



CORRUPTION AND CRIME COMMISSION



REPORT ON OPERATION AVIEMORE: MAJOR CRIME SQUAD INVESTIGATION INTO THE UNLAWFUL KILLING OF MR JOSHUA WARNEKE

5 NOVEMBER 2015

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CORRUPTION AND CRIME COMMISSION

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Dear Mr Pratt
Dear Ms Robinson

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption, Crime and Misconduct Act 2003* (CCM Act), the Commission hereby transmits to you a copy of its *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke*.

The Commission notes that under section 93(3) of the CCM Act a copy of a report transmitted to the Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in black ink that reads "John McKechnie".

Hon. John McKechnie, QC
COMMISSIONER

5 November 2015

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INTRODUCTION

- [1] Western Australian Police officers have often failed to comply with the *Criminal Investigation Act 2006* (CI Act) and their own Police Manual when interviewing suspects.
- [2] As a result, miscarriages of justice may have occurred either when the wrong person is convicted or material that might be crucial to conviction is excluded because it was obtained illegally.
- [3] This Report is both a case study of Operation Aviemore and a call for WA Police to ensure:
 - all officers know and apply their obligations under the *Criminal Investigation Act* and the Police Manual contained in the Corporate Knowledge Database;
 - persons who are not proficient in English have the assistance of an interpreter;
 - officers interacting with Aboriginal citizens are properly trained in culture and language; and
 - decisions not to charge a person are properly authorised and accountable.
- [4] WA Police accepts most of the recommendations in this Report and will take steps to implement the recommendations immediately.

CHAPTER ONE

OPERATION AVIEMORE IN OVERVIEW

1.1 A Killing Occurs and an Investigation Commences

- [5] Mr Joshua Warneke spent the evening at a local hotel and nightclub before calling in to the McDonald's Restaurant in Broome for some food at about 2:30 am on Friday 26 February 2010. Shortly after, he set off on foot towards his home in the Roebuck Estate. He never arrived.
- [6] That morning Mr Warneke's body was discovered by a taxi driver on the side of Old Broome Road. Broome Police initially attended but soon afterwards officers from the Major Crime Squad (MCS) in Perth took over. The investigation was called Operation Aviemore. The investigating officer was Detective Sergeant Cameron Western.
- [7] A post-mortem examination concluded that the cause of death was head injury in a man with acute alcohol intoxication. The head injuries included bruises, abrasions, lacerations to the skin and extensive fracturing of the skull with injury to the brain.
- [8] An expert opinion and further enquiries ruled out the realistic possibility that the deceased had been struck by a car.

1.2 Gene Gibson becomes a Person Of Interest

- [9] The MCS has conduct of homicide investigations. During the relevant period from 2010 to 2012 it was very busy with many complex investigations. Operation Aviemore was protracted and difficult. A number of people were identified as persons of interest. One of these was Mr Gene Gibson.
- [10] Some witnesses had heard Gibson say things that indicated he might be implicated in the death. Other witnesses spoke of his involvement in a stolen vehicle on the night.
- [11] Gibson was 18 years old on 26 February 2010. He usually lived in Kiwirrkurra, sometimes described as the remotest community in Australia. It is near the Western Australia border with the Northern Territory about 850 kilometres west of Alice Springs. It has no police presence and few facilities.
- [12] Gibson's parents were alcoholics. His father died when he was young. He was given to his grandmother to be raised by her, but she did not look after him properly. At times, he did not have enough food to eat, was badly clothed, and suffered many childhood infections. When Gibson was about 13 years old, his grandmother moved permanently to Alice Springs. He remained in Kiwirrkurra with no adult responsible for him. He was a neglected child.

- [13] Gibson's education at Kiwirrkurra was poor. At the end of 2005, he went to boarding school in Alice Springs but was not good at school. His first language was Pintupi and his English was basic.
- [14] At the age of 12 Gibson began to sniff petrol. He started to binge drink at 15 to 16 and also began to use marijuana. By 2010 he was living a transient lifestyle, sometimes visiting Broome, sometimes Alice Springs.
- [15] For some time Gibson was not the major person of interest (POI) to Operation Aviemore. There were many leads and theories. RC was identified as a significant person of interest. Another man boasted to others that he was responsible. MCS had information that a stolen vehicle may have been involved although the information was vague and contradictory. Some witnesses suggested Gibson had been in the car.

1.3 Operation Aviemore Progress in 2012

- [16] It is unnecessary to recount the progress of the investigation until 2012. The investigation was not easy and a number of lines of enquiry were explored.
- [17] On 15 February 2012, Detective Sergeant Johnston, then Officer in Charge (OIC) Derby Detectives, conducted an interview with RC¹. Johnston had significant experience with Aboriginal people. Although he said he did not have a reasonable suspicion to arrest RC, he nevertheless conducted an electronically recorded interview (EROI) and administered a caution to RC before commencing to ask questions.
- [18] Shortly thereafter, Johnston joined MCS and was appointed investigating officer for Operation Aviemore. Western was now the Senior Investigating Officer. Other members of the investigative team were Detectives Phillip Gazzone and Rodney Shannon. Their experience with Aboriginal people was limited.
- [19] Operation Aviemore relied upon the support of local detectives from the Kimberley region to conduct inquiries. The Officer in Charge of Broome Detectives in 2012 was Detective Senior Sergeant Baddock. On 16 February 2012 in response to a request from MCS to locate a number of witnesses including Gibson, Baddock disagreed with MCS and recommended that other witnesses should be interviewed before speaking to Gibson and another person. His advice was not followed.
- [20] On 18 February 2012 Gazzone and Detective Russell interviewed TN at Halls Creek. This EROI demonstrated Gazzone's inexperience in interviewing Aboriginal people from remote communities. His inexperience was not picked up by his supervisors.

¹ It is not in the public interest to name Aboriginal witnesses.

[21] On 22 May 2012 Johnston prepared a detailed report as to the current lines of inquiry and concluded that Gibson remained a priority POI.

Attempts should be made to conduct an audiovisual record of interview with GIBSON to ensure any confessional evidence is captured in an admissible format. Prima facie evidence exists in relation to the stolen motor vehicle and, at this time; GIBSON cannot be eliminated as being involved in the death of WARNEKE.²

[22] Superintendent Anthony Lee commenced as Officer In Charge MCS on 23 July 2012.

1.4 Sergeant Mark Pring is Asked to Assist

[23] Kintore, in the Northern Territory is a multi-jurisdictional police facility. A West Australian officer is stationed there and takes a two hour drive to Kiwirrkurra as needed.

[24] Sergeant Mark Pring was posted to Kintore as Brevet Sergeant in May 2012. Pring had been a police officer in the United Kingdom, joining WA Police after a transition course in December 2008. Little was done to prepare him for the isolation and challenges of remote community life at any time.

[25] Soon after his arrival at Kintore Pring was asked to let MCS know when Gibson was in Kiwirrkurra. On 9 July 2012 he advised Gazzone that Gibson was present. Gazzone asked Pring to arrest Gibson on suspicion of murder so that Gibson would be sober and available. On 10 July 2012 Gazzone and Shannon set out on a Police Air Wing plane. Shortly before landing in Kalgoorlie en route, Gazzone was advised by Pring that Gibson was not in Kiwirrkurra and, in fact, Pring had not actually seen Gibson there himself. Gazzone told Pring that Gibson was a priority POI for an unsolved murder. Gazzone and Shannon returned to Perth.

1.5 The Decision to Treat Gibson as a Witness

[26] Two meetings were held at MCS on 30 July and 31 July 2012. During the course of those meetings, Gibson's position was discussed. The result of the meeting on 31 July 2012 was that Western decided that a potential charge of stealing a motor vehicle was "off the table". He gave instructions that Gibson was to be interviewed as a witness. At that stage, the main focus continued to be on RC.

[27] In an action plan emailed after the meeting Western wrote:

² Major Crime Squad, Operation Aviemore, Person of Interest File - INQUIRY REPORT, Detective Sergeant Johnston 22 May 2012.

Based on Investigations, GIBSON is being spoken to in order to ascertain his knowledge of the circumstances surrounding the death of Josh WARNEKE. At this stage there is not sufficient suspicion to indicate that GIBSON was involved in the death of WARNEKE. The decision is "GIBSON will be engaged as a witness" unless he makes a statement or indicates he has involvement which causes a reasonable suspicion. At that point he is to be immediately cautioned.³

- [28] The decision to treat Gibson as a witness rather than a suspect was later found by a judge to be an honest decision but a mistaken one. It had grave consequences.

1.6 Gazzone and Shannon Interview Gibson: 16 August 2012

- [29] Pring attended the opening of the Kiwirrkurra clinic on 14 August 2014 and met Gibson. He advised Gazzone by email that Gibson was present. Travel by Police Air Wing was arranged.
- [30] Gazzone and Shannon flew with Johnston and a female detective to Kiwirrkurra, leaving in the early morning of 16 August 2012. Gazzone and Shannon disembarked at Kiwirrkurra, while Johnston and the other detective flew on to Kintore to interview a woman who may have been able to give police information about the possible involvement of RC.
- [31] Gazzone thought his visit would be quick and only took a small backpack. The officers brought a video camera and a computer with them.
- [32] Pring brought Gibson to an office in the Community Hall, where Gazzone said he gave Gibson his rights under the CI Act (s.28). These are rights given to a witness who is not under suspicion. An interview friend was discussed. Gibson declined the offer. Gibson was interviewed for nearly three hours. The officers kept some notes of the conversation. These were not comprehensive.
- [33] While Shannon was preparing a written statement on the computer, Gibson made a comment significantly inconsistent with earlier comments. The comment indicated he had an opportunity to assault the deceased on the night of the killing.
- [34] Gazzone spoke to Western and was instructed to treat Gibson as a suspect. Nevertheless the interview continued, unrecorded until Gibson made an admission that he had assaulted the deceased. Finally a camera, held firstly by Shannon, and then balanced to enable Shannon to take part, recorded the interview. An interview friend was arranged. SB not only acted as an interview friend, but

³ Action Plan Friday 3 August 2012 GENE GIBSON.

engaged in extensive translation which neither Gazzone nor Shannon could understand. SB pressured Gibson to answer questions.

[35] In the course of the interview, Gibson exercised his right to obtain legal advice. Ms Claire Kilby, a lawyer with the Aboriginal Legal Service in Kalgoorlie was contacted by phone. There was a conversation between Gazzone and Kilby concerning the language principally spoken by Gibson. Gazzone wrongly nominated a language different from Pintupi, Gibson's first language. Gibson was given the opportunity to speak in private with Kilby. Kilby arranged for an interpreter to assist her in advising Gibson. Kilby then told Shannon that she had advised her client not to take part in an interview. Nevertheless the interview continued. Neither Gazzone nor Shannon immediately clarified that Gibson wanted to continue notwithstanding legal advice. SB continued to translate.

[36] Gazzone described the interview:

... the whole process was a mess. I think I was out of my depth. I think that I had good intentions to go there, good intentions when I arrived there, good intentions when I went through the process with him, but I juggled all these balls and they all fell down and collapsed, and it was just a mess. It turned into a dog's breakfast.⁴

1.7 Broome: 17 August 2012

[37] Late that night, Pring drove Gazzone, Shannon and Gibson, who by now had been arrested on suspicion for murder, to Kintore. They arrived after midnight. Gazzone and Shannon slept on the floor before arising very early and flying to Broome with Gibson. Johnston joined them.

[38] Meanwhile, Western flew to Broome from Perth with other officers. To avoid media attention, Western was specifically ordered not to warn Broome Police that he was coming. A suspect has a right to a reasonable degree of privacy from the mass media.⁵

[39] Shortly after their arrival Baddock listened to Gazzone and Shannon's account of the previous day. He advised Western to redo the interview and offered to arrange an interpreter. Western did not agree, relying on Gazzone and Shannon's account of Gibson's understanding of English.

[40] Gibson then accompanied all four detectives on a re-enactment and further interview, pointing out various places of interest.

⁴ Transcript of Proceedings, Private Examination of 30 June 2015, Phillip Gazzone, p.36.

⁵ *Criminal Investigation Act 2006* s.137(3)(b).

[41] The damage done the previous day was not repaired. Western and Johnston were the supervisors and had greater experience than Gazzone and Shannon, but did nothing. No attempt was made to correct the errors. No interview friend was arranged. No opportunity was given for further legal advice even though Kilby spoke with Lee about this. No interpreter was arranged even though the Kimberley Interpreting Service was contracted by WA Police for just this type of event.

1.8 There is a Pre-trial Hearing

[42] Gibson was charged with the murder of Joshua Warneke. At a pre-trial hearing, counsel for Gibson successfully challenged the voluntariness of the interviews on 16 and 17 August 2012. In judgment, *State of Western Australia v Gibson* [2014] WASC 240, Hall J found that the interviews were not voluntary, were obtained in breach of the CI Act and to admit them would in any event be unfair to the accused.

1.9 Gibson Pleads Guilty to Manslaughter

[43] Notwithstanding the rejection of some of the evidence against him, following discussions between his lawyers the Aboriginal Legal Service and the DPP, Gibson pleaded guilty to manslaughter. His counsel explained to the Court Gibson's instructions as to why he committed the crime. On 22 October 2014, Jenkins J sentenced him to a term of seven years and six months imprisonment with parole eligibility: *State of Western Australia v Gibson* [2014] WASC SR 203.

CHAPTER TWO

INVESTIGATIONS INTO OPERATION AVIEMORE

COMMENCE

[44] The WA Police Internal Affairs Unit (IAU) commenced an investigation of the circumstances of 16 and 17 August 2012. So did the Commission. While the purpose of each investigation was different, there was cooperation and information sharing between them.

2.1 Scope and Purpose of the Commission Investigation

[45] Police misconduct allegations are a major function of the Commission. It generally performs this function by monitoring and reviewing investigations undertaken by the WA Police into possible misconduct by police officers.

[46] The Commission will tend to investigate separately and report on police misconduct when there are also wider lessons to be learned. This is one such investigation.

[47] The purpose of the Commission's investigation was to determine if any public officer employed by WA Police has, is, or may have been engaged in misconduct and/or reviewable police action during the investigation of the death of Joshua Warneke and the subsequent arrest and prosecution of Gene Gibson.

[48] The Commission was given access to voluminous WA Police material including records of interviews with relevant officers. Material supplied by WA Police was carefully reviewed. The Commission also gathered its own material.

[49] The Commission appointed Mr Darren Renton and Ms Nadia Pantano as counsel assisting. Private examinations were held during the week commencing 29 June 2015:

- i. Brevet Sergeant Mark Anthony Pring - West Australian Police Officer at Multi-Purpose Facility Kintore, Northern Territory, with responsibility for Kiwirrkurra in August 2012;
- ii. Inspector Brett Baddock - Officer In Charge, Broome Detectives office on 17 August 2012;
- iii. Detective Sergeant Phillip Gazzone - Detective Operation Aviemore, lead detective in interviewing Gibson;
- iv. Sergeant Rodney Shannon - Detective Operation Aviemore, corroborating detective in interviewing Gibson;
- v. Detective Sergeant Graeme Johnston - Investigating officer, Operation Aviemore;
- vi. Detective Senior Sergeant Cameron Western - Senior investigating officer, Operation Aviemore;

- vii. Detective Superintendent Anthony Lee - Officer In Charge, Major Crime Squad from 23 July 2012.
- viii. Another officer was examined but his evidence was not sufficiently relevant to note in this report.

[50] As the Commission's investigation advanced, the focus widened from misconduct by individual officers to systemic issues involving lack of knowledge and skills when interviewing Aboriginal people, confusion about the CI Act, failure to appropriately record critical and discretionary decisions and questions around disclosure.

[51] Compliance with disclosure obligations was closely examined, including disclosure to Defence of information concerning other POI. Pring's notebook was not disclosed in a timely manner. However, there is no sufficient evidence to conclude that it was deliberately retained or concealed. The Commission has decided to make no further reference to disclosure, other than to observe that disclosure obligations appear to have been met. In particular the Commission notes that on 3 July 2013 a unified physical material list was supplied by Johnston to the Aboriginal Legal Service. The list referred to documents held by police in relation to other POI, including AS and SR.

[52] An arrested subject who has difficulty communicating in English is entitled to an interpreter before being interviewed. The Commission examined the extent to which this entitlement was breached.

2.2 Not a Review of the Conviction

[53] The Commission's role is to investigate possible misconduct, not to undertake a review of the adequacy of evidence which led to a conviction. Unlike some notorious cases of miscarriage of justice in Western Australia, Gibson was not convicted after a contested trial. He pleaded guilty after advice from the Aboriginal Legal Service. That Service has not asked the Commission to examine the evidence because of any doubt that Gibson is in fact guilty.

[54] The Commission notes that the Commissioner of Police has ordered a review of Operation Aviemore. No doubt the results of that review will be examined by Gibson's legal advisors.

[55] Draft copies of this Report were given to persons who might be adversely affected by its publication. Sergeant Gazzone and WA Police both made submissions which have been taken into account in finalising the Report.

CHAPTER THREE

EXCLUSION OF GIBSON'S INTERVIEWS BY THE SUPREME COURT

- [56] Either a prosecutor or an accused may apply to the Court for an issue to be dealt with before the trial commences.⁶
- [57] Counsel for Gibson sought a ruling before trial that the EROIs of 16 and 17 August 2012 were inadmissible because his participation was not voluntary and further there was a failure to comply with the CI Act. In the alternative, exclusion of the evidence was sought as a discretionary matter on the grounds of unfairness.
- [58] A contested hearing took place between 3 and 11 April 2014 before Hall J. Relevant police officers were called by the prosecution. Pring, Johnston, Western, Gazzzone, and Shannon gave evidence and were cross-examined.
- [59] Both the prosecution and defence called witnesses who translated into English the words spoken in Pintupi between Gibson and SB.
- [60] Expert linguists gave evidence as to the meaning of words and the extent of Gibson's comprehension and understanding of such concepts as the right to silence.
- [61] The judge reserved his decision until 4 July 2014 when he published detailed reasons for ruling that the interviews on 16 and 17 August 2012 were inadmissible: *SOWA v Gibson [2014] WASC 240*. The full judgment is available at www.supremecourt.wa.gov.au.
- [62] In summary the judge held:
175. I am not satisfied to the requisite standard that the accused's participation at any stage in the police interview was voluntary. I come to that conclusion for the following reasons:
1. as a suspect the accused should have been cautioned from the outset of the unrecorded interview. He was not and did not appreciate his right not to speak to the police;
 2. the accused did not understand the caution when it was later given and, in particular, did not understand his right to silence;
 3. the accused's will was overborne because he was pressured by ... [SB] to answer the police questions. Bearing in mind the cultural context and the kinship relationship between the accused and ... [SB], the statements made by ... [SB] would have been

⁶ *Criminal Procedure Act* 2004 s.98.

understood by the accused as a direction to answer the police questions. The accused would be likely to have felt obliged to comply with such directions;

4. the interview that occurred in Broome was accepted by the prosecution as being a continuation of that which had been commenced in Kiwirrkurra. An interview that is not voluntarily commenced can rarely, if ever, become voluntary. This is because the options of the accused are necessarily limited by what has gone before. Accordingly, the conclusion that the accused's participation in the recorded interview was not voluntary from the outset means that the whole of the interview is inadmissible.
176. In any event I find that there were breaches of the CIA which render the interview inadmissible. Those breaches are:
1. The failure to record the initial interview as required by s 118; and
 2. The failure, once the accused was arrested, to ensure that the accused was assisted by a qualified interpreter as required by s.137(3)(d) and s.138(2)(d).
177. There was no reasonable excuse for not recording the initial interview. The recording equipment was readily to hand and the decision to treat the accused as a witness and not a suspect was plainly wrong.
178. There was no reasonable excuse for not obtaining the assistance of an interpreter. All the objective indications were that an interpreter was required. Such inquiries as were made to determine the English language proficiency of the accused were inadequate. There is no reason to think that suitably qualified interpreters could not have been located - several were called as witnesses in these proceedings.
179. There is no sufficient reason to exercise the discretion to admit the evidence notwithstanding the breaches, pursuant to s 155 CIA. That is because the breaches were serious and put into significant doubt the reliability and, therefore, the probative value of the evidence. I take into account the seriousness of the alleged offence and that the breaches were not intentional, but they do not outweigh the other factors. In any event, as I have noted above, the evidence does not satisfy me that the interviews were voluntary.
180. Even if I was wrong in regards to the questions of voluntariness and breaches of the CIA, I would exclude the interview on fairness grounds. In my view, it would be unfair to the accused to admit evidence of the interviews. I come to that conclusion for the following reasons:
1. the accused did not have the benefit of an independent interpreter;

2. his ability to comprehend and communicate in English was severely limited. This raises doubts as to the reliability of any answers given by the accused;
 3. the efforts by the police to determine whether the accused had an adequate understanding of English and needed an interpreter were inadequate;
 4. the accused did not have an interview friend of his choosing. He did not want ... [SB] to be present and ... [SB] did not provide the support and assistance that would be expected of an interview friend;
 5. as noted above, the accused was placed under pressure by ... [SB]. This also increases the possibility that answers given by the accused were unreliable;
 6. the interview continued after the police had been informed by the accused's lawyer that he did not wish to answer any further questions. It was inappropriate for the police to continue with the interview in these circumstances.
181. In my view it is unlikely that the admissions of the accused would have been made at all if the interview had been properly conducted. All the indications are that if the accused had been treated as a suspect from the outset and had his rights explained to him by a qualified interpreter he would have exercised the right to silence.
182. In the event the interviews that did occur were unfair to the accused because he was at a serious disadvantage given his limited understanding of English. This was compounded by the power imbalance between a shy young Aboriginal man on the one hand and several police officers and an older male relative of the accused on the other. Added to these factors were the length of time that the interviews continued and the circumstances in which they occurred. There is a significant possibility that answers given by the accused are unreliable because he did not understand what he was being asked, could not communicate his own thoughts adequately in English or gave false answers in order to appear agreeable.⁷

[63] The decision is binding on all concerned including the Commission and has been taken into account in the Commission's assessment of the behaviour of police officers during interviews with Gibson.

⁷ *SOWA v Gibson* [2014] WASC 240, [175-182].

CHAPTER FOUR

CONDUCT OF WITNESS INTERVIEWS OTHER THAN GIBSON

[64] The interviews of witnesses and suspects during Operation Aviemore show that errors of approach are not confined to Gibson.

4.1 RC Interview

[65] RC was interviewed at Derby on 15 February 2012 by Johnston and Detective Cleal. Viper Action # 1164⁸ instructed officers to "Interview RC to ascertain his knowledge of and /or involvement in the death of Josh Warneke".

[66] RC was approached by police after appearing in Derby Magistrates Court and agreed to accompany them to the police station where an EROI was conducted. At the beginning Johnston referred to giving RC his rights as a witness previously and that RC was not under arrest to which RC agreed. Johnston provided RC with his rights in accordance with the CI Act ss. 137 and 138 and asked some questions to ensure understanding. He also provided information in compliance with the Anunga Guidelines.

[67] During his IAU interview Johnston suggested that because the information nominating him was anonymous, he and Cleal were not satisfied there were sufficient grounds to arrest RC so he was invited to accompany them, but was still cautioned prior to interview. Johnston also suggested that, based on the information they had, RC "... was a suspect but certainly not enough to arrest him on suspicion ... if you haven't got enough to arrest them on suspicion, then you're not under any obligation in the act to afford them [their] 137, 138 [rights]."⁹

[68] Johnston established that English was not RC's first language and, although an interpreter was offered and declined, Johnston did not make any formal assessment of RC's ability to understand English.

[69] During the interview, RC referred to knowingly being a passenger in a stolen vehicle which he suggested may have collided with something at the relevant location on the night of the murder (heard/felt a bump). He described the vehicle as a small white car (he thought) and nominated Gibson and EM as having stolen the vehicle with Gibson being the driver.

[70] Toward the end, RC made an unsolicited comment to explain the possible existence of his DNA and fingerprints on the steering wheel

⁸ Viper is the WA Police Major Crime Investigation case management system.

⁹ Internal Affairs Record of Interview of 20 November 2014, Graeme Johnston, pp.49-50.

of the vehicle. The comments made by RC could be considered sufficient to cause an increase in the level of suspicion that RC had some involvement in the death.

[71] At the conclusion, Cleal prepared a typed statement which RC adopted. Despite RC being cautioned at the beginning of his EROI, there is no such caveat at the beginning of his statement. The final paragraph of the statement contains the appropriate declaration and RC appears to have signed the statement after reading it. There is no indication that the statement was read to RC or that his literacy was questioned apart from ascertaining, during the EROI, that he attended school until year 10. A later statement obtained from RC in August 2012 makes reference to it being read to him because he "... cannot read a lot."¹⁰

[72] The scenario that the vehicle may have collided with the deceased was contrary to an expert opinion regarding the cause of death to the effect that the injuries were inconsistent with being struck by a vehicle. During the EROI, RC referred to a white boy being "bumped." When Johnston attempted to define the word, RC appeared to have trouble understanding and Johnston did not pursue it. The use of the word "bumped" is a common theme throughout the interviews conducted by MCS officers and was used by Gibson when making admissions to relatives. The term was not sufficiently defined by police interviewers, who possibly assumed it is a reference to the involvement of a vehicle as opposed to a colloquial term for someone being killed - "bumped off".

4.2 EM First Interview

[73] EM was interviewed at Broome on 17 February 2012 by Detective Wilson and Detective Huggins as a result of Viper Action # 1183.

[74] Despite possible involvement in the offence of stealing the vehicle, EM was interviewed as a witness. There is no documentation to determine how he was engaged by police, whether his rights were provided or whether his understanding of English was sufficient for him to understand those rights. An EROI was not conducted. Huggins told IAU that EM was not considered a serious witness prior to interview.

[75] A subsequent statement obtained from EM nominated Gibson and TN as being responsible for stealing the vehicle from an address in Broome although EM also implicated himself in the offence by knowingly being a passenger in the stolen vehicle. Due to the lack of a caution and appropriate recording of the interview, the admission was inadmissible. The final paragraph of the prepared statement

¹⁰ Statement RC of 20 August 2012.

refers to it having been taken by Huggins but read to EM by Wilson before it was adopted.

- [76] During his IAU interview, Wilson acknowledged that he would normally cover all offences in an interview and he would include the details of a peripheral offence because it would show a series of events which lead up to the critical incident. Prior to the interview with EM, Wilson researched Viper and believes he contacted someone from MCS to discuss the matter. He believes Huggins searched the WA Police Incident Management System (IMS), and accessed the stolen vehicle details and Baddock obtained photographs of the relevant vehicle from the Broome Forensic Office. EM later adopted this photograph during his interview.
- [77] Wilson said that EM was not treated as a suspect for the homicide or stolen car due to insufficient grounds existing at the beginning of the interview. Wilson acknowledged that if the grounds regarding the stolen car had become apparent at some point during the interview there would be no point in stopping and commencing an EROI as any subsequent admissions would be inadmissible due to EM already being interviewed without a caution.
- [78] Wilson speculated that they did not commence an EROI when EM made admissions about the stolen vehicle because they were working toward the greater good to solve the homicide as opposed to being concerned with a minor offence of stealing a car.
- [79] During his IAU interview, Huggins stated that he had no independent memory of the interview and relied on notes made during the interview and in his official diary. The interview notes indicate that EM was located at 8:30hrs and conveyed to Broome Police Station and then spoken to in the interview room at 8:48am. Huggins then recorded a page and a half of handwritten notes of EM's account.
- [80] Huggins' official diary also records that EM was located and conveyed to the police station for interview but then records "Statement obtained after allowing him to sleep in the interview room at his request. Intoxicated prior to statement being obtained."¹¹
- [81] During his IAU interview, Huggins acknowledged that EM was probably interviewed then allowed to sleep in the interview room and during that time his statement was prepared based on what he had said during the interview. Examination of the statement shows it was signed at 12:50hrs.
- [82] Huggins could not explain why EM was not cautioned and interviewed in accordance with the CI Act s.118 as a consequence of his admission regarding the stolen vehicle.

¹¹ WA Police Official Diary P Huggins, Broome Detectives 30 January 2012, p.24, 08:00 17 February 2012.

- [83] EM's statement nominated Gibson, TN and EM as being in the vicinity of the offence at the relevant time and EM provided information suggesting that the vehicle did not hit the deceased. This information was corroborated by photographs of the car taken by Broome forensic officers which shows the vehicle had no damage consistent with a collision.
- [84] The engagement of EM as a potential witness to the homicide is consistent with the level of information available to the interviewers. The information from RC implicated EM in Stealing a Motor Vehicle offence. Consequently he would be expected to have been engaged in accordance with the CI Act ss. 118 and 138 if the stealing offence was being considered. It appears the interviewing officers were not considering that charge at all prior to the interview.
- [85] The issue of EM being interviewed while potentially being incapable due to intoxication raises serious concerns regarding the fairness of the interview and the appropriateness of the interviewer's conduct.

4.3 EM Second Interview

- [86] EM was further interviewed at Broome at 09:00hrs on 26 February 2012 by Gazzone and Russell in response to a request for clarification of certain points and apparent inconsistencies between his previous statement and the accounts of RC and TN - Viper Action # 1195. There is no documentation to determine how he was engaged by police, whether his rights were provided or whether his understanding of English was sufficient for him to understand those rights.
- [87] An EROI was not conducted and he was again interviewed as a witness. An addendum statement was obtained confirming Gibson's and TN's involvement in the stealing of the motor vehicle but refuting RC's account that he was present in the vehicle on the night.
- [88] The final paragraph of the statement indicates the statement was read to EM by Gazzone prior to him adopting the statement because he "... cannot read or write English."¹²

4.4 TN First Interview

- [89] TN was interviewed at Halls Creek on 18 February 2012 by Russell and Gazzone as a result of Viper Action # 1189.
- [90] Prior to engaging TN, Gazzone and Russell were aware of the accounts of RC and EM nominating TN as being involved in the offence of stealing a motor vehicle. Gazzone was aware the stealing motor vehicle allegation referred to a specific offence, namely the theft of a red Pintarra stolen from an address in Broome on the night.

¹² Operation Aviemore Viper Action # 1195.

- [91] Gazzone's handwritten running sheet indicates that they located TN at 07:00hrs and asked him to accompany police to discuss the "Josh Warneke incident"¹³ but there is no record of Gazzone or Russell mentioning the stolen vehicle. There is no requirement for a person to be advised of specific offences being investigated when asked to accompany the police.
- [92] After arriving at the Hall's Creek Police Station, TN was interviewed by Russell as a witness with no caution being administered. TN made admissions implicating himself in the stealing a motor vehicle at the very beginning of the interview. The first paragraph of Gazzone's notes records "I was walking other way I don't live in One Mile. Walking towards Norman Street. I was too drunk and I saw a car, there was a car with a key in it so I jumped in and drove ..."¹⁴
- [93] Gazzone's record of the interview contains a further page of handwritten notes which includes TN's movements in the stolen vehicle, the nomination of Gibson and EM as co-accused, the places where the car was located and dumped, and the adoption by TN of a photograph of the stolen car.
- [94] At the conclusion of Gazzone's handwritten notes of TN's account he then recorded "Due to offence disclosed immediately stopped interview and commenced EROI."¹⁵ However, it was not.
- [95] The EROI with TN commenced at 08:17hrs and lasted 20 minutes. Russell led the interview and at the beginning TN confirmed that he had not been placed under arrest when asked to accompany police but did refer to "having to" accompany them. Both Russell and Gazzone attempted to clarify this issue during the interview which suggests that TN may not have been made fully aware of his rights under the CI Act s.28, or the officers did not ensure that he understood his rights, when he was first engaged.
- [96] At the commencement of the EROI, Russell explained that the interview was being conducted regarding the stealing of the motor vehicle and provided TN with his rights in accordance with the CI Act ss.137 and 138. He also asked questions in compliance with the Anunga Guidelines.
- [97] During the EROI TN made it abundantly clear that he did not wish to participate in the interview and both Gazzone and Russell began negotiating with him in an attempt to elicit further information regarding his movements and observations on the night.

¹³ Major Crime Squad Running Sheet Operation Aviemore, Officer Gazzone commenced 18 February 2012.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

- [98] TN was cautioned and indicated on a number of occasions he did not wish to speak further. Eventually the officers agreed not to ask questions about stealing a motor vehicle but wanted information about the death.
- [99] After 20 minutes the EROI was concluded. TN was further interviewed and a statement prepared regarding his movements and observations on the night. It included much greater detail than he had provided in the original unrecorded interview, as recorded by Gazzone's notes, and implicated himself, Gibson, EM and BB in a stolen motor vehicle offence.
- [100] The statement also placed Gibson, EM and TN at the location at the time of death but denied that a vehicle was involved. The statement also refuted RC's account that he was present in the vehicle at the time. The statement refers to it being read to TN by Russell before it was adopted.
- [101] On the day of TN's interview, Detective Mills accessed IMS and attempted to update the relevant Incident Report nominating Gibson, EM and TN as POI's for the offence. For an unexplained reason, Mills updated the incorrect Incident Report and Gibson, EM and TN were not linked to the correct report as POI's.
- [102] It can be inferred from the EROI that TN was provided with his rights in accordance with the CI Act s.28 but it is questionable whether Gazzone and Russell sufficiently ensured he understood those rights.
- [103] Despite sufficient information existing to ground a suspicion, prior to the interview, that TN was involved in stealing a motor vehicle, he was not cautioned or interviewed from the outset in accordance with the CI Act or WA Police procedures. Therefore any subsequent admissions made by TN in relation to that offence during the unrecorded interview could be inadmissible
- [104] Even if Gazzone and Russell did not believe there was sufficient information to ground a suspicion that TN was involved in the stealing a motor vehicle offence, they demonstrated a disregard of TN's rights and WA Police interviewing procedures by continuing, at length, to elicit information from TN after the admission and before cautioning him and commencing an EROI. As a result of their actions, any subsequent admissions by TN during the EROI in relation to that offence may not be admissible either.
- [105] During the EROI, TN indicated on nine occasions that he did not wish to answer further questions but Gazzone and Russell persisted in an attempt to persuade him to provide information regarding what he knew about the night of the death. This conduct is a violation of the principles laid down in the Anunga Guidelines and a breach of WA Police procedures AD-01.03 *Interview of Aboriginal and Torres Strait Islander Persons*.

4.5 TN Second Interview

- [106] TN was re-interviewed by Gazzone in Balgo on 20 August 2012 after Gibson's arrest. A witness interview plan was prepared which included details of TN's previous statement and a summary of facts provided by Gibson.
- [107] The interview plan indicates that TN was to be engaged only as a witness. However, according to Gazzone's handwritten notes, before locating and interviewing him in Balgo, Gazzone made the decision to arrest TN under suspicion of murder due to information provided by Gibson that TN had made a comment which may have encouraged Gibson to assault the deceased.
- [108] According to Gazzone's handwritten notes, at 10:20hrs he located TN and arrested him on suspicion of murder, provided his CI Act rights and addressed the Anunga guidelines. At the beginning of the interview, Gazzone established that TN spoke both English and an Aboriginal dialect and could read and write English "... just not long words."¹⁶
- [109] The EROI lasted a total of almost five hours including breaks. TN denied any involvement in the death and provided an account consistent with his previous interview in February although he included information implicating himself and others in an aggravated burglary at a drug dealer's house.
- [110] TN was told that Gibson had admitted hitting the deceased but TN consistently denied witnessing the actual assault. During the interview TN was pressed to provide an account of the actual assault and he appeared to become frustrated that the officers were not accepting his version of events.
- [111] TN indicated on five occasions that he could not, or did not want to, provide the information by stating he had nothing else to say. On each occasion TN's wishes were left unaddressed and the interview continued.
- [112] At 13:00hrs, the interview was suspended for 52 minutes. When the interview recommenced at 13:52hrs, TN was asked again to provide an account of events. Gazzone attempted to use passages from TN's original statement to refresh his memory. When asked whether reading from the statement had refreshed his memory, TN stated that it had not and suggested his memory was affected by being a chronic petrol sniffer and cannabis user from the age of fourteen.
- [113] When asked to describe the positioning of the deceased's body that he had witnessed, TN demonstrated by lying on the floor. The positioning of TN's arms, head and legs was not dissimilar to the positioning of the deceased when found. However, immediately prior

¹⁶ Transcript of Interview of TN at Balgo 20 August 2012, p.4.

to the demonstration, Gazzone had drawn a stick figure which he showed to TN before inviting him to draw it on a diagram. TN also incorrectly described the body as lying parallel with the road with his face toward the airport and described him as having brown hair and wearing jeans.

[114] When some of the inconsistencies were highlighted to TN, he stated "Well I can't remember how it was ... that's what I'm trying to keep telling youse."¹⁷

[115] Gazzone then provided TN with a detailed account of Gibson's admission including:

- Mr Gibson had a steel pole in the car;
- He stopped the car after passing the deceased;
- He took the steel pole from the car;
- He ran across the road;
- He hit the deceased to the back of the head;
- He used his left arm (Gazzone demonstrated the strike);
- The body was lying perpendicular to the side of the road (not parallel); and
- TN had told Gibson to hit the deceased.

[116] Gazzone accused TN of deliberately withholding information and asked him to provide more detail about what occurred at the time of the actual offence. TN denied telling Gibson to hit Warneke but conceded that he had seen Gibson hit him. TN then described a version of events completely consistent with the information provided by Gazzone. After providing the information and being further questioned, Gazzone asked TN why he had not provided certain information earlier:

PG ... You never told us about Gene hitting him at the back of the head.

...

TN Cos it, you got my memories back while you was keep asking me the questions.

PG Okay. Are you saying this because we've, I've told you information of what they said? And you're just going with what Edwin and what Gene have said? Or is that what you remember? Now I don't want to confuse you. If you honestly can't remember any of this stuff, you just let me

¹⁷ Transcript of Interview of TN at Balgo 20 August 2012, p.25.

know. You say, "I can't remember Phil". But if you can remember this happening, ... [TN], then that's ... because you can remember everything else. When we asked you at the very start, you can remember the creek there with the path and the house on the corner, and taking the Jack Daniels. You can remember parking the car on the street.

TN But I don't even ...

PG But, but, but what I'm saying is, you remember all those things on this map, where you got the car, where you parked the car, where you met the guys, where you met Edwin, where you went and stole the Jack Daniels, where you saw Joshua's body. But you never told us about Gene hitting him. What was the reason for that?

TN Cos I can't remember.

PG That's a big part of the story to forget. That's a very important part, which is the most important part for us. Everything else you can remember. You can remember the, the flowers on the back of the car. You can remember the car being a small pizza car. But you can't remember this bit here. ... [TN], did you have any ...

TN I haven't, no I haven't. Just make that up.

PG What's that?

TN I been just make that up. Cos, you know, I don't know, I ... coz I was keep saying nothing, nothing, I don't know nothing. And you boys keep asking me, keep asking me. So I had to go with your words. Then I had to make it up, cos I don't really know what's going on. I said it, I don't know, and you mob was keep pushing me, pushing me, pushing me, pushing me and so I have to make up.

PG So all that you just told us was make up?

TN Yeah¹⁸

[117] TN requested a toilet break and the interview was suspended for eight minutes. When the interview recommenced, Gazzone attempted to address TN's previous retraction but did not do so to such an extent as to conclusively remove doubt.

[118] According to Gazzone's notes, at 16:10hrs TN was unconditionally released and advised of his s.28 rights. A further unrecorded interview was conducted between 16:30hrs and 19:30hrs and a typed statement prepared.

¹⁸ *Ibid* pp.54-55.

[119] The statement varies significantly from TN's original statement taken in February 2012 in that it includes much greater detail and TN nominates himself as witnessing the actual death.

[120] There are few notes of the unrecorded interview. However, Gazzone recorded the following:

4:30pm - Commence statement with ... [TN]

- [TN] *stated that he didn't see Gibson get pole.*
- *Saw him hit him with left side arm.*
- *Saw Josh turn towards road.*
- *Saw Josh (sic) body on road the way he was found deceased.*

6:50pm - ... [TN] reads statement again and signs each page¹⁹

[121] Despite TN admitting his involvement in an aggravated burglary during his EROI, he was not charged.

[122] It is possible that TN's assertions, that he had nothing else to say, could be construed as communicating that he did not wish to answer further or specific questions and, if that was the case, Gazzone at the very least, should have clarified the situation and addressed TN's assertions before proceeding. Otherwise any subsequent admissions of culpability regarding the death may have been deemed inadmissible.

[123] Alternatively, TN's assertions that he had nothing else to say in relation to witnessing the actual death could be construed as communicating that he had not witnessed the event or had no memory of the event. If that was the case, then Gazzone should have taken greater care in the amount of information he provided to TN, and the formulation of the questions put to him.

[124] Placing a suspect under a certain amount of pressure during an interview may on occasions be a valid interviewing technique. The style of questioning used by Gazzone, at times, was cross examination, something which should be scrupulously avoided, especially when interviewing Aborigines.

[125] The veracity and accuracy of TN's account, that he witnessed Gibson's actions at the time of the death, was undermined by Gazzone's disclosure of detailed information and TN's unresolved retraction. Accordingly, it was of paramount importance that such information should have been subject to disclosure to Gibson's defence.

¹⁹ Gazzone EROI Notes, 20 August 2013, p.2.

- [126] TN's second statement includes inconsistencies which create further doubt regarding his account being accurately recorded. In paragraphs 60-64, Gazzone recorded TN's description of the death whereby he allegedly states he saw Gibson swing his left arm toward the deceased's head (as previously demonstrated by Gazzone during the EROI) but could not see if he held a weapon because Gibson's body blocked his view.
- [127] Thereafter there is no reference to Gibson possessing a weapon or TN sighting a weapon. However, in paragraph 69, "I didn't see where he put the pole" and in paragraph 70 "...the first I saw or knew he was there, was when Gene hit him with a pole."²⁰ The inconsistency is highlighted by the fact that during the EROI, Gazzone consistently referred to the weapon as a "pole" while TN called it a "bar".

4.6 CM First Interview

- [128] CM was interviewed at Kintore on 16 August 2012 by Detective Johnston and Detective Pender, after Gazzone and Shannon had disembarked at Kiwirrkurra. CM was identified as a possible witness due to her relationship with RC and was identified in the relevant Viper Action # 1322 as a "significant person of interest."
- [129] Email correspondence, on 13 August 2012, between Pring and Johnston (and Gazzone) regarding CM's whereabouts indicates that Pring had spoken to her and warned "... she speaks very little English. I have asked her family if someone can help with interpreting. They have agreed but you may feel it more appropriate to source another."²¹ Johnston clarified with Pring the dialect/language group CM spoke and Pring later advised that he had spoken to her again and "Her English is better today!!"²²
- [130] An interview plan for CM, apparently prepared by Gazzone, contains no information that CM may not speak English sufficiently to communicate or understand her rights.²³
- [131] The statement taken from CM included a final paragraph indicating that the statement was read to her by Pender prior to it being signed. There is no indication that an interpreter was used.
- [132] Despite being warned that CM may not be able to understand English sufficiently, an independent interpreter was not engaged and there is no evidence that an English Language Test was considered or conducted.

²⁰ Statement of TN, 20 August 2012, paras [69]-[70].

²¹ Email from Mark Pring to Phil Gazzone Monday 13 August 2012 09:07.

²² Email from Mark Pring to Graeme Johnston and Phil Gazzone 13 August 2012 09:43.

²³ Witness Interview Plan CM VA1322.

4.7 BB Interview

- [133] BB was interviewed at 08:52hrs in Balgo on 21 August 2012 by Gazzone and Shannon.
- [134] Despite being implicated by TN the previous day as participating in an aggravated burglary, he was engaged as a witness, was provided with his CI Act s.28 rights but not cautioned.
- [135] BB's statement indicates that he speaks English as a second language and has low literacy skills.²⁴ Despite this an interpreter was not utilised.
- [136] According to Shannon's handwritten notes, BB made admissions regarding driving the stolen red Pintarra but denied being present at the time of the aggravated burglary or at the time of the death.²⁵
- [137] BB was not engaged as a suspect in accordance with the CI Act or WA Police procedures despite being implicated in offences.

4.8 GP Second Interview

- [138] GP was interviewed in Billiluna on 19 February 2012 by Gazzone and Shannon in response to Viper Action # 1165 due to her purportedly being in a relationship with RC. A handwritten statement was obtained by Gazzone which indicated it was read to GP before she signed it because she found it difficult to read English.
- [139] On 8 May 2012, Gazzone created Viper Action # 1267 to re-interview GP regarding discrepancies in her statement and to give consideration to "... assessing whether ... [GP] would be suitable/willing to assist police with a pre text [sic] call to ... [RC]."²⁶
- [140] Gazzone prepared a planning document identifying potential actions for MCS officers in relation to RC and Gibson as persons of interest, which included the interview of GP as a witness. Notwithstanding that GP was to be engaged as a witness, from the planning document Gazzone prepared, it appears that his intention was for GP to be arrested under suspicion of committing a series of credit card fraud offences to enable her to be conveyed to the police station for interview.²⁷
- [141] The WA Police IMS shows that, at the time, GP was wanted for questioning in connection with the alleged theft and use of a credit card in Broome in 2011. The relevant WA Police Incident Report indicates that, less than a month after Gazzone created the Viper

²⁴ Statement of BB, 21 August 2012, paras [2]-[3].

²⁵ Shannon Interview Notes of BB, 21 August 2012.

²⁶ Operation Aviemore Viper Action # 1267.

²⁷ Inquiries Chart (02983-2014-0094).

Action, GP was stopped and spoken to by police in Fitzroy Crossing on 2 June 2012.²⁸ The report was subsequently updated to show that GP had been interviewed regarding the offences and had denied all knowledge or involvement.

- [142] On 18 June 2012, Gazzone appears to have become aware that the file had been closed and sent an email to the officer who had spoken to GP questioning what action had been taken. In the email Gazzone stated:

*The issue we have is that she may not wish to speak to us and may not wish to accompany us back to the police station. I was hoping to use this file and arrest her under suspicion ...*²⁹

- [143] Gazzone then sent an email to the case officer in Broome suggesting that the interview was insufficient and that GP would need to be officially interviewed before the matter could be finalised. He requested the case file be allocated to him because GP was "...an important witness for Operation Aviemore" and he was intending to interview her about the murder and "... deal with the fraud at the same time." Gazzone went on to say:

*This file may also provide us with the opportunity [to] formally arrest her under suspicion and convey her back to the police station for the matter to be dealt with.*³⁰

- [144] In August 2012, after Gibson's interview, the importance of GP as a witness lessened and the Viper Action was later written off without her being interviewed. Gazzone returned the fraud case file to Broome in September 2012 for them to resolve. The file was later reviewed by Broome Police and found to contain insufficient evidence to establish GP as a person of interest.

- [145] Gazzone's stated intention to engage GP as a witness does not align with his stated intention to conduct an EROI and deal with the criminal matter at the same time.

- [146] Gazzone's attempts to have GP arrested on suspicion of possible fraud charges in order to interview her as a witness to a homicide, were improper.

²⁸ Running Sheet Incident Report 310111 0934 13911.

²⁹ Email from Phil Gazzone to Shelley Grey, 18 June 2012 2:43:13 PM WST.

³⁰ Email from Phil Gazzone to Jodie Leahy, 18 June 2012 3:13:37 PM WST.

CHAPTER FIVE

FAILURES IN INTERVIEWS ARE NOT CONFINED TO THIS MATTER

[147] The conduct of interviews described in this case study are an illustration of a wider issue both as to breaches of the CI Act and involuntary confessions.

[148] In a series of cases over many years³¹ Judges of the Supreme and District courts have dealt with evidence obtained in breach of the CI Act or involuntary confessions. The 15 examples footnoted below are likely to be an under-reporting because not every ruling at a pre-trial hearing is later published as a judgment. There are occasions when an EROI is challenged and held to be voluntary and admissible. There are other occasions when an EROI is taken in breach of the CI Act but a judge exercises powers under the CI Act s.155 to admit evidence even though unlawfully obtained. Still, the extent of breaches of the CI Act is disturbing.

[149] The Director of Public Prosecutions was asked by the Commission if there was a record kept on challenges to the admissibility of an EROI. There are no such records but the Director advises:

- *The ODPP regularly abandons reliance upon an electronically recorded interview if we assess it to be inadmissible, regardless of whether there is a formal challenge by Defence.*
- *The main reasons electronically recorded interviews are challenged in the Children's Court are as follows:*
 - *Intoxication;*
 - *Illness;*
 - *Time of interview (e.g. Late at night);*
 - *Fatigue;*
 - *Understanding of caution;*
 - *Inability to exercise free will;*
 - *Oppression;*
 - *...*
 - *Inability to exercise rights (e.g. as to legal advice);*
and
 - *Inducement.*³²

³¹ *Churnside v SOWA* [2015] WADC 26; *Wallam v SOWA* [2014] WADC 123; *Allen v DPP* [No 2] [2014] WASC 472; *Narrier v SOWA* [2014] WASC 21; *SOWA v Riley* [2010] WADC 52; *SOWA v Leering* [2010] WADC 25; *JWRL v SOWA* [2009] WASC 285; *C v SOWA* [2009] WADC 121; *SOWA v Wandiga* [2009] WADC 82; *SOWA v Cox* [2008] WASC 287; *Martin v SOWA* [2008] WASC 105; *Cox v SOWA* [2008] WASC 101; *Siddon v SOWA* [2008] WASC 100; *Marshall v SOWA* [2008] WASC 99 and *SW v SOWA* [2008] WADC 117.

³² Letter from Director of Public Prosecutions to CCC 3 July 2015.

[150] The number of cases where an EROI is successfully challenged may be indicative of a systemic weakness in proper interviewing techniques.

Recommendation One

The Commission recommends that WA Police and the Office of the DPP record a challenge to an EROI in any court and the result so that an accurate measure of compliance with the CI Act is obtained.

CHAPTER SIX

SYSTEMIC WEAKNESS PART 1

USE OF THE CORPORATE KNOWLEDGE DATABASE: FAMILIARITY AND EASE OF USE

- [151] A Corporate Knowledge Database (C.K.D.) available electronically to all officers. The Police Manual is part of the C.K.D. There is a vast amount of material in the C.K.D. Although by regulation officers are expected to be familiar with it all, that is realistically impracticable.
- [152] Every officer examined by the Commission described difficulty in searching the C.K.D. for relevant information. The following comments are typical:

Pring

Generally speaking, how familiar are you with the content of the corporate knowledge database?---Very poor.

Why would that be?---I was never made aware of it. It's something that I've stumbled across and it's not a particularly user friendly site. I've used it more recently because of the role that I do now but it's just something that I was not aware of in any great detail.

In what respect do you find it an unfriendly system to work with?--I just find it hard to find much stuff on there. I find the searching, it's – maybe it's the terminologies but now that I've been using it more, I'm finding it a bit easier but certainly when I first would have opened it, it was just not user friendly at all.³³

Baddock

In terms of gaining access to the materials in the corporate knowledge database, is that an easy exercise?---No.

What are some of the difficulties that you personally encountered?---There's a lot of information in there, so if you were to print it, it would be quite voluminous. It would be a number of volumes, probably, dare I say, and this would be a guess, multiple lever-arch files, so it's not indexed very well. The key to using the police manual is doing a Boolean search on a key word, and once you do that – for instance, if you did a search on the word interpreter it would come up with a number of sections that had the word interpreter, not unlike a Goggle search on the Internet. So you do have to trawl through a

³³ Transcript of Proceedings, Private Examination of 29 June 2015, Mark Pring, p.4.

number of things that may not be necessarily relevant before you actually get to the relevant section you are looking for.

...

Have you observed this in others, that is, difficulty in navigating and searching?---I've heard similar comments as recent as last week in actual fact, a conversation we were having regarding something completely irrelevant to this proceeding but in relation to the police manual itself in that we need to make it simpler, so the working group that I was part of, where this conversation was occurring, they were of a similar view to myself, and then prior to that, in years gone by, I've heard people make similar comments as well in relation to the difficulty in navigating, and also searching with in it. It has a good search ability but it's on key words, which you then have to trawl through wherever those key words - - -

So you can get a lot of hits that are not really helpful?---Yes, that's exactly the word I was going to use. You do get a lot of hits, yes.³⁴

- [153] In Operation Aviemore officers demonstrated ignorance of important and relevant procedures detailed in the C.K.D. There may be many reasons for this but one reason is the difficulty in accessing information. If this difficulty is widespread, there is a significant problem.
- [154] WA Police notes that a simple search using the search term "interview" or "Aboriginal" brings up a link to AD 1:03 which is the WA Police Policy on interviewing Aboriginal and Torres Strait Islander persons. However, if officers have experienced difficulty earlier, they may forego subsequent searching.

Recommendation Two

The Commission recommends the C.K.D. be reviewed and its index and search capacity improved. Either online tutorials or regular training should be investigated to ensure all police officers have the necessary competency to access the C.K.D. as needed.

- [155] WA Police agrees with this recommendation.

³⁴ Transcript of Proceedings, Private Examination of 29 June 2015, Brett Baddock, p.4.

CHAPTER SEVEN

SYSTEMIC WEAKNESS PART 2

INTERVIEWING ABORIGINAL WITNESSES AND SUSPECTS

- [156] Though the Aboriginal community is about four percent of the West Australian population, Aboriginal offenders comprise about 38 percent of the adult prison population. More have received non-custodial sentences or fines. Necessarily, those in prison, and those who are dealt with other than by prison, must have been in contact with Police officers.
- [157] There are many Aboriginals from remote communities whose first language is not English but a particular Aboriginal language or dialect. Even those who use Kriol may have difficulty in understanding basic English. The challenges which arise for Police officers are not to be underestimated. Nevertheless, it is essential in the interests of justice that those challenges are overcome. The risk of injustice is magnified when a person to be interviewed also has an intellectual disability.
- [158] Johnston had spent some years in the Kimberley. Western had been posted to Kununurra early in his career. The other officers directly engaged in Operation Aviemore, including Pring, had little or no experience dealing with Aboriginals from remote communities. They had little idea of culture, customs or language variation.
- [159] Pring was posted to Kintore with only basic knowledge despite nearly a year in Laverton. He did not access the C.K.D. and the extensive material that might have helped him. He made some Google enquiries. That was the extent of preparation for a remote posting in daily contact with Aboriginal people. There does not appear to be any system to ensure he was properly equipped for the task ahead.

Pring

... I've been in Australia about six and a half years now, started in Mandurah, so there were – I had dealings with part Aboriginals but town Aboriginals, for want of a better expression. Then I moved to Laverton, where - I was posted there for a year, where I had dealings with - pretty much all of the work was dealing with Aboriginals prior to going to Kintore.

And in those dealings, did you receive any specific training in relation to how to deal with Aboriginal people?---The only training of how it is – we had an input at the academy. I was recruited from the UK. We had an input on Aboriginals but the training – it wasn't so much training on how to deal with them. It was more about the background between the whites dealing with

Aboriginals and the issues that that's raised such as the stolen generation and things such as that.

Did part of that training go into the disadvantages suffered by Aboriginal people in terms of their education, their ability to understand English and so forth?---I think it did, yes.

...

Was there any refresher course offered to you post the academy?---I did the video interviewer's course and I'll be honest. I don't recall if it was part of that course. That would have been the only time it may have come up but there's no specific training or requalifying in that.³⁵

Gazzone

[c]onsidering the date of 16 August, dealings with Aboriginal people as suspects?---Again city based Aboriginals.

Does that suggest that you had not had any dealings with remote Aboriginals at that stage?---That's correct.

...

Had you had any specific training in relation to dealing with Aboriginal people as suspects?---No.

Any specific training in relation to dealing with Aboriginal people who were witnesses?---No.

How would you describe your experience interviewing people as at 16 August 2012 who were chronic substance abusers?---Very limited.³⁶

Shannon

... [o]utline for us what dealings you had had with Aboriginal persons as witnesses and generally what I'm after is how experienced were you in dealing with Aboriginal people?---In 20 years of policing I've dealt with Aboriginal people quite often. In particular with remote Indigenous people, that was probably the first time I had had any dealings of that nature.

...

During your course of duty as an officer did you receive any specific training in dealing with Aboriginal people?---Not specific training. There was cultural awareness training that the police

³⁵ Transcript of Proceedings, Private Examination of 29 June 2015, Mark Pring, pp.3-4.

³⁶ Transcript of Proceedings, Private Examination of 30 June 2015, Phillip Gazzone, p.3.

provided to all officers which I undertook at some stage in my career, yes.

Was it toward the beginning, middle or end of your career that you had the cultural awareness training?---It was at the very beginning of my career.

Back in the academy?---Yes.

Any refresher courses or progress courses over the course of your career that you have engaged in?---No, not that I can recall.

Are you aware as to whether any such courses are offered?---No, I'm not.

What experience did you have prior to 16 August in interviewing people who are chronic substance abusers?---No formal training as such. Experience as far as chronic substance abusers go, to my knowledge no experience at all.³⁷

Johnston

Had you had any specific training in relation to dealing with Aboriginals either from remote locations or otherwise?---there was cultural diversity training many, many years ago but, I mean, I can't even recall to what extent that training provided us.³⁸

Baddock

Had you had any specific training in relation to dealing with Aboriginal people in relation to your policing duties?---During the police academy there was a component of cultural awareness and that effectively was it.

When was that?---1992.

Is there any supplementary training offered at any stage in relation to, one might say, a refresher of that cultural awareness or was it on the job sort of training you get there after?---To the first part of your question the answer is no; and the second part of your question, the answer is yes. As an OIC, as an officer in charge of a business unit, you need to take responsibility for yourself and also for your staff in relation to cultural matters that need to be taken into account when dealing with Aboriginal people.³⁹

³⁷ Transcript of Proceedings, Private Examination of 30 June 2015, Rodney Shannon, p.3.

³⁸ Transcript of Proceedings, Private Examination of 1 July 2015, Graeme Johnston, p.4.

³⁹ Transcript of Proceedings, Private Examination of 29 June 2015, Brett Baddock, p.3.

- [160] Beyond basic cultural awareness training on entry, there appears to be no system to review and repeat that training. Cultural awareness training is generic and is intended to build awareness of cultural diversity generally. It is not specifically directed towards Aboriginal culture. The lack of knowledge before undertaking an interview with an Aboriginal person is worrying. It suggests more than a failure of an individual officer to access the C.K.D. or read the Police Manual.

Recommendation Three

The Commission recommends immediate attention be given to ascertain if the lack of knowledge disclosed is widespread. If so, the Commission recommends development of an ongoing training and refresher course in dealing with Aboriginal people with particular emphasis on language and culture.

- [161] WA Police agrees that ongoing training (and a refresher course) be developed to train officers in aspects of Aboriginal languages and culture. When developing the training course, WA Police notes consideration needs to be given as to who should be in receipt of such training (and to what level) with specific emphasis on officers posted, or to be posted, to areas with high Aboriginal populations and officers tasked with interviewing Aboriginal people suspected of serious crimes.

CHAPTER EIGHT

SYSTEMIC WEAKNESS PART 3

BALANCE BETWEEN POWERS AND RIGHTS UNDER THE *CRIMINAL INVESTIGATION ACT 2006*

[162] Since 1 July 2007 WA Police exercises powers and responsibilities under the CI Act. These are the powers Gazzone and Shannon purported to invoke when interviewing Gibson on 16 -17 August 2012.

[163] The CI Act is reforming legislation. Its overall purpose is to codify the extent of police powers. It balances the powers and duties of police with the rights of citizens who may be subject to the exercise of these powers, bringing a measure of certainty and equality into the law.

[164] Relevantly, it provides police officers with powers and responsibilities when it is necessary to interview a witness, a suspect or an arrested person in the course of an investigation.

8.1 An Interpreter Must be Used if Necessary

[165] There is an overarching requirement if a person has a lack of understanding of English. Before invoking the powers of the CI Act if an officer is required to inform a person about a matter and if a person is for any reason unable to understand or communicate in spoken English sufficiently, the officer must if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter.⁴⁰

[166] This obligation is now reinforced by the Western Australian Language Services Policy 2014 which now requires State government agencies, among other things, to ensure clients who are not able to communicate in spoken and/or written English are made aware of:

- their right to communicate in their preferred language;
- when and how to ask for an interpreter.

Agencies must also ensure all relevant staff are able to identify when to engage an interpreter and how to work with an interpreter.

[167] To balance the use of police powers under the CI Act and to protect against misuse, a witness, a suspect or an arrested person acquires certain rights depending on their status. It is the responsibility of a police officer to advise the person of those rights and to allow a reasonable opportunity for their exercise. If a person does not properly understand what is being said to them, the rights are useless, and the procedure becomes unbalanced.

⁴⁰ CI Act s.10.

8.2 Right to Silence and the Need for Comprehension

- [168] One fundamental common law principle is not explicitly found in the CI Act. Unless statute otherwise provides, a person enjoys a privilege against self-incrimination. When a person is questioned as to involvement in an offence, that person has the right to remain silent. If they answer questions, they must do so in the exercise of free choice to speak or not. Their responses must be voluntary. An admission or confession that is involuntary is inadmissible in criminal proceedings.
- [169] Many people confess to criminal behaviour when interviewed by police officers. This is permissible provided that they make a voluntary choice to speak or remain silent. For this reason, an arrested suspect must be cautioned that they are not obliged to answer any questions and that anything they do say may be recorded and later given in evidence.⁴¹
- [170] Procedures have been developed to ensure that a suspected person completely understands their rights so that what is said thereafter is a free and voluntary choice. If will is impermissibly overborne or, the person does not understand that there is a choice, then any confession is inadmissible.
- [171] The CI Act balances the expanded powers given to Police with rights to be accorded to a person interviewed by Police. If the power is misused or the rights not given, then the balance is removed and what occurs may then be unlawful. Evidence unlawfully obtained is inadmissible unless a Court exercises a discretion to admit it.⁴²
- [172] It is manifestly important that when a suspect is being questioned as to possible involvement in a criminal offence, they are able to exercise a free choice to speak, or remain silent.
- [173] Many things might impair that choice - inebriation, fatigue or lack of comprehension. The first two can be resolved by time. The third may be ameliorated by an interpreter.
- [174] To ensure that any admission is voluntary, the law has developed a series of checks and rules. These have been adopted, and sometimes expanded, in the C.K.D.
- [175] Adherence to those rules by police officers maintains the integrity of an investigation, protects the vulnerable and helps to ensure justice is done.

⁴¹ CI Act s.138(2).

⁴² CI Act s.155.

8.3 Police Power to Question

- [176] Any person has the right to ask questions of another. The other has the right to decline to answer. Police officers may, and every day do question citizens and require no special powers to do so.⁴³
- [177] Powers arise in particular circumstances when a person is requested to accompany a police officer for questioning or when a person is detained for questioning.
- [178] If a person is suspected of committing an indictable offence with limited exceptions the interview must be recorded.⁴⁴ The C.K.D. reinforces this requirement.

8.4 Requesting a Citizen to Accompany a Police Officer

- [179] A police officer may request a person not in lawful custody such as a witness (or a person whose involvement is yet to be established) to accompany the officer to assist in an investigation.
- [180] However, they must inform the citizen and be satisfied the citizen understands:
- that he or she is not under arrest;
 - that he or she does not have to accompany the officer;
 - if he or she does accompany the officer, he or she is free to leave at any time unless then under arrest.⁴⁵

8.5 Arrested Suspects: Their Rights and Police Powers

- [181] One difference between a person voluntarily assisting police and an arrested suspect is that the volunteer may leave at any time while an arrested suspect may be detained for a variety of purposes, including that of interview.⁴⁶
- [182] A police officer may arrest a person for a serious offence if the officer reasonably suspects that the person has committed an offence.⁴⁷
- [183] Other relevant rights include:
- to be informed of the offence for which they have been arrested or may be suspected;
 - to be cautioned before interview as a suspect;
 - a reasonable opportunity to communicate or attempt to communicate with a lawyer.⁴⁸

⁴³ CI Act s.8.

⁴⁴ CI Act s.118.

⁴⁵ CI Act s.28.

⁴⁶ CI Act ss.28 and 139.

⁴⁷ CI Act s.128.

- [184] In addition to those rights and the overarching requirement under the CI Act s.10 if an arrested suspect is for any reason unable to understand or communicate in spoken English sufficiently, the arrested suspect is entitled (emphasis added) not to be interviewed until the services of an interpreter or other qualified person are available.⁴⁹ An interpreter can participate remotely.⁵⁰
- [185] The words of caution are not specified in the CI Act but the usual form is "You are not obliged to say anything, but anything you do say will be recorded and may later be given in evidence".
- [186] The English language test within the C.K.D. is designed for use when interviewing witnesses and victims. It is not intended to be used for suspects and it is unsuitable because the questions in the test are contrary to the words of the caution which places no obligation to answer a question on a person.
- [187] Gibson had a superficial understanding of English, sufficient to pass in basic conversation but was unlikely to understand the intellectual concept of choosing to speak or remain silent in an interview as a voluntary choice. He will not be alone.

Recommendation Four

The Commission recommends that attention is given to the administration of a caution for a person unfamiliar with their right to silence when English is not that person's first language. It is for WA Police to identify the best approach to improving the administration of a caution.

- [188] WA Police agrees that attention should be given to the administration of the caution for people with English as a second language, specifically Aboriginal people. WA Police notes that it has already undertaken some work in this area. It is considering adopting the Northern Territory model whereby the caution is recorded in a variety of Aboriginal languages and the correct version is played to the interviewee prior to any interview.

8.6 Interviewing Practices and Training

- [189] The Commission examined training material provided by the WA Police Academy to identify possible training deficiencies, establish knowledge levels the officers involved in the interviewing and charging of Gibson should have had, and whether their actions and decisions were in accordance with their training. All relevant officers had been trained.

⁴⁸ CI Act s.138(2)(a)-(c).

⁴⁹ CI Act s.138(2)(d).

⁵⁰ CI Act s.116.

[190] Examination of the current Foundation Training Legal Unit "Confessional Evidence" Lesson Plan, Power Point and précis shows that legislative and case law requirements regarding the admissibility of admissions and confessions have been taught correctly since the introduction of the CI Act and there appear to be no deficiencies.

[191] The problem is in the retention and the application of knowledge by police officers in practice. There is a systemic weakness demonstrated by Operation Aviemore. There appears to be no mechanism to ensure officers engaging with Aboriginal witnesses and suspects are, and remain, competent to do so.

Recommendation Five

The Commission recommends that refresher training is given to police officers in relation to the exercise of powers and responsibilities under the CI Act.

[192] WA Police agrees with this recommendation.

CHAPTER NINE
SYSTEMIC WEAKNESS PART 4
CONFUSION BETWEEN RIGHTS AS A WITNESS AND
RIGHTS AS AN ARRESTED SUSPECT

- [193] A decision when a person should be treated as witness and when a person should be arrested as a suspect carries important legal consequences. Police officers examined by the Commission described confusion and much discussion about the difference.
- [194] Documents and correspondence created during Operation Aviemore show a number of different terminologies were used to categorise Gibson. At various times, Gibson was referred to as a Category B person of interest, a suspect, and a priority person of interest (POI). These "titles" are part of WA Police guidelines but are not aligned to the CI Act. It is evident officers have been applying these processes without sufficient regard to the CI Act. As a result they have, on occasion, given insufficient consideration to the lawfulness of their actions and the voluntariness of the interview.
- [195] There is potential for abuse by treating a person as a witness and not affording them rights under the CI Act s.137-138 until after they have confessed.
- [196] The Commission considered whether there might be a practice in WA Police to interview suspects as witnesses in order to circumvent the rights that would be otherwise acquired by that person. The Commission cannot determine whether there is such a practice.
- [197] There is no evidence that the decision to treat a suspect as a witness in Operation Aviemore was done for an improper purpose. Some witnesses were interviewed either as suspects with a caution given and the interview recorded, or as arrested suspects. On occasion, after interview, the status was changed to witness and a statement obtained under CI Act s.28.
- [198] Despite subsequent action plans describing the need to arrest Gibson as a suspect, at the meeting on 31 July 2012 Western made the decision, possibly endorsed by Lee, that Gibson was to be treated as a witness.
- [199] Western's classification of Gibson as a witness though mistaken was defensible. The Commission examined all the material around this decision, including evidence from Western and other officers. There is no evidence it was done to obtain any improper advantage.
- [200] The Commission has examined all the material about this decision and taken evidence from Western and Lee on the Decision. There is no evidence that the decision to treat Gibson as a witness was made for an improper purpose.

[201] The practical effect of classifying Gibson as a witness meant that MCS officers were not immediately required to issue a caution, commence an audio-visual recording, consider the use of a lawyer, interpreter or interview friend, or give consideration to detention periods and places for detention.

9.1 Confusion about Reasonable Suspicion

[202] Whether a person's action might or might not give rise to a reasonable suspicion is also one that appears to generate much discussion.

[203] Lee and Western gave evidence about the classification of a person as a POI as an investigative strategy. When police are investigating a crime and there is no obvious perpetrator, it is an appropriate strategy to consider whether there are persons of interest that can be either implicated or eliminated.

[204] There may be no reasonable suspicion that a POI might be an offender until further investigation is carried out.

[205] Difficulties arise when at some point during further investigation a police officer ought to have formed a view that there are reasonable grounds for suspecting the POI has committed an offence. The provisions of the CI Act are then enlivened. The test is objective, not subjective and so can be judged by others.

[206] The decision will not always be easy, but the possibility that a person of interest may become a suspect as defined in the CI Act must be continually borne in mind. A mistaken view may have profound effects later and lead to the rejection of evidence.

[207] The CI Act s.4 defines "reasonably suspects":

4. *Reasonably suspects, meaning of*

For the purposes of this Act, a person reasonably suspects something at a relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if they are subsequently found to be false or non-existent), when judged objectively, are reasonable.

[208] A police officer may arrest on reasonable suspicion.⁵¹ An arrested suspect acquires rights.⁵²

[209] A suspicion has been judicially described:

A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of

⁵¹ CI Act s.128(2).

⁵² CI Act s.138.

*actual apprehension or mistrust amounting to "a slight opinion but without sufficient evidence" ...*⁵³

...

*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but cannot prove".*⁵⁴

- [210] Facts which can reasonably ground a suspicion may be quite insufficient to reasonably ground a belief.⁵⁵
- [211] The requirement of "reasonableness" imports an objective standard which is a restraint against arbitrary arrest and also a trigger for acquisition of rights.⁵⁶
- [212] A person may be assessed by police as a POI and at the same time be one of a number of people who could be reasonably suspected of involvement in an offence. The two positions are not contradictory in view of the low threshold of reasonable suspicion.

Recommendation Six

The Commission recommends that WA Police re-evaluate the POI investigative strategy to emphasise the separate classification requirements under the CI Act. These requirements are the relevant source of both police powers and the rights acquired by a person being interviewed.

⁵³ *Queensland Bacon Pty Ltd v Rees* [1966] 115 CLR 266, Kitto J at 303.

⁵⁴ *Hussien v Chong Fook Cam* (1970) AC 942 per Lord Devlin at 948.

⁵⁵ *George v Rocket* (1990) 170 CLR 104.

⁵⁶ CI Act ss. 128 and 138.

CHAPTER TEN

SYSTEMIC WEAKNESS PART 5

DISCRETION NOT TO CHARGE

[213] Even when there is credible evidence that a person may have committed an offence, a police officer has a discretion not to charge a suspect with an offence.⁵⁷ The risk of corruption in the exercise of that discretion is obvious. That is why there are procedures to be followed, to ensure that the decision to exercise discretion is open and accountable.

[214] The DPP has issued guidelines as to the exercise of the discretion, requiring the reasons to be recorded in writing and subject to review.⁵⁸ These are reproduced in the C.K.D. The C.K.D. expands on the Guidelines setting out the principles and rules. Central to accountability and to mitigate against corruption is a requirement for recording and review:

When a decision has been made by an investigating officer not to lay a charge in relation to an indictable offence or in relation to a simple offence where property, a prohibited substance, or a prohibited article is involved, the decision must be recorded and referred by the investigating officer's OIC to a commissioned officer for review. The commissioned officer must record all determinations made in the review.

...

*All determinations during a review are to be recorded in writing by the commissioned officer responsible for the review.*⁵⁹

[215] A district or Divisional Officer is responsible for maintaining a Discretion Register which is to be audited on a quarterly basis.⁶⁰

[216] There are a number of reasons why the exercise of discretion must be recorded and reviewed. The possibility of corruption is obvious. But another good reason is that investigators may develop tunnel vision and in their single-mindedness to gain evidence against a target, overlook serious criminality by others.

[217] There is a third reason. In the event that the discretion is exercised in favour of a person who becomes a witness for the prosecution, the accused is entitled, through disclosure, to know that the witness was not charged with an offence and the reason why.

⁵⁷ *R v Commissioner of Metropolitan Police; Exp. Blackburn* [1968] 2 QB118; *Hinchcliffe v Commissioner of AFB* (2001) 118 FCR 308.

⁵⁸ Guidelines to Police Officers and Other Public Officers for the Exercise of Discretion Not to Prosecute Indictable Offences.

⁵⁹ C.K.D., DP 1.3.

⁶⁰ C.K.D., DP 1.4 and 1.5.

- [218] In the case of Operation Aviemore the discretion not to prefer a charge was exercised a number of times but was unrecorded and unreviewed.
- [219] The decision to exercise discretion in respect of Gibson on a charge of stealing a motor vehicle is not recorded either as a critical decision or in the Discretion Register. There is no record that Gibson was to be interviewed in relation to a stolen motor vehicle in any of the various Action Plans, although the Action Plan dated 1 August 2012 refers to Gibson being interviewed in relation to "Death by Dangerous Driving and/or murder ...".
- [220] The Discretion Register should have been completed for the decision not to charge Gibson with stealing a motor vehicle. It is probable that Western having made the decision secured Lee's consent to it, even though this was not recorded in the Discretion Register. Lee agreed that the exercise of discretion not to charge a person should be recorded.
- [221] Despite RC's admissions implicating him in knowingly being a passenger in a stolen vehicle, neither Johnston nor Cleal were considering pursuing that matter and their focus was the homicide. The officers appear to have used an element of discretion not to charge RC or make further inquiries to identify the offence. There is no record of that discretion being reviewed by a senior officer or being entered in the Discretion Register.
- [222] The engagement of EM as a potential witness to a homicide is consistent with the level of information available to the interviewers that he may be implicated in stealing a motor vehicle. It appears the interviewing officers were not considering that charge at all prior to the interview. If the stealing offence was not being considered then the officers used their discretion not to charge and there is no record of that discretion being reviewed by a senior officer or recorded in the Discretion Register.
- [223] Despite TN admitting his involvement in an aggravated burglary at his drug dealer's house during his EROI, he was not charged. No entry was made in the Discretion Register. Nor was the decision reviewed.
- [224] According to Shannon's handwritten notes, BB made admissions during interview regarding driving a stolen motor vehicle but denied being present at the time of the aggravated burglary or at the time of death. No entry was made in the Discretion Register. The decision was not reviewed.
- [225] The Commissioner of Police as part of the response has expressed the view that the majority of police officers are well aware of the policy concerning the discretionary register and act in accordance with that policy.

Recommendation Seven

The Commission recommends that the requirement for recording and reviewing the exercise of discretion not to charge an offence be reinforced immediately with all officers in case Operation Aviemore reflects widespread practice.

CHAPTER ELEVEN

ASSESSMENTS AND OPINIONS OF MISCONDUCT

[226] The Commission has power to make assessments and form opinions as to whether serious misconduct or misconduct has occurred: CCM Act s.22. The role of the Commission is described by Martin CJ in *Cox v Corruption and Crime Commission* [2008] WASCA 199 at 45:

*The Commission does not perform the function of making binding adjudications or determinations of right. It is neither a court nor an administrative body or tribunal in the usual sense of those expressions. In the performance of the misconduct function it is an investigative agency. After conducting investigations, its role is limited to making assessments, expressing opinions and putting forward recommendations as to the steps which should be taken by others. In characterising the findings made by the Commission as 'assessments' and 'opinions' it is clear that the legislature intended that the conclusions of the Commission should not be regarded as determinative or binding in any subsequent proceedings. So, if the Commission expresses an opinion that a member of the public service has been guilty of misconduct and that disciplinary proceedings are warranted, the question of whether or not a breach of discipline has been committed can only be authoritatively determined in the course of subsequent disciplinary proceedings instituted by the relevant employing authority, and not by the Commission.*⁶¹

[227] Although the Chief Justice was speaking of disciplinary proceedings, s.23 at the time of these events provided:

- (1) *The Commission must not publish or report a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence.*
- (2) *An opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.*⁶²

[228] This reflects the common law: *Parker and Ors v Miller QC and Ors Sup Ct* [1998] WASCA 124.

[229] The Commission must be satisfied that there has been misconduct on the balance of probabilities in light of the seriousness of the issues involved and the potential consequences.

⁶¹ *Cox v Corruption and Crime Commission* [2008] WASCA 199 at [45].

⁶² *Corruption and Crime Commission Act 2003* s.23.

[230] Although an opinion of misconduct has no legal consequence, such an opinion may cause significant reputational or other harm to the person concerned. For that reason, the Commission will always adopt a cautious approach to an opinion of misconduct and will not do so unless clearly persuaded on an analysis of all the material that such an opinion is appropriate.

11.1 Opinions of Misconduct Arising from This Investigation

[231] In large measure the conduct of police officers in Operation Aviemore speaks for itself. Whether that conduct should be the subject of disciplinary or other proceedings is a decision for the Commissioner of Police. The failure to follow procedures mandated in the C.K.D. and the failure to comply with the law set out in the CI Act reflect not only a lack of competence by some officers, but systemic failures that should be addressed by commissioned officers responsible for training and professional standards.

[232] The Commission is aware that WA Police has instituted disciplinary proceedings with respect to a number of officers named in this Report. Consideration is also being given to criminal charges in relation to one officer.

[233] The Commission's principal function is to report to Parliament, a minister or an appropriate authority.

[234] It may, but is not obliged to, form an opinion of misconduct. In respect of Operation Aviemore, the Commission has formed opinions and reported separately to the Commissioner of Police, also providing him with material in respect of those opinions.⁶³

[235] Decisions on publication of opinions will be made case by case. Due to the risk of prejudice to current proceedings within the jurisdiction of the Commissioner of Police, the Commission has decided not to publish its opinions in this Report.

⁶³ CCM Act s.22(3)

CHAPTER TWELVE

LESSONS FROM OPERATION AVIEMORE

- [236] The MCS is supposed to be an elite squad. It is certainly important to public safety as it is charged with the responsibility of investigating serious crimes. It should function at the highest level with officers of proven competence.
- [237] Acknowledging the pressure on the MCS caused by many concurrent and challenging homicide investigations, the failures in Operation Aviemore reflect no credit on it. MCS should urgently review its capacity to conduct admissible interviews and its recording practices for important investigative decisions such as the exercise of a discretion not to charge.
- [238] The relevant content of the WA Police training module is comprehensive. C.K.D. directions about interviewing persons who may not sufficiently understand or communicate spoken English are appropriate. So are the directions about the power and duties under the CI Act and the process to approve a decision not to charge.
- [239] Clearly the message is not getting through. There is an urgent need to review training to ensure that all police officers have competence in dealing with people who are vulnerable because of language difficulties.
- [240] The interview of a suspect will almost always be both an important investigative tool and an important piece of evidence. In homicide cases in particular, the stakes for the investigators and a suspect are high. So strict compliance with the CI Act is necessary to achieve the balance between police powers and a suspect's rights.
- [241] During Operation Aviemore a large number of Aboriginal people from remote communities were interviewed. No general consideration seems to have been given to the need for an interpreter. Little attempt was made to obtain an interpreter when a need was identified even though the Kimberley Interpreting Service is contracted to WA Police to supply interpreters.
- [242] During Operation Aviemore there appears to have been no documented consideration how police were to engage with vulnerable Aboriginal people generally. An investigation plan should have included general and specific engagement strategies to be adopted in regard to the large number of potential Aboriginal witnesses to be interviewed.
- [243] Many decisions were made not to charge a suspect with an offence. There was no easily accessible record on a Discretion Register of these decisions and no approval of those decisions by a senior officer.

[244] Things went wrong in Operation Aviemore because of:

- a lack of familiarity with and understanding of the resources available within WA Police for engaging with Aboriginal people;
- difficulty in accessing the material due to the manner in which the information and the contents of the Police Manual in particular, are indexed and arranged;
- a lack of adequate training or practical experience for engaging with Aboriginal people, particularly those from remote locations;
- a lack of adequate supervision and guidance provided to inexperienced staff expected to conduct interviews with Aboriginal persons;
- a lack of familiarity with the remote environment;
- resourcing and workload pressures within MCS at the time (including multiple murder investigations); and
- in some cases, exhaustion, emotional fatigue and external life pressures.

[245] The Commission has chosen to take a cautious approach in forming opinions on misconduct because in many cases the errors of individual officers reflect a deeper malaise and systemic weakness which permeates criminal investigations in this State. The lessons have been a clarion call for improvement.

