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NORTHERN TERRITORY OF AUSTRALIA

CORONERS COURT

A 51 of 2019

AN INQUEST INTO THE DEATH

OF KUMANJAYI WALKER

ON 9 NOVEMBER 2019

AT YUENDUMU POLICE STATION

JUDGE ARMITAGE, Coroner

TRANSCRIPT OF PROCEEDINGS

AT ALICE SPRINGS ON 16 NOVEMBER 2022

(Continued from 4/11/2022)

Transcribed by:
EPIQ

THE CORONER: Dr Dwyer.

DR DWYER: Good morning, your Honour. Your Honour, I call Constable Zachary Rolfe.

THE CORONER: Thank you.

ZACHARY BRIAN ROLFE, affirmed:

XN BY DR DWYER:

DR DWYER: Sir, could you please tell the court your full name?---Zachary Brian Rolfe.

You have been employed by the Northern Territory Police since 2016, is that right?---Correct.

You're still a serving police officer, is that correct?---Correct.

You're not in uniform today, is that right?---Correct.

What's your current substantive position? That is, where are you based?---I'm based in a – the RCG House in Darwin. I've been banned from all police stations. So I am – I believe I come under the umbrella of SerPro.

What's the – just so we all understand, what's the RCG office?---It's a government building in Darwin.

You are attached to the Digital Transformations Project, is that right?---Correct.

So that is your substantive position within the police force, is that correct?---Yes.

Are you currently on leave?---Yes.

On 9 November 2019, Kumanjayi Walker passed away, after he was shot by you. As a result of Kumanjayi's death, you were charged with murder, and two alternative counts of manslaughter, and engaging in a violent act, causing death. In March 2022, you were found not guilty of those offences. Is that right?---Correct.

That summary? You understand that in Warlpiri and Luritja culture, it's not appropriate to speak the first name of the person who passed away for a considerable time after they have passed. You understand that?---Yes.

And that's why the term "Kumanjayi" is used, you understand that?---Yes.

Constable Rolfe, during the course of the trial, sometimes at the prompt of legal counsel, you used Kumanjayi's first name to signify a period before he passed away, and you used the term "Kumanjayi" after. Can I ask you to understand that it will

never be appropriate in this court to use Kumanjayi's first name. So we won't ask you to do that?---Understood.

After the verdict, you resumed – well I withdraw that. After you were charged with murder on 13 November 2019, you were suspended from work. Is that right?---Correct.

You resumed work on 18 July 2022, is that correct?---Yes I believe so.

How long have you been on leave for?---I started leave just before the Coronial started.

So the Coronial inquest started on 5 September this year, you started leave just prior to that, is that right?---Correct.

How many days prior, do you recall?---I don't recall.

I want to ask you some questions first about your background. You will appreciate that the family and community of Kumanjayi Walker are interested to understand something about that?---Okay.

You grew up in Canberra, is that right?---Yes.

Where did you go to school in Canberra?---Canberra Grammar School.

You completed your schooling at that high school?---Correct.

What year did you complete your schooling?---2009.

When you were growing up in Canberra, did you have much involvement with Aboriginal people?---No I did not.

Had you ever been to the Northern Territory, at any time, before coming to work here in 2016?---No.

In October 2010, you joined the Australian Defence Force, as a soldier or rifleman, is that right?---Yes.

You worked with the Australian Defence Force until May of 2015, correct?---Correct.

Why did you join the Army?---There are number of reasons why.

What were they?---I needed a job. Didn't know what – anything else to do. Basically wanted to be a soldier at that time.

You were deployed to Afghanistan between July 2014 and January 2015, as part of what is known as Operation Slipper, is that correct?---Correct.

Before you went to – well I withdraw that. Was that the first overseas deployment that you went on with the Australian Defence Force?---Yes.

And was it the only one?---Yes.

Going to a country like Afghanistan obviously involves you going to a country with a different religion, and different cultural expectations, is that right?---Yes.

Did you do any cross-cultural training, or cultural awareness training, before going to Afghanistan?---Yes.

Did that focus on ways to show respect for another culture, community?---I'm sure that was a part of it. I can't recall it completely.

There would be at least a part of it that would focus, wouldn't it, on how employees of the Australian Defence Force might go into a different country, and behave in a way that is consistent with cultural norms, wherever possible?---I'm not sure. I can't recall it.

Do you recall any component of it that would teach soldiers of the ADF ways in which they could show respect to the culture in Afghanistan?---We were taught to be respectful where we could be, yes.

Well what did you gather – what did you gain from that cultural awareness program in relation to going to Afghanistan?---Again, I can't recall the training. I was taught to show respect, regardless of culture.

Were you taught to show respect for culture?---Some aspects.

What aspects?---Aspects that should be respected.

Your platoon operated as a force protection unit in Afghanistan. What did that mean?---We were there to provide force protection for the mentoring elements in Afghanistan.

The mentoring elements?---Yes, the mentoring elements.

What does that mean?---The elements that were mentoring the Afghan National Army.

I see. So was there – did you see active service in Afghanistan? That is, were you out on patrol yourself in Afghanistan?---We were out in Afghanistan, correct.

Did you carry weapons in Afghanistan when you were out on patrol?---I'm not sure how much we're allowed – you know.

All right. On 4 May, you – in 2015, you transferred from the permanent service of the ADF to the Active Reserve?---Yes.

Is that right? What did that mean?---That was a way to transition out of full-time to part-time, and start my separation from the military.

Sir, can I ask you to keep your voice up, because you're not being captured on the recording, thank you?---Yes.

Could you repeat that answer please?---That was a way for me to transition from full-time to part-time and start my separation from the military.

What were your reasons for leaving the military at that time?---I wanted to move on.

Why?---I felt like moving on.

From December 2015 to February 2016, you submitted several applications to join Australian police forces around the country. Is that right?---Correct.

On 22 April 2016, you received an offer of employment from the Northern Territory Police Force. Is that right?---Yeah, if that's the date, that's the date. I'm not sure of the date.

All right. Well, you recall it was 2016, wasn't it?---Correct.

Okay. And you went through a recruitment process to be engaged to be a police officer in the Northern Territory?---Yes.

On 30 May 2016, you commenced recruit training in Darwin. Does that accord with your memory?---Yes.

You were in squad 129. Is that correct?---Correct.

On 30 June 2016, if you can take it from me, you are recorded as completing an element of training called, "Respect, Equity and Diversity Online Training". Do you recall anything about that?---Yeah, I recall that, that we were trained in that way.]

What did that involve, "Respect, Equity and Diversity"?---It's pretty self-explanatory. It was teaching us about elements of respect, equity and diversity in the workplace and in the public, I believe.

Your training records suggest that was online. Do you remember that? You filled out forms on a computer in relation to that, answered questions?---Yeah, I remember a lot of online training we did.

Do you remember any face to face training that you did on cultural awareness or cultural competency?---I believe we did have a small block of that.

What did that involve?---As far as I can recall, I thought we just had a small – it could have been part of the day with an instructor talking about the culture in the Northern

Territory, I believe.

Do you recall the name of the instructor?---No.

Do you recall whether or not the instructor was an Aboriginal person?---No, I can't recall.

Do you recall whether you left Darwin for the purposes of that instruction?---I don't think I left Darwin for any instruction.

All right. Do you recall whether the cultural competency course was delivered in a classroom or on country?---I believe all of my training was in the classroom, except for one day where we went to a community in Darwin, like a town camp, sorry.

Was it Bagot Community that you went to?---I believe so.

Do you recall speaking to any of the Elders at Bagot Community?---During that day?

Yes?---Yeah, I believe we spent the day speaking to the Elders and the community members.

You mentioned earlier that you learnt about culture awareness within the Northern Territory, did that distinguish any different cultural groups in the Northern Territory?---I believe there was – well there's multiple differences in the cultural intricacies through each community. I believe it's - - -

It's a multicultural community; there's a Greek community, there's Asian communities living in Darwin, there's Aboriginal communities. Did you learn about that in the cultural context that you're talking about?---I believe our training focussed on the Indigenous communities.

Was there anything of value to you in that training?---Yes.

Can you tell us anything that you took from it?---Well, it's taught me about Indigenous culture that I wasn't aware of, aspects of it.

Like what?---Look, there's lots.

Anything specific to your work that you can recall?---To be honest, the cultural training that we did, I haven't found the specific use of that in the job, because I'm responding to humans – human problems of humans asking for help and then humans breaking the law. I have not been presented with a problem, a cultural problem as a police officer. In saying that, I was in Alice Springs.

Okay. Did you receive any training in relation to cultural competency or cultural awareness that related to anything you might have dealt with as a police officer in Alice Springs?---Well, I believe we may have in that training, but again, I haven't come up with some much of a cultural clash as a police officer. I've come up with a

behaviour clash as amongst humans.

All right. I'm going to ask you to keep your voice up again, Constable Rolfe, if you don't mind?---Yeah, copy.

In relation to a clash between humans, I appreciate you're trying to make a point about something, what is it? Do you want to explore that? Do you want to expand on that?---No, I'm just saying that, like as a police officer, I'm responding to a job where someone has called for help or someone has broken the law. I have not been called to a cultural issue.

Aren't you often, as a police officer, actually engaging in general duties work where you might, for example, travel in a police car on the streets of Alice Springs and see whether or not there is anybody needing assistance?---Yes.

Do you say that you receive no training in terms of cultural awareness that assisted you in that job?---No, I'm saying we received cultural training, but – look again, I haven't responded to cultural clashes in the job.

Was any part of your training within the Northern Territory Police Force to be taught about the history of colonisation in this country?---Yeah, I believe we had a minor part of that.

Did you learn about any of the – for example, historic massacres that Aboriginal people experienced, were victims of?---Yeah. I believe.

You did?---I believe we have, yes.

What particular massacre did you learn about, or multiple, tell us?---Well, the massacre that we've been talking about in this Coronial a lot. The Coniston Massacre, we were taught about that.

You learnt about that in your training in Darwin, did you?---I believe so.

Did you learn about the disposition of Aboriginal people from their country as part of your training as a police officer?---Perhaps.

Did you learn about the Stolen Generation, the impact of that for people in the Northern Territory?---Yes.

Did you have any training in the trauma that Aboriginal people have experienced as a result of what we just talked about, the disposition and the massacres that they've experienced?---I'm not sure if we had training on that.

Is that something that you understood; that is, had you read about that or did you have any understanding of traumas of Aboriginal people prior to your work in Alice Springs?---Traumas of some, yes.

What can you tell us about that? What was your understanding of trauma that Aboriginal people had experienced as a result of colonisation of this country?---Well, I wouldn't paint a whole group of people with the same brush and say that everyone is traumatised by the same thing. I would say that some people that we've learnt about have been traumatised intergenerationally from what's happened previously.\

Is that something that you learnt about during your training as a police officer?---I can't recall if that was in police.

On the 8th of – I withdraw that. Just before I move on from some of the training that you received in Darwin, did any of that training involve ways in which you, as a police officer, could show respect to Aboriginal people?---I believe we were taught to respect everyone.

So, are you saying in that answer that you were not taught any particular ways in which you might show respect to Aboriginal people?---Well, I think it's the same in the way that you respect anyone else.

As the answer to my question is "no", is it, that you did not receive any training in relation to how you might show particular – show respect to Aboriginal people anywhere in the Northern Territory?---No, because if we were taught how to respect everyone, Aboriginal people are included in that.

Okay. So, if you're talking to me in a community; say if you're talking to me as – to anybody in, for example, Yuendumu or Willowra or Uluru, it's exactly the same, is it, in terms of your training?---No, we were taught to treat people in a way that they understood and a way that they would feel comfortable according to that individual.

How would you do that? What were you taught about that?---We would have to establish how that individual would feel comfortable if someone would, for example, if you spoke to a fellow lawyer, he could understand what you're saying, but if you're speaking to a tradie or me, I might not understand all the same words that you guys understand, so you're going to have to like dumb it down for me, for example.

So, what would you do when you were speaking to an Aboriginal person? Would you "dumb it down"?---I would speak to them how they felt comfortable.

How? How would you do that? What did your training allow you to – how did your training teach you to adapt when you were speaking to an Aboriginal person?---The same way you would adapt by speaking to anyone else. You speak to them, establish how they would feel comfortable in your communicative way and do that.

When you left the Academy in Darwin, you had a choice, did you, as a young recruit of working in Katherine or Tennant Creek or Alice Springs. Is that right?---Yeah, I believe you could put your priority in.

What was your priority?---Alice Springs.

Why was that?---From what I'd heard it was the busiest station, I would be able to get the most experience in the quickest format.

Why was that of interest to you?---Because I wanted to improve. I wanted to learn my career as fast as possible - or learn my job.

Were you enthusiastic about your role in Alice Springs? That is when you started in Alice Springs did you go into the police force with sense of enthusiasm about the job?---Yes.

Did you receive any sort of induction when you started in Alice Springs about the different community groups that you would come into contact with in policing?---Yes.

How did that happen?---I believe we had a day or two in the station before we actually started work as a group, of the new recruits that went down there.

And did someone deliver that induction package?---Yes.

Who was that?---I can't recall.

Was it an Aboriginal person?---I can't recall.

What can you tell her Honour that you learned about the different communities that you would be engaging with in and around Alice Springs?---We just got taught about the different town camps in Alice Springs and the community surrounding it, more so a geographical - it was more geographical training versus different cultural idiosyncrasies between the communities.

So there was nothing particular about ways in which you would show respect to Aboriginal people in and around Alice Springs?---Not that I can recall specifically.

You have given evidence, I think, to the effect that in terms of speaking with Aboriginal people or working alongside Aboriginal people you would treat them exactly the same way as you would a non-Aboriginal person, is that right?---Well, yeah, generally, I treat everyone the same.

You would show respect for an Aboriginal person in the same way you would show respect for a non-Aboriginal person, is that your evidence?---Yeah, I believe that's what you should do.

I am going to ask that you be shown MFI C. Could you turn to page 3 please? There's an exchange between you and officer Mark Sykes. He is another police officer, correct?---Correct.

He was someone you served in Afghanistan with, is that right?---Correct.

So he has previously been in the Army and then moved to the police force too, correct?---Correct.

The exchange involves this; Constable Sykes texting, "Heard you had a rough arvo yesty, grubby fucks". This is 27 April 2019. You replied, "Nah bra, just slightly annoying haha, coons man." Do you agree, Constable Rolfe, that the content of that message is obviously racist?---I wish to exercise my right and claim the penalty privilege on the basis my answers - my answers might tend to expose me to a penalty.

There are a number of other messages on your mobile phone that was in your possession in 2019 that I want to ask you about. With respect to other material on that phone that is racist, is your answer the same?---Correct, I'll claim the penalty provision.

With respect to messages on your phone that relate to the use or misuse of body-worn video, is your answer the same?---Yes.

With respect to messages on your phone that relate to the use of force, is your answer the same?---Yes.

Your Honour, I intend to show Constable Rolfe a video of a particular incident in Alice Springs and ask him a question.

THE CORONER: Yes.

DVD PLAYED

DR DWYER: Constable Rolfe, that footage is found on your phone with a date of 10 April 2019. It appears to be film of CCTV footage, is that correct?---That's what it appears, yes.

Do you recognise the two officers who are standing at the table?---I believe I know one of them.

Is that an area around Epilogue, a bar that exists in Alice Springs?---I believe so.

Are you one of those two officers?---No.

NON-PUBLICATION ORDER

What is the name of one of the officers you know?---I believe it's [REDACTED]

I'm sorry, could you repeat that?---[REDACTED].

Your Honour, I ask for a non-publication order - a temporary one at least, over the name of that police officer, until we have had an opportunity to speak with him about that incident.

THE CORONER: Yes, I now grant a non-publication order or make a non-publication order over the name of that officer.

DR DWYER: Do you know the other officer who was standing there?---No, I can't recall. I probably did at the time.

Why is that incident on your mobile phone?---I wish to exercise my right and claim the penalty privilege on the basis my answer might tend to expose me to a penalty.

I am going to show you a table of objections to topics or categories of questions which I understand has been prepared with the assistance of your legal counsel. There are 1 to 14 topics or categories of questions listed here.

Your Honour, I will just provide a copy of that table to my learned friends as well.

THE CORONER: Yes.

DR DWYER: I won't read all of those incidents onto the record, Constable Rolfe, but you will see there that the first category of objections relates to text messages that are arguably racist, sexist or homophobic or as they relate to the use of force incidents and the events of 9 November 2019. You have claimed the privilege with respect to those categories of questions, correct?---Correct.

And is the list of 1 to 14 there an accurate representation of the topics or categories of questions that you would claim an objection in relation to?---Yes.

Your Honour, I tender that list.

THE CORONER: Yes. That will be the next exhibit in these proceedings.

DR DWYER: Exhibit 22.

EXHIBIT 22 List of categories of objections numbered 1 to 14.

DR DWYER: Just to make that - or to try to make sense of that for those listening to these proceedings, there are a number of categories related to text messages. There are a number of categories related to use of force incidents and there is a final category relating to the events of 9 November 2019. Constable Rolfe, do I understand that if I was asking you questions about the events on 9 November 2019 leading up to Kumanjayi's death and involving Kumanjayi's death, you would take that same objection at this point?---Yes.

Your Honour, might I now invite Dr Freckelton to help clarify one issue, and that is that my understanding is that with respect to a number of these incidents, disciplinary proceedings have begun in respect of some of them, they may have finalised. If your Honour was going through the process required by s 38, of determining firstly that a privilege applies and if it does, whether or not a certificate would be granted your Honour would want to be informed about the stage of those

disciplinary proceedings. I don't invite your Honour to have to go through that process now but I do ask that Dr Freckelton put on the record clearly what is the situation with those notes?

MR OFFICER: Sorry, your Honour, Just before Dr Freckelton does, I've informed counsel assisting I would be making some brief submissions after Dr Freckelton.

THE CORONER: Yes.

MR OFFICER: Indeed, I will be inviting you to go through the process you adopt (inaudible) for the purposes of each these objections but I don't envisage those submissions being overly long (inaudible) today.

THE CORONER: Yes.

Dr Freckelton.

MR FRECKELTON AO KC: Thank you, your Honour. Your Honour, I will go through the 14 categories. They may not correlate with the order of the document that has just been distributed, I apologise for that.

THE CORONER: Would you like the lectern?

MR FRECKELTON: That would be helpful, thank you. Thank you.

I will start, your Honour, with the matter involving Chris Walker. I will refer to people's names save a minor to whom I will make reference without referring to his name.

THE CORONER: Yes.

MR FRECKELTON: The first matter is that involving a Chris Walker, which involved an entry into a house with a gun drawn.

THE CORONER: So we're talking about item number 11 - - -

MR FRECKELTON: That's number 11 on - - -

THE CORONER: - - - on exhibit 22.

MR FRECKELTON: Yes.

THE CORONER: Yes.

MR FRECKELTON: And that related to a person who'd made a – a complaint to police, and said that they were hiding in the bathroom. And your Honour would recall that that was of – in an arrival by – at the house of – and the person, by a number of officers, including Constable Rolfe. No disciplinary action ultimately has

been taken in respect of that matter, on the basis of a view that the basis for the entry was justified, and the excessive – and the use of force was not excessive. That matter therefore has been finalised.

I move now to the one which is relating to two intoxicated males at Araluen Park, which is number six on your Honour's list.

THE CORONER: Yes.

MR FRECKELTON: That matter too, has been finalised. Which has resulted in a decision to provide remedial advice to Constable Rolfe. That will be provided to him as a part of his OSTT requalification training. That has not been able to be provided to Mr Rolfe, to this point, because he has been absent from work on – on the basis of serial medical certificate. The first extending from 10 August to 4 September. The next from 9 September to 9 October. The third commencing on 10 October and its expiration is 9 December.

MR BOULTEN SC: Your Honour, may we have the dates that these things were finalised, so we know when that occurred, as well as what dates are pending in terms of what might be further done. For example, for the first one, when was the use of force issue concerning Walker finalised, et cetera?

THE CORONER: Do you have that information?

MR FRECKELTON: I don't have that at hand, your Honour - - -

THE CORONER: But it - - -

MR FRECKELTON: - - - but there are two affidavits from Assistant Commissioner Porter, which refer to most of these matters. And I can liaise with my learned friend in due course.

MR BOULTEN: Thank you.

MR FRECKELTON: One of the issue which – one of the issues which arises in respect of these matters is a statutory one, your Honour. Namely s 162(6) *Police Administration Act* of the Territory. And that provides that an action under part four in relation to a breach of discipline must be commenced within six months after the act or omission constituting the alleged breach of discipline was discovered. Your Honour will hear evidence about this from Assistant Commissioner Porter in due course.

But the options available for addressing the conduct of Constable Rolfe were limited, by reason of a decision that was made by the Northern Territory Police Force to avoid any possibility of interfering with a fair trial of Constable Rolfe, by requiring of him explanations and engaging in disciplinary actions against him, while the criminal action for murder was current. So in respect of this matter, for instance, the – the only option in the circumstances, was remedial advice, given when the matter

was investigated, and when it was finalised, to take up the issue raised by Mr Boulten.

The third matter, your Honour, is the Todd Tavern incident, which is number nine on your list. This was a matter where a man was questioned. Who then ran away. He was chased for a distance in the order of three to 400 metres, and he collided with the outside part of the Tavern, an artificial impediment that existed outside the Tavern. He was taken to hospital for shortness of breath and chest pain, the effects of having collided with that impediment. This was another of the matters that came into this category of being investigated after the expiration of the s 162(6) permitted period.

The decision has been made to provide Constable Rolfe with remedial advice, and it's not been possible because of his taking of leave on the occasions described already to your Honour. The next matter is number 10 on your list. So this is the fourth of the matters for which I'm making reference. This is the Albert Bailey matter, your Honour. Where it appears from the video footage, that a man and a woman were having an argument. And members of the Northern Territory Police Force ran across the lawn and the victim was pushed at full speed, it appears, by Constable Rolfe, into a wall of the building.

He struck his head on that wall. And that required suturing. Your Honour heard evidence about that from Mr Hansen, previously. Mr Hansen was given remedial advice in respect of it. A s 79 notice was served upon Constable Rolfe. He responded – and that was on the – I beg your pardon, on 31 October, Constable Rolfe responded that he did not admit having used excessive force. A notice of investigation under s 81(3)(d) was then served upon him. And the disciplinary matters in respect of that issue are ongoing.

What can take place hereafter, is a decision that there was no breach of discipline, or if there was a breach of discipline, if it is found that there was a breach of discipline, a variety of consequences can follow. Including his being charged in a disciplinary sense. Those are matters to be resolved in due course. The next matter is number seven on your Honour's list. It relates to [REDACTED]. [REDACTED], as your Honour will recall, was arrested after a foot chase, and he sustained injuries upon his head and his nose.

Constable Rolfe's body-worn video had been turned off, prior to the apprehension. A number of persons were involved in that matter, including Sergeant Furber and Constable Rolfe. Remedial advice was provided to Constable Rolfe on 26 July of this year. I move then to the matter of Malcolm Ryder, which is number eight in your Honour's list.

THE CORONER: So number seven's finalised?

MR FRECKELTON: I'll come to - - -

THE CORONER: You've told us that the remedial advice has been provided - - -

MR FRECKELTON: Yes, that's right. (Inaudible) - - -

THE CORONER: - - - and it has been finalised.

MR FRECKELTON: Yes, that's so. So I'm moving then to the Malcolm Ryder matter. Number eight in your Honour's list. Your Honour will recall that this is the matter where Judge Borchers found evidence via Constable Rolfe, that – he said could not be relied upon. And that Constable Rolfe had not been truthful in his evidence. This evidence has been scrutinised by Professional Standards Command. And a decision has been made that the matter is concluded in respect of the honesty issue, if I can term it that way, and a perjury charge will not be preferred against Constable Rolfe, in spite of the troubling issues raised by Judge Borchers. I move now to - - -

THE CORONER: Can I add the word "finalised" to those comments?

MR FRECKELTON: Yes, you can, your Honour. That's fine with us.

DR DWYER: And could my learned friend clarify that that's a criminal charge of perjury that - - -

MR FRECKELTON: Yes.

DR DWYER: - - - that won't be preferred, but with respect to any disciplinary proceedings following from Malcolm Ryder, have they been finalised or are they not preferred?

MR FRECKELTON: Those are finalised.

MR BOULTEN: So, what was the outcome of this new proceedings about Mr Ryder's case?

MR FRECKELTON: The explanation of what has taken place in that regard is to be found in the second affidavit of Assistant Commissioner Porter at page 16. The outcome is (inaudible).

I move now to the matter involving the minor, which is the 14-year-old boy in a bin. That is number 5 in your Honour's list. This again falls into the category of matters that are outside the 162(6) situation. This matter is currently in the hands of Professional Standards Command who are further considering the matter, but by reason of the timing of the issue, the only potential outcome in that regard to the provision of remedial advice.

And if that is the outcome, which will be determined imminently, it would be provided at the same time as the other forms of remedial advice that the – was requalification, if and when Constable Rolfe returns to work.

THE CORONER: What does "OSTT" stand for?

MR FRECKELTON: Operational Safety Tactical Training, your Honour, OSTT. It's scene 2, Professional Standards, that that would be a suitable occasion on which to speak with Constable Rolfe about his approach to apprehending persons and the commitments that he should employ to minimise risk and harm to any person who was called upon to intervene with.

So, I have referred to the minor. I move now to a matter involving Luke Madrill which is number 12 in your Honour's list. This is a matter in which excessive use of force was alleged during an arrest, as well as rudeness by Constable Rolfe and what was asserted by the complainant was that he sustained an injury to his knee at the time of an arrest and it involved a heel.

Again, remedial advice was provided in relation to that usage of body-worn camera. That was given to him on 27 July of this year.

THE CORONER: Is that finalised?

MR FRECKELTON: It's finalised therefore, your Honour.

THE CORONER: In both aspects of body-worn video and any use of force?

MR FRECKELTON: Yes. Yes, it is. I move now to the matters at Yuendumu. They are number 14 in your Honour's list. Remedial advice was provided to Mr Hawkings in respect of his role in the matters at Yuendumu on 27 July of this year.

Remedial advice is pending for Sergeant Frost and Constables Eberl and Rolfe. Mr Kirstenfeldt is still to be interviewed in respect of that matter, so it is not finalised in relation to him. So, that matter is ongoing. I move now to number 4 in your Honour's list.

THE CORONER: Just on 14, but for the provision of remedial advice, the investigation is otherwise finalised?

MR FRECKELTON: Yes. That's insofar as it concerns Mr Rolfe.

THE CORONER: Yes.

MR FRECKELTON: I move now to number 4, your Honour, which is his failure to disclose matters in relation to his service in the ADF.

THE CORONER: You might have mentioned number 13. There is one use of force incident which I haven't made a note next to, but I might have missed - - -

MR FRECKELTON: No, I haven't mentioned it. I'm coming to it next, if I may, your Honour.

THE CORONER: Sure.

MR FRECKELTON: So, 14, the one after that one, is the ADF record matter. I beg your pardon, 4.

THE CORONER: Yes, sorry.

MR FRECKELTON: I beg your pardon, thank you.

THE CORONER: Is it limited to the ADF information?

MR FRECKELTON: Yes. At the time of the application, and of course there had been a recruitment issue. Constable Rolfe was not a member of the police force, so there were statutory limitations in terms of charges that could be preferred. The decision has been made not to pursue that matter further and so your Honour can regard it as finalised in terms of either criminal or disciplinary action.

I move further to number 13, the one to which your Honour made reference.

THE CORONER: Sorry.

MR FRECKELTON: Antonio Woods. This was an allegation that Mr Woods was tripped and fell and hit his head when he was lying face down on the ground. It involved Constable Rolfe and Constable Kirstenfeldt, Constable Hanson and Sergeant Kirkby.

Remedial advice was provided in relation to body-worn footage issue to Constable Rolfe on 26 July this year. And for completeness sake, remedial advice was provided to Constable Hanson and Sergeant Kirkby in relation to body-worn footage camera issues on 16 August and 24 August respectively, and remedial advice for rudeness was provided to Constable Kirstenfeldt on 20 July.

THE CORONER: Is that matter finalised - - -

MR FRECKELTON: That is finalised, your Honour.

THE CORONER: - - - for body-worn and use of force issues?

MR FRECKELTON: Yes, it is.

I move then to number 2 in your Honour's list and that relates to a variety of matters including the sending of body-worn video footage to persons not entitled to be privy to it. Drug use matters; discriminatory remarks; - and I think your Honour has this in number 2 and 3 separated, so it's the - I beg your pardon. So number 2 is the text messages relating to a recording and dissemination of body-worn video. So I will refer to that first and then I will refer to the other matters which are 1 and 3 together. The outcome is the same.

The situation in that regard is that action has been taken in relation to Constable Rolfe and the hearing officer involved was a senior member of the Northern Territory Police Force, handed down his decision in relation to various legal challenges that were made to the usage of material downloaded from the telephone of Constable Rolfe, taken into possession of the Northern Territory Police Force at the time of the arrest of Constable Rolfe for murder and other charges.

So that decision in respect of the legal matters was handed down on 12 October. It is open to Constable Rolfe if he is so inclined, to seek judicial review of the correctness or otherwise of that decision as a matter of law, by 12 December of this year your Honour, to enable Constable Rolfe to make a decision in that regard. The hearing is adjourned.

MR BOULTEN: Sorry, which hearing?

MR FRECKELTON: The hearing in respect of the body-worn footage sent to persons not entitled to receive it. And I will refer to the associated matters presently. The hearing is listed to resume on 13 and 14 December of this year. There are two phases at that stage, your Honour. The first is, if you like, the finding as to whether there has been a breach of discipline and then if that is found then penalties can be imposed.

In your Honour's list there are two other matters, numbers 1 and 3. The first relates to the content of text messages, about which you have heard much evidence, that are said to be racist, sexist, homophobic, disrespectful and inappropriate in a variety of ways. All of that material falls into the same category as that to which I have just made reference. In other words, the legal issues are the same and the hearing has been listed to resume on 13 and 14 December as required.

The next matter is number 3 in your Honour's list, which relates to text messages relating to the usage of drugs either illicit or prescribed, by Constable Rolfe, and again, the status of those matters is the same.

So, in short, in respect of those three categories of matters, 1, 2 and 3 in your Honour's list, disciplinary action is partially completed and the hearing will resume on 13 December unless, once more, action is taken by Constable Rolfe to assert some irregularity or impropriety or illegality in the process by way of an (inaudible) judicial review in the Supreme Court.

There is another matter which is not on your Honour's list, and that relates to conduct of Constable Rolfe in being interviewed by the Spotlight Program and associated matters. That matter is finalised and a formal caution in writing was issued to Constable Rolfe and he was ordered to be of good behaviour for 12 months.

So to summarise, your Honour, the matters on your Honour's list plus the additional one to which I have just made reference, all are finalised save the trio of matters related to the telephone and the matter involving Mr Bailey.

Your Honour is aware that there is an application for a judicial review on behalf of Mr Rolfe which is currently before the Supreme Court and will be heard presently. That extends to the protection which your Honour has apportioned to provide and I don't say that with any criticism to Constable Rolfe in respect of not just criminal charges but also disciplinary charges, so therefore the construction of s 38 of the *Crimes Act* upon those matters being resolved by the Supreme Court, which I think we are all hoping will be imminent.

The status of what is taking place in these ongoing matters can be further considered by your Honour and be the subject of further submissions, that refers to those four categories amongst those already (inaudible).

THE CORONER: Yes.

MR FRECKELTON: I hope that assists, your Honour, and counsel assisting.

THE CORONER: Thank you.

Mr Mullins?

MR MULLINS: Your Honour, just for the benefit of the family and other members of the community, can we have a brief explanation from Mr Freckelton as to what is "remedial advice"?

MR FRECKELTON: I am more than happy to do that. It consists of an assertive conversation by a senior police officer with a member, to provide guidance and a mentoring to them in respect of the way in which they conduct themselves. It is not a formal disciplinary outcome but it is intended to provide assistance to them so if something has been identified which is inappropriate in the way that they conducted themselves, they can be guided to do better.

Your Honour will see that an example of remedial advice is annexed to the affidavit of Mr Porter, the second one of those, and that is an example of that. Sometimes it is in writing. It is usually accompanied by a meeting in which the officer is spoken to by a much more senior member and that guidance is imparted and there can be interaction and the notion lying behind it is that the member can learn and improve their conduct in the future and it also constitutes a basis for further action if the member does not learn and repeats the kind of conduct involved.

THE CORONER: Mr Boe?

MR BOE: Your Honour, just two matters. It may assist your Honour in addressing the s 38 issue, if it was disclosed whether in any of those incidents, the constable gave a version in response to the issue being raised of him. And whether that

version was under s 79A or not. I don't know. That information is not in the Porter affidavits. It may bear on the question as to whether or not the certificate covers any concerns.

And that's a matter about which I was going to make some further submissions about at some stage.

MR FRECKELTON: We'll need to follow up on that to – to assist our learned friend. The effect of course of the s 38 certificate, assuming that your Honour's certificate is valid on its face, in other words, that it extends to both criminal and disciplinary matters, is that whatever is said by the member, cannot be used against them, in a future criminal or disciplinary proceedings. That's all. It's not indemnity. It's simply a preclusion on the use of the words uttered in a witness box, against the member.

MR BOE: We appreciate that. It's really whether or not there is any increased risk to the member, in giving evidence in this court, in relation to any outstanding matter.

THE CORONER: As to whether or not a version has already been given.

MR BOE: Correct.

THE CORONER: I don't know if that increases the risk, Mr Boe, but - - -

MR BOE: No, no, no I'm not saying it does. It may be a question that's relevant to your Honour, and perhaps relevant before the Supreme Court, whether the claim to refuse to answer, goes to increasing any risks, if there are any risks still existing, in relation to these matters.

THE CORONER: Well, Dr Freckleton are you able to advise us now, or later, and you can take that further if need be.

MR FRECKELTON: In respect of the other (inaudible) matter, I cannot advise your Honour at this stage. But we will ascertain the position. The only other set of matters is – is the trio, and no formal statement, to my knowledge, has been made by Constable Rolfe in respect of those matters.

THE CORONER: Thank you.

DR DWYER: Your Honour, just before you call on Mr Officer, can I clarify two issues. The first is in relation to Mr Bailey. At page 14 of the affidavit of Deputy Commissioner Porter, there is information with respect to the outcome of the Bailey matter. Remedial advice was provided on 4 October 2018 to all members who failed to activate their body-worn video footage, and that included Constable Rolfe. So that was 4 October 2018. I apologise, it's Assistant Commissioner Porter.

And the table attached to the Assistant Commissioner's statement, indicates that there was consideration of a perjury charge, but one will not be laid. In relation to the remedial advice for failing to activate the body-worn camera, that was delivered.

And it was noted that there was insufficient evidence to sustain an allegation of excessive use of force. Perhaps because of – well I'll just ask my learned friend to clarify. It's page 14 of the affidavit of Assistant Commissioner Porter.

THE CORONER: Which affidavit? I think there are - - -

DR DWYER: It's the second affidavit, 7-111C, 2 September of this year.

MR FRECKELTON: Excuse me, your Honour, may I just have a word - - -

THE CORONER: Sure.

DR DWYER: I'm sorry, your Honour, I said the word "Bailey", I'm intending to refer to Malcolm Ryder and the - - -

THE CORONER: Right.

DR DWYER: - - - complaints made with respect to Malcolm Ryder. My learned friend earlier referred to a particular page in Assistant Commissioner Porter's affidavit. It is in fact clarified in the table at page 14. "That remedial advice was provided to all members for failing to activate their body-worn camera. That remedial advice was certainly provided to Constable Rolfe, because he was one of the officers who failed to activate his body-worn camera."

And that table notes that that remedial advice was provided on 4 October 2018, with respect to the allegations of excessive use of force. You recall Malcolm Ryder was a gentleman who had sutures in his head – 13 sutures in his head. "There was insufficient evidence to sustain the allegation of excessive use of force." And I note the absence of body-worn video footage in that matter.

THE CORONER: Yes.

MR FRECKELTON: My learned friend is correct in that regard. We've got the individual sorted out now. In what I said to your Honour, we only referred to the further matter, which is the perjury matter, and that not – the decision being made not to proceed against him for that. But what our learned friend has said referring to page 14 of the second Porter affidavit is correct. And that means that that aspect of the matter is finalised as well.

THE CORONER: Yes. So as I understand it, the only matters that are not finalised, so far as disciplinary proceedings are concerned, are matters one, two, three and 10, on exhibit 22.

DR DWYER: That's my understanding, your Honour. And that's consistent, I believe, with what Dr Freckelton has outlined. Can I just clarify one issue, and that is in relation to number four. And your Honour asked a question of Dr Freckelton. Number four reads "Suggested false information in relation to the application to the

Northern Territory Police Force.” Your Honour wanted to clarify whether that was only in relation to a suggestion of false information about disciplinary proceedings.

As I understand it, that covers any suggestion of false information. So for example, related to a previous charge in Queensland, and relating to previous applications to other police forces in the Northern Territory. But I understand that the answer from Dr Freckelton is the same. Which is, because Constable Rolfe was not then a member of the Northern Territory Police Force, there are statutory limitations on what disciplinary proceedings can follow.

THE CORONER: Yes, thank you.

MR FRECKELTON: And I should qualify what has been said in relation to the events of 9 November. I’ve informed your Honour about the remedial advice pending for the three members. There are some associated matters which are still ongoing in relation to the matters of 9 November. But it would be inappropriate for me to go into details in respect of those at this stage, your Honour. However, your Honour will note that the period of time limitation applies in respect of such matters, so the – there are major limitations in terms of anything that can be done in respect of the 9 November matters.

And this highlights an issue that we will raise with you in due course in our submissions, about the legislative constraints which inhibit the capacity of the Northern Territory Police Force to deal with persons in a disciplinary sense, in many contexts.

THE CORONER: Yes.

Mr Officer.

MR OFFICER: Your Honour, I’m going to be about 45 minutes.

THE CORONER: Sure.

MR OFFICER: Do you want me to start now (inaudible).

THE CORONER: I think so.

MR OFFICER: Your Honour, the first point I just wanted to deal with is the claim for a privilege, in other words, the characterisation of penalty privilege. And I don’t seek to recanvas what your Honour said in your Honour. That is ruling number five. But what I do wish to make clear is the extent and nature of the privilege as background, why these claims have been taken. And then take your Honour through why it is that s 38 applies here, and why you should approach your decision in relation to (inaudible) on each of the topics for the purposes of today.

But equally, as your Honour’s aware, the matter will be before the Supreme Court, in which Constable Rolfe has applied to be joined as a plaintiff, where the

issue about the nature and extent of the privilege should be determined, whether it's consistent with your Honour's ruling, or otherwise. And coupled with that, you'll certainly have a consequence of how the privilege might or might not be taking, before your Honour, as the inquest proceeds.

Can I just start, your Honour, by referring – and again, I simply referring to lay the foundations for (inaudible) which was taken, not seeking to go behind your Honour's ruling. But can I lay the foundation for when a privilege claim is taken for exposure to a penalty, which comes from a decision – I rely on a decision of *the Australian Property Custodian Holdings Limited v Michael Woolridge*, which was a decision in equity.

However, my respectful submission is that it applies here in terms of a test upon which it is – I can give that citation, that is [2012] VSC 576. The basis upon which a privilege claim for exposures and penalty can be taken. And it starts at par 80 where it is said by Robson J:

“A common law privilege against exposure to penalty is based on the deep seeded belief that those who alleged the commission of a crime should prove it themselves. They should not be able to compel the accused to provide proof against himself.”

At 81:

“A common law privilege against exposure to penalty may successfully invoke both penalty proceedings and other proceedings where a penalty is not sought, but may otherwise expose a party to penalty in other proceedings that are on foot or anticipated.”

So, the point I make about that, your Honour, is Constable Rolfe doesn't need to demonstrate that there is in fact actual proceedings, although in this case, we know there are some, nor does he need to demonstrate that proceedings are likely. It is actually or otherwise potential exposure to disciplinary proceedings which could amount to a penalty.

Now, your Honour, that decision is important in the context of the legislative scheme in which discipline is administered with the police force in the Northern Territory. And your Honour, if you can – or if not, pull up the *Police Administration Act*.

THE CORONER: Sorry, I didn't - - -

MR OFFICER: 1978, I should have given you advance notice, your Honour, but it is important that I take you through the scheme of it.

THE CORONER: Do you have a hard copy for me? *Police Administration Act* section?

MR OFFICER: Part IV, starting at s 76.

THE CORONER: Thank you.

MR OFFICER: And your Honour will see there that Pt IV discipline and the head of Duties and Obligations of Members and it lists breaches of discipline. And it is important, your Honour, that I note the following in which potential exposure exists for my client.

THE CORONER: Just give me one moment.

MR OFFICER: Yes, your Honour.

THE CORONER: Yes.

MR OFFICER: Your Honour will see s 76(a) that:

“A member commits a breach of discipline if they:

- (a) engages in disgraceful or improper conduct, either on or off duty; or
- (b) is negligent, inefficient or careless in the discharge of the member’s duties;
or
- (c) contravenes or fails to comply with the provision of a Code of Conduct referred to in s 14A(2) - and that’s the provision then that the Commissioner is able to congregate general orders – or;
- (d) fails to obey an lawful direction, instruction or order given by, or caused to be issued by, the Commissioner or a member having authority over the member, including general orders and instructions issued under s 14A(1) and directions, instructions or orders given in relation to a breach of discipline or an alleged breach of discipline; or
- (db) fails to be of good behaviour for a period fixed under s 84D(c).”

And that will be read as I advanced these submissions a bit later; or

- (h) aids, abets, counsels or procures or, by any act or omission is directly or indirectly knowing and concerned in or a party to, a breach of discipline committed by another member in circumstances referred to in the aforementioned paragraphs.”

As your Honour turns the page numbers, your Honour, Ousley(?) calls up s 78 and that talks about public interest dismissal which says that:

“Notwithstanding anything else in the Act, a member may be immediately dismissed from the police force where the Commissioner:

- (a) is of the opinion that the member has committed a breach of discipline and it is in the public interest that the member be immediately dismissed; and
- (b) Has taken into account any written response of the member made after service on the member of the notice under s 79.”

Your Honour, s 79A deals with disciplinary powers generally, and some matters to which I will return to assist the court in terms of what was raised by Mr Boe. I will do that a bit later. If your Honour pulls up s 79, that is the service of a notice for alleged breach of discipline.

And your Honour, where the Commissioner believes on reasonable grounds that a member, or prescribed member, believes on reasonable grounds that a member of a rank below that of a prescribed member, and a prescribed member is anyone from senior sergeant and above, has committed a breach of discipline and considers that the breach is serious enough to warrant action being taken under this part. The Commissioner or prescribed member just serve notice under s 84F on the member.

And your Honour, I won't go through every provision thereafter, but once a response is put in, the response to be accepted and no further actions taken before an investigation can be commenced with s 81, the consequences of which, again, no further action might be taken, or counsel and caution of a member or causing the member to be formally cautioned in writing, or ultimately, they can be charged over that breach of discipline.

Your Honour, s 84D is the order of the Commissioner or prescribed member and this deals with the penalty upon a consequence in which a finding of a breach of discipline has been substantiated or proven.

And your Honour, they range in severity from as low as counsel and cautioning, including the imposition of a good behaviour bond for a period of 12 months or less. A fine, reduction in rank, reduction in salary, transfer of the member, a suspension, an order of costs by way of compensation or ultimately, the most serious in terms of police officers, dismissal from the police force.

Your Honour, if I can for a moment hand to you a *Code of Ethics*. I have a copy for the parties, I have a few copies, not for every single one.

THE CORONER: Has it become an exhibit at this stage, the *Code of Ethics*? I know we've referred to it.

MR OFFICER: I couldn't fine it.

DR DWYER: We'll just check on that, your Honour.

THE CORONER: Sure.

MR OFFICER: Now, your Honour will recall - - -

THE CORONER: If it isn't yet an exhibit, shall - - -

MR OFFICER: (Inaudible) your Honour, yes.

THE CORONER: Thank you.

MR OFFICER: Your Honour will recall when I was taking you through what amounts to a breach of discipline, it can be a contravention of the *Code of Ethics*.

And your Honour it is important that I take you through some of that to emphasise the submission I make in respect of claims taken by Constable Rolfe, if you turn to page 3, it sets out the purpose of Clause 2:

“The purpose of this general order is to provide instruction, guidance and advice and make explicit certain behaviours that aren't acceptable for all, regardless of rank, and to provide an ethical framework for members' decisions and actions.”

At Clause 4 under:

“Coverage”, “This general order and Code of Conduct and ethics applies to all members of the Northern Territory Police Force.”

Clause 5:

“Throughout this general order, some paragraphs are bold and italicised. Those paragraphs are intended to be prescriptive in nature and if a member breaches any one of them, they may be subject to the disciplinary provisions of the *Police Administration Act*.”

- which I've taken your Honour through.

Some of those bold, at least on my copy are italicised, bold clauses that start at page 5. And your Honour will note under, “Personal conduct.”

Clause 19, “Members must act with honesty and integrity at all times.”

Clause 20, “Members must always conduct themselves, both on and off duty, in a proper manner that does not bring, or has the potential to bring, discredit to or adversely affect the police force.”

Clause 22, “In the exercise of their power, the members must be honest, impartial and consistent and never act arbitrarily or with malice.”

Clause 26, “Members should always conduct themselves in a professional manner that is lawful and in the spirit of the intended Code of Conduct and ethics.”

Clause 27, “Members must be receptive and responsive to lawful orders and instructions given by the Commissioner of Police or any person who is entitled to give such an order or instruction. Members are to carry out the lawful orders or instruction promptly and to the best of their ability.”

Clause 28, “Members may only use force that is lawful and reasonable in the circumstances.”

Clause 29, “Members must always perform their duties with due diligence and to a satisfactory standard.

I skip forward, your Honour past provisions in the Code which don’t deal with claims here. To Clause 49, under Protecting Official Information.

“Members must not access, use or disclose any official information without proper authorisation, or in circumstances that amount to a misuse of the information.”

Clause 65, under Discrimination and Harassment, “A member must treat everyone with courteous, fairness and respect.” Page 10, under A Fairness of Language.

Clause 70, “A member must not use language that under the circumstances, another person may find rude, inappropriate, obscene or offensive.”

Clause 71, “Members must not use any illegal drugs at any time.” And finally, your Honour, at page 12, under Reporting Improper Conduct or Breaches of the *Code of Conduct and Ethics*.

Clause 85, “All members must report any suspected or action breach of the *Code of Conduct and Ethics*, or any suspected (inaudible) conduct.”

Now your Honour, that is the *Code of Conduct* that applies to all members, which informs members about potential risks of discipline for failure to follow that, or those clauses. And that is but of potential risks under s 76, a member might be exposed to in terms of a breach of discipline.

Your Honour, one important aspect of the path will stem, if I can take you to what Dr Freckelton has referenced in his submissions, and that is, the provision in terms of any extensions of time, under the *Police Administration Act*. Which is s 162. And that section – subs (6):

“An action under part four, in relation to a breach of discipline by a member shall commence within six months, after the act, or omission constituting the alleged breach of discipline was discovered. Or such a long period if the Commissioner or local court judge allows under subs (9).”

Subsection (7) deals with the period of time in which an application can be made.

Subsection (9) deals with how the application is made, and to who.

Subsection (10) deals with the matters that those who are determining whether or not to grant the extension, must take into account, whether or not to grant that extension.

Now your Honour will be familiar with the decision of Southwood J in *Holmes(?)*, as your Honour appears as counsel in that matter. And what Southwood J ultimately held, which is yet – sorry, is binding, has not yet been challenged since, was that, an action of the purposes of part four, of discipline, is the charging of a member.

Section 79 Notice is the precondition to all powers or functions exercised under part four. And your Honour, in terms of s 79A, Brownhill J, in the decision of *Turner v The Northern Territory of Australia & Anor*. That is at citation [2021] NTSC 55, set, at par 149 of that judgement:

“Turner sought in order an order in the nature of mandamus compelling the Board to require, pursuant to s 79A of the Act, Scott and Jeremiah to attend the hearing, and answer questions put in cross-examination.”

Brownhill J says:

“Section 79A is not the source of the power to require a member to answer questions or provide information; it simply acknowledges that such power exists and addresses the common law right against self-incrimination.”

Now your Honour, in terms of assisting the court, in response to Mr Boe’s query, Constable Rolfe has submitted to a couple of section – what I would characterise as s 79A interviews, however, as Brownhill J makes it clear, that is not the source of the power. And they are interviews in relation to, as I recall it, the Yuendumu matter, the Bailey matter, the Madrill matter, and the Woods matter.

MR BOE: So just to be clear, they’re 10, 12, 13 and 14 on the list?

MR OFFICER: That’s right.

MR BOE: Thank you.

MR OFFICER: Now your Honour, that wording, “Date of discover” is crucial in the context of this conduct, or breaches of discipline under part four. And your Honour, can I hand to you, and the other parties, applications for extensions of time that were made into a – in relation to a number of matters. And at the same time, I would also hand to you an affidavit of Commander Bacon in support of that, or those applications.

THE CORONER: Are these being tendered?

MR OFFICER: I will tender those, your Honour. I think, at least the first two applications are on the brief. And the affidavit is as well that the purpose of this objection and application I think they should be formed as (inaudible).

THE CORONER: Sure. We'll give them the following exhibit numbers.

DR DWYER: Your Honour, I just wonder if they should be – shouldn't be given MFI numbers in relation to the – this application, rather than separate exhibits in the hearing process.

THE CORONER: I'm happy for them to be MFI'd on the application.

DR DWYER: I think that's more appropriate with respect, your Honour. And I note that the document that was referred to earlier, the *Code of Conduct*, is in the brief of evidence, at 17-28. But again, it might be easier if that's MFI 1 and these two follow.

THE CORONER: All right.

DR DWYER: On the application.

MR OFFICER: I'm happy with that, your Honour. Your Honour will see the first is an application for extension in relation to, in the second paragraph, "The act or omission constituting alleged breach of discipline is the fatal force used that resulted in the death", and – and I won't say the name for obvious reasons. The date of discovering it is 9 November, and noting the six-month period against an action, is April/May 2020, and the application was sought for an extension for three years, and granted by the Chief Judge Morris, her Honour, Judge Morris. Three years from the date of that approval would take us to April next year.

And that would be the same for all of the applications that follow. The second one is an application or the act of omission, is the operational actions and decision making surrounding the pre and post deployment of the IRT, which resulted in the fatal force. It has the date of discovery, and the period of expiration again is approved for three years. The next matter is the Malcolm Ryder matter. Application in relation to misrepresentation of evidence and professionalism in the execution, allegations surrounding perjury, it has the date of discovery. It also has the fact that the previous extension was granted, and this one – or this application was made, and granted, for a period of three years.

However, I note in the matter of frankness to the court, that has since been at least in correspondence to me, one interpretation is that extension granted by her Honour, the Chief Judge, was actually invalid, because a previous one had been given. Now that might simply indicate an ambiguity or that might in fact be right. But none the less, it doesn't affect the ultimate submission I made about the Malcolm Ryder matter.

The next one you'll see, in relation to Albert Bailey, and yet again, a complaint on excessive force. The application for an extension was three years, and granted by the Chief Judge. Same in relation to Antonio Wood, a complaint of excessive force. Applied for three years and granted by the Chief Judge. And finally, the application in relation to Luke Madrill, in relation to a complaint of excessive force, sought and applied for, and that extension of three years was granted by the Chief Judge.

They are the applications that at least I am aware of in existence. And each of those would be in carriage with that place on the Ryder matter, still have effect, given the extension of time. Whether or not they're valid is a different argument. If I can take your Honour through the affidavit of Commander Bacon, which was provided in support.

And at par 3:

"The role of TCS", and this is dated 6 April 2020, "Is to review the circumstances of this incident and history of Constable Rolfe with a discipline lens. This is to ensure the Commissioner of Police has the ability to act on any of these prior disciplinary matters that may be discovered in this investigation, as well as consider any issues that need broader consideration surrounding policy and procedures within the organisation."

At par 7:

"In consultation with the Ombudsman Office, this period of time", he's referencing the 12-month extension that's available to the Commissioner above, as only a judge can grant three years - "This period of time is not considered sufficient given the circumstances surrounding Constable Rolfe, and his outstanding matters."

He then mentions there's also doubt, following the *Holmes* decision, that only one extension can be sought under 162. So the most appropriate application should be made to a Local Court judge and so it was.

Paragraph 8, and I start with the second sentence, talking about complexities:

"Principally this applies to obtaining the evidence of the evidence of Constable Rolfe himself as well as any potential evidence that is uncovered or presented during the criminal trial process which may or may not also (inaudible)."

And your Honour is aware from my submission at least that at least a couple of those directed interviews have taken place.

Paragraph 9:

"There will also be a Coronial investigation into the circumstances of this matter where evidence obtained during this process may need to be considered in the discipline space."

Your Honour, pars 13 and 14 (inaudible) references - notes from the joint management committee and then it lists under par 14 all of the matters in which the extension is sought. I note at 14.4 that the matter which says, "(inaudible) expired" in brackets, relates to the [REDACTED] matter and again, for the purpose of this submission, your Honour, he is not favourable to be claimed was taken.

If your Honour turns to that annexure, which is briefing note 6, under the "brief circumstances" second paragraph:

"PSC are actively reviewing the criminal and Coronial investigations with a discipline lens. These investigations will be leveraged upon to ultimately report to the Commissioner of Police unidentified discipline matters and organisational issues."

He then lists the fatal shooting, a review of all members' actions leading up to and during the fatal shooting to determine what it, if anything, breaches of discipline had occurred and then noting at the box that deals with "Actions required." "Part 4 action not yet commenced."

Now, a Pt 4 action, if your Honour recalls from Southwood J's decision was to charge of a member of a breach of discipline.

If Your Honour turns over to the Malcolm Ryder matter at page 3 of the brief note, it goes through a short history of that particular matter in relation to use of force and it says over on page 4, "PSC - something - something - to progress both matters from a disciplined aspect."

In the second box, "Discipline only relates to evidence presented in court in response to the Ombudsman. Action re arrest force had already been dispensed with".

You might recall that was a decision made in 2018 which subsequently became at the complaint, whilst Judge Borchers handed down his decision, which was subsequently investigated and then there's a discussion in the third box about a review and comparison, statutory declarations provided and evidence in court to determine if a serious breach of discipline has occurred.

You then have the [REDACTED] matter about it being expired. At page 5, this is the Madrill matter, that no determination made re Pt 4 action at this time, further investigation required, and that's in the third box. In relation to the Antonio Wood matter, on page 6, not examination made re Pt 4 action at this time. Further investigation required. Under the recruitment information which deals with the application process, consideration of Pt 4 application, and in relation to the Bailey matter and, your Honour, this really forms the crux of what I would submit is the exposure to a potential (inaudible) and that is the basis we chose that this plan could properly be taken.

You will note in the third box, dealing with use of force during apprehension, this has been running across parks and lawns. Body-worn video identifying Stewart. Body-worn video does not suggest excessive force when viewed in conjunction with the statement of Sergeant Evan Kelly. Issues identifying members due to wearing of unsigned body-worn video cameras, no breach of discipline detected. Likely to be finalised in near future.

Well, your Honour now knows that, in fact it was not - or has not been finalised. It has resulted in the preliminary steps of Pt 4, the previous use of Pt 4 as Southwood J refers to it, by the issuing of s 79 notice consequent upon which charges can be laid.

And so, your Honour, whilst Northern Territory Police might say: "This is finalised" (inaudible) in terms of general characterisation of disciplinary matters, if they are finalised what does that mean? In terms of remedial advice, what does that mean? We've had a description about sitting down (inaudible) and having an email. But if your Honour turns to and reflects on, the date of discovery, being the date on which is the triggering event for the time that's to apply, there are two ways in which - neither of which might be finalised - or matters which might have resolved by remedial advice, some of those which will have an extension of time that would be - at least on their face - available to PSC, in which to take Pt 4 action, It can be the evidence from one's own mouth in the course of a Coronial investigation which might give rise to a new date of discovery for an act or omission or an impugned conduct.

It could be, your Honour, you will find in respect of certain activities in respect to certain conduct undertaken by a member in the course of matters which you have indicated you will investigate. Part of those events, your Honour, in my respectful submission could be the trigger - I am talking about potential exposure to a penalty, could be the trigger for a date of discovery for any matter which might presently sit within the characterisation about the time or otherwise finalised or otherwise dealt with by way of remedial advice.

In my respectful submission, it does not bring finality to those potential proceedings. I think as Senior Counsel Mr Boulten indicated when Dr Freckelton was going through the Malcolm Ryder outcome, that - to the effect of what disciplinary proceedings, or were the disciplinary proceedings.

Disciplinary proceedings, your Honour are quite apart from remedial advice. Disciplinary proceedings are quite apart from sitting down with someone and sending someone an email them to put their body-worn video on. This is an action that is the charging of a member is a precondition to the charging of a member, the service of a notice which the person who serves the notice must form a requisite suspicion, all of these matters in Commander Bacon's affidavit are premised on the suspicion of a breach of discipline.

And so, if a witness gets into the box, be it Constable Rolfe, be it any members, who says something which is a fact that gives rise to a suspicion of a breach of discipline, that is not where there's a statute bar, it could also be your Honour's

findings, inclusion of your investigations. About whether you accept evidence or reject evidence of a particular witness which could give rise to the date of discovery of a breach of discipline and then that sets in train all of the motions under Pt 4 to be taken (inaudible) so your Honour's statutory construct in context is entirely relevant and important in the circumstance of this case.

Your Honour, can I also emphasise in relation to the Ryder matter, we tendered exhibit 16 which was the email from Detective Superintendent Lauren Hills and that was tendered on 28 October 2022 - sorry, it was tendered on that date but the email is received at 12.35 pm AEDT. And, your Honour, that was received and tendered in the middle of the evidence of Claudia Compagnaro. Your Honour will see exhibit 16; "Hello, Constable Rolfe, this email is to provide formal advice to you" - and I am paraphrasing here for efficiency and time,

"It is determined there was no evidence to support the allegation of perjury associated to the comments made by Judge Borchers following the hearing of the Malcolm Ryder, I've also reviewed the internal investigation, there is no evidence to support a breach of discipline and the allegation is not substantiated. This email confirms internal investigation 044 is closed."

Below that was an email sent to a number of other police officers involved in that incident and it says this;

"Hello, this email is to provide you with advice of a complaint against police that was reopened and further examined due to the police shooting in Yuendumu in 2019."

Now what possible connection that has, your Honour, is beyond me. But none the less, we now know that the Yuendumu matter's still pivotal to an extension of time, in which part for action can be taken. I have been told you may have been aware of this matter being re-examined. In June 2018 a complaint against police by Mr Malcolm Ryder was received. Sergeant Roach sought and received responses from each of you which were consistent with your initial statements.

Section 92 report refers to the *Ombudsman's Act* was signed, and relevant parties notified of the outcome. The (inaudible) was closed with findings, determined that the police action was lawful and reasonable in relation to the use of force. And remedial advice was provided to Acting Senior Sergeant Flack(?) and Senior Sergeant Roach by email, and Superintendent Burns via email about the use of body-worn video. The hearing for Mr Ryder was held in Alice Springs. The charges were dismissed. Judge Borchers handed down his decision. Criticised the conduct of some attending members. He considered the evidence untruthful. His comments were reported in the media, the publically stated comments by Judge Borchers were referred to PSC which confirmed the complaint against police is closed.

So we have an instance your Honour where it's closed, or finalised. Remedial advice was given. Something happened subsequent to that, which is the decision of Judge Borchers, and it's reopened. So your Honour, it only reinforces the

submission when I say, the significance of disciplinary proceedings and part four action is date of discovery. It's not the date of the act or omission. The date that it becomes known to a police officer, disputably whether it's a prescribed member or not, but none the less, that's how it might be interpreted. It's when it is discovered. And so your Honour, one of the very significant issues in the context of the Malcolm Ryder matter, if I can turn to each of those cases to support or indicate, why the privilege is taken.

In the affidavit of Assistant Commissioner Porter, dated 2 September 2022, he says this, in respect of the Malcolm Ryder matter. He prefaces it by explaining what Ms Campagnaro had said in her statutory declarations, and then says at par 8:

"Taking into account statements of Ms Campagnaro and further examination of evidence gained in the complaint investigation, my view is that there is still insufficient evidence as to determine whether the force applied to Mr Ryder, was excessive in the circumstances."

And he lists reasons as to why.

Your Honour, I just want to pause there for a moment, and reflect on when he says "Insufficient evidence" which is littered that – those two words is littered among the table, he captures that statement. He says this.

In his first affidavit, dated 13 July 2022, at par 70, page 13.

"As outlined in the police complaints agreement between the Commissioner of Police and the Ombudsman, the finding of insufficient evidence to sustain an allegation means, based on the material, there is some evidence to support the complaint, but it is insufficient to sustain the allegation. This may apply, whether there is some evidence to support the allegation, but the quality of the evidence is unreliable. Or taking into account other evidence as a whole, is insufficient to sustain the allegation."

Turning back to his second, or third statement I think it is, 2 September this year. He says this, when he talks about the insufficiency of the evidence, "That is because the evidence of" - - -

THE CORONER: Paragraph? Paragraph?

MR OFFICER: - - - par 8.

"The evidence of Ms Campagnaro has been untested."

Well your Honour knows, she came before this court. She presented for examination and cross-examination. And she was tested. That evidence was tested. And that's got to be borne in mind in the context your Honour, where, on the very same day, we received notification from PCS at least, or Superintendent Hill that all matters are closed, in a history of matter which has opened and closed,

opened and closed, finalised, and remedial advice given. And under that, she has now presented her evidence.

“The voracity of related claims by Ms Campagnaro, contain insufficient details for any meaningful enquiry to be completed.”

Three:

“It is not known why Ms Campagnaro did not report any of the alleged disclosed conduct in her statements of the time.” Well I think she gave evidence about why she did that, to the effect of, that she was new, she was young, impressionable, et cetera. The information that she claims she was told indicates that Constable Rolfe disclosed that he was in process of committing offences, including fabrications, false stat dec, perverting the course of justice, not to mention, serious breaches of discipline. Failure to report the alleged breaches at the time was a breach of discipline by her, if claims are to be believed.”

And as your Honour knows from Mr Edwardson KC, she was – had propositions put to her in cross-examination about those matters.

Skipping forward to number six.

“It is known that Constable Rolfe and Mr Ryder struggled on the lounge room floor, but the particulars of that interaction are unclear, with the version of events from both parties differing.”

Paragraph 7:

“If the claims by Ms Campagnaro were known at the time of the investigation, a further investigation would have been undertaken. I am unable to say what size – what additional evidence might have been adduced and what the outcome may have been. Without further definitive information, there is insufficient evidence, bearing in mind what those two words mean, to determine whether the force applied to Mr Ryder was excessive in the circumstances.”

And your Honour, in respect of Ms Campagnaro and in your ruling number 2, commencing at par 49, and this is your ruling dealing with Constable Rolfe’s objection to the evidence of Ms Campagnaro, you set out some of the evidence that she had given in her stat dec at that time.

At 49, you said, “Further passages for Ms Campagnaro’s evidence might be said to undermine Constable Rolfe’s credibility concerning his use of force” You set out some examples.

At par 51, “Other aspects of Ms Campagnaro’s evidence might be said to suggest an over-preparedness on the part of Constable Rolfe to draw, aim or use a

firearm in situations that may call for the use of force.”

At par 53, “Other pages of the statement might be said to suggest a concerning culture within the Alice Springs Police Station.”

At par 54:

“I do not express any view on whether the evidence from Ms Campagnaro should be accepted as credible or reliable. There may well be significant issues with her credibility and/or her reliability as a witness for interpretation of her evidence. However, at this stage, the evidence is rationally capable of acceptance, the interpretation is seemingly open and the accounts and evidence of the enquiries I am undertaking.”

You finalise at par 56 of that ruling:

“I note that the DPP has declined to charge Constable Rolfe with an offence arising out of these events and that, according to his evidence he made, pursuant to s 38 of the *Crimes Act*, a claim with every chance of illumination (inaudible) before (inaudible) could be raised.”

And at footnote 62, you state that Constable Rolfe was compelled to give evidence over his objection, the practical effect of the decision is to confer a direct, not definitive (inaudible) use immunity in criminal, civil and disciplinary proceedings.

So, your Honour, the effect of that is, whilst it might be categorised, that is the Ryder matter, as “finalised” in the sense or the views of the Northern Territory Police, bearing in mind what your Honour has held, bearing in mind the history of that matter, it is completely having the potential of exposure to the penalty should my client give evidence about those matters.

And so, in my respectful submission, the Malcolm Ryder matter certainly, well and truly alive for the purposes of the claim.

THE CORONER: How much further have you got?

MR OFFICER: Well, your Honour, I need to deal with each of the matters which would otherwise be characterised as “finalised”.

THE CORONER: Yes.

MR OFFICER: Much the same lines. I don't need to go it chapter and verse. I can truncate it, but - - -

THE CORONER: No, I'm not asking you to truncate it. I'm not putting time pressure on you. I'm just trying to make a decision in relation to breaks. It's 12:30, should we take the lunch break or the morning tea break, if you need to have the lunch hour?

DR DWYER: I think it's probably appropriate to take a lunchbreak, your Honour.
We've been going since 10:30.

THE CORONER: Yes.

DR DWYER: And then resume at 1:30, if possible.

THE CORONER: Yes, all right, we'll adjourn for lunch.

ADJOURNED

RESUMED

ZACHARY BRIAN ROLFE:

MR FRECKELTON: Your Honour, I indicated to you this morning that number 14 in your Honour's list, "Events of 9 November", which is technically Serious Custody 2019-004, was an ongoing investigation. I've had an opportunity during the break to have that clarified in terms of what it means. It is ongoing, only in the sense that Mr Rolfe has not formally had remedial advice administered to him. What that means is that it is finalised, save for the interaction that will take place, as soon as Mr Rolfe is well enough to participate in a – in some (inaudible).

And when we say to your Honour that a matter is finalised, that means that it is completed. It means that it will not be reopened, regardless of whether anyone else has another perspective, or a commentary, or an idea about it. It is finalised, namely it is closed, and the outcome is as identified to your Honour. Whether that be no further action, or whether it be remedial advice, or whether it be the administration of a caution. The matter is closed. And it will not be reopened.

THE CORONER: Yes.

MR OFFICER: Thank you, your Honour. Your Honour I think one authority I neglected to give a citation for was *Holmes v Commissioner of Police* [2011] NTSC 108. Your Honour, before the lunch break, I was starting to deal with the individual matters on exhibit 22, in which the privilege has been claimed. And I have dealt with the Bailey matter and the Ryder matter. I think suffice to say I can deal with numbers one, two, three – and I will add to that number 10, the other Bailey matter. And we talk about the exposure to a potential. Those matters are in fact not potential exposure, they had actually been realised, in the formulation of charges, or the precondition being the s 79 notice, which is in the Bailey matter.

So I won't labour those ones any further, unless your Honour wishes me to do so. And of course, the Malcolm Ryder matter, I've made submissions with respect to that. Your Honour, whilst – what Dr Freckelton might provide is (inaudible) just submitted to your Honour, might provide some comfort to Constable Rolfe. I think with respect to those who say that it has been finalised, completed, and will not be reopened, simply cannot be the case, when your Honour's conducting an investigation into the cause and circumstances of the death of Kumanjaya Walker.

And part and parcel of that, is the lead up to, from at least 6 November, the events, conversations, whether or not Sergeant Frost's plan was adhered to, followed to, or was contradicted. Whether or not the approach to House 577 was intelligence gathering, or out to get an arrest. And whether or not what happened inside of House 511, was in fact within the confines of his training. And I say that, your Honour, because, unless I have misunderstood the position, and Mr Boulten of Senior Counsel for NAAJA will correct me, if I am – if I have misunderstood it. Transcript 2995, and this is when we were having a debate about the effect of an acquittal, he said this.

“To assert an acquittal of murder, of manslaughter, and unlawful homicide is the equivalent of a finding that use of force is legal – is legally incorrect.”

And so I understand that to mean that one possible interpretation of that your Honour might be invited to find, or at least consider on the evidence before you, whether or not, the conduct was excessive.

And as Mr Boulten put in his submissions, and your Honour accepted in ruling number two, I think it was, that as Mr Boulten highlighted, and I’m just going to get the wording right, I thought I had it tabulated your Honour, but the effect of the submission was that, Constable Rolfe had only been acquitted of shots two and three, and not shot one. And so your Honour, my – at least my impression, when we talk about the exposure to the risk of a penalty if you take into account those submissions that an acquittal is effectively not the end of the matter, in terms of 9 November.

So your Honour, in dealing with number 14 on the exhibit 22. Your Honour, in my respectful submission, privilege is properly taken, because indeed what are you are doing is conducting an investigation into the cause and circumstances of death, includes the conduct of those police officers. And I hasten to add, the fact that there is still in existence, at least two extensions of time, at least until April 2023, in which an action that is charged for misconduct or breach of discipline, can be taken.

So whilst it provides some comfort, I don’t think it’s the end of the matter, with respect to potential exposure.

Your Honour, in terms of the Master Gibson matter, which is number five on exhibit 22. Mr – Dr Freckelton had indicated today that there was an issue in relation to s 162, which is the extension provisions.

That’s simply a submission that I understand has been made from the bar table. I don’t see it in any of the affidavits from Porter. And his submission was that it was currently in PSC’s hands, further considering only potential outcomes for remedial advice.

Your Honour, in respect of that particular matter and why privilege, in my respectful submission, was properly taken; firstly, I’ve indicated to your Honour the ambiguity about what is remedial advice and the ambiguity about what his finalisation – well, I’ll take you to specific examples where matters were closed, reopened, or there was at least an indication in the affidavit of Commander Bacon that it was likely to be finalised.

And so the matter in respect of Master Gibson goes no further than it is likely that Constable Rolfe will receive remedial advice, albeit he’s currently on leave and albeit, if he gives evidence in the meantime and is challenged on some of the aspects of that matter, that could, for all intents and purposes, be a new factual basis upon which there is a new day of discovery or re-enlivens at least that particular

matter in relation to the use of force.

And your Honour, it's pertinent to point out that that particular matter, in respect of Master Gibson, was dealt with in some detail through the evidence of Pauline Vickery and about what her views were in relation to that use of force and shoving of the bin.

And indeed, your Honour observed in some of the transcript that you could take into account or you could – “it was a matter of common sense” were your words, that the showing of the bin lid to someone of a young age who has experienced trauma, you can take into account how (inaudible) was feeling and it was certainly Pauline Vicary's evidence that the showing of the bin lid was not appropriate in the circumstances.

In the Proctor report, whilst it does speak to finalisation, I think Mr Boulten has seen and contended with your Honour that the complaint didn't mention anything about a bin the time and certainly, your Honour, there was some umbrage to making that accommodation that was given to Constable Rolfe for his use of body-worn video. So - - -

DR DWYER: Might I just pause. I'm loath to interrupt my learned friend, but just the name of Master Gibson is subject to a non-provocation order, just a reminder for the media.

MR OFFICER: And indeed at 30 – transcript 3060, to emphasise the point, counsel assisting took Ms Vickery to the general order on custody and transport which talks about the duty of care commencing at the point of – the public is or forms the belief that they're in control of the Northern Territory Police.

It goes on to say, and I'm quoting:

“The member who was responsible for a person in custody must be diligent and professional in the exercise of their duties, the member's duties, caring for persons in custody in accordance with the general order and the Code of Ethics. You would expect your officer to know about that?---He is, yes.”

The simplest approach to understanding the nature of the duty of care required is the answer – is to answer the question, “How would I want myself or a member of my family to be treated if they were in custody?” “Yes, that's correct.”

And so, your Honour, that brings into sharp focus, not only the Code of Ethics, but to the fact in the general order and noncompliance with it could amount to a breach of discipline which would enliven, in my respectful submission, police in risk of potential exposure to breaches of discipline.

At transcript 3059, Dr Dwyer was asking Constable Rolfe then:

“The – Constable Rolfe then, after doing a noise, click, click, slamming the lid

– well, I'll withdraw that, putting the lid down in a way that hit the bin with some force, rested his arm on there for a couple of seconds, then pulls the bin down to the ground, causing the child to fall out. Do you have any difficulty with that?---I have some difficulty with the force that they used to do that. That was probably unnecessary.”

So, at least your Honour, on those examples where evidence has been adduced from Ms Vickery, in my respectful submission, that is certainly a matter which is within the ambit of exposing Constable Rolfe to a potential penalty should – as that evidence continues to be explored in the course of these proceedings.

Your Honour, in dealing with item number 4, this is the application to the Northern Territory Police Force, I won't labour that point any further than beyond what was noted by Dr Freckelton that matters relating to the nondisclosure of Defence Force history, at least on the evidence that has been adduced by counsel assisting, is not the end of the matter, as counsel assisting pointed out, there is obviously the issues in relation to what happened in Queensland.

And everyone knows that might not fall within an honesty – or being honest in the application processes. So, that, your Honour, in my submission, is still well and truly enlarged and within the ambit of a proper claim for privilege.

Your Honour, the matter of [REDACTED], again, this matter was put to Alistair Gall with some detail in relation to that instance where he was the supervisor that signed off, if I can characterise it that way, the use of force report that was submitted to – by Constable Rolfe in relation to that matter.

And your Honour, it really commences – if I can give you the transcript references without having to read it verbatim, transcript 2966 through to transcript 2975, and again at transcript 2985 to 2986. The effect of what was being put by junior counsel assisting was that Alistair Gall in supervising that particular use of force report, it turns out relied only on the version given by Constable Rolfe.

He understood what was put to him, at least, that there was a suggestion by another police officer that there be explanation given by Constable Rolfe as to why the body-worn video was not operating was not credible. It was then put to him that there were three other incidents where there was been an arrest at the hands of Constable Rolfe and the person who was being arrested suffered head injury, much like [REDACTED].

It was put to him that - whether he was aware about the comments of Judge Borchers in terms of an allegation, fabrication of evidence. And it was also put to him at transcript 2975, I think this is really what gives much more weight to this submission. Detective Sergeant Barram gave his opinion following this review of Constable Rolfe's use of force incidents:

“Rolfe demonstrates a tendency to want to get his man, no matter way, and pays little or do regards to the consequences of his actions, which was

resulted in quite severe and totally unnecessary injuries to subjects in some cases.”

“Can you see the consistency between that conclusion that Constable Rolfe’s use of force history and your faith that because, sorry, and your decision of you employing Constable Rolfe not concerning complaints of excessive force, because he’s always got the job done?---I can.”

Was his answer.

“See a connection between those two then yes?---Yes.”

“Is it mentioned in the sense that we don’t rapidly address excessive use of force and would reward him if when he got the job done. They may very well think that it doesn’t matter if they’re a little bit rough, because the institution they work for rewards results?---There was no reward for his results, your Honour. I think I know where you’re coming from with your question. Yes, there was certainly no rewards for – with his results.”

Then, your Honour, “(inaudible) expect there was a reward?---Yes, I would acknowledge that.”

Yes. So, what you had on there is the totality of circumstances where, at least on its face, there is the submission that the force used against [REDACTED]. One interpretation open, because there was no exploration beyond the version given by Constable Rolfe in some detail with Alistair Gall, that there is potentially an interpretation open that the use of force could have been excessive.

I think Assistant Commissioner Porter, in his affidavit, I think the first and the second, he talks about not knowing how [REDACTED] sustained his injuries. So, in my submission, that is a matter that could lend itself to a potential exposure to – at the risk of a penalty.

Your Honour, the Roland Park(?) matter which is the incident involving two gentlemen who – there are two aspects to this particular matter. Firstly, there is the incident itself of the pushing of the two gentlemen over. There is then the filming of that on body-worn video which is what has been played in this court, and at transcript 3073, Pauline Vicary was taken to that particular incident:

“Superintendent, do you see that it appears to be Constable Rolfe watching that incident on his phone; that is, ‘I didn’t see it I guess I just saw it on the body-worn video.’”

“Do you appreciate when you watched that, the fact that Constable Rolfe filming (inaudible) screen, said he had a copy of the incident on his phone?---Well, I can see that now. I didn’t see that yesterday.”

“And he appears to be playing it back to somebody laughing and giving a commentary?---Yes, I can see that.”

“What do you think, does that - - -?---I think it’s extremely (inaudible). It’s not okay.”

“It’s indiscipline, do you agree with that?---Yes.”

That it looks like it’s celebrating use of force, well it looks like celebrating - like you’re making fun of somebody while – after use of force?---Yes.”

“And wholly unacceptable for a police officer?---In my opinion, yes.”

“Completely inconsistent with the values of the Northern Territory Police Force about respecting members of the public?---Yes.?”

So, your Honour, in my respectful submission, and notwithstanding that matter might be finalised with all the ambiguity that goes with that word, at least is open, having evidence before your Honour, that one view is that it is potentially excessive, and a secondary view that the filming is appropriate. And so, your Honour, in my respectful submission, that claim is also properly taken.

The Todd Tavern one, your Honour – and I think it can deal with Todd Tavern, Christopher Walker, Luke Madrill, and Antonio Woods in a complete submission. I repeat all of the previous submissions I have made about the explosion to a penalty arising on a new set of circumstances or a new set of facts in evidence given in the course of this interview, albeit from a finding from your Honour or a comment in the course of your report, that enlivens the ability for these (inaudible). The view is formal adopted that, in those instances, there was an excess of force.

Your Honour must also bear in mind when a claim of privilege in this particular case and the circumstances of this matter is taken, you have not just one or two or three matters. You have a totality of matters – I think we’re up to 14 on the list. So, your Honour, there is a cumulative effect to the privilege, in terms of exposure to a penalty, because at least, on one view, multiple breaches substantiated or proven, or even alleged, could amount to the imposition of a penalty. You’ve got public interest dismissal which simply follows the event of forming a belief that a breach of discipline has occurred, taking into account a s 79 response and in taking that into account, it is of the view of the Commissioner there is public interest in warranting the dismissal of that, in and of itself, would amount to a penalty.

Your Honour, those matters are at items 9, 11, 12 and 13, the ones I’ve referred to in exhibit 22, in my respectful submission, given use of force has been explored and use of force, your Honour has heard, is relevant to your inquiry, are all matters which exposure to a penalty can occur in circumstances where (inaudible) give evidence on that and taking into account the evidence that has been given by other witnesses or might still come. We’ve still got to see Sergeant Barram who might express a view on that also.

So, in my respectful submission, your Honour, those are the matters, each of the matters which make out the claim. Can I add to that this, what we loosely call number 15 is the incident with Channel 7 and the Spotlight program, which has finalised and is completed because there has been finality, in the sense that the imposition of a penalty has taken place. That imposition of a penalty was a caution and also a good behaviour bond.

If your Honour remembers, under s 76, the breach of a good behaviour bond is, in fact, a triggering event of a new breach of discipline. So, any one of the previous 14 matters, including those 1, 2 3 and 10 of exhibit 22, which are actually realised in the sense of charges, it is open, possibly, any finding of substantiation or proof that these breaches of discipline had occurred will trigger a breach of the good behaviour bond, which in and of itself, creates a separate instance of a breach of discipline, which then of itself highlights the potential exposure to a penalty.

Your Honour, if I might finish just by referring to the decision in *Borland* which your Honour references in ruling number 5 and the relevance of this is how you approach the task of s 38 and what *Borland* dealt with is not dissimilar circumstances in the sense that it was an inquest involving a police officer, a police officer who had given a compelled version and the mischief which was debated in that case was that there was no dispute that there was jeopardy to the plaintiff.

In that particular case, the Commissioner of Police might take action, and this is at par 11, the first decision – I'll come to the appeal decision in a moment - it's Grove J in *Borland v New South Wales Deputy State Coroner & Ors* [2006] NSWSC 982.

At 11, Grove J said:

The jeopardy which the plaintiff asserts is the potential of the Commissioner of Police to take action in accordance with his powers under s 173 or s 181D of the *Police Act*. Under the former, the Commissioner may take action including reduction in rank or seniority or deferral of salary increment, and under the latter may remove a police officer from New South Wales Police. Thus the plaintiff asserts that he is 'liable to a civil penalty' within the meaning of that expression in s 33AA. It is conceded by the Crown that provision of the Police Act abovementioned suffice to constitute potential 'civil penalty' so as to enliven the plan of privilege made by the plaintiff."

Referencing the *Police Service Board v Norris* and *Rich v ASIC*, and in that case, what was argued was that civil penalty was in fact abrogated in the New South Wales Coroner's Court and a certificate could be issued, but the protection certificate only went to use of that material in a court, as opposed to outside of the court, such as in disciplinary proceedings, and what Grove J said at 21 – his Honour then referred to the absence – this is the Coroner in the first instance – of his foresight as to whether disciplinary proceedings were imminent or likely, privilege cannot be claimed if it is unsustainable.

But, if it is sustainable in that it exposes a witness to potential jeopardy, it is not an additional requirement that the jeopardy be imminent or there be included some assessment of the likelihood of action being taken by whoever is vested with the relevant power.

At 23: "The authorities cited above show there is no universal reason for concluding that a civil penalty requires a different character depending upon the identity of the imposer in a court, tribunal or other authority and the distinction between discipline proceedings on the one hand, proceedings of an offence of civil penalty on the other should not be drawn. In due course, it would be necessary to consider the context of the statute."

Your Honour, I pause for a moment. In the context of a statute, I forgot to mention earlier, we have Pt IV of the *Police Administration Act*, but we also have the connection with the *Ombudsman's Act*, and if your Honour recalls what I mentioned at par 7, the affidavit of Bruce Porter, dated 30 July 2022, about the police complaints agreement that insufficient evidence means there's an interior support complaint since (inaudible) the allegation. Under s 14 of the *Ombudsman's Act*, there is – the Ombudsman may, despite any provision in any Act – sorry, I withdraw that.

Subject to ss 15 and 16, the Ombudsman may investigate the administrative action of a public authority or conduct of a police officer on a complaint or on the Ombudsman's own initiative. Sections 15 and 16 deal with that. They can't investigate deliberations of executive council or cabinet, or the administrator of executive council or cabinet, and 16 talks about what administrative actions may not be investigated. Just by way of example, the Ombudsman couldn't investigate a Coroner, under the *Coroners Act*, while discharging or purporting to discharge a responsibility relating to investigation or inquest under that Act.

And then, your Honour, at s 10, the Ombudsman's functions are: to investigate and deal with complaints about administrative actions or part of authorities.

Subsection (d), "To investigate or deal with complaints about conduct of police officers."

At s 21, it sets out who may make a complaint and that complaint can be about the conduct of a police officer, which can be made by a person aggrieved by the action of the conduct – action or conduct. The person representing the person aggrieved by the action or conduct, or a third party for a person that was in a third party.

And your Honour, there is a provision which deals with the time for which a complaint must be investigated. That's s 25.

“A complaint must be made within one year after the person aggrieved by the administrative action or conduct, the subject of the complaint, first becomes aware of the action or conduct.”

For subs (1):

“A person’s taken to have become aware of the action or conduct and the person might reasonably be expected to have become aware of the action or conduct.”

Subsection (3):

“However, the Ombudsman may accept a complaint after the one-year period, if the Ombudsman considers it is appropriate to do so in the public interest, or because of special circumstances.”

And your Honour would be aware that the *Ombudsman Act* – the Ombudsman and the Professional Standards Command are a very interwoven relationship about the sharing of information, and the receipt of complaints and investigation of complaints. The use of powers for the investigation of those complaints. The categorisation of those complaints. Be it conduct resolution. Be it category 1 or category 2 on the sliding scale of severity. So that’s yet another statutory contest, to which the privilege might well be enlivened outside of the *Police Administration Act*.

At 26, Grove J said:

“I accept the submission that the appropriate test is not to ask whether a personal interest is overridden by the interest of justice, however there was a balance to be taken from the importance of evidence sought to be compelled, and the magnitude of the risk to which the witness would be potentially exposed, if the claim to privilege was denied.”

At 27:

“An assessment of the risk and the level of possible penalty, was a material consideration.”

And ultimately Groves J held that the decision to issue the certificate to that witness, and directed to answer questions was wrong, and it had to be re-decided.

At par 39, which talks about the civil penalty in the context of the New South Wales legislation. Groves J said this:

“That preferred construction does not eliminate regard having been had to express proviso in s 33 ‘except in accordance with s 33AA’. An inevitable consequence would be that, although the plaintiff may be in possession of a certificate, it will be of no protection to the receipt of a testimony which he has

been compelled to give if the Commissioner moves to exercise his power under the *Police Act*.”

At 40:

“A legislative expression is unambiguous and the protection extends no further than to proceedings in a New South Wales court, within the meaning of the *Evidence Act*.”

And then talks about definition of a New South Wales court. And excludes the exercise of functions by the Commissioner of Police, a comment that were it a desirable legislature to extend the protection provided by a certificate, there would be no inhibition upon so providing.

41 and 42, which is the nub of what is in dispute in the terms of what the Supreme Court in the Northern Territory, part of it we have to decide but the point of the submission I’ll make clear in a moment.

“The plaintiff’s argument, if accepted, involves the existence of a right, outside the scope of statute, which would, as the defendant submitted, lead to the curious result that a witness who claimed penalty privilege, based upon the risk of civil penalty by a non-judicial authority, would be in a better position than a witness who faced the risk of a criminal charge, in the sense that although protected, the latter can be compelled to speak whereas in the former situation, need say nothing.”

42:

“It is clear of course, as the first defendant recognised, that he is vested with a discretion by the statute and it is an element of the risk which I have held to be a matter of material consideration which needs to be given weight in the exercise of discretion, that any certificate will be ineffective protection against the evidence given being used to impose civil penalty by the Commissioner”.

Now as your Honour knows, in ruling number five, s 38 is of course discretionary, and indeed appeal decision, the appeal which was taken by the Attorney-General as was dismissed, that being the *Attorney-General of NSW v Borland and Ors* [2007] NSWCCA 201.

At par 17:

“In my judgement, s 33AA confers the privilege in clearest terms. The section applies, that is operates, if the witness objects to giving evidence on the ground it may tend to prove that he’s liable to a civil penalty. Subsections (2) and (3) then confirm and regulate the Coroner’s discretion to sustain or overrule the objection. Counsel for the Attorney-General conceded that the Coroner had a discretion the appeal should fail.”

At 18:

“If the witness liable to civil penalty and enforcement of court of this state, certificate under s 33AA(3) which confer a substantial measure of protection against the use of his evidence against him. Even then, the Coroner has a discretion under subs (3) to relieve the witness from the obligation to answer. However a certificate under subs (3) confers no protection of federal court, in the court of another state, and a tribunal in this state, which is not a court, or in cases where penalty may be imposed by the admission of action.”

19, and this is relevant to the – all the submissions I advance as to why the exposure to the penalty exists to Constable Rolfe’s case, where all 14 items.

“The fact that a certificate would not protect the witness against the risk of a civil penalty which he would be exposed, is a most material consideration in the exercise of discretion. Another highly relevant consideration is that the Coroner already has statements from the police officers, which give their version of events. He is not bound to accept those versions and could receive any expert, or other evidence, which tended, to contradict them.”

20:

“Although these considerations are highly relevant, they do not in the matter discretion conferred, except in terms by s 33A.”

And then obvious the appeal was dismissed. The point I wish to make of that, your Honour, is that in approaching the task before you, in ruling number five, you acknowledge that – or you state at 34, there’s no dispute the Coroner (inaudible) privilege of self-incrimination. And I’m not going behind your Honour’s ruling, I’m just highlighting what your Honour found as to the advance of the submission in respect to approaching the task next to you.

But admitting a Coroner in effect to sustain or overall a claim of privilege upon the offer of a certificate, or it appeals to the Coroner and expedient for the purposes of justice, a person can be compelled to answer the questions. And you accepted the submissions of Mr Coleridge. The text of s 38 *Coroners Act*, read in context and by reference to its purpose, also clearly abrogates the penalty privilege. That’s at par 37, that s 38(1) deals with penalty privilege is also consistent with the scope of the immunity conferred by s 38(3).

And as your Honour knows, of some – or there is some conjecture as to whether that applies in disciplinary proceedings, or an action, or a breach of discipline. Section 38(3) provides a direct use of immunity, not just in criminal proceedings, but also in civil proceedings, or in proceedings before a tribunal, or a person exercising powers and functions in a judicial manner.

And as I indicated to your Honour earlier in – one of your earlier rulings, you emphasised that the immunity appears to be one of direct use but (inaudible) might

still be open indeed, you acknowledge that, in relation to Sergeant Kirkby at 47, where you accept that there is a real possibility that disciplinary could be taken against Sergeant Kirkby, under Pt IV of the *Police Administration Act*, if he is compelled to answer questions. But then you state at 49:

“However I concert there’s a real public interest for Sergeant Kirkby being compelled to answer the questions. I explain the nexus between this evidence and the circumstance of Kumanjayi Walker’s death in ruling number three.”

And then you offered Sergeant Kirkby the certificate. So your Honour, finally, in respect of all 14 matters, it’s my respectful submission that the way in which this task, or your task should be approached in relation to the claims, Constable Rolfe has taken the claim of exposure to penalty. And I’ve explained to you what those – what that exposure is. Your Honour must, in my respectful submission, first deal with the question of whether that claim – whether you accept that claim, and whether that claim is made good.

And I implore upon your Honour to accept my submissions that each of the claims to each of those topics, separately, and distinct from one another, is a claim – a proper claim made by Constable Rolfe. If your Honour accepts that, one view that’s been – or will be debated before the Supreme Court, is if that the penalty privilege is not abrogated then that is an absolute bar to Constable Rolfe answering questions on those topics.

But your Honour’s ruled on that, and I’m not seeking to go behind that. I’m simply explaining to your Honour the steps in which you take.

Assuming for the time being that your ruling is standing, that it is abrogated, it is still the case that you must accept the (inaudible). You must then deal with subs (b) of 38 in determining the Commissioner’s certificate that appears expedient for the purposes of justice that Constable Rolfe be compelled to answer the question. And there are two ways in which you can approach that.

Firstly, you can find, having assumed that you accept the claims, it is not expedient for the purposes of justice to compel Constable Rolfe to answer questions and you can relieve him of that obligation. If you are no so minded then in terms of determining the expedience for the purposes of justice to issue his certificate, and this is why the highlighting took you through Borland, one of the significant issues there was the use of compel (inaudible) compelled evidence in that particular case, why I’ve highlighted to you all of the matters in Pt 4 which form the basis upon which a penalty might be incurred, how matters might be reopened and that in fact, as you recognised with Sergeant Kirkby that one of the unfortunate aspects is there might be a real possibility disciplinary action could be taken at its worst could amount to dismissal.

So your Honour must consider by virtue of what you mentioned in ruling number 5, the nexus between the evidence in the circumstances of Kumanjayi’s death must

be at the forefront of your mind in determining whether or not it is expedient for the purposes of justice that Constable Rolfe be compelled to answer questions on each of those topics.

So it's a bit of a staged process which your Honour must take and if you come to the conclusion in your reasons, that it is expedient for the purposes of justice under the current ruling, your Honour should issue Constable Rolfe a certificate and then release Constable Rolfe from giving any further evidence until such time as the matters in the Supreme Court have been determined.

THE CORONER: Thank you, Mr Officer.

Are there any other submissions?

MR BOE: Your Honour, should we go first or - - -

THE CORONER: Yes. Okay, Mr Boe.

MR BOE: As your Honour appreciates, that we appear for the Walker, Lane and Robertson families.

THE CORONER: Yes.

MR BOE: In relation to this claim like we did in the Kirkby application, we oppose the submissions that have been made in essence that the penalty privileges are not abrogated. To that end and to keep matters short, we prepared some short written submissions which only go to four pages. We have provided a copy to counsel assisting and some of the parties and I hand over some more submissions to those who may not have it - Dr Freckelton, Mr Officer and I think everybody else has them. I will hand up a copy to your Honour.

THE CORONER: I will take hard copy thanks, Mr Boe.

MR BOE: Your Honour will see that the first two of the three points we raised are matters already covered in your Honour's ruling so you may not need to look at that now. The only matter I was going to speak briefly about was that which starts at par 12 from our review of your Honour's ruling and the submissions previously made, the point there taken is not one that has been considered by your Honour. In short, our submission is that Constable Rolfe makes a valid privilege claim only where there is a real and appreciable risk that his answer will expose him to an increased risk of disciplinary penalty.

We then shortly refer to the compulsion power under s 79 and in our submission, where a member of the Northern Territory Police Force can be required to answer questions or provide information about alleged or suspected breaches of discipline and those answers and that information can be used to support disciplinary allegations, it cannot be said that giving evidence in this inquest increases their

jeopardy. So we ask your Honour to consider that submission and see if it assists your Honour in considering the (inaudible) your Honour can make.

This is an important matter for our client, as you can imagine, your Honour, not just in terms of the substance of the matter, but the impact of these applications and it is subject to your Honour's ruling and what is said by Constable Rolfe in these issues in the Supreme Court, we are likely to join and intervene in those proceedings so that is why will make these submissions now.

THE CORONER: Thank you, Mr Boe.

MR BOULTEN: Could I be brief, your Honour?

THE CORONER: Yes, Mr Boulten.

MR BOULTEN: I wish to present the position of the North Australian Aboriginal Justice Agency on this application your Honour.

What your Honour ruled in number 5 decision is, we say, with all due respect, entirely correct and we just wish to make that plain for the record. And our submission today is that your Honour need not go past the first portioning of that judgment where your Honour determined that the privilege does not exist. And that is our primary positioning. The witness should be compelled to answer all questions as any other witness would be and we contend that it is well open to this court in these proceedings to make findings that might ultimately cause some ramifications to this witness ultimately.

The reality is that once your Honour considers the tension that has been caused through this argument, an arm's length observer would be confused by a position that suggests that the evidence, if only coming from this witness, was so obvious as to make it clear that he could not possibly carry out duties as a police officer in the Northern Territory but yet can give the answers to questions with the benefit of a certificate which makes it clear that he is unfit for office but then be allowed to continue in office because of the protection of a certificate.

That may inform discretionary factors about whether or not to issue the certificate, but we say that is a proper lens through which to understand the true purpose of s 38 in the context of your act and in the context of the *Police Administration Act* and the *Ombudsman's Act* that this court has a particular function and if the consequence is that the evidence discloses that someone is unfit for their office then that is where the cast should lie, we say.

Your Honour, it is clear that this matter is going to be mitigated in the Supreme Court. There is a limited utility in your Honour going through every single aspect of the submissions that have been made comprehensively on Mr Rolfe's behalf today. There will be considerable light shed on the true statutory purpose of s 38 in due course.

We are of the view that your Honour can give a ruling or not or that your Honour can give a ruling about the applicability of a penalty privilege or not but if your Honour forms the view that you can say that there is the capacity to make a claim for privilege and to uphold the privilege, there's little utility in your Honour then determining in each of the 14 or 15 categories, whether or not to issue a certificate that covers one or 14 of 15 of those categories without the benefit of a ruling in the Supreme Court.

If the court pleases.

THE CORONER: Thank you.

MR MCMAHON AC SC: Your Honour, just for the record, the Brown family also objects and supports the submissions of the Walker, Lane and Robertson families.

THE CORONER: Thank you, Mr Mullins (sic).

MR MCMAHON: Your Honour, I should also - - -

THE CORONER: Mr McMahon.

MR MCMAHON: I'm sorry?

THE CORONER: Yes.

MR MCMAHON: I should also say for the Parumpurru Committee that we adopt the submissions of Brown, Walker, Lane, Robertson and NAAJA. May I also add on, your Honour, just as a matter of practicality, there are apparently submissions either been filed or about to be filed in the Supreme Court by various parties.

And I just would ask that if any parties filing submissions, that they be served on all parties here for the sake of convenience, because some of us are not yet parties in the Supreme Court and may become so.

And while we're not yet parties, we may not be automatically served with documents that are about to be served, and so if the parties could extend that courtesy to all the parties at the table, that would be appreciated.

If your Honour pleases.

DR DWYER: Would your Honour excuse me one moment?

THE CORONER: Sure.

DR DWYER: Your Honour, just before I make brief submissions, can I just try and clarify one issue through Mr Officer. Mr Officer has outlined your Honour's task under s 38 of the *Coroners Act*, if your Honour deems it applicable. However, it's unclear whether or not Mr Officer submits how your Honour should conclude.

It is not clear, in my respectful submission, at least to your counsel assisting, whether Mr Officer submits that your Honour should compel Constable Rolfe under the section or should not compel Constable Rolfe under that section, and if not, why not. So, perhaps my learned friend could clarify that.

MR OFFICER: What I'm simply highlighting is that the tension that exists is the Supreme Court deciding at the moment, *milia* declaratory relief on how s 38 should be interpreted.

In the meantime, Constable Rolfe has sought to join those proceedings. He has also been summonsed or answered his summons in evidence today and taking the privilege of articulated risk on which I say privilege is maintained or can be sustained.

Your Honour must approach s 38 in the same vein as you did Sergeant Kirkby, that is, is the privilege properly taken? If it is, secondly, is it expedient for justice that Constable Rolfe be compelled to answer questions on those topics? And if so, the issuing of a certificate or not.

If you don't think it's expedient as to why he should give the answers, all that Borland talks about in the discretionary exercise is one of the significant material matters in that particular case was the fact that a penalty was – sorry, I withdraw that, was the fact of evidence making its way to the Commissioner of Police, who could take disciplinary action and a penalty that the police officer is exposed to is dismissal from the force. That's the discretionary factor.

So, that might be something that plays into your Honour's mind in terms of determining whether or not it is in the interests of justice that Constable Rolfe be compelled and issue a certificate or it might – you might be satisfied that it's not. Or you might be satisfied, having regard to ruling number 3, his evidence won't assist your Honour in terms of your investigative task in deciding or investigating the causative circumstances of the death of Kumanjayi on the night of November 2019.

You might find that the exposure of listening to Rolfe in doing so is something that outweighs the expedience of justice in directing him to answer or compelling him to answer questions. That's the point I'm making about the task that you approach.

Now, Mr Boulten put it out, well one of the discretionary factors is someone who might not be fit to hold office, should he continue to hold office for the benefit of a certificate. All Constable Rolfe is doing is merely asserting a right. And as I said, the right is that penalty privilege has not been aggregated. It's an absolute bar.

If the Supreme Court find that your Honour's ruling is sound and it is correct, we still come back to the task of s 38 that I have taken your Honour through, which were applied to Sergeant Kirkby. And there is no prejudice to you making a decision, like you did for Sergeant Kirkby, on Constable Rolfe.

It just simply means, once you've reached your decision, I simply ask that Constable Rolfe be relieved, if you don't relieve him yourself, even in looking at those discretionary factors in the interest of justice to push on, it might simply be that if the Supreme Court agree with Mr Rolfe's application that your Honour's orders would be of no effect.

So, I would ask your Honour to make a decision, if it is the decision of your Honour that the privilege is well taken, and if it is the decision of your Honour that it is inexpedient for justice that he answer questions and that he be given a certificate for that purpose. I simply ask that your Honour relieve Constable Rolfe for the interim of giving any evidence until the Supreme Court decide the matter.

MR FRECKELTON: Your Honour.

THE CORONER: Yes.

MR FRECKELTON: Just a short point in terms of law and procedure, s 38 is a provision that is question-specific. It doesn't allow for the taking of a broad objection. It permits the witness to decline to answer a question on the stipulated grounds, but then it provides to your Honour a certain course, if the predication of expediency that occurs of justice is made out.

In our submission, what follows from that is that your Honour does need to engage with the various matters that have been identified by our learned friend, Mr Officer, to you rather than responding in general. We say that your Honour can divide the matters straightforwardly, on the basis of ones which are ongoing and ones which have been finalised. And that is an easy distinction.

And as our learned friend, Dr Dwyer, has identified already to your Honour, the Supreme Court is going to provide us with what is likely to be a clear articulation of the applicability of the existence of penalty privilege for relevant proceedings and also the scope of the penalty privilege.

So, it may very well be that your Honour could confine the decision which you make at this stage, so as to enable the Supreme Court to be properly seized of the issues which are now being identified by Mr Rolfe as against by the initial applicant to the Supreme Court and then the matters can be resolved more specifically and comprehensively where your Honour has the benefit of the Supreme Court directions.

THE CORONER: Did you have something further, Mr Officer?

MR OFFICER: Your Honour, I was just going to say, I understand what Dr Freckelton raises about the technicality of, it's an objection to the questions. We've tried to be as broad in the topics in which questions fall under that. It's likely the claim will be still taken and indeed it was topics in the decision of Bell.

That went before the Supreme Court for Blue J to determine whether or not the

penalty privilege applied. And in fact, what happened in that case, the application was for a discharge of Ms Bell's son's – before any question was in fact asked. So, it's not unusual, topically considered, yes technically, it should be questioned.

But in the balance of the communities, I'm trying to make it as detailed and as broad as possible. Now, I'll just flag this, the timetable in the Supreme Court currently, those who are plaintiffs or applying to be plaintiffs' submissions and evidence is due today, of which the transcript for today's proceedings would all be – will form part of that affidavit.

Interveners and defendants, as I understand it, presently have to file by Monday and this matter at the moment is due to start on the 22nd. Now, there might be some practical difficulties in getting that evidence on time and circulating among the parties for them to consider their decisions, whether or not their clients are struggling to intervene. It's a very tight timeline before the Supreme Court currently. I just flag that for everyone's benefit as to where the matter sits at present.

THE CORONER: Thank you.

MR OFFICER: (inaudible) ruling.

THE CORONER: Dr Dwyer.

DR DWYER: Your Honour, can I try and put some things on the record to make sense, to the extent humanly possible, of what we are – why these issues have come to light, and what the legal issue is. As those in court will recall, Sergeant Kirkby, when he gave evidence a couple of weeks ago, initially refused to give evidence on the basis of penalty privilege. And made an application that he declined to give evidence on the basis that he might be exposed to disciplinary proceedings. And your Honour then refused the application that he made.

And Sergeant Kirkby – there was a discussion of – prior to that, of the application of s 38, of the *Coroners Act*, as it applied to penalty privilege in this court. Section 38 says, "That if a person's summonsed to give – to attend at an inquest as a witness, declines to answer a question on the ground that his or her answer will criminate, or tend to incriminate him or her, and it appears to the Coroner expedient for the purposes of justice, that they be compelled to answer the question, the Coroner may tell the person that if the person answers the question and other questions that may be put to him or her, the Coroner will grant a certificate."

Ultimately, Sergeant Kirkby did not appeal your Honour's decision in relation to his application. And he decided that he would give evidence. But ruling number five, which related to Sergeant Kirkby's application, prompted an application in the Supreme Court on behalf of another witness. That other witness is Sergeant Bauwens, who was the head of the IRT at the time that Constable Rolfe was working in the Alice Springs Police Station. The Supreme Court will determine that issue on 22 November.

That's only three working days away. And Constable Rolfe's lawyers have applied to join those proceedings. And it's in that context, that other lawyers at the Bar table have indicated that their clients might have a legal interest in that, and will also apply to intervene in the proceedings. Your Honour will welcome the guidance of the Supreme Court in relation to the application of s 38, and what it means in terms of the penalty provision. So not just criminal proceedings, but what criminate means in the terms of disciplinary proceedings.

In my respectful submission, going through the list of one to 14 topics, your Honour can accept that there are reasonable grounds for Constable Rolfe's concern, that in respect of some of the topics outlined, his answers may tend to expose him to a disciplinary penalty under the Police Administration Act. For example, numbers one and two on that list. Number one raises texts messages, and number two, the dissemination of body-worn video. In those circumstances, it is not necessary, in my respectful submission, for your Honour to determine whether there are reasonable grounds for that concern, with respect to every topic, to which Constable Rolfe objects answering questions.

He has the capacity to make the claim. That's clear. With respect to some of those matters on the list of one to 14. And it's not necessary for your Honour to determine whether you would offer him a certificate under s 38 with respect to all of those matters. Each of those matters gives rise, and it's clear from the – from the discussions this morning, each of those matters gives rise to a number of a complex questions, which regard – which have regard to the nature of the scheme for disciplinary action, as it exists with the Northern Territory Police, under the Police Administration Act.

Some of those questions have been the subject of conflicting authority by the Supreme Court of the Northern Territory. In light of the fact that the Supreme Court is actively considering whether s 38 applies to any objection, for which there's a proper basis, it is appropriate for your Honour to defer answering those questions until after the Supreme Court confirms whether or not, in fact s 38 actually applies. So depending on the outcome of the Supreme Court proceedings, it may be that there is no occasion to consider the application of s 38 in the Coroner's Court, as it relates to penalty provisions.

The penalty provision might not apply – sorry penalty privilege might not apply, or alternatively, it might be an unqualified immunity, or s 38 might extend to disciplinary proceedings. But your Honour, in my respectful submission, should wait for the guidance of the Supreme Court in that regard, and then the objection might be properly taken, but depending on the outcome of the Supreme Court proceedings. Which as I say, as my learned friend knows, are only three working days away.

THE CORONER: Yes. If there's nothing further, I'm proposing to take the afternoon adjournment. We'll adjourn.

ADJOURNED

RESUMED

THE CORONER: Yes, Mr Boe?

MR BOE: Your Honour, we just had some discussions in the break, in particular with Dr Freckelton and myself and we have raised it with some of the parties. Given that the - and it is submitting an approach slightly different from that which Dr Dwyer has suggest to you last, given that the matter is up in the Supreme Court, in our submission to ensure that there is no technical issue that gets in the way of the matter being resolved at that hearing, given that Dr Dwyer has. In fact, asked a question which the witness has refused to answer and given that an explanation has been given to it, in our submission, it would be of some utility if your Honour ruled in relation to that questions and indicated whether your reasons in ruling number 5 as to penalty privilege is part and parcel of that direction and that your Honour directs him - if your Honour feels that it is appropriate - under s 41(1)(c) to answer that question.

In our submission that would be of some utility in ensuring that we are not wasting time going back and down on jurisdictional questions. I understand that that is a view supported by at least some of the others at the Bar table.

HIS HONOUR: Yes.

DR DWYER: Your Honour, I press the submissions before - that I made before the break. In my respectful submission there is no - there is going to be no technical difficulty in the Supreme Court, I can't see it, and in my respectful submission, given you've got three working days before the Supreme Court hears, it would involve a complex judgment to deal with each of those issues now - it is not necessary and in my respectful submission, not appropriate in circumstances where we are waiting for a guidance of the Supreme Court.

MR OFFICER: Well, your Honour, there is some technical difficulty aspect to it because indeed, the Attorney-General saw fit to object to Constable Rolfe's application to joint as a plaintiff on the very fact of potential hypothetical nature of the claim and all the artificiality of it not yet been taken and ruled upon.

DR DWYER: But the claim has been taken - - -

MR BOE: No, the claim has been taken.

THE CORONER: Exactly.

DR DWYER: The claim has been taken - - -

THE CORONER: And the basis has been very thoroughly identified in the list of 14 topics. It's no longer hypothetical.

MR OFFICER: No, your Honour, it's not but I am simply imploring your Honour to make a ruling in respect of what I took you through and test and the task you must approach in relation to s 38. I simply make that observation.

THE CORONER: Yes.

MR OFFICER: For the record.

THE CORONER: Thank you. I note those submissions. However, today Constable Rolfe has objected to giving evidence in relation to 14 topics of evidence which he has set out in a schedule that has been tendered on the application as exhibit 22.

The basis for Constable Rolfe's objection is that the answers he may give in respect of those topics might expose him to a disciplinary penalty under the Police Administration Act. Constable Rolfe submits that he is entitled to claim the privilege and that s 38 of the *Coroners Act* does not modify that privilege.

However, in ruling number 5 I held that to the extent the penalty privilege applies in this inquest, s 38 of the *Coroners Act* modifies the privilege. In three business days on 22 November 2022, the Supreme Court will consider the correctness of that conclusion.

I am satisfied that in respect of some of the topics over which Constable Rolfe has made the claim of penalty privilege, the proposed examination might expose Constable Rolfe to a disciplinary penalty under the *Police Administration Act*. However, in light of the Supreme Court proceedings, in my view it is not necessary to determine whether there is a proper basis for Constable Rolfe's concern in respect of every category nor is it necessary to determine whether I would offer Constable Rolfe a certificate under s 38 in respect of the claims for which there may be a proper basis.

For the reasons given by Mr Officer, each of the questions I am asked to resolve today gives rise to a number of complex issues regarding the nature of the scheme for the taking of disciplinary action under the *Police Administration Act*. Some of those questions have been the subject of conflicting authority in the Supreme Court of the Northern Territory. In light of the fact that the Supreme Court will consider whether s 38 applies to any objection for which there may be a proper basis, it is appropriate to defer resolving those questions until after the Supreme Court confirms whether s 38 applies to this application.

Depending on the outcome of those proceedings, it may be that there is no occasion to consider the application of s 38 of the *Coroners Act*. In addition, the Supreme Court may provide guidance regarding the matters that would bear upon how I may be asked to apply s 38 in this case. Accordingly in my view, it is appropriate that I respect those proceedings and defer the resolution of the objection until after the Supreme Court has determined the application before it.

DR DWYER: Your Honour, I think my learned friend has an application to make with respect to exhibit 22, that is requesting a nonpublication order. There is no interim nonpublication order over that document at this stage. It is tendered.

THE CORONER: There is no interim nonpublication order under any - in respect of any of the documents, other than the name of the child and I made an interim order in relation to the name of another person.

DR DWYER: Yes.

MR OFFICER: Yes, your Honour, I am not making an application.

THE CORONER: I see, okay.

MR OFFICER: I just wasn't sure whether (inaudible).

DR DWYER: Your Honour, just before we go there I understand of course, as do my learned friends at the bar table, your Honour will not force Constable Rolfe to answer any other questions and I don't wish to fragment my cross-examination in any way. I just want to ask a couple of following questions in relation to the summons so it's clear to everybody in court.

Constable Rolfe, you attended court today in response to a summons to appear in the Coroner's Court, correct?---Correct.

You understand that's a legal obligation to appear in court?---Yes.

And you respected that legal obligation of course, by being here today?---Yes.

You appreciate that you are - although you are not being asked to answer any more questions today, you are not being released from that summons. Do you understand that?---Yes.

And so you will be obliged to come to court and answer questions at a later date, do you understand that?---Yes.

Your current medical certificate I think takes you to 9 December. Is it likely that you will return to work after that time?---No.

So you are not likely to be in Darwin when you return to court, is that right?---No.

Do you intend to return to the Northern Territory Police Force?---Pardon?

Do you intend to return to work at all in the Northern Territory?---Ever?

Ever?---Potentially.

In any event, wherever your summons is served, you understand it will be a legal obligation for you to attend?---Yes.

Thank you.

THE CORONER: So Constable Rolfe, you are excused from giving any further evidence today but as explained by Dr Dwyer, you are still on your summons to give evidence in these proceedings and counsel assisting, through your counsel, will let you know when you are required to return for further examination?---Understood, your Honour.

So you are excused for today but you are not excused from your summons to attend and give further evidence?---Yes, understood.

Thank you.

WITNESS WITHDREW

DR DWYER: Your Honour, might we adjourn briefly now? There is another witness who is coming to give short evidence but we will need to get him on the video link. So if we might just adjourn for 10 minutes now.

THE CORONER: Yes.

ADJOURNED

RESUMED

THE CORONER: Dr Dwyer.

We have Sergeant Kirkby back in the witness box?

DR DWYER: Yes, thank you, your Honour. I recall Sergeant Paul Kirkby, who's on the AVL.

THE CORONER: Mr Robson.

MR ROBSON: Your Honour, I announce my appearance again for Sergeant Kirkby.

THE CORONER: Yes, thank you.

MR ROBSON: Thank you, your Honour.

PAUL MICHAEL KIRKBY, affirmed:

XN BY DR DWYER:

DR DWYER: Sergeant, just for the record, could you please state your full name again?---Paul Michael Kirkby.

And you're currently physically located in Darwin to give evidence to us today, is that right?---Correct.

You last gave evidence in this court on 25 October this year, is that right?---Yes, that's correct.

Following – after you gave evidence, you – or in the course of giving evidence, you were answering some questions about an incident that occurred on or around 3 September 2019. You, just to remind you, that text exchange that you had with Constable Rolfe, was it on 3 September you texted him to say, “Sorry about the stress caused by losing my shit the other night. Stress you didn't need. You sorted it well. I'd just had enough. He was the second person to press my button that night.” Constable Rolfe replied, “Bro, there was literally no stress about it. I'm all for that shit. I've done the same thing to you more than once before. I'm always ready to make my camera face the other way and be a dramatic cunt for the film, ha ha.” You recall that exchange?---The text, yep.

Yes. And you recall that on the last occasion when you were giving evidence in this court, I asked you about the circumstances that caused you to lose your shit the other night, that you were texting Constable Rolfe about, correct?---Correct.

And you gave some evidence that to the – about what you recall of that incident, correct?---Correct.

And I asked you some questions about whether or not that incident would have been written up in your notebook, you recall those questions?---I do.

And you gave a response that indicated you believe you would have written something in your notebook about it, and you were prepared to have a look for that notebook to assist the court?---Correct.

In relation to that, you've produced a statement to assist her Honour, which is dated 2 November this year, is that right?---Correct.

In your statement, you say this. "I explain to my Honour – to her Honour, that my notebooks are kept in my locker, and I would, or should, be able to locate them. I further explained that I had lost one notebook, as it had gone through the wash, while still in the pocket of my police pants." You go on to explain at par 9, "After giving evidence at the Walker Coronial, I returned to work in Darwin on Thursday, 27 October. I located my notebooks in my police duty bag. This had been stored in my old office while relieving as officer in charge of the Darwin Police Station. In the bag", you say, "I located nine police notebooks that covered February 2015, through to May 2019. I would therefore have commenced using a destroyed notebook in May 2019." Sergeant, you could not locate any notebook which covered the period of May 2019 through to September 2019. Is that correct?---That's correct.

Why is that?---That would have been the notebook that went through the wash.

Between June 2021 and December 2021, you relieved as the senior sergeant in charge of the Darwin Police Station. Is that right?---Correct.

What you say in your new – newest statement, is that you believe that sometime in early December 2021, your wife washed your police uniform without realising that your notebook was still in the pants. Whereabouts in the pants did you keep your police notebook?---They're cargo pants, your Honour. So it would have been in the – just in the side pant pocket, against the thigh.

Do you have a recollection that that was always where you kept your police notebook, around 2021?---Yes, that's generally where I kept it. I have a – yeah, that's where I kept it. Just in my – in my right thigh, I guess, side pocket.

Those cargo pants, they're part of your official police uniform, is that right?---Correct.

So when you were out on jobs, you would put the notebook in your – the pocket of your police uniform, correct?---Generally it was always there.

And would you then transfer that pocket to somewhere else – notebook I beg your pardon?---Sorry?

Would you then transfer that notebook to somewhere else generally, before the pants were washed?---When – yeah, generally when I get home I would take the – the notebook out, and just on the kitchen bench, there's a bowl. I would put the

epaulettes, like these things, the notebook, my swipe card, things like that, just in the bowl.

So you would take your epaulette, that you're pointing to your shoulder, stripes on your shoulder - - - ?---Yep.

- - - on the bands, and - - - ?---Correct.

- - - your keys, and your passcode and et cetera and take them home with you at the end of each shift, is that right?---Correct.

And you'd take your uniform home with you at the end of each shift, correct?---Correct.

And you're general practice, in 2021, was to take your notebook home with you as well, is that right?---Correct.

Has that always been the case during your policing career in the Northern Territory?---No, if I had my uniform – sometimes I – in Alice Springs, I had a locker, I would run to work, bike to work, (inaudible) and I would have – have a shower at work, and everything would be in my locker.

Did you have a locker when you worked as the senior sergeant in charge of the Darwin Police Station in 2021?---I – I did, but I – yes I did.

Was it your general practise, to take your notebook out of your pants pocket and keep it in the locker, or not - - - ?---No.

- - - when you were in Darwin?---No.

Why not?---No that – I just – it would stay in my pocket and I would take it home.

Why would it stay in your pocket, in Darwin, and not stay in your pocket when you were in Alice Springs?---I – at Alice – sorry, at Darwin, I just didn't use the locker.

Why not?---I didn't really need to. I – my uniform was slightly different. Generally I would have an accoutrement belt.

You would have an accoutrement belt in Darwin or in Alice Springs?---In Alice Springs.

Did you keep anything in your locker in Darwin?---I – not really. There were some things, maybe some items of uniform. Deodorant if I needed it, if I was going to have a shower during the shift or.

Why was it different, in terms of the storage of your notebook, whether you had your accoutrement belt on or not, as part of your uniform?---When – well I would take my

accoutrement belt – I wouldn't take that, I'd – so in Alice Springs when I finished my shift, I would take everything off, put it in my locker. If I rode my bike home also I didn't do that uniform. And in Darwin, I obviously it's 25 Ks or 20 Ks to work, so I would drive.

What is your police duty bag?---It's a – when you go out on shift, it's just a – it's a bag, it's a canvas bag. It's rectangular. It's – sometimes you can get them from like the 5 11, they do police gear, or you can get it from, I think there's a general store in Darwin. And it's basically everything you need to go out on shift.

Did you store any police notebooks in your police duty bag?---I did, but – well that's where I found them. From early 2020 I – I moved from Darwin to – sorry, I moved from Alice Springs to Darwin. And I had a locker there. I then – when COVID hit, I got moved from the watch house at Darwin, to the watch house at Palmerston. From Palmerston, then I went and I worked at what's called Operation Crown, was to do with the – all things COVID. And so I moved into the PMC, like the Peter McAulay Centre, the college. And so I was moving, I think five times in two years. And so I think I just kept everything in that bag. As opposed to a locker. Sometimes I would have to lock the bag twice, I had to give the lock back at Palmerston. They were short of.

So after you gave evidence on the last occasion, you located a number of notebooks in your police duty bag - - - ?---Yep.

- - - stored in your old office. You located - - - ?---Correct.

- - - nine police notebooks that covered February 2015, through to May 2019. Where have you kept your police notebooks after May 2019? Apart from the one you've lost, where are the others?---After May '19?

Well I'll go back a step - - - ?---Yep.

- - - once you lost a notebook in the process of your wife washing the clothes, you would have had to start another notebook wouldn't you?---No I haven't started one.

And why is that?---I – just the roles I'm in, I don't need one.

Well, from June 2021 and December 2021 when you were the senior sergeant in charge of the Darwin Police Station, did you need a notebook?---I used – I generally didn't need it, because I was in an office. I didn't go out and about. I signed in, in a sign in book. I didn't need to keep track of shifts. I was Monday to Friday, so I just didn't need the notebook, but I still had it. I just never used it.

Sergeant, if you didn't need a notebook - - -?---I didn't use it – sorry, I didn't use it often.

Sergeant, if you didn't need a notebook between June and December 2021 - - -?---Yep.

- - - you wouldn't be carrying one in the right pocket of your cargo pants, would you?---Yes, I did. I used it occasionally. There were some things sometimes I would go out and about. I used it for – there was some COVID, anti-COVID, anti-vaccination events and I've used it on those occasions.

Well then, why didn't you get another one that you've subsequently carried after your wife destroyed the first – or the one following May. If you occasionally used it, why wouldn't you get another one and keep that in your - - -?---I don't know. I just never got another notebook.

When you gave evidence on the last occasion on 25 October, you were asked a question about whether or not you had ever disposed of any notebook since August 2019, this is at page 2425. And your answer is, "One has been disposed of." You were asked, "What date did that cover?" Your answer was, "I don't know, but that's the only one I remember." You were asked "Why?" And you said, "I left it in my shirt and it got washed." Was it your shirt or was it your pants pocket, or are you just making this evidence up?---Initially, the shirts we used to wear – if I could describe, it had a pocket here. It opened there and sat beneath – it was like a separate layer. Notebooks would sit in there. The newer shirts don't have it. I think I said shirt or – it was shirt or pants. I know I said "shirt", but I don't – I don't know.

Sergeant Kirkby, are you familiar with a general order which relates to the safe-keeping of notebooks?---I read it maybe a week/two weeks ago.

Had you read it at any time prior to that?---I doubt it very much.

Why was that? It's dated 1 June 2012. Were you a police officer in the Northern Territory at that time?---2012?

Yes?---No.

When did – just remind us when you first became a police officer in the Northern Territory?---2013. I may have seen it at the college. It may have been something that we had to do. I really don't know. I can't remember.

You accept it was in place at the time that you started your training as a Northern Territory police officer. Correct?---Yeah, I accept that, yes.

And do you recall receiving any training about the importance of keeping a notebook?---I imagine. I don't remember like something in college, but - - -

Well, it's obvious, isn't it, that a notebook is an extremely important record for a police officer?---I agree.

When you read the general order on notetaking, notebooks and diaries, I take it that there was nothing in there that particularly surprised you?---No.

The purpose of notetaking, it sets out at par 11 is, "The ability to take and record notes is considered one of the single most important attributes that a member of the police force can develop." You would agree with that?---Yep, I agree.

Paragraph 15, "The police-issue notebook or diary is a valuable tool to use for the integrity of notetaking and storage of information." You would agree with that?---I agree.

Paragraph 16, "As a police member, the requirement for taking and recording notes is of paramount importance." You would agree with that?---I agree.

"The object of a member's efforts is to ascertain all of the available evidence concerning the truth of a matter under inquiry in order to prove the commission of any criminal offence, beyond reasonable doubt, and enhance the reputation and credibility of the member of the Northern Territory Police Force." You accept that?---Yep, I accept that.

The general order goes on to note that with respect to notebooks, par 58, "All police members have a responsibility in the care and safekeeping of their official notebook or diary, as they are the property of the Northern Territory Police Force. You understand that?---I do.

And you understood that in 2021?---I – yep.

Just remind us what your role was in Darwin in 2021? The senior sergeant in charge of the Darwin Police Station?---Correct.

That's a responsible role, isn't it?---It is.

In fact, at your level of seniority, you're responsible for reminding a number of officers of junior rank of their duties in relation to things like notebook taking?---I don't think I spoke to anyone about notebook taking, but yes, I accept that.

And you're responsible, aren't you, for ensuring that junior officers act with integrity?---I do.

The general order goes on to say, "Notebooks and diaries should be carried whenever on duty. They are for official use only." Do you say to the court that you did not carry your notebook at any time after it was destroyed in 2021?---I'm not sure of the date that it was destroyed. I think I can work out, and the statement from Sergeant Lymbery probably helps more than mine. But maybe I did not carry a notebook. I think, around that time, I'd finished my role as the OIC at Darwin and I moved to Palmerston watchhouse and in the watchhouse, I did not require a notebook again.

Were you on duty when you were in the watchhouse?---Yes.

So, the general order says, "Notebooks and diaries should be carried whenever on duty." Did you just ignore that when you were in the watchhouse?---I – yep, I – I don't think I carried a notebook in the watchhouse ever, so.

So, you just ignored that general order?---I guess I did.

Did you deliberately ignore the general order or were you not aware of it?---I didn't think I was required. I didn't think it was needed for me to carry a notebook in the watchhouse.

So, you weren't aware of the general order that said, "Notebooks and diaries should be carried whenever on duty."?---I probably was, but I didn't think I was required to – I didn't think it was needed for me to carry a notebook in the watchhouse.

Did anybody ever tell you that it wasn't needed to carry it in the watchhouse?---I don't know. I don't know. I don't recall.

The general order goes on, "When a notebook or diary is nearing completion, members are to arrange to be issued with another." That's common sense, isn't it?--
-Correct, yep.

"Completed notebooks or diaries should be retained and kept in safe storage by the individual member." You understood that?---Correct.

It goes on to say that officers in charge of stations, sections, units are responsible for the security and custody of new notebooks and diaries. Who was the officer in charge of the station when you were in Darwin?---Me.

So, in fact, right at the time when you were responsible for ensuring the safety and security of new notebooks and diaries, your notebook containing critical evidence in relation to an incident from 2019 went through the wash. Is that right?---Like – it didn't have – yeah, it would have had more stuff, but yes, that's correct.

It would have had a lot of other important stuff in it. Is that what you're saying?---Correct.

Well, did you report that to anybody?---No, I made - like I obviously told some people but did I report it to my superior? No, I don't think I did.

Who was your superior in 2021 when you were the sergeant in charge of Darwin?
---It would've been the superintendent in charge of the Darwin district.

Who was that person?---Superintendent Shean, Daniel Shean.

And you failed to report any loss of a police notebook containing critical information to Superintendent Daniel Shean, is that right?---I may have but I don't know what – I can't say I did.

Well, we can enquire of Superintendent Shean whether or not any report was made by you of a loss of a notebook but to the best of your memory you did not, is that right?---That's correct.

Your counsel has provided a statement from a Todd Lymbery who is a Northern Territory police officer who was the administrative sergeant for the Darwin division between November 2021 and August 2022. He says that until 25 November you were officer-in-charge of Darwin City police station and you worked closely together on the general day to day running of the division as well as the planning of logistics for the number of operations and he recalls a conversation he had with you during that time, after an operation you'd run over a weekend where acting Senior Sergeant Kirkby told me he washed his notebook over the weekend. It came up because acting Senior Sergeant Kirkby was picking pieces of paper off the front of his shirt." Is there any reason why you were carrying a notebook around that period of time - November 2021?---Yes, I used it, there were certain things - when I did go out from the office I always had my notebook in my pocket, it was just at the start of the day you put your notebook in - end of the day you take it out.

And you are obliged to write the date of the start of every new notebook, so are you able to tell us what's the last date of the nine notebooks you were able to find?---It was May. Sorry, I can't remember - I can't remember the actual date, it was May 1919 - sorry - 2019.

Do you have it there with you, your notebook of May 2019?---No, I didn't bring them.

Are they in Darwin? Or where are the nine notebooks now located?---At the Darwin station, in my bag.

Your Honour, I call for the production of the last notebook which Sergeant Kirkby is able to locate which ends, as I understand it, in May 2019.

Can I clarify that date, Sergeant? Is it May 2019 which is the last entry into the notebook that you have been able to locate?---Correct. I can't remember the date - the actual day but it was you know, 0519.

Zero five nineteen?---May - May 2019.

Yes. What rank is Todd Lymbery?---He is a sergeant.

So he was of an inferior rank to you or a lower rank to you in 2021?---I was acting senior sergeant, correct, he was - at that stage, acting sergeant.

Is there any reason why you would've told him about your notebook and not report it to the superintendent of Darwin Police Station at that time?---I would've told everyone in that office probably. But Lymbery just remembers.

Are you now saying you would have told Superintendent Shean?---No, I said earlier I may have told him but I don't know, I can't say with certainty and I - I may have.

In the general order that I have referred you to, at par 55 it notes that;

"Supervisors should inspect notebooks and diaries on at least a monthly basis with probationary and junior members there may be more regular inspections to ensure compliance and assist with the correct development of notetaking skills. Divisional officers are to inspect notebooks and diaries periodically and ensure supervisors are inspecting their subordinates' notebooks and diaries on at least a monthly basis. A notation should be made at the time of the inspection recording the date of the inspection, the name and rank of the inspecting officer or supervisor."

What do you understand to be the meaning by of the term "Supervisor" in the Darwin office in 2021 - who was the supervisor?---There'd be lots of supervisors, there would be the patrol group sergeants, if there's a team of - you have operation Lyra at the moment dealing with domestic violence, there would be a sergeant in charge of that group. That person would be a supervisor. The senior sergeants would be supervisors of the sergeants and - - -

All right, so you were, as a senior sergeant you were the sergeant who was - I withdraw that. As a senior sergeant you were the supervisor or sergeants in terms of their notebooks, correct?---Yes, I guess, yes.

So for example, the gentleman you just referred to who was the administrative sergeant, did you supervise his notebooks?---No.

MR ROBSON: Your Honour, I have to object at this point. I didn't want to object earlier because there was some cross-examination, really on a collateral matter of credit concerning this officer's inability to produce the notebook. I let that go. He's been cross-examined on that.

Now we're ranging into general matters concerning his supervision of other police in and around issues of issued notebooks. That has no connection whatsoever with an issue in this inquest. It has nothing to do with Constable Rolfe. He has been cross-examined over two days on previous occasions in relation to his supervision of Constable Rolfe. We are now getting cross-examination in relation to supervision in general. It's not a line of examination that can lead to evidence that assists your Honour in making findings or commenting on matters relating to the circumstances of Kumanjaji Walker's death or matters that your Honour could comment on as being matters connected with that. We've moved well beyond that. It started as a collateral matter of credit. We've done that and now we're one step beyond that into really, matters completely and utterly irrelevant to the subject matter of this inquest.

DR DWYER: I disagree with respect and I press the question for two reasons. First is I am actually trying to assist your Honour to get to the bottom of an incident that occurred immediately prior to 3 September 2019 that was the subject of a significant text exchange, that's one. And the second is this, the systems that are in place for

the Northern Territory Police in relation to taking notes about use of force incidents and inspections may well be the subject of a recommendation and is likely to be of critical importance, those systems, and this officer, with respect, has some important information to give as to whether those systems, in fact, are in operation at all or whether or not the general order is disregarded for the most part and practice.

THE CORONER: I think it is relevant, Mr Robson, in relation to those supervisory practices and I am going to allow the question.

MR ROBSON SC: As your Honour pleases.

DR DWYER: Sergeant, as the acting senior sergeant, you said that you were responsible for supervising the notebook taking - this is at least under the general order - notebook taking by sergeants. One of those sergeants was Sergeant Lymbery. Did you ever inspect his notebook, for example?---Never.

Did you ever inspect the notebooks of any sergeants while you were in the Darwin office?---No.

Were you aware that you should be inspecting notebooks and diaries on a monthly basis, consistent with the general orders?---I understood that there was a general order that said notebooks were to be inspected. I never inspected anyone's notebook.

Why not, if the general order said that you should?---Well, so I - I never did.

Why not?---I don't know, I didn't really think it was - I don't really know.

Well, did you think it was up to you whether or not you obeyed or ignored general orders?

MR ROBSON: Well, at this point if I might raise the question of privilege if the learned counsel assisting is now going to embark upon further on this line of cross-examination, your Honour, it could lead to disciplinary action, failure to observe operation orders and matters of that - - -

DR DWYER: I won't press the question. Someone else might do, your Honour, if it is considered relevant and then your Honour might consider granting a certificate under those provisions. But - - -

THE CORONER: Yes.

DR DWYER: - - - I'll focus on the systems.

Did you think that it was part of your role, that is, did you think it was actually a genuine expectation of you, that you inspect the notebooks of sergeants?

MR ROBSON: Your Honour - - -

THE WITNESS: No.

MS OZOLINS(?): - - - (inaudible) before that I - - -

DR DWYER: The question's answered.

MS OZOLINS: - - - possibly a bit late, but if my learned friend's going to go on, can I just query are we – is the question in relation to General Order 55? And if it is, it doesn't specify sergeants. It talks specifically about probationary and junior members.

DR DWYER: So I'm referring to the General Order, JPS-01 "Notetaking, notebooks and diaries" which came into – which was promulgated on 1 June 2012. At par 55, there's a sub-heading of "Inspection of notebooks" which refers to supervisors who should inspect notebooks and diaries on at least a monthly basis. My learned friend will recall a series of questions that I asked this witness, as to who was a supervisor, under the meaning of the General Order. And his answer was, unless I misheard, that supervisors would be sergeants or senior sergeants, that is, that there was a layer of supervision and supervisors included him, as senior sergeant, responsible for supervising the sergeants underneath him.

MS OZOLINS: Yes, and the reception of General Order 55, goes on to talk about responsibilities for inspecting notebooks of probationary and junior members.

DR DWYER: I've read that onto the record. I'll read it again. "Supervisors should inspect notebooks and diaries on at least a monthly basis. With probationary and junior members, there may be more regular inspections to ensure compliance and assist with the correct development of notetaking skills."

THE CORONER: And supervision is referred to in par 7, "Supervision of the implementation (inaudible) order is the responsibility of all the supervisors and managers within the Northern Territory Police Force."

DR DWYER: Thank you, your Honour. I'll continue.

But I think senior sergeant – I think sergeant, the answer to your last question was no, that is, what – in relation to your understanding of your responsibilities, you did not think it was a genuine requirement that you actually inspect the notebooks and diaries of sergeants on a monthly basis. Is that right?---Correct.

So in relation to your supervisor - - -

THE CORONER: Can I just –

Have your notebooks ever been inspected?---Once, your Honour, in 25 years.

When was that?---Oddly enough, it was here, and I – I think I was – it was the OIC of Southern Desert.

When you say it was here, it was when you were a - - - ?---Sorry, sorry, within the NT.

Right?---So I would have been working Southern Desert, and it was the OIC, or the senior sergeant in charge of Southern Desert.

DR DWYER: Who was that?---Senior Sergeant Michael Potts.

And was that a routine inspection? That is, how did that inspection come about?---I really don't know. It was – I came into town, and went to see Senior Sergeant Potts, and that was one of the things he asked to do.

When you were in Darwin as the Acting Senior Sergeant in charge of that police station, who was the divisional officer?---The senior – the Superintendent Daniel Shea. And the Commander in charge of the Darwin – I don't know the correct terminology, Commander Matthew – I can't remember his surname, sorry.

Paragraph 56 of the General Order says "That divisional officers are to inspect notebooks and diaries periodically, to – and ensure supervisors are inspecting their subordinates notebooks and diaries on at least a monthly basis." I take it from the answers you've given so far, that Superintendent Shean did not inspect your notebook or diary periodically, at any time, while you were in Darwin. Is that right?---That's correct. He never inspected my notebook.

And you were there for six months I think, as the Acting - - - ?---I think it was – I think it was six months, yes.

And in spite of the fact that the General Order says that the divisional officer is to inspect notebooks monthly, yours was never inspected during that time, correct?---Correct.

THE CORONER: And only inspected on one occasion in his whole career in the Northern Territory Police Force, including his postings in Alice Springs, or in the surrounding areas. As I understand the evidence.

DR DWYER: Senior Sergeant, are you aware that in the top of the notebook, there is actually an instruction to Northern Territory Police, that is in the physical notebook, as to what should be done in relation to the notebook?---No, I write my name in it, or my registered number. I've never read what's in it – like on the front page or anything.

I'm going to ask – I'm putting the court officer on the spot here. In the brief of evidence, at 7-115D – I apologise to the court officer. And otherwise I'll just read it onto the record, 7-115D, there's an example of Constable Rolfe's notebook.

No that's fine, it's just the first page. Okay, so thanks. If you'd like to scroll down, I think you'll see some writing, some typed writing on the second page. I see, I'll read it onto the record. My fault for not giving you any advance notice of that.

THE CORONER: I think we'll have to just read it.

DR DWYER: I shall do.

So it – for the benefit of my friends, that reference is 7-115D.

At the top – in the top cover of – well, the front cover of the Northern Territory Police Force has the emblem of the Northern Territory Force. Just inside, it has room for your name, as a police officer, and your registered number. You recall that?---Yes.

That's coming up now, thank you very much.

Okay, so you see there the name of Constable Rolfe. In your circumstances, you'd write your name and your registered number, correct?---I do.

And the first direction, or instruction, is that "In this book should be entered in the member's own handwriting, such information as considered necessary for the performance of his or her duties." It goes on to say, "This book should always be carried when on duty, so as to be ready for reference, and also to note on the spot, any of the above particulars. No private memoranda what so ever, will be entered." I'll just pause there. That information is all obvious, so far, isn't it?---Correct.

It goes on to say, "As this book will be frequently inspected, the entries must be in a neat, concise and abbreviated form." It's a specific direction to officers inside the cover of their notebook that the book will be frequently inspected. Do you recall reading that at any time?---No, I don't.

So, you're saying, at no time during your period in the Northern Territory Police Force have you ever bothered to read the inside instructions of a notebook?---Correct. Not that I can remember, I don't think I've ever read it.

"This books should not be mutilated in any way, no page or part of a page is to be removed. When the book is finished and all cases finalised, it should be handed to the member in charge of the section. On remote stations, the completed notebook should be forwarded to the divisional officer for retention." Do you agree, sergeant, that that entry suggests that when you have finished each notebook, you need to give it to the member in charge of the section? That would have been you in Darwin, wouldn't it?

THE CORONER: I don't think it means that. It says, "When the book is finished and all cases finalised". I think it takes a long time to finalise cases and that might be an issue in relation to why notebooks are not secured.

DR DWYER: I will ask the sergeant what his understanding was, your Honour.

THE CORONER: Sure.

DR DWYER: Sergeant, firstly, you told us that you never – you don't recall ever reading that particular paragraph, but did you have any understanding that the notebook, at any stage, should be handed to the member in charge of the section?---I did and it's upon a member leaving – leaving the police.

I see?---Up until that time, you kept them safe and secure and upon leaving, you would hand them to the officer in charge of your station. They would then be trimmed, I don't know what really that means, and they would be archived. But up until that time, you kept all – you didn't hand your notebooks to anyone.

That can come down now, thank you.

In terms of keeping them safe and secure, I take it that you understood that you – I'll withdraw that. What was your understanding as to how you were to do that?---Well, generally, I'd have like a cardboard box or something like that, or just utilise the top shelf of the locker and that's where they would stay.

Did you ever receive any instructions that keeping your notebook safe and secure involved putting them in your notebook – sorry, putting them in your locker?---No, I don't think so.

So, was it your understanding that members could decide for themselves how to keep their notebook safe and secure?---I think that's the expectation, that they keep it safe and secure, and they do. But you're not – yep, that's – I think that was the answer to your question.

In relation to any of the officers underneath you, of inferior rank or your subordinates, have you ever enquired of them where they keep their notebooks?---No, I don't believe so.

Did you note consider that that was ever part of your responsibility?---I may have had conversations with new Constables as a sergeant, but I can't remember any. But I certainly don't remember any conversations about keeping notebooks safe.

Sergeant, I want to suggest to you that the story that you have set out in your most recent statement as to losing your notebook which covered the period between May and September 2019 is made up; that is, that you are lying about that. What do you say to that?---That's not correct.

That notebook would have outlined the circumstances of your use of force that you were texting Constable Rolfe about in September 2019. Is that right?---I don't know. I couldn't answer. I don't know.

You gave evidence starting from page 2389 about that use of force and what you

recall it to be. I'm not going to go through the whole of that evidence again, but what you said at that page of the transcript when you were asked about what happened, is that, you're not 100 percent sure. "It was possibly a trucking yard. I don't know what the job was, how I got called there. But I've ended up there and in a foot chase. I don't know what the offending was or what had been reported." You don't know whether or not you turned your body-worn video on for the foot chase. I don't think the person was arrested. You think that you were shouting at the chap in the truckyard. You go on to say, you jumped a couple of fences. You were asked, "What happened?" And you said, "I kind of, not really tackled him, but I grabbed him as we're running and we crashed into a shed. I can't remember the conversation. I remember shouting. He was shouting at me, calling me whatever and I was shouting at him." You accepted that that was a use of force, tackling him into a garden shed. Correct?---Correct, yep.

And you accepted that he was detailed at that period of time. Correct?---Correct.

And you gave evidence that it was likely to be a matter where you would have filled out a use of force incident report. Do you recall that?---No, but if I said that, I'll take that.

Transcript page 2391, you were asked, "And is that likely to be a matter where you would have filled out a use of force incident report?" And you said, "Yeah, I don't – yeah, yep." Sergeant, the officers in charge of this inquest have looked carefully at the use of force incidents, there is nothing to indicate a use of force by you, that is a use of force incident report sheet, filled out at any time leading up to those text messages of September 2019. You accept that?---Yep, okay.

Did you fail to write up a use of force report because you wanted to cover up having lost your temper at that time?

MR ROBSON: I object?---No, I don't know. I don't know.

DR DWYER: In fairness, I'm going to suggest something to you and ask you for your response to it. I suggest to you, sergeant, that the evidence you gave about an incident in a truck yard was made up by you to cover up a more serious use of force by you at that time. What do you say to that?---No, not true.

Claudia Campagnaro is an individual who had a romantic relationship with Constable Rolfe in 2018. Did you ever meet her?---I did.

Was she an officer who you were in charge of; that is, you were of senior rank to her?---Yeah, a senior member. No, I wasn't a sergeant at that time.

Were you a senior constable in 2018?---Correct.

You were somebody who was in a position, that is, you were based in Alice Springs. Is that right?---Correct.

The position - - -?---I don't know when I worked with her, but yeah, I – yeah.

In the position of senior constable, you're setting an example, aren't you, for constables who are junior in rank to you. Correct?---Correct.

And particularly, of course, probationary constables, who are just learning about their profession within the Northern Territory Police Force?---Correct.

When Claudia Campagnaro gave evidence in this court, she gave evidence about the use of racist language by a number of officers in the Alice Springs Police Station in the year that she was a police officer. And she was asked about the names of those who were using the language. She was asked, "What about Sergeant Paul Kirkby, was he somebody who freely used racist terms?" And she said, "Yes. Yes, he was." What do you say about that?---She's mistaken.

Nothing further, your Honour.

THE CORONER: Other questions?

A PERSON UNKNOWN: No thank you, your Honour.

MR BOULTEN: I have some.

THE CORONER: Yes, Mr Boulten.

XXN BY MR BOULTEN:

MR BOULTEN: Sergeant, my name is Boulten. I'm asking questions of behalf of the North Australian Aboriginal Justice Agency?---Good afternoon.

Sergeant, the text messages that were the subject of questioning last time, between you and Mr Rolfe, dated 3 September 2019, which you described in your evidence relating to an incident that was comprehensively described. I just want to check, did you actually write something about that incident in the notebook that you had at that time?---I – I don't know. I don't know.

Did you, as a matter of your normal course, make entries in a notebook when you used force on someone in the community?---I would say yes.

You'd say yes?---Yep.

So it was your normal practise to make an entry in your notebook every time you used force against a citizen, is that your evidence?---Yes, to the best of my knowledge, yes.

How much detail would you put in your notebook, when you used force against a citizen?---Sometimes not too much, name, their date of birth, where it was, what – maybe a quick precis of what had happened.

Would you then make a formal use of force entry on a form?---Or someone would, some – whoever was involved, and they would put people who were involved. So it might not necessarily be me.

Are you suggesting that there might be a use of force form in existence, but the police assisting the Coroner haven't located yet, that describes your use of force, sometime at or around the 2nd or 3 September 2019, is that what you're saying?---
No I was just saying that if – you can be involved in something, and sometimes force is used, but you may not be the member who actually puts the use of force in. You may just have your name included as – I think there's a – there's a – as you're doing it, it's drop down boxes, and you would outline who was involved, and what happened. It would have other officers involved.

Right, well assuming that has been searched for, the drop down document that you just described - - - ?---The use of force – yes.

- - - the use of force document?---Yep.

That would have your name on it, as the man who pushed somebody into a fence, on the relevant occasion. Presume that's been looked for, and it hasn't been located. The Coroner is likely to conclude there is no such use of force form. What I want to ask you then is you would be certain, because of your normal practise, that you would have made a note of that use of force, your use of force, in your own notebook, right?---There – there may have been. I don't know.

Well that's what you normally do?---That's what I normally do, but I don't know.

So, having regard to the evidence that you're aware of from Mr Lymbery, you – do you say that the conversation referred to in his particular affidavit relates to the washing of the notebook that you have described in your evidence, do you? You only had one notebook washed?---Yep.

And this - - - ?---Yes, correct.

- - - and that conversation described by Mr Lymbery is about the notebook that your wife washed, right?---Correct.

And that, if we accept what he has to say, was sometime before 25 November 2021, right?---Correct.

And as we understand your evidence, on the occasion – according to his evidence, that what prompted the conversation was you being on duty with him, and you picking pieces of paper off the front of your shirt, right?---Correct.

And your evidence tells us, that when you realised that your wife had washed your notebook, there was evidence of the fact of the washing, because the paper from the

notebook had disintegrated into pieces about the same size as grains of sand. Is that right?---Correct.

And was it little grains of sand sized bits of paper that you were picking off your shirt when Mr Lymbery and you discussed what was on your shirt?---I – I don't know. I couldn't actually remember the picking of pieces of paper. I couldn't remember that, but that's – that's what he said, so I took that. I had other shirts and they were covered in it, so - - -

Little grains of sand sized bits of paper?---Yes, he looked like paper mache.

Some paper mache can be massive, but this is – this is like sands through the hour glass, is that right?---Correct.

I want to ask you about your understanding of the frequency with which your fellow officers experienced problems with their notebooks. How many times did you ever hear about a police officer losing a notebook, destroying a notebook, washing a notebook, or anything like that? How often have you ever heard of it?---Since this has come out, quite regularly.

Right. What about before this inquest? How often had you heard of it before the inquest?---Yeah, would have heard people losing their notebooks and - - -

Did you ever hear of it when you were supervising police?---(Inaudible).

Did you ever hear of anyone losing a notebook or destroying a notebook when you were supervising a police officer?---No I've put one through the wash previously, but.

So this is not the first time - - - ?---No.

- - - was this the second or third or fourth one? What – how – how many notebooks have you or your family washed?---Two.

And when was the first one?---I don't know. It was – I was - - -

Approximate?---Fourteen – 2015, Alice Springs, maybe 2013, I don't know.

Right, did you make any record of that one having been washed?---No.

Did you tell anyone why you needed a new one?---I don't recall.

Is there any - - - ?---I think I was still able to use the first one that got washed.

So - - - ?---Or I was still able to read it.

- - - so - - - ?---It wasn't destroyed, it was washed.

- - - it was only partially washed, it was cleaned - - - ?---Well washed, but - - -

- - - (Inaudible)?---It was washed but – it was fully washed.

Fully washed, but useable?---Wouldn't say useable, but yeah.

Did you - - - ?---The pages were stuck together and - - -

Did - - - ?---It didn't disintegrate.

Did you continue to use it?---I – I don't know. A lot of the pages were stuck together.

THE CORONER: We might call for all of the nine notebooks. We might have the one that's stuck together.

MR BOULTEN: So did you keep the one that was stuck together?---I haven't got three, I think. My notebooks start in 2015, your Honour. I started in 2013, so there's some missing at the start.

Well the one that got washed with pages stuck together, not completely destroyed, that one you think was damaged in 2014 or '15, is that what you're saying?---'13, '14 – '13 or '14.

(Inaudible)?---Sorry, I can't hear you.

That's all right. So you know the Coroner has just called for the production of all of your notebooks?---Yep.

And then I asked you whether or not we are likely to see any of them with their pages stuck together?---Correct.

Are we going to see any with their pages stuck together?---No, I don't think so.

Why is that?---When I went out bush the station - the Darwin - sorry, the Alice Springs station moved from the old station to across the road. When I returned in 2016 my early notebooks had been in a locker or in a filing cabinet.

Yes?---And they've gone - the early notebooks had gone.

Have they been reported missing, discarded or in any way drawn to the attention of your superiors?---I probably said that "Where are the notebooks from across at the station?" or "Is there anything been collected from across the station" but - but no, I don't remember any particular conversation. I don't know how many notebooks there were.

You explain that you have only had your notebook inspected once in your entire career?---Correct.

Have you heard about other people every having their notebooks inspected by superior officers?---No. No.

Would it be your evidence that it would be the rarest event for any other officer to inspect a police officer's notebook?

MR ROBSON: I object to that. That's not a question this witness can answer, will he remember about other police officers to inspect other police officer's notebooks. He can only speak to his own experience. He has given that evidence. It's an unfair question and burden to put on this witness.

THE CORONER: Well, I will limit it to his experience then.

MR BOULTEN: That's all I am doing.

THE CORONER: Mr Boulten.

MR BOULTEN: Yes, your Honour.

THE CORONER: I mean, he is in police stations, and I assume he sees and - if people are regularly inspecting notebooks that would be something that would be common, it would just occur with regular force and likewise if someone came and inspected it and it only ever happened once every 25 years, people might remember it.

MR BOULTEN: So, keeping in mind her Honour's remarks in that ruling?---Sorry, I couldn't actually hear that.

Okay, so given that you've been a police officer for so long and that you go to work every day and that you're in amongst a whole lot of other police officers, all of whom are supposed to carry a notebook, given that you have only been asked to produce yours once for an inspection, have you ever heard of anyone else having their notebooks inspected?---No, not off the top of my head.

And you've never seen anyone else inspect the notebook?---No.

So when counsel assisting asked you whether or not you've read the relevant operational order you said you don't think you ever read it and when you were shown the inside cover of a notebook and asked whether you had ever read the instructions you said you've never read them either. Do you - - -?---No, I think I said for the - the general order I think I said within a week or two ago, so - but that was the only time.

Apart from a week or two ago, you'd never read it until a week or two ago and you've never read the inside of your own notebooks. How come? Was it a bit hard? Or what's the story?---I fill the notebooks in, I don't read the - it's like there's half a dozen pages at the end with different information in, I'm not sure if I've read all of that. It's got some telephone numbers in it, it's got some acronyms in it.

Sergeant?---I've never really read the notebook.

Sergeant, you were in charge of Darwin Police Station for a while. Did you read any general orders or operational orders?---Probably in regard to different things, I - yes, probably.

Some? Probably some? Can you remember reading any?---No. No, I can't remember which ones I read but I imagine I referred to some.

Referred to them? Okay. In your recent statement you said that you're on a return to work plan but you're not currently operational and that you're working in the judicial policy office. What is the judicial policy office?---Well, my role there is just when the files come through - prosecution files come through I will get those, I will read those files, make sure the correct charges are laid, make sure that the - I guess, that the evidence is there.

So you've got an important role in determining what evidence gets put before a court, is that what you're saying?---Yes, correct.

Fine. That's all I wish to ask.

MR MCMAHON: Your Honour, I have one minute of questions, if I may?

THE CORONER: Yes, Mr McMahan.

MR MCMAHON: Sergeant Kirkby, my name is McMahon, I appear for the Parumpurru Committee, which is a justice committee from Yuendumu?---Good afternoon.

Do you have a notebook with you now in your pocket?---No.

How come?---I haven't - I don't use a notebook at this point in time.

The notebook that you are using, from time to time, you have one that you use from time to time, is that correct?---I haven't started one for - since 2021.

Since the washing? Since the laundry?---No, the wrecked one, I haven't got a new one, no.

Can you say that again?---No, since the one got washed I haven't started a new one.

So since the laundering of the notebook there hasn't been a new one?---No, correct.

So just to be clear, when you said you - in your statement and in your evidence today, pardon me - when you said in your evidence last time you were in court that the notebook was washed in our shirt, you meant that it was washed in your shorts, is that right?---In my trousers - in my pants.

In your trousers?---Yes.

And did you tell Dr Dwyer today that you'd only ever washed one notebook?

---No, I don't think so, I don't - I don't recall.

Earlier today when you said that you had washed one notebook earlier, in about 2014 and 2015, I take it from your subsequent answers you meant that you actually washed it in about 2013 and 2014?---Yes, it was early on.

Did you change your answer there just because you began to realise that people in this court would be interested in seeing the notebook that was washed but not destroyed?---No, I was on the point of sale at the possie - I couldn't remember the date, it was '13 or - but I don't know, I couldn't remember the date, it was '13 - '14 but I don't know.

But you know it wasn't - - -?---I didn't - I don't know the exact date. It would be prior to 2015 because my current - the notebooks that I have - the nine, I think it starts some time in 2015, so .

How do you know that the one that was previously washed is not one of those?

---Sorry, say again?

How do you know that the one that was previously washed, years ago, was not one of the nine that you currently possess?---It kind of blew up, like it expanded, so it's quite easy to see.

When you - your Sergeant Lymburg, is he a friend of yours?---I'm sorry.

Sergeant - is t Lymburg is the fellow who makes the statement about you having - - -

MR BOULTEN: Lymbery.

MR MCMAHON: Lymbery?---Sergeant Lymbery.

Is he a friend of yours?---Yeah, yeah.

Did you tell him that you had washed the notebook?---Yes, I must have.

And in your statement for these proceedings - the most recent statement - you've said that it seems that your wife has washed the notebook. Which one of those answers is - which one of those people washed the notebook? You or your wife?
---My wife.

And when she washed the notebook - this is in November 2021, did you discuss that with her?---Yes.

Has she made a statement?---No.

MR ROBSON: I object to that, it's not for this witness to add anything to that. It would be - - -

THE CORONER: Well, I guess he is being asked, "Do you know whether or not she has made a statement"? I think the answer is that he does know and she hasn't, but maybe that can be clarified.

MR MCMAHON: Is that the situation?---Your Honour is correct. No, my wife hasn't made a statement.

Why did you tell Sergeant Lymbery that you had washed the notebook?---Well, I don't think I said I washed the notebook, I think I said the notebook, it had been washed.

His evidence is in his statement, he says, "Sergeant Kirkby told me he had washed his notebook." Do you think at that – what do you say to that? He says in his statement, "Sergeant Kirkby told me he had washed his notebook."?---Okay, I think it's neither here nor there.

Okay?---The notebook got washed.

Yes. You told everyone – correct me if I'm wrong - but did you say earlier today that you told everyone at the station that you had washed your notebook?---No, just in the admin room. I don't know if there were a few other people there but I imagine I would have said – made light of it.

At the time that you washed the notebook, were you worried that there was something in the notebook that would incriminate you down the track?---No, I was a bit upset, because I – there was some recent things in there that I wanted.

To give evidence in another proceeding?---Correct.

Yes. And finally, the gentleman who was crashed into the shed, on that occasion, you've given evidence and I'm not going to go over it, but on that occasion, correct me if I'm wrong, your body-worn camera was off. Is that correct?---I don't know.

Okay?---I don't know. I don't recall.

The name of the gentleman you crashed into the shed, do you remember his name?---I don't recall.

And do you remember making any record ever in any place of the name of the gentleman who was crashed into the shed?---No, I don't recall.

All right, thank you.

THE CORONER: Any further questions?

MR ROBSON: I don't have any questions, unless anybody else has. But just in relation to the production of the notebooks.

THE CORONER: Yes.

MR ROBSON: Obviously, I can't produce them as a conduit. They can be provided to Detective Sergeant – Superintendent Morgan, I take it, so that they can be kept in proper custody and produced for the inquest, your Honour.

THE CORONER: Thank you.

DR DWYER: Your Honour, there's one issue that arises following from the statement of Janelle Tonkin, if I might be permitted to ask it and somebody else might have a question that follows.

THE CORONER: Yes.

DR DWYER: In the statement of Janelle Tonkin, she notes this at par 10, that "An internal broadcast reminding officers of the obligations with respect to notebooks was sent out to all sworn officers on 19 October 2021." I have now obtained a copy of that email from Superintendent Morgan with that date, and I will tender that. Do you recall seeing any internal broadcast in relation to the archiving and storage of notebooks, journals and diaries in October 2021?---I don't recall it, but I also – I grabbed a copy today. I found a copy.

I see. So, when you – or you read a copy of that today. Is that right?---Correct.

And would you have read it around the time that it came out in October 2021?---I may have. I may have skimmed it. I may have – yeah. I don't recall.

Is it your practice to read internal broadcasts that are sent to all officers?---It's not my practice to read all of them.

Why not?---Some, I might just – some, I might decide aren't relevant to myself.

Do you think that there's an expectation from the Northern Territory Police Force that you will read all emails that are addressed to sworn officers?---I don't know.

This email reminds officers of their record-keeping obligations under the *Information Act 2002* and it reminds officers of the note – taking notebooks and diaries' general order. When you read that today for the purpose of giving evidence, did it refresh your memory in relation to something you'd read previously?---No.

The email notes, the journals and diaries, must be kept forever. They've got permanent retention requirements. That was something you already knew. Is that right?---No, journals and diaries have never really concerned me. I've just had notebooks. The CIB detectives have the journals and diaries, and senior officers.

If you read this internal broadcast in 2021, it would have prompted you, wouldn't it – or it would have been fresh in your memory, that is the record-keeping obligation in relation to notebooks. Correct?---It would have refreshed my memory, correct.

And then at some point when your notebook went through the wash, either before or after that date, you would have thought to yourself, well that's going to be significant, given my record-keeping obligations?---No, I don't know. It never – doesn't actually say anything about what to do with a destroyed or lost – I've been looking to see if there was – what I should have done. But no, the general order doesn't say if a notebook is lost or destroyed, what to do.

What it does say, that is this email broadcast, is that – the subheading is, "Where should your notebooks, journals and diaries be stored" in bold. And it notes that, "As per s 61 of the Notetaking, Notebooks and Diary general order, all completed notebooks or diaries should be retained and kept in safe storage by the individual member." It goes on to say, "All completed records are not to be removed from the Northern Territory Police Force workplace". You knew about that?---The completed ones?

Yes?---Correct. That's – yeah, that's why they would have been in a locker or in my duty bag, if I was between stations.

Is it your evidence that you thought that noncompleted notebooks, that is active notebooks, you were free to take home and take back to work at any time?

MR ROBSON: Well, I object. Only simply if counsel could reorder par 63 of the general order which answers – well, negates the whole question. There's no proper basis for the question which is premised on - - -

DR DWYER: I will do. I withdraw the question.

Section – par 63 says, "Members should leave their notebook or diary at the station if they're going to be off-duty for an extended period in case it is required for reference during their absence. Arrangements should be made with the relevant officer in charge to store the notebooks or diaries in a secure but accessible location. Members, however, may retain their notebooks or diaries between shifts and over rostered days off to allow them to move between stations and duties." So, it's your understand – what did you understand from that as to whether or not you could take your notebook home between shifts?---Yeah, if I was using my notebook, if it was still active, I would take it home. If it was my practice to take my uniform home, then my notebook would be in my uniform.

That's provided it was your practice to carry your notebook in your pocket at that time. Is that right?---Correct. If – yeah, if I was in a role where I needed a notebook.

Nothing further, your Honour.

THE CORONER: No other questions?

Yes, thank you, Sergeant – Senior Sergeant Kirkby. We will break the link now?---Thank you.

WITNESS WITHDREW

THE CORONER: And that completes the evidence for today. Just before we leave, the plan for tomorrow is - - -

DR DWYER: We only have one witness, your Honour. Because of the disruption in relation to Constable Rolfe's evidence, because he was scheduled to give evidence for three days starting from today. So, we have been able to kindly – well, that is, due to the good grace and patience and Senior Constable Brad Wallis(?).

He will come tomorrow. He was available today also, because we weren't anticipating that the arguments would go for so long. So, he's kindly agreed to make himself available tomorrow. On Friday, we have Senior Sergeant Barram.

THE CORONER: All right, and are we starting at 9:30 tomorrow?

DR DWYER: Yes, your Honour. And I'll just indicate for the benefit of my learned friends that I had finished asking questions of Senior Constable Brad Wallis. So, he is being made available again, so that they might complete their questions.

THE CORONER: Yes, because on the last occasion, everyone only had one question at the end of the day. But if you've got additional questions, tomorrow would be the opportunity to ask them.

MR ROBSON: Thank you, your Honour.

THE CORONER: We'll adjourn until – sorry.

MR FRECKELTON: Your Honour, just before you finish, for your information, there has been communication from the Supreme Court which indicates that her Honour, Brownhill J is intending to relist the hearing in respect of the s 38 matter at 10 am on Wednesday, the 23rd, setting it down at that stage for two days.

THE CORONER: Thank you. We'll adjourn.

ADJOURNED