

LECC Law Enforcement
Conduct Commission

OPERATION VENTI
REPORT PURSUANT TO SECTION 132 *LAW*
ENFORCEMENT CONDUCT COMMISSION ACT 2016

July 2023

LECC

Law Enforcement Conduct Commission

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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Office of the Chief Commissioner

13 July 2023

The Hon. Rod Roberts, MLC
Deputy President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon. Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Under section 132 of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission provides you with a copy of its report in relation to its investigation in Operation Venti.

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

Yours sincerely

A handwritten signature in black ink, appearing to be 'Peter Johnson', with a long horizontal flourish extending to the right.

The Hon. Peter Johnson SC
Chief Commissioner

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1. Introduction

- 1.1 The issues arising in this investigation are of considerable importance for contemporary policing in New South Wales. They involve matters of public trust, accountability and responsibility of the NSW Police Force (NSWPF) and its officers. The availability and use of BWV cameras (BWV) by police and the prompt documentary recording of occasions when powers are exercised or force is used against a citizen form part of community expectations of serving police officers in the NSWPF. This is especially so where force is used against a young person and injury results. There are special laws for police officers concerning use of force in the course of their duties.¹ As will be seen, excessive force was used by a police officer against a 16-year-old youth with no use of BWV nor any record made by the police officer of his use of force. How and why did this happen? This report will examine these issues with findings and recommendations to be made under the *Law Enforcement Conduct Commission Act 2016* (LECC Act).
- 1.2 In March 2021, the Commission received a complaint about the conduct of police officers following their interaction in the early hours of 21 November 2020 with Civilian ILZ, who was then aged 16 and identified as Aboriginal. The complaint alleged that:

On 21 November 2020, at about 2.00am Civilian ILZ and his partner, Civilian YSL were at a bus stop waiting for a bus when a uniformed police officer approached Civilian ILZ and asked him to “*come here*”. Civilian ILZ “*felt threatened and fearful*” as the officer advanced towards him, repeating “*come here, come here*” in an aggressive manner. So he started to quickly walk away. Shortly after, he felt a blow to the back of his head, which momentarily caused him to stumble. He regained his balance and ran, followed by the police officer in foot pursuit. The object which had struck him in the back of the head was a torch thrown by the police officer, witnessed by Civilian YSL.

Civilian ILZ was eventually apprehended by another police officer, Senior Constable MKJ (Officer MKJ). He was handcuffed and searched. He was not told why he was being detained. Civilian YSL started to film the incident. Officer MKJ directed offensive language towards her. Civilian ILZ kept pleading that he had not done anything and that his head was bleeding.

The police officer who threw the torch arrived at the scene and he confiscated Civilian YSL’s phone.

Civilian ILZ was placed in the back of a police van for about 20 minutes. He was then released and both he and Civilian YSL had their photographs taken, notwithstanding that Civilian YSL was

¹ Sections 230-231 *Law Enforcement (Powers and Responsibilities) Act 2002*.

never under arrest.

At no time did any police officer ask Civilian ILZ whether he needed medical attention, even though his head was bleeding and he asked several times for an ambulance.

- 1.3 The complainant provided mobile phone footage taken by Civilian YSL capturing the moment of Civilian ILZ's arrest by Officer MKJ. The footage runs for 61 seconds. It captures:
- Civilian ILZ lying face down on the ground and being handcuffed by Officer MKJ
 - the searching of Civilian ILZ's pockets and the removal of items found- mobile phone, bankcard and opal card
 - the placing of those items on the footpath
 - Civilian YSL (who is filming and is not visible to the camera) attempting to pick up the cards from the ground with the explanation that the cards belong to her
 - Officer MKJ's interaction with Civilian YSL until another officer appears on the scene (only the bottom half of that officer's legs can be seen in the footage) and the footage ends abruptly.

2. The Commission's Statutory Functions

- 2.1 The relevant provisions of the LECC Act are set out in Appendix 1 to this Report.
- 2.2 The Commission has had regard to the statutory provisions referred to in Appendix 1 in the preparation of this Report.
- 2.3 The Commission does not sit as a criminal or civil court. It does not determine the rights of any person. However, the Commission may make findings which are adverse to persons and their reputation. The standard of proof to be applied by the Commission in making findings of fact is the civil standard of proof, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test is whether the facts have been proved to the reasonable satisfaction of the Commission.²
- 2.4 An important function for the Commission is to determine whether any police officer has engaged in "*serious misconduct*" as defined in s 10 LECC Act.

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34; *Rejtek v McElroy* (1965) 112 CLR 517 at 521; [1965] HCA 46; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171-172; [1992] HCA 66.

- 2.5 In addition, the Commission may make findings, express opinions and make recommendations under s 133 LECC Act. Those provisions will be considered later in the Report.
- 2.6 For reasons explained in Appendix 2, all witnesses referred to in this Report will be described by pseudonym and their names will not be used.

3. The Commission's Investigation

- 3.1 On 28 February 2022, the Commission decided to investigate this matter under Operation Venti. Several witnesses attended private examinations at the Commission for the purpose of determining whether Senior Constable MKJ (Officer MKJ) or any other NSW police officers engaged in serious misconduct during their interactions with Civilian ILZ on 21 November 2020.
- 3.2 The Commission was particularly concerned with:
- whether police officers had used excessive force during the arrest of Civilian ILZ
 - inadequate record-keeping by the NSWPF, in particular the failure to record the use of force against Civilian ILZ
 - failure to use BWV
 - failure by NSWPF officers to comply with their internal policy and procedures.
- 3.3 The following persons gave evidence in private examinations before Chief Commissioner Johnson:
- Civilian ILZ (23 September 2022)
 - Civilian YSL (23 September 2022)
 - Officer MKJ (9 November 2022)
 - Sergeant ZDA (Officer ZDA) (9 November 2022)
 - Senior Constable LPY (Officer LPY) (30 November 2022)
 - Senior Constable DMK (Officer DMK) (30 November 2022)
 - Senior Constable ZHR (Officer ZHR) (30 November 2022).

CIVILIAN WITNESSES

Civilian ILZ

- 3.4 Civilian ILZ was 18 years old when he gave evidence. He informed the Commission that he asked his mother to submit the complaint on his behalf to the Commission and that he assisted her in preparing it. He confirmed that the complaint to the Commission dated 1 March 2021 was that complaint in relation to the events of 20-21 November 2020.³

³ Exhibit YSL1C.

- 3.5 Civilian ILZ confirmed that he had participated in a recorded interview with Commission Investigation officers on 30 August 2022 in which he provided more details as to the events of 20 November 2020. He confirmed that the transcript of that interview was an accurate record of what he told Commission investigators in that interview.
- 3.6 On the night of 20 November 2020 he was at Charlestown skate park with a group of about 10 to 15 friends, including Civilian YSL, who was his girlfriend at the time. They were *“just kicking back, sitting at the skate park, riding, whatever”*.⁴ They had arrived there at about 9pm. Police officers began arriving and told them all to leave. They moved on to Charlestown Oval and soon after police officers began arriving there so he moved down to the bus stop in the street below. He was sitting at the bus stop with Civilian YSL when an officer walked down the stairs he had come from, approached him and said *“Come here, cunt. Come here, cunt.”* He said that he stood up and asked *“What for?”* and then he took a few steps back because he had not done anything wrong. Civilian ILZ stated that: *“He was like acting – he was like aggressive. So – and then he - he just kept saying and it, and then he started running for me, so I turned around and started running, and like two seconds after I just felt a big, like, bang, right in the back of my head...I felt like I got knocked out for like a split second, and then I fell, like, to my knees. I pushed myself up off the ground and then I seen- I turned around, seen him and the torch next to me – like seen him running and like quickly glanced at the torch, and it was flashing. And then after it – when I got up, he was probably like not even a metre away from me, and then I just, I just started running up through the Kmart tyre and auto alleyway onto the road where like Maccas and that is.”*⁵
- 3.7 Civilian ILZ had not had any previous interaction with the police officer who was chasing him and he did not know who he was. He ran up an alleyway and looked behind him to see the police officer still chasing him. He ran into a construction site near McDonald’s, where he hid for a while. Civilian YSL was not with him at that point, but she was close by. The police officer who was in pursuit shone a torch onto the site and the light caught the reflective strips on Civilian ILZ’s hat. The police officer started running towards him and so he jumped a fence and ran into an alleyway near the police station which runs into the McDonald’s car park. He was about halfway down when Officer MKJ pulled up in a marked police car and jumped out. Civilian ILZ was *“puffed out and that tired”* that he put his hands up. He recognised Officer MKJ from his previous interaction with him at a Halloween party about a month earlier.⁶ Officer MKJ shoulder barged him onto the ground and he landed on his back. He was then turned over onto his stomach. He said that Officer MKJ did not tell him why he was being arrested or being handcuffed.

⁴ Transcript of private examination, 23 September 2022, Civilian ILZ at T8.

⁵ Transcript of private examination, 23 September 2022, Civilian ILZ at T10-11.

⁶ Transcript of private examination, 23 September 2022, Civilian ILZ at T 14.

- 3.8 At that point in time the officer who had been in pursuit of him arrived on the scene. Officer MKJ told him to take Civilian YSL's phone. He did not see what that officer did with Civilian YSL but he understood that eventually her phone was taken from her.
- 3.9 Civilian ILZ was shown the mobile phone footage taken by Civilian YSL. He identified Officer MKJ as the officer arresting him in the footage. He identified Civilian YSL as the female speaking.
- 3.10 Shortly after Officer LPY and an unidentified female police officer arrived in a police wagon. Civilian ILZ recognised Officer LPY as he had also attended the Halloween Party incident. He was then placed in the back of the police wagon but he could not recall by which officer.⁷ He was still handcuffed at that stage. He did not know why he was under arrest but he overheard Officer LPY on the police radio asking for the description of a person and heard "*A black raiders shirt and raiders trackies*".⁸ He was not wearing those clothes. He stated that it was another ten minutes until they released him from the back of the wagon. He estimated that he was in the back for about 30 minutes altogether. Photographs of him and Civilian YSL were then taken and their details were noted in the police notebook. Civilian ILZ indicated that he was "*pretty sure it was the one that, like, hit me in the back of the head*"⁹ who wrote their details down in his police notebook.
- 3.11 Civilian ILZ stated that at no point did the police officers ask him if he wanted an ambulance, although he told them he did.¹⁰ He said that on being released, he and Civilian YSL went to McDonald's and he used Civilian YSL's phone to call his grandmother to come pick him up, which she did. They went to the hospital and were triaged but left after waiting three hours or so.¹¹ He did not sustain any injuries prior to having the torch thrown at him. Civilian ILZ was shown a photograph of the back of a head with a bloodied injury. He confirmed that that was a photograph of the injury to his head taken by Civilian YSL on her mobile on the night he was injured. He said that it took about a week for his injury to heal.¹²

Civilian YSL

- 3.12 At the time of giving evidence, Civilian YSL was 19 years old. She was a full-time mother.
- 3.13 She was asked to recall the events of 20 November 2020 and the interaction she and Civilian ILZ had with police officers. At that time, she was in a relationship with Civilian ILZ and they were living together. Their relationship ended about April/May 2022.

⁷ Transcript of private examination, 23 September 2022, Civilian ILZ at T18.

⁸ Transcript of private examination, 23 September 2022, Civilian ILZ at T18.

⁹ Transcript of private examination, 23 September 2022, Civilian ILZ at T19-20.

¹⁰ Transcript of private examination, 23 September 2022, Civilian ILZ at T19.

¹¹ Transcript of private examination, 23 September 2022, Civilian ILZ at T20.

¹² Transcript of private examination, 23 September 2022, Civilian ILZ at T21.

- 3.14 She told the Commission that on the night of 20 November 2020, she and Civilian ILZ were at the skate park drinking with a few friends. There were about ten of them. They were there for about an hour or two. They left the skate park around midnight and headed down to the bus stop on the street below. They were at the bus stop waiting for the last bus when a police officer approached from the oval end of the street and said “*Oi cunt, come here*”.¹³ She had not seen that police officer previously. He did not introduce himself. He “*just started, pretty much chasing [Civilian ILZ]*”. When the police officer spoke to Civilian ILZ, they both stood up. Civilian ILZ was “*half running-ish because he kept looking back*”. She was behind as she had injured her ankle.¹⁴ Civilian YSL observed the following: *the police officer has grabbed his torch from his belt, thrown it. It’s hit [Civilian ILZ] in the back of the head. He’s fallen on his hands and knees, gotten up, and then the police officer’s ran, picked up his torch, banged it – it was flickering; that’s how I knew it was the torch, and I was shocked.*¹⁵
- 3.15 Civilian YSL marked on a map of the relevant area the path Civilian ILZ took when he ran from the police officer. He ended up in a bush paddock next to McDonald’s, which is where she caught up with him. They then “*popped out at the McDonald’s, at the top drive... and there was already a bull box there, a paddy box, and they’ve grabbed [Civilian ILZ], thrown him on the ground, put him under arrest*”.¹⁶ Civilian YSL thought there were two police officers at the scene. She recalled that the officer who arrested Civilian ILZ told him that he was under arrest and later, when other officers arrived, explained the reason why.¹⁷
- 3.16 Civilian YSL was shown the mobile phone footage of Civilian ILZ’s arrest. She said that she recorded the footage on her mobile phone “*just for our own safety, whatever else, because he was by – he was by himself at that point and then more officers have arrived.*”
- 3.17 Civilian YSL described that as she was filming she came closer to the police officer to grab items on the ground taken from Civilian ILZ’s pockets and placed there by the officer who was conducting a search. The officer told her to “*fuck off*” and to “*stop filming*” and he told the other police officer who had arrived on the scene to grab her. She stated that that officer grabbed her, told her to sit down and then grabbed her phone which is when the footage stopped.¹⁸
- 3.18 Civilian YSL thought that the officer arresting Civilian ILZ may have been one of the officers who attended her Halloween Party in October 2020 (as he told her that he knew who she was) but she did not recognise him.

¹³ Transcript of private examination, 23 September 2022, Civilian YSL at T11.

¹⁴ Transcript of private examination, 23 September 2022, Civilian YSL at T12.

¹⁵ Transcript of private examination, 23 September 2022, Civilian YSL at T12.

¹⁶ Transcript of private examination, 23 September 2022, Civilian YSL at T13.

¹⁷ Transcript of private examination, 23 September 2022, Civilian YSL at T14.

¹⁸ Transcript of private examination, 23 September 2022, Civilian YSL at T16.

- 3.19 Civilian YSL recalled that in addition to the second male officer who turned up, a female officer arrived in a separate car. The female officer placed Civilian ILZ in the back of the police box. One of the male officers took down her details. Civilian ILZ was in the back of the box for about 10 minutes. She said that whilst he was in the police box he was asking for an ambulance but they did not call one.¹⁹
- 3.20 Civilian YSL said that she could not remember if the officers told Civilian ILZ the reason he was under arrest. She recalled that the police were looking for someone in relation to a robbery and that Civilian ILZ matched the description of the offender. She overheard the officers talking over the police radio about a robbery and that they were looking for a shirt with a “*raiders symbol*”. They lifted up Civilian ILZ’s jumper to look at his shirt. He was wearing a “CK” shirt and as soon as they saw that, they told him to go on his way.²⁰ They released Civilian ILZ from the back of the police vehicle and then one of the male police officers took photos of both her and Civilian ILZ.
- 3.21 Civilian YSL took a photo of Civilian ILZ’s injury to his head. They then called Civilian ILZ’s grandmother, who picked them up and they then took Civilian ILZ to the hospital. He was triaged but as there was a three/four hour wait, they left and his injury was patched at home.²¹
- 3.22 Civilian YSL stated that she and Civilian ILZ complied with all police instructions. She estimated the time from when the police officer initially approached Civilian ILZ to the time the police let them go was just over half an hour.²²
- 3.23 Civilian YSL identified the police officer who threw the torch as being the same one who was captured in the mobile phone footage arresting Civilian ILZ.²³
- 3.24 Civilian YSL stated that the interaction with the police officers made her feel scared. She said: “*I was petrified. That’s why I started filming, because of what happened prior, down on the main street. I didn’t know what was going to happen up there. That’s why I pulled my phone out and started videoing.*” When asked about her reference to what happened on the main street, she said “*the police torch*”.²⁴

¹⁹ Transcript of private examination, 23 September 2022, Civilian YSL at T23.

²⁰ Transcript of private examination, 23 September 2022, Civilian YSL at T23.

²¹ Transcript of private examination, 23 September 2022, Civilian YSL at T24.

²² Transcript of private examination, 23 September 2022, Civilian YSL at T31.

²³ Transcript of private examination, 23 September 2022, Civilian YSL at T20.

²⁴ Transcript of private examination, 23 September 2022, Civilian YSL at T28.

POLICE OFFICER WITNESSES

Officer MKJ

- 3.25 At the time of his examination, Officer MKJ had been a police officer for almost 10 years. He held the rank of Senior Constable and was then acting in the rank of Sergeant.
- 3.26 On 20 November 2020 he worked an afternoon shift (3pm to 3.30am) with Officer LPY. They were assigned police Vehicle 1, a sedan. It was a busy shift with multiple incidents in the Charlestown area, including serious assaults and what at the time they believed to be a robbery involving the theft of a phone and wallet from one of the assault victims. The police believed that the incidents involved the same group of people causing problems in the general area. He recalled that he had returned to the station to catch up on work from the previous evening when at about 2.30am, a priority 2 job was called over the radio despatch, priority 2 being urgent. He went to assist in Vehicle 1. He went alone and cannot recall where Officer LPY was at that point in time.
- 3.27 Officer MKJ heard Officer ZDA on the radio call “urgent” and that someone had taken off from him and he was in foot pursuit and heading towards McDonald’s. Officer MKJ was in the vicinity of McDonald’s and was aware that it was common for people evading police to run through the back of the McDonald’s and out through an alleyway. He pulled into the driveway near McDonald’s and coincidentally at that moment, he saw 2 persons running towards the alleyway, one of them being Civilian ILZ, whom Officer MKJ recognised.
- 3.28 Officer MKJ had had two previous interactions with Civilian ILZ. One involved attendance at a house party at Civilian ILZ and Civilian YSL’s premises which had got out of control with over 300 attendees. It was a “highly volatile incident”, and several arrests were made, including that of Civilian ILZ, whom Officer MKJ described as “the antagonist on that incident”.²⁵ Following that incident (the “Halloween party incident”) Officer MKJ was aware that Civilian ILZ was a young person (16 years old) and an Aboriginal person. He explained that it was in consideration of his being a vulnerable person that a decision was made on the night of the Halloween party incident to release Civilian ILZ and other young persons taken into custody into the care of a parent/guardian and to deal with any laying of charges at a later date.
- 3.29 Officer MKJ told Civilian ILZ to get on the ground, which he did. Officer MKJ did not recall pushing or shoulder-charging him. He directed Civilian ILZ to get down on the ground and he complied with the direction. He recalled Civilian YSL was upset with him but could not recall what she was saying. Officer MKJ indicated that he was in a dark alley and he was unsure if there were any other members of the group with Civilian ILZ so

²⁵ Transcript of private examination, 9 November 2022, Officer MKJ at T27.

he handcuffed him so that he could monitor him, Civilian YSL and whether anyone else from the group was approaching. A short time later Officer ZDA arrived on the scene and Officer MKJ asked him to deal with Civilian YSL. At that point in time Officer MKJ believed that Civilian ILZ was a suspect for the robbery and earlier assaults that evening.

- 3.30 Officer MKJ liaised with the detectives working on the case to establish whether they had enough evidence to arrest and determined that they did not. He removed the handcuffs and discontinued the arrest. This occurred after receiving clarification from another police unit that the description of one of the perpetrators was *“young sixteen year old wearing black trackies, sort of ah, track, black track pants, skinny build with Raiders written across his short on the back”*.²⁶ Civilian ILZ’s clothing did not match that description and so Officer MKJ discontinued the arrest.
- 3.31 Civilian ILZ was complaining of a head injury and at 2.45am Officer MKJ called for an ambulance. Officer MKJ identified the request on the Computer Aided Dispatch (CAD) records which noted *“Ambo, 16-year-old, conscious and breathing, small laceration at the back of head, back of Maccas at Charlestown”*. At 2.48am a further update recorded *“Cancel ambo family is coming to get him”*.²⁷
- 3.32 Officer MKJ recalled that following the request for an ambulance he had a discussion with Civilian ILZ as to how long the ambulance would take and whether it might be more appropriate for his grandmother to come and pick him up, after which Civilian ILZ decided he did not want the ambulance and instead contacted his grandmother to come pick him up, which she did a short time later. In the meantime, Officer ZDA had taken photos of both Civilian ILZ and Civilian YSL in order to further the investigation. At that stage a female had also been identified as being involved in the assaults and they wanted to establish clothing and either exclude or include Civilian YSL in the investigation.
- 3.33 The officer in charge of the job was initially a detective but Officer ZHR was later tasked with the job when it was downgraded from robbery to assault. The COPS Event records that Officer ZHR was the officer in charge.
- 3.34 Officer MKJ recalled that Civilian ILZ told him that he had been hit in the head but there was no discussion about how he sustained the injury. He was quite emotional and making a *“big fuss about it”*.²⁸ Officer MKJ thought that the injury was minor but he was not a medical professional and so he called for an ambulance. He was certain that the injury did not occur during the arrest by him as at no time did Civilian ILZ’s head come into contact with the ground.

²⁶ Transcript of private examination, 9 November 2022, Officer MKJ at T41.

²⁷ Exhibit MKJ8C at pg 3.

²⁸ Transcript of private examination, 9 November 2022, Officer MKJ at T42.

3.35 It was about 15 minutes between Civilian ILZ being arrested by Officer MKJ and the cancellation of the ambulance as his grandmother was coming to pick him up.

Mobile Phone Footage

3.36 Officer MKJ was shown the mobile phone footage capturing his arrest of Civilian ILZ and his interaction with Civilian YSL.

3.37 Officer MKJ conceded that his conduct during his exchange with Civilian YSL was not professional and that he should not have used the language he did. He explained: *“But when you’re in a circumstance like that, on your own, you’ve got a volatile situation where you are arresting an offender, yes, he’s compliant at that point, but you’ve also got another person coming towards you. I’m giving her a clear direction, you know, in language I believe she understands, You know, having had dealings with her before in that other incident we spoke about earlier, she’s a volatile young girl. And so as such, for me, I adapted my language to make sure she would understand exactly what my sentiment was with her, ‘go away’”...I have absolutely no issue in saying that I acknowledge it’s unprofessional. And, you know, but sometimes in these circumstances when it’s volatile you do say things you you-you know, you’re just trying to get it in control....it was appropriate at that time to convey what I needed to be done until other police could arrive.”*²⁹

3.38 Officer MKJ was asked why he directed Officer ZDA on his arrival at the scene to *“sort her arse and get rid of her phone”*. Officer MKJ explained that he was not concerned about Civilian YSL filming him but *“when she’s coming up close and sticking it in my face and things like that, it does- it creates that extra – well “fear” is probably not the right word, but an extra thing that I have to think about then, too. Like what is she coming up to do? You know, I don’t know what – yes, she’s got her phone, but what else has she got? I don’t know.”*³⁰

3.39 Officer MKJ agreed that he told Officer ZDA to get her phone but that it did not capture his intention – not that Civilian YSL’s phone be taken from her but rather that she be moved away from him so that he could effect the arrest. Thereafter Officer MKJ was concentrating on his interaction with Civilian ILZ and he did not know whether Officer ZDA grabbed Civilian YSL and/or removed her phone. He thought that Officer ZDA would have moved her away from him so that he could concentrate on Civilian ILZ.

Record-keeping

3.40 Officer MKJ agreed that his notebook should have recorded the exercise of powers, including the use of handcuffs and the arrest of Civilian ILZ, which it did not. He agreed that: *“I should have put something in my*

²⁹ Transcript of private examination, 9 November 2022, Officer MKJ at T49-50.

³⁰ Transcript of private examination, 9 November 2022, Officer MKJ at T51.

notebook. Absolutely. And it's embarrassing from my point of view, that as a supervisor at the moment it's something that I am big on with my police - that they are recording their incidents. And you know, in this circumstance, I failed to do so."³¹

- 3.41 Officer MKJ also conceded that the COPS Event was inadequate, with the only reference to his involvement in the interaction with Civilian ILZ being "stopped during the same night by [Officer MKJ] and [Officer ZDA]". Officer MKJ stated that he should have updated the event in relation to use of force. He passed on the information to the officer-in-charge that they had stopped Civilian ILZ, arrested him at the back of McDonald's and then did not have enough evidence to move forward with it. He also told the officer-in-charge about the photographs taken of Civilian ILZ and Civilian YSL but he could not recall whether he informed him of the use of handcuffs. Officer MKJ agreed that the COPS Event should also have included the fact that Civilian ILZ had sustained an injury (which potentially could have been caused during his interaction with police) and an ambulance called.
- 3.42 Officer MKJ said that whilst he thought the officer-in-charge may have written up the details conveyed to him that it was up to him to have updated the COPS Event as he was the one who had exercised the power.³²

BWV

- 3.43 Officer MKJ recalled that at the time of the incident with Civilian ILZ it was at their discretion as to whether police officers wore BWV when out in the field. It was (by November 2022) mandatory in accordance with the updated policy. Activation of the BWV was still at the discretion of individual police officers. He thought it was a "great tool" and that his practice even in November 2020 was to take it out with him.³³ He confirmed on viewing the mobile phone footage of his interaction with Civilian ILZ that he was not wearing his BWV. He could not recall why he was not wearing it but posited that on returning to the police station prior to attending the incident, it had been docked for the purpose of accessing footage.³⁴

Officer ZDA

- 3.44 In addressing the evidence of Officer ZDA, it must be kept in mind that he, like other witnesses, objected to answering questions and, at his request, was granted a declaration under s 75 LECC Act so that there is a statutory protection against use of his evidence concerning any criminal

³¹ Transcript of private examination, 9 November 2022, Officer MKJ at T53.

³² Transcript of private examination, 9 November 2022, Officer MKJ at T57.

³³ Transcript of private examination, 9 November 2022, Officer MKJ at T17.

³⁴ Transcript of private examination, 9 November 2022, Officer MKJ at T17.

prosecution of him. As will be seen, this aspect is of particular significance to the evidence of Officer ZDA.

- 3.45 In November 2022, Officer ZDA had been a police officer for around 14 years. He was then at the rank of Sergeant. At the time of the incident under investigation, he was a senior constable.
- 3.46 Officer ZDA was aware of his powers and responsibilities under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), specifically under section 202. His understanding of the appropriate use of handcuffs was to prevent people from escaping or causing injury to themselves or others. He did not record the use of handcuffs in his notebook and he was unaware until it was pointed out to him at his examination that use of handcuffs should so be recorded.
- 3.47 Officer ZDA understood that members of the public were entitled to use their mobile phones to record the conduct of police officers but that officers could take mobile phones if they believed that they contained evidence.³⁵
- 3.48 Prior to attending his examination before the Commission, Officer ZDA refreshed his recollection of events on the evening in question. He looked up the COPS Event, referred to all the CAD jobs in relation to the particular incident and referred to his notebook. His notebook recorded the names of Civilian ILZ and Civilian YSL, referring to them as “*POI*”, being persons of interest, and a reference to the COPS Event. Officer ZDA explained that if the case was his, he would create the event straight away but that as it was not his event, all information he obtained in relation to it would be passed on to the officer-in-charge.³⁶ This would be done during the shift either in the field or on return to the police station.
- 3.49 On that particular evening, Officer ZDA was working with another officer. They had been assigned caged truck Vehicle 2. Throughout the evening there were numerous jobs coming from Charlestown Square where youths had been congregating and engaging in anti-social behaviour. Three victims had been “*severely assaulted*” on that evening and he received information that the property of one of those victims may have been stolen.
- 3.50 Officer ZDA explained that there was a big issue with children engaging in anti-social behaviour around Charlestown Square and there was a “*big focus on it, as we didn’t want a repeat of that incident that happened in 2015*”.³⁷ Officer ZDA explained that in the 2015 incident a father had gone to pick up his daughter from Charlestown Square and was set upon and badly injured. Subsequently there were “*user pay*” shifts for that particular square in an effort to curb all violence. Officer ZDA stated that

³⁵ Transcript of private examination, 9 November 2022, Officer ZDA at T7.

³⁶ Transcript of private examination, 9 November 2022, Officer ZDA at T17.

³⁷ Transcript of private examination, 9 November 2022, Officer ZDA at T19.

it was “well-known that they do congregate around there and there’s generally operations that have been put in place to curb all this as well.”³⁸

3.51 Officer ZDA explained that the officers who arrived to investigate the incident viewed CCTV footage and took a screen shot which was then disseminated to all the crews working shifts on that evening with the message “we’re looking for these people”.³⁹ He had a copy of the still photo on his personal mobile phone but he could not recall how it came to be on his phone. He was informed that the entire group captured on CCTV footage was part of the robbery⁴⁰ and the still showed about ten people in the group with Civilian ILZ being one of them “with quite a distinctive blue hat on.”⁴¹ He did not specifically recognise any of the persons captured in the footage and may have had interactions with them but noted that officers deal with a lot of people.⁴² Officer ZDA had not had any previous interactions with Civilian ILZ but he was aware of his name from morning police briefings.⁴³

3.52 Throughout the evening they had numerous calls in relation to the assaults and they had tried to co-ordinate their response so as to corner them on Charlestown Oval.⁴⁴ Officer ZDA initially stated that he was on foot and walking up a pathway towards the oval when he spotted Civilian ILZ ahead of him. He recognised the “distinctive blue hat”. He said that he asked several times for Civilian ILZ to stop but he ran off.

3.53 Officer ZDA gave the following evidence:⁴⁵

“...but I was asking him to stop, for the intention that I was going to place him under arrest in relation to that robbery. As you can see through the CAD messages, he’s ran off. I’ve called that he’s started to run off. At that time, I did have a small Pelican torch in my hand. All I had – in my mind, my mind thought at that stage was, I am a lot heavier than he is, I’m wearing a lot more stuff than he is, I’ve started chasing him. He was getting too far away for me to catch him. He probably would have been some distance. [He estimated 7 – 10 metres away] So I took it as an opportunity. I’ve utilised that torch with the mindset that I will try and take his legs out to stop him from running and to effect the arrest...I’ve thrown it. However, that didn’t go to plan. Inadvertently, it has hit him in the back of the head. It did stall him for a second....Like, it’s – he’s lost balance. He didn’t fall on his feet. He didn’t fall down, nothing like that...It’s obviously hit and he’s felt that”.

3.54 Civilian ILZ ran off and Officer ZDA lost sight of him. He radioed in the last known direction of Civilian ILZ and about one or two minutes later heard

³⁸ Transcript of private examination, 9 November 2022, Officer ZDA at T19.

³⁹ Transcript of private examination, 9 November 2022, Officer ZDA at T20.

⁴⁰ Transcript of private examination, 9 November 2022, Officer ZDA at T20.

⁴¹ Transcript of private examination, 9 November 2022, Officer ZDA at T19.

⁴² Transcript of private examination, 9 November 2022, Officer ZDA at T22.

⁴³ Transcript of private examination, 9 November 2022, Officer ZDA at T19.

⁴⁴ Transcript of private examination, 9 November 2022, Officer ZDA at T23.

⁴⁵ Transcript of private examination, 9 November 2022, Officer ZDA at T24-25.

that Officer MKJ had him in custody and he was located in the laneway leading to McDonalds.⁴⁶ He stated that it took him a few minutes to arrive at the radioed location where he saw Officer MKJ with Civilian ILZ on the ground and handcuffed. Civilian YSL was also there and Officer MKJ yelled out *"She's filming all this"*. He pushed Civilian YSL out of the way to assist Officer MKJ. At that point in time they realised that Civilian ILZ had a cut to his head and they organised an ambulance to assist him. Phone calls were also made in relation to what to do with Civilian ILZ in relation to the robbery. At some point Civilian ILZ requested to call his grandmother and his request was granted. Officer ZDA thought that Civilian YSL may have made the call but he could not recall who and on whose phone. They were then told to take photographs of Civilian ILZ to forward them to the officer-in-charge in furtherance of the investigation. The arrest was discontinued and his handcuffs removed. He declined the ambulance and his grandmother sought first aid for him. He was not sure whether they ended up going to the hospital or not.⁴⁷

- 3.55 Officer ZDA stated that at the time he believed that Civilian ILZ was a vulnerable person.
- 3.56 Later in his evidence Officer ZDA indicated that he could not recall at which point he first sighted Civilian ILZ. He stated that: *"It's a bit blurred to where I actually pick him up. Its' just that I've caught eye of this hat. And whether I'm still at the top in Charlestown Oval and he's down there, I can't – that's a bit vague, that part."*⁴⁸
- 3.57 Officer ZDA stated that he did not know whether he was wearing BWV on that evening. He indicated that if it was off at that stage he would have had no chance to be activating it. *"I'm pretty much letting an offender go if that's the case. And I'd much rather capture that offender than worry about activating my body worn."*⁴⁹ When asked whether this was the very situation where he would activate BWV (on his own and following him with a reasonable suspicion that he was an offender in relation to a serious offence), Officer ZDA explained *"Once again, I'm going through shrubland, I'm trying to navigate through that shrubland. I'm not having time to activate my camera. I would be losing footing. It was very loose ground. You have to appreciate that. And that's – I can't even recall if I had my camera at that stage."*⁵⁰
- 3.58 Officer ZDA disagreed with the proposition that he first saw Civilian ILZ sitting with Civilian YSL at the bus stop nearby the pathway leading up to the oval as he could not have seen them if they were sitting there. He said that whilst he could not recall exactly where he first sighted Civilian ILZ, something made him divert from being near the top close to the oval and

⁴⁶ Transcript of private examination, 9 November 2022, Officer ZDA at T25.

⁴⁷ Transcript of private examination, 9 November 2022, Officer ZDA at T26-27.

⁴⁸ Transcript of private examination, 9 November 2022, Officer ZDA at T29.

⁴⁹ Transcript of private examination, 9 November 2022, Officer ZDA at T28.

⁵⁰ Transcript of private examination, 9 November 2022, Officer ZDA at T29.

to travel down the pathway to the street below. He was sure that Civilian ILZ had gone down the pathway leading down to the street below.

3.59 Officer ZDA stated that he did not use offensive language when he called out to Civilian ILZ to stop. He asked Civilian ILZ several times to stop and Civilian ILZ turned towards him and then starting walk back towards the skate park. Officer ZDA said that Civilian ILZ was “*obviously being wary and keeping an eye on where I’m at. And then he’s decided to run, somewhere around the vicinity of pretty much the opposite side to where that bus stop is.*” Officer ZDA marked on a hard copy of a map of the relevant area where he believed he first sighted Civilian ILZ and where he was when he started to run.⁵¹ It was at that point in time when Officer ZDA threw the torch at Civilian ILZ as he had admitted earlier in the examination.

3.60 Officer ZDA was questioned about his understanding of whether throwing a torch was a reasonable use of force:⁵²

Q: *Is that something you’re taught in your training, that if someone runs, you throw any available object to try and stop him?*

A: *Not as far as I’m taught. However, I believe in my opinion there’s reasonable force that can be used to arrest someone.*

Q: *You think throwing the torch at him was reasonable?*

A: *Given my mindset at that stage, yes. Upon reflection, it could have been dealt with differently. But at that stage my pure intentions were to try and trip him with the torch.*

3.61 Officer ZDA collected the torch on his way after throwing it.⁵³

3.62 Officer ZDA stated that he had not prior to or since that time thrown a torch at someone who was fleeing. He gave the following evidence:⁵⁴

Q: *Did you perhaps throw it in frustration?*

A: *I’d say more frustration and anger at the fact of what this person has done. I was annoyed at the situation that we were in, given what had been alleged that had occurred. I feel I’ve got a duty to the community that I have to protect them, and the way I was protecting them is to get that person off the street, given the information I had on him at that time”.*

Q: *Were there any limits to what you could do to achieve that end?*

A: *Certainly. I didn’t use my firearm, I didn’t use my taser. There are limits”.*

⁵¹ Transcript of private examination, 9 November 2022, Officer ZDA at T33.

⁵² Transcript of private examination, 9 November 2022, Officer ZDA at T34.

⁵³ Transcript of private examination, 9 November 2022, Officer ZDA at T35.

⁵⁴ Transcript of private examination, 9 November 2022, Officer ZDA at T36.

Mobile Phone Footage

- 3.63 Officer ZDA was shown the mobile phone footage taken by Civilian YSL. He identified Officer MKJ, Civilian ILZ and Civilian YSL and his own voice heard in the footage. He recalled pushing Civilian YSL out of the way because she was grabbing property and they did not know if that property belonged to the victims. In his view, she was hindering the investigation. He stated that he did not take her phone, nor did he ask for her PIN number. He stated that Civilian YSL was “*well within her right to film that*”.⁵⁵ He could not explain why the footage cut out when he grabbed her arm as seen in the footage.
- 3.64 Officer ZDA recalled that following the events captured in the mobile phone footage, he took photographs of both Civilian ILZ and Civilian YSL and an ambulance was organised. He could not recall any other specific details. He may have assisted Officer MKJ to stand Civilian ILZ up or to sit up so that he was more comfortable.⁵⁶ He could not recall if Civilian ILZ was placed in the back of a police van and thought that that did not occur as although they called for a caged truck over the police radio, the decision was made to release him.⁵⁷
- 3.65 Officer ZDA was shown a photograph taken by Civilian YSL at the time of Civilian ILZ’s arrest of the injury to his head and captured in the background is part of a police vehicle. Officer ZDA indicated that it was definitely not a sedan but he could not be certain whether it was an “*iload*” or a “*Ranger or Hilux*”, which was the type of Vehicle 2 was and which had been assigned to him on that evening.

BWV

- 3.66 Officer ZDA was examined about his use of BWV and in which circumstances he might activate the video. He noted that following an update to the Standard Operating Procedures (version 2.4 November 2021) it was now a requirement that police officers wear their BWV but its use was still at the discretion of the officer.⁵⁸ His understanding was that it was ok if he decided not to use it during a shift and that there were shifts when he did not use it at all. He noted that it was different in his current role as he did not interact much with the community, now being a team leader.⁵⁹
- 3.67 Officer ZDA indicated that whether he activated his BWV depended on the situation but that there was a “*bit of process to do it*”.⁶⁰ “*I’ve got to press and hold for at least up to three seconds or. Two, three, four seconds, depending on the device. No longer than at least four seconds. And then*

⁵⁵ Transcript of private examination, 9 November 2022, Officer ZDA at T42.

⁵⁶ Transcript of private examination, 9 November 2022, Officer ZDA at T46.

⁵⁷ Transcript of private examination, 9 November 2022, Officer ZDA at T46-47.

⁵⁸ Transcript of private examination, 9 November 2022, Officer ZDA at T14.

⁵⁹ Transcript of private examination, 9 November 2022, Officer ZDA at T14.

⁶⁰ Transcript of private examination, 9 November 2022, Officer ZDA at T11.

once that then, the green light will activate. That'll tell me that's on standby and then I'll press it and the red light will activate and tell me it's recording. So as you can see, it's a bit of a process. We're talking anywhere up to five or 10 seconds. It's quite some time".⁶¹

Record-keeping

3.68 Officer ZDA was shown the COPS Event relating to the incident for which Civilian ILZ was detained. He agreed that he would expect that the following details should have been contained in the narrative in that event:

- the fact that Civilian ILZ was detained and handcuffed for a period of time;
- that he was a young person;
- that he identified as Aboriginal and that he was a vulnerable person;
- that he had been injured as a result of being struck by a torch thrown by him.⁶²

3.69 Officer ZDA agreed that the COPS event was inadequate and that it did not fulfil the requirements of a COPS event and that it did not disclose all that had occurred.⁶³

3.70 Officer ZDA stated that it was not his narrative. Based on the information in the COPS event, he assumed that the officer-in-charge was Officer ZHR as he was recorded as having created the initial event.

3.71 Officer ZDA did not hear Civilian ILZ saying "*my head's bleeding, my head's bleeding*" as he arrived after that point. He acknowledged that his injury was more than likely as a result of his being hit with the torch.⁶⁴

3.72 Officer ZDA believed that notwithstanding the likelihood that he had caused Civilian ILZ's injury to the head, his obligation to report the incident was met when he forwarded that information on to the officer-in-charge. He stated that he would not tend to follow up on what that officer does with the information as it was not his investigation.⁶⁵

3.73 Officer ZDA stated that he trusted those who were creating the event narrative to record appropriately the information given to them.⁶⁶ If it had been him writing up the event he would have referenced the fact that he had been involved in an incident where a 16-year-old Aboriginal person was injured.⁶⁷

⁶¹ Transcript of private examination, 9 November 2022, Officer ZDA at T12.

⁶² Transcript of private examination, 9 November 2022, Officer ZDA at T51 and T58.

⁶³ Transcript of private examination, 9 November 2022, Officer ZDA at T58.

⁶⁴ Transcript of private examination, 9 November 2022, Officer ZDA at T52.

⁶⁵ Transcript of private examination, 9 November 2022, Officer ZDA at T53.

⁶⁶ Transcript of private examination, 9 November 2022, Officer ZDA at T55.

⁶⁷ Transcript of private examination, 9 November 2022, Officer ZDA at T55.

3.74 Officer ZDA stated that he verbally forwarded the information to the officer-in-charge.⁶⁸ He explained that if he knew that it was going to be some time before he got in contact with the officer he would provide in writing information relevant for the COPS event. However, on that particular night he was in regular contact with the officer-in-charge.⁶⁹

3.75 Officer ZDA was asked the following about what he told the officer-in-charge:⁷⁰

Q: *Did you tell the officer in charge that you had thrown a torch at him and caused a head injury?*

A: *I can't recall exactly what I told him, but I told him the scenario that occurred as far as what happened, what had occurred. I can't recall exactly what I told him, but I've let them know that he'd obviously been – well, the interaction we had with him.*

3.76 Later he was asked:⁷¹

Q: *Did you tell the officer that you had thrown the torch?*

A: *As I said previously, Commissioner, I can't recall whether that information was passed on or not."*

3.77 Officer ZDA stated that, notwithstanding that this was a unique event and he had never prior to or since thrown a torch at someone, he could not recall whether he told his Sergeant that this had occurred but that generally he would.⁷²

3.78 Soon after Officer ZDA was asked:⁷³

Q: *If you use force, there's no obligation on you individually as a police officer to record that anywhere?*

A: *In hindsight, maybe something in my notebook. However, at that point in time, like I said before, I forwarded it on to the OIC.*

3.79 Officer ZDA was pressed as to whether he should have recorded the fact of his use of force causing an injury at least in his notebook. He stated that he could recall it as it was a unique event but that "quite potentially" he should have recorded it in his notebook.⁷⁴

Officer LPY

3.80 In November 2022, Officer LPY was 54 years old and held the rank of Senior Constable. He had been a police officer for almost 22 years. On the

⁶⁸ Transcript of private examination, 9 November 2022, Officer ZDA at T55.

⁶⁹ Transcript of private examination, 9 November 2022, Officer ZDA at T56.

⁷⁰ Transcript of private examination, 9 November 2022, Officer ZDA at T51.

⁷¹ Transcript of private examination, 9 November 2022, Officer ZDA at T57.

⁷² Transcript of private examination, 9 November 2022, Officer ZDA at T58.

⁷³ Transcript of private examination, 9 November 2022, Officer ZDA at T58.

⁷⁴ Transcript of private examination, 9 November 2022, Officer ZDA at T59.

day of the incident, he commenced his shift at 3pm. He was working with Officer MKJ and they were assigned police sedan Vehicle 1.

- 3.81 Officer LPY recalled that they patrolled the Charlestown area and were looking for persons of interest connected to a number of assaults on a number of people. He could not recall being present at the arrest of Civilian ILZ. He knew of Civilian ILZ as he had attended the Halloween party incident. His notebook made no reference to the arrest of Civilian ILZ on 21 November 2020 as he had nothing to do with the arrest. He had no recollection of seeing Civilian ILZ in the early hours of 21 November 2020 at the back of McDonald's.
- 3.82 Officer LPY was asked about the appropriateness of a police officer throwing a torch at someone. He stated that he would not throw a torch but later stated that it would depend upon the circumstances. For example, if someone on "ice" was coming towards him, he might throw a torch.⁷⁵
- 3.83 Officer LPY indicated that whilst he wore his BWV when out in the field, as it was mandatory, he rarely activated it. He did not believe that he wore BWV when he attended the Halloween party incident as at that time it was not mandatory. Officer LPY also indicated that he was "not a fan" of turning BWV on straight away and that he was resistant to doing so as he had seen other officers disciplined for things which had been videoed.⁷⁶

Officer DMK

- 3.84 As at November 2022, Officer DMK had been a police officer for over 23 years and held the rank of Leading Senior Constable.
- 3.85 Officer DMK was on duty on the evening of 20 November 2020. She was working with Officer Wright in caged truck Vehicle 3.
- 3.86 Officer DMK was one of the officers who had attended the Halloween Party incident. Consequently she was aware of Civilian ILZ and that he was 16 and identified as an Aboriginal person. However, she indicated that she would not recognise Civilian ILZ if she saw him in the street. She had no knowledge of Civilian YSL.
- 3.87 Officer DMK indicated that she was most probably not wearing BWV in 2020 when the incident took place as it was then not mandatory to do so. Following the change in NSWPF policy requiring the wearing of BWV, she now wears it always and she activates it in most jobs, "anything from a domestic to speaking to people".⁷⁷ Officer DMK was asked in which situations she would activate her BWV. She indicated that if she were approaching a group of people who had assaulted someone or had been

⁷⁵ Transcript of private examination, 30 November 2022, Officer LPY, at T22.

⁷⁶ Transcript of private examination, 30 November 2022, Officer LPY, at T29.

⁷⁷ Transcript of private examination, 30 November 2022, Officer DMK, at T14.

involved in robbery in company she would activate her BWV so that she would have a recording of the incident.⁷⁸ Officer DMK indicated that it was simple to activate, requiring the pressing of a button twice.

- 3.88 Officer DMK had no recollection of being present when Officer MKJ arrested Civilian ILZ. She was shown the mobile phone footage taken by Civilian YSL, photos of Civilian ILZ and Civilian YSL taken following the discontinuation of Civilian ILZ's arrest and the photograph of his head injury. Officer DMK had no recollection of being present when the photographs were taken and could not identify the location from the mobile phone footage. Following consideration of the CAD data from the evening of 20 November 2020, Officer DMK agreed with the proposition that her caged truck did not attend the scene where Civilian ILZ was and that at about that point in time she was at another location with another person in custody. Officer DMK recorded that interaction in her notebook. Officer DMK also agreed that the CAD data indicated that Vehicle 4, a caged truck, also did not attend the scene where Civilian ILZ was.
- 3.89 Officer DMK was examined about her understanding of what details should be recorded in a COPS event. She would expect that if a young person was injured when an officer threw a torch at him, that those details would be recorded in the COPS event. She never heard anything about such an incident occurring or heard anyone discussing such an incident. She agreed that it would be an uncommon event. She also agreed that if the torch was thrown at the person whilst they were running from an officer that it would probably be a use of force. She stated, however, that she could not say whether it was a proper use of force as she did not see it and did not know how it was used.⁷⁹
- 3.90 Officer DMK explained that in an event involving several police officers across several locations, such as occurred on the evening of 20 November 2020, she would record relevant details in her notebook and then send a copy (either photocopy or screen shot) to the officer-in-charge of the event. Officer DMK was asked:⁸⁰

Q: *So if you were involved in, for example, arresting a young person, handcuffing them, they had sustained an injury during the arrest – is that the sort of information you would then ensure that the officer-in-charge had to be able to record in the narrative?*

A: Yes.

Q: *Would you ever check the narrative to ensure all that information had been properly uploaded or recorded?*

A: *Not always, no.*

⁷⁸ Transcript of private examination, 30 November 2022, Officer DMK, at T14.

⁷⁹ Transcript of private examination, 30 November 2022, Officer DMK, at T23.

⁸⁰ Transcript of private examination, 30 November 2022, Officer DMK, at T16.

Q: When you say not always, in what circumstances would you check and wouldn't you check?

A: I guess if – in my role I'm always working with very junior police. If I was – if I was working with one of those boys, I would normally re-read their COPS event prior to them submitting it.

Q: And for what reason?

A: Because they're just learning how to still complete COPS events.

Q: Are you wanting to ensure that everything is accurately and fully recorded?

A: Yes, so they know that they're – just to make sure they've got everything correct in the COPS event, yes.

3.91 Officer DMK would expect that the fact of an arrest, a discontinuation of an arrest, use of handcuffs and any use of force would be recorded in the COPS event.⁸¹

Officer ZHR

3.92 As at November 2022, Officer ZHR had been a police officer for over 15 years. He held the rank of Senior Constable.

3.93 Prior to attending the Commission to give evidence he had referred back to the COPS Event and his notebook in order to refresh his memory concerning the incident. On 20 November 2020 his shift commenced at 3pm and he was partnered with another Senior Constable in police sedan Vehicle 5. Officer ZHR had a good recollection of events of that evening. Some time after midnight he was called to Charlestown Square as they had received a call from security that there was a group of youths running around the centre assaulting people and attacking cars in the street. A person had been attacked by a group of youths as he attempted to get into a taxi. They pulled him out and started kicking the taxi. The taxi drove off. A victim also called in. Later they received another report of a female being assaulted in the car park and “*blood coming from her head*”.⁸² Officer ZHR and his partner attended the centre and viewed CCTV footage of the incidents and broadcast descriptions of the persons of interest. There were about 10 to 15 youths involved. Officer ZHR explained that on that particular evening they were on a “*Summer Safe Operation*” which was *targeting youth antisocial behaviour around public areas, being Charlestown Square, the skate park, beach car parks...shopping centres in general.*”⁸³

3.94 Officer ZHR was shown stills from the CCTV footage and recognised Civilian YSL as he had dealt with her previously.⁸⁴ At that point in time he

⁸¹ Transcript of private examination, 30 November 2022, Officer DMK, at T17.

⁸² Transcript of private examination, 30 November 2022, Officer ZHR, at T7.

⁸³ Transcript of private examination, 30 November 2022, Officer ZHR, at T9.

⁸⁴ Transcript of private examination, 30 November 2022, Officer ZHR, at T8-9.

did not know Civilian ILZ but when shown the still during the examination he identified the “fellow with the blue cap” as Civilian ILZ.⁸⁵

3.95 Officer ZHR indicated that as he was first on scene that made him officer-in-charge.⁸⁶ Later he gave the following evidence:⁸⁷

Q: *And how is it determined that you are officer in charge?*

A: *Well, it’s basically whoever takes carriage of it. So we were the first there, I was looking at the CCTV describing the offenders, I had spoken to the two victims, so it’s just determined I just took carriage of it. That’s how it’s determined, basically.*

Q: *Would there be an assumption made by the other police officers on that evening who were also involved in, say stopping potential persons of interest, that you were the officer in charge and to convey any relevant information to you?*

A: *I believe so, yes.*

3.96 As the job initially came over as a robbery, Officer ZHR assumed that most police officers would have assumed that it would be taken over by the Detectives, who had contacted him when he was at the scene.⁸⁸ “As per normal protocol, we give them a rundown of what’s occurred, speak to them over the phone. They will make a decision as to which way they want to run it. Like if I tell them it’s a robbery, we find if there are any crime scenes or such available from the information. Then basically – normal practice is I will come back and put the event on from the information I’ve found out and they will follow up with the victims providing statements and so forth.”⁸⁹

3.97 Officer ZHR confirmed that the CAD transcript captured Vehicle 5 acknowledging the incident at 12.38am with the status changing from “broadcast” to “acknowledged”.⁹⁰ They patrolled the area and found nothing and so called that in and then moved on to attend other jobs. Officer ZHR recalled taking one of the victims to John Hunter Hospital. Some time after that he returned to Belmont Police Station and started the event.⁹¹

3.98 Officer ZHR explained that a COPS event was the initial report when all the persons of interest, victims, times and dates were entered onto the event. That information was then verified by a supervisor, placed on a priority list and allocated as a case for further investigation. He created the narrative for the COPS Event. There is an option to link the CAD incident to an event.⁹²

⁸⁵ Transcript of private examination, 30 November 2022, Officer ZHR, at T8.

⁸⁶ Transcript of private examination, 30 November 2022, Officer ZHR, at T10.

⁸⁷ Transcript of private examination, 30 November 2022, Officer ZHR, at T14.

⁸⁸ Transcript of private examination, 30 November 2022, Officer ZHR, at T15.

⁸⁹ Transcript of private examination, 30 November 2022, Officer ZHR, at T15.

⁹⁰ Transcript of private examination, 30 November 2022, Officer ZHR, at T11.

⁹¹ Transcript of private examination, 30 November 2022, Officer ZHR, at T14.

⁹² Transcript of private examination, 30 November 2022, Officer ZHR, at T18.

3.99 Officer ZHR was shown his notebook entry for 20 November 2020 in which he had recorded the names of two victims and two persons of interest, neither of which was Civilian ILZ. The COPS Event included the information that Civilian ILZ was stopped later the same night by Officers MKJ and ZDA. He was asked where that information had come from and he indicated that it would have come from either Officer MKJ or Officer ZDA.⁹³ He recalled that they had come back and uploaded to the COPS Event the still images of both Civilian ILZ and Civilian YSL and told him that they had come across Civilian ILZ.

3.100 Officer ZHR gave the following evidence:⁹⁴

Q: *So what did they tell you?*

A: *Basically, from memory, they'd been patrolling around Charlestown and spotted him, going off a description of the blue cap, the black shirt and I believe it had a white emblem. ... I believe he must have - he did run from them at one point. They'd caught up with him. They obtained his details, pictures of him, and basically gave me that information.*

...

Q: *When they caught him, were you given any other details about what occurred?*

A: *Not particularly. ... I believe they caught him, I don't know if he fell over or they - how they caught him, it was a chase. I think they just took details and - I'm not sure if they took him home or not.*

3.101 Officer ZHR was shown the mobile phone footage of the arrest of Civilian ILZ by Officer MKJ. He stated that he was not aware that handcuffs had been placed on Civilian ILZ and that that was something he would expect to be recorded in a COPS event as it was classed as a use of force.⁹⁵

3.102 Officer ZHR was asked:⁹⁶

Q: *In an event like this which is clearly multifaceted, you've got a number of vehicles out, you've got a number of people running around causing lots of problems and police officers attending different scenes but in relation to essentially the same event, how do you ensure that you have been provided with all the information that you need, for the COPS.*

A: *Basically you rely on the officers out there. So I- basically in this sort of role, I'm - if I take charge I'm the- basically the hub, all the information should come to me as it happened. So basically I should be told who they spoke to, where they spoke to them, what they were wearing, because we're trying to identify people off footage that we don't particularly know. Some of them we know but confirm what they*

⁹³ Transcript of private examination, 30 November 2022, Officer ZHR, at T24.

⁹⁴ Transcript of private examination, 30 November 2022, Officer ZHR at T25.

⁹⁵ Transcript of private examination, 30 November 2022, Officer ZHR at T27.

⁹⁶ Transcript of private examination, 30 November 2022, Officer ZHR at T27-28.

were wearing, where they were, where they were stopped, so we get an approximate distance from the actual location, yeah, and then the circumstances of why they were – it would be normal case, like why they were stopped, as in they were wearing this clothing, so out there to give me that information in turn to put into the event to pass on to detectives, because ultimately, for legalities later on, the detectives need to know these reasons. Even if they're – on the night they're not arrested and brought back to the station, we're confirming their ID but we've got to have reasonable grounds to sort of basically arrest them at the scene or detain them, at least.

Q: And you mentioned earlier that you would expect use of force – for you to be provided with details of use of forces, and handcuffs comes in under that category?

A: Oh yes, yes.

Q: And you would expect to be informed of what happened when they were arrested, if something happened beyond 'he was arrested, he wasn't a person of interest, we let him go'? So, for example, if he had been injured during the police interaction, would you expect to be told about that?

A: Oh, yes, for sure, especially being a juvenile.

Q: Were you aware that Civilian ILZ had been injured during the foot pursuit?

A: No, as far as I believed, he was just taken home to his parents, I believe. I can't verify that or not but I believe that's what happened.

Q: Do you recall being told that he had sustained an injury because a police officer had thrown a torch at him and got him on the back of the head?

A: No, not a torch, no.

Q: Is that something you would remember if you had been told?

A: I'd imagine so, yes. An injury from being chased and falling, yes, I remember that, but- sorry, that would be sort of something in the lines of – but a torch to the back of the head, no, don't remember that at all.

Q: And would you find that to be an unusual occurrence?

A: I would say so, yes. Yes. That's extreme. I can't see why you would be chasing someone and throw a torch at them.

3.103 After viewing the mobile phone footage and becoming aware of further details, Officer ZHR indicated that the description at page 6 of the COPS Event in relation to the interaction police had with Civilian ILZ was inadequate. He expected that the event should have made reference to the fact that he was arrested at the scene, then unarrested. There should

have been reference to the use of force and the fact that an ambulance had been called.⁹⁷

3.104 Officer ZHR was asked about his use of BWV. He stated that he could not recall if he was wearing it on the night of this incident but that he usually did. He was unsure whether he had activated it as his initial role was to look at footage and broadcast it and so he may not have activated it but he probably would have had the camera on.⁹⁸ Officer ZHR said that his practice now was that he always wore his BWV and that he would activate it 7 times out of 10. He gave the following examples of when he might activate the BWV: *“If the people there are known for violent behaviour as such or something to that effect, I’ll activate it. Yeah, I take it on a case-by-case basis.”* In the scenario where he was on foot and was approaching someone and whether he would activate the body worn video he gave the following evidence:⁹⁹

“Yes, I probably would. More so in the case – I’m not going to catch a young 16-year-old kid, so I’ll get the footage to show them running, that sort of thing. However, saying that, on that night I come across the young girl that I took the mobile phone, and I don’t believe I activated my body camera then because I pretty much jumped out of the car and went straight to them and stopped them and I just didn’t think to activate it.”

3.105 Officer ZHR could see the advantages of using BWV and he used it quite often. He stated, however, that there can be times when an officer was reacting to a situation and the *“last thing you think of doing is pushing a button and- they are good but you push it once to have it on stand-by and you’ve got to push it again to ensure it’s recording. So by the time – if you’re doing something quickly, you just can’t always sit there and so (indicating). But, no, they are quite good. They’re very good for their purpose.”*¹⁰⁰

Use of Force

3.106 Officer ZHR was posed the hypothetical question as to whether, if he had thrown a torch at a fleeing offender, he had a duty to tell his superior that he had used the torch in that way and that he should immediately report this on his return to the police station. Officer ZHR responded: *“Well, you should do, yes, especially if it’s required an ambulance. As I said, if it was a case the young person ran away and fell over and scratched his knees, it would be something I’d mention; may not be recorded as a use of force. But throwing a torch at somebody, ...that is a use of force.”*¹⁰¹

⁹⁷ Transcript of private examination, 30 November 2022, Officer ZHR at T31.

⁹⁸ Transcript of private examination, 30 November 2022, Officer ZHR at T31-32.

⁹⁹ Transcript of private examination, 30 November 2022, Officer ZHR, at T33.

¹⁰⁰ Transcript of private examination, 30 November 2022, Officer ZHR, at T33.

¹⁰¹ Transcript of private examination, 30 November 2022, Officer ZHR, at T34.

Other Evidence Obtained

3.107 The Commission issued several notices pursuant to s 55 of the LECC Act seeking further documentation, including:

- An audit of the BWV cameras system signed out to Officers MKJ, ZDA, LPY and DMK between 18 November 2020 and 23 November 2020
- NSWPF training material in relation to use of BWV
- Police notebooks of Officers MKJ, ZDA, LPY, DMK and ZHR for the relevant period.

3.108 The Commission obtained information that on 20 November 2020 BWV cameras were signed out to Officers MKJ and ZDA. Officer MKJ activated his camera during his shift, with the last activation ending at 12.10.16am. Officer ZDA did not activate his body worn video at all during his shift.

3.109 The NSWPF also provided a copy of their BWV training.

3.110 In addition, the Commission sought a report from the NSWPF Operational Safety Training and Governance Command seeking an opinion as to whether the use of a police torch thrown at a fleeing suspect with the intention of tripping them up was reasonable in the circumstances and whether the use of a torch for that purpose could ever be reasonable.

3.111 The report in response (received on 15 December 2022) noted that “*each individual officer is responsible for their own action and they should understand that any level of force used must be reasonable and proportionate to the perceived level of resistance met*”. The author of the report noted that the action performed by the police officer (throwing a torch) was not a taught technique delivered by the NSWPF and opined, that on the limited information provided, they could not offer any comment as to whether the use of force was reasonable in the circumstances described. However, they considered that the technique employed was not likely to be effective based on the use of a small pelican torch, the speed at which both the police officer and the young person were moving and the ability to throw anything with accuracy whilst running. It was unlikely to achieve the desired outcome of preventing the young person running away.

4. Excessive Use of Force – The Law

4.1 In considering the exercise of police powers, it is appropriate to keep in mind that each member of the NSWPF is to act in a manner which places integrity above all, upholds the rule of law, preserves the rights and freedoms of individuals and ensures that authority is exercised responsibly.¹⁰²

¹⁰² Sections 7(a), (b), (c) and (h) *Police Act 1990*.

- 4.2 It is a recognised aspect of policing that physical force may need to be used from time to time during interaction with members of the public in the discharge of duties of a police officer. A special law provides for this and that law is expressed in general terms.
- 4.3 Section 230 LEPRA makes it lawful for a police officer in the execution of his duty to use such force as is “*reasonably necessary*” to exercise the function.
- 4.4 Section 231 LEPRA provides that a police officer who exercises a power to arrest another person may use such force as is “*reasonably necessary*” to make the arrest or to prevent the escape of the person after arrest.
- 4.5 The question whether the use of force exercised by a police officer was “*reasonably necessary*” was considered recently by Ierace J who concluded that:¹⁰³
- “...the term “reasonably necessary” in s 230 is to be understood as incorporating the common law test. I find that the objective test is as stated in R v Turner¹⁰⁴ and quoted with approval by Heydon JA in Woodley v Boyd,¹⁰⁵ which is to this effect when appropriately modified for the purposes of s 230: whether a reasonable person in the position of the police officer would not consider the use of force disproportionate to the risk or danger sought to be prevented.”*
- 4.6 An associated issue is the power of a police officer to arrest a person under s 99 LEPRA.
- 4.7 In the context of the police conduct in this matter, the Commission must consider the following when determining whether reasonable force was exercised by police officers during their interaction with Civilian ILZ:
1. Did the officer ‘*reasonably believe*’ that the force that they exercised was necessary, and
 2. Would a reasonable person in the same position as the officer believe that such force was proportionate to the suspect’s actions?
- 4.8 The present case is unusual. The more common scenario concerning alleged excessive use of force arises from the use of OC Spray, a Taser, or a firearm, or direct manual use of force.
- 4.9 Here, the use of force under consideration involves Officer ZDA throwing an object (a torch) at a 16-year-old Aboriginal youth who was moving away from the police officer. The stated purpose was to strike the leg or legs of the youth to bring him down with the intention of effecting an arrest. The

¹⁰³ DPP v Greenhalgh [2022] NSWSC 980 at [186].

¹⁰⁴ R v Turner [1962] VR 30.

¹⁰⁵ Woodley v Boyd [2001] NSWCA 35.

torch struck the youth's head with sufficient force to cause a cut to the head. Officer ZDA did not assert he was acting in self-defence. The youth was moving away from the police officer. Nor did Officer ZDA assert a belief or suspicion that the youth was in some way armed. He acknowledged that there were elements of anger and frustration which contributed to his conduct.

- 4.10 To throw an object at a person is capable of constituting an assault unless there is a lawful excuse for so acting. Where injury is caused to the person, the act may constitute an offence of assault occasioning actual bodily harm under s 59 *Crimes Act 1900*. The injury sustained by the youth in this case is capable of constituting "*actual bodily harm*".¹⁰⁶
- 4.11 Was it "*reasonably necessary*" for Officer ZDA to use this degree of force against Civilian ILZ in the circumstances that existed on the night?
- 4.12 It will be necessary to return to the question of use of force by a police officer in the course of an arrest after considering and assessing the evidence in the present case.

5. Analysis of Evidence

- 5.1 The circumstances leading up to the arrest of Civilian ILZ in the early hours of 21 November 2020 are not in dispute. The officers gave similar accounts as to the events of 20 November 2020 and leading into the early hours of 21 November 2020. In summary, the police had received several reports from members of the public, raising concerns about several young persons who had congregated at Charlestown Square and were engaging in anti-social behaviour. That behaviour included running in and out of moving traffic and assaulting passers-by. Reports indicated that one person had been seriously assaulted and had been taken to hospital to have his injuries treated. Information had also been conveyed to police officers that the assault victim may also have had his wallet and mobile phone stolen during the assault. Another person had apparently been assaulted in the car park at the centre. Those reports had been despatched over the radio and Officer ZHR had arrived first on the scene, essentially making him the officer in charge of the event.
- 5.2 Charlestown Square had been identified as a hot spot following a serious incident in 2015 to which Officer ZDA made reference in his evidence. Accordingly, there was usually a police presence there, including on a user pays basis. (The Commission understands that this is a reference to circumstances warranting the NSWPF charging fees to clients for the benefit of their services.)¹⁰⁷ Officer ZHR was assigned to the Summersafe Operation which targeted youth anti-social behaviour around public areas, including Charlestown Square and the skate park.

¹⁰⁶ *McIntyre v R* [2009] NSWCCA 305; 198 A Crim R 549 at [44].

¹⁰⁷ Sections 208-211 *Police Act 1990*; Clause 144 *Police Regulation 2015*.

- 5.3 The Commission will consider the evidence of Officers ZDA, MKJ and ZHR in greater detail below.
- 5.4 Officer DMK was called before the Commission following the evidence of Civilian ILZ and Civilian YSL that a female officer was present for some of the time of Civilian ILZ's arrest. They did not know the identity of that female officer. Upon review of the staff rosters for the evening shift of 20 November 2020, the Commission formed the view that it may have been Officer DMK. However, following Officer DMK's evidence, the Commission is satisfied that she was not present at any time during the police interaction with Civilian ILZ. The CAD data verifies that at about the same time as the arrest of Civilian ILZ, Officer DMK was in a nearby location effecting the arrest of another person. Her evidence, did not, therefore, further the Commission's investigation of whether the conduct of any of the police officers involved in their interaction with Civilian ILZ amounted to serious police misconduct.
- 5.5 Officer LPY had little or no recollection of the events of that evening. His evidence did not assist the Commission's investigation.

Officer ZDA's interaction with Civilian ILZ

- 5.6 Following on from the reports of assaults and a possible robbery and the dissemination of the still photographs of potential offenders captured on CCTV, police were on duty in the area searching for those persons. Officer ZDA happened upon Civilian ILZ whom he recognised from the still because of his distinctive blue cap.
- 5.7 BWV had been signed out to Officer ZDA for his shift. The BWV was not activated at all by Officer ZDA during the shift. Despite the non-use of BWV, the Commission finds that Officer ZDA was carrying the BWV when he encountered Civilian ILZ. It was available to be used if Officer ZDA saw fit to do so.
- 5.8 The accounts of what occurred next differ in some detail but overall are very similar. Officer ZDA recalled Civilian ILZ standing near the bus stop but not sitting down. Civilian ILZ and Civilian YSL say they were sitting down and that Civilian ILZ only stood up when Officer ZDA approached him in an aggressive manner. Not much turns on whether they were sitting down or standing up and it is unnecessary for the Commission to make a finding on this aspect.
- 5.9 Both Civilian ILZ and Civilian YSL said that Officer ZDA used offensive language when approaching them and that they perceived his manner as hostile. Officer ZDA denied that he used the words "*come here cunt*" and that he simply said "*come here*" several times. Civilian ILZ and Civilian YSL gave persuasive accounts of their recollection of events, including what was said and the manner in which it was said. Whilst they had similar accounts, there were also differences which is to be expected,

particularly given the lapse of time since the incident. The Commission found their evidence reliable and credible.

- 5.10 On the issue of whether offensive language was used by Officer ZDA, the Commission prefers the evidence of Civilian ILZ and Civilian YSL to that of Officer ZDA. The Commission is satisfied that Officer ZDA used offensive language towards Civilian ILZ and that Civilian ILZ, who was only 16 at the time, took flight through fear as Officer ZDA approached him in an aggressive manner.
- 5.11 Civilian YSL gave unequivocal evidence that she saw a police officer, whose identity was unknown to her, throw a torch at and strike Civilian ILZ in the back of the head. Civilian ILZ clearly recollected being hit in the back of the head with an object which he then saw lying at his feet and which he recognised as a torch.
- 5.12 During her examination, Civilian YSL identified the officer captured by her in the mobile phone footage arresting Civilian ILZ (Officer MKJ) as the officer who engaged in the foot pursuit with Civilian ILZ and who threw the torch. The Commission finds that Civilian YSL was mistaken and prefers the evidence of Civilian ILZ, who identified the officer who pursued him on foot as the one who threw the torch and that it was not Officer MKJ, as he knew who Officer MKJ was from his attendance at the Halloween party incident.
- 5.13 The Commission notes, that at the time of the incident and the making of the complaint, the identity of the police officer who had thrown the torch was unknown. There was no available BWV, CCTV or mobile phone footage of that incident. The COPS Event did not assist in identifying the officer. The closest the COPS Event came to recording any interaction between police officers and Civilian ILZ was the entry on page 3:
- “CIVILIAN ILZ
CNI 743874043
Caucasian wearing blue cap black CK t shirt, black shorts black shoes.
Stopped later the same night by [Officer MKJ] and [Officer ZDA]”*
- 5.14 This was an inadequate and incomplete record of the interaction police officers had with Civilian ILZ. During the course of the Commission investigation, Officer ZDA was identified as the police officer who had most likely thrown the torch but otherwise it did not have sufficient information on which to make an informed finding as to which police officer threw the torch. This was the position until Officer ZDA admitted (with the benefit of a s 75 declaration) that he had thrown the torch at Civilian ILZ.
- 5.15 As noted earlier, the Commission is satisfied that Officer ZDA was carrying a BWV camera at the time of the incident. However, Officer ZDA demonstrated in evidence his disinterest in the use of BWV with practical problems being advanced by him as an excuse for not using BWV.

5.16 In a recent public hearing in Operation Mantus, Assistant Commissioner Crandell was asked about the use of BWV:¹⁰⁸

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

A. No, not at all .

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

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

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

A. Yes.

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

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

Q. What the courts have certainly recognised, and I'm sure many in the field would recognise, is that what in the past were often protracted court hearings involving incidents with people where charges may be laid for offensive conduct, resist arrest, assault police, et cetera, and you might find several police officers and possibly several witnesses on the defence side giving evidence with a magistrate usually, being called upon to sort out and

¹⁰⁸ Operation Mantus, Public Hearing Transcript, 4 April 2023 at T104-106.

make findings, that rather protracted scenario can be, if not avoided completely, certainly greatly assisted by contemporary film evidence of what happens?

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

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

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

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

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

- 5.17 The Commission does not accept the evidence of Officer ZDA concerning suggested problems with the use of BWV. There was a proper opportunity for him to activate the BWV to capture the incident from the time that he first approached Civilian ILZ. It was Officer ZDA's evidence that he intended to arrest Civilian ILZ for robbery. It was especially important to use BWV as there was no other police officer present to witness the incident.
- 5.18 The failure of Officer ZDA to activate BWV was compounded further by his failure to report and record his use of force against the youth which caused injury, as Officer ZDA well knew.
- 5.19 There was a fundamental failure on the part of Officer ZDA to report and record his own use of force that evening in circumstances where there was no other police witness and no documentary record of what he did. Taken with the use of force itself, these were grave failures on his part.
- 5.20 Evidence of use of force came ultimately from Officer ZDA, who admitted in evidence with the benefit of a s 75 declaration, that he threw the torch and that it struck Civilian ILZ on the back of his head.
- 5.21 Civilian ILZ stated that the injury to his head was caused by the torch thrown by the police officer. Officer ZDA agreed that it was most likely that he had caused Civilian ILZ's injury. The Commission is satisfied on the available evidence to the requisite standard that Civilian ILZ's injury was caused by Officer ZDA.
- 5.22 Officer ZDA expressed the view that his conduct in throwing the torch was appropriate in the circumstances. He realised that he could not catch Civilian ILZ who was much younger and faster and so threw the torch with the intention of tripping him up for the purpose of arresting him.

- 5.23 The use of force expert report provided by the NSWPF (on 15 December 2022) confirmed that throwing a torch as a projectile was not a taught technique. It noted that this did not, taken alone, render it an unreasonable or excessive use of force and that much depended upon the specific circumstances. However, the author of the report also opined that throwing the torch in the circumstances described was unlikely to achieve the desired outcome of stopping the young person as he was running away.
- 5.24 Would a reasonable person in the same position as Officer ZDA believe that such force was proportionate to Civilian ILZ's actions? Civilian ILZ had been sitting down waiting for a bus when approached by Officer ZDA. There was no information suggesting that Civilian ILZ was armed with a weapon or that he posed any immediate threat to himself or anyone else. Officer ZDA conceded during his evidence that he threw the torch in "*frustration and anger*" and that he was "*annoyed*" at the situation. Police officers are trained to respond to situations appropriately and proportionately. Feeling frustrated or annoyed is not a justification for an unreasonable use of force. It is not appropriate or lawful under ss 230 and 231 of LEPRA to use force against a person for punitive purposes.
- 5.25 Officer ZDA's use of the torch as a projectile in an attempt to apprehend Civilian ILZ, a 16-year-old Aboriginal youth, was not proportionate to Civilian ILZ's actions nor was it appropriate. At the very least it was reckless, indiscriminate and without thought as to possible consequences, including the risk of serious injury. The Commission is of the view that it was an unreasonable use of force by a police officer who at the time had over 12 years' experience in the job.
- 5.26 In so far as Officer ZDA said that he intended to arrest Civilian ILZ for robbery, it is pertinent to observe that Civilian ILZ was released without charge as described by Officer MKJ. Civilian ILZ has not been charged with any offence arising from events on the evening of 20-21 November 2020.

Officer MKJ's interaction with Civilian ILZ

- 5.27 Officer MKJ was on his own when he apprehended Civilian ILZ, who was in the company of Civilian YSL. He was aware that Civilian ILZ had fled from police shortly prior to his capture. He was in a dark alley and he was unsure whether others from the group were with Civilian ILZ. The NSWPF Handbook instructs police officers that the decision to handcuff rests with them and that officer safety is paramount. Generally, the use of handcuffs is justified only when a person "*has tried to escape, or to prevent escape or injury to themselves or others.*"¹⁰⁹ Officer MKJ gave evidence that he

¹⁰⁹ NSWPF Handbook page 16.

handcuffed Civilian ILZ so that he could monitor him, Civilian YSL or anyone else who might be approaching.

- 5.28 Taking all the circumstances into account, the Commission is satisfied that the arrest of Civilian ILZ was lawful in accordance with s 99 LEPRA. Officer MKJ had a reasonable suspicion that Civilian ILZ may have been involved in an assault and robbery earlier that evening. Once he received confirmation that Civilian ILZ's clothing did not match those worn by the alleged offender, his arrest was discontinued in accordance with s 105 LEPRA and the handcuffs were removed. The Commission is satisfied that Civilian ILZ did not remain handcuffed any longer than was required or reasonable in the circumstances. As noted earlier, Civilian ILZ was not charged with any offence arising out of the events on this evening.
- 5.29 The Commission is also satisfied that Officer MKJ's use of handcuffs in the circumstances in which he found himself was appropriate and a reasonable use of force.¹¹⁰
- 5.30 The Commission is satisfied that Officer MKJ was unaware of how Civilian ILZ sustained his injury nor of Officer ZDA's involvement in the incident. He acknowledged that he should have followed up the COPS Event to ensure it accurately recorded his interaction with Civilian ILZ, including the use of handcuffs. The Commission does not find his conduct in failing to do so amounted to serious misconduct.
- 5.31 Civilian ILZ believed that an ambulance was not called to treat his injury but the Commission is satisfied that Officer MKJ requested an ambulance and then cancelled the request when Civilian ILZ decided to call a family member to come to collect him. This is supported by the CAD data which recorded the request for and subsequent cancellation of an ambulance.

Officer MKJ's interaction with Civilian YSL

- 5.32 Officer MKJ's interaction with Civilian YSL was inappropriate and unprofessional. Officer MKJ acknowledged that his language and conduct towards Civilian YSL, as captured in the mobile phone footage, was unprofessional. At the point in time of searching Civilian ILZ, Officer MKJ was of the understanding that a robbery of a phone and wallet had taken place and accordingly the identification of the legitimate owner of those items was necessary to rule out their relevance to any crime, such as a robbery. Civilian YSL can be seen in the mobile phone footage approaching Officer MKJ and picking up items placed on the ground by Officer MKJ, including a mobile phone, which she promptly placed back down after being told by him to leave those items alone.
- 5.33 The Commission accepts that the stressful circumstances in which Officer MKJ found himself, Civilian YSL's actions in picking up items during the search, including a mobile phone, and his earlier interaction with Civilian

¹¹⁰ *Makri v State of New South Wales* [2015] NSWDC 131 at [136] to [142].

YSL at the Halloween party incident all contributed to his use of inappropriate language towards her. Whilst unprofessional, the Commission does not find it to be serious misconduct.

The COPS Event -What was reported to Officer ZHR as Officer-in-Charge

- 5.34 Officer ZHR had a detailed recollection of events. He was the officer in charge of the Charlestown Square event. He did not recall Officer ZDA informing him that he had thrown a torch at a young person hitting him in the back of the head and injuring him. Officer ZHR expressed surprise that this had occurred. The Commission found his reaction genuine and his evidence clear and cogent. The Commission is satisfied that Officer ZDA did not tell Officer ZHR, or indeed any police officer, that he had thrown a torch at Civilian ILZ. Had Officer ZHR so been told, the Commission is satisfied that he would have recorded it on the COPS Event in line with NSWPF guidelines for producing accurate and detailed Event Narratives.
- 5.35 The Commission is also satisfied that Officer ZHR was not told that Civilian ILZ had been detained and handcuffed for a period of time whilst inquiries were made as to the description of the alleged offender of the assault at Charlestown Square. Those details should have either been conveyed to Officer ZHR so that he recorded them in the COPS Event or alternatively added later into the COPS Event by Officer MKJ.

6. Submissions

- 6.1 Police officers who had given evidence in private examinations were provided, on a confidential basis, with the draft report of the Commission to enable submissions to be made with respect to its contents. At times, the Commission has adopted the practice of supplying a draft report to interested persons to provide procedural fairness to those persons and this practice operates as an important safeguard to ensure fairness and accuracy in the final published report.
- 6.2 Submissions made on behalf of Officer MKJ and Officer DMK were confined to the issue of publication of their names. Both sought that a pseudonym be used and the Commission has accepted those submissions.
- 6.3 The submissions made on behalf of Officer ZDA addressed both the draft findings and the pseudonym issue.
- 6.4 With respect to the evidence concerning the throwing of the torch, counsel for Officer ZDA submitted:
- “3) *In throwing the torch Officer ZDA’s intention was to trip Civilian ILZ, not hit him in the head. Given the information he had at the time, and when Civilian ILZ began to run, Officer ZDA believed the throwing of the torch (for the purpose of tripping) to be reasonable.*

4) *Upon reflection he agreed it could have been dealt with differently.”*

6.5 Counsel for Officer ZDA submitted that a finding of serious misconduct should not be made for the following reasons:

“1) *Although Civilian ILZ was moving away from a police officer, although it was a use of force beyond that which was reasonable, necessary, proportionate and appropriate to the circumstances, and although it was beyond a level of force that was reasonably necessary for the safe and effective performance of Officer ZDA’s duties, it does not amount to serious misconduct.*

2) *That’s because:*

a) *Although perhaps an unlikely outcome, there is no reason to reject Officer ZDA’s evidence that it was his genuine intention to trip Civilian ILZ.*

b) *In so doing Officer ZDA’s conduct was not calculated to injure Civilian ILZ. Although his conduct might be characterised as reckless, he did not wilfully and intentionally, or with any improper motive misconduct himself. His purpose, his objective, his intention was not to use excessive force.*

c) *Whilst the throwing of the torch resulting in Civilian ILZ’s head injury fell short of the conduct expected of a police officer in the execution of their duty, it not being Officer ZDA’s intention to cause Civilian ILZ any physical harm, his conduct does not warrant the severity of a finding of serious misconduct.”*

6.6 With respect to the evidence concerning failure to report use of force, Counsel for Officer ZDA submitted:

“1) *Officer ZDA agreed that the COPS narrative should have included a record of his throwing of a torch and of it causing Civilian ILZ to suffer an injury.*

2) *It being “two years down the track” Officer ZDA could not recall whether he had verbally forwarded the information to the officer in charge (T57.12). Having passed on any such information Officer ZDA was of the view that it was thereafter the responsibility of the officer in charge to record that information in the COPS narrative (T58.05; T59.11).*

3) *Officer ZHR, the officer in charge, said he did not recall being told that Officer ZDA had thrown a torch at Civilian ILZ and that as a result he had suffered a head injury. He said that if he were told such a thing he imagined he would remember it (LECC Draft Submissions at 3.102).”*

6.7 Counsel submitted as follows with respect to the failure to report:

- “1) Although Officer ZHR said that if he were told such a thing he “imagined” he would remember it, it does not follow that he was not told. There is on the evidence a reasonable possibility that he was told and that it was his failure to include such information that reasonably explains its absence in the COPS entry.
- 2) That possibility not having been excluded vitiates any finding of serious misconduct against Officer ZDA.”

6.8 The Commission has had regard to these submissions in reaching findings, opinions and recommendations in the report.

7. Findings

Officer ZDA

7.1 For the reasons noted earlier, the Commission is satisfied on the available evidence to the requisite standard that:

- Civilian ILZ’s injury to the head was caused by Officer ZDA.
- Officer ZDA’s use of the police torch as a projectile resulting in actual bodily harm to Civilian ILZ was an unreasonable use of force.
- Officer ZDA should have informed either the officer-in-charge or his supervisor of the use of the force and injury caused to Civilian ILZ and he failed to do so.

7.2 It is appropriate to return to the use of force issue flagged earlier concerning Officer ZDA.

7.3 The NSWPF has adopted the Use of Force Principles of the Australia New Zealand Policing Advisory Agency (ANZPAA) as a foundation when determining policy, procedures and guidance regarding use of force. The key ANZPAA Use of Force Principles are:

“The authority to use force is derived from the law.

- *Police should only use force that is reasonable, necessary, proportionate and appropriate to the circumstances.*
- *Police should use no more force than is reasonably necessary for the safe and effective performance of their duties.*
- *Individual police are accountable and responsible for their use of force and must be able to justify their actions at law.”*

7.4 The “underpinning principles” provide, amongst other things, that “police organisations should:

...

- *maintain governance structures to report, record, monitor, and evaluate the use of force to improve public and police safety.”*

7.5 Officer ZDA was accountable and responsible for his use of force. There was no other police witness who observed his use of force. He did not activate BWV to capture the event electronically and had no proper excuse for failing to do so. It is true that the use of BWV was, at that time, left to the judgment of the officer. That said, BWV was a valuable aid for use by operational uniformed police and this was a very clear situation where its use would serve the public interest and also constitute an actual contemporaneous electronic record of the use of force. The failure of Officer ZDA to utilise BWV to record his interaction with the young person was serious in the circumstances.

7.6 The then current *Body-Worn Video Camera Standard Operating Procedures* (Issued 1 July 2019) stated at paragraph 2.3:

“A police officer will activate their BWV camera when it is appropriate to do so. In making the decision to activate the BWV cameras a police officer will use their own judgement and take into account a number of factors including:

- *Officer safety and protection*
- *The need to capture evidence*
- *Accountability*
- *Community expectations*
- *Contentious situations*
- *Involvement of vulnerable people*
- *Protection for offenders and the community*
- *Any other relevant factors that exist”.*

7.7 There is no sign that Officer ZDA took into account these factors in considering his use of BWV. The evidence indicates his disinterest for this valuable facility. This is a disturbing feature of this investigation. Equally disturbing is the continuing disinterest of Officer ZDA in the use of BWV as reflected in his evidence before the Commission on 9 November 2022.

7.8 The use of force by Officer ZDA was unlawful. It was not “*reasonably necessary*” for the purpose of ss 230 and 231 LEPPA.

7.9 The primary obligation to record use of force lay with Officer ZDA. He had thrown the torch, injuring the young person, in the absence of any police witness. The rationale for recording use of force by a NSWPF officer was effectively subverted in this case. This was no technical omission on the part of Officer ZDA.

7.10 The Commission has considered submissions made for Officer ZDA concerning the throwing of the torch.¹¹¹ Those submissions focus upon

¹¹¹ See paragraphs 6.4 - 6.5 of the Report.

Officer ZDA's intention in throwing the torch. They do not address the test to be applied under ss 230 and 231 LEPPRA.¹¹² Officer ZDA threw the torch at Civilian ILZ which struck him on the head with sufficient force to cause injury. It was, in effect, an uncontrolled throw of a weighty object which struck the head. That the torch struck Civilian ILZ's head supports an inference that the intended target was the head area and not the legs. The Commission finds that Officer ZDA was aiming for the head area of the young person when he threw the torch. Even if this conclusion was not reached, this was a highly reckless use of a heavy object as a projectile or weapon. This was a clear assault which was neither reasonable nor necessary. An intention to cause harm is not required for an offence of assault occasioning actual bodily harm.

7.11 Officer ZDA's conduct in throwing the torch constitutes serious misconduct. It does so as it:

(a) is conduct of a police officer that could result in prosecution of the officer for a serious offence,¹¹³ and also

(b) is conduct of a police officer that could result in serious disciplinary action.¹¹⁴

7.12 The Commission has considered submissions made for Officer ZDA concerning failure to report his use of force.¹¹⁵ The Commission accepts the evidence of Officer ZHR that if extraordinary conduct of this type had been reported to him, he would have both recalled and recorded it.

7.13 It was Officer ZDA who had used force in throwing the torch and injuring Civilian ILZ. He bore the responsibility to record his use of force which took place in the absence of any police officer witness. The Commission is satisfied that Officer ZDA did not disclose his use of force until he gave evidence before the Commission. He intentionally withheld this information as it served his interests to do so.

7.14 Officer ZDA's failure to report his use of force constitutes serious misconduct as it is conduct of a police officer that could result in serious disciplinary action.¹¹⁶

7.15 The Commission finds that Officer ZDA's conduct in:

- throwing a torch at Civilian ILZ resulting in a head injury
- failing to report this conduct to the officer-in-charge and/or his supervisor

amounts to serious misconduct.

¹¹² See paragraph 4.5 of the Report.

¹¹³ Section 10(1)(a) LECC Act.

¹¹⁴ Section 10(1)(b) LECC Act.

¹¹⁵ See paragraphs 6.6 - 6.7 of the Report.

¹¹⁶ Section 10(1)(b) LECC Act.

Officer MKJ

- 7.16 The Commission is satisfied that the arrest of Civilian ILZ by Officer MKJ was lawful and the use of handcuffs in the circumstances described earlier was an appropriate use of force. The arrest was discontinued in accordance with s 205 LEPRA as soon as it was clear that there was no proper basis to continue the arrest.
- 7.17 Officer MKJ's conduct towards Civilian YSL, whilst it fell short of the conduct expected from a police officer in the execution of their duty, did not amount to serious misconduct.
- 7.18 The evidence does not support a finding of serious misconduct against Officer MKJ.

COPS Event

- 7.19 The Commission finds the COPS Event recording the interactions police had with Civilian ILZ fell well below what was required and did not comply with the NSWPF Policy and procedure.
- 7.20 The responsibility for this lies with Officer ZDA. He had used force and caused injury to a 16-year-old Aboriginal youth. He was the only police officer who was in a position to record what had happened.
- 7.21 The NSWPF Handbook instructs officers that it is mandatory to record use of force in COPS events and that this is in keeping with the ANZPAA's *Use of Force Guiding Principles*.
- 7.22 The NSWPF Crime Recording Standard instructs police officers that event narratives "*should be clear, concise, in chronological order and contain sufficient detail to describe the circumstances of the matter.*" Where police powers or discretion are exercised, "*it is essential that sufficient information is provided in the Event Narrative to justify the exercise of the discretion.*"¹¹⁷ Relevantly, it informs police officers that event narratives are utilised by a number of external parties and "*it is important that the information contained in Event Narratives is relevant, accurate, and capable of withstanding external security.*"¹¹⁸
- 7.23 On 21 November 2020, a young person who identified as Aboriginal was:
- arrested
 - handcuffed
 - detained in the back of a police vehicle for a period of time
 - injured by a police officer during his interaction with police
 - subsequently unarrested (the arrest being discontinued).

¹¹⁷ State Intelligence Command NSWPF Crime Recording Standard, p 48.

¹¹⁸ State Intelligence Command NSWPF Crime Recording Standard, p 49.

- 7.24 Not one of those details was recorded on the COPS Event. Every single one should have been. The Commission is concerned by the failure of police officers to adequately record relevant and important details, including use of force. The inconsistent views between the police officers who gave evidence as to who was responsible for ensuring the COPS Event accurately contained all relevant and important details are of significant concern to the Commission.
- 7.25 Officer ZDA expressed the view that once he had passed on all the pertinent information to the officer-in-charge he no longer had any involvement or responsibility in the matter. As noted earlier, the Commission does not accept that Officer ZDA informed any other police officer about the use of force in this case. He intentionally withheld that information to serve his own purposes.
- 7.26 Officer MKJ, on the other hand, accepted responsibility that he should have checked the COPS Event and updated it if information was missing.
- 7.27 The evidence suggests that there are deficiencies in police practices concerning the creation of COPS Events, what information should be recorded in those events and (where several police officers are involved) which officer is ultimately responsible for ensuring the accuracy of the event.
- 7.28 Earlier this year, the Commission furnished its Report on NSWPF Use of Force Reporting¹¹⁹ in which the Commission found, *inter alia*:
- Widespread inconsistencies in record keeping
 - Under-reporting of the use of force
 - At least 1 error in 73% of reviewed records
 - Gaps in policies and training.
- 7.29 The Report made 11 recommendations to the NSWPF to help improve instructions to officers about what should be reported and when and in relation to training about recording use of force. The NSWPF supported the majority of the recommendations and undertook to develop new policy, guidelines and training about how officers should record and verify use of force. The Commission will monitor progress on this work.
- 7.30 The present investigation provides a further illustration of such a failure and the serious consequences which may flow from a failure to record this important information. These requirements are not mere technical rules requiring the completion of paperwork or “*box-ticking*”. The rules have real importance for day to day operational policing and are a fundamental measure for the NSWPF (and its officers) taking responsibility and being accountable for actions of police officers.

¹¹⁹ The Commission Report: *Review of NSW Police Force Use of Force Reporting*, furnished to NSW Parliament on 21 February 2023.

BWV

- 7.31 The Commission finds that there continues to be an inconsistent approach amongst police officers as to the use and activation of BWV.
- 7.32 As noted earlier, at the time of the incident with Civilian ILZ, the *Body-Worn Video Camera Standard Operating Procedure* (SOP) did not mandate police officers to wear BWV when out in the field.¹²⁰ That SOP was updated in November 2021¹²¹ and it instructed that “*all police officers wearing police uniform, whilst engaged in duties of operational response, must, where practicable, wear as part of their uniform, a BWV camera for use in accordance with these SOPs.*” Then NSWPF Commissioner Fuller’s foreword to those SOPs was direct and couched in strong language. The Commissioner noted that “*mandatory wearing and early activation will protect the overriding integrity of operational policing activity. Results already show significant outcomes of protection for operational police officers and the delivery of exceptional evidence to judicial officers in courts throughout NSW*”.
- 7.33 Version 2.5 of the “*Body-Worn Video Standard Operating Procedures*” issued in November 2022 with the Foreword of Commissioner Webb included the following:
- “As an officer of the NSW Police Force (NSWPF), you are provided equipment and training to achieve a safer NSW, which includes the protection of people from harm and property from damage. The introduction of body-worn video (BWV) cameras has enhanced our collective capability to reliably record incidents and obtain accurate evidence.*
- With this capability comes high expectations of professional police behaviour, including requirements to wear BWV cameras on a mandatory basis, where practicable, when operationally deployed in uniform to perform a response policing role.*
- Activation of BWV cameras is required when circumstances to commence recording are anticipated, evolving, or actually occurring. In addition to ensuring early activation, a BWV recording should only be deactivated when all relevant material, including interactions and evidence, has been captured and the incident has concluded. Capturing reasons for deactivation is as important as determining early activation.”*
- 7.34 Version 2.6 of the “*Body-Worn Video Standard Operating Procedures*” was issued in April 2023 with an amendment limited to one area not relevant to this investigation.

¹²⁰ NSWPF *Body-Worn Video Camera Standard Operating Procedure*, version 2.2 May 2019, Education and Training Command.

¹²¹ NSWPF *Body-Worn Video Standard Operation Procedures*, version 2.4 November 2021, State Intelligence Command.

- 7.35 The police officers who appeared before the Commission in relation to this investigation had differing attitudes and practices in relation to BWV.
- 7.36 Officer MKJ thought it was a “*great tool*” and had made it a practice to wear BWV even prior to it becoming mandatory. On the night of his interaction with Civilian ILZ he had signed out a BWV and had activated it during his shift. He was not wearing it during his interaction with Civilian ILZ. He gave as a possible explanation for this that close to the end of his shift he had returned to the station and most likely had placed the BWV in its dock for uploading onto the system. He was then called back out into the field and as it was uploading, he would not have been able to take it out again.
- 7.37 Officer DMK indicated that following the change in NSWPF policy requiring the wearing of BWV, she now wore it always and she activated it in most jobs, “*anything from a domestic to speaking to people.*”
- 7.38 Officer ZHR could see the advantages of using BWV and he used it quite often.
- 7.39 These attitudes can be contrasted with those of Officer ZDA and Officer LPY. Officer ZDA indicated that he was of the understanding that it was acceptable if he decided not to use his BWV at all during a shift and that there were shifts when he was out in the field when he did not activate it at all. The shift on 20-21 November 2020 serves to illustrate his non-use of BWV even though the equipment had been signed out to him. He indicated that it was a “*bit of a process*” to activate the camera. The Commission notes that other officers did not encounter any difficulties with operating BWV effectively and that evidence of Assistant Commissioner Crandell (referred to earlier) does not support this view.
- 7.40 Officer LPY stated that whilst he wore his BWV when out in the field, as it was mandatory, he rarely activated it. He was “*not a fan*” of turning it on straight away and he was resistant to doing so as he had seen other officers disciplined for things captured on video.¹²²
- 7.41 The Commission is concerned with any police officer choosing not to activate BWV. This level of concern is magnified with officers of a higher rank. Officer ZDA, at the rank of Sergeant, has a duty to provide guidance and supervision to more junior officers, who would seek to learn from their superior. The importance of BWV cannot be overstated. The NSWPF should ensure that there is a consistent approach adopted as to its use and that more senior police officers appropriately encourage and promote the use of body worn video cameras in accordance with the SOPs.

¹²² Transcript of private examination, 30 November 2022, Officer LPY, at T29.

8. Affected Persons

- 8.1 In Appendix 1 to this Report the Commission set out the provisions of s 133 LECC Act dealing with the content of reports to Parliament. Subsections (2), (3) and (4) relate to “*affected persons*”.
- 8.2 The Commission is of the opinion that Officer MKJ is an affected person within the meaning of s133(3), being a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of the investigation.
- 8.3 The Commission is of the opinion that Officer ZDA is an affected person within the meaning of s133(3), being a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of the investigation.

Consideration of Affected Persons Under s 133(2) LECC Act

- 8.4 Section 133(1) authorises the Commission to include in a s 132 report statements as to any findings, opinions and recommendations of the Commission together with statements of the Commission’s reasons for any findings, opinions and recommendations.
- 8.5 Section 133(2) requires the Commission to include in a report, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given (relevantly) to the following:
- (a) obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence;
 - (b) the taking of action against the person for a specified disciplinary infringement;
 - (c) the taking of action including the making of an order under s 181D *Police Act 1990* against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the police officer;
 - (d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.
- 8.6 Section 133(2)(e) concerns the taking of action against a Crime Commission officer or an administrative employee and is not relevant to the present investigation.
- 8.7 Some observations should be made about the various steps contained in s 133(2).

- 8.8 Firstly, it is mandatory that the Commission give consideration to such measures in s 133(2) as may be relevant to the particular affected person. In the present case, s 133(2)(e) has no application as only police officers are under consideration.
- 8.9 Secondly, in considering whether to obtain advice of the DPP under s 133(2)(a), it is necessary for the Commission to disregard evidence given under objection by the person being considered for referral. The evidence of that person is not admissible in any criminal proceedings against that person: ss 57, 74, 75 LECC Act. Evidence given under objection should not be provided to the DPP in the event of a s 133(2)(a) referral.¹²³ However, the evidence given under objection by one person may be taken into account by the Commission in determining whether another person should be referred to the DPP for advice as to prosecution under s 133(2)(a).¹²⁴
- 8.10 Thirdly, in considering whether a s 133(2)(b) recommendation ought be made, regard should be had to the definition of “*disciplinary infringement*” in s 4(1) LECC Act:
- “disciplinary infringement includes any misconduct, irregularity, neglect of duty, breach of discipline or substantial breach of a code of conduct or other matter that constitutes or may constitute grounds for disciplinary action under any law.”*
- 8.11 The term “*disciplinary infringement*” is used in ss 9 and 10 LECC Act. The Commissioner of Police may issue instructions to members of the NSWPF with respect to the management and control of the NSWPF.¹²⁵ Instructions to members of the NSWPF under s 8(4) *Police Act 1990* may include instructions and guidelines with respect to the exercise of police officers of functions conferred under LEPPRA.¹²⁶ The terms “*misconduct*”, “*neglect of duty*” and “*breach of discipline*” in the definition of “*disciplinary infringement*” are capable of picking up alleged breaches of Commissioner’s Instructions issued under the *Police Act 1990*.
- 8.12 Fourthly, the various steps in s 133(2) are not mutually exclusive. They are not expressed as alternatives although, as noted earlier, not all will be capable of application in a particular case. Clearly, s 133(2)(e) has no application in the case of a police officer.
- 8.13 Fifthly, the Commission is not bound to select one or other of the steps contained in s 133(2)(c) and (d). They are not expressed as alternatives. In some cases, a s 133(2)(c) recommendation for action under s 181D *Police Act 1990* may be the clear course of action to be recommended. In other cases, action under s 173 *Police Act 1990* may seem the clearly

¹²³ *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 at [24], [86]-[87], [124]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 at [54], [163]; *Strickland (a Pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53 at [75]-[80].

¹²⁴ Section 74(5)(d) LECC Act.

¹²⁵ Section 8(4) *Police Act 1990*.

¹²⁶ Section 237(1) LEPPRA.

appropriate course to be recommended. There will undoubtedly be cases where factors may bear upon the exercise of judgment by the Commissioner of Police in the choice between s 181D or s 173 action, and those factors may not be fully known to the Commission. Reviewable action under s 173 *Police Act 1990* involves more serious disciplinary action falling short of dismissal from the NSWPF.

- 8.14 It is open to the Commission under s 133(2) to state that consideration be given to the taking of action under s 181D or s 173 with an opinion being expressed that one of these steps is supported more strongly than the other. The Commission's reasons given under s 133(1)(b) will explain the thought processes which have led to the s 133(2) steps being addressed in this way.
- 8.15 Sixthly, it is necessary to keep in mind the statutory scheme for responding to Commission reports. Section 146(1) LECC Act provides that the Commissioner of Police, as soon as practicable after receiving a Commission report, must notify the Commission of "*the nature of the action taken, or to be taken, as a result of the report*". This obligation relates to recommendations made in a report including (in the case of a police officer) statements made under s 133(2)(b), (c), or (d). Section 146(2) makes clear that both the Commissioner of Police and the Commission are obliged to take timely action with respect to recommendations and s 133 statements in Commission reports. If there is disagreement between the Commissioner of Police and the Commission the matter may be taken up with the Minister for Police and Counter-terrorism under s 146(3) and (4). The issue may be made subject of a Commission special report under s 138: s 146(5) LECC Act. In these ways, the statutory scheme in s 146 requires timely attention to be given and action taken arising from a Commission report.
- 8.16 Because of s 146, it should not be taken that the Commission reaches the end of its statutory processes with the issue of a report. The public interest is served by a process of timely consideration and appropriate action being taken arising from a Commission report. This statutory feature is an important point of distinction between a standing investigatory body (such as the Commission) and an ad hoc Royal Commission appointed under the *Royal Commissions Act 1923*, whose functions are spent once a report is provided by the Royal Commission to the Government of the day and its commission has expired.¹²⁷
- 8.17 There is an expectation that the NSWPF and the Commission should work collaboratively with respect to, amongst other things, the education of police officers about police misconduct and the support and promotion of initiatives of the NSWPF directed at the prevention and elimination of such misconduct.¹²⁸

¹²⁷ "*Royal Commissions: Law and Practice*" C. Jacobi and S. Newman, Thomson Reuters, 2022 paragraph [10.85].

¹²⁸ Section 6A(1) *Police Act 1990*; s 3(e) LECC Act.

8.18 Against this background, it is appropriate to turn to the circumstances of the present investigation.

Section 133 Consideration Concerning Officer ZDA

8.19 Findings have been made earlier in this Report that Officer ZDA had engaged in serious misconduct by his unlawful use of force against a 16-year-old Aboriginal youth and his failure to record his use of force (which caused injury) in accordance with NSWPF instructions. Conduct of this type constitutes an assault and breaches of Commissioner's instructions issued under s 8(4) *Police Act 1990* and s 237 LEPPRA.

8.20 Although the use of BWV was not mandatory as at November 2020, the failure of Officer ZDA to activate his BWV to record his interaction with the young person was a significant discretionary omission which served to magnify the gravity of his actions (or inaction) which has given rise to a finding of serious misconduct.

8.21 A consequence of all these matters was that the identity of the police officer who threw the torch at the young person was not known until Officer ZDA gave evidence before the Commission on 9 November 2022 (with the benefit of a s 75 declaration).

8.22 But for the exercise of investigatory powers by the Commission, the identity of the officer who threw the torch would still not be known. This aspect demonstrates the importance and utility of the exercise of the Commission's powers. However, the evidence of Officer ZDA, given with the protection of a s 75 LECC Act declaration, cannot be taken into account when considering referral to the DPP under s 133(2)(a). The evidence can be taken into account for the purpose of possible disciplinary action under s 133(2)(b), (c), and (d).¹²⁹

Consideration of Referral to the DPP

8.23 Consideration of possible referral to the DPP under s 133(2)(a) requires attention to be given to the evidence of Civilian ILZ and Civilian YSL and other available evidence (excluding that of Officer ZDA). Civilian YSL saw the torch throwing incident but identified Officer MKJ as the thrower. Her mistaken identification should not be subjected to criticism in circumstances where this was a fast-moving incident at night time. Civilian ILZ was looking the other way when the torch was thrown. He did not know the police officer who had spoken to him before he commenced to run away. His original account was that Civilian YSL told him what had happened with the torch. For understandable reasons, his evidence does not provide any clear identification of Officer ZDA as the thrower. Beyond those persons, the Commission is left with the evidence of police officers and police records which may constitute circumstantial evidence of

¹²⁹ Section 74 (3), (4) and (5) LECC Act.

Officer ZDA's involvement. There were several police officers responding to the events at Charlestown Square. Officer MKJ identified Officer ZDA as the police officer who arrived after Officer MKJ had arrested Civilian ILZ. The CAD data includes messages sent by Officer ZDA, but these do not contain any clear admission or incriminating statement.

- 8.24 Of the elements of the offence of assault occasioning actual bodily harm under s 59 *Crimes Act 1900*, the live and critical issue for present purposes is whether there is evidence that Officer ZDA threw the torch. There is evidence to the contrary from Civilian YSL and unsatisfactory evidence from Civilian ILZ. There is some other evidence which goes towards a circumstantial case that Officer ZDA was the torch thrower.
- 8.25 In determining whether to refer the matter to the DPP under s 133(2)(a), the Commission should consider the available legally admissible evidence. It remains a matter for the DPP to apply the DPP Prosecution Guidelines if a referral is made.
- 8.26 In circumstances where the taking of disciplinary action by the Commissioner of Police is to be recommended under s 133(2)(b), (c), or (d), the Commission will keep in mind the desirability of such action being considered as soon as practicable. This aspect is important by operation of s 146 LECC Act and the expectation that the Commissioner of Police will give prompt consideration to possible disciplinary action.
- 8.27 Section 133(2)(b), (c), or (d) action is separate from a referral to the DPP under s 133(2)(a). If referral to the DPP is made, the Commissioner of Police should not delay the taking of any necessary action under s 133(2)(b), (c), or (d) until the DPP's advice is known.
- 8.28 In the present case, there is no admissible direct evidence which points to Officer ZDA as the torch thrower. Indeed, some direct evidence identifies a different police officer in this respect. Beyond that, there is a fragile circumstantial case which is open to significant challenge.
- 8.29 There is insufficient admissible evidence to warrant referral of the matter to the DPP.
- 8.30 For these reasons, the Commission states under s 133(2)(a) that it is not of the opinion that consideration should be given to obtaining the advice of the DPP concerning the possible prosecution of Officer ZDA.

Consideration of Disciplinary Action

- 8.31 There is a public interest in early consideration being given to the disciplinary and employment consequences of the police officer by way of recommendations made under s 133(2)(b), (c), or (d).
- 8.32 Having regard to the totality of the evidence, including that of Officer ZDA, the Commission is of the opinion, for the purposes of s 133(2)(b), (c)

and (d), that consideration should be given to disciplinary action against Officer ZDA. There is evidence to support “*disciplinary infringements*” on his part in the form of excessive and unlawful use of force causing injury to a 16-year-old Aboriginal youth and his serious failure to report or record his use of force causing injury to the youth. These significant breaches were compounded and aggravated by his failure to activate BWV to record his interaction with the youth. Officer ZDA’s evidence concerning the use of BWV, given in November 2022, reflected a disturbing attitude for a police officer with the responsibility for mentoring more junior officers in the exercise of their duties including the use of BWV in the interests of the community and the NSWPF.

8.33 This combination of matters is, in the Commission’s view, very serious and is sufficient to warrant consideration of action under s 181D *Police Act 1990*.

8.34 In the event that there were matters not known to the Commission which militated against the taking of s 181D action, there would be, in the Commission’s view, a powerful case for the taking of strong reviewable action under s 173 *Police Act 1990* with respect to Officer ZDA.

8.35 In considering an appropriate recommendation concerning disciplinary action for Officer ZDA, the Commission has taken into account submissions made on his behalf.

8.36 Counsel for Officer ZDA submitted:

“8. *The Commission in its draft report is of the opinion that an order under s181D of the Police Act 1990 be made. Such an order is made with a view to dismissing, dispensing with the services of, or otherwise terminating the services of Officer ZDA.*

9. *Having regard to the public interest, to the circumstances of Officer ZDA’s misconduct, and to his 14 year service with the NSW Police Force without prior complaint, a more appropriate course to be recommended is the taking of reviewable action within the meaning of s173 of the Police Act 1990, that involving disciplinary action falling short of dismissal from the NSW Police Force.”*

8.37 The factors relied upon concerning Officer ZDA’s service in the NSWPF are relevant to determination concerning disciplinary action. However, the combination of features disclosed by the conduct of Officer ZDA in assaulting Civilian ILZ causing him harm, his complete failure to report his use of force and his non-use of BWV reflect a degree of seriousness which call for consideration of his removal from the NSWPF under s 181D *Police Act 1990*.

Recommended Action Concerning Officer ZDA

- 8.38 In summary, the Commission states, with respect to Officer ZDA, that consideration:
- (a) should not be given under s 133(2)(a) to obtaining the advice of the DPP concerning a possible prosecution;
 - (b) should be given to taking disciplinary action under s 133(2)(b), s 133(2)(c) or s 133(d) in the form of action under s 181D or s 173 *Police Act 1990*.

Section 133 Consideration Concerning Officer MKJ

- 8.39 Although there have been certain criticisms made of the conduct of Officer MKJ, no finding of serious misconduct has been made.
- 8.40 Officer MKJ demonstrated a positive attitude to the use of BWV. In so far as his actions on the night of 20 November 2020 were unsatisfactory in several respects, Officer MKJ acknowledged readily that this was the case. He demonstrated significant insight in his evidence and has undoubtedly learned from his experience through the Commission's investigation.
- 8.41 Having regard to the evidence, the Commission expresses the opinion that consideration should not be given to the taking of action against Officer MKJ under s 133(2)(a), (b), (c) or (d) LECC Act.

9. Other Recommendations

BWV

- 9.1 This investigation has revealed ongoing and inconsistent practices and attitudes towards the wearing and use of BWV. These unsatisfactory aspects persisted in late 2022 despite the developing and increasingly strict and emphatic BWV SOP's which issued in 2021 and November 2022.
- 9.2 All police officers involved in this investigation were uniformed officers so that the BWV SOP's apply directly to them.
- 9.3 There is a continuing need for the NSWPF to emphasise with vigour and repetition, the community expectation that police officers will wear and activate on all appropriate occasions their BWV. This should be almost second nature now to operational police officers.
- 9.4 There is a powerful case for making the use of BWV mandatory.
- 9.5 There should be disciplinary consequences for officers who do not use BWV in the course of their duties in accordance with the BWV SOP's.

Other areas

- 9.6 The Commission repeats, with emphasis, the recommendations made in February 2023 in the Report concerning Use of Force Reporting. There have been continuing failures to record use of force as this investigation (and later incidents) have made clear to the Commission. There should be serious disciplinary consequences for officers who fail to record use of force.
- 9.7 The investigation has also revealed poor practices with respect to related issues involving the creation of COPS Events with incomplete records being made with (at least) a capacity to mislead concerning relevant events.
- 9.8 The Commission recommends that NSWPF training and ongoing refresher training address the importance of accurate completion of COPS Events with disciplinary consequences to follow in the event of failures to record accurate and complete COPS Events.
- 9.9 The Commission looks forward to the response by the Commissioner of Police under s 146 LECC Act to the recommendations contained in this Report, including notification of action taken, or to be taken, as a result of the Report.

Appendix 1 - The Commission's Statutory Functions

1. The *Law Enforcement Conduct Commission Act 2016* (the LECC Act) lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.
2. Section 9 of the LECC Act defines "police misconduct", "administrative employee misconduct" and "Crime Commission Officer misconduct":

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

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

- (a) whether or not it also involves participants who are not police officers, and
- (b) whether or not it occurs while the police officer is officially on duty, and
- (c) whether or not it occurred before the commencement of this subsection, and
- (d) whether or not it occurred outside the State or outside Australia.

(2) Definition – administrative employee misconduct For the purposes of this Act, **administrative employee misconduct** means any misconduct (by way of action or inaction) of an administrative employee –

- (a) whether or not it also involves participants who are not administrative employees, and
- (b) whether or not it occurs while the administrative employee is officially on duty, and
- (c) whether or not it occurred before the commencement of this subsection, and
- (d) whether or not it occurred outside the State or outside Australia.

(3) Definition – Crime Commission officer misconduct For the purposes of this Act, **Crime Commission officer misconduct** means any misconduct (by way of action or inaction) of a Crime Commission officer –

- (a) whether or not it also involves participants who are not Crime Commission officers, and
- (b) whether or not it occurs while the Crime Commission officer is officially on duty, and
- (c) whether or not it occurred before the commencement of this subsection, and
- (d) whether or not it occurred outside the State or outside Australia.

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

- (a) conduct of the officer or employee that constitutes a criminal offence,
- (b) conduct of the officer or employee that constitutes corrupt conduct,
- (c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),
- (d) conduct of the officer or employee that constitutes a disciplinary infringement.

(5) Former police officers, administrative employees and Crime

Commission officers Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer, administrative employee or Crime Commission officer involved is no longer a police officer, administrative employee or Crime Commission officer (but only in relation to conduct occurring while he or she was a police officer, administrative employee or Crime Commission officer). Accordingly, references in this Act to a police officer, administrative employee or Crime Commission officer extend, where appropriate, to include a former police officer, administrative employee and Crime Commission officer, respectively.

3. Section 10 of the LECC Act defines “serious misconduct”:

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

- (a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,
- (b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,
- (c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) In this section:

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

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

4. “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 11(2) in these terms:
 - (2) **Officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):
 - (a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - (b) arises, wholly or in part, from improper motives, or
 - (c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - (d) arises, wholly or in part, from a mistake of law or fact, or
 - (e) is conduct of a kind for which reasons should have (but have not) been given.
5. The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).
6. The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).
7. Section 29 provides the authority for the Commission to make findings and express opinions:
 - (1) The Commission may:
 - (a) make findings, and
 - (b) form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:
 - (i) has or may have occurred, or

- (ii) *is or may be occurring, or*
- (iii) *is or may be about to occur, or*
- (iv) *is likely to occur, and*
- (c) *form opinions as to:*
 - (i) *whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*
 - (ii) *whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and*
- (d) *make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and*
- (e) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter or opinions or the results of any such investigations.*
- (2) *Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.*
- (3) *The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (4) *An opinion or finding that a person has engaged, is engaging or is about to engage in:*
 - (a) *officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or*
 - (b) *specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning*

such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

- (5) *Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*
- (6) *The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.*
- (7) *The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.*

8. This report is made pursuant to Part 11 of the **LECC Act**. Section 132(1) provides that the Commission may prepare reports “*in relation to any matter that has been or is the subject of investigation under Part 6*”.

9. Section 133 (Content of reports to Parliament) provides that:

- (1) *The Commission is authorised to include in a report under section 132:*
 - (a) *statements as to any of the findings, opinions and recommendations of the Commission, and*
 - (b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*
- (2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*
 - (a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*
 - (b) *the taking of action against the person for a specified disciplinary infringement,*
 - (c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as*

a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,

- (d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*
- (e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

Note. See section 29 (4) in relation to the Commission's opinion.

- (3) An "**affected person**" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.*
- (4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

10. Section 146 provides:

“146 Notification of proposed action on reports

- (1) As soon as practicable after the Commissioner of Police or Crime Commissioner receives a report under section 27, 32, 132, 134, 135 or 136 or a copy of the report is laid before a House of Parliament, the Commissioner of Police or Crime Commissioner, respectively, must notify the Commission of the nature of the action taken, or to be taken, as a result of the report.*
- (2) If the Commission has provided a copy of the report to the Commissioner of Police or Crime Commissioner and the Commission is of the opinion —*
 - (a) that the Commissioner of Police or Crime Commissioner has unreasonably delayed notifying the Commission of the nature of the action taken, or to be taken, as a result of the report, or*
 - (b) that the nature of the action taken, or to be taken, as a result of the report is, in the circumstances of the case, unreasonable or inadequate, or*

(c) that the Commissioner of Police or Crime Commissioner has unreasonably delayed taking action as a result of the report,

the Commission is to advise the Commissioner of Police or Crime Commissioner accordingly by notice in writing served on that Commissioner.

- (3) If the Commission and the Commissioner of Police do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Police Act 1990 that the issue is unresolved.*
- (4) If the Commission and the Crime Commissioner do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Crime Commission Act 2012 that the issue is unresolved.*
- (5) The issue may be the subject of a Commission's special report under section 138.*

Appendix 2 – Use of Names of Witnesses or Pseudonyms in this Report

1. All witnesses who gave evidence in Operation Venti did so in private examinations. Having considered matters relevant to the choice between a private and public examination under s 63 *Law Enforcement Conduct Commission Act 2016* (LECC Act), the Commission had determined that each examination should take place in private.¹³⁰
2. There is a legal restriction in s 177 LECC Act concerning the disclosure and use of evidence given at a private examination.
3. As Operation Venti was the subject of examination under Part 6 of the LECC Act, the Commission must prepare a report either under s 132 or s 135 in relation to the investigation.¹³¹ As Operation Venti did not involve a public hearing, the Commission is not obliged to prepare a public report concerning that investigation.¹³²
4. The Commission may prepare a public report¹³³ or an effectively private report to the Minister for Police and Counter-terrorism and the Commissioner of Police.¹³⁴
5. Having regard to the issues raised in the investigation and the Report, the Commission has determined that a public report is appropriate in this case.
6. The question arises as to whether persons (including witnesses) should be named in the Report.
7. It should be kept in mind that the Commission is not a court hearing adversarial civil or criminal proceedings. The Commission is empowered to hold public or private examinations in aid of its investigatory functions under the LECC Act. The principle of open justice, which applies to court proceedings, has no application to Commission examinations.¹³⁵
8. Submissions were sought from police officers identified in the Report and their responses were taken into account in deciding whether any of them should be identified or whether pseudonyms ought be used in the Report.

¹³⁰ Factors relevant to the choice of private and public examinations under s 63 LECC Act were considered in the *Public Decision Concerning Public and Private Examinations in Aid of an Investigation in Operation Mantus* (3 March 2023) (“Operation Mantus Public Examination Decision”).

¹³¹ Sections 132(1), 135 LECC Act.

¹³² Section 132(2) LECC Act.

¹³³ Sections 132(3), 133 LECC Act.

¹³⁴ Section 135 LECC Act.

¹³⁵ Paragraph 10, Operation Mantus Public Examination Decision.

9. The starting point is that each person gave evidence in a private examination and there is, subject to further order of the Commission, a statutory restriction upon revelation of that evidence including disclosure of the identity of the witness.
10. Where persons have given evidence about events which occurred when they were young persons under 18 years old, the Commission should adopt the same approach, by analogy, as that taken in courts where there are statutory restrictions upon identification of young persons.¹³⁶ A pseudonym will be used with respect to the two young persons referred to in this Report.
11. As noted earlier,¹³⁷ each of Officers MKJ and DMK sought that pseudonyms be used for them in the Report.
12. Counsel for Officer ZDA sought that his client be referred to by pseudonym in the report by reference to factors concerning adverse consequences to the officer and his family if publication occurred which were said to significantly outweigh any public interest that lies in publication of the officer's name.
13. With respect to possible naming of police officers in public reports of the Commission, guidelines are being prepared by the Commission for general use. The Commission sought general submissions from a number of offices and agencies on the question whether police officers should be named in Commission reports under s 132 LECC Act.
14. Submissions were made on this topic on behalf of the Commissioner of Police, the Police Association of NSW, Legal Aid (NSW) and the Redfern Legal Centre. All submissions recognised the particular circumstances where the Commission is to issue a s 132 report following private examinations. Detailed reference will be made to these submissions in the guidelines to be issued by the Commission. Each submission recognised the proper use of pseudonyms in Commission s 132 reports. By way of example, the primary submission of Legal Aid (NSW) was that police officers who are subject of adverse findings should be afforded use of pseudonyms but have their rank and command correctly identified.
15. Several factors referred to in the Operation Mantus Public Examination Decision are relevant to the question of naming persons and the use of pseudonyms in a public report under s 132 LECC Act.¹³⁸

¹³⁶ See, for example, s 15A *Children (Criminal Proceedings Act) 1987*.

¹³⁷ See paragraph 6.2 of the Report.

¹³⁸ Paragraphs 38-66 Operation Mantus Public Examination Decision. See also paragraphs 4-5, 9 Operation Mantus Confidential Examination Decision (3 March 2023).

16. For the purposes of this Report, the Commission has determined that Officers MKJ, LPY, DMK and ZHR should not be identified. No adverse findings have been made with respect to them and each remains as a serving member of the NSW Police Force (NSWPF). It is not necessary to identify any of those officers to understand their role in the events under investigation.
17. Adverse findings are made in this Report against Officer ZDA. He remains a serving member of the NSWPF. As recognised in the submissions made to the Commission on the question of identification of police officers in reports, there can be detrimental consequences flowing to the officer and the officer's family through identification in a public report of the Commission. There is also an argument that transparency points to identification of an officer against whom adverse findings have been made.
18. The future of Officer ZDA in the NSWPF will be a matter for prompt consideration by the Commissioner of Police as a result of the recommendations made under s 133(2) and the Commissioner of Police's duty to consider those recommendations under s 146 LECC Act. To name the officer in this Report may interfere with the assessment required to be undertaken by the Commissioner of Police. In considering the issue, the Commission has had regard to the submission made on behalf of Officer ZDA.¹³⁹
19. It is not necessary to name Officer ZDA to understand his actions in the events under consideration.
20. The Commission has decided that Officer ZDA should not be named and he will be referred to by a pseudonym in this Report.
21. It is appropriate for the Commission to use pseudonyms in the Report. This allows a clear understanding of the roles of different persons referred to in the Report. Although the LECC Act does not provide expressly for the making of pseudonym orders, this step is incidental to the power to conduct private examinations, to make orders under ss 176 and 177 and to issue a public report under s 132 LECC Act. The use of pseudonyms is simply a mechanism to identify different persons in the Report without using names. This is a necessary step to facilitate a meaningful and informative report without detracting from analysis of the important issues arising in the context of the investigation.

¹³⁹ See paragraph 12 of Appendix 2.

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