

18 August 2023

Ms Sophie Dunstone
Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House Canberra
ACT 2600

Via email: FirstNationswomenchildren.sen@aph.gov.au
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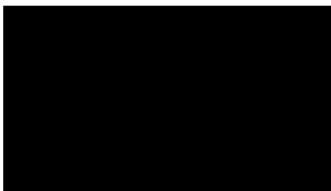
Dear Ms Dunstone,

Inquiry into missing and murdered First Nations women and children

Thank you for the opportunity to appear before the Committee. Below are the answers to 2 questions taken on notice from Senator Shoebridge (page 2-3).

I also attach Hansard corrections for the consideration of the Committee (page 4). These are factual corrections to unintentional errors I made in my opening statement.

Yours sincerely



Anina Johnson
Commissioner

1. What are the options for police officers giving evidence, including self incriminating evidence, when being interviewed by other police officers as part of a critical incident review.

A critical incident is an incident where a death or serious injury occurs as a result of a police operation. Under section 114 of the *Law Enforcement Conduct Commission Act* (NSW) the Commission may monitor the NSW Police Force investigation of a critical incident, but the Commission may not control, supervise, direct or interfere with the police investigation. The Commission has no power to investigate a critical incident.

While monitoring a critical incident investigation, the Commission may be present as an observer during an interview of an involved police officer, but only with consent of the police officer being interviewed and the police officer running the critical incident investigation. Consent to live monitor the interview of a police officer as an observer has been declined in every instance since the Commission began monitoring critical incident investigations on 1 July 2017.

The Commission also has the power to access any interview recordings, including those of involved police officers, without unreasonable delay. As such, when the Commission monitors a critical incident, the Commission routinely requests and reviews all involved officer interviews.

Pursuant to Regulation 8 of the *New South Wales Police Regulations 2008* police officers may be directed to provide a version of events to a police officer conducting a critical incident investigation. In almost all cases police officers do provide a version of events to critical incident investigators.

However, in accordance with *Baff v NSW Police Commissioner* [2013] NSWSC 1205, police officers directly involved in a critical incident may legally decline to provide a version of events to investigating officers for the purposes of a critical incident investigation, if they believe that answering the question may lead to self-incrimination. If a police officer believes that answering questions may lead to self-incrimination, it is not lawful for the police officer's employer to require the officer to answer the questions. Sometimes police officers may delay providing a version of events for the purposes of the critical incident investigation on legal advice, until the outcome of a postmortem, toxicology or cause of death is known, in case criminal allegations arise.

When a directly involved officer declines to provide a version of events, they may be compelled to do so, for critical incidents which involve a death and are subject to the coronial jurisdiction.

In accordance with Coronial Practice Note No 3 of 2021, 8 weeks after a critical incident, police officers investigating a critical incident investigation are required to provide a preliminary report to the Senior Coroner with carriage of the matter. In the preliminary report, the police investigators are required to state whether directly involved police officers have or have not provided a version of events.

Under section 61 of the *Coroners Act 2009* (NSW) the Senior Coroner may compel a witness, including a police officer, to give evidence in circumstances where a witness objects to giving evidence due to a claim against self-incrimination. The Senior Coroner also can call an early directions hearing to obtain versions of events from any involved officers that do not provide

voluntary statements. At this point, the Commission may be provided with a transcript of the directly involved officer's evidence.

When the Coroner compels a witness to provide a version, they may be offered a certificate of immunity, which prevents the evidence being used against the witness in other jurisdictions.

Directly involved police officers cannot be compelled by their employer to provide a version of events for a critical incident which involves a serious injury, although they may voluntarily provide a version of events during criminal proceedings some years after the event.

2. Given the statistics of First Nations overrepresentation in the Commission's STMP interim report (published 2022) and review of police use of consorting laws (published February 2023), why has the Commission not investigated systemic racial bias in the NSW Police Force?

As Senator Shoebridge noted in his question, many of the Commission's public reports have highlighted disproportionate impacts of policing interactions on First Nations communities. We have highlighted where officer conduct or NSW Police Force policies or practices may allow police powers to be exercised in a way that reflects deliberate or unconscious bias. Where appropriate, we raise the possibility that the disparity may be influenced by implicit or systemic bias.

The Commission's statutory role is to identify officer or agency misconduct or maladministration. Generally speaking, to state that the NSW Police Force is racist or biased does not help the Commission's statutory obligation to work cooperatively with the NSW Police Force.

Labels are not constructive to the ongoing, constructive relationships the Commission requires with police to help reverse the disparities in policing of First Nations communities. The Commission aims to work with police to address the disproportionate impact of policing interactions on First Nations communities. We do this by:

- carefully reviewing complaints which concern First Nations people, and giving them priority for investigation by the Commission
- encouraging the NSW Police Force to reflect at a systemic level on the conduct of officers, and consider reasons for the conduct
- encouraging the NSW Police Force to embed practical steps in its policies, training and other instructions to officers which reduce the opportunities for biased decision making, whether that bias is deliberate or unconscious

The Commission will continue to scrutinise police conduct and policies, and highlight any disproportionate impacts on First Nations peoples.

Hansard Corrections**Anina Johnson, Commissioner, Law Enforcement Conduct Commission**

Item	Page	Current text	Correct text
1	28	"1 July last year"	"last year" [Please delete 1 July, as the project was ongoing throughout 2022, so it is not correct to say 1 July]
2	29	"Aboriginal Affairs unit"	"Transforming Aboriginal Outcomes unit"
3	29	"PASAC"	"PACC"
4	30	"I think it is the first Aboriginal strategic direction document" "We've done the review of the first Aboriginal strategic direction from the New south Wales police."	 [Please remove both of these sentences altogether. These sentences contain unintentional errors. The document is not the first Aboriginal Strategic Direction].
5	30	"About 33 percent of the complaints" "Sixteen percent were complaints about"	"About 33 percent of the allegations" "Sixteen percent were allegations about"
6	31	"But we have spoken to both community and the Commanders"	"But we have spoken to the Commanders" [The Commission did not speak to community for this project. Commissioner Johnson makes that clear on p29 of the Hansard]
7	32	"As fair as I'm aware there's no formal mechanism for feeding back complaint themes into training or PASAC concerns in to training"	 [Please replace PASAC with PACC – as per item 3]