

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

September 2023

LECC

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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.



25 September 2023

The Hon. Benjamin Cameron Franklin, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

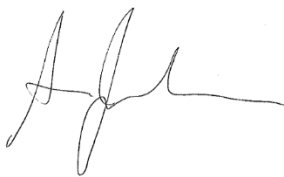
The Hon. Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Under section 132(3) 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 Potosi.

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 'Anina Johnson', with a stylized, flowing script.

Anina Johnson
Acting Chief Commissioner

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1 Summary

- 1.1 On 29 November 2020, staff employed by the Western Sydney Local Health District working at a hospital ('the Hospital') witnessed a 17-year-old Aboriginal male patient being tackled to the ground, repeatedly punched, and then dragged along the floor by a NSW Police Officer. The young person, ZDP, was in police custody at the time. The staff complained to the Law Enforcement Conduct Commission ('the Commission').
- 1.2 The Commission held 6 private examinations with both police and hospital staff. The Commission was satisfied that:
- Officer JGH's tackle of ZDP to apprehend him after his escape from custody was an appropriate use of force.
 - Officer JGH's first punch of ZDP was a reasonable use of force. ZDP was in a hospital Emergency Department corridor. He had previously resisted arrest while being tackled by 3 police officers. A punch, after he had been tackled, was reasonable to ensure adequate control of the situation.
 - After being tackled, ZDP was not resisting or struggling. The next 2 punches thrown by Officer JGH were not reasonable uses of force.
 - Dragging ZDP along the ground by the handcuffs was not a reasonable use of force. No attempt was made to get ZDP to stand. Another officer was close by and could have assisted in transporting ZDP back to a seat.
 - Officer JGH's failure to make any notes in his police notebook of the escape, the use of force and the circumstances which justified it was a breach of the Commissioner of Police's instructions.

- Officer JGH's failure to make an adequate record of the use of force in the COPS database was a breach of the Commissioner of Police's instructions.
- 1.3 There is no evidence that ZDP sustained actual bodily harm as a result of these assaults, although he was taken for further hospital tests. The Commission will refer the behaviour of Officer JGH to the Director of Public Prosecutions ('the DPP') for consideration of two counts of assault, contrary to s 61 of the *Crimes Act 1900*.
- 1.4 An assault is not a "serious offence" under s 10 of the *Law Enforcement Conduct Commission Act 2016* ('the LECC Act'). However, this conduct is certainly enough to warrant serious disciplinary action against Officer JGH. So too is Officer JGH's failure to make adequate records of his use of force. The Commission considers that Officer JGH has engaged in serious misconduct.

2 Background

- 2.1 In March 2021, the Commission received a complaint from a staff member at the Hospital. The complaint alleged that on 29 November 2020, staff witnessed a 17-year-old Aboriginal male patient by the name of ZDP, being tackled to the ground, repeatedly punched, and then dragged by a male NSW Police Officer.
- 2.2 At the time of the incident, ZDP was in police custody. He had been taken to the hospital for a medical assessment. ZDP had been sitting with two NSW Police officers in the triage area of the Hospital and had run down the corridor before being tackled by Officer JGH.
- 2.3 After the incident, ZDP was handcuffed to a hospital bed. Whilst laying on the bed it was alleged ZDP lashed out, kicking a police officer in the chest. Due to his state of agitation, ZDP had to be sedated. A number of tests were performed which included CAT scans of ZDP's head, neck and chest.

- 2.4 Following a medical assessment ZDP was discharged into the care of police.
- 2.5 ZDP was charged with 3 offences which had occurred prior to him being taken to the hospital. He was also charged with Attempt Escape Police Custody, and Resist Arrest. These offences arose from his conduct at the hospital.
- 2.6 ZDP appeared in the Parramatta Children's Court on 20 December 2021, where he pleaded guilty to all charges. In respect of the charge of Attempt Escape Police Custody the offence was found proved but was dismissed with a Caution. In respect of the charge of Resist Arrest, ZDP was placed on a good behaviour bond for 6 months.

3 The Commission's Statutory Functions

- 3.1 The relevant provisions of the LECC Act are set out in Appendix 1 to this Report.
- 3.2 The Commission has had regard to the statutory provisions referred to in Appendix 1 in the preparation of this Report.
- 3.3 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 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.¹

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34; *Rejcek 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.

- 3.4 An important function for the Commission is to determine whether any police officer has engaged in “*serious misconduct*” as defined in s 10 of the LECC Act.
- 3.5 In addition, the Commission may make findings, express opinions and make recommendations under s 133 of the LECC Act. Those provisions will be considered later in the report.
- 3.6 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.
- 3.7 There is to be no publication of the name or image of any person assigned a pseudonym in relation to the evidence given in Operation Potosi or included in this report without further order of the Commission.

4 The Commission’s Investigation

- 4.1 On 19 April 2021, the Commission decided to investigate this matter under Operation Potosi. The Commission obtained signed statements from several hospital staff members. In addition, a total of 6 witnesses attended private examinations at the Commission for the purpose of determining whether Officer JGH or any other NSW police officers engaged in serious misconduct during their interactions with ZDP.
- 4.2 The Commission was principally concerned with:
- whether Officer JGH had used excessive force in the re-capture of ZDP following his attempted escape.
 - Inadequate record keeping by NSW Police Force officers.
- 4.3 The following persons gave evidence before Commissioner Johnson:
- GKMC (8 December 2022)
 - NJSC (8 December 2022)
 - Constable RGW (10 March 2023)
 - Senior Constable KCL (10 March 2023)

- Senior Constable ZBD (12 April 2023)
- Senior Constable JGH (12 April 2023)

Civilian Witnesses

GKMC

- 4.4 GKMC had worked as an endorsed enrolled nurse at the Hospital for 25 years, with the last 8 years being in the Emergency Department ('ED').
- 4.5 She was on duty on 29 November 2020, covering the night shift. At the relevant time, she was in the utility room, or pan room. She had taken a sample from a patient and was processing it. She heard someone call out and ask to phone their Mum. The person said that their Mum had cancer.
- 4.6 Looking out the door of the pan room, she saw a young, slightly built Aboriginal boy sitting on a seat in a corridor adjacent to the ambulance bay. He was seated about 5 metres away from where she was working.
- 4.7 ZDP was in the custody of two police officers – one male and one female. He was handcuffed to the front. She heard one of the officers say something along the lines of "you can call your Mum when we get back to the station." GKMC returned to her work.
- 4.8 GKMC then heard a loud bang and looked up. A hospital laundry basket, which usually sat on the opposite wall to the pan room, had been knocked over and was now close to the entrance to the pan room. ZDP was moving along the corridor, and for a moment, GKMC thought that he was coming for her in the pan room. ZDP got up off the ground and began running. He did not enter the pan room, but turned to the right and travelled along the corridor into the ED short stay area.² At this point, GKMC thought ZDP no longer had handcuffs on.

² Examination GKM at T17.

4.9 ZDP was followed around the corner by the male police officer. GKMC moved to the door of the pan room and looked down the ED corridor. ZDP was lying on the ground on his front. The male officer was on top of him, with his left arm around the boy's neck. GKMC saw the officer give three swift punches to the boy's head or temple with his right arm. GKMC described these punches as being made with force and with a closed fist. The punches were delivered in quick succession. In her evidence, GKMC was asked what she remembers seeing:³

Q *'Immediately before the officer punched, for the first time, the young person, are you able to recall what, if anything, the young person was doing?*

A *He wasn't doing anything. He was - I think he was more scared than anything, that ..*

Q *Was he, for example, kicking? Was he thrashing about?*

A *No, no, no.*

Q *Was he wriggling?*

A *No.*

Q *So he was basically just immobile?*

A *He was basically - yes, yep...'*

At this point GKMC was approximately 2 metres from where this incident occurred.

4.10 The male police officer said something into the boy's ear, but GKMC did not hear what was said. GKMC said that the boy was now handcuffed again to the front. The officer then dragged the boy along the ground by the handcuffs, back to where he had been previously seated in the corridor next to the ambulance bay. This was a distance of between 5-10m. GKMC did not see the officer make any attempt to stand the boy upright so that he could walk.⁴ ZDP was conscious and moaning a little.

³ Examination GKM at T21-23.

⁴ Examination GKM at T24-25.

- 4.11 The female officer remained standing in the corridor near the ambulance bay, which was around a corner from the ED corridor. She had no involvement in that interaction.⁵ From GKMC's evidence, the female officer would not have been able to see the punches being thrown.
- 4.12 GKMC and other staff reported the matter to the Clinical Nurse Unit Manager ('CNUM'), who was the most senior member of nursing staff on duty on that shift. GKMC said she believes that the CNUM arranged for ZDP to be taken to a hospital bed, as they were concerned about head injuries.
- 4.13 GKMC said that she spoke to another nurse, LZMC, who was working in the short stay area of the ED. LZMC provided a signed statement to the Commission. A patient in the short stay area, with his wife, had seen the incident unfold. They raised their concerns with nursing staff, but did not want to complain to police.
- 4.14 At 1:27 am on 29 November 2020, GKMC made an electronic entry in the Patient Health Record of ZDP concerning the incident involving the male police officer. She estimated the entry was made about 15 minutes after the incident. The recording was not meant to be an exhaustive account but a summary of the main points.⁶ She said that staff were required to complete an entry if there is a significant event, and she definitely considered that this was an incident of significance. The Patient Health Record was tendered in evidence.⁷ GKMC made the following entry in the Patient Health Record:

'I was in Pan Room, Patient called out to me in Ambulance Bay, is there a pay phone in here. Patient has two Police Officers with him and is handcuffed. Patient yelled and ran around near Pan Room, knocked over metal skip bin, fell over, got up again and ran into Short Stay Unit, Tall Male Officer tackled Patient to ground and punched him 3 times in head and chest, Patient was

⁵ Examination GKM at T25-26.

⁶ Examination GKM at T8-9.

⁷ Ex GKM1C.

then dragged by handcuffs back to the Ambulance Bay by the tall Male Police Officer.'

In addition to making an entry in the Patient Health Record, the incident was also reported to the Nurse Unit Manager, JDBC.

- 4.15 GKMC was shown a typed statement in regard to the hospital incident that she signed on 19 August 2021. She agreed that it was true and correct to the best of her knowledge. The statement was tendered in evidence⁸.
- 4.16 During her 8 years as an ED nurse, GKMC said she had seen patients in custody, needing restraint and in various states of distress. She had never before witnessed an interaction of this kind.⁹

NJSC

- 4.17 NJSC is an administration officer, working in the ED and responsible for the registration of new patients as they are admitted to the hospital through the ED.
- 4.18 NJSC first saw ZDP when she came to arrange his registration as a hospital patient. She described him as a young Aboriginal boy, with a very small build.¹⁰ He was with two police officers, one male and one female. ZDP was handcuffed to the front. She finished registering ZDP's details into the hospital system and returned to her office. The office is only about 10 metres away from where ZDP and the officers were sitting, but it is around the corner.
- 4.19 Sometime later, while sitting in her office, NJSC heard a loud banging. She heard a female voice screaming, some thudding and banging. She opened the office door and looked out into the corridor. She saw ZDP being dragged along the hospital corridor floor. His hands were handcuffed and

⁸ Ex GKM4C.

⁹ Examination GKM at T30.

¹⁰ Examination NJS at T6.

the male police officer was dragging him by the handcuffs.¹¹ He was partially lifted up so that his shoulder blades were off the floor. She said that he did not make a sound. His eyes were open, but he looked stunned. He certainly was not fighting, kicking or being non-compliant in any way.

4.20 NJSC stepped out of her office and saw ZDP being dragged back around the corner to the ambulance bay.

4.21 The female officer had not moved from her station beside the ambulance bay. NJSC thought that the female officer was still looking at her phone when ZDP was returned to the chair.

4.22 Another member of nursing staff, GKMC was also in the corridor. GKMC looked shaken. NJSC noticed that the linen trolley had been knocked over and was now lying near the utility or pan room. She helped GKMC to put the linen trolley back upright. She saw a patient in bed 1 in the ED with a family member. A nurse was also standing there.¹² NJSC spoke to the CNUM, JLHC, about what she had seen.

Police Witnesses

Officer JGH

4.23 Officer JGH gave evidence before the Commission in April 2023, which was about 2 ½ years after the incident.

4.24 Officer JGH joined the NSW Police Force ('NSWPF') on 2 May 2014. By 2020 he had progressed to the rank of Senior Constable.

4.25 In November 2020, Officer JGH was working at a Police Station within the NSWPF Western Command.

¹¹ Examination NJS at T12.

¹² Examination NJS at T14.

- 4.26 The officer knew ZDP, and his family, before 29 November 2020. He was aware of his troubled history and the family had a reputation within the Police Station.
- 4.27 On the evening of 28 November 2020, Officer JGH together with Officer ZBD were tasked by the Custody Manager, Officer YCJ, with transporting ZDP to the Hospital for a medical assessment. Officer JGH agreed that he would have been told what type of medical assessment was to be conducted by Officer YCJ at the time, but he could not remember this information.
- 4.28 For the purpose of attending the Commission, Officer JGH said that he had refreshed his memory from the NSWPF COPS Event and Police Facts Sheet, but not the Custody Management Record for ZDP. When shown these records¹³ he agreed that at 29 November 2020, ZDP was a juvenile, being 17 years and 3 months of age. When shown the Custody Management Record for ZDP, he agreed that no physical injuries were listed, and there was no note of ZDP complaining of any physical injuries.¹⁴
- 4.29 The officer said that he had no recollection of anything occurring during the transportation of ZDP to the hospital or if ZDP was handcuffed at that time.
- 4.30 When they arrived at the hospital, the two police officers and ZDP entered through the ambulance bay and waited in an adjoining corridor. ZDP was seated in a chair.
- 4.31 Officer JGH had some memory of his conversations with ZDP whilst they were waiting for him to be seen by hospital staff. He remembered ZDP telling him that he wanted to escape. He did not recall ZDP asking to call his mother.¹⁵ The officer said that ZDP was agitated and possibly drug affected. He described him as not calm but not hysterical. He was asked

¹³ Ex JGH4C.

¹⁴ Examination JGH at T11-12.

¹⁵ Examination JGH at T18.

by counsel assisting, whether ZDP was being objectionable and whether he could have told ZDP to “shut the fuck up”. He agreed that it was possible that he used this language.¹⁶

4.32 At a point during the guard duty, ZDP suddenly got up and ran down the corridor towards the hospital pan room. Officer JGH said that ZDP deliberately knocked over the hospital laundry basket at the corner of the corridor, in order to block Officer JGH’s path.¹⁷ At this point ZDP was a few metres ahead of the officer. He said that ZDP tried to open the door to an office. This attempt delayed him long enough to allow the officer to catch up with him. Officer JGH tackled him to the ground in front of one of the short stay beds.¹⁸ Although he did not have a clear memory of how they landed, the officer thought that ZDP was lying on his back, and that Officer JGH was pretty much fully lying down, but on his side.¹⁹

4.33 In answer to a question about whether anything else happened whilst they were on the ground, Officer JGH said “I think I might have punched him.” Counsel assisting asked whether he punched ZDP three times to the head. He agreed that there could have been three punches, but he could not remember if they were delivered to the head. He agreed that the punches would have been delivered in quick succession. He was asked if those punches were delivered “with considerable force”, to which he replied that it was ‘*proportionate*.’²⁰ He agreed that he may have dragged ZDP backwards along the ground by the handcuffs. He said that he probably would have done this if ZDP had refused to get up.²¹

4.34 Officer JGH’s memory of the incident was limited. However, in explaining his use of force, including the punches he said:

¹⁶ Ibid.

¹⁷ Examination JGH at T20-21.

¹⁸ Examination JGH at T23.

¹⁹ Examination JGH at T23.

²⁰ Examination JGH at T33-34.

²¹ Examination JGH at T35-36.

*'...I was more concerned about trying to get him back out of that area, because it should be noted that that was being used as a COVID area for patients that were suffering potential COVID at the time, which was deemed a red zone in the hospital. ... I just wanted to get him out of there - make sure he wasn't going to hurt anyone and get out of there.'*²²

- 4.35 Officer JGH was asked about his training whilst at the Police Academy. He agreed part of his training involved an understanding of various provisions contained in the *Law Enforcement (Police Responsibilities) Act 2002* (NSW) ('LEPRA'), and was referred to section 230.²³ He agreed that the force used by an officer had to be proportionate to the level of aggression, and resistance being used or threatened against that officer.²⁴
- 4.36 The officer said that he also received training in relation to the provisions concerning tactical options and the use of force. He was familiar with the document issued by the NSWPF entitled '*Tactical Operations and Use of Force*',²⁵ the Tactical Options Model which listed 9 tactical options available to police. He agreed the options used depend upon the situation an officer finds themselves in. In coming to a decision as to which option to employ, he agreed that an officer had to undertake a risk assessment.
- 4.37 The officer was taken to various aspects of the Model including '*Officer/Subject Factors*', where he agreed a comparison needed to be done between the officer and the subject in regard to age, gender, size, fitness and Multiple Officers/Subjects. Where multiple officers were present and there was only one subject, the officer agreed that this may have an impact upon the level of force required to gain control, but only to a point, and not something he would rely upon.²⁶ Officer JGH acknowledged that ZDP was of slight build, with a weight of around 60 – 65 kilos, and a height of around 170 centimetres. By comparison the

²² Examination JGH at T24 & T36.

²³ Ex JHG1C.

²⁴ Examination JGH at T5.

²⁵ Ex JGH2C.

²⁶ Examination JGH at T8.

officer weighed 135 kilos and had a height of 195 centimetres. In short, the officer was much bigger than ZDP.²⁷ The officer agreed that if needed, he had officer assistance in the form of Officer ZBD, who was less than 10m away.

- 4.38 Officer JGH's memory was that Officer ZBD did not join him at the time that he tackled ZDP. She remained around the corner in the corridor. His memory was that by the time he returned ZDP to his seat, Officer ZBD was walking in front of him.²⁸
- 4.39 Officer JGH was asked by counsel assisting what was his purpose in punching ZDP in the head, rather than employing a less potentially dangerous option. He responded that there were not many other weaponless options, and that he just wanted to get some control over him. He was also aware that earlier in the day ZDP had *'wrestled and kicked and thrashed about with three officers on him,'* and he wanted to stop ZDP before that happened. He did however acknowledge that ZDP was not behaving in such a fashion at the time that he was punched.²⁹
- 4.40 After ZDP was placed in a hospital bed, Officer JGH was approached by a female nurse who said that she did not think he had handled the situation (with ZDP) correctly and that she was going to make a complaint.
- 4.41 Upon returning to the police station Officer JGH was told by the Custody Manager that he had received a complaint from the hospital, but after the elapse of so much time he could not recall what was said. He did however recall speaking on the telephone with Officer KCL who had relieved him from guard duty. There was a conversation in which Officer KCL told him hospital staff were not happy. He also told Officer JGH that he (Officer KCL) had been kicked in the chest by ZDP. He vaguely recalled asking Officer KCL if there was any security footage.³⁰

²⁷ Examination JGH at T37.

²⁸ Examination JGH at T38.

²⁹ Examination JGH at T39-40.

³⁰ Examination JGH at T41.

4.42 Officer JGH was shown a copy of the page from his official notebook for 28 November 2020. He agreed the only entries that it contained were a reference to the amount of overtime he had worked, and a reference to Officer ZBD and the vehicle they had been working in. He acknowledged no entry had been made concerning the escape incident in the hospital involving ZDP. He agreed police were taught to record matters of significance in their notebook, such as apprehending someone who has tried to escape, or, use of force under the provisions of LEPRA. One of the things a notebook entry does is to provide a contemporaneous record of an event, which can be used by the officer at a later time to refresh his recollection.³¹

4.43 Officer JGH was shown the COPS Event entry in relation to the attempted escape by ZDP at the hospital,³² which he agreed he created at 3:15 am on 29 November 2020. The narrative of the incident recited that ZDP (whilst on the ground after being tackled) *'attempted to resist police custody'*. The officer could not now recall what ZDP was doing to prompt this entry. The narrative continued *'Police were required to use force to restrain the accused.'*³³ Officer JGH agreed the narrative provided no description of the force used. The officer was next taken to other parts of the COPS Event and he agreed the only additional details of the incident provided were:

'Has level of resistance, Unarmed, Resisted control, Wrestle.' and that this encapsulated everything that happened in terms of his encounter with ZDP when he apprehended him.³⁴

Officer ZBD

4.44 Officer ZBD also gave evidence before the Commission in April 2023.

³¹ Examination JGH at T24.

³² Ex JGH8C.

³³ Examination JGH at T28.

³⁴ Examination JGH at T31-32.

- 4.45 The officer was on duty with Officer JGH at the Hospital in the early hours of 29 November 2020, guarding ZDP.
- 4.46 The officer recalled ZDP being brought into the Police Station and being told by the Custody Manager, Officer YCJ, that he was to be taken to the hospital for a medical assessment. As far as she was aware, the officer was not told what type of assessment was to be undertaken.
- 4.47 The officer was shown the Custody Management Record for ZDP.³⁵ She agreed the entries made by Officer YCJ suggested that at the time the Record was compiled, ZDP had no physical injuries.³⁶
- 4.48 Officer ZBD had no recollection of transporting ZDP or entering the hospital with him.
- 4.49 Before attending the Commission to give evidence the officer said that she had refreshed her recollection of events in regard to ZDP's attempted escape from custody from the COPS Event and the charge for ZDP.³⁷ Before reading this material her only memory of the events was a memory of ZDP running and she and Officer JGH following. She had a memory of rounding the corner (into the ED Short Stay area) and seeing ZDP and Officer JGH on the ground.³⁸
- 4.50 Having refreshed her memory from the COPS entry, Officer ZBD's evidence was that she and Officer JGH were waiting with ZDP in the corridor next to the ambulance bay. On the occasions that she attended the hospital performing guard duties, there were chairs in the corridor for them to use, and she marked this location on a map.³⁹ The chairs were positioned on the right hand side of the corridor.⁴⁰ At the time they were waiting in the corridor with ZDP she could not recall if he was handcuffed.

³⁵ Ex ZBD2C.

³⁶ Examination ZBD at T9.

³⁷ Examination ZBD at T6.

³⁸ Examination ZBD at T29.

³⁹ Ex ZBD4C (Letter A).

⁴⁰ Examination ZBD at T12.

- 4.51 The officer said she remembered ZDP running down the corridor and Officer JGH chasing him. They both turned the corner and she lost sight of them. She ran after them and when she saw them again, they were both lying on the floor. The officer marked on the map the location where ZDP was caught by Officer JGH.⁴¹ Before ZDP was caught she said that she did not know of him running into anything.⁴²
- 4.52 Officer ZBD recalled approaching ZDP on the ground and that she and Officer JGH stood on either side of ZDP to lift him to his feet and walk him back down the corridor to the chairs where they had been sitting. The officer was asked to comment on the evidence of other witnesses, namely that ZDP was dragged back to the chair by Officer JGH while she stayed in the ambulance bay. She disagreed with this version of events.⁴³
- 4.53 The officer could not remember if she was using her phone whilst waiting in the corridor with ZDP.⁴⁴
- 4.54 The officer was asked whether she saw Officer JGH punch ZDP in the head. Officer ZBD said that she had no recollection of seeing this happen, and did not think this could have happened before her arrival:
- ‘Because I was, like, - so I didn’t see him apprehend him, but from my memory – it was pretty quick that I came round the corner and he- I was there as well.’*
- 4.55 The officer said that this was her *‘best recollection’*.⁴⁵ However, when questioned by her legal counsel about whether it was possible that the tackling and punching could have taken place before she turned the corner into the ED corridor, she agreed that it was possible. Given the 2 ½ years between the incident and giving her evidence, it was difficult to say

⁴¹ Ex ZBD4C (Letter B).

⁴² Examination ZBD at T15.

⁴³ Examination ZBD at T20-21.

⁴⁴ Examination ZBD at T28.

⁴⁵ Examination ZBD at T19-20.

how long it took her to catch up with Officer JGH and how far behind him she had been.⁴⁶

- 4.56 Officer ZBD was not involved in writing the COPS entry as it was not her event. She agreed the narrative in the document was very vague and did not assist a reader of the document to identify what type of force was used.⁴⁷ Officer ZBD did not have any notes in her notebook about her guard duty on 29 November 2020. She said in her evidence that when she returned to the station, she was aware that a complaint had been made.

Officer KCL

- 4.57 Officer KCL gave evidence before the Commission in March 2023. Officer KCL gave evidence that he and Officer RGW attended the Hospital at around 2 am of the morning on 29 November 2020 for the purpose of relieving Officer JGH and Officer ZBD, who had been guarding ZDP. He was told that ZDP had tried to escape custody.
- 4.58 When he first saw ZDP, he was restrained on a hospital bed by a handcuff. Officer KCL described the behaviour of ZDP as '*very erratic, aggressive*' and at some stage '*irrational*'.⁴⁸ At one point ZDP attempted to dislodge an intravenous drip from his arm. ZDP also kicked the officer in the chest. Officer KCL activated his BWV camera.
- 4.59 ZDP was continually shouting out that he wanted to see his mum before she died, and the officer tried to calm him down. ZDP continued to resist and eventually he had to be sedated by hospital staff. Both he and Officer RGW helped hospital staff to take ZDP to have medical tests and scans performed.
- 4.60 Whilst still on shift he was contacted by Officer YCJ and informed that a complaint had been made by hospital staff, and was asked if there were

⁴⁶ Examination ZBD at T30-31

⁴⁷ Examination JBD at T27-28.

⁴⁸ Examination KCL at T9.

any CCTV cameras in the corridor of the hospital. He checked and reported that there were none.

Officer RGW

- 4.61 Officer RGW also gave evidence before the Commission in March 2023. The officer was questioned about completion of a COPS Event when a police officer has used force. She said there is a 'use of force' tick box on the WEBCOPS and that an officer needs to elaborate on the type of force used.⁴⁹
- 4.62 Officer RGW gave evidence that she and Officer KCL attended the Hospital at around 2 am to relieve Officer JGH and Officer ZBD, who had been guarding ZDP.
- 4.63 ZDP was handcuffed to a hospital bed. His behaviour escalated and he was screaming that he wanted to talk to his mother. He became aggressive and was thrashing himself around. Police had to use reasonable force to control his behaviour. It was not possible to have a coherent conversation with ZDP.
- 4.64 ZDP did not complain of having any injuries. She did not know that a CAT scan of ZDP's brain had been done whilst he was at the hospital. She could not recall if she had been told by hospital staff why he was to have a CAT scan performed.⁵⁰

Other Evidence Obtained

Patient Health Record – ZDP

- 4.65 The Patient Records relating to the admission of ZDP to the Hospital on 29 November 2020 were tendered during the evidence of GKM1C.⁵¹ The

⁴⁹ Examination RGW at T12.

⁵⁰ Examination RGW at T16.

⁵¹ Ex GKM1C.

record contains entries made by a number of hospital staff referred to below.

4.66 The entry made by GKMC at 1.27 am on 29 November 2020 is set out at paragraph 4.14 of this Report.

4.67 An entry made by Registered Nurse JLHC at 1:19 am on 29 November 2020, states the following:

'I heard yelling form (sic) the ambulance bay, as I approached ambulance bay I saw male officer dragging patient by his handcuffed arms. pt was then slammed into the plastic chair in the ambulance bay – hitting his L side. Pt retriaged to Cat 2'.

4.68 An entry made by Registered Nurse LZMC at 1:23 am, states the following:

'Heard commotion from triage area. Patient seen sprinting towards other patients in short stay away from police Male police officer body-slammed patient to the ground in front of EDSS bed 2 Police officer then punched patient whilst on ground still in handcuffs with closed fist x 3 to face and chest areas. Patient slammed head on ground when tackled vby (sic) police and then dragged by handcuffs along ground back to triage area. Patient seemed drowsy at first, then came to Other patients have raised concern for police behaviour in EDSS 2 TL aware of above.'

4.69 The Custody Management Record for ZDP indicates that he was taken to the Hospital for a medical assessment. The custody management does not record any complaints of physical injury, or any physical injury being apparent upon a visual assessment of him at the police station.

4.70 The ED Assessment contained within the Patient Health Record notes that after being tackled to the ground and punched 3 times to the face and chest area the patient *'was drowsy at first, then came to.'* It is noted the patient:

*‘Has been c/o [complaining of] elbow, bilateral knee pain ‘Also c/o hip pain and chest pain after the incident in ED has headache as well, c/o nausea.’*⁵²

A CAT scan is ordered for ZDP’s brain, neck chest, abdomen and pelvis.⁵³

Statement of Registered Nurse LZMC

4.71 The Commission also had a Statement made by Registered Nurse LZMC on 6 April 2022.⁵⁴ LZMC did not give evidence. She was initially due to give evidence on the same day as the other hospital staff, but was unwell. A rescheduled date was fixed. However, as the day approached, contact with LZMC became increasingly difficult. She ultimately stopped responding to the Commission’s calls and messages. Her evidence remains untested and must be given less weight as a result. However, her sworn statement adopts her contemporaneous notes. It says that she saw ZDP being hit by a male police officer and then dragged down the corridor. Her statement corroborates this aspect of the evidence of the hospital staff who did give evidence. She makes other additional allegations, which go beyond the evidence of the other two hospital witnesses.

Conversation with ZDP

4.72 ZDP was interviewed by a Commission officer. He has no recollection of the events at the Hospital on 29 November 2020. He confirmed that he had taken a number of substances on that evening. He was not called to give evidence before the Commission.

Documents Obtained from the NSW Police Force

4.73 Extract from the NSW Police Force Handbook concerning the use by police of their official Police Notebook.⁵⁵

⁵² Ex GKM1C barcode 8503217.

⁵³ Ex GKM1C barcode 8503162.

⁵⁴ Ex LZM1C.

⁵⁵ Ex RNL1C PP 289 – 290 version as at 6 August 2014.

4.74 State Intelligence Command NSWPF Crime Recording Standard.⁵⁶

4.75 NSW Police Force – Standards of Professional Conduct.⁵⁷

5 Excessive Use of Force – The Law

5.1 A police officer may use reasonably necessary force in order to execute a lawful arrest: s 99 LEPR. Section 231 of LEPR 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. Unless the use of force meets these statutory expectations, it is an assault.

5.2 The question of whether the use of force exercised by a police officer is reasonably necessary was recently considered by Jerrard J⁵⁸ who concluded that:

The term “reasonably necessary” in s230 is to be understood as incorporating the common law test. I find that the objective test is as stated in R v Turner⁵⁹ and quoted with approval by Heydon JA in Woodley v Boyd⁶⁰, which is to this effect when appropriately modified for the purposes of s230: 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.

5.3 In the context of the police conduct in this matter, the Commission accepts that ZDP was under arrest when brought to the hospital. When he ran away from the officers he was attempting to escape custody. The officers accompanying him were entitled to use a level of force which was

⁵⁶ Ex RNL2C PP 48 – 49 V-3.2 Date of Effect 18/12/2015.

⁵⁷ Ex RNL3C.

⁵⁸ DPP v Greenhalgh [2022] NSWSC 980

⁵⁹ R v Turner [1962] VR 30

⁶⁰ Woodley v Boyd [2001] NSWCA 35

reasonably necessary in order to apprehend him and ensure that he did not escape further.

6 Analysis of Evidence

6.1 The Commission has identified three areas of concern during its investigation:

1. Did Officer JGH ‘reasonably believe’ that the force that he exercised on ZDP 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?
3. Did the officers keep adequate records of ZDP’s escape from custody and the force used in his apprehension?

6.2 Examinations were held in December 2022, March and April 2023. The Commission must therefore take into account that hospital staff and police officers were giving their evidence nearly 2 ½ years after the event. This understandably impacted everyone’s ability to remember the events.

6.3 This was particularly reflected in the evidence of Officer JGH and Officer ZBD, where, when asked to recall specific details of events, they repeatedly replied that they could not remember.

6.4 Officer JGH and Officer ZBD had done guard duty many times at the hospital, both before and after the event, which made it harder to recall this specific incident. However, neither had made notes of the incident in their notebooks. The COPS entry is vague and of little help.

6.5 This vagueness of events recounted by Officer JGH and Officer ZBD is to be contrasted with evidence given by hospital staff. GKMC, who had been an enrolled nurse at the hospital for 25 years, gave a clear account of events. She said in her statement⁶¹ that she ‘*was traumatized and disgusted*

⁶¹ Ex GKM4C.

with the male officer's (Officer JGH) actions.' In evidence GKMC said of the incident that '*... something you never forget. I'm never going to forget... it's just - it's not very good.*'⁶² In addition, the hospital's clinical notes, referred to previously, include contemporaneous notes of the incident from 3 staff members.

Escape, Tackle and Punches

6.6 There is no dispute that upon arrival at the hospital, ZDP was seated on a chair in the corridor. ZDP was talkative and belligerent.⁶³ GKMC heard him calling out to talk to his mother, which is consistent with his comments recorded on the body worn video captured by Officer KCL later that morning. Officer JGH told the Commission that he may have said to ZDP '*shut the fuck up*'⁶⁴ but there is no need to make a positive finding on this point.

6.7 At some point ZDP got out of his seat and ran down the corridor, with Officer JGH in pursuit. It is common ground that as ZDP reached the end of the corridor he knocked over a linen trolley. Officer JGH thought this was a deliberate act on ZDP's part. There is no dispute that Officer JGH was able to eventually grab ZDP in the Short Stay ED area and both he and ZDP ended up on the ground.

6.8 The narrative contained within the COPS Event recited:
'The accused attempted to resist police custody'.

6.9 In his evidence Officer JGH could not recall what ZDP did that amounted to resistance.⁶⁵ However, GKMC has a vivid recollection of events. She said that ZDP was not resisting, kicking or thrashing but was immobile.⁶⁶ The Commission accepts the account given by GKMC that when ZDP was

⁶² Examination GKM at T30.

⁶³ Examination JGH at T18.

⁶⁴ Statement of LZMC at paragraph 14 put to Officer JGH Examination JGH at T18.

⁶⁵ Examination JGH at T28.

⁶⁶ Examination GKM at T22.

tackled to the ground, prior to any further ‘use of force’ being applied by Officer JGH, ZDP was not resisting the officer.

6.10 The COPS Event then says:⁶⁷

‘Police were required to use force to restrain the accused.’

6.11 GKMC and LZMC both made contemporaneous notes recording that the male police officer punched ZDP 3 times in the head and chest area. GKMC confirmed this evidence in her statement and her oral evidence. LZMC provided a signed statement, but did not give evidence. Her account of events could not be tested. However, it is consistent with the Patient Health Record notes and the account of GKMC.

6.12 This allegation was put to Officer JGH. He volunteered that he may have punched ZDP after tackling him to the ground.⁶⁸ He agreed with counsel assisting that he may have punched ZDP 3 times, but he could not remember if the punches were to his head. He also agreed the punches would have been delivered in quick succession.

6.13 Although Officer JGH had a poor recollection of his encounter with ZDP, when asked whether the punches were delivered with considerable force, he responded that the degree of force was ‘proportionate’.⁶⁹ Officer JGH’s evidence on this point suggests a stock response to challenges about use of force, rather than a genuine assessment of the force used.

6.14 Officer ZBD had very little independent recollection of the incident. She did not witness Officer JGH punching ZDP. She agreed it may have occurred after she arrived in the corridor.⁷⁰ Her evidence does not help. Indeed, the Commission prefers the evidence of NJSC and GKMC, which is that Officer ZBD did not move far from her place in the ambulance bay and did not go into the ED corridor at all.

⁶⁷ Ex JGH8C barcode page 8532782.

⁶⁸ Examination JGH at T33.

⁶⁹ Examination JGH at T34.

⁷⁰ Examination ZBD at T31.

- 6.15 The Commission accepts that ZDP was tackled to the ground by Officer JGH and then punched 3 times to the head in quick succession. The Commission is also satisfied that having been tackled to the ground but immediately prior to his being punched, ZDP was not resisting police.

Dragging ZDP Along the Corridor

- 6.16 The consistent evidence of the hospital staff is that Officer JGH dragged ZDP along the ground by the handcuffs from the ED corridor back to the triage area. This was reported in the contemporaneous hospital notes, documented in the statement of the 3 hospital witnesses and was the oral evidence of GKMC and NJSC. GKMC said that before Officer JGH began to drag ZDP, he made no effort to first stand him up.⁷¹ GKMC estimated ZDP was dragged a distance of approximately 6 – 7 metres.⁷² NJSC described the expression on ZDP's face whilst being dragged as '*stunned*'.⁷³ GKMC described ZDP as '*more like moaning a little bit*' and later, she said '*he was conscious, but then, he'd just been hit round the head, too*'.⁷⁴
- 6.17 In his evidence Officer JGH could not recall if he dragged ZDP, but said it was possible that he did, if ZDP didn't get up.⁷⁵ Officer JGH did not think he was joined by Officer ZBD at this point, and said that '*she hadn't engaged with him [ZDP]. It was just me and him, I think, yeah...*'⁷⁶ Officer JGH said that whilst walking back to the seat Officer ZBD was walking in front of him.⁷⁷
- 6.18 Officer ZBD's recollection of events was limited. NJSC and GKMC both said that she did not move during the escape attempt but remained in the corridor. This is consistent with Officer JGH's evidence. Officer ZBD denies this, saying she followed Officer JGH. Her evidence was that she assisted getting ZDP to his feet and both police walked him back down the corridor

⁷¹ Examination GKM at T25.

⁷² Examination GKM at T26.

⁷³ Examination NJS Ibid.

⁷⁴ Examination GKM at T25.

⁷⁵ Examination JGH at T35.

⁷⁶ Examination JGH at T38.

⁷⁷ Examination JGH Ibid.

to the chair.⁷⁸ The officer denied ZDP was dragged along the ground by Officer JGH.⁷⁹

6.19 The Commission prefers the evidence of the hospital staff, corroborated by their contemporaneous notes. The Commission is satisfied that ZDP was left dazed immediately after being punched to the head 3 times. If Officer JGH directed ZDP to stand up, on which there is no clear evidence, it is not surprising that he may have been physically unable to do so.

6.20 The evidence that ZDP was dragged by handcuffs along the ground a distance of approximately 6-7 metres is overwhelming, and the Commission is comfortably satisfied that this in fact occurred.

7 Findings on Use of Force

7.1 The use of force under consideration involves Officer JGH:

- tackling to the ground ZDP, a 17 year old Aboriginal youth, and
- thereafter delivering multiple punches to his head and chest, in quick succession and with considerable force, and
- dragging ZDP by the handcuffs along the ground a distance of between 6 – 7 metres to a chair.

7.2 The Commission accepts that this incident occurred during the COVID-19 pandemic, at a time where the transmission rate of the virus was high. Hospitals in general were on high alert, with many persons being admitted with the virus. The incident occurred in the ED Short Stay Area. Officer JGH, in his evidence, said that at that time the ED Short Stay Area was being used as a COVID area and that he wanted to quickly remove ZDP. He also did not want ZDP to hurt anyone.⁸⁰ The Commission accepts that there was an urgent need for Officer JGH to apprehend ZDP and that in

⁷⁸ Examination ZBD at T17.

⁷⁹ Examination ZBD at T20.

⁸⁰ Examination JGH at T24

the circumstances it was a reasonable use of force for him to tackle ZDP to the ground.

- 7.3 The next question is, was it *reasonably necessary* for the officer to punch ZDP multiple times to the head and chest in order to gain control of him. The Commission accepts the evidence of GKMC that once ZDP was tackled to the ground, he was not resisting the officer. The officer had no recollection of the manner in which ZDP *‘attempted to resist police custody’*, as described in the COPS Event narrative. Officer JGH agreed that the level of force used by police has to be proportionate to the level of aggression, resistance being used, or threatened against a police officer. From the officer’s evidence it appears that earlier in the day ZDP had *‘wrestled, and kicked and thrashed about with three officers on him’* and he wanted to:

*‘..stop that before that happened. I needed to have control before we got to that point.’*⁸¹

This evidence suggests this action on the part of the officer was a pre-emptive strike on his part.

- 7.4 The NSW Police Force Tactical Options Model, requires amongst other things, for police to take into consideration a number of factors when considering what level of force should be used in order to gain control of a subject. The Model lists under the heading *‘Officer/Subject Factors’* a comparison that is to be undertaken by police between the officer and the subject:

- Age
- Gender
- Size
- Fitness
- Skill level
- Multiple Officer/Subjects

⁸¹ Examination JGH at T39-40.

- 7.5 Here, ZDP was a 17 year old youth and was handcuffed to the front. Officer JGH was considerably taller, heavier, stronger, trained in weaponless control techniques, and could ask for assistance from Officer ZBD. Once tackled, ZDP did not resist arrest. However, ZDP had a recent history of resisting arrest against multiple officers and Officer JGH was aware of this. The escape took place in a hospital corridor. There was a risk to the safety of patients and their families, as well as the risks associated with COVID-19.
- 7.6 Would a reasonable person in the same position as Officer JGH believe that 3 punches to the head and body of ZDP, in quick succession and with force, was proportionate to the threat that ZDP posed?
- 7.7 The Commission is satisfied that it was reasonable for Officer JGH to feel certain that he had control of ZDP, even after he was tackled to the ground. One punch could be justified in the circumstances. Given that the officer and ZDP were lying on the floor of a hospital corridor, the Commission accepts that a punch thrown in these circumstances risked landing on ZDP's head. That pre-emptive strike can be seen as reasonable as it allowed the officer to be confident that he had control of the situation.
- 7.8 However, the Commission considers that the further 2 punches were excessive and not warranted in the circumstances. It was not '*reasonably necessary*' for Officer JGH to deliver the 2nd and 3rd punches for the purpose of s 230 of LEPRA.
- 7.9 The Commission is also satisfied that Officer JGH did not make any attempt to get ZDP to stand up. Rather he dragged him along the ground. This was completely unreasonable. Officer ZBD was no more than 10m away and available to assist in getting ZDP to his feet. Dragging anyone, let alone a youth, by his handcuffs along the floor for 6 or 7 metres in front of hospital staff, patients and family members, is degrading. This conduct clearly upset hospital staff and at least 1 patient and a member of his family.

7.10 The Commission is satisfied that Officer JGH's conduct in this regard was not '*reasonably necessary*' for the purpose of s 230 of LEPR.

Serious Misconduct

7.11 If the second and third punches and the dragging by the handcuffs, were not excused by LEPR, then they must constitute an assault. The question is, were they serious misconduct?

7.12 To be serious misconduct, the act must be one that could result in prosecution for a serious indictable offence, or lead to serious disciplinary action. What is the appropriate charge in these circumstances?

7.13 ZDP was assessed for injuries in hospital, including a CAT scan of his head, after he was punched and dragged. However, there was no evidence that he sustained actual bodily harm in the arrest. He was discharged from hospital back into police custody, early the following morning. In those circumstances, the charges that should be considered are for an assault contrary to s 61 of the *Crimes Act 1900*.

7.14 A charge of assault laid under s 61 is punishable by a maximum of 2 years imprisonment. A serious indictable offence must be punishable by a term of 5 years or more⁸². Therefore, laying charges under s 61 alone would not bring Officer JGH's actions within the meaning of serious misconduct.

7.15 The officer's conduct was also in breach of the NSW Police Force Code of Conduct, which requires police to:

- Behave honestly and in a way that upholds the values and good reputation of the NSWPF.
- Treat everyone with respect, courtesy and fairness.
- Comply with the law.

⁸² S 4 *Crimes Act 1900* NSW.

- 7.16 Whether or not charges are laid, the Commission considers that the actions of Officer JGH would be enough to warrant serious disciplinary action. For this reason, the second and third punches, and the dragging of ZDP by the handcuffs amount to serious misconduct.

8 Police Record Keeping

Official Police Notebook

- 8.1 The NSW Police Force Handbook⁸³ provides that an officer is required to record in their official Police Notebook particulars of incidents for future reference. The Handbook goes on to state:

‘All particulars after an incident should be recorded as soon as practical. Any issue of a serious or contentious nature must be recorded in a notebook or duty book as soon as practical.’

And further:

‘Remember, making notes at the time of an incident is a professional approach to policing, providing a reliable tool for you in many ways. Not only can you refer to the notes during evidence, but they also help you recall incidents and might help if you have to justify your actions...’

- 8.2 The Handbook provides examples of matters that ought to be recorded. This includes recording the circumstances where police exercise a power. On 29 November 2020, Officer JGH was involved in an escape from custody which required the use of force to apprehend the escapee. However, the only entry made by Officer JGH for that day was reference to the overtime he worked.⁸⁴
- 8.3 In the course of giving evidence Officer JGH agreed a Police Notebook should record matters of significance, such as when there has been a use of force such as an engagement of s 230 of LEPR.⁸⁵ The officer agreed he had not made any entry in regard to the attempted escape of ZDP and

⁸³ Ex RNL1C.

⁸⁴ Ex JGH7C.

⁸⁵ Examination JGH at T24.

his recapture. He said that he could not make an entry as he was worried that ZDP would escape again.

- 8.4 The Commission accepts that Officer JGH may not have been able to make an entry in his Notebook whilst he was continuing to guard ZDP at the hospital. However, he had the opportunity after returning to the station.
- 8.5 By the time he was back at the station, he was aware that a complaint had been made by the hospital staff. The importance of making a good record of what had occurred should have been clear to him.
- 8.6 Clearly, there was a complete failure by Officer JGH to follow police guidelines in regard to the recording of events in his Police Notebook.

COPS Event

- 8.7 Officer JGH was shown a copy of the COPS Event which he had read before coming to the Commission in order to refresh his recollection of the incident. The officer agreed that he created a narrative for the incident at 3.15 am on 29 November 2020. Where he had recorded:

‘The accused attempted to resist police custody’,

He was asked what did this mean, what did ZDP do? The officer said that he could not recall.

- 8.8 In the COPS Event narrative the Officer JGH then recorded:

‘Police were required to use force to restrain the accused.’

The officer agreed the narrative provided no description of the force used by police to restrain ZDP.

- 8.9 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”.*⁸⁶ 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.*”⁸⁷

- 8.10 Officer JGH’s entry in the COPS database fell short of the standard set by the NSWPF Crime Recording Standard. He had exercised a police power, but did not provide sufficient details to justify that use. Officer JGH failed to make an adequate record even though he was already on notice that his actions were likely to be subject to external scrutiny.
- 8.11 However, this failure to keep adequate records is not a serious indictable offence. Nor, on its own, would it be enough to warrant serious disciplinary action. However, it is part of a course of conduct beginning with an unreasonable use of force and which then includes a failure to make adequate records of that use of force. In the context of this conduct as a whole, the Commission is satisfied that the officer’s failure to comply with the guidelines and policies in regard to record keeping amounted to serious misconduct.
- 8.12 The Commission notes that in February 2023, it presented its Report on NSWPF Use Of Force Reporting to the NSW Parliament. The Report contained a number of findings and recommendations to assist the NSWPF to improve instructions it gives to officers in regard to the recording of use of force. This was recently the subject of further comment by the Commission in its Report in Operation Venti.⁸⁸
- 8.13 This investigation is yet another example of the failure by police to record any, or sufficient information, and the consequences that may result from that failure.

⁸⁶ State Intelligence Command NSWPF Crime Recording Standard, p 48.

⁸⁷ State Intelligence Command NSWPF Crime Recording Standard, p 49.

⁸⁸ The Commission Report Operation Venti, presented to the NSW Parliament on 13 July 2023.

9 Submissions

- 9.1 Police officers JGH and ZBD 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.
- 9.2 The Commission received detailed submissions on behalf of Officer JGH. The submissions addressed the draft findings insofar as they concerned his conduct and are summarized below.

Use of Force

- 9.3 Officer JGH did not agree with the preliminary findings or the recommendations set out in the draft report.
- 9.4 It was submitted firstly that when evaluating the evidence before it, the Commission must apply the criminal standard of proof of '*beyond reasonable doubt*' and cited *Briginshaw v Briginshaw* [1938] 60 CLR as authority for this proposition. As noted at paragraph 3.3 of this Report, the Commission applies the civil standard of proof. However, consistent with the principles in *Briginshaw v Briginshaw*, the more serious an allegation, and the gravity of its consequences, the more substantial proof may be required in order to prove such an allegation on the balance of probabilities.⁸⁹ This is the approach that the Commission has adopted.
- 9.5 Officer JGH submitted the focus of the Commission's investigation was too narrow in that it did not take into account the events involving ZDP from the time of his arrest 12 hours before the incident at the hospital, and

⁸⁹ See for example *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; [1992] HCA 66 or *Lim v Lim* [2023] NSWCA 84 at [17]- [27] per Bell CJ, Kirk JA and Griffiths AJA

a number of hours post the incident whilst he was still in the hospital. In support of this submission, Officer JGH tendered as exhibits 4 video clips, those being:

- Exhibit JGH9C - CCTV video 1 Convenience store 28 November 2020, 6.24 pm (58 seconds).
- Exhibit JGH10C - CCTV video 2 Convenience store 28 November 2020, 6.34 pm (1 minute and 9 seconds).
- Exhibit JGH11C - BWV video 3 Hospital 29 November 2020, 2.25 am (7 minutes and 44 seconds).
- Exhibit JGH12C - BWV video 4 Hospital 29 November 2020, 3.27 am (5 minutes and 7 seconds).

It was submitted by Officer JGH that the actions of ZDP at the Convenience store leading up to, and his arrest, depict a young person behaving in an extremely aggressive manner, committing damage to property, and behaving in a threatening manner towards members of the public. He also struggled during his arrest by three police officers.

The body worn video taken by police at the Hospital relates to the behaviour of ZDP some hours after his attempted escape and recapture. It shows a number of violent outbursts by ZDP toward hospital staff and police.

It was submitted the Commission needed to take into account the behaviour of ZDP shown in the 4 video clips when assessing the conduct of Officer JGH.

- 9.6 Regarding the punches administered by Officer JGH to ZDP in the course of his recapture, it was submitted these were appropriate and proportionate. As Officer JGH was guarding a violent person whom he believed to be drug affected and had hours beforehand committed serious offences towards members of the public and had acted violently towards police during his arrest. Furthermore, Officer JGH believed that the force he used was reasonable and necessary given that he was in the hospital's emergency ward and in an area which

contained patients involved in the pandemic and suffering from COVID-19. It was further submitted, that it was important to note that ZDP made no complaint as to hurt or injury, and also that witness GKMC, an experienced nurse, made no observations of any injuries to ZDP.

9.7 It was submitted that the punches used by Officer JGH were part of a focussed use of force, over a very short period of time, upon a very violent offender, and that in the circumstances, the force used was lawful, and ought to be distinguished from the decision in *R v Greenhalgh* [2022] NSWSC 880.

9.8 Submissions were made in relation to the evidence given by witness GKMC, which are summarised as follows:

- The witness did not have a full view of the whole incident, she had a back view of the altercation.
- There are inconsistencies in the account of the incident given by the witness in the entry made by her in the Patient Health Record, the statement that she gave to the Commission's investigator, and her oral evidence before the Commission. In the Patient Health Record and her statement, the witness had stated that she saw Officer JGH 'tackle' ZDP, however in her evidence, when asked how ZDP was tackled, she said:

*'I didn't see him tackle him, so I take that back. I didn't see him tackle him.'*⁹⁰

- A further inconsistency is that in the Patient Health Record the witness recorded in regard to the punching of ZDP, that she saw the police officer:

⁹⁰ Examination GKMC at T21.

*‘...punch the male to the head and torso...’*⁹¹ whereas in her statement the witness stated:

*‘...I saw the male officer punch the patient at least 3 times to the head...’*⁹²

In giving evidence the witness said in response to a question from counsel assisting:

‘He punched him 3 times on the right side.’

It was submitted by Officer JGH that it was important that witness GKMC was uncertain about where the punches from the officer struck ZDP.

9.9 It was submitted that if 3 punches were delivered by Officer JGH to ZDP, they were delivered in a very short time frame, and that this was supported by the evidence of Officer ZBD that they did not even have time to see them.

9.10 Officer JGH submitted that ZDP was not ‘dragged’ along the hospital floor from the point of his arrest to a chair in the corridor, but a more appropriate word would be that ZDP *‘slid across the floor.’* He submitted it was *‘common knowledge’* that hospital floors are polished clean and as such have a very low surface friction rate. Evidence as to the state of the floor was provided by witness GKMC who, in answer to a question from counsel assisting, said:

*‘I heard this bang. I looked because I was right there. Then the trolley’s over on its side, he’s on the floor, because he had no shoes on, and he’s obviously slipped and slips into the trolley or...’*⁹³

⁹¹ Ex GKM1C.

⁹² Examination GKMC at T19 Line 2.

⁹³ Examination GKMC at T18.

- 9.11 Finally, in regard to the incident, it was submitted that as ZDP reportedly had no memory of the entire incident, no formal complaint was made in the matter.

Record Keeping

- 9.12 In relation to the absence of any reference in his official Police Notebook to the incident at the hospital, and the adequacy of the details of the use of force that he recorded in the COPS Event, Officer JGH submitted that he did not have the time at the hospital to make a record in his Notebook as he had other matters to attend to.
- 9.13 Regarding the entry that he made in the COPS Event upon his return to the police station, Officer JGH submitted that he *‘made a comprehensive and lengthy COPS entry which provided a detailed chronology of the events that ZDP was involved in whilst in police custody that day and the preceding day.’*

Referral of Brief to the DPP

- 9.14 It was submitted that it would be a *‘waste of time and resources’* to refer the matter to the DPP for consideration of whether or not there is sufficient evidence to bring criminal charges against Officer JGH, since he performed his duties lawfully, there was no mens rea, and that his actions were measured and in response to a real risk which resulted in no injury to, or complaint from ZDP.

Response to Submissions

- 9.15 The Commission has had regard to the submissions made by the legal representative of Officer JGH in reaching findings, opinions and recommendations in the report. The Commission makes the following comments about those submissions.

- 9.16 Officer JGH submitted it was important to take into account the actions of ZDP both before and after his attempted escape. Officer JGH was not present at the arrest and his evidence about its impact on his state of mind was limited. The Commission accepts that Officer JGH was aware of the actions of ZDP the preceding day when he was arrested by a number of police. It was Officer JGH's knowledge that his colleagues struggled to arrest ZDP which justified Officer JGH's one pre-emptive blow to ZDP after ZDP was tackled to the ground.⁹⁴ ZDP's actions in his arrest the proceeding day are not otherwise relevant to the conduct of Officer JGH.
- 9.17 For completeness, the Commission considers that the submission made on behalf of Officer JGH about the conduct of ZDP in the Convenience store is exaggerated. On behalf of Officer JGH, it was asserted the CCTV footage showed ZDP being '*extremely aggressive, committing a number of malicious damage offences*' to the property of the convenience store, and that he also '*physically threatens members of the convenience store staff*'. However, the COPS Event Narrative⁹⁵ and the CCTV footage show ZDP kicking the front shop counter twice, pushing a stand containing chocolates and a metal slurpy straw holder towards a male shop attendant, and pushing over a confectionary stand, causing its contents to spill across the counter. The '*physical threat*' consists of ZDP taking a handful of slurpy straws from the shop attendant and throwing them at him. It is not disputed that members of the public were in the convenience store at the time.
- 9.18 There is body worn video footage ('BWV') which shows ZDP behaving in a violent fashion over 2 hours after his recapture by Officer JGH. The BWV footage of ZDP's behaviour after the assault would only be relevant if there was evidence that his behaviour captured on BWV was

⁹⁴ See paragraphs 7.3 and 7.5

⁹⁵ Ex JGH8C.

similar to his behaviour while waiting in the corridor. In that instance, the video footage would illustrate his earlier behaviour. However, Officer JGH describes ZDP as *'just being belligerent and telling us he was going to escape,'*⁹⁶ *'being a bit objectionable or irritable'*⁹⁷; *'agitated'*⁹⁸; *'Not hysterical...He was talking a lot.'*⁹⁹ Upon his recapture and being placed back in a seat Officer JGH agreed the demeanour of ZDP was the same as before his attempted escape.¹⁰⁰ From the evidence of Officer JGH it is clear that ZDP did not behave in a violent or aggressive manner immediately prior to his attempted escape or during his recapture.

9.19 In regard to the submissions made concerning the evidence of witness GKMC, Officer JGH correctly points out that there is an inconsistency between what she recorded in the Patient Health Record and her typed statement (that Officer JGH tackled ZDP) on the one hand, and her oral evidence on the other, where she withdrew the allegation, saying that she did not see the Officer tackle ZDP. However, this issue is not in dispute. Indeed, Officer JGH admitted to tackling ZDP.¹⁰¹

9.20 Officer JGH further submitted the evidence of witness GKMC was inconsistent. In the Patient Health Record she described ZDP as being punched to the head and torso. In her typed statement, made approximately 21 months after the incident, she said *'...I saw the male officer punch the patient at least 3 times to the head.'* In her oral evidence, GKMC gave a slightly different account of where Officer JGH punched ZDP, saying¹⁰²:

Q. *'What – immediately – did you see the first punch the officer threw at the young person?'*

⁹⁶ Examination JGH at T18.

⁹⁷ Ibid.

⁹⁸ Examination JGH at T19.

⁹⁹ Examination JGH at T27.

¹⁰⁰ Ibid.

¹⁰¹ Examination JGH at T23.

¹⁰² Examination GKMC at T 21 Line 46 – T22 Line 1

A. *'He punched him 3 times on the right side.'*

In considering the evidence of GKMC, the Commission took into consideration that the accounts were given over more than 2 years ago and that some discrepancies were understandable. However, in regard to the central issue of punches being delivered to the head of ZDP, both the contemporaneous Patient Health Record, and her statement accounts were consistent, namely that Officer JGH punched ZDP 3 times to the head. The full transcript of GKMC's oral evidence shows that her evidence on this point remained consistent.

Q. *'You have talked about the punches and you have said there were 3 punches. Could there have been more?'*

A. *'I saw 3. And I..'*

Q. *'Could there have been less?'*

A. *'There could have been more. No, there was definitely 3 because it was like bang, bang, bang. Sorry.'*

Q. *'And the punches – where I think you said this, did each of the punches thrown by the police officer – were they towards the young person's head?'*

A. *'Yes.'*

Q. *'And are you able to recall what part of the head the police officer was punching? Was it the face?'*

A. *'The side, one, two, three.'*

Q. *'You're indicating the temple?'*

A. *'Yes, yep...'*¹⁰³

Officer JGH submits that on a polished hospital floor, it is more appropriate to refer to ZDP as being *'slid'* rather than *'dragged'* across it. Regardless of the word used, the fact remains that Officer JGH did not help ZDP to his feet, but pulled him by the handcuffs across the

¹⁰³ Examination GKMC at T22.

hospital floor. For what it is worth, the Commission considers that the word “drag” is appropriate, as it is the word used in the Patient Health Record.¹⁰⁴ It is used by GKMC in her oral evidence where she says

A. *‘...And then – oh God. He’s dragging him from – with the handcuffs and he’s dragging him along the ground like a dog.’*¹⁰⁵

Even Officer JGH said that he may have dragged ZDP back to the chair.¹⁰⁶

9.21 Officer JGH submitted that ZDP received no injury as a result of his arrest but did not articulate the importance of this. The Commission acknowledges this. However, the absence of actual bodily harm has no bearing upon whether the actions of Officer JGH were lawful or appropriate.

9.22 Finally, the Commission recognises that ZDP had no memory of the incident, and did not complain. The complaint was received from a hospital staff member.

9.23 The explanation given in evidence by Officer JGH as to why he was unable to make an entry in his official Police Notebook concerning the incident with ZDP, whilst he was at the hospital was, as referenced in paragraph 8.4 of this report, accepted by the Commission. No submission has been made concerning the failure by the officer to make an entry in his Notebook upon his return to the police station.

10 Affected Persons

10.1 In Appendix 1 to this report the Commission set out the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to ‘affected persons’.

¹⁰⁴ Ex GKMC1C.

¹⁰⁵ Examination GKMC at T24.

¹⁰⁶ Examination JGH at T36.

- 10.2 The Commission is of the opinion that Officer JGH is an affected person within the meaning of s 133(3) of the LECC Act, 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

- 10.3 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.
- 10.4 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; and
 - (d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

- 10.5 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.
- 10.6 Some observations should be made about the various steps contained in s 133(2).
- 10.7 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.
- 10.8 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. 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).
- 10.9 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.”

- 10.10 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. 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 LEPRA. 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*.

10.11 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.

10.12 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 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.

10.13 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.

10.14 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.

- 10.15 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.
- 10.16 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.
- 10.17 Against this background, it is appropriate to turn to the circumstances of the present investigation.

Section 133 Consideration Concerning Officer JGH

10.18 Findings have been made earlier in this report that Officer JGH had engaged in serious misconduct by his unlawful use of force against a 17 year old Aboriginal youth, and his failure to record his use of force in his Police Notebook, or adequately record in the COPS Event his use of force in accordance with NSWPF instructions. Conduct of this type constitutes 2 assaults and breaches of Commissioner's instructions under s 8(4) of the *Police Act 1900* and s 237 of LEPRA.

10.19 A report under s 132 of the LECC Act may include such comments and recommendations relating to the investigation as the Commission considers appropriate. They might include comments and recommendations about:

- seeking the advice of the DPP in relation to the commencement of criminal proceedings; and/or
- recommending disciplinary action by the Commissioner of Police.¹⁰⁷

Referral of Officer JGH's Actions to the DPP

10.20 The Commission has considered whether Officer JGH's unlawful use of force should be referred to the DPP under s 133(2)(a). In deciding this question, the Commission must disregard the evidence of Officer JGH. That evidence is not admissible in any criminal proceedings against that person: ss 57, 74, 75 of the LECC Act. 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.¹⁰⁸

10.21 The admissible evidence is discussed below.

¹⁰⁷ Section 133(2)(a), (b) or (c) LECC Act.

¹⁰⁸ Section 74(5)(d) LECC Act.

- 10.22 GKMC saw Officer JGH punch ZDP 3 times to the head and chest. He was not offering resistance. GKMC then saw Officer JGH drag ZDP by the handcuffs, along the floor a distance of 6 – 7 metres to a chair. NJSC also saw the officer drag ZDP along the floor. JLHC made an entry in the Patient Health Record that she witnessed the dragging of ZDP by the officer, and a statement from her could also be obtained.
- 10.23 LZMC did not give evidence, and her statement alone is unlikely to be admissible. The Commission has not considered the possibility of this further evidence being available when deciding whether to refer this matter to the DPP.
- 10.24 Officer ZBD did not see punches thrown. She cannot say whether no punches were thrown or whether she was simply not in a position to see any punches that were thrown. Her memory is that ZDP was not dragged on the ground, but walked by her and Officer JGH. However, no other witnesses saw ZDP being walked by Officer ZBD.
- 10.25 As discussed earlier, the Commission considers that one punch could be justified as a reasonable use of force under s 230 of LEPR. However, the last 2 punches could not. There is therefore a prima facie case that Officer JGH assaulted ZDP.

11 Recommendations

- 11.1 The Commission is satisfied that there is sufficient admissible evidence to warrant referral of two allegations of assault to the DPP. The two punches should be considered as related events and dealt with as a single offence.¹⁰⁹ The two assaults are:

- a. The 2 punches thrown whilst ZDP was on the ground; and
- b. The act of dragging ZDP along the ground by the handcuffs.

¹⁰⁹ *Council of the City of Lake Macquarie v Morris* [2005] NSWSC 387 at [48]

- 11.2 There is no admissible evidence of any harm sustained by ZDP. At this stage, the Commission proposes to seek the DPP's advice on whether a prosecution should be initiated on two charges of assault, contrary to s 61 of the *Crimes Act 1900*.

Recommendation that the Commissioner of Police Take Action Against Officer JGH

- 11.3 The Commission recommends that the Commissioner of Police take disciplinary action against Officer JGH. This recommendation is made on the basis that he was involved in excessive and unlawful use of force against a 17-year-old Aboriginal youth and then failed to adequately record that use of force.
- 11.4 This combination of matters is, in the Commission's view, very serious and is sufficient to warrant consideration of action under s 181D of the *Police Act 1990*.
- 11.5 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 of the *Police Act 1990* with respect to Officer JGH.
- 11.6 The Commissioner of Police should not delay the taking of any necessary action simply because a brief has been referred to the DPP. This is important because of the operation of s 146 of the LECC Act and the expectation that the Commissioner of Police will give prompt consideration to possible disciplinary action. There is a public interest in early consideration being given to the disciplinary and employment consequences of the police officer by way of recommendations.

Recommended Action Concerning Officer JGH

- 11.7 In summary, the Commission states, with respect to Officer JGH, that:

- The DPP should be asked to advise on the prospects of commencing a prosecution for 2 charges of assault contrary to s 61 of the *Crimes Act 1900*; and
- The Commissioner of Police should consider taking disciplinary action in the form of action under s 181D or s 173 of the *Police Act 1990*.

12 Other Recommendations

- 12.1 The Commission endorses the comments it made in its Report in Operation Venti, that it appears poor practices continue in relation to inadequate reporting in COPS Events. In the present case, this is compounded by the failure by police to make any or any adequate records in their Police Notebook.
- 12.2 The Commission repeats the recommendation made in its Report in Operation Venti, that the NSWPF provide ongoing refresher training in regard to the importance of accurate completion of COPS Events and the consequences for officers who fail to do so, but in addition, it recommends refresher training be extended to the requirement for officers to fully comply with existing police guidelines in relation to the recording of events in their Police Notebook.

13 Matters Arising

- 13.1 The Commission looks forward to the response by the Commissioner of Police under s 146 of the LECC Act to the recommendations contained in this report, including notification of action taken, as a result of the report

14 Further Action

- 14.1 There is to be no publication of the actual name of any person referred to in this report in relation to the conduct discussed in this report, without order of the Commission.

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 Potosi 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.¹¹⁰
2. There is a legal restriction in s 177 of the LECC Act concerning the disclosure and use of evidence given at a private examination.
3. As Operation Potosi was the subject of examination under Part 6 of the LECC Act, the Commission may prepare a report in relation to the investigation.¹¹¹ As Operation Potosi did not involve a public hearing, the Commission is not obliged to prepare a report concerning that investigation.¹¹²
4. However, the Commission has determined that it is appropriate to prepare a report concerning Operation Potosi.
5. The Commission may prepare a public report¹¹³ or an effectively private report to the Minister for Police and Counter-terrorism and the Commissioner of Police.¹¹⁴
6. 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.

¹¹⁰ 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”).

¹¹¹ Section 132(1) LECC Act.

¹¹² Section 132(2) LECC Act.

¹¹³ Sections 132(3), 133 LECC Act.

¹¹⁴ Section 135 LECC Act.

7. The question arises as to whether persons (including witnesses) should be named in the Report.
8. 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.¹¹⁵
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.¹¹⁶ A pseudonym will be used with respect to the young person referred to in this Report.
11. With respect to possible naming of police officers in public reports of the Commission, guidelines are being prepared by the Commission for general use.
12. 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 of the LECC Act.¹¹⁷

¹¹⁵ Paragraph 10, Operation Mantus Public Examination Decision.

¹¹⁶ See, for example, s 15A *Children (Criminal Proceedings Act) 1987*.

¹¹⁷ Paragraphs 38-66 Operation Mantus Public Examination Decision. See also paragraphs 4-5, 9 Operation Mantus Confidential Examination Decision (3 March 2023).

13. For the purposes of this Report, the Commission has determined that Officers ZBD, KCL and RGW should not be identified. No adverse findings have been made with respect to them and each remains as a serving member of the NSWPF. It is not necessary to identify any of those officers to understand their role in the events under investigation.
14. For the purposes of this Report the Commission has similarly determined that hospital staff who were either examined before the Commission, or whose identity was revealed during the course of evidence given by witnesses, should not be identified. A number of those persons continue to work at the Hospital which as a hospital, continues to have regular contact with officers of the NSWPF. It is not necessary to identify any of the hospital staff members to understand their role in the events under investigation.
15. Adverse findings are made in this Report against Officer JGH. 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.
16. The conduct of Officer JGH is being referred to the Director of Public Prosecutions to seek advice as to possible prosecution. In addition, the future of Officer JGH 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 of the LECC Act. To name the officer in this Report may interfere with these processes.

17. It is not necessary to name Officer JGH to understand his actions in the events under consideration.
18. The Commission has decided that Officer JGH should not be named, and he will be referred to by a pseudonym in this Report.
19. 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 of the 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.

