

Second Investigation Report

Operation Crimen

Alleged improper conduct by Northern Territory Police in respect of the arrest and charging of Mr Zachary Rolfe.

Section 50(1) of the *Independent Commissioner Against Corruption Act 2017*.

December 2025

Office of the
Independent
Commissioner
Against
Corruption NT



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Introduction

- [1] On 26 June 2025 I was appointed an authorised officer by the former Acting Commissioner of the Office of the Independent Commissioner Against Corruption (OICAC) pursuant to section 131(1) of the *Independent Commissioner Against Corruption Act 2017* (ICAC Act).
- [2] On the same day I was also appointed Delegate of the former Acting Commissioner having the following powers and functions:
- (a) All of the powers and functions given to the ICAC in Divisions 5,6 and 7 of Part 3 of the ICAC Act;
 - (b) All of the powers and functions given to the ICAC in Part 4 of the ICAC Act;
 - (c) The power to make a declaration in accordance with section 94 of the ICAC Act.
- [3] On 16 July 2025 I was requested by the former Acting Commissioner to review relevant holdings of the OICAC in respect of one aspect of an investigation conducted by the former Commissioner, namely, the conduct of certain officers of the NT Police Force following the death of a Warlpiri/Luritja teenager on 9 November 2019.
- [4] I was also requested to prepare a report pursuant to section 50(1) of the ICAC Act.
- [5] I understand there is a cultural practice within Aboriginal communities across the Northern Territory of not naming persons who have died, at least for a specified period of mourning which may last months or years. In the Warlpiri language, the word Kumanjayi is used. Out of respect for this practice I have adopted the same approach as the Coroner. I have used the term Kumanjayi throughout this Report. The name given to Kumanjayi at birth is contained in the Coroner's formal findings.
- [6] Kumanjayi was a 19-year-old aboriginal male. On 9 November 2019, he was shot at Yuendumu (the shooting) by Constable Zachary Rolfe (Constable Rolfe), an officer of the NT Police Force. Kumanjayi later died from his injuries on the floor of the Yuendumu Police Station.

Summary of findings

- [7] I am satisfied that none of the allegations of improper conduct have been made out.
- [8] I am satisfied that following the shooting:
- (a) None of the attendees at the Joint Management Committee (JMC) meeting of 12 November 2019 intended that Constable Rolfe be charged with any criminal offence absent advice from the Director of Public Prosecutions (DPP)

- (b) By meeting's end the common understanding of the participants was Constable Rolfe needed to be moved from Alice Springs post haste because of concerns for his welfare and safety.
- (c) The failure of senior officers attending the JMC meeting of 12 November 2019 to take notes was not illegal, improper, or incompetent.
- (d) Note taking by two other participants at the meeting was a reasonable and appropriate method of keeping a record.
- (e) Although Acting Commissioner Michael Murphy (Act/C Murphy) was not appraised of the work carried out by the JMC, he wanted Constable Rolfe to travel to Darwin and stay in the Territory.
- (f) One of Act/C Murphy's reasons, and an important one, was concern for Constable Rolfe's welfare and safety.
- (g) It would not have been improper for a direction to have been given by Act/C Murphy to Constable Rolfe that he travel to Darwin.
- (h) The evidence does not support a finding that Constable Rolfe was directed to travel to Darwin by Act/C Murphy or any other officer.
- (i) Neither Assistant Commissioner Nick Anticich (A/C Anticich) nor any other member of the JMC caused Constable Rolfe to be transferred to Darwin for the purpose of an arrest.
- (j) Assistant Commissioner Dr Narelle Beer (A/C Beer) was genuinely concerned for the welfare and safety of Constable Rolfe.
- (k) A/C Beer's concern for Constable Rolfe's welfare and safety was the sole reason he was booked to fly and travelled to Darwin.
- (l) Given increasing public interest, the volatile mood of the community in Alice Springs and Yuendumu, and the release of Constable Rolfe's identity, it would have been reckless for the NT Police Force to allow him to remain in Alice Springs
- (m) At a meeting with the DPP on 11 November 2019, the DPP expressed a preliminary opinion, based upon the footage on Constable Rolfe's Body Worn Video (BWV) and an oral summary provided by one or more of the police officers present.
- (n) The DPP's preliminary opinion was to the effect that "at face value" it looked like Constable Rolfe had murdered Kumanjayi.
- (o) At a further meeting with the DPP and the Deputy Director of Public Prosecutions (DDPP) on 13 November 2019, a "short file" was provided to the DPP.
- (p) The DPP had an opportunity to review the "short file".

- (q) The material contained in the “short file” was sufficiently comprehensive and provided a proper basis for the DPP to express an opinion on 13 November 2019
- (r) The DPP Guidelines required all cases involving the death of a person to be referred to the DPP. The DPP was entitled to give opinions in relation to such cases.
- (s) The DPP gave an opinion that based on the material shown to him it was “open” or “appropriate” to charge Constable Rolfe with murder.
- (t) The D/DPP was of the same opinion.
- (u) It was appropriate for the arresting officer, Acting Commander Kirk Pennuto (SIO Pennuto), to consider the opinion of the DPP and the concurrence of the DDPP when considering whether Constable Rolfe should be arrested and charged with murder.
- (v) After the meeting with the DPP and DDPP on 13 November 2019, and prior to a meeting with several senior police officers later that day, SIO Pennuto formed the appropriate belief that he had proper grounds to effect an arrest of Constable Rolfe.
- (w) Commander Martin Dole (Commander Dole) and A/C Anticich formed the same state of mind.
- (x) There was nothing inappropriate in the attendance of SIO Pennuto at the meeting of senior officers which occurred after the meeting with the DPP and D/DPP; on 13 November 2019.
- (y) There was nothing inappropriate in the direction given by A/C Anticich at the meeting of senior officers to effect an arrest.
- (z) No police officer present at the meeting of senior officers engaged in improper conduct.
- (aa) Commander Dole did not have an actual conflict of interest arising from his involvement in the investigation of the shooting.
- (bb) Commander Dole did not have a perceived conflict of interest arising from his involvement in the investigation of the shooting.
- (cc) It was appropriate to involve Commander Dole in the investigation of the shooting.

[9] I have considered section 50A of the OICAC Act.

[10] I am satisfied it is appropriate to publish this report. In circumstances where none of the allegations have been made out the NT Police Force and the individual police officers who were alleged to have engaged in improper conduct ought to have the benefit of publication of my findings to this effect.

Background to this report

[11] On 15 March 2022, Constable Rolfe provided a report to the OICAC alleging, amongst other matters, improper conduct by officers of the Northern Territory Police and certain Northern Territory Government ministers who were either directly or indirectly involved in events which followed the death of Kumanjayi.

[12] The former ICAC determined that the allegations were serious and required investigation. He stated:

These are serious allegations that continue to gain a great deal of media and political commentary. They relate to allegations of improper conduct of senior government officials. It is important that the matters are properly considered, reported upon and, if necessary, action taken. In my view it is in the public interest that I investigate.

[13] The former ICAC's investigation was limited to the period between the shooting incident on 9 November 2019 and the arrest and charging of Constable Rolfe on 13 November 2019. On that day Constable Rolfe was arrested and charged with the murder of Kumanjayi.

[14] At trial the DPP indicted Constable Rolfe on the murder charge, together with two alternative charges. The first alternative charge was that Constable Rolfe engaged in conduct that caused the death of Kumanjayi, being reckless or negligent as to causing the death of Kumanjayi contrary to section 156 of the *Criminal Code 1983* (NT) (Code). The second alternative charge was that Constable Rolfe engaged in conduct involving a violent act to Kumanjayi, namely, discharging a firearm causing the death of Kumanjayi contrary to section 161A (1) of the Code.

[15] Constable Rolfe was committed to stand trial, tried, and acquitted of all charges. Nothing in this Report is intended to question, in any way, the outcome of Constable Rolfe's trial.

[16] The investigation focused upon:

(a) The release of Constable Rolfe's identity as being the officer who shot Kumanjayi.

(b) The movement of Constable Rolfe from Alice Springs to Darwin before his arrest.

(c) The decision to arrest and charge Constable Rolfe with murder.

(d) Any political influence on the investigation into the shooting before the arrest and charging of Constable Rolfe

[17] A further issue was identified during the investigation, because of evidence given in the Inquest into the death of Kumanjayi (Inquest). It concerned a possible conflict of interest involving then

Commander Martin Dole (now Commissioner Dole) and his relationship with the Yuendumu community.

- [18] Several allegations were made against a former Commissioner of OICAC. Ken Fleming QC arising out of statement made by him at a Black Lives Matter demonstration in Alice Springs. The suggestion an ICAC or his delegate could investigate the conduct of a former ICAC is misconceived. I have not addressed those allegations in this Report. I consider it would have been improper for me to have done so.

Improper conduct

- [19] The NT Police Force is a public body as defined in the ICAC Act. Police officers are public officers.
- [20] Improper conduct can take several forms.
- [21] The ICAC Act defines improper conduct as including corrupt conduct, misconduct and unsatisfactory conduct .
- [22] Corrupt conduct as defined must constitute an offence, whether in the Territory or elsewhere, for which the maximum penalty is imprisonment for a term of at least 2 years, with or without a fine. Subject to defined criteria, it also includes conduct that constitutes reasonable grounds for dismissing or terminating the services of a public officer. The conduct must be connected to public affairs.
- [23] Misconduct as defined must constitute an offence, whether in the Territory or elsewhere, for which the penalty is a fine or imprisonment for a term of less than 2 years with or without a fine. Subject to defined criteria, it also includes conduct that constitutes reasonable grounds for disciplinary action against a public officer (short of dismissal or termination of appointment) or varying the terms of the public officer's appointment. The conduct must be connected to public affairs.
- [24] Unsatisfactory conduct as defined must involve illegality or impropriety, negligence or incompetence. The conduct must result in substantial mismanagement of public resources, the inappropriate or significantly inefficient use of public resources, substantial mismanagement in relation to the performance of official functions, or substantial detriment to the public interest. The conduct must be connected to public affairs .
- [25] In this matter I have found there was no improper conduct. I have done so having regard to the statutory definitions noted above.

The standard of proof

- [26] A finding of improper conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. There are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of improper conduct.
- [27] In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. OICAC investigations, including any interviews or hearings, are not criminal in their nature. Hearings are neither trials nor committals. The standard of proof is the civil standard, that is, on the balance of probabilities. This requires reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters.
- [28] The civil standard is the standard which has been applied consistently by the OICAC when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* ¹(1938) 60 CLR 336 at 362:

....reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

- [29] This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, to be understood:

.....as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court

¹ (1938) 60 CLR 336 at 362

should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

[30] I have applied these principles to findings made by me in this Report.

[31] In preparing this report I have had regard to a substantial amount of material including evidence taken from the persons below. Because several police officers are no longer serving with the NT Police Force, and others have been promoted since this time, I have used what I believe are the designated ranks which existed at the time of, or shortly after, Kumanjayi's death. Hopefully, this will avoid confusion.

(a) Commander Martin Dole (Commander Dole) - Crime Command, Crime, Intelligence and Capability. He was subsequently appointed Commissioner of the NT Police and Chief Executive Officer of the NT Police Force.

(b) Acting Commissioner Michael Murphy (Act/C Murphy) - Acting Commissioner of Police until 11 November 2019 when Commissioner Jamie Chalker was sworn in. He then resumed his position as Deputy Commissioner of Police (D/C MUPRHY).

(c) A/C Beer- former Assistant Commissioner of Police. She was appointed to manage the police operational response following the death of Kumanjayi.

(d) SIO Pennuto – He was appointed Senior Investigating Officer of the investigation into the death of Kumanjayi.

(e) Constable Rolfe - former Constable of Police.

(f) A/C Anticich - Assistant Commissioner for Crime and Professional Standards

(g) Detective Acting Senior Sergeant Leith Phillips (DSS Philips) - Crime Command, Regional Investigations Division, Alice Springs.

(h) Commissioner Jamie Chalker (former Commissioner Chalker) – former Commissioner of the NT Police Force.

[32] I also had regard to statements, statutory declarations, and answers to written questions obtained from Assistant Commissioner Michael White (A/C White), Detective Senior Sergeant Malogorski (appointed as Deputy SIO – D/SIO Malogorski), Detective Senior Sergeant Wayne Newell (DSS Newell) Detective Senior Sergeant Chris Wilson (DSS Wilson), Detective Sergeant Isobel Cummins (DS Cummins), Acting Detective Sergeant Andrew Kren (A/DS Kren), Lauren Nolan nee Wetherall, Staff Officer to the Assistant Commissioner Regional Operations, Alice Springs (Ms Nolan), Commander Daniel Bacon (Commander Bacon), Paul McCue (President of

the Northern Territory Police Association), the Director of Public Prosecutions Jack Karczewski (DPP) and the Deputy Director of Public Prosecutions Mathew Nathan(D/DPP).

[33] Like the former ICAC, I had regard to a significant volume of miscellaneous written material including, emails, correspondence, memoranda, handwritten notes, meeting records, briefing papers, and parts of the transcript of evidence taken at the Inquest.

[34] I have also viewed video footage of the incident taken via Constable Rolfe's body worn video (BWV) on 9 November 2019 and the so called "short file" which was provided to the DPP on 13 November 2019.

[35] Counsel Assisting prepared submissions, and parties were invited to receive and consider those submissions in order that they have an opportunity to respond. I have had regard to the submissions of Counsel Assisting together with the submissions of interested parties. I have not expressly referred to every submission of either Counsel Assisting or interested parties. I have had regard to those most relevant to my task.

[36] As was the case in respect of the former ICAC's report, this report is limited to the period 9 November 2019 to 13 November 2019.

Political influence

[37] The question of political influence need not be further addressed. It was the subject of a Report published by the former ICAC in May 2023 (First Report).

[38] In respect of the question whether there had been political influence, the investigation came to focus primarily upon the conduct of the former Chief Minister the Hon. Michael Gunner and comments made by him to members of the Yuendumu community on 12 November 2019. It also considered the conduct of others, including the former Deputy Chief Minister and Minister for Police, Fire and Emergency Services, the Hon Nicole Manison MLA.

[39] The former ICAC was satisfied there was no political influence in respect of the investigation of the shooting or the charging and arrest of Constable Rolfe. Put simply, there was no improper conduct.

[40] The investigation also examined the conduct of several officers of the NT Police Force. However, the ICAC did not issue a report in respect of such conduct. For various reasons, which I need not repeat, the ICAC determined that a second report dealing with the conduct of those officers would be prepared after the Inquest had been finalised. The coroner made findings on 10 June 2025. As previously noted, I was requested to prepare this Report by the former Acting ICAC.

The shooting

- [41] The facts which give rise to this Report are well known, if not notorious. I provide a summary below.
- [42] On Saturday, 9 November 2019, a team of police officers from the NT Police's Incident Response Team (IRT) attended Yuendumu to arrest Kumanjayi on an outstanding warrant. It was evening.
- [43] The IRT comprised Constable Rolfe, Constables Adam Eberl (Constable Eberl), Anthony Hawkings (Constable Hawkings), James Kirstenfeld (Constable Kirstenfeld), and Senior Constable Adam Donaldson (Senior Constable Donaldson) from the Dog Unit.
- [44] Shortly after 7pm, Constables Eberl and Rolfe located Kumanjayi at an address in Yuendumu. They sought to identify Kumanjayi. A struggle ensued between Kumanjayi and the two police officers. Shots were fired by Constable Rolfe. Kumanjayi received three gunshot wounds and died on the floor of the Yuendumu Police Station some hours later. It was a death in police custody and a critical incident requiring investigation.
- [45] That night Acting Deputy Commissioner White (D/C White) declared the death a critical incident investigation under the Major Crime, Major Investigations & Critical Incident Response Policy.
- [46] The next day, 10 November 2019, Detectives from the NT Major Crime Squad based in Darwin were assigned to investigate the death in custody (the investigation team). The investigation team's reporting structure, in order of seniority, was as follows:
- (a) D/C Murphy – returned to his substantive position on 11 November 2019 on the appointment of Commissioner Chalker.
 - (b) Acting Deputy Commissioner White – returned to his substantive position of Assistant Commissioner.
 - (c) Assistant Commissioner Anticich
 - (d) Commander Dole
 - (e) A/Supt Kirk Pennuto (SIO)
 - (f) Det Senior Sergeant Mark Malogorski (D/SIO).
- [47] Around midnight, Constable Rolfe returned to Alice Springs via Polair.

Constable Rolfe's welfare and safety

- [48] Interest in the investigation and its possible outcomes was considerable. It received a great deal of coverage in the media and on social media. There was also community unrest in Yuendumu and Alice Springs. Public comments were made by the Chief Minister and other public officials. The comments were the subject of investigation by the former Commissioner. His findings were published in the First Report.
- [49] Whilst the investigation team commenced its work, Constable Rolfe was off-duty and remained at home in Alice Springs until the afternoon of Tuesday 12 November, when he flew from Alice Springs to Darwin.
- [50] The reason for Constable Rolfe's departure from Alice Springs to Darwin was one of the issues examined in this investigation.
- [51] It is alleged that Constable Rolfe's travel to Darwin was improper as its purpose was to facilitate his arrest. Whilst several senior officers located in Darwin may have believed it was desirable to arrest Constable Rolfe in Darwin, if an arrest was required, that evidence has been of limited assistance. In my opinion, it is necessary to examine the conduct and purpose of those directly involved in the movement of Constable Rolfe.
- [52] A/C Beer was a senior officer of NT Police stationed in Alice Springs, whose role in relation to the shooting was to manage the police operational response throughout the regional and remote parts of the Territory and ensure delivery of policing services. This included chairing the Investigation Management Team (IMT) meetings in Alice Springs and ensuring Constable Rolfe's welfare and safety. A/C Beer's duties also included engagement with the community. She was the most senior officer of the NT Police who had contact with Constable Rolfe in the lead up to his travel to Darwin. The operational response was to be kept separate from the investigation. The investigation team was understandably guarded in relation to the information it disclosed about the investigation to other members of the NT Police Force including A/C Beer. Commander Dole said Detective Superintendent Jo Foley (DS Foley) was the conduit between the JMC and A/C Beer. However, Commander Dole did not tell DS Foley everything because 'there was no need for some of that to be conveyed to the IMT'. He said there was a 'need to keep things tight' in the investigation team.
- [53] On Sunday 10 November or Monday 11 November 2019, Constable Rolfe spoke to A/C Beer and Commander Brad Currie (Commander Currie). Both suggested he take a few additional days off and return to work on Friday 15 November 2019. Constable Rolfe agreed and because of the additional days off, his mother, who was living in Canberra, booked a flight to visit him in Alice Springs. His intention was to remain in Alice Springs until Friday, for his first shift back to work.

- [54] An IMT was established in Darwin. It met for the first time at approximately 5pm on 10 November 2019. It was chaired by Acting D/C White. The evidence suggests that this committee was the precursor to the formation of a JMC which would oversee the investigation. The expressions IMC and JMC were sometimes used interchangeably.
- [55] On Tuesday 12 November 2019, Constable Rolfe's mother flew into Alice Springs. Constable Rolfe was due to pick her up from the airport. However, at about 7am he was visited by a Police Association member and psychologist who told him he had been identified on social media as the police officer who shot Kumanjayi. He was shown a Facebook post which contained a photo of him in police uniform, naming him and with a caption along the lines of 'this is the white dog that shot [Kumanjayi]'. Constable Rolfe was told to 'lockdown' his social media accounts, so they could not be publicly accessed.
- [56] Those involved in managing Constable Rolfe's welfare and safety also mistakenly believed his address had been disclosed. Nothing turns upon this except to the extent it throws light upon the state of mind of those involved in the movement of Constable Rolfe from Alice Springs to Darwin. The immediate response was to place a police vehicle in the street upon which Constable Rolfe's house was located.
- [57] A preliminary threat assessment was carried out, and a Threat Assessment Report was prepared by Senior Constable Lance O'Connor (SC O'Connor) who was stationed Darwin. He noted:
- It is difficult to assess the actual threat posed to NTPOL officers and, more specifically, Constable ROLFE and his family. It is likely the majority of online commentary which advocates retaliation against police is little more than 'armchair bravado', with the respective authors simply venting, or hoping to inspire someone else to take action. However the incident must be considered to **increase** the risk of police officers being involved in confrontations across the Northern Territory, and **substantially increases** the risks to safety of Constable ROLFE and his relatives (identified on social media).*
- [58] The highlighting in the extract above is contained in the original Threat Assessment Report. SC O'Connor made several recommendations including:
- Discreetly remove Constable Rolfe and his family to a secure location outside of Alice Springs*
- [59] I am satisfied that given increasing public interest, the volatile mood of the community in Alice Springs and Yuendumu, and the release of Constable Rolfe's identity, it would have been reckless to allow him to remain in Alice Springs. I also agree with SC O'Connor that the identification of Constable Rolf on social media and the posts responding to such disclosure

'substantially' increased the risk of harm to Constable Rolfe and his family. For example, the following call to arms was posted:

Time To Be A Vigilante A Mercenary & Cop Killer

If They Can Do It SO CAN WE

TIME TO TAKE BACK OUR LANDS AND OUR COUNTRY

[60] Following a visit from a Police Association member and a psychologist, Constable Rolfe received a follow up phone call from A/C Beer. She directed him to stay at home. When he said he was due to collect his mother from the airport, A/C Beer offered to pick up Mrs Rolfe from the airport and take her to his home. It was during this phone call that Constable Rolfe said A/C Beer suggested he leave Alice Springs and fly to Darwin, at the expense of NT Police.

[61] Constable Rolfe said the reason A/C Beer asked him to go to Darwin was implied in the conversation: that it was for his safety, given the release of his name and photograph on social media. However, he claimed he declined to go to Darwin because there was nothing for him there. Constable Rolfe told A/C Beer that if he had to leave Alice Springs, then it would be Canberra or Bali. He said his suggestions were not supported or explored by A/C Beer.

[62] A/C Beer had no independent recollection of a specific conversation with Constable Rolfe. However, she said once his identity was released, she was 'always and only' concerned about his welfare. For that reason, A/C Beer was happy for Constable Rolfe to go to Darwin or Canberra. If he had wanted to go to Bali, she would not have stopped him, but that was not a conversation she could recall.

[63] On the same day, 12 November 2019, at about 8:50am, a meeting of the JMC took place in Darwin. In attendance were Acting Deputy Commissioner White (Acting D/C White), A/C Anticich, Commander Dole, Detective Superintendent Janelle Tonkin (DS Tonkin) from Professional Standards Command, SIO Pennuto and D/SIO Malogorski. News about the release of Constable Rolfe's identity on social media had reached Darwin and was discussed at the meeting.

[64] I accept SIO Pennuto's description of the basic function and workings of a JMC. He said:

...JMC, generally speaking, is a high-level cohort of individuals. Often they come from different areas of the organisation. It might be that you have an Assistant Commissioner of Crime, an Assistant Commissioner of from a regional area where a major incident has occurred, you might have some specialised people as part of that group as well depending on the nature of the event. Their role is really strategic steering, I think more than anything else and providing support to the operational context and those down below who are actually tasked with – ah undertaking the investigation. So how I would - I'm not

sure if the question will come, but how I would think about them being used by me is if I see that there's something in front of me that perhaps has a broader organisational context or a risk associated with it at a much higher level, then I'm very comfortable asking that question of the JMC, knowing that those p[people are there to provide specialised understanding or have significantly more experience, I would hope, in um - these matters than me. And then if it becomes a critical decision, its something we've had some buy-in at the right level about.

[65] There are no audio recordings or official minutes of the meeting. However, notes were taken. The best contemporaneous record of what occurred at the meeting are the contemporaneous notes taken by SIO Pennuto and D/SIO Malogorski.

[66] Both officers' notes show that one of the first topics discussed at the JMC meeting that morning was the posting of Constable Rolfe's photograph on social media. Welfare concerns were raised. However, the group concluded that it was not a matter for JMC to manage. It needed to be managed by the IMT structure in Alice Springs (headed by A/C Beer). It seems to me this approach was reasonable. The JMC oversaw the investigation. It did not oversee operations on the ground, including at Alice Springs.

[67] Later, the topic of Constable Rolfe's movement to Darwin was raised again. This time, it was raised in the context of arrest procedures if the DPP advised a charge was appropriate. The DPP had not done so at that point in time although he had expressed a preliminary view as to the appropriateness of proceeding with a charge of murder.

[68] Malogorski's notes record:

** Arrest Procedures discussed if DPP grant request to have Constable Zac Rolfe arrested and charged. Alice Springs location will be difficult due to current tension amongst southern members towards investigators. Ass Commissioner Nick Anticich provided an option to have Const Zac Rolfe transported to Darwin.*

** Decision from Executive is to transfer Const Zac Rolfe to Darwin today due to welfare and safety concerns if he was to remain in Alice Springs. Ass Commissioner Narelle Beer to arrange transfer to Darwin. Security and demonstrations reasons.*

[69] There was nothing improper with the discussion between attendees at the JMC concerning arrest procedure. The discussion was contingent upon advice from the DPP. There was tension between the investigation team and certain police officers stationed at Alice Springs. Several witnesses gave accounts to this effect. There had also been considerable community unrest in Yuendumu and in Alice Springs following the shooting. It is unsurprising the JMC concluded Alice Springs would be a difficult location to effect an arrest if it became appropriate to arrest Constable Rolfe. Although A/C Anticich suggested a transfer from Alice Springs to Darwin was

an option, it was no more than that. It does not appear any other person present at the meeting engaged with A/C Anticich, and it was not part of the JMC's decision. The decision to transfer Constable Rolfe to Darwin was made based on concerns for his welfare and safety.

[70] SIO Pennuto's notes record:

6. Discuss possibility DPP advice/recommendations involve charges + that requires an arrest. ASP → very challenging location. Significant tensions here. Likely widespread issues to arise at ASP level, that may impact business continuity. Additionally, there will be a detrimental impact on investigators.

Suggested by Anticich, Rolfe could be relocated so no direct action against him (if reqd) happens in ASP.

White/Anticich liaising in background at Exec level re: potential for relocation by way of consent. Relocation is welfare based however it is expected some will see it as an underhanded exercise

Advised by Exec, A/C Beer to commence arranging for relocation.

Decided in view of potential relocation offer of EROI etc must be progressed ASAP + prior to relocation.

[71] Counsel Assisting submitted that a plain reading of SIO Pennuto's notes suggest it was A/C Anticich who suggested relocating Constable Rolfe to Darwin so that no direct action (i.e. arrest and charging) would happen in Alice Springs. Such a reading was said to be consistent with the notes of D/SIO Malogorski extracted above. However, when asked about this, SIO Pennuto said his notes should not be interpreted in this way. He said A/C Anticich's suggestion to move Constable Rolfe to Darwin was 'entirely a welfare statement', that Alice Springs was not a good place for Constable Rolfe and he could come under threat if he remained. SIO Pennuto said if his notes could be interpreted any other way, then it was his fault for 'misrepresenting' what was said by A/C Anticich in his notes.

[72] Commander Dole said A/C Anticich did not suggest that Constable Rolfe could be relocated to Darwin. He said A/C Anticich was quite clear that certain matters were not for the investigations team to address. When parts of SIO Pennuto's notes, as extracted above, were read to D/C Dole, he said the only part he agreed with was that A/C Beer was given carriage of what was to happen to Constable Rolfe. He specifically remembered A/C Anticich saying 'we can't have any involvement in discussion with that [transfer]'.

[73] A/C White stated there was discussion at this meeting that Constable Rolfe's identity was known in the media and social media. He was aware there were safety concerns for Constable

Rolfe, and it was D/C Murphy who decided to fly Constable Rolfe to Darwin. D/C White denied any involvement in the making of that decision.

[74] Counsel Assisting submitted it was difficult to accept the positions put forward by several of those who attended this JMC meeting on 12 November 2019, namely, that either A/C Anticich did not suggest moving Constable Rolfe to Darwin or that he did suggest it, but it was made purely on welfare grounds. The following reasons for this submission were advanced by Counsel Assisting.

[75] First, A/C Anticich accepted he probably suggested the option of moving Constable Rolfe to Darwin because of the hostile environment in Alice Springs for the investigation team. However, he maintained that his suggestion during the JMC meeting did not have a role to play in Constable Rolfe's move to Darwin. He said the move was a decision that involved D/C Murphy and A/C Beer. Whilst he accepted that Constable Rolfe's location in Darwin made it easier for the investigation team, he said the move to Darwin did not happen through 'direction or forethought or foresight' from the investigation team.

[76] Secondly, A/C Anticich conceded that if Constable Rolfe had not moved to Darwin, the investigation team would have considered the suggestion to move him to Darwin because Alice Springs was without a doubt a 'hostile environment' for the investigators.

[77] Thirdly, the remaining notes of SIO Pennuto also support a narrative contrary to the recollections of Commander Dole and SIO Pennuto:

8. A/C Anticich queried position if Rolfe wishes to travel to former home rather than Darwin. Rolfe is previously an ACT resident.

Query- in the absence of DPP assessment of the 'short file', is there a basis to arrest with a view to charge. Obviously if charging is recommended. It is much better that Rolfe is NT local. Absolutely wish to avoid any chance of having to extradite etc. but doesn't want arrest/charge prematurely. Does this change timeframes? Will there be a need for an EA Plan. Anticich conferred with A/C Beer by phone. Beer confirmed that flight has been booked for Const Rolfe to travel to Darwin today at 1700 hrs. A/C Wurst may travel with him as will family who is now in ASP.

10.17- A/C Beer confirmed by phone Rolfe's intent to travel to Darwin this evening. Wurst to travel also.

[78] D/SIO Malogorski's corresponding notes on this topic are as follows:

** Information given from Ass Commissioner Nick Anticich is if Constable Zac Rolfe wants to return to his former home in the ACT then he will have to be arrested at the Alice Springs Airport. [after advice]*

** Confirmation from Ass Commissioner Narelle Beer is that a flight has been booked for Constable Zac Rolfe today at 1700 hrs to travel to Darwin.*

[79] A/C Beer also had a notebook entry on 12 November 2019, of a conversation with A/C Anticich. Both officers accepted they probably spoke to each other on the day, although neither could recall the content of their conversations.

[80] Counsel Assisting further submitted it should be found that during this JMC meeting A/C Anticich and A/C Beer spoke about Constable Rolfe's situation and travel intent. However, it was unlikely that A/C Anticich revealed that he wanted Constable Rolfe in Darwin to facilitate a potential arrest. That is consistent with A/C Beer's position that she was not invited to the JMC meetings and was not privy to information about certain aspects of the investigation that impacted her responsibilities for service delivery of police operations. A/C Anticich did not need to tell A/C Beer about the direction of their investigation once, as recorded in the officers' notes, he was told by her that Constable Rolfe was either intending to fly to Darwin or already booked on the 1700 hours plane to Darwin. That is all he needed to know if he wanted to plan for a potential arrest. This was also consistent with A/C Beer's account that she did not know she was facilitating an arrest by putting Constable Rolfe on a plane to Darwin.

[81] I accept these submissions. I would only add that the notes of the meeting evidence the fact that the senior participants considered it important to keep the investigation separate from what was happening on the ground in Alice Springs. That too supports a conclusion that A/C Beer knew nothing about any potential arrest of Constable Rolfe. The investigation team was understandably guarded in relation to the information it disclosed about the investigation to other members of the NT Police Force. After all, it was investigating the actions taken by a fellow officer. On any view it was a sensitive investigation. Commander Dole said DS Foley was the conduit between the JMC and A/C Beer.

[82] Counsel Assisting submitted that A/C Anticich did suggest moving Constable Rolfe to Darwin to avoid the hostile environment of Alice Springs for the investigations team created by Constable Rolfe's continuing presence in Alice Springs. If that was the operating reason for the move of Constable Rolfe to Darwin, then it was arguably "improper conduct".

[83] For the reasons set out below, I disagree with this submission.

[84] Counsel Assisting further submitted A/C Anticich's suggestion could not be considered in isolation. The reality was at the time he suggested moving Constable Rolfe to Darwin as an option, Constable Rolfe's personal safety had already been compromised, and consideration was being given to moving him out of Alice Springs for that reason.

[85] I agree with this submission.

- [86] The then Commissioner of Police, Jamie Chalker advanced several submissions in response to the submissions of Counsel Assisting.
- [87] First, it was put that if A/C Anticich had suggested moving Constable Rolfe to Darwin to avoid a hostile operating environment for the investigation team it was not “improper.”
- [88] I agree with this submission.
- [89] As I have noted, the JMC had responsibility for overseeing the investigation. The investigation concerned the shooting of a young aboriginal male on community by a police officer. That was about as serious as it could get for the NT Police Force. It was imperative that, to the extent the JMC could control outcomes, nothing occurred on its watch which compromised the investigation. The investigation might be compromised by contact between Constable Rolfe and other officers stationed at Alice Springs or informal contact between him and members of the investigation team.
- [90] There is no doubt Constable Rolfe engaged with both station staff and the investigation team. For example, during the morning of Sunday 11 November 2019, A/C Beer was on duty at Alice Springs Police Station. She heard that Constable Rolfe was mingling on the ground floor in the muster room. She proceeded to the muster room, gave him a hug, and took him to the second floor. This occurred in circumstances where he had not yet been afforded an opportunity to participate in an interview in relation to the shooting either under caution or otherwise.
- [91] The risk of compromise through misguided pressure being put on members of the investigation team by officers stationed at Alice Springs was significant as was the risk of contamination of the evidence. Risks such as these could be ameliorated by the movement of Constable Rolfe from Alice Springs to Darwin. Constable Rolfe remained a serving member of the NT Police Force. He remained subject to the directions and orders issued by more senior officers from time to time. No decision had been made that he be arrested and charged. In my opinion, it would have been proper to direct the transfer of Constable Rolfe to Darwin if the JMC believed on reasonable grounds that his continued presence in Alice Springs would prejudice the investigation.
- [92] I am satisfied those attending the JMC did not intend that Constable Rolfe would be charged with any offence absent the final advice of the DPP. That is unsurprising. As I have said, the investigation concerned the shooting of a young aboriginal man. It occurred within his community. It was a shooting carried out by an officer of the NT Police Force. It was bound to be controversial, most likely highly so. Any misstep would likely have had very serious repercussions.

- [93] The then Commissioner of Police also submitted that if A/C Anticich had raised the option of moving Constable Rolfe to Darwin, it was no more than a suggestion put forward at the JMC meeting for further consideration.
- [94] I also agree with this submission. It has already been addressed.
- [95] It was reasonable for the members of the JMC to discuss all possibilities in respect of an investigation which, if compromised, would give rise to considerable criticism and disquiet. That was particularly so if, either intentionally or unintentionally, Constable Rolfe or a member of the investigation team compromised the investigation. I have little doubt that many questions would have been asked, and explanations sought, including the reasons for failing to move Constable Rolfe out of Alice Springs.
- [96] The then Commissioner of Police further submitted that the situation faced by the JMC presented significant operational difficulties. There was an expectation, that all available options were to be considered as part of the JMC's strategic oversight. That included working through both the legal and operational practicalities of different options that arose on a case-by-case basis.
- [97] I agree with these submissions.
- [98] In the investigation of a serious incident, such as a critical incident involving the death of a civilian at the hands of police and whilst in custody, high quality policing and investigation must surely be enhanced by open discussion amongst senior officers of possible strategies even if they are not adopted. In my opinion it is a matter of plain commonsense and ought to be encouraged. I am far from persuaded that the expression by one officer of views that, with the benefit of hindsight, might be regarded as contentious provides a valid basis for criticism.
- [99] In the circumstances which existed following the shooting of Kumanjayi there is but one question of significance in respect of the JMC meeting which took place during the morning of 12 November 2019. Was the action subsequently taken reasonable and appropriate?
- [100] The then Commissioner of Police submitted the words were ambiguous and capable of more than one meaning. I disagree. The meaning of the words is clear enough. I am satisfied that SOI Pennuto was referring to direct action by way of an arrest.
- [101] However, I am also satisfied that by meeting's end the common understanding of the participants was that Constable Rolfe needed to be moved from Alice Springs post haste because of concerns for his welfare and safety. There are several references to welfare and safety in the notes of SIO Pennuto and D/SIO Malogorski including "*Relocation is welfare based*"

- [102] I place little weight on the possible inconsistency between the version of events recorded by SIO Pennuto and D/SIO Malogorski and, in particular, the disputed reference to “direct action (if reqd)” in the notes of SIO Pennuto and the accounts given by SIO Pennuto and others that the entry meant adverse action carried out by third parties against Constable Rolfe, and not direct action in the form of an arrest.
- [103] At an operational level it was contemplated by both Constable Rolfe and A/C Beer that Constable Rolfe would travel to the family home in Canberra. However, there were no available flights. By the time the booking was made the only available flight was one to Darwin.
- [104] Constable Rolfe submitted that the failure of senior executives of the NT Police Force to:
-take notes on key and crucial decisions, and meetings, is unsatisfactory to say the least, and amounts to unsatisfactory conduct because it is in breach of the general orders relating to note taking which police officers are required to follow”.*
- [105] I have assumed that Constable Rolfe is addressing, at least in part, the fact that senior members of the JMC did not take notes at the meeting.
- [106] I disagree with the submission.
- [107] The definition of unsatisfactory conduct in the ICAC Act refers to conduct which involves illegality, impropriety, negligence or incompetence. I am satisfied that the failure of senior officers to take notes at the JMC meeting held during the morning of 12 November was not illegal, improper, or incompetent. The most senior investigator, SIO Pennuto, took notes. So too did his deputy, D/SIO Malogorski. It is regarded as best practice in meetings more generally, for a designated notetaker to make a record of what occurs. It is more likely to improve accuracy. Further, it allows other participants to participate fully in the discussion without being distracted by taking notes. I do not know whether SIO Pennuto or D/SIO Malogorski were formally “designated” as such, but they certainly took notes. There was no illegality, impropriety, negligence or incompetence involved in the taking of notes by two participants only. I am satisfied the manner of note taking was reasonable and appropriate.

Constable Rolfe travels from Alice Springs to Darwin

- [108] Constable Rolfe said he received a phone call from Lauren Nolan, during the afternoon of 12 November 2019. She was Staff Officer to the Assistant Commissioner and assisting A/C Beer at this time. Constable Rolfe claimed she told him during the telephone call that “the suggestion to go to Darwin has now changed to a direction. You will be going to Darwin this afternoon and I’m organising your flights”.

- [109] Constable Rolfe claimed that, at the time of the direction he did not suspect anything would happen to him in Alice Springs. As far as he was concerned, he was 'already clear' because of the conversation he claimed had taken place with DSS Phillips at the Alice Springs Police Station. Further, he had been cleared by the psychologist to return to work. He understood the direction to travel to Darwin was based entirely on his safety.
- [110] Ms Nolan said she and A/C Beer collected Mrs Rolfe from the airport and when they arrived at Constable Rolfe's house, there was a discussion about his safety and the risk of him remaining in Alice Springs. The Rolfes were left to discuss where they would like to fly. When Ms Nolan returned later in the day to speak to the Rolfes, she was told they wanted to travel to Canberra. Ms Nolan conveyed this to A/C Beer, who supported their wishes. However, approximately five minutes later A/C Beer called Ms Nolan and said that D/C Murphy had directed Constable Rolfe to fly to Darwin.
- [111] Both Ms Nolan and A/C Beer believed Constable Rolfe could not be directed to go to Darwin. However, as it turned out there was only one available flight out of Alice Springs that afternoon. It was a flight to Darwin. The seats were booked. Ms Nolan said the intention had been to book the Rolfes on a flight from Darwin to Canberra the following day.
- [112] As far as A/C Beer was concerned, any direction given to Constable Rolfe to travel to Darwin would have been unlawful. D/C Murphy suggested Constable Rolfe needed to remain in the Territory. A/C Beer told D/C Murphy there was no legislative authority to direct Constable Rolfe to do so. A/C Beer said she did not direct Constable Rolfe to go to Darwin. I accept her account.
- [113] D/C Murphy said that early on Tuesday 12 November he learnt that Constable Rolfe's photos had been released on Facebook and his residence identified. He therefore spoke to A/C Beer who mentioned that Constable Rolfe wanted to travel to Canberra. However, D/C Murphy said that it was not the 'best option' and it was important for the 'perception piece' that Constable Rolfe remained accessible in the Territory.
- [114] D/C Murphy made these comments without being aware of what was happening in the criminal investigation. Like A/C Beer he was not kept informed of the decisions of the JMC and he was not part of it. D/C Murphy said that when he spoke to A/C Beer, he intended to convey a firmer instruction that Constable Rolfe fly to Darwin, which was 'not a matter for negotiation'. D/C Murphy said he could not recall A/C Beer questioning the power to direct Constable Rolfe to remain in the Territory. He said he thought he would remember if there was a challenge to the power to direct. However, he allowed for the possibility that such a conversation did occur.
- [115] As D/C Murphy was not apprised of the work carried out by the JMC, the question arises as to the reasons why he wanted Constable Rolfe to travel to Darwin and stay in the Territory.

[116] I am satisfied that one of the reasons, and the most important one, was concern for Constable Rolfe's welfare and safety. D/C Murphy said he had been provided with an update from A/C Beer concerning the release of Constable Rolfe's identity. He was also mistakenly told that Constable Rolfe's residential address had been disclosed. As previously noted by me, a Threat Assessment was prepared. In substance it found that there were risks to Constable Rolfe's welfare and safety if he remained in Alice Springs. The Threat Assessment suggested Constable Rolfe should be discreetly removed with his family to a secure location outside Alice Springs. D/C Murphy acknowledged that he had not received the Threat Assessment until 6.45pm on 12 November 2019 but it "validated" his concerns.

[117] There was another reason why D/C Murphy wanted Constable Rolfe to travel to Darwin. He wanted him to remain in the Territory so that he would be accessible to the investigation team. He said, in relation to his conversation with A/C Beer:

I think she flagged the fact that he had planned on travelling to Canberra. I said "Well, it's not really probably the best option. It's preferred if we can house him safely in Darwin because if he needs to be accessed by investigators or anyone else, at least he's available."

[118] It should be noted that at the time of the conversation with A/C Beer, no decision had been made to charge Constable Rolfe. The investigation team had not interviewed him, whether voluntarily or under caution. The DPP had done no more than express a preliminary opinion and, in any event, D/C Murphy was unaware of any decisions made by the JMC. He said:

I think I explained to her that given the magnitude of the investigation and he's obviously an officer, involved in a – and he's still a police officer, that for that perception piece that it's important that he's accessible as well, and he would have been safer in Darwin or definitely safer in Darwin than Alice Springs from the information we had.

[119] And later:

Yeah, I definitely don't recall any challenge about legislative provisions. I think I just explained that he's a police officer, there's a police investigation, it's best if he stays in the Territory somewhere safe and come to Darwin.

[120] I am satisfied there was nothing improper in the actions of D/C Murphy and it would not have been improper for a direction to have been given to Constable Rolfe to travel to Darwin. He remained a police officer, there was an ongoing investigation, it was a very important investigation, and he was potentially an important source of information. He had not yet been approached to participate in an interview, and no decision had been made, as of 12 November 2019, to charge him. As far as I have been able to ascertain there was no legislative impediment to the issuing of a direction. In my opinion it would have been appropriate for D/C

Murphy to direct Constable Rolfe to travel to Darwin. There was nothing improper in D/C Murphy considering the optics if Constable Rolfe left the Territory and travelled to Canberra during the course of that investigation.

- [121] Following her discussion with D/C Murphy, A/C Beer and Ms Nolan took steps to arrange flights for the Rolfes to Darwin that afternoon and then book flights for them to fly to Canberra the next day. A/C Beer did not require Constable Rolfe to travel to Darwin and was happy for him to return to Canberra.
- [122] Ms Nolan spoke to the Rolfes and explained that they were welcome to travel to Canberra, but given the posts on social media, Constable Rolfe needed to leave Alice Springs that day but could then take a direct flight to Canberra the next day. The Rolfes agreed. Tickets were booked for the Darwin leg at about 1:20pm that day by Ms Nolan. She intended to book flights for the Rolfes to fly to Canberra the following day.
- [123] An email from Ms Nolan to Mrs Rolfe on 12 November 2019, at 2:44pm forwarded the itineraries for the Alice Springs to Darwin flights and stated "I haven't booked your flight to Canberra yet, I will once we confirm what flights you would like to be on". A contemporaneous email from Ms Nolan to Mrs Rolfe on 12 November 2019, at 4:23pm stated "Narelle has no requirement for Zach to stay in Darwin, it was just the only flight out of Alice Springs today. I have booked you two nights in Darwin, but it (sic) can change that easily."
- [124] Just before 5pm on 13 November 2019, A/C Beer received a phone call from D/C Murphy and A/C White. She was advised that Constable Rolfe would be arrested in Darwin. Both A/C Beer and Ms Nolan, who heard the call, were shocked by the news. A/C Beer said she was 'bitterly disappointed' that she had been unknowingly placed in a situation of facilitating 'an improper means to facilitate an arrest'.
- [125] I do not accept that A/C Beer had unknowingly facilitated an improper arrest. True, Constable Rolfe was in Darwin when arrested. However, he was there because it was unsafe for him to remain in Alice Springs.
- [126] On Wednesday 13 November 2019, Ms Nolan was told by the HR Director to leave any travel arrangements to Superintendent John Atkin of Workforce Development (S Atkin). There is no evidence to suggest any impropriety on the part of S Atkin in issuing this instruction.

There was no direction given to Constable Rolfe

- [127] I am satisfied that the evidence does not support a finding that Constable Rolfe was directed to travel to Darwin.
- [128] The only senior officer to have contact with Constable Rolfe on 12 November 2019, concerning his departure from Alice Springs was A/C Beer. She denied directing him to travel to Darwin and explained that if she had given him such a direction, then she would have arranged for a member of the police force to accompany Constable Rolfe on the plane to Darwin. That did not occur because there was no such direction. The communications between Ms Nolan and Mrs Rolfe do not suggest that the travel was based on a direction. They suggest there was discussion and mutual agreement.
- [129] I am satisfied that Constable Rolfe's relocation to Darwin did not occur because of any direction given by D/C Murphy. However, in the circumstances, had such a direction been given and acted upon, it would not have been improper. I have addressed these matters above.

What was the reason for Constable Rolfe's travel to Darwin?

- [130] I am satisfied that A/C Beer was genuinely concerned for the wellbeing and safety of Constable Rolfe and that this was the only reason she arranged for his flight to Darwin: She oversaw operations in Alice Springs. One of her duties was to look after the welfare and safety of Constable Rolfe. It is clear to me that A/C Beer took her policing seriously. She determined that it was unsafe to allow Constable Rolfe to remain in Alice Springs. As it turned out, this view was shared by the JMC. A/C Beer believed that Darwin was to be an overnight stop for Constable Rolfe and his mother, potentially a two-night stop, before flying to Canberra.
- [131] There is no evidence to suggest that A/C Beer had an ulterior motive to move Constable Rolfe to Darwin. As of 10 November 2019, at 1800 hours at the IMT meeting in Alice Springs, A/C Beer was of the understanding that Constable Rolfe was to give an account of what occurred but not as part of a criminal investigation. When A/C Beer spoke with D/C Murphy and he told her that Constable Rolfe should remain in the Territory, she challenged the authority to do so. She said she would not have facilitated the arrest of Constable Rolfe, had she been aware this was the reason for his movement to Darwin.
- [132] I am satisfied that concern for Constable Rolfe's welfare was the sole purpose he was booked to travel to Darwin and, in fact, travelled there. Neither A/C Anticich nor any other member of the JMC caused Constable Rolfe to be transferred to Darwin for the purposes of an arrest. The decision made by the JMC on 12 November 2019, was based upon genuine concerns for the welfare and safety of Constable Rolfe. The JMC recognised that the movement of Constable Rolfe was an operational matter and it was undesirable for the JMC to become involved. It was left to A/C Beer to get Constable Rolfe out of Alice Springs and she did so.

- [133] I am cognisant of the fact that Constable Rolfe's movement to Darwin might have been advantageous to the investigation team and may have facilitated his arrest if that became necessary. In the circumstances as they existed at the time there was no other rational choice. It is highly likely, if not inevitable, that NT Police Force would have faced considerable, and justifiable criticism had Constable Rolfe been injured as a consequence of remaining in Alice Springs.
- [134] Before addressing the arrest of Constable Rolfe, it is necessary to address an issue raised by him during the investigation.

Was there improper disclosure to Constable Rolfe of matters concerning the investigation

- [135] In his interview with the ICAC, Constable Rolfe stated that in the early hours of Sunday 10 November 2019, whilst at the Alice Springs Police Station and in company with the Vice President of the NT Police Association representative, Sergeant Chris Wilson (Sergeant Wilson), he spoke with DSS Phillips. It is common ground DSS Phillips, Sergeant Wilson and Constable Rolfe interacted with one another that morning at the Alice Springs Police Station.
- [136] Constable Rolfe claimed DSS Phillips shook his hand and told him that he was 'clear on justification and excuse' and that 'they just had to tick off on authorisation'.
- [137] If true, this is the sort of conduct which, from an investigation perspective, made it undesirable for Constable Rolfe to remain in Alice Springs.
- [138] DSS Phillips said it was 'ridiculous' to suggest he said something along those lines because if he had done so, it would have compromised the investigation.
- [139] I note that at 01:32 on 10 November 2019, DSS Phillips had a conversation with A/C Wurst and A/C White. He made a note 'manslaughter is the appropriate charge to consider re Authorisation, Justification or Excuse'. He also noted '? Rolfe in stn with Chris Wilson around this time'. It appears that the words authorisation, justification or excuse were known to DSS Phillips and used by him on the day. However, those words would have been known to many members of the NT Police Force. Having regard to Constable Rolfe's involvement in the death of Kumanjayi, I consider it likely that he too would have known those words and understood their meaning. His alleged conversation with DSS Phillips supports this conclusion. He thought he had been cleared.
- [140] Sergeant Wilson said he did not witness DSS Phillips telling Constable Rolfe that he was clear on justification and excuse and waiting to be ticked off on authorisation. However, he said that during the evening of 9 November 2019 he attended the Alice Springs Police Station and had 'numerous discussions' with DSS Phillips. During these discussions, DSS Phillips told Sergeant

Wilson that he had reviewed the body worn footage of the shooting and Constable Rolfe was clear on justification and excuse and he was reviewing the details surrounding authorisation. Sergeant Wilson accompanied Constable Rolfe that evening and morning and thinks he would have relayed this information to Constable Rolfe at some stage after his discussion with DSS Phillips. He said:

I did not witness Mr Phillips tell Mr Rolfe that he was clear on justification and excuse and was waiting to be ticked off on authorisation. I was present when they talked at this time. And although I can't say for sure, I have no doubt that I would have relayed this information to Mr Rolfe at some stage after my discussion with Mr Phillips. I also believe that this is something that Mr Phillips would have said to Mr Rolfe

[141] Sergeant Wilson sought to clarify his Statutory Declaration in correspondence between him and the former ICAC. He said:

..... I was not, at any time involved with the investigation of Constable Rolfe or the shooting incident, nor was I involved in or privy to investigation meetings, decision-making or assessment of evidence by investigators. I had not had access to or watched the Body Worn Camera footage of the incident at the time of my interactions with various members on 9 and 10 November 2019.

As stated in my statutory declaration, from the time I arrived at Alice Springs Police Station, I had numerous discussions with Detective Sergeant Leith Phillips. My recollection was that there was some discussion at about the time that intimate samples were being taken from Constable Rolfe and the discussions related to various matters including police powers to take intimate samples, authorisation, justification and excuse provisions and other matters relating to the IRT deployment more generally.

I did not witness Detective Phillips discussing justification, excuse or authorisation with Constable Rolfe. However, at the time of swearing my statutory declaration, my recollection was that at some point, Detective Phillips told me that he had reviewed the body worn footage of the shooting incident and was reviewing the details surrounding authorisation. I note the submission of Counsel Assisting that there "is a reliability issue with an aspect of Mr. Wilson's comment: that Detective Phillips told him on 10 November he had reviewed the body worn footage of the shooting", concluding that Detective Phillips is unlikely to have watched the footage until at least 10 November 2019. Counsel Assisting also submitted that it is difficult to accept that a detective as experienced as Detective Phillips would say what has been alleged."

[142] He also said:

...I did not (and still do not) have a clear recollection of what matters I discussed directly with Constable Rolfe in that regard, however, noting that I was there over a number of hours to provide support to Constable Rolfe (not to investigate him or his conduct), I surmised that I would have relayed the various discussions I had had with people at the station to him, including Detective Phillips. I did not keep notes of my various interactions with people as I was there in a support role for a NTPA member, not that of an investigator.

- [143] To “surmise” is to suppose that something is true without having evidence to confirm it. Findings cannot be made based on conjecture. In my view there is considerable uncertainty in relation to what was said and done in Alice Springs in the immediate aftermath of the shooting of Kumanjayi. My impression is that the atmosphere in Alice Springs and within the Alice Springs Police Station was very unsettled. There were strong and different views amongst police officers concerning the investigation into the shooting of Kumanjayi and what should happen to Constable Rolfe.
- [144] I am satisfied that on the evidence, and applying the requisite standard of proof, it would be unsafe and unfair for me to make any adverse findings in relation to the conduct of DSS Phillips and Sergeant Wilson.
- [145] In any event, it is unnecessary for me to resolve any discrepancy between the account given by Constable Rolfe and that given by DSS Phillips for the purpose of the investigation. If in fact either or both suggested to Constable Rolfe, he was all but in the clear, they were simply wrong. He was arrested and charged with murder.

The decision to arrest Constable Rolfe

- [146] Before the arrest of Constable Rolfe, the investigation team sought the advice of the DPP.
- [147] This occurred on Monday, 11 November and Wednesday, 13 November 2019. At the conclusion of the 13 November meeting with the DPP and the D/DPP, the DPP opined that the body worn video disclosed a prima facie case of murder. The D/DPP agreed. There was no dissent from the police officers present at the meeting that a charge of murder was appropriate.
- [148] I note that although a police officer could arrest a suspect and charge that suspect with murder without consulting the DPP, the DPP’s Guidelines are relevant. Paragraph 27 of the Guidelines concerns “Opinions” of the DPP. Subparagraph 27.5 provides:

All cases involving the death of any person, must be referred to the Director

[149] The meeting with the DPP of 11 November 2019, commenced at 12:09pm. It was attended by A/C Anticich, A/C Dole and SIO Pennuto. I am satisfied that SIO Pennuto's notes of the meeting accurately record the substance of what was said during that meeting. He noted:

DPP. Meet with Director. Anticich +Dole leading conversation. Query Director's view of vision. Succinct contextual summary provided to the Director orally. Director viewed BWV from both angles twice + with pauses etc. General discussion around issues such an event is likely to have in a community such as Yuendumu.

Director: "You've got a criminal prosecution and at face value it looks like it might be a murder. It is a trial in my preliminary view, sadly."

Query-format of conversation

Director: "Under caution definitely"

Discuss limitations of BWV viewing being the only basis upon which such an assessment might be made as to potential criminal occurrence Defence.

Director indicated he was happy to receive 'short file' acknowledging it would be different in many areas at this early time. On the basis of that 'short file' he would be prepared to make recommendations relating to prima facie, 'yes charge' or 'no don't'. If it is a yes charge response, he would also direct/recommend the charge to be laid. Should be done ASAP Rushed.

Query what his view of a suitable bail position might look like if he ended up recommending charges. Anticich suggested police would go through normal process if this situation arose. Director agreed bail con needed to be as comprehensive as possible

Query-mechanism to progress if charges are recommended. Director stated words to the effect that based on BWV, he saw nothing at this stage suitable for Summons/NTA [emphasis in notes]

[150] I am satisfied that at the meeting of 11 November 2019, the DPP expressed a preliminary opinion, based upon the BWV and an oral summary provided by one or more of the police officers present. The DPP's preliminary opinion was to the effect that "at face value "it looked like Constable Rolfe had murdered Kumanjayi and, sadly, he would be tried for that offence. The meeting ended at 12.46pm.

[151] SIO Pennuto held concerns that matters were proceeding at speed and requested that they be slowed down. He was also uncomfortable with the idea of a "short brief" being provided to the DPP and suggested that it be provided with caveats. However, he does not appear to have

demurred to a statement by A/C Anticich that the brief could be provided with caveats although gaps were unlikely to be material in nature having regard to what was shown on the BWV.

[152] SIO Pennuto was also concerned with what he had seen on the BWV. He told the former ICAC:

I found it very confronting, and my first thoughts were, that's not okay. So I started working through, well what would justify that, and I was writing these things down, I don't understand how he can - I was -trouble - having trouble reconciling what I was seeing. So I was saying, well I don't understand how this can be - I'm not sure this can be lawful, I'm not sure how we can justify that, I'm not sure this man is in a position to pose the threat that requires the deployment of lethal force while he's in that position. Those are the sorts of things that I was thinking at the time, in summary So - I also questioned, from memory and I know the body-worn video doesn't capture what an individual sees, I'm very aware of that, but I just - I struggled to understand how – the assessment of the threat - would be reconcilable by Mr Rolfe with - the tactical option he chose to use and I felt that it was - I don't want to use base language, but um – I can think of many, many other things that could have been used - to have dealt with that scenario in the absence of having to deploy lethal force and I felt that we were talking about one absolutely extreme response, noting of course that Mr Rolfe had been injured,; I accept that. But um - my thinking was that this is - going to be challenging to be able to justify this

[153] A further meeting with the DPP was held on 13 November 2019. A/C Dole, A/C Anticich and SIO Pennuto were present. On this occasion the D/DPP was also in attendance. The meeting was lengthy. It commenced at 1.52 pm and concluded at 3 25 pm. Once more SIO Pennuto took notes. His notes were as follows:

At DPP. Meeting room with Director and his Deputy. "Short file" considered by Director and Deputy inclusive of documentary materials + enhanced (and original) BWV. Director + Deputy had a general discussion about risk, proximity of EBERLE to deceased when he's shot, the 'recklessness' of shooting during the moving struggle and alternatives both in view of stabbing and regardless. Also discussed possible defences + UOF justifiability/lawfulness. Discussed by Director + Deputy the 1st shot fired. Both thought despite being reckless it was possible justification on face value, but they weren't entirely convinced.

Deputy - "Looks like an intended use of force that can only ever cause more than serious harm"

"It looks to me to be a double tap style execution"

Director – “One shot maybe but then shots 2 + 3 while he’s down on the ground with his partner lying on top, he can hardly argue that he is protecting or looking after his partner and he has a taser, now I know he may have been stabbed but shots 2 + 3 are a real concern. Actually, all of it is a concern”

Director/ Deputy discuss issue of bail if Rolfe was to be charged. Talk of risk, prospect of conviction, public interest.

Deputy- “prospect of conviction reasonably is high for manslaughter at a minimum.”

Director – “regarding bail it is critical to consider the strength of the case and this is not a who dunnit [sic.] If charged you would need to be providing a long list of potential bail conditions”

I/S. “I admit to this conversation being very uncomfortable for me. It is hard to hear when we are speaking about a colleague + I have been in similar predicaments myself. I want to be very clear what’s being said here. What is your recommendation?”

Director – “laying of a murder charge under 156“

Deputy- “I feel for you gentlemen, but it does look like that”. I’m inclined to recommend the same”

Small talk b/w A/C + Director

[154] Subject to one matter I am satisfied the notes are an accurate record of what occurred at the meeting. However, I am not satisfied, to the required standard, that either the DPP or the D/DDP “recommended” Constable Rolfe be charged with murder. That said it is more than possible SIO Pennuto interpreted what was said by the DPP and the D/DPP as a “recommendation”.

[155] The DPP gave the following account

Police provided a narrative of events leading up to Mr Rolfe and his partner being in Yuendumu and going into the house where the shooting took place. The footage was played numerous times and explained. I can't recall the order in which things happened, but I do recall asking if there was anything else that we (the DPP) needed to be aware of or, that was relevant. I was told there was not. The video showed Mr Rolfe shooting Mr Walker at very close range while Mr Walker was lying on the ground. At the time Mr Rolfe was standing over Mr Walker. Mr Rolfe's partner was lying on top of Mr Walker and not offering any apparent threat. Mr Rolfe fired three shots, there being a gap several seconds

between the first and then the second and third shots. There was discussion regarding defensive conduct. I was asked what charges might be open on the material. Again, I can't recall the precise way the question was put to me. The question may have been even devoid of the word "charge" and put as simply as "what do you think." Instead of answering the question directly, I asked Martin Dole what he thought. His reply was "162" which I understood to be a reference to s 162 of the Criminal Code'(NT). Up until 2006, s162 of the Criminal Code defined the offence of murder. At the time of the shooting the offence of murder was defined by s 156 of the Criminal Code. Knowing that Martin Dole had come up through the ranks and knowing that he had been involved in the investigation of murder cases before, I saw no need to challenge him on his reference to s 162 instead of s 156. I replied to words to the effect that there being no other material that I too was of the same view. Deputy Director Matthew Nathan also agreed. No one in the room disagreed that murder was the appropriate charge. My view and that of my Deputy was that in accordance with the Director's Guidelines the body worn video disclosed a prima facie case of murder. There was no doubt that Mr Rolfe shot the deceased three times. There was no doubt that Mr Walker died from the gunshot wounds. There was compelling evidence (three shots fired at close range into the body of a restrained prone man) that at the very least the shooter had an intent to cause serious harm. The only remaining issue was that of self-defence and that was always going to be a jury question. Towards the end of the meeting, I asked "what's going to happen now" or words to that effect. Neither I nor Deputy Director Nathan directed Police to lay a charge of murder or any other charge. The DPP has no power to direct police to do so. From memory the reply was that Mr Rolfe would be charged with murder. There was some discussion among the police members as to when that might take place. My concern was that a brief, however brief, should be delivered to the DPP before Mr Rolfe appeared in court. Police said they would ensure that would happen.

[156] The D/DPP provided this investigation with a Statutory Declaration. He said:

[5] During the meeting the NT Police showed vision of the body worn video footage of the shooting. From my recollection there was no formal brief at that stage, the primary evidence being reviewed was the video footage of the body worn. There was further discussion around the background to this incident, but I cannot remember the exact detail of this, and the actions of the police officer being potentially inconsistent with use of force protocols. These discussions also looked at potential defences that might be relevant.

[6] Further discussion then took place between the NT Police and the Director. I remember one of the police members asking the Director words to the effect of, "what do you think". The Director responded to the effect, "You provide us with a recommendation,

and we will provide an opinion". I am not sure who asked this question from police but to the best of my memory now, it was Martin Dole"

[7] The person then responded with the old Criminal Code section for the offence of murder and the Director replied to the effect that that would be open.

[157] SIO Pennuto responded to several questions concerning the "short file" during his interview with the former ICAC:

Q. Do you recall waiting a while before they read the brief or how was it sort of – the dynamics of it?

A. So I recall them-ah doing different things at the same time. So I can't recall exactly what it was, but an example would be um say Mr Nathan, the Deputy Director, he had not had the benefit of looking at the vision. Actually, he hadn't seen any statements either, at that point, but the Director had had the benefit in the previous meeting of looking at the vision and such. So I believe Mr Nathan was looking at the vision um and watching that whilst the Director was working through the written document or the documentary materials that had been provided. Um and then I -as they were going – no I don't want to put them – I don't want to put it wrong, but there was a discussion and I cant recall whether it was as they arrived at a particular question one had for the other, they put that to the other or whatnot, but it was – that's – very loosely that's how I recall it occurring.

Q. Do you have a distinct recollection of either the Director or the Deputy Director reading the statements, the transcripts, any of the other material in - in - the brief?

A. As I've indicated sir, I recall the Deputy definitely looking at the vision whilst the Director was reading materials. What he was reading, I – I don't know, but he was reading what we'd handed him.

[158] Apart from the account given by SIO Pennuto and the contents of his notes there is other evidence to the effect that the DPP was provided with a file on 13 November 2019.

[159] A/C Dole was also present at the meeting. In an email of 18 November 2019, to Detective Superintendent Richard Bryson, the then Officer in Charge of the Judicial Operations Unit, A/C Dole gave the following account of the meeting:

- In respect to our conversation on Friday and my undertaking to provide you with information and advice around the interaction with the DPP and what was considered or otherwise by them.*

- *The attached folio index indicates what information was contained in the brief that was taken over on Wednesday 13 November and discussed and assessed by the DPP when seeking advice as to the relevant charge to be laid.*
- *Present at the meeting was, AC Anticich, Myself and A/Superintendent Pennuto, who I believe took some notes of the conversation and decisions. (Pennuto is presently away until tomorrow).*
- *Both the Director and Deputy Director were present and viewed the footage of the incident, the statement from Eberl, and various other pieces of information from the folder disclosed to them.*
- *The advice from both the DPP was that there was prima facie to support a charge under 156 CC and that was the appropriate charge to bring in the circumstances.*
- *They viewed the footage several times and discussed the incident, in regards to the first shot and the second two shots being comparatively different. It was their view that the justifications for the use of force were those for Constable Rolfe to provide. There was discussion surrounding the proximity of his partner to the shots and other available use of force options.*
- *It was on the basis of that verbal advice from the DPP that the offence Rolfe was arrested for was the 156 charge.*
- *As you will see there was a number of incomplete transcripts and material in the process of transcription that was initially provided that may differ somewhat to that which appears in the initial arrest file provided to your office. This was provided to JOS as an initial arrest file as Constable Rolfe had been charged and bailed and I was intended to get the bail conditions and indictment to the DPP rather than just the information provided to them in the meeting.*
- *I understand the position of your office and the difficulties you may face with your assessment of the evidence as it is currently presented to you. To avoid and [sic.] difficulties or conflicts you may face with regards to the position of the DPP and any absence of formal advice I am happy for the information to be put in my name as I was involved in the discussions and am confident of the position and advice from the DPP.*

[160] Although the email was not created contemporaneously, it was sent within 5 days of Constable Rolfe's arrest. The last paragraph suggests A/C Dole was satisfied with the accuracy of his account, and I am also so satisfied.

[161] Although the DPP could not remember being provided with a brief and the D/DPP could not recall a “formal brief at this stage”, I am satisfied that the DPP was provided with a “short file”, and that he had an opportunity to assess its contents during the meeting. He appeared to do so. The meeting lasted approximately 1.5 hours.

[162] Constable Rolfe made a number of submissions.

[163] First, it was submitted that:

The DPP did not direct, nor recommend, nor authorise, the charging of Constable Rolfe with murder. The highest it was put was that on the information the Director had, it was “open”

[164] I do not accept this submission. It does not properly reflect what occurred at either meeting with the DPP.

[165] The concerns expressed by Constable Rolfe are also misconceived. They reflect a lack of understanding of the role of the DPP in the criminal process.

[166] It was not the role of the DPP to “direct”, “recommend” or “authorise” the laying of a criminal charge. However, it was within his remit to express opinions based on material presented to him. That included expressing an opinion that it was “open” on the evidence to charge Constable Rolfe with murder. According to the D/DPP this is what occurred during the meeting of 13 November 2019. He also said:

[8] As is always the case in these interactions, no formal approval was given from the DPP to arrest or charge Constable Rolfe. Unlike offences such as money laundering, there is no legal requirement for the Director to consent to a charge of murder prior to any action by the NT Police. There is however a requirement in the Director’s Guidelines under the section relating to the provision of Opinions by the DPP (formerly at 27.5) that “All cases involving the death of any person, must be referred to the Director”. This process has been followed by police throughout my time with the Northern Territory DPP.

[10] To my knowledge and from what I observed, there was no departure from the existing protocol in homicide matters in the process of determining whether and what charges should be laid in this matter.”

[167] Secondly, it was submitted that:

The DPP did not give an opinion, either in writing or orally, that recommended a charge of murder.

[168] This submission is also based on a misconception of the role of the DPP in the criminal process. I agree with Constable Rolfe that the DPP never “recommended” a charge of murder.

[169] However, I am satisfied the DPP was entitled to express an opinion. Indeed, the Director’s Guidelines acknowledged the power to do so.

[170] I am also satisfied the DPP expressed an opinion that based on the material shown to him it was “open” or “appropriate” to charge Constable Rolfe with murder.

[171] I am satisfied the D/DPP was of the same opinion.

[172] I am further satisfied it was appropriate for the arresting officer, SIO Pennuto, to consider the opinion of the DPP and the concurrence of the D/DPP when considering whether Constable Rolfe should be arrested and charged with murder.

[173] Thirdly, by way of a “preliminary observation, it was submitted that:

...it matters not Constable Rolfe was committed for trial, that his trial has been had, and that he was acquitted as justifying conduct of a Northern Territory Police Senior Executive in the rapid charging of Constable Rolfe. The test is not to look with the benefit of hindsight and say, because the criminal trial process followed it absolves any criticism that can be properly directed to those making decisions which profoundly effected [sic.]and still effect [sic.] the reputation and the rights and interests of Constable Rolfe.

[174] I do not accept this submission.

[175] In my opinion it is relevant to consider that following the arrest and charging of Constable Rolfe, the DPP had carriage of the matter. It took the matter to trial. It is reasonable to conclude that the DPP and Crown Counsel considered there were reasonable prospects of conviction. It is also open to conclude the trial judge was of the view that the evidence presented by the Crown was capable of supporting a verdict of guilty. He left the matter in the hands of the jury. It cannot be gainsaid that Constable Rolfe had a right to a fair trial. However, as far as I am aware there has never been any allegation the trial was unfair. Constable Rolfe was represented by experienced counsel. No application was made to the trial judge to stay the proceedings based on any alleged unfairness arising because of the way the matter was investigated and charges laid.

[176] I note that during this investigation the DPP made the following observation:

From what I have been able to glean from reports in the NT News, it would appear that a backwards process of reasoning has been engaged in to arrive at the conclusion that there was improper conduct; namely, because the police investigation was criticised by defence counsel in his closing address to the jury and because the jury found the accused

not guilty, therefore the jury must have accepted this argument and therefore it follows that Const Rolfe should never have been charged and that any decision to proceed with the charge of murder, or indeed any charge, whether by the police or my office amounted to improper conduct

[177] I agree that some of the submissions advanced by Constable Rolfe have this colour. However, Constable Rolfe also acknowledged that had a full and comprehensive investigation been carried out, "charges might still have followed."

[178] Fourthly, it was submitted that:

The DPP were provided insufficient evidence to give a proper and fulsome opinion, because it was rushed, and an incomplete brief to properly consider an opinion as to whether or not a serving police officer should be charged.

[179] This submission is directed at both the police and the DPP.

[180] The substance of the submission appears to be twofold. First, it was improper for the police to seek an opinion from the DPP based upon an incomplete brief. Secondly, it was improper for the DPP to provide an opinion based upon that incomplete brief.

[181] Implicit in this submission is that Constable Rolfe should not have been charged based on the evidence presented to the DPP and the D/DPP or, at the very least, should not have been charged prior to the completion of the investigation.

[182] The submission necessarily gives rise to the question whether I should examine the sufficiency of the evidence provided to the DPP prior to Constable Rolfe's arrest.

[183] In my opinion I have power to determine whether that evidence provided a sufficient basis for the DPP to provide the opinion he did provide on 23 November 2019.

[184] I am satisfied that in circumstances where Constable Rolfe has put in issue the adequacy of the material provided to the DPP it is appropriate for me to examine the adequacy of such material. I do not consider this impinges upon the jury's verdict. The jury acquitted Constable Rolfe. In circumstances where an accused person is convicted it can be inferred the jury was satisfied as to his or her guilt. In those circumstances I consider it would have been inappropriate for me to engage in the exercise of reviewing the sufficiency of the evidence leading to the arrest and charging of Constable Rolfe. That is a question for the courts both at trial and, in appropriate cases, on appeal. However, a verdict acquitting an accused is different. One cannot infer from such a verdict the jury were satisfied an accused is innocent. The verdict may mean no more than the jury was not satisfied beyond reasonable doubt of the accused's guilt.

- [185] Nevertheless, I am conscious of Constable Rolfe’s submission that those who made decisions concerning his arrest and charge “... profoundly effected [sic] and still do effect [sic] the reputation and the rights and interests of Constable Rolfe”. I am also mindful of the fact that this investigation concerns events during the period 9 November to 13 November 2019 only. Nothing I say should be interpreted as my assessment of the strength of the prosecution evidence at trial or the defence case. I am concerned only with the sufficiency of the evidence available to the police and the DPP prior to the arrest and charging of Constable Rolfe.
- [186] I have examined the “short file”. The expression “short file” was one coined by SIO Pennuto during the first meeting with the DPP on 11 November 2019. It was never intended to be the complete prosecution brief. It consisted of what was available at the time, namely, over 200 pages of documentary material and a hard drive. It contained a number of transcripts of accounts provided by police and civilian witnesses, which were intended to be later incorporated into formal statements. It also contained other relevant material such as the BWV with transcripts of several police officers who attended Yuendumu on 9 November 2019, including the BWV of Constable Rolfe. It is clear on the face of the material that the police investigation was incomplete. There were several acknowledgements within the material contained in the file that the police investigation was ongoing and it contained several caveats. It was described as a “preliminary opinion file”.
- [187] The file also contains a covering memorandum. The memorandum was produced subject to a claim for legal professional privilege. I am satisfied that but for section 79(1)(c) of the ICAC Act the memorandum contained a privileged communication which was protected by legal professional privilege. I note, however, that section 79(3) of the ICAC Act prohibits me from making the memorandum publicly available in this Report except to the extent I consider it necessary to explain or support a finding of improper conduct the ICAC has made public. This is not such a case. I do not propose to disclose its contents. However, in my opinion, Parliament should consider extending section 79(3) to cover a situation such as the present, where there are positive findings there was no improper conduct by persons whose names and alleged conduct are in the public domain or will be because of this Report.
- [188] I have reviewed the documentary material contained in the file. I have also watched the video produced by Constable Rolfe’s BWV. I am satisfied the material contained in the file was sufficiently comprehensive and provided a proper basis for the DPP to express an opinion, including the opinions expressed by him on 11 November and 13 November 2019.

The direction to arrest Constable Rolfe

- [189] Following the meeting with the DPP and the D/DPP on 13 November 2019, A/C Anticich, Commander Dole and SIO Pennuto met again. The meeting commenced at 3.47 pm. and concluded at 4.02 pm. It was held in the office of D/C White. Also present were D/C Murphy,

A/C White, Superintendent Gavin Kennedy, (Superintendent Darwin Region) and Mr Rob Cross, Director of Media and Public Affairs, NT Police.

[190] I am satisfied that the notes of the meeting taken by SIO Pennuto are accurate. Relevantly, he noted

White states he has recent credible information that Rolfe is flying out of the NT to Canberra tomorrow morning. White queries whether arrest is now appropriate on basis of: DPP recommendations.

Travel info.

Murphy/Anticich- if arrested where to etc? Kennedy to arrange Darwin WH

White/Anticich both advise if arrest is made, Rolfe is to be treated in a fashion consistent with others taken into custody

Anticich- "my view is we have to consider acting or 'going' now"

White- 'it does looks (sic) like he is travelling and an extradition would be a nightmare'

Murphy- 'ok then'- leaves room

Anticich- 'what is the decision then?'

White- 'we have to arrest what else is reasonable?'

Anticich- 'ok we are arresting. Kirk, Doley there is to be no communications prior but immediate comms after. There will need to be family advice + the chief will need to know straight away'

White- 'I guess we locate him, assemble arrest teams + act'

Anticich to Cross- comms strategy one consistent message- Anticich confirmed arrest direction. Meeting adjourned. [emphasis added]

[191] Constable Rolfe submitted that:

It was improper conduct within the meaning of the ICAC Act for senior executives of the NTTPF, in company with the arresting officer Kirk Pennuto, to form an opinion that because they were of the view there was a prima facie case; that Constable Rolfe be avoided extradition issues, and that the DPP have confirmed that he should be charged, (which is disputed), which on any sensible and rational view, would no doubt bring to bear extreme pressure on Pennuto to form his own view that there was a proper and sufficient

basis to arrest at that time, particularly so when in the hours earlier according to the notes of Pennuto, he was expressing concern as to the speed of the process, and a view that restraint was required on the need to act as it did.

[192] I do not accept these submissions.

[193] During the inquest, SIO Pennuto gave the following evidence:

- Q. *So, in the morning, you expressed concern, the morning of 13 November, about rushing?*
- A. *Yes.*
- Q. *And we know that there is a meeting of the senior executives, including the Commissioner of Police, that you're not included in?*
- A. *Yes.*
- Q. *And a subsequent meeting that you are included in?*
- A. *Yes, that's right.*
- Q. *And you note here that a direction has been given to arrest Constable Rolfe by Assistant Commissioner Anticich, and you say words to the effect "We are arresting".? You've then included in your notes, you had considered grounds and basis for arrest from the requisite level of belief to continue. What changed that gave you that formation of the belief from the morning?*
- A. *So, this conversation occurs subsequent to the second meeting with the Director of Public Prosecutions and the Deputy Director of Public Prosecutions. So, during that second meeting – prior to that second meeting, whilst I think I considered Mr Rolfe to have been a suspect in the offence and there was no rush. My notes phonetically are consistent with, let's await further advice from the DPP and his deputy after he's had an opportunity to assess the materials that we were providing. That had occurred. I'd been present during those deliberations, I guess, for want of a better description. And it was very clearly articulated there that there was a prima facie case, at which point, I was obviously working through the material that I had and my own beliefs to see where I was sitting with it and that's basically where it ended up.*
- Q. *All right. So, is it your evidence that Assistant Commissioner Anticich saying, "We are arresting" afford you any additional pressure in making your decision?*

- *A. No, that's right. I'm not in the business of following directions I feel are unlawful or improper and I certainly didn't do so on this occasion.*
- *Q Well, Superintendent, that wasn't my proposition. Why are you offering that answer? I simply asked whether you felt any pressure?*
- *A. Well, I'm sorry, I misunderstood the question, your Honour. I thought that was the inference.*

[194] SIO Pennuto also gave the following evidence during the Inquest:

Q. Now you've told her Honour already that Mr Anticich part the way through 1671 think it is – 161 said: OK, we are arresting". Was that an order to you or was it a summary of where things had got to or was it something else?

A. I would – so I think my view is that Mr Anticich was summing up the conversations that had just taken place, in light of what we are – the position we found ourselves in.

Q. Yes?

A. And that as a result he was making it very clear to myself and the commander of crime that we're going to be in the space where we're making an arrest.

[195] After the meeting SIO Pennuto noted at 16:15 hours that he had 'considered grounds/basis for arrest and had formed the requisite level of belief to continue'.

[196] He later detailed the grounds for arrest at 16:25 hours.

[197] It is well recognised that the power to arrest an individual is enlivened when a police officer believes on reasonable grounds that a person has committed an offence. The NT Police General Order on Arrest requires that a member directing or instructing another to arrest must provide a statement of the alleged facts and available evidence, so that the arresting officer can form the reasonable belief. An officer cannot be directed to arrest a person if he or she does not hold the reasonable belief. These issues were recognised by those senior to SIO Pennuto. Commander Dole said he was aware that he could not direct an officer to arrest and he recalled discussing with SIO Pennuto that if he was not comfortable arresting Constable Rolfe, then he was willing to do it himself.

[198] A/C Anticich also recognised that he could not direct an officer to arrest a person, stating that the power to arrest is in the mind of the constable. However, he also told this investigation that it was 'our decision, the group' to arrest and charge when they became aware Constable Rolfe

was going to leave the jurisdiction. When it was pointed out that a collective decision to arrest is contrary to an individual police officer's power to arrest, A/C Anticich corrected himself and said the collective group discussed the potential to arrest.

[199] Counsel Assisting submitted that officers of higher rank than SIO Pennuto decided in a meeting that it was time to arrest Constable Rolfe and that it was not best practice for such a discussion to occur without the SIO first, independently, forming the reasonable belief. The approach could have had the effect of compelling the SIO to retrospectively form the requisite belief because more senior officers had come to the conclusion to arrest. It involved outcome-based reasoning and should not have occurred because of the risk that it would compromise the independent exercise of a power vested in the arresting officer, SIO Pennuto.

[200] I accept there could be circumstances where it would be inappropriate for senior officers to meet and decide an alleged offender should be charged. An example might be where an officer is directed to effect an arrest, but he or she has insufficient knowledge to have formed the requisite state of mind. However, that is not the case here. SIO Pennuto was the officer in charge of the investigation. He was present at several JMC meetings. He was involved in the preparation of the "short file". He participated in both meetings with the DPP and had viewed the BWV video on several occasions. He had read much of the documentary materials in the "short file." Importantly, he was also privy to the opinion expressed by the DPP during the meeting of 11 November 2019 and the opinions of the DPP and the D/DPP given at the meeting of 13 November 2019.

[201] The meeting which is the subject of complaint occurred a mere 22 minutes after the meeting with the DPP.

[202] During his interview with the former ICAC, SIO Pennuto explained why this was so:

Q. Did you take that to be a direction to you to arrest Mr Rolfe?

A. I think it's – so there are two aspects to the response I'd like to provide you. Firstly, this is one of those conversations that doesn't happen in a vacuum, so we're having - a series of senior people around, so we're going, oh we're in a space where we potentially have to arrest a colleague now and we think that is the way to go. Um yes, I was provided a direction, I believe, ah – by virtue of a combination of things that had been said by maybe Mr Anticich and Mr White in this context. However, um – to be clear, I have – was also in the same position. I felt it was time to make an arrest on the basis of what we had been told. So um – nothing is contrary to where I was – I had landed.

Q. So to clarify that you say you had landed, so when did you form that view about the necessity to arrest Mr Rolfe.

A. Well I think after the second conversation with the Director and his Deputy and um having listened – and obviously I’ve viewed the video and I read the – I’d read the materials as much as I could, um the critical stuff anyway, that I felt having listened to their deliberations and context of conversations about it and having thought about then the information around, okay, well Mr Rolfe’s here but he’s going and a few other things that come into play, um, I felt it was pretty clear we had a prima facie case for a criminal charge. And my view was that if we were talking about a member of the public whom had been a person who pulled a trigger and caused the death of somebody else and the Director and his Deputy said, you’ve got a prima facie case, um that I would have acted by arresting that person rather than allowing them to travel. So my view is that the – the prima facie case existed – and I agreed with it.

Q. And you had formed that view after receiving the advice from the Director and his Deputy?

A. In relation to the need to arrest?

Q. Yes

A. Or in relation to - so, I had – I had a view that we were going to be arresting Mr Rolfe after the second meeting. As to the timing, that’s a different issue because it came to pass in the next meeting. But yes.

Q. But you formed that belief of – that – that you require to arrest....

A. I believed on reasonable grounds that there was a need to make an arrest.

Q. Yeah, after the second DPP meeting?

A. After that meeting, yes I did.

[203] Shortly after the meeting, namely, at 4.15 pm, SIO Pennuto participated in a teleconference with D/SIO Malogorski and several officers involved in the investigation. He made a note which read in part as follows:

Contact Malogorski by telephone. Teleconference with MM, SP, WW, IC, AK

- Full brief provided regarding DPP advice and recommendation*
- Stated direction had been given to effect an arrest with view to charging (156)*

- - Stated I had considered grounds/basis for arrest and had formed the requisite level of belief to continue
- - Directed team members consider their own position should they end up being the contact person.
- Advised if they did not have the belief I would effect the arrest
- - caution/contact at the scene to be recorded
- - No prior comms with anyone
- - cannot be treated preferentially.....

[204] At 4.25 pm. SIO Pennuto made a further entry in his notebook. The entry was as follows:

Consider grounds for arrest

. ID not in Question

. Events not visibly complex (3+3+3 etc)

. Capture on BWV

. DPP view

. Gravity of offence

. Absence of VOE

. Unable to discuss critical issues such as lawfulness, justification, defences etc in absence VOE explaining thinking + lead up considerations

. Appropriateness of Summons/NTA

. Public interest

Issue of relativity – i.e. what would I do if murder charges were recommended against a civilian

. likelihood of travel

**123 PAA*

Belief on reasonable grounds exists. Non compliance with GO but unusual circumstances

[205] The letters GO were a reference to a police General Order. He said:

Its actually not a general order, now that I know. At the time I wrote general order. It was an instruction in relation to body-worn video that I was thinking about then um because none of my – not myself and none of the people I was working with would available to them at the time and during the meeting at - 1547, there is, as I recollect, is a direction that we weren't going to share any information about the arrest having to occur with anyone outside of our group, which meant I probably couldn't go out and get some uniformed police officers in a van, a cage, with some body worn video to come and work with us to make an arrest; we were going to be making it ourselves. I knew that would be controversial, potentially controversial. Subsequent to that um and you'll have it no doubt, I decided I would activate my audio recording device and audio record the conversations and the arrest itself.

[206] SIO Pennuto informed the former ICAC of his reasons for making the note. It was not a contemporaneous record of SIO Pennuto reaching the point, for the first time, where he had reasonable grounds to effect an arrest. It was a note taken by him after the event to provide “a little of a moment of clarity”. During SIO Pennuto’s interview the following exchange took place:

Q. One potential interpretation of your notes is that there's been a direction to arrest for which you were present for and then after that, you've gone away, because of the direction, you've had to sit down and make some notes as to the grounds for arrest. And because of the direction, you felt compelled to a particular result which was to arrest and that's one way in which your notes could be interpreted. What do you say about that?

A. No. I accept they could be interpreted that way. Um there were – a number of people who formed the same – the same view, that arrest was an appropriate – as to the timing, it's pretty that there were people who said to me, you need to make an arrest. And it is subsequent to that conversation clearly that I've thought , okay, lets make sure I'm OK here, but its about, for me, it was about making sure in my own mind that if I was to arrest Mr Rolfe – um I, the person who was exercising the power, had the grounds and I wanted to just give myself a little bit of a moment of clarity. And that's – that- I accept what you say, it could be conceived, that's how it occurred, that's not what was occurring for me.

[207] I am satisfied SIO Pennuto had formed the appropriate belief that he had proper grounds to effect an arrest after meeting with the DPP and prior to meeting with senior officers.

[208] I am also satisfied the other attendees at the meetings with the DPP, namely, Commander Dole and A/C Anticich had the same state of mind. There is no evidence suggesting SIO Pennuto’s belief was disingenuous. If that is so, the direction given by A/C Anticich takes on a different hue.

- [209] If, as I have found, SIO Pennuto was satisfied he had reasonable grounds to arrest Constable Rolfe prior to the meeting which is the subject of complaint, the direction to arrest was nothing more than a direction to do what he was lawfully entitled to do. It had no role in the formation of SIO Pennuto's state of mind.
- [210] The alleged murder of Kumanjayi by Constable Rolfe was a matter which, by its very nature, required consideration by senior officers of the NT Police Force. An arrest was likely to attract significant public debate and media coverage, not all of it positive. It was also likely to create further unrest within the ranks of the NT Police Force.
- [211] In my opinion it was logical for senior officers to meet to discuss the opinions of the DPP and D/DPP and the practical consequences of that advice. D/C Murphy, A/C White, Superintendent Kennedy and Mr Rob Cross were not present at either meeting with the DPP. It was appropriate to inform them of what had transpired. There was nothing sinister in the involvement of SIO Pennuto in the meeting. He was the officer in charge of the investigation. He had also been present at the meetings with the DPP and D/DPP. He had taken notes. It would have been unreasonable to have excluded him. Those officers who had not attended the meeting with the DPP and DDPP were entitled to have his input just as much as they were entitled to have input from Commander Dole and A/C Anticich.
- [212] In the circumstances of this particular matter, I am satisfied that there was nothing inappropriate in the attendance of SIO Pennuto at the meeting or the direction given by A/C Anticich to effect an arrest.
- [213] In deference to the submissions of Counsel Assisting I have considered whether, in any event, the conduct alleged can amount to improper conduct as defined in the ICAC Act.
- [214] Counsel Assisting submitted that the making of a decision to arrest at a higher level without considering the state of mind of the arresting officer is not corrupt conduct or misconduct.
- [215] Further on the particular facts of this case, it also does not fall within the definition of unsatisfactory conduct as it did not involve illegality, impropriety, negligence or incompetence that is connected to public affairs and results in substantial mismanagement in relation to the performance of official functions.
- [216] The ICAC Act makes clear that incompetence does not include conduct that is less than best practice.
- [217] Counsel Assisting further submitted that even if the process in reaching the decision to arrest was problematic, the actual exercise of the power to arrest on 13 November 2019 was appropriate and cannot be said to have amounted to improper conduct because legal advice was sought and received from the DPP that supported the laying of a charge of murder.

[218] Commander Dole formed a reasonable belief that a criminal offence had been committed. He said if SIO Pennuto did not have a reasonable belief, he would have effected the arrest on the day. Commander Dole said that before he went to the DPP's office on Monday 11 November, he already held a reasonable belief that Constable Rolfe had committed an offence.

[219] Views differ about the amount of information or evidence that ought to have been collated before the DPP's opinion was sought. The purpose of this investigation is not to assess when it would have been appropriate for the police to approach the DPP. The issue is whether there was any improper conduct around the time police arrested Constable Rolfe on 13 November 2019. At that time, the DPP was prepared to offer, and did offer an opinion based on the materials which were presented to him. It was in light of the DPP's opinion and that of the D/DPP that Constable Rolfe was arrested.

[220] I accept Counsel Assisting's submissions.

[221] I am satisfied that no officer present at the meeting of senior officers on 13 November 2019 engaged in improper conduct.

A possible conflict of interest

[222] During the Inquest the former ICAC became aware Commander Dole had been examined in relation to his prior connection with the Yuendumu community. It has been alleged he had a conflict of interest or, at the very least, there was a perceived conflict of interest in that his personal relationship with the Yuendumu community conflicted with his duties as a police officer.

[223] At the request of the former ICAC, he prepared a Statutory Declaration addressing whether he considered his previous associations represented a personal interest that conflicted with his role on the JMC, and in respect of the police response to the shooting of Kumanjayi.

[224] Constable Rolfe made two "observations" in relation to the role of Commander Dole.

[225] The first observation was in the following terms:

Another observation to be made relates to the involvement of Commander Dole in the investigative process as well as the meetings with the DPP, and ultimately the charging of Constable Rolfe. It has emerged during the inquest and in various matters during the criminal trial that Commander Dole used to be heavily involved in the Yuendumu community, is very familiar with a number of the Indigenous people there, and is fact referred to as a 'brother', by Eddie Robertson, a relative of [Kumanjayi]. Commander Dole signed the Information charging Constable Rolfe with murder.

[226] The second observation was as follows:

One must seriously question the ability of Commander Dole to be open-minded and impartial in this instance. At the very least, there was an apparently obvious conflict-of-interest in him having any role and decisions relating to Constable Rolfe. This is not satisfactory.

[227] I do not agree with either observation.

[228] On 31 January 2024 the then acting Deputy Commissioner Dole (A/D/C Dole) furnished a statutory declaration to the former ICAC. The contents are summarised below.

[229] A/D/C Dole has been a member of the NT Police Force for 27 years, having commenced on 20 January 1997. He spent over 10 years of his policing car career working in various regional and remote postings across the Northern Territory where he formed a number of relationships of trust and respect, specifically with the Aboriginal populations within the areas he served.

[230] A/D/C Dole was born and raised in the Northern Territory and spent the very early years of his childhood from birth till about aged 4 in the community of Yuendumu. This was in the late 1970's. During that period his parents established the Yuendumu Social Club and built and managed the community store. They were well respected members of the community and were held in high regard by many community members.

[231] After leaving the Yuendumu Community in the very late 1970's or very early 1980's he could not recall ever having visited the community or associating with its residence until he joined the Police Force in 1997.

[232] After graduating from police training college, he was posted to Alice Springs. In 1999 he transferred to the Yuendumu community and spent 2 and a half years working as an officer stationed there. His wife was employed by NT Health and performed the duties of a Remote Area Nurse (RAN). During his time there as a police officer he was recognised and accepted by the community through family groups that had strong and close relationships with his parents, both of whom were then deceased. He believed the acceptance of him as someone whose parents were held in standing in the community, enabled a level of trust in the police that he believed had not been held previously.

[233] A/D/C Dole did not believe his relationship with the Yuendumu community ever constituted a conflict of interest as there was no particular family group he held stronger relationships with than others.

[234] The Warlpiri culture is based on a skin system, where males and females are given certain skin names determining relationships such as brother, sister, father, mother, grandfather, grandmother, son, daughter. There are eight male and eight female derivatives of these meaning Warlpiri people often refer to others as their brother or sister, father or mother

dependent on skin groupings. Non-indigenous people are often provided skin names in communities, which shows a level of acceptance and trust. His parents were given these when they resided there, so by default he had a skin name, that meant he was the son of his father.

[235] Eddy Robertson also had the same skin name and often referred to A/D/C Dole's father as his father and by default A/D/C Dole as his younger brother. The Robertsons were one of the families that had close relationships with his parents.

[236] During his service at Yuendumu the police officers stationed there policed firmly. The level of trust community people had for the police was a key to the success. There was policing by consent and the officers had the trust of the community that offenders would be dealt with fairly. He recalled having locked up direct family members of the Robertson family a number of times. He did not consider his relationship with the Robertsons created a conflict of interest for himself, despite having what he described as strong trusting relationships with the Robertsons.

[237] A/D/C Dole was stationed at Yuendumu as a police officer from 1999 to 2001. He then transferred to Ti Tree as Officer in Charge. He would often see Warlpiri people, in the various communities within the Ti Tree district or in Alice Springs and would always stop and converse.

[238] Since leaving Yuendumu in 1999 he had not returned to the community or had contact with the residents, aside from dealings within policing from time to time. He served just on two years in Ti Tree during which time he also formed strong trusting relationships with community members across the numerous aboriginal communities serviced by the station.

[239] To this day he still has Aboriginal people from across the Territory come up to him and engage in conversation. The basis of these relationships was trust and respect. They would not be classed in the normal sense of close relationships where you would have each other over for dinner, holiday together or speak to each other on a regular basis.

[240] Prior to participating in the very first Investigation Management Team meeting (this was essentially a JMC but named by A/C Anticich as IMT due to his unfamiliarity of the policy) he had no knowledge of who or what families were involved.

[241] Even if he had this knowledge, it would not have altered his assessment regarding any conflict of interest. He did consider the fact that it was a community he was familiar with but did not class his involvement as a manager of those tasked to investigate the incident as a conflict of interest in any sense.

[242] A/D/C Dole made A/C Anticich aware of his connections with the community, being a former police officer who had strong trust and respect from many community families and a former resident in his early childhood years. A/C Anticich did not see this as a conflict that required was to be formalised or any specific management plan put in place.

- [243] The JMC sitting above the investigation was made up of senior police representation from the Police Professional Standards Command, the Assistant Commissioner Crime, Commander Dole as the Commander Crime, senior investigating police from the Crime Command and NT Police Media officers. He noted that JMC was not an investigative body or one that makes decisions on direction or scope of the criminal investigation. It was the body that made decisions in respect of matters brought to it by the investigative teams that might require resourcing, financing, be publicly sensitive, or have whole of Territory impacts. At no stage did his former associations with the Yuendumu community or any relationships from that community have any impact on his duties as a member of the JMC nor could they have.
- [244] On 5 March 2024, in response to a request from the former ICAC, former A/C Anticich provided a statutory declaration. He too was of the opinion there was no conflict of interest. He was aware that A/D/C Dole grew up in Yuendumu and had been stationed there as a police officer. At a community meeting in Yuendumu, shortly after the shooting, he observed that A/D/C Dole was known to the community members.
- [245] A/C Anticich was of the view that A/D/C Dole's relationship with the community was important to re-establish trust with police investigators, to engage the relevant witnesses as well as enforce the law at the times of arrest and charge.
- [246] Implicit in A/C Anticich's statutory declaration is that A/D/C Dole told him about his connections with the Yuendumu community and A/C Anticich did not identify a conflict that needed to be managed. Indeed, he thought the opposite, that A/D/C Dole's relationship was 'important for the investigation to re-establish trust' with the community.
- [247] An actual conflict of interest arises "when there is a clash between a person's personal interests and the performance of that person's public duty". Personal interests can include financial, social and familial interests.
- [248] A perceived conflict of interest arises where "a reasonable and objective outsider, vested with sufficient information, would come to the conclusion that a person's personal interests will, or will likely, influence the performance of that person's official duties."
- [249] I am satisfied that A/D/C Dole did not have an actual conflict of interest. His involvement with the community at Yuendumu seems to have been based upon mutual respect. These sorts of relationships must surely be a significant resource to the NT Police Force in respect of remote policing. The relationship was not based upon favouritism towards the Robertson family or any other member of the community. He had resided in Yuendumu for a period as a young child. Whilst he had served as a police officer within the community that was for a two-year period. He had moved from Yuendumu approximately 25 years ago.

[250] I am also satisfied it was appropriate to involve A/D/C Dole in the oversight of the investigation through the JMC. The Yuendumu community was in a considerable state of unrest. There were several potential witnesses from the community who had been at Yuendumu when Kumanjayi was shot. The police needed the trust and assistance of the Yuendumu community both in relation to the investigation and managing unrest there and in Alice Springs. There was no personal interest which conflicted with his duties as a police officer.

I am also satisfied there was no apparent conflict of interest. A reasonable and objective outsider, vested with the information I have referred to above, could not reasonably conclude that any personal interest of A/D/C Dole would, or would likely, influence the performance of his official police duties.

Recommendations

[251] I am satisfied this is not a matter where there is a need to provide recommendations to the Commissioner of Police or the relevant Minister.

[252] There is, however, one matter in respect of which the Commissioner of Police should consider and, if necessary, address.

[253] The Major Crime Policy states that one of the most important aspects of the management of any investigation is the systematic recording of decisions made for the advancement of that investigation. A/D/C Dole said that he had a memory of A/C Anticich saying he wanted all decisions recorded appropriately and that task would have fallen to the SIO. However, for the relevant period of this investigation (9 to 13 November 2019), there was no critical decision log, no recordings of the JMC meetings, and no official minutes. Decisions were logged by SIO Pennuto.

[254] The failure to keep proper records in relation to the investigation was unfortunate. Having regard to the seriousness of the matter, the identity of the alleged offender, and the likely future examination of police records concerning the arrest, it is also surprising. Although the failure does not amount to improper conduct as defined in the ICAC Act it is a matter which may need to be revisited by senior officers in respect of investigations of serious criminal offences in the future.



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