LAW ENFORCEMENT CONDUCT COMMISSION (LECC)

OPERATION ALMAS

Submissions on behalf of Messrs:

(i) Superintendent Scot Tanner;

(ii) Superintendent Tracy Chapman; and

(iii) Assistant Commissioner Joseph Cassar

1. The events that gave rise to this enquiry occurred on 3 January 2023 and the 4 January 2023. The scope and purpose of the public examinations: firstly, all relate to matters relevant to the NSW Police Force response to a 000 call made on or about 7.03pm on 3 January 2023; secondly, the scope and purpose of the public examinations enquires of the Police Force Officer's response, actions and decision not to "*declare a critical incident in relation to the death of Lindy Lucinda*"; thirdly, the scope and purpose of the public examination gives rise to an obligation on behalf of the Commission to make findings with respect to Police misconduct, Administrative Officer misconduct, serious misconduct or agency maladministration and in connection thereto whether any systemic issues arise that could be areas for agency improvement.

2. It is trite to observe that the matters that gave rise to the death of Lindy Lucinda were tragic and seriously criminal in nature. Justice Rothman sentenced Mr Huber with respect to the death of Ms Lucinda, the details of which can be found in his published decision in *R v Huber* [2025] NSWSC 714.

3. Such that it may be relevant, Justice Rothman concluded at paragraph 430 of his written Judgment in the following terms:-

> "*While I do not consider that the precise time of death is particularly important in these proceedings, I do not consider the description of Mr Leadbeatter of hearing what he thought might have been the deceased at 9.30pm reliable...it's likely that the deceased died at or about 7.20pm but she may well have been deceased when Ms Hudson-Moon saw her but it may be that she died just after 9.30pm.*"

4. Any suggestion that the Police could have saved Ms Lucinda is a distraction, given the evidence and objects of this enquiry. More probably than not, the best evidence suggests,

Ms Lucinda died at or about 7.20pm. Nevertheless, at times during the public examination there appeared to be criticism of the attending Police, that they did not exit their vehicles when attending the job. It is clear from the photos, and the attending Police's account, that they had clear vision of the carpark area and they were able to illuminate that space with the use of their "*alley lights*". Any suggestion that exiting the vehicle would have led to circumstances entitling the Police Officers to move within enclosed lands (as in the enclosed alcoves along the side of the building) is misplaced.

5. The area was enclosed by a roof and two gates. The body of the deceased was hidden by donation clothing and was in the furthest area from the first gate (see T395.41-397.3).

6. The Police have power to enter premises under s.9 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 but only in restricted circumstances; they are not permitted to enter the premises for investigation or inquiry, without consent or a warrant (see, *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635; and, *State of NSW v Bouffler* [2017] NSWCA 185).

7. Whilst unlikely, to allow the attending Police Officers unfettered access to enclosed lands, an amendment would be required, enabling access to enclosed lands.

8. I am grateful and benefited by comprehensive written submissions composed by Ms Sullivan, Barrister, Counsel assisting and unless necessary do not propose repeating her summaries of evidence unless necessary for the purposes of understanding this submission.

9. I endorse Ms Sullivan's submissions at paragraphs 298 to 300 and submit that, having regard to the scope and purpose of the public examinations in the first instance the Commission should make findings consistent with paragraphs 298 to 300.

10. Paragraphs 301 to 321 of Ms Sullivan's submissions, I do not join issue with, both her summary of the evidence and issues and Recommendation 1 of her Outline.

11. With respect to the submissions appearing at paragraphs 322 to 354 of Ms Sullivan's submissions, I do not intend to add to those summaries.

12. With respect to Recommendation 2, appearing at paragraph 355, I join issue.

13. With respect to those Recommendations I submit the following:

a. The content of the recommendation would be consumed by a properly implemented Recommendation 2, as referred to above;

b. The content of the recommendation would be consumed by a properly implemented Recommendation 2, as referred to above;

c. The content of the recommendation would be consumed by a properly implemented Recommendation 2, as referred to above;

d. The content of the recommendation would be consumed by a properly implemented Recommendation 2, as referred to above.

14. It is difficult to conceive how further checklists and comparisons with other incidents would necessarily improve the outcomes of Police functions and appropriate use of resources. Each circumstance turns on its own facts. It is clear that Parliament intended to give the determining Officer a broad discretion, to be guided by the legislation and the Officer's own experience and interactions with respect to the specific facts under consideration.

15. The evidence does not disclose a recognisable benefit, achievable by moving beyond training and regard to the legislation.

16. It is trite to observe that "*reasonable minds may differ*" or that the exercise of a discretion may result in different outcomes. Seeking to confine the exercise of the discretion by reference to a prescriptive guideline, as opposed to a consideration of the legislation, suffers the risk of diluting and restricting the discretion for no identified benefit. The discretion is intended to be broad and reflects Parliament's recognition that, in life, no two circumstances are the same.

17. The declaration of a "*critical incident*" is the exercise of a discretion by a very senior Police Officer who brings to the fore their professional and life experience. The manner with which the relevant operative legislation was cast clearly recognises the expertise and experience of the determining Police Officer. There is no evidence to suggest that comparative examples provide any better outcome for, the performance of Police duties or outcomes for the public. By way of example, Superintendent Tracy Chapman was cross examined about an incident that happened in metropolitan Sydney and despite her limited knowledge of the job she was able to, readily, distinguish that example (see paragraph

242 of Ms Sullivan's submissions). The distinctions were coherent and properly observed; no two circumstances are the same.

18. Recommendation 3 should be rejected where in circumstances Recommendation 2 is enacted.

19. Recommendation 4, appearing at paragraph 358 of Ms Sullivan's submissions, respectfully, fails to recognise that senior Police Officers turn their mind to whether or not there should be a critical incident declaration in circumstances of all serious crime, daily. The content of the decision making and the exercise of the discretion is more opaque than what might be assumed by the delivery of all declarations and non-declarations to a central database. It is difficult to conceive, and there is certainly no evidence to support, a conclusion that there would be greater uniformity in decision making, if there were a centralised database; and nor should there be any aspiration to homogenise decisions – that would undermine the construct of the legislation.

20. The decisions are made by a broad spectrum of individuals and involve infinite variations to facts and circumstances; so much is recognised by Parliament when legislating the broad, non-prescriptive, discretion to be exercised under s.111.

21. There is no evidence to suggest that Recommendation 4 provides any identifiable benefit to both policing activities and of the use of resources.

22. Since the provision of Counsel's assisting Outline of Submissions the Commission has advised the party that the Commission is considering a recommendation:-

> "*...implement a procedure to provide a copy of all Critical Incident Declaration/Non-Declaration by Region Commander informs (P1179) to the Commission in a timely manner*".

23. There is no evidence to suggest that this recommendation would provide for better policing and public service but contrary to that is the evidence before the Commission that investigations through then have the propensity to poorly attend to the mental health of Police Officers and the Police Force's retention rate.

24. Moreover, Parliament has made their position clear, having regard to Part 8, Oversight of critical incident investigations under the *Law Enforcement Conduct Commission Act* 2016. Further, s.3, Objects of Act, specifically addresses the *monitoring* of critical

incident investigations at s.3(h), rather than the making of the declaration when exercising the discretion.

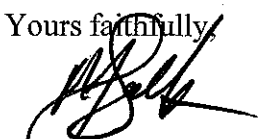
25. Sections 108 to 119 set out a regime wherein a matter is determined a critical incident and *thereafter* that an obligation arises to involve and inform LECC.

26. It is only when a critical incident is determined (failing misconduct) that LECC's jurisdiction arises. The implementation of a system proposed would be ultra vires to the Act; any purported benefit is without evidential support.

27. Unless the exercise of the discretion is capricious or unreasonable, in the *Wednesbury* sense, then the decision remains unimpugnable. Exposing Police Officers (in the absence of misconduct or Wednesbury unreasonableness, for which there are other LECC provisions, that capture such behaviour) to interrogation and investigation of their decision process, one imposed upon them regularly and routinely, simply because someone else might come to a different decision, is detrimental to the Police Officer, the proper use of resources and the intention of Parliament when casting the legislation in the manner that they have.

28. The Recommendation should be rejected.

Yours faithfully,



Matt Gollan

Barrister

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