPP director or directors or - yes, the director  
3 calling him or her direct. So again, "It's ad hoc" would  
4 be probably my umbrella statement around it. I think there  
5 does need to be more scope around that these are emerging  
6 issues and what we can do collectively to educate and be  
7 better in preserving all rights for both sides.

8  
9 Q. I'm just going to distinguish those two different  
10 types of cases by jurisdiction. You heard just before  
11 lunch Mr Coffey, who appears on behalf of the Commissioner,  
12 referring to a process or a memorandum or some system  
13 between the NSW Police and the Director of Public  
14 Prosecutions in terms of what I'll call feedback. Do you  
15 know anything more about that?

16 A. No. No, I don't. That was the first I'd heard of it,  
17 but I think it's - yes, I think it's timely and important.

18  
19 Q. What about within NSW Police - so, for example, police  
20 prosecutors in the Children's Court - is there a way that  
21 if cases are being dismissed or admissions are being  
22 excluded from evidence, that that is fed back as to the  
23 reasons why, so there can be changes to practice?

24 A. There are reviews and reports done for clearly  
25 withdrawal of charges or ultimately failed prosecutions.  
26 Some of them - there's many, many reasons why a prosecution  
27 might fail, and of course a technicality fail might be  
28 a withdrawal of a charge, preference of another one, you  
29 know, negotiations. And those things happen clearly at the  
30 highest level, both at a prosecutorial level and at the DPP  
31 level, as we know, without going into any more than that.

32  
33 So by virtue of that, some cases or some indictments  
34 get put aside. If you're talking about a robust hearing,  
35 for example, where there are criticisms, then many times  
36 the judge or the magistrate have written letters of  
37 complaint about the impropriety or - of the police officer,  
38 their evidence, whether it was truthful and the like.

39  
40 If a case just fails - ie, for whatever reason, in the  
41 course of the heat of the battle - I'm not sure the  
42 magistrate or the Bench write issues; it's just one of  
43 those, "Okay. That's the way it bounced."

44  
45 There does need to be, I think, some greater scrutiny  
46 around failed prosecutions, both in the Local Court,  
47 Children's Court, and clearly the superior court level.

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Q. This investigation heard evidence during private examinations about one particular district, police district, where the prosecutors in that district didn't even attempt to put evidence before a court, Children's Court, where interviews were obtained after a refusal by the young person.

A. Mmm-hmm.

Q. How does something like that come to the attention of the organisation so that changes can be made?

A. As I sort of indicated before lunch, there's going to be a lot of really meaningful recommendations, I'm sure, and certainly hope, will flow from this hearing, and I have no doubt one or two might be around the point we're talking here. I think that is a really good time to set in place a structure and a protocol around those sorts of failings, perceived or real, at least be scrutinised and then, if there is a failing, then that be fixed up, be corrected and amended, whether that, as I said, be by policy, process, academia, education, training, whatever the case is.

Q. That leads into the next area of questions that I am going to ask you about, which is the part of your report where you have referred to preliminary areas identified for review.

A. Yes.

Q. I wonder if MTS94 could be placed up on the screen, please, to page 8620385. Could paragraph 42 be zoomed in, please. What you state at paragraph 42 is:

*Following the private examinations and review of the Legal Aid Submissions, the areas set out below have been identified for review by the [NSW Police Force].*

You go on to say:

*Of course, there will be more that are identified during consultation.*

Does that mean that, by way of introduction, everything that you've noted at paragraph 43 is a matter that has been identified for review - that is, something needs to be done about these matters in the future rather than something is being done right now?

1 A. Yes, they're matters that essentially I think from  
2 I suppose the origin of this hearing particularly, I can't  
3 go into any other previous hearing in this forum or  
4 otherwise, but I will address from this hearing, the origin  
5 would be that some of the - some of and not limited to but  
6 certainly inclusive of however many there are are areas  
7 which should be taken away, and in the consultation, both  
8 internally to our very massive organisation and externally  
9 with people again represented by this forum, to look at  
10 what needs to be done.

11  
12 And again, I know I've been pressed on the "now",  
13 versus the "soon", I can't commit these things to the  
14 "now". All I'm committing to is this organisation - on  
15 behalf of the organisation I will commit that we as an  
16 organisation - not necessarily me as in Peter Cotter, but  
17 this organisation - will go away and look at all of the  
18 things that flow from this hearing and equally some of the  
19 things that I've listed in paragraph 43.

20  
21 Some of them will be easy fixes and quick fixes and  
22 can be just administered by a memorandum, for example.  
23 Some of them do go to the core of policies and the law.  
24 Some of them might touch on technological systems and every  
25 time you mention that word you mention money and the  
26 constraints and opportunities there. And of course, we  
27 have a finite budget and some of these things might rely on  
28 amendments to the digital side of the house as well as the  
29 record-keeping side of the house, and it might have  
30 education and training, you know, pushed all around it.  
31 And those things do take time, Mr Fernandez, but I - my  
32 guarantee to you is this: this organisation, my  
33 organisation, treat this very seriously and we'll take it  
34 away and in the fullness of time I'm sure there will be  
35 some considerable amendments, which I think will deliver  
36 enormous benefits.

37  
38 Q. Can you explain why it's taken this investigation to  
39 bring these matters to the attention of the NSW Police  
40 Force, when these issues have been prevalent for at least  
41 20 years, going back over the cases including in the  
42 Supreme Court?

43 A. I accept that, and probably perhaps even before  
44 20 years. I can't answer that exactly, can I? All I can  
45 say is that every action or compilation of actions has  
46 a reaction, and this is, again, another point in all our  
47 history of policing and all our history of legal engagement

1 where we will walk away, have a really good reflective look  
2 on how we do things, make some amendments, no doubt, and  
3 hopefully, things will be better.  
4

5 Q. Can I take you to the list of matters you refer to at  
6 paragraph 43 of your statement. What is currently on the  
7 screen is 43 paragraphs (a) and (b) where you refer to the  
8 difference between legal advice and instructions. There  
9 has been evidence received in private examinations about  
10 police saying that they would not even ask a custody  
11 manager what a child wishes to do, because that's a matter  
12 for legal advice, not drawing a distinction between the  
13 relaying of information by the solicitor to the custody  
14 manager being different to the provision of advice between  
15 the solicitor and the child. Do you understand that?

16 A. I think so.  
17

18 Q. I'm just wondering if that's what you're drawing  
19 attention to in 43(a) and (b), that there's some education  
20 to be provided, some guidance provided to police, that  
21 there is a difference between legal advice given by a  
22 solicitor to a child and the relaying of the child's  
23 instructions to police?

24 A. Yes.  
25

26 Q. Is that what you had in mind?

27 A. That's what I'm talking about, yes.  
28

29 Q. That would encourage investigating police, then, to  
30 actually ask the custody manager what are the child's  
31 wishes. Do you agree with that?

32 A. I do agree. I think it is very important. Really  
33 important.  
34

35 Q. Are you aware of that as being a widespread issue  
36 that's happening right now, that the outcome, the  
37 instructions, the wishes of the child are actually not  
38 being inquired of and children are being interviewed?

39 A. No. And again, I go to the opening comments, of  
40 yourself in questioning of me today, and of the Chief  
41 Commissioner as well, and I don't want to misquote anyone,  
42 but plenty of good work gets done every day, and there is  
43 some issues where, through lack of learning, custom and  
44 practice, right or wrong, things - corners are cut and  
45 things are not per the protocols, and we have to get back  
46 to more strictness and more understanding and education of  
47 the protocols, and part of that is, you know, informing,

1 perhaps, some junior investigators, if not people without  
2 any investigative experience, particularly in the general  
3 policing side of the house, who are doing micro or  
4 smaller-time investigations, but are still put in a place  
5 where they're doing interviews and things like that, but  
6 they don't have perhaps an investigator's course behind  
7 them, they clearly don't have a detectives training behind  
8 them, a designation, at all levels. So it's not just  
9 focusing on plain clothes and investigators, the criminal  
10 investigation side of the house, it is concentrating on the  
11 education of the whole organisation on what is the  
12 difference of all those things, but certainly the  
13 difference, differentiation between legal advice and  
14 instructions.

15  
16 Q. If I can ask for paragraphs (c) and (d) to be brought  
17 up, please. What you refer to in those two subparagraphs  
18 is about the custody management records. I think you state  
19 at paragraph (d) that the custody manager is required to  
20 make a note in the custody management system of any  
21 information provided by a legal representative. When you  
22 say that's a matter to be reviewed, that's the very content  
23 of the memorandum of understanding between Legal Aid NSW  
24 and the NSW Police Force, isn't it - going back to 2004?

25 A. Yes, and when I say the word "review", I'm with you,  
26 Mr Fernandez. "Review" doesn't have a negative  
27 connotation; it might mean strengthening it and putting  
28 more clear, concise, definite, step by step what you have  
29 to do. That's what I mean by the word "review."  
30

31 Q. When you heard some conversation between the Chief  
32 Commissioner and Mr Coffey and history of the matters, what  
33 was referred to is that these issues are continuing,  
34 perhaps not every day. We heard evidence during the  
35 private examinations from Mr Frankham from Legal Aid who  
36 reviewed a number of cases and, in fact, got a call the  
37 night before that related to the very issue of his  
38 evidence, children being interviewed when they have been  
39 given legal advice and had refused to be interviewed. The  
40 question I'm asking is can you see that there is some  
41 urgency for clarity to be provided to NSW Police on these  
42 issues that I'm taking you to?

43 A. Yes.  
44

45 Q. Will that urgency be communicated to whoever it needs  
46 to be communicated to in terms of amendments to standard  
47 operating procedures and other documents?



1 A. Absolutely.

2

3 Q. Could I ask you to go to subparagraph (e). The  
4 reference there is where a legal representative  
5 communicates the instructions of a person in custody to the  
6 custody manager, that a number of things need to be done,  
7 including notes being made in the custody management  
8 records. Can I let you know that in the particular  
9 investigation this Commission is looking at, the custody  
10 manager was given information and made no records at all.  
11 No record was put in the custody management records or  
12 anywhere else. You refer to this being as matter that can  
13 be reviewed. Isn't this something that should be done by  
14 custody managers now in accordance with regulation 131?

15 A. Yes. That is the entry level of this theme, is that  
16 such records should be put into the custody management  
17 system. That is the system, the corporate system, by which  
18 all things custody are entered into. I cannot speak to why  
19 the custody manager in the origin of this matter did or did  
20 not do anything.

21

22 Q. You refer, at paragraphs (f) and (g), to the  
23 communication between police and specifically between the  
24 custody manager and investigating police. Now, I'll  
25 shortly take you to the standard operating procedures when  
26 I ask you questions about the role of the custody manager,  
27 but what you've set out in paragraphs (f) and (g), doesn't  
28 that form part of the obligations of the custody manager  
29 here and now, under their obligations?

30 A. Yes.

31

32 Q. Are you able to say why it's necessary for these  
33 particular matters, as basic as communicating with  
34 investigating police, need to be put into the standard  
35 operating procedures or anywhere else? I'm accepting the  
36 importance of that, but it's such a basic obligation. Why  
37 has it taken this long for this to be identified as  
38 a problem?

39 A. You are correct in saying that it is the practice and  
40 the expectation at the moment. What I've said a few times  
41 here today already, and again most recently with the  
42 review, I'm talking about the organisation should go back  
43 and look at this and strengthen it, make it more specific,  
44 if possible, even give it more clarity and more meaning and  
45 more purpose, and perhaps even front and centre in SOPs,  
46 handbooks and the like.

47

1 Q. Referring to the remaining matters on your list of  
2 matters to be reviewed, you refer at paragraph (i) about  
3 making detailed records of conversations and recording of  
4 steps taken to arrange for support persons, is it the case  
5 that the answers you have given previously apply to those  
6 circumstances as well?

7 A. Yes, I think there should be, where possible, clearly  
8 the "I said", the "He said", you know, clearly in the  
9 context, just like you would in a notebook, as if it was  
10 a live recording, albeit that it's not, but that, you know,  
11 the exact words are used. And that is a benefit and  
12 a protection, I might say, for both sides into the future -  
13 for the prosecutor and clearly the defence and the  
14 vulnerable person in this case.

15  
16 Q. Could I have paragraph 44 pulled up, please. It's on  
17 the following page. What you refer to there, Assistant  
18 Commissioner, is reports being created which ensure actions  
19 are recorded and printed, and you go on to say:

20  
21 *... along with an indication of whether an*  
22 *action has been created automatically as*  
23 *a result of some other action with the COPS*  
24 *system or has been manually created by*  
25 *a police officer.*

26  
27 What's the distinction between the two? Why does that have  
28 to be indicated?

29 A. I don't absolutely know my way all around the COPS  
30 system or the custody management system. I made certainly  
31 fair concessions around that earlier.

32  
33 What I do know about, I suppose, decision-making,  
34 recording of decision and equally importantly the recording  
35 of rationale and the timing and dating of that, to put it  
36 in true chronology, is really important, whether that be  
37 when you're running a command centre, a command post, or  
38 equally, when you have someone in custody.

39  
40 So I dare say that the custody management system - and  
41 these sorts of things are digital and technology, so the  
42 two words that jump into my head there are "money" and  
43 "time", but what is needed is perhaps a review of the  
44 system and perhaps even ultimately the purchasing of  
45 a system that gives more opportunity and is user friendly  
46 to the creation of records and the decision made by the  
47 officer as opposed to, "If you click that box automatically

1 it jumps to another screen", for example. There's an  
2 automation side to - no doubt that's just the way  
3 technology runs. But I think we need to pull it back to  
4 a system where the decision of the decision-maker is  
5 recorded, the rationale and the timing of that - not the  
6 time they press the print button but the timing of the  
7 decision is locked and loaded in certain parts of the  
8 system.  
9

10 Q. Assistant Commissioner, I've asked you many questions  
11 about the issue of children, legal advice and subsequent  
12 interviewing. I'm going to put that issue to one side now  
13 and I'm going to ask you about the second area I mentioned  
14 to you, which is about the role of the custody manager. Do  
15 you understand that?

16 A. Yes.  
17

18 Q. Is it the case that in terms of training of custody  
19 managers, that's something that Sergeant Edgell, who is  
20 present, can speak more directly towards? Is that  
21 something you yourself have any knowledge of that you are  
22 able to assist the Commission with?

23 A. The reason why we called Sergeant Edgell was I've  
24 clearly - my career has been very different, and you've got  
25 that in front of you and we don't need to go over it. I've  
26 never been a custody manager, I've never done the custody  
27 manage program, and so I haven't lived or breathed that,  
28 clearly in my early investigative days. Custody managers  
29 came in I think in the early 1990s, certainly in my early  
30 criminal investigation career they were there, and still  
31 today, let me say, they own the ground of that custody  
32 suite and all things custody.  
33

34 Sometimes, custody managers don't always get it right.  
35 Sometimes there's good custody managers, diligent ones.  
36 Sometimes they're tired, just like lawyers, just like every  
37 other occupation. There's good, there's bad, there's  
38 indifferent, without talking about any specific case or  
39 custody manager.  
40

41 But what I do know about their training, and as  
42 I said, I will defer to Sergeant Edgell to take you through  
43 the minutiae, but it is a system where many police are  
44 trained in it and we regard them as professionals in this  
45 domain, they treat it seriously, they have a responsibility  
46 not only for the geographic area of the station, they've  
47 got to make sure suspects, prisoners, everyone is attended

1 to, people don't escape, people don't hurt themselves, and  
2 people are afforded their rights. It is an enormous  
3 responsibility. And I think it is worth noting that every  
4 charge room is different. Sometimes they are the most  
5 hectic places in the world due to volume or due to  
6 a person, prisoner or suspect, either through mental health  
7 or other issue, misbehaving, and the onus for them to make  
8 sure medical care, safety, security - not only of the  
9 person, the prisoner, but equally the police officer, under  
10 work health and safety obligations - is enormous.

11  
12 So they do training and they treat their job  
13 seriously. Commanders have the right to appoint them.  
14 They do the training, it goes through the education and  
15 training side of the particular police area or district,  
16 comes through to the commander for sign-off under his or  
17 her delegation under an instrument delegated by the  
18 Commissioner, and then they are put on an instrument of  
19 appointment, which is put up in the police station with  
20 all their names on it. And, for example, Surry Hills has  
21 50 officers all above the rank of senior constable, which  
22 is five-years-plus policing, so mature into their career,  
23 and it covers probably, you know, 10 or 15 sergeants -  
24 don't quote me on the number - and 30 or so senior  
25 constables, who are respected and diligent people.

26  
27 As we go out further away from the mother ship of the  
28 CBD of Sydney and you get into the police districts and  
29 particularly remote and rural country, those numbers change  
30 dramatically and the onus and responsibility to not have  
31 a totally independent or dedicated custody manager occurs  
32 in remote or regional country policing. That's just the  
33 nature of the beast. But to the training - and I thought  
34 it was important that I get that out. I wasn't necessarily  
35 answering your question, but in a roundabout way I am.

36  
37 The education is significant. They are trained. They  
38 treat their job seriously. Most of the time they get it  
39 right and like every occupation, everywhere in the world,  
40 sometimes people get it wrong.

41  
42 Q. When you describe, as you do, custody managers at  
43 paragraph 13 of your statement as officers with a "uniquely  
44 privileged set of duties", you are referring to just how  
45 important they are for all sorts of reasons; is that right?

46 A. Yes.

47

1 MR FERNANDEZ: I'm going to ask for exhibit MTS80 to be put  
2 up on the screen. This is the standard operating  
3 procedures relating to the charge room and custody  
4 management. I'm going to ask for page 8544533 to be placed  
5 up on the screen, please. Could 3.1, about accountability,  
6 be zoomed in on, please.

7 Q. Assistant Commissioner, you talked about custody  
8 managers owning the ground. What the standard operating  
9 procedures make clear in terms of the police area commander  
10 or the police district commander is that it is those  
11 officers of those ranks who have overall accountability for  
12 people in custody in their area commands and their police  
13 districts. Would you agree with that?

14 A. Yes. Well, essentially, as you would be aware, the  
15 difference between a police area command and a police  
16 district is essentially the police area is the city  
17 metropolitan hub stations, and the police districts are in  
18 the rural. So that's the only differentiation there, just  
19 for everyone's information.

20  
21 Like most things in policing, the buck stops with the  
22 boss, and the boss of the PAC or a PD is a person who holds  
23 the rank of superintendent, and ultimately they are  
24 responsible for all things that occur in their community  
25 from the policing perspective ultimately, their  
26 accountability, but also all things work health safety,  
27 operations, fiscal responsibility and management of the  
28 day-to-day, and primary in that is the welfare of their  
29 staff and the welfare of anyone who walks through the door,  
30 whether that be a visitor, a contractor, and equally  
31 a person in custody.

32  
33 Q. Appreciating the many responsibilities of  
34 superintendents, are you aware of what particular support,  
35 training, information they receive about people in custody  
36 to assist them in their role in terms of overall  
37 accountability?

38 A. All I can say is it's probably dependent on their road  
39 to their position. Some of them could have come from  
40 a generalist policing arena, where they may have been  
41 a custody manager in a time gone by. And that might only  
42 have been, you know, maybe in the last decade. So some  
43 things haven't changed, clearly, that much in that  
44 responsibility. So some of them have been educated in this  
45 world specifically.

46  
47 Others have been duty officers or inspectors and

1 ultimately have been - have lived day-to-day operational  
2 policing in PACs or PDs.

3  
4 Others clearly come from specialist areas and that  
5 might be a little bit less, such as myself, for example.

6  
7 But once they reach the rank of superintendent, to my  
8 knowledge, there is not a specific program that touches on  
9 custody. I'll stand to be corrected, and perhaps Sergeant  
10 Edgell can confirm that. But I do have a knowledge of  
11 senior leadership programs and courses, and a lot of that  
12 is more around leadership, perhaps not necessarily some of  
13 these operational nexus. So I'd say by the time they get  
14 to superintendent, there's not, certainly, ongoing  
15 training. But perhaps there is - there could be some  
16 advice from the back of the room while I'm still in the box  
17 here around some of that.

18  
19 Q. One of the factual issues that has come before this  
20 Commission in this particular investigation is the  
21 relationship and communication between the custody manager  
22 and investigating police, and you yourself have made  
23 comments about that in your statement. Just before I take  
24 you to that, I'm going to ask for page 8544536 to be  
25 brought up, please. Could 4.2 be enlarged, please, because  
26 I would like to take you to the second paragraph. What you  
27 can see there, Assistant Commissioner, is the following:

28  
29 *Where there is a disagreement between the*  
30 *Custody Manager and the arresting/escorting*  
31 *police, refer the matter to a Duty Officer*  
32 *to resolve ...*

33  
34 And there is some further information. Can you see that?

35 A. Yes.

36  
37 Q. Is it correct to say that the standard operating  
38 procedures refer only to disagreements between the custody  
39 manager and arresting/escorting police, and that the  
40 standard operating procedures do not refer at all to  
41 disagreements between the custody manager and investigating  
42 police? Is that your understanding?

43 A. Sorry --

44  
45 Q. Or, to put it another way, is there any other part of  
46 the standard operating procedures that relates to  
47 disagreements between the custody manager and investigating

1 police?

2 A. I can probably quite solidly say to you that what  
3 we mean by "arresting/escorting police" are the  
4 investigative - the arrest team, the escort team and the  
5 investigative team. They would be interchangeable.  
6

7 Q. How would a reader know, though, a police officer at  
8 a police station pulling up these standard operating  
9 procedures, that those terms are interchangeable?

10 A. Oh, I have certainly agreed with you a lot today,  
11 Mr Fernandez, but I think that is pretty plain English,  
12 that we would be talking about the people who are doing the  
13 arresting are the chief investigators.  
14

15 If you're asking me that we need to further clarify  
16 that, I'm sure we are happy to take it away, but I don't  
17 think there's any confusion in the mind of the custody  
18 manager, when a person is brought in for custody, that the  
19 people who do it wear many hats, and investigating the  
20 incidents of what they have arrested the person for is part  
21 of it.  
22

23 Q. What is referred to there is if there is  
24 a disagreement, the matter should be referred to the duty  
25 officer to resolve, and if one is not available, the next  
26 most senior officer not connected with the matter. The  
27 duty officer, what rank does the duty officer generally  
28 have?

29 A. Inspector. So a distinguished - the first rank of  
30 a commissioned officer, with total independence. Again,  
31 once you hit the rank of inspector, you are not any way  
32 engaged in the preference of indictments, charges. You're  
33 not - you have ceased those sort of core operational  
34 abilities, and you are a very senior leader and manager and  
35 monitoring person in the policing precinct, whether it be  
36 outside on the street or in the police station. And  
37 generally, during the day and during the night, across all  
38 of the major policing areas and PDs and PACs there will be  
39 an inspector on duty.  
40

41 Q. Can I take you to what you have referred to in your  
42 statement about that issue about disagreements by the  
43 custody manager with other police, if MTS94 could be  
44 brought up, please, page 8620380, and could paragraph 15 be  
45 zoomed in on, please. In fact, I'll take you firstly to  
46 paragraph 14. What you note there is that the role of the  
47 custody manager is such that, in addition to providing all

1 assistances to persons in custody, they have to ensure that  
2 the people in custody are aware of their rights and can  
3 exercise those rights. You go on to say in the last  
4 sentence of paragraph 14:

5  
6 *This must take precedence over the wishes*  
7 *of investigative police officers.*  
8

9 Can you see that? I'm not going to ask you to look at that  
10 sentence in isolation, I'm going to ask you to look at  
11 paragraph 15. What you refer to there is where there is  
12 a disagreement between an investigating police officer and  
13 a custody manager, generally speaking, the decision of the  
14 custody manager will prevail. You then go on to say at  
15 paragraph 17 that if the disagreement can't be resolved,  
16 such as between the custody manager and investigating  
17 officer, the standard procedure is to seek the assistance  
18 of the inspector or above. Do you see some benefit in  
19 setting out in the detail you have provided in your  
20 statement to the Commission those very details in the  
21 standard operating procedures?

22 A. Yes, I do.  
23

24 Q. Would there be a benefit in making absolutely clear to  
25 any reader, even those outside of police, that when there's  
26 a reference to the custody manager and other police, that  
27 those other police can be named as including investigating  
28 police?

29 A. Yes. I think that's fair.  
30

31 Q. In terms of police stations outside of Sydney, in more  
32 regional locations, what would be the situation if an  
33 inspector was not available? Do you know what mechanism  
34 someone would go through if there is a disagreement?

35 A. There is one available on the phone. Given that, you  
36 know - I don't know what experience you've had in your work  
37 as a lawyer, and clearly as a barrister now, but it is  
38 really different in the country, and I'm a city boy, and  
39 I've taken over southern region, as we discussed. But  
40 I learn every day about country policing, as in the  
41 remoteness, the absence of assets, resources and the time.  
42 You know, the tyranny of distance sort of argument around  
43 that it takes to escort people - both police to get from A  
44 to B and to be physically present all the time and support  
45 persons and lawyers and everything else. So it's not the  
46 perfect big-city scenario, where people are sort of present  
47 all the time, or available. So the best - the very best



1 happens in country New South Wales.

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Specifically to your question, if a duty officer is not physically present, then there is a duty officer somewhere, perhaps an hour and a half away but, you know, a millisecond away via a telephone and a Teams meeting and anything else that needs to - you know, it might be just a telephone call but there's obviously other capacity to, you know, have faces on the screen and so forth by whatever medium.

Q. On that same issue of challenges for regional and remote areas, you refer in your statement to potential situations where the investigating officer may also need to perform the functions of the custody manager. To your knowledge, how prevalent is that situation?

A. I think it is infrequent but it occurs. It occurs all around the state because it just has to, and there's a protocol and a mechanism by where the reasons are documented and explained and, you know, through the COPS system I do know - through the custody management system on COPS, sorry, it asks you a specific question, "Are you the arresting officer?" And if you type in "Yes", then you can't go any further, I don't think, in the system until you get authority from an inspector to say that you have got the special concession that due to time, distance, opportunity, fatigue, transporting - you know, there are two sides to the story. One is having police officers who have just finished, you know, lengthy shifts and having to get them to drive an hour and a half from wherever township they come from, so there's those industrial and serious work health issues.

And then you've got the other issue of the escorting of a suspect, vulnerable person or otherwise, an hour and a half from their home town to another where the lights are on, for example, in a brighter, bigger city or regional township. Then there's the fallout of that extra conveyance, that extra risk, all that sort of stuff, taking them away from support persons and all these sorts of things that are in their home town, and then landing an hour and a half down the highway, for example, and then having to get the support person there and all the things that go through that. And then, after the process happens, then everyone has to get an hour and a half back. And this can be - let's be real, it can be midnights, 2ams in the mornings, in very dark country roads, no public transport.

1 Perhaps there's socioeconomic issues with the people we  
2 have arrested and their support persons. So we live in a  
3 really real environment out there in the bush. I'm  
4 sounding like a bushy but I'm not. But I certainly embrace  
5 it and adopt the vagaries of it. And it has certainly  
6 awakened my eyes to the realities of it.

7  
8 So to get the sanction of that inspector, there's  
9 a form, there's questions and there's communication, and it  
10 can't be done without that sanction, and then that form  
11 becomes part of the records and it's logged in the system.  
12 It's not ideal, it's a last resort. It happens. I cannot  
13 give you any statistic, but it happens. It happens in my  
14 world, it happens in western region and it happens in  
15 northern region.

16  
17 Q. Are you saying - you have described it as a concession  
18 or a sanction, but that happens in real time, that the  
19 request is made and it relies on an inspector somewhere  
20 else to give that approval?

21 A. Yes, correct. It will be an inspector on duty at the  
22 next big station where an inspector is on duty. And  
23 ultimately, with, you know, the ability of phone calls, it  
24 can be an inspector from outside of the larger precinct.  
25 You could ultimately ring an inspector at Surry Hills. If  
26 you were at Griffith, or somewhere out the back of  
27 Griffith, say Narrandera or somewhere, and you couldn't get  
28 anyone, you could ring clearly Surry Hills. There is  
29 a whole list and prescription of inspectors who can give  
30 that authority, and they are people - yeah.

31  
32 Q. I'm going to ask you about another issue that this  
33 investigation is dealing with, and that is the use of  
34 excessive force. The particular respect that I want to ask  
35 you a question about is recording of potential uses of  
36 force or uses of force by police in custody records or  
37 custody management records. Are you aware of what the  
38 situation is if a police officer is involved in a forceable  
39 apprehension where there's an injury to someone who has  
40 been arrested, what recording needs to be made of that  
41 circumstance or that fact?

42 A. Again, the custody management record is essentially  
43 the platform where all things are recorded. I mean, we've  
44 touched on that before. Clearly, the health, you know, the  
45 level of intoxication, the health, any medical needs,  
46 whether it be medicine, whether it be use of force, whether  
47 it be visible injuries, whether it be impairment - whatever

1 the case is - are all recorded. There is an enormous  
2 requisition of questions that are answered.

3

4 The other responsibility for the custody manager is to  
5 do that medical assessment, right up there with explaining  
6 of the legal rights when somebody comes in to their domain.  
7 And this also goes to the point of when I say they own the  
8 ground and they make the decision. If they deem the person  
9 is not medically well in a variety of ways, psychologically  
10 or essentially physically, whether it be by use of force or  
11 whatever, then their duty is to call medical help in or,  
12 alternatively, have that person escorted to a medical  
13 centre, hospital, whether that be via ambulance or as  
14 a last resort by police, and things like that, and that is  
15 done literally on a daily basis across this state and done  
16 very diligently. Nobody wants a hurt suspect, a hurt  
17 prisoner, on their patch. And this is sometimes where  
18 there might be a little bit of conflict, but again, this is  
19 why I say the decision on these sorts of grounds, the  
20 decision - the recording and the decisions to get medical  
21 assistance is the responsibility of the custody manager.

22

23 Q. What obligations or guidance or directions are there  
24 for arresting police to make entries in the COPS system or  
25 anywhere else about injuries to a person in the course of  
26 arrest? Are you aware of that? Or is that something for  
27 someone else?

28 A. No, I'm going to have to probably defer that question.  
29 I'm not sure. I've already made the concession that I'm  
30 not a whiz when it comes to COPS.

31

32 Q. Can I take you to the physical area of the cells, the  
33 custody area of police stations, now appreciating that  
34 there are police stations all over New South Wales. One of  
35 the factual issues in this investigation is what was said  
36 to a young person while he was in custody at a police  
37 station. That's part of what this investigation is  
38 investigating. There is no audio to assist in that. Is  
39 there a reason why custody areas, cells or wherever else,  
40 do not have audio recordings?

41 A. They have video, as I think - well, not thinking,  
42 sorry. They do have video. Why they don't have audio,  
43 I do not know the answer to that.

44

45 Q. Whose responsibility would that be? Who within  
46 NSW Police would know about that particular aspect?

47 A. I don't think there's any corporate sponsor for all of

1 that. That's just clearly in the build of custody suites  
2 and the cell complexes. I have no idea who has the answer  
3 as to the why or why not.  
4

5 MR COFFEY: Just in relation to this question, Chief  
6 Commissioner, I wonder if it's a matter that could, with  
7 respect - I accept the Assistant Commissioner has given his  
8 evidence but I wonder if it could be taken on notice for  
9 this reason: there are a lot more considerations in play  
10 here other than just, with respect, a person in custody;  
11 there's workplace surveillance, industrial rights, things  
12 like that.  
13

14 And also could I invite the Commission that if there  
15 is potentially a proposal to make a recommendation, that  
16 whatever is grounding that information be provided so we  
17 can actually have some meaningful engagement with it,  
18 because that is a - it obviously sounds like it has some  
19 benefits but it also has some consequences that would, with  
20 respect, go well beyond this investigation.  
21

22 THE CHIEF COMMISSIONER: Yes. Well, I think the starting  
23 point is to find out what the answer to the question is,  
24 and the Assistant Commissioner, quite understandably, can't  
25 know everything, and has said that he can't answer that  
26 question.  
27

28 It would help us to know what the answer to the  
29 question is. Whether we then look at any possible  
30 recommendation in the area depends on what the answer is as  
31 to why it's not there in the first place. I can understand  
32 some of the things you have raised may be in play.  
33

34 MR COFFEY: Understood.  
35

36 THE CHIEF COMMISSIONER: But we have seen the footage of  
37 the video in the custody area at the relevant location,  
38 and, of course, there's no sound, and for some purposes,  
39 sound would be very helpful. For other purposes, for other  
40 reasons, it may be that there are good reasons not to have  
41 sound. But I think - can we look to your client to provide  
42 an answer to that question? We can issue a statutory  
43 notice if you would like.  
44

45 MR COFFEY: Hopefully not --  
46

47 THE CHIEF COMMISSIONER: Or can I rely on this

1 conversation?

2

3 MR COFFEY: You may rely on this conversation, Chief  
4 Commissioner, thank you.

5

6 THE CHIEF COMMISSIONER: All right. If we can leave it at  
7 that, thank you.

8

9 Yes, Mr Fernandez.

10

11 MR FERNANDEZ: Q. I'm going to take you back to your  
12 statement now, Assistant Commissioner, to page 6 of your  
13 statement. Could that be brought up, please. The barcode  
14 is 8620383. If paragraphs 32 and 33 could be focused on,  
15 please, at the top of the page.

16

17 In this part of your statement, Assistant  
18 Commissioner, you describe competing obligations on the  
19 NSW Police Force. You state at paragraph 32:

20

21 *It is important to recognise the competing*  
22 *statutory obligations imposed on the*  
23 *[NSW Police Force] in respect to the*  
24 *community and victims of crime and those*  
25 *persons who are arrested and [persons in*  
26 *custody].*

27

28 What do you mean by "competing obligations"? What are the  
29 obligations and why are they in competition?

30

31 A. As the NSW Police Force, we have a statutory  
32 obligation to, as it is described there in paragraph or  
33 chapter 6 - section 6 of the Police Act. I won't go  
34 through it except to say that we are the only ones in the  
35 business to keep the place essentially safe from crime and  
36 to make sure that the community and the victims are also  
37 attended to along this journey.

37

38 There's no primacy right, though, that puts our  
39 obligations over the right of an accused or a suspect. Let  
40 me be really clear on that. That's an organisational  
41 position and it's also my personal belief and position.

42

43 But our job is to prevent crime, and if it has  
44 happened, do our very, very best within the confines of the  
45 law, not to overstep the law but within the confines of the  
46 law, to bring those people to justice. And again, as I say  
47 to a lot of my team, not to deliver justice, not to be the

1 judge, the jury or the executioner, but to make the  
2 appointment with justice.

3  
4 So we take that - I take it, every 17,000 who take the  
5 oath presently at the moment who are serving take that  
6 obligation and section 6 really seriously, and caring for,  
7 believing, showing faith in victims and helping them  
8 through potentially the economic, the physical, the  
9 psychological side of harm, taking them through the court  
10 process, being by their side, to make sure that justice is  
11 delivered. And I have no opinion on what justice looks  
12 like for any individual or any crime, per se, certainly not  
13 relevant to this hearing.

14  
15 And the community do judge us on making sure that they  
16 have a safe place to live in and that they have faith in  
17 their police force that we know what we're doing and we can  
18 go out and catch perpetrators. But equally, they expect of  
19 us, if not demand of us, that we don't do summary justice  
20 and we don't overstep our obligations.

21  
22 That's what I mean by "competition". It is, for us,  
23 a big puzzle. There's a lot of competing interests. And  
24 we have to keep everyone happy most of the time, and we do  
25 our very best. In your opening comments, sometimes we get  
26 it wrong by victims, sometimes we get it wrong by the  
27 community, sometimes we get it wrong in the eyes of the DPP  
28 and the prosecutor, and sometimes we get it wrong in the  
29 times [sic] of some of our suspected people. And we  
30 recognise that and we do our best every day to be better in  
31 this space. That's why we welcome this hearing, to take  
32 away some of the recommendations and some of the themes and  
33 be better.

34  
35 Q. You have referred to section 6 of the Police Act in  
36 your statement, which is about the missions and functions  
37 of the NSW Police Force. Section 7 refers to a statement  
38 of values - that's right, isn't it?

39 A. Yes.

40  
41 Q. I'm not going to take you to every single statement,  
42 but that, too, sets out the values which the NSW Police  
43 Force undertakes itself and the responsibilities it has to  
44 members of the community as well as to people who find  
45 themselves under arrest and in custody for whatever reason;  
46 is that correct to say?

47 A. Absolutely. Another lighthouse or guiding light in

1 how we go about our business every day, with integrity  
2 clearly being number 1.

3

4 MR FERNANDEZ: Chief Commissioner, I note the time. Could  
5 I have a short adjournment of five minutes, please?

6

7 THE CHIEF COMMISSIONER: Yes.

8

9 If you'd like to step down for the moment, thank you,  
10 Assistant Commissioner, we'll take a five-minute break.

11

12 **SHORT ADJOURNMENT**

13

14 THE CHIEF COMMISSIONER: Yes, Mr Fernandez?

15

16 MR FERNANDEZ: That completes my questions, Chief  
17 Commissioner.

18

19 THE CHIEF COMMISSIONER: Q. Could I just ask you some  
20 questions which touch on some of the things that  
21 Mr Fernandez has asked you, and I am conscious that we're  
22 heavily taxing you on many of these issues, Assistant  
23 Commissioner, but you're in the hot seat, in a sense, and  
24 therefore I need to ask you some additional questions just  
25 to assist my understanding of it.

26

27 The decisions of courts that we have seen fall broadly  
28 into two categories - some of them which got published by  
29 the judge and put on case law, and others which are  
30 effectively unreported Children's Court decisions, one  
31 District Court decision. Unless they're brought to the  
32 attention of the police, or indeed someone in the court  
33 system, they won't really know about them because they're  
34 really on the court file or in the hands of the parties.  
35 But just confining myself for the moment to judgments that  
36 got placed on Caselaw, in 2013 Justice Adamson put her  
37 judgment in *R v FE* on Caselaw and I ask that the first  
38 page of the judgment be brought up. It's exhibit MTS70,  
39 but it has the barcode 8543630. It should just come up on  
40 the screen, I hope.

41

42 Could we expand the catchwords in the middle of the  
43 page. The first thing I wanted to ask is: are you aware  
44 whether, as at 2013 or in subsequent years, there was any  
45 system within the police force where someone, perhaps in  
46 the legal area, would be keeping an eye on judgments that  
47 come out which may touch on areas of policing and,

1 therefore, need to be taken into account?  
2 A. I can't answer absolutely, Chief Commissioner, except  
3 to say that, as I sort of touched on before with  
4 Mr Fernandez' questioning, if it was of - clearly there's  
5 a lot of judgments and a lot of decisions that make their  
6 way into law enforcement and how we do things, and clearly  
7 the four hours detention after arrest, which is now six  
8 hours and all those sorts of things and all that case law  
9 going back 30 years - so those big marquee cases, yes,  
10 clearly have ripple effects into law enforcement and  
11 prosecuting and so forth.

12  
13 I don't know if there's an exact process then, in  
14 2013, or now for that matter, but potentially there needs  
15 to be a more robust conduit, where these certain - and  
16 I take your point, Local Court, Children's Court, but  
17 principally these stated cases now really need to be  
18 brought out and touched on.

19  
20 So unless there's a complaint about the propriety of  
21 a police officer or the DPP make a complaint about whatever  
22 it was, the behaviour at the time or during the court,  
23 a lot of these things probably are not brought, they don't  
24 have the visibility that they probably could or should.

25  
26 Q. And I'm conscious that this may be testing the outer  
27 limits of what you can speak of, but say within the police  
28 force, a large organisation there is the Office of General  
29 Counsel on the legal side, there would also be the police  
30 prosecutors, there may be other areas of persons looking  
31 out for developments in the law in that general sense, as  
32 you understand it, was the position in 2013 and in  
33 subsequent years that it really depended on someone picking  
34 this up and deciding that it's something that called for  
35 further attention?

36 A. Yes. Of course, you would very much understand that  
37 the police prosecuting side of the business and the Office  
38 of General Counsel - two very different and distinct areas  
39 with different remits completely and totally. So I can't  
40 speak for necessarily - I've never commanded either, I've  
41 never been a part of either, per se. So they're questions  
42 best left with them about how they scour the judicial  
43 judgments and identify what's hot and what's not.

44  
45 Q. I mean, in the world of criminal law, if I could  
46 put it that way, barristers and solicitors who specialise  
47 in the area would have had immediate interest in



1 Justice Adamson's judgment, I don't think that's undue  
2 speculation, and indeed judicial officers as well, in  
3 seeing it.

4  
5 Perhaps I could just take you to the catchwords. When  
6 you look at the catchwords, "improperly obtained evidence-  
7 failure to caution the accused- interview conducted  
8 notwithstanding initial refusal to answer  
9 questions ... unfair deprivation of right to silence-  
10 advantage taken of vulnerable person- 15-year-old girl",  
11 They're catchwords that tend to draw attention in the  
12 current context.

13 A. They're not beautiful headlines, Chief Commissioner.

14  
15 Q. No.

16 A. And I do take your point, absolutely take your point.  
17 They are red flags that, if seen, should have caused at  
18 least some review of it. Notwithstanding a judge has - she  
19 has made a decision there. That's within the confines of  
20 the courtroom. There might be other things that, you know,  
21 in the reality, might mitigate or otherwise of that. But  
22 it needs to be reviewed, I suppose, is what I'm getting to,  
23 yes.

24  
25 Q. And if this is picked up, it might be thought there  
26 were at least two purposes that could be served. One is to  
27 check whether there is any police practice that may be  
28 contributing to this outcome which ought be addressed; and  
29 the second being for training purposes, that if you are  
30 training detectives and police generally in interviewing  
31 techniques, then a decision like this would be quite  
32 important to emphasise this type of problem, wouldn't it?

33 A. Agree.

34  
35 Q. I am conscious I have put two propositions in the one  
36 question, but --

37 A. I agree with both, Chief Commissioner.

38  
39 Q. The judgment of Justice Adamson has been referred to  
40 in a number of the later decisions, which I won't stop to  
41 take you to, but it has been treated as being one of  
42 recurring application.

43  
44 In the body of the judgment, her Honour referred, at  
45 paragraph 111, which is at barcode 8543653, if that could  
46 be brought up, to the decision of Justice Wood in *R v Phung*  
47 *and Huynh [2001]*. This has been regarded as a seminal case

1 about the responsibility of custody managers. It gets  
2 referred to quite frequently in the context of judges who  
3 may find that the custody manager, in a particular context,  
4 was really going through a box-ticking exercise rather than  
5 something that was more substantial.

6  
7 I'm not inviting you to read the whole of that now,  
8 but it occurs to me that the decision in *Phung and Huynh* is  
9 something that should be part of the training of persons  
10 who may become custody managers. Even though it is now  
11 more than 20 years old, it is still the correct  
12 application. Is there any - do you have knowledge of what  
13 may be done in selecting cases such as this to be included  
14 in training materials?

15 A. Personally, no, I haven't, and no, I don't. It  
16 sounds, reading the words of Chief Justice Wood there at  
17 34, it is pretty plain English, as he was known to do, and,  
18 yes, it's pretty good words that could have a break-out box  
19 in any type of training, I would have thought, that'd have  
20 real impact. That said, the spirit and intent of what  
21 Justice Wood there said is the core of what our education  
22 around vulnerable persons are.

23  
24 Q. This decision was referred to most recently at the end  
25 of January this year, when his Honour Judge Buscombe in the  
26 District Court gave reasons for excluding an interview and  
27 said the problems identified by Justice Wood were still  
28 manifest in that case, but --

29 A. Is that the case of *Nean*?

30  
31 Q. *Nean*.

32 A. I have read it, Chief Commissioner.

33  
34 Q. That's, in a sense, the most recent word emerging from  
35 a court on this topic. And in this discussion, I suppose,  
36 I'm saying that there are certain decisions that should be  
37 in the training material and, indeed, for illustrative  
38 purposes as well, if need be, in police SOPs or other  
39 documents to emphasise that this is not academic but very  
40 practical.

41 A. Yes. You know, I look at - I'll be quite honest,  
42 I look at the handbook and I - particularly the handbook,  
43 I appreciate it is electronic as well, sometimes, less  
44 words but more impact and a little bit of colour and  
45 movement, break-out boxes, a stated case, a bit like the  
46 Legal Aid submission, perhaps, can have a powerful impact,  
47 rather than 30 pages of words. Short paragraphs that go to

1 the core of what we need to do in unequivocal language with  
2 a bit of citation and reference to it, and perhaps cite the  
3 learned lessons - hopefully - the learned lessons or  
4 certainly where we have been reprimanded before, whether it  
5 be judicially or just through, you know, oversight bodies  
6 such as this or even internally.

7

8 So yes, perhaps there is a new way of maybe getting  
9 those real messages across. We do a lot of - across the  
10 spectrum of all the things we have to be across and learn,  
11 work health and safety, if I pick on that one, a lot of  
12 that work is done by external agents, law firms, for  
13 example, and they do make it with a bit of colour and  
14 movement and impact and perhaps we just need to get a  
15 little bit different in some of our impactful learning.  
16 But as I said, a lot of it is digital learning that people  
17 do in their own time, and it has got plenty of colour  
18 pictures and that, to be fair. But I think your point is  
19 well made, to give it - that it just doesn't sound like  
20 academia, that it has actually got some realness to it and  
21 history to it is a great way to learn.

22

23 Q. It has been suggested during the course of the private  
24 examinations, at least, in exchanges that have taken place  
25 at times with those appearing, that there is a risk, if an  
26 interview goes ahead in a situation wherein instructions  
27 are, "Don't wish to be interviewed", but the interview  
28 takes place, that that interview will be excluded, and the  
29 investigators may not fully and completely investigate  
30 beyond that to provide what could be regarded as a complete  
31 brief because they're relying on the interview. Is that  
32 a risk in this situation?

33 A. Yeah. I think everyone is time poor at times,  
34 investigators as well, as well as people preparing to  
35 defend, and so forth. It is a busy world, and, you know,  
36 particularly sitting on the Bench for many years. Yes, one  
37 of the pitfalls, I suppose, of not going all the way - yes,  
38 rely on, get, if you can, clearly, obtain the interview,  
39 but don't rest totally on that and continue to investigate,  
40 if that is part of your question, because if it were to be  
41 deemed inadmissible for whatever reason, then yes, there  
42 still needs to be other evidence gathered and testimony  
43 from other people, notwithstanding you have an admission or  
44 a confession.

45

46 I think that is well known, though, by investigators.  
47 I think - I don't have to go back, even though I was one

1 for over 20 years, a detective - I don't think we need to  
2 teach them how to hunt and how to put briefs together,  
3 sometimes we do, but there are some very, very good  
4 detectives out there, and as I said, sometimes we get it a  
5 little bit wrong with trying to be too perfect.

6

7 Q. Well, the temptation here, for one reason or another,  
8 may be that, "The interview is there, we'll leave it at  
9 that", with the risk that if the interview was excluded,  
10 there is no viable case beyond that, and so that's a risk  
11 that could occur beyond that. You've made comments about  
12 the expectation of investigating police in the situation  
13 such as that.

14 A. Yes, continue to investigate.

15

16 Q. I have not, I think, gone through and seen what the  
17 upshot was of the individual cases where the interviews  
18 were rejected here. I think there are at least some  
19 examples where that was the end of the case. But it may be  
20 there are other cases where there was a viable case that  
21 was left. But what it does is expose the prosecution case  
22 and place at risk the administration of justice by meaning  
23 that there may be a criminal prosecution that fails because  
24 of the problem with an approach to interviewing that leads  
25 to exclusion.

26 A. Yes. I agree.

27

28 THE CHIEF COMMISSIONER: Mr Fernandez, is there anything  
29 else you want to ask?

30

31 MR FERNANDEZ: No, thank you, Chief Commissioner.

32

33 THE CHIEF COMMISSIONER: Would anyone else like to ask  
34 some questions? Ms Lee?

35

36 MS LEE: Yes, Chief Commissioner.

37

38 <EXAMINATION BY MS LEE:

39

40 MS LEE: Q. Thank you, Assistant Commissioner, I think  
41 you heard before, but my name is Samantha Lee from Redfern  
42 Legal Centre. I represent [YPM1], who is the young person  
43 in this matter. I just wanted to ask you in particular  
44 about disclosure of potential excessive force by police in  
45 an ERISP interview. My client, which I just take you back  
46 to, is a young Indigenous boy. He suffered quite a sever  
47 head injury at the time of the incident. He was in a

1 hospital and then taken straight from the hospital to the  
2 police station.

3  
4 During the ERISP interview, he disclosed to two police  
5 officers in that room that he had been bashed by police.  
6 What procedures should take place after such a disclosure  
7 is made?

8 A. Thank you, Ms Lee, and nice to meet you. We haven't  
9 met before.

10  
11 I don't know the exact words, but we'll just go with  
12 "bashed", whether they were the words or not, I don't know.  
13 But clearly, any disclosure to any police officer of  
14 assault by that officer - by an officer, sorry, or any  
15 other act of impropriety is clearly indoctrinated in all  
16 police officers that there should be a record made of that.

17  
18 Q. Record where?

19 A. Well, it was recorded in the ERISP interview, that's  
20 the first thing. It would come out and the next step would  
21 be for that officer that it was reported to, whether it be  
22 during an ERISP or elsewhere, would be to report it to  
23 a senior police officer and commit it to writing. That  
24 would be --

25  
26 Q. And what happens to that written record?

27 A. Well, again, those things don't disappear. So if it  
28 was handed from, for example, an officer to the next  
29 ranking officer - if I get away from the specifics of this  
30 case because I don't know all of it, but just how it should  
31 run is that complainant complains, documented in writing,  
32 because you can, as a complainant, you can put in a  
33 complaint in writing or you can make it verbal to a police  
34 officer, who is then obligated to commit it to writing, and  
35 then it goes up through the chain.

36  
37 So it would go up to the next level, to, say, the  
38 sergeant, if it was reported to a senior constable, to an  
39 inspector, and to the commander, being the superintendent  
40 for that particular area, police area or police district.  
41 And then from there, it should be adjudicated and go to the  
42 complaints management team for that area - for every police  
43 station there's a complaints management internal review  
44 mechanism - and it would be triaged and assessed as  
45 a potential complaint. And then from there, it would be  
46 determined whether it was an investigation, as in a  
47 departmental investigation, depending on the accusation,

1 all the way through to, through the triage process, looking  
2 at things like body-worn video and that to assess whether  
3 it fits into the criminal realm and therefore investigated  
4 as a criminal complaint.

5  
6 Q. It is an alleged allegation of being bashed by police,  
7 would you say that's in the criminal realm?

8 A. Let's unpick that because I'm not going to answer that  
9 per se like that.

10  
11 MR COFFEY: Chief Commissioner, I --

12  
13 THE WITNESS: You started off with use of force and use of  
14 force has - in policing, has --

15  
16 THE CHIEF COMMISSIONER: Q. Just stop, I think Mr Coffey  
17 has --

18  
19 MR COFFEY: I just object to the relevance of these  
20 questions, Chief Commissioner, with respect. This is not  
21 the evidence that the Commission has before them in the  
22 private examination and I am concerned --

23  
24 MS LEE: I'm purely asking about a process in place, not  
25 necessarily about this particular case.

26  
27 THE CHIEF COMMISSIONER: Q. Let me ask you this  
28 directly: if it emerged in a record of interview that  
29 a young person said he had been bashed by police during the  
30 course of the arrest, what should the interviewing police  
31 do as a result?

32 A. Okay, I have answered, with respect to everyone,  
33 I have answered that, that it should be reported,  
34 documented and pushed through the chain to the  
35 superintendent level, across to be assessed, triaged by the  
36 complaints management team of that area, and then them, in  
37 their diligence, to assess the merits or otherwise of the  
38 words "bashed", which, in the words of a young person, it  
39 can be "bashed". When assessed with - and I appreciate  
40 it's not in this case, but there might be CCTV available,  
41 there might be body-worn video, there might be independent  
42 witnesses, who will then assess and they put it all  
43 together and then go, "Well, okay, there was an outcome  
44 where the child", or whoever it was, "sustained an injury",  
45 that doesn't equate to being bashed. It may equate to,  
46 quite legitimately, use of commensurate - a legitimate use  
47 of force which occasioned an injury. There's a massive

1 difference, as you would be well aware.

2

3 MS LEE: Q. Assistant Commissioner, you say you are not  
4 a whiz with the COPS system, but as an assistant  
5 commissioner, you must request reports from the COPS  
6 system; is that correct?

7 A. I have many people who work around me, as I've said in  
8 my statement. I have about 2,000 people at any given time  
9 who work around me, for me, with me and --

10

11 Q. Do they request reports from the COPS system?

12 A. Yes, they do. They do dip samples, they do audits,  
13 there is governance around use of force.

14

15 Q. Have you asked them to request reports about the use  
16 of force by police?

17 A. Yes, there are use the force panels in police  
18 stations. There are guidelines being --

19

20 Q. Have you collected statistics on the use of force by  
21 police?

22 A. No, I have not.

23

24 Q. Why is that?

25 A. It is not my role and responsibility to collect  
26 statistics globally across the NSW Police Force around use  
27 of force. We have --

28

29 Q. Don't you want to know about any potential civil case  
30 against police by the use of force?

31 A. Well, that becomes pretty readily apparent to me when  
32 such a civil case crystallises and comes through the door.

33

34 Q. If you don't ask the question, you may not get the  
35 answer?

36 A. How can I ask - well, hang on. Let's just step back  
37 to one of your earlier questions. There are dip samples  
38 done around use of force, looking at body-worn video,  
39 tasers and so forth. All the tasers, for example, use of  
40 force, are examined and are determined to either be  
41 legitimate use of the appointment or not. And equally, dip  
42 samples, as has been given in evidence, across physicality,  
43 also, you know, capsicum spray and other appointments.

44

45 Q. What about, though - I'm not talking about tasers or  
46 capsicum spray - what about the use of force by fists?

47 A. Again, if injuries are noted and complaints are made,

1 it starts a process. Other systems, like body-worn video  
2 and all of this are looked at across every command in the  
3 state to assess the probity and the use of force, and  
4 inclusive of physical force.  
5

6 Q. Do you agree that the Commissioner, and you as  
7 Assistant Commissioner, that it's part of your obligation  
8 to keep the police force safe to the best of your ability?

9 A. To keep the NSW Police Force safe?

10

11 Q. That's right.

12

13 A. Under work health and safety requirements, law and  
14 policy, as a very senior officer in the organisation, yes,  
15 I have an enormous obligation to keep people as safe as  
16 possible.

16

17

18 Q. So would that include, if you're looking at an issue -  
19 does keeping the police force safe also include making sure  
20 they're not potentially exposed to legal proceedings, both  
21 civil and criminal?

21

22 A. Oh, I think that's a tenuous link. I have an  
23 obligation across everything.

23

24

25 Q. Does exposing a police officer to criminal proceedings  
26 cause that officer stress?

26

27

28 MR COFFEY: I object.

28

29

30 THE CHIEF COMMISSIONER: How does this assist the current  
31 investigation, Ms Lee?

31

32

33 MS LEE: Well, the current investigation, my client was  
34 subjected to --

34

35

36 THE CHIEF COMMISSIONER: I understand that and your client  
37 has leave.

37

38

39 MS LEE: -- excessive force by police which was not  
40 recorded anywhere. There was no body-worn video footage  
41 and what the testimony the witness has given is that he  
42 himself has not been - has not asked questions around  
43 systemic issues within the force which may have prevented  
44 these types of incidents from happening in the first place.

44

45

46 We are looking at officers on the ground, but what  
47 responsibility do these people have in the higher echelons  
of the commission in regards to preventing such things



1 happening on the ground? And that is about requesting  
2 reports, making sure that their officers are not exposed to  
3 this type of behaviour in the first place.

4  
5 THE CHIEF COMMISSIONER: Put your next question.

6  
7 MS LEE: Q. If you're interested in keeping the police  
8 force safe, will you monitor your own police force on the  
9 ground by asking for reports particularly on the use of  
10 force?

11  
12 MR FERNANDEZ: I object.

13  
14 THE CHIEF COMMISSIONER: Yes?

15  
16 MR FERNANDEZ: This really is not relevant now, Chief  
17 Commissioner.

18  
19 THE CHIEF COMMISSIONER: We are moving into a wide,  
20 open-ended line of questioning, Ms Lee. A number of the  
21 topics which have been the subject of examination touch on  
22 some of the matters you have raised in a specific and  
23 concrete way. I do think that this is not assisting the  
24 present investigation. You can make submissions in due  
25 course. You have been given significant leave within the  
26 context of the investigation. But I do think it's  
27 necessary to keep in mind the context of this  
28 investigation. So the last question is not allowed.

29  
30 MS LEE: Yes, Chief Commissioner. In the context of this  
31 investigation, may I just raise that the issue of  
32 systemic - that the word "systemic issue" has been raised  
33 numerous times, not by myself, by your assisting counsel.

34  
35 In terms of trying to address systemic issues, then we  
36 need to look at how these issues are filtering on through  
37 the whole of the police force and commission. We can't  
38 just concentrate on SOPs or policies or protocols. We need  
39 to look at the system as a whole and what the LECC can do  
40 to ensure that this type of incident does not occur again  
41 on a systemic level.

42  
43 THE CHIEF COMMISSIONER: And that's what the Commission is  
44 doing and your last question is disallowed. Have you got  
45 further questions?

46  
47 MS LEE: No further questions, thank you.

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THE CHIEF COMMISSIONER: Thank you.

Any further questions?

MS LEWER: With the Commission's leave I seek to ask some questions if I may.

THE CHIEF COMMISSIONER: Yes.

**<EXAMINATION BY MS LEWER:**

MS LEWER: Q. Assistant Commissioner my name is Lewer, I'm a barrister appearing for Legal Aid NSW. I've just got some questions in relation to paragraphs 39 through 41 of your statement. Do you have access to your statement?

A. I do.

Q. Perhaps I will just get you to turn to page 7 and just have that in front of you.

A. Sorry, paragraphs 39 through to 41?

Q. Yes, 39 through 41.

A. Yeah, sure.

Q. I'm just going to begin, if I may, with some questions about process. Can you see in paragraph 39 you refer to a time in which the investigation is likely to have been paused as a time out? Do you see that?

A. Sorry, just let me read the whole paragraph to get absolute context. Yes, as a time out, yes, for the person in custody to get advice, yes.

Q. Just to clarify, what you're referring to there is the investigation period under LEPRA in which a person is held, for which there can be time-outs for a number of reasons. They include, for example, so a person in custody can have access to legal advice?

A. Yes.

Q. That's what you are referring to?

A. Yes, time out.

Q. At the point at which a young person who is in custody indicates to police they don't wish to participate in any investigative procedure, and they indicate that either themselves or through a lawyer, at that point, the

1 investigation period will likely shortly come to  
2 a conclusion and the police will make decision about what  
3 to do going forward; is that fair?  
4 A. Yes.  
5  
6 Q. And that might be whether to charge or not, to give  
7 bail or not - those types of considerations?  
8 A. Yes, to progress to charge and then - or legal  
9 process, yes, and then ultimately to bail.  
10  
11 Q. Of course, bail doesn't arise unless a person is  
12 charged?  
13 A. (Witness nodded).  
14  
15 Q. When a young person is in custody and the Youth  
16 Hotline is contacted, would you agree with me that, as  
17 a matter of process, what usually happens first is there is  
18 a conversation between the practitioner manning the Youth  
19 Hotline and a police officer?  
20 A. Yes, I think that's generally right.  
21  
22 Q. And the police give the practitioner certain  
23 information about the young person?  
24 A. Yes.  
25  
26 Q. Their name, their date of birth, why they're in  
27 custody, those sorts of things?  
28 A. Yes.  
29  
30 Q. Whether there's a support person there or attempts  
31 have been made to obtain a support person?  
32 A. Yes.  
33  
34 Q. And after that, that's to permit the lawyer to have  
35 a conversation with the young person?  
36 A. Yes.  
37  
38 Q. At paragraph 39 you give some evidence about the  
39 appropriateness of legal practitioners manning the Youth  
40 Hotline in speaking to custody managers about "the attitude  
41 of police to bail"; can you see that?  
42 A. Yes.  
43  
44 Q. And you also give some evidence about what you call  
45 "diversion", I think; do you see that?  
46 A. Yes.  
47

1 Q. When you're speaking about diversion, you're talking  
2 about perhaps outcomes under the Young Offenders Act?

3 A. Yes, strategies under that, yes.  
4

5 Q. Now, would you agree with me that not all young people  
6 in custody are eligible for outcomes under the Young  
7 Offenders Act?

8 A. Yes, given the gravity of the crime or perhaps their  
9 antecedents in committing a number of crimes before.  
10

11 Q. Yes, it might be because of the nature of the charge  
12 or because of something personal to the young person,  
13 they're not eligible for those outcomes under the Young  
14 Offenders Act; that's fair?

15 A. Yes.  
16

17 Q. Now, in circumstances where, for whatever reason, the  
18 young person isn't eligible for an outcome under the Young  
19 Offenders Act, the consideration by police is going to be  
20 whether to charge or not; that's what's going to occur? Is  
21 that fair?

22 A. Yes.  
23

24 Q. Would you accept that in circumstances where a young  
25 person is not eligible for consideration for a Young  
26 Offenders Act outcome, it would be appropriate for the  
27 practitioner manning the hotline to have a conversation  
28 with the police officer about the likely outcome in terms  
29 of bail?

30 A. Yes, that's okay. What I - it's just that it is a  
31 little bit like putting the cart before the horse, in my  
32 opinion, around going straight to the bail question when  
33 the hotline [sic] is contested. But I think as you work  
34 through and you know all nuances of the individual, the  
35 vulnerable person, and then you get to that end of the  
36 funnel where an outcome under the YOA is not available, the  
37 Young Offenders Act, and anything, yeah, one of the suite  
38 of opportunities there is not available, and you're going  
39 to progress because of the gravity of the charge and all  
40 the things, to charge in right here, right now, then that  
41 is then a fair - and that is a fair question. Yes, that's  
42 a fair point, I can see that.  
43

44 Q. What I'm going to suggest to you, Assistant  
45 Commissioner, you might not appreciate this, but the  
46 solicitors involved manning the hotline have in front of  
47 them a pro forma form which takes them through a number of

1 matters to discuss with the police and the young person.  
2 Would you accept that from me?

3 A. Yep.

4

5 Q. And would you accept from me, these are trained legal  
6 practitioners who have specific training on speaking to  
7 police and children in custody? Would you accept that?

8 A. Yes.

9

10 Q. Would you accept that, as a matter of practice,  
11 practitioners manning the Youth Hotline would not speak to  
12 police about the attitude to bail until it was indicated  
13 that a Young Offender Act outcome was off the table? Would  
14 you accept that?

15

16 MR COFFEY: No, I object. I'm concerned that that's not  
17 necessarily evidence that came from the witnesses from  
18 these particular legal providers themselves. I accept  
19 that, as a general proposition, that is one option, but it  
20 shouldn't be put to this witness that that is the main  
21 proposition or the way in which it occurred. I very much  
22 accept it could happen, but not on every single occasion  
23 and that's, in fact, not what fell from the witnesses.

24

25 MS LEWER: Chief Commissioner, there has been no  
26 opportunity, by reading evidence on this topic to be put  
27 on, indeed, no questions were asked of Mr Frankham on these  
28 topics yesterday. They are my instructions.

29

30 THE CHIEF COMMISSIONER: Yes. And tomorrow, Ms Hopgood  
31 will be giving evidence and these issues can be addressed,  
32 but --

33

34 MR COFFEY: It was, Chief Commissioner, the evidence in  
35 the private examinations. I accept my learned friend's  
36 comment as relates to the public examinations, but my  
37 objection, I should say relates to the evidence given in  
38 the private examinations. I apologise for not making that  
39 clearer.

40

41 THE CHIEF COMMISSIONER: In any event, I will allow the  
42 question because ultimately it will be a matter for the  
43 Commission to have regard to where the evidence leads, in  
44 circumstances where Assistant Commissioner Cotter's  
45 statement was not available certainly to the Commission  
46 until after Mr Frankham had finished yesterday.

47

1 In any event, carry on for the moment, Ms Lewer.

2  
3 MS LEWER: Q. Assistant Commissioner, I suppose I'm  
4 putting it to you as a proposition, and you might know or  
5 not know the answer: would you accept as a matter of  
6 practice that police attitude to bail is not canvassed by  
7 a Youth Hotline solicitor unless a Young Offenders Act  
8 outcome is off the table?

9 A. I think it would be fair to say, from my vantage point  
10 right here, right now, that that is but one option. Just  
11 as I can't talk to the ability, veracity, competence of  
12 every police officer, equally, I cannot talk to the  
13 veracity, competence or otherwise of every Legal Aid  
14 solicitor. So I don't know whether it's the first  
15 question - yes, it might be on a form in front of them, but  
16 I can't give any evidence, specifically or generally, other  
17 than to say what order those questions are asked.

18  
19 Q. You simply don't know; is that fair?

20 A. I said that, actually, early. Yes, I don't know.

21  
22 Q. If I could turn to the content at paragraph 40 of your  
23 statement. I'll perhaps just let you read that to  
24 yourself.

25 A. Yes.

26  
27 Q. Paragraph 40 appears to suggest that the line of  
28 questioning - am I taking that to mean that this is the  
29 practitioner asking about the police attitude to bail;  
30 that's the line of questioning that you're referring to?

31 A. Yes.

32  
33 Q. Your evidence is that that may cause a young person to  
34 miss out on an opportunity for diversion?

35 A. Yes, well, equally as you said in your previous  
36 questions around if the Young Offenders Act is not on the  
37 table due to strike rate of offending or equally the  
38 gravity of the crime, equally there are other opportunities  
39 as well, where the Young Offenders Act and options under  
40 that are also - are on the table, and that if the advice is  
41 a blanket, "No, no talk", "exercise right to silence",  
42 which I absolutely respect if that's what it is, don't  
43 confuse my answer at all, if that is the answer, then that  
44 is the answer. But there are - clearly, by not talking,  
45 and not making admissions, instantly the sliding door  
46 moments of the young offender activities and actions are  
47 off the table. That's what I'm saying there.

1  
2 Q. It's the fact of the absence of admissions that makes  
3 the Young Offenders Act option be taken off the table  
4 rather than the fact of a lawyer talking about bail.  
5 That's the effect of your evidence; is that right?  
6 A. No, no, I don't think that's what I said. I said what  
7 I said. I'm talking about not making - not being  
8 interviewed and not making admissions in some instances,  
9 where the Young Offenders Act might be on the table, is  
10 clearly taken off the table if that interview and  
11 admissions are not forthcoming.  
12  
13 Q. It is not a lawyer asking, "Is the young person going  
14 to get bail" that's taking it off the table; it is the  
15 absence of admissions, that's right?  
16 A. Yes.  
17  
18 Q. In terms of the absence of admissions, it is the case,  
19 isn't it, that the admissions don't have to be recorded in  
20 a record of interview; you are aware of that?  
21 A. Yes, they can be done in handwriting, they can be done  
22 by other mediums, yes.  
23  
24 Q. And in fact, there's a form, a protected admissions  
25 scheme form, that can be used in order for the young person  
26 to make relevant admissions?  
27 A. Yes.  
28  
29 Q. It can be recorded in a notebook or a duty book?  
30 A. Yes.  
31  
32 Q. So there are other ways to procure admissions other  
33 than on tape in an ERISP; is that fair?  
34 A. Yes, there are, but then, of course, there are other  
35 admissibility questions which might flow around that  
36 through the other jurisdictions.  
37  
38 Q. In terms of missing an opportunity for diversion,  
39 you'd accept that there's any number of reasons why a young  
40 person might not wish to make admissions?  
41 A. Absolutely.  
42  
43 Q. Including, for example, that they don't admit the  
44 offence?  
45 A. That they? Sorry, I beg your pardon.  
46  
47 Q. That they don't admit the offence?

1 A. Yes.

2

3 Q. Or it might be that they're willing to accept some  
4 advice about the strength of the case and whether, for  
5 example, the prosecution would be able to rebut the *doli*  
6 *incapax* presumption. They might be matters that a young  
7 person takes into account in deciding whether or not to  
8 make admissions?

9 A. That's but yet another one.

10

11 Q. And it's difficult for you to decide whether or not  
12 a young person has missed an opportunity by refusing to  
13 make admissions if you don't know why it is that they've  
14 chosen not to do so?

15 A. The Young Offenders Act is a statutory piece which  
16 offers diversion, which we clearly support as an  
17 organisation and a government, and we work within the  
18 confines of the statutes to the very best of our ability to  
19 make it work. But of course, it is - for whatever reason,  
20 it is a two-sided argument. It's a two-sided sword. It  
21 takes two parties to plan it. Now, they're not my rules.  
22 That's the rules of the government via the statute.

23

24 Q. My question was directed to this concept of missing an  
25 opportunity. Would you agree that it's difficult to know  
26 whether an opportunity was missed or not if you don't know  
27 the reason why the young person didn't make admissions?

28 A. That's a fair proposition.

29

30 Q. Just lastly, I appreciate this is something that you  
31 might not know about, but are you aware of previous  
32 meetings that have taken place between representatives of  
33 the NSW Police Force and Legal Aid NSW where issues have  
34 been raised about whether or not young people have access  
35 to diversion and whether that has been denied to them  
36 because they haven't made admissions?

37 A. It's not a portfolio that I work in as a corporate  
38 owner or sponsor; nor are any of those meetings any meeting  
39 I have ever been invited to as a senior police officer,  
40 with Legal Aid or ALS or whoever. So I can't give direct  
41 or specific evidence of it. I believe that other parts of  
42 the organisation meet quite frequently with ALS and Legal  
43 Aid, and, I would expect, discuss some of these things.  
44 That's my anecdotal evidence on it. That's the best I can  
45 take it.

46

47 Q. So it follows if I asked you about whether or not



1 examples were forthcoming at those meetings, you wouldn't  
2 be able to assist me with that?  
3 A. I've got no idea. I have never been to one, never  
4 been invited to one.

5

6 MS LEWER: Chief Commissioner, can you just excuse me for  
7 one moment? Thank you, they are the questions I have.

8

9 THE CHIEF COMMISSIONER: All right. Any questions? Have  
10 you any, Mr Coffey?

11

12 MR COFFEY: I have no questions. I have a matter to raise  
13 with something your Honour asked. Maybe I can do it while  
14 the witness is in the witness box.

15

16 Earlier there was a question by you, Chief  
17 Commissioner, and counsel assisting, in respect to - these  
18 are my words - whether or not it would be appropriate to  
19 issue some sort of dissemination or notification to the  
20 police force about the MOU signed by the then Commissioner  
21 Moroney and also the 2005 police circular.

22

23 What I am able to indicate is that I was instructed  
24 over the course of the lunch break that that has been  
25 raised up the chain of command to the Commissioner's  
26 office. It's a matter that will be discussed at the  
27 Commissioner's executive team, which is the Commissioner  
28 and the five deputies, early next week for resolution in  
29 terms of dealing with that exact point.

30

31 THE CHIEF COMMISSIONER: Is it the position that this  
32 Commission would be informed of the outcome of that meeting  
33 once a decision is made?

34

35 MR COFFEY: I didn't have that clarified in instructions  
36 but what I would have anticipated is you probably would  
37 have got a copy of the dissemination that's sent out.  
38 I think there is likely to be favourable consideration to a  
39 reminder going out, the terms and the scope of that,  
40 I don't have those final instructions, but I would have  
41 thought that would be provided.

42

43 THE CHIEF COMMISSIONER: It is very much in, I think, the  
44 public interest that there be some clarification and prompt  
45 decision-making about this, and that the Commission be  
46 informed if some action is to be taken, or, for that  
47 matter, if no action is to be taken. So can you pass on

1 that communication to those instructing you?  
2  
3 MR COFFEY: Of course.  
4  
5 THE CHIEF COMMISSIONER: Is there anything further that  
6 you had, Mr Fernandez?  
7  
8 MR FERNANDEZ: No, thank you, Chief Commissioner.  
9  
10 THE CHIEF COMMISSIONER: So does that complete the  
11 evidence of Assistant Commissioner Cotter?  
12  
13 MR FERNANDEZ: Yes, it does.  
14  
15 THE CHIEF COMMISSIONER: Thank you, Assistant  
16 Commissioner, for your assistance today on a range of  
17 topics.  
18  
19 THE WITNESS: My pleasure, Chief Commissioner, my  
20 pleasure, Mr Fernandez, Ms Lee and - sorry, I didn't catch  
21 your name.  
22  
23 THE CHIEF COMMISSIONER: Ms Lewer.  
24  
25 THE WITNESS: Thank you for the opportunity.  
26  
27 **<THE WITNESS WITHDREW**  
28  
29 THE CHIEF COMMISSIONER: It is closing in on 4 o'clock.  
30 Tomorrow there is a 9.30 start.  
31  
32 MR FERNANDEZ: Yes.  
33  
34 THE CHIEF COMMISSIONER: Ms Hopgood.  
35  
36 MR FERNANDEZ: There is one witness tomorrow, Chief  
37 Commissioner, Ms Hopgood.  
38  
39 THE CHIEF COMMISSIONER: Having regard to the examination  
40 by Ms Lewer, I think it would be very much of assistance to  
41 have some questions asked about the issues raised in  
42 Assistant Commissioner Cotter's statement and in the  
43 questioning of Ms Lewer with Ms Hopgood.  
44  
45 MR FERNANDEZ: Yes.  
46  
47 THE CHIEF COMMISSIONER: If Mr Frankham wanted to add

1 anything from an evidentiary point of view, there is no  
2 difficulty with that. I'm conscious, I think he has been  
3 in the hearing room today, which is helpful, I'm sure, to  
4 you and to the Commission. So there's an invitation for  
5 any further evidence that may assist.

6  
7 MS LEWER: Thank you, Chief Commissioner. I will speak to  
8 counsel assisting about that.

9  
10 THE CHIEF COMMISSIONER: Now, tomorrow it is necessary to  
11 stop at 12.30 at the latest. So I think Ms Hopgood will --

12  
13 MR FERNANDEZ: Solely Ms Hopgood tomorrow.

14  
15 THE CHIEF COMMISSIONER: Yes, and then on Thursday?

16  
17 MR FERNANDEZ: We have Assistant Commissioner Crandell,  
18 Sergeant Edgell, if he is available, to give evidence about  
19 training, and possibly another witness who I'm discussing  
20 with Mr Coffey in relation to the use of excessive force,  
21 if available.

22  
23 THE CHIEF COMMISSIONER: Use of excessive force, yes, all  
24 right. Well, it is an issue which is amongst those which  
25 the Commission is considering, so it would be important  
26 that there be a witness on Thursday on that topic as well.  
27 If that's the case, I think we will be having a full  
28 hearing day.

29  
30 Is there anything that anyone wanted to raise before  
31 the Commission adjourns?

32  
33 MS LEE: Sorry, just an administrative matter, Chief  
34 Commissioner. On Thursday I have to be at the Supreme  
35 Court for a judgment but Emmanuel Kerkyasharian will be  
36 here in my place.

37  
38 THE CHIEF COMMISSIONER: All right. That's fine. I'm  
39 conscious that in the nature of these inquiries legal  
40 representatives come and go, and so that is no problem.  
41 A transcript, of course, of each day is available.

42  
43 All right. The hearing is adjourned until 9.30am  
44 tomorrow, and I will adjourn.

45  
46 **AT 3.57PM THE COMMISSION WAS ADJOURNED TO**  
47 **WEDNESDAY, 5 APRIL 2023 AT 9.30AM**