



The Implementation of Recommendations Arising from the Commission's Investigation into Operation Aviemore - A Further Report

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Introduction

- [1] On 5 November 2015, the Commission reported to Parliament about deficiencies in investigatory action undertaken by the WA Police Force in Operation Aviemore, a Major Crime Squad investigation into the unlawful killing of Mr Joshua Warneke. The Police investigation resulted in the conviction of Mr Gene Gibson, a young Aboriginal man with cognitive impairment who resided primarily in the remote Western Australian community of Kiwirrkurra. Mr Gibson was sentenced to seven years and six months imprisonment for manslaughter.
- [2] The Commission's jurisdiction is serious misconduct, which includes police misconduct. It is not the Commission's function to conduct a review of the adequacy of evidence which led to the conviction of Mr Gene Gibson.
- [3] However, following the Commission's report, Mr Gibson commenced an appeal. On 12 April 2017, the Court of Appeal allowed the appeal, set aside the judgment of conviction and entered judgment of acquittal: *Gibson v State of Western Australia* [2017] WASCA 141.
- [4] The Commission's report on Operation Aviemore went beyond the actions of officers involved and exposed systemic issues in the manner in which Police interacted with indigenous people, and aspects of the investigative policies utilised by the Major Crime Squad. These are matters of significance to the Western Australian community and to the administration of justice.
- [5] The Commission made seven recommendations to Police for improvements relating to interviewing practices, the understanding and implementation of the *Criminal Investigation Act 2006* (CI Act) and the Police Manual.¹
- [6] This report details the actions taken by Police responding to those recommendations.
- [7] Police identified the proposed actions to be taken to implement the Commission's recommendations as recorded in the Commission's report (this response was tabled in Parliament on 2 December 2016).
- [8] On 7 September 2017, the Commission sought an update on action taken to implement the recommendations.

¹ Commissioner's Orders and Procedures Manual (COPS Manual).

- [9] On 3 November 2017, the Commission received a response from Police outlining numerous initiatives that are proposed or being implemented to address each recommendation.
- [10] On 12 December 2017, the Commission sought more detailed information about these initiatives, and proposed meetings with those officers responsible for implementation.
- [11] The Commission received a further response from Police on 25 January 2018.² Commission officers also received a briefing from the Office of Investigative Practices (OIP), the area responsible for coordinating and implementing the Commission's recommendations. The OIP is located at the WA Police Academy and consists of seven staff who are responsible for investigative interviewing, victims of serious crime and investigative standards. The OIP reports to the Investigations Standards Reference Group.
- [12] The OIP was helpful, engaging with the Commission and providing relevant information. At the OIP's invitation, Commission officers attended an 'Investigative Interviewing' training course for senior investigators at the WA Police Academy. The Commission has been invited to attend a similar training session for police recruits in April 2018. Commission officers also attended a presentation on 'Investigative Interviewing' given to senior investigators by Professor Tracey Green of Charles Sturt University.
- [13] The Commission fully recognises the difficulties confronting front line police officers dealing with sometimes intractable problems. Those officers deserve to be supported by modern systems and clear policies and guidance.
- [14] The Commission is encouraged by the positive response from Police in addressing the weaknesses exposed in the investigation of Operation Aviemore and in the progress that has been made. However, neither Police nor the Western Australian community should doubt the magnitude of the changes that should continue and their importance to criminal justice.

² Dated 18 January 2018.

Recommendation one

The Commission recommends that the WA Police Force and the Office of the Director of Public Prosecutions (ODPP) record a challenge to an audio-visual record of interview (AVROI) in any court and the result so that an accurate measure of compliance with the CI Act is obtained.

Commission report

- [15] The Commission's report raised concerns about interviews with Mr Gibson and six other persons who were interviewed as either witnesses or suspects. Mr Gibson's counsel successfully challenged the admissibility of his recorded interview. Mr Gibson's interviews were excluded on multiple grounds including voluntariness, fairness and non-compliance with the CI Act.³
- [16] The Commission's report illustrated that there were wider issues in Police concerning breaches of the CI Act and obtaining involuntary confessions in interview.
- [17] The Commission found that the ODPP does not record challenges to the admissibility of AVROI and regularly abandons an AVROI that may be inadmissible, even if there is no formal challenge.

WA Police Force response

- [18] Police advise that actions taken in response to this recommendation are complete.
- [19] In September 2016, the OIP expanded to include two additional staff who constitute an Investigative Interviewing Team. They assess the quality of AVROIs across Police and have implemented the following initiatives:
- Written resources relating to AVROI procedure have been reviewed and republished. These include the Investigative Interviewing Manuals which provide a comprehensive overview of interviewing philosophies, guidelines, methodologies and relevant legislation. The manuals provide specific guidance about informing suspects of their rights pursuant to the CI Act, admissions, management of vulnerable suspects (including adherence to the Anunga guidelines)⁴ as well as required actions when a witness becomes a suspect.

³ *State of Western Australia v Gibson* [2014] WASC 240.

⁴ The Anunga Guidelines establish procedural requirements for interviews with Aboriginal people as stated by Forster J in *R v Anunga* (1976) 11 ALR 412.

- A preliminary regime of AVROI quality audits (to assess approximately 20% of detective interviews and 10% of uniform staff interviews). Police advise that this initiative remains in progress limited by resourcing. However, the OIP, at the request of relevant business areas, has conducted targeted audits of regional WA involving Aboriginal interviewees; Joondalup Detectives; Albany Detectives; and an AVROI review in relation to a particular operation.
- Presentations on 'Investigative Interviewing' with a focus on interviewing Aboriginal people, have been provided to the Pilbara and Kimberley Districts.
- An online resource that includes an electronic Post Prosecution Report (PPR), which can flag flawed AVROIs for review.⁵ The PPR only applies to prosecutions dealt with summarily, and, to date, only two AVROIs have been flagged for review. In both instances, police officers failed to adequately administer the criminal caution in contravention of the CI Act.
- Police and the ODPP have entered into an agreement whereby a list of AVROIs that have been excluded by a court or have not been relied upon due to significant flaws will be supplied quarterly to the OIP for review. To date, the ODPP has referred 19 AVROIs for review. Issues that have been identified include failing to plan prior to conducting an interview, and failing to ensure an interviewee's proper understanding of a caution. The OIP held a series of 'learning events' in May 2017 highlighting these issues, and will publish their findings online.
- An interview guide that specifically addresses Foetal Alcohol Spectrum Disorder (FASD) has been published.
- The Tier 3 Specialist Child Interviewing process has been reviewed and enhanced.

Commission review

- [20] The OIP is taking a number of steps to identify failed or flawed AVROI and review them for compliance with the CI Act. The agreement between the ODPP and Police looks promising, however little data has yet been received and it is too early to assess the impact of this initiative.
- [21] While the Police response focused on the prosecutors or court identifying flawed AVROI, there is a responsibility for senior investigators to review the AVROI before a matter proceeds to prosecution. At Professor Green's

⁵ The online resource became live on 29 April 2017.

presentation, senior officers requested that feedback on flawed AVROI be provided to the relevant officer, their supervisor and their Officer in Charge. The work of the OIP will continue.

[22] **The Commission considers this recommendation to be complete.**

Recommendation two

The Commission recommends the Corporate Knowledge Database (CKD) be reviewed and its index and search capacity improved. Either online tutorials or regular training should be investigated to ensure all police officers have the necessary competency to access the CKD as needed.

Commission report

- [23] A CKD containing the Police Manual is available electronically to all officers. The Commission found that to expect officers to be familiar with the vast amount of information contained in the CKD was realistically impractical. Officers described difficulty searching the database.

WA Police Force response

- [24] In 2016, Police advised that work was underway to upgrade the database to improve access and search capability. In early 2017, the Policy Development Division implemented significant enhancements to the CKD which improved search and indexing. User competency was addressed via a more intuitive system interface, improved system usability and user support initiatives.
- [25] The Police Manual contains a link to instructional information regarding how to use the search facility and construction of search queries. Police have deemed other training to be unnecessary as the search functionality is relatively simple and not dissimilar to most search engines.
- [26] The Commission has received informal advice from the OIP that a new Portfolio within Police is compiling a business case for a new database. If this proceeds, officers are likely to receive training on its usability.

Commission review

- [27] Steps have been taken to address the issues raised regarding the usability and functionality of the CKD.
- [28] **The Commission considers this recommendation to be complete.**

Recommendation three

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

Commission report

- [29] The Commission identified systemic weaknesses in interviewing Aboriginal witnesses and suspects. There was little preparation for officers being deployed to remote areas of WA that involved daily contact with Aboriginal people, beyond basic cultural awareness training on entry. Police agreed that ongoing training (and refresher training) be developed to train officers in aspects of the Aboriginal languages and culture.

WA Police Force response

- [30] In 2016, Police advised the Commission that evidence available to the Police did not support a conclusion that there was a widespread lack of knowledge in this area, and that cultural diversity training was already being delivered to recruits. However, Police advised that in response to the Commission's report, segments of training dealing with language barriers in the investigative environment were being introduced into training packages. Induction packages were being enhanced and refresher courses were being developed that emphasised cultural competencies in Police investigations.

- [31] In 2017, Police advised that:

- Policy and procedures relating to interviewing vulnerable people are being developed and will form part of a greater policy titled 'Investigative Interviewing'. Currently, interviewing manuals for suspects and witnesses outline the approach to be taken when interviewing vulnerable people. The FASD Interview guide also provides significant guidance for interviewing persons with FASD and other vulnerabilities. Some of the guidance for officers provided in these manuals includes:
 - conducting a language assessment;
 - considering whether an interview friend, responsible adult or independent person should be present;

- properly checking the interviewee's understanding of the caution;
 - following the 'Conversation Management' model of interviewing;
 - ensuring corroborative evidence of confessions is obtained;
 - using the Anunga guidelines where appropriate; and
 - conducting appropriate interview planning.
- The OIP is awaiting progression of a week-long vulnerable person's interview course, which includes significant consideration of Aboriginal cultural awareness. Elements of this training have been incorporated into other training courses.
 - Police are seeking to invigorate the Interview Advisor role, which supports investigating officers during complicated and high profile interviews. This initiative is still in concept stage and awaiting corporate approval. As of August 2017, 27 Interview Advisors had been trained.
 - The OIP is creating an 'Investigative Interviewing' adjunct to the existing regional WA induction package. A draft copy has been provided to the Commission. It includes information relating to the Anunga guidelines, FASD and general guidelines for interviewing Aboriginal people.
 - Police are developing a broader Aboriginal strategy to address issues beyond those raised in Operation Aviemore. This initiative is in the early stages.

Commission review

- [32] The focus of the material provided to the Commission and the training observed, related to investigative interviewing for vulnerable people, including Aboriginal people. The OIP is working to ensure that officers are properly identifying vulnerabilities and applying appropriate practices, and is emphasising the use of the Anunga guidelines (where applicable) for all persons with vulnerabilities, not just Aboriginal people. While training has been enhanced in a number of existing courses, there are still a number of initiatives awaiting endorsement that would be beneficial for officers, including the vulnerable person's interview course.
- [33] The OIP also gave the Commission a briefing on the status of cultural awareness training in Police more generally. Provision of cultural awareness training at the WA Police Academy is under review to

determine how this can be better facilitated. A well-designed cultural awareness training program for all officers, especially those working in regional or remote WA, could significantly diminish the risk of recurrence of some of the issues arising in Operation Aviemore.

- [34] **The Commission does not regard this recommendation as complete and will seek a further update on progress in 12 months time.**

Recommendation four

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

Commission report

- [35] The Commission's 2015 report noted that Mr Gibson had a superficial understanding of English, sufficient to pass in basic conversation, but was unlikely to understand the intellectual concept of choosing to speak or remain silent in an interview as a voluntary choice. This issue is likely to arise with other interviewees with English as a second language, including Aboriginal people.

WA Police Force response

- [36] Police advised that they were considering adopting the Northern Territory model whereby the caution is recorded in a variety of Aboriginal languages and the correct version is played to the interviewee prior to an interview.
- [37] This initiative has not significantly progressed.
- [38] In 2017, Police advised that they have engaged the Kimberley Interpreting Service to create pre-recorded cautions. Twenty Aboriginal languages have been identified for interpretation and the caution wording to be interpreted has been drafted. A funding request is under consideration.
- [39] Police advised they are seeking to address this recommendation through other initiatives including:
- A business case for an Automated Interview Plan (AIP) has been developed which will give interviewers a tool to prompt them to identify potential vulnerabilities, and apply the information necessary to address them within an interview context.
 - Creating an automated email within the custody system, which forwards information relating to AVROI to the case officer. This initiative has not progressed past scoping.

Commission review

- [40] The Commission is concerned that the Kimberley Interpreting Service initiative may not be a cost effective approach to aiding the proper understanding of the criminal caution. The Commission and Police discussed barriers to effectiveness including the difficulty in capturing all languages spoken, margin for error in identifying the correct language spoken by an interviewee, and the potential for a misunderstanding of comprehension of the language. Police will undertake further research before progressing this initiative.
- [41] The Commission considers that the AIP being developed by the OIP appears to be a more cost effective measure to assist with interviewing vulnerable people, which includes Aboriginal people in some circumstances.
- [42] The AIP is a simple but effective tool to prompt officers to identify the vulnerabilities of an interviewee and plan accordingly. It addresses issues beyond the interviewee's understanding of the criminal caution, an issue still to overcome. Reviews of recently failed AVROI identified that officers are struggling to ensure cautions are properly understood. In training, the OIP and the WA Police Academy are reinforcing that officers must take steps to ensure that interviewees properly understand a caution before proceeding to interview.
- [43] While the AIP is a promising initiative, the concerns raised by the Commission relating to the comprehension of the caution have not been fully addressed.
- [44] **The Commission does not regard this recommendation as complete and will seek a further update on progress in 12 months time.**

Recommendation five

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

Commission report

- [45] As part of its investigation into Operation Aviemore, the Commission examined training material provided by the WA Police Academy to establish the knowledge levels of the officers involved in interviewing and charging Mr Gibson, and to identify possible training deficiencies. All officers had been trained, and the legislative and case law requirements taught accurately. A problem with the retention and practical application of knowledge by the officers was identified.

WA Police Force response

- [46] Police provided an outline of a comprehensive program of CI Act training provided to officers throughout their careers. Frontline police are required to undertake annual training (Frontline Investigation Training) in relation to the powers and legislative responsibilities arising from the CI Act. Additionally, there are a number of in-service training courses that reinforce aspects of this legislation.

- [47] The Police response includes:
- Investigative training for recruits and in-service officers has been amended to provide greater emphasis on confessional evidence, the Anunga guidelines and interpretation of the CI Act, focusing on fairness to vulnerable persons.
 - Completion rates for annual competency testing of the CI Act have risen from 65% to 84% between 2013 and 2017.
 - The following training courses have been amended to incorporate more comprehensive CI Act training:
 - Introductory Detective training;
 - Detective Evaluation Course;
 - Senior Investigator Course; and
 - Senior Investigating Officer Course.

- [48] The OIP is currently reviewing the content of the annual Frontline Investigations training. The Recruit Investigation training has been

reviewed but was not significantly amended. The OIP has also recently conducted a series of training events at the WA Police Academy which highlight the CI Act in an operational context.

- [49] The OIP is resuming investigative audits (termed 'health checks') which include a review of CI Act competence. This initiative had been limited by resourcing in recent years. Health checks will recommence in the metropolitan area with the intention of extending them State-wide, depending on resources.

Commission review

- [50] There are a number of training courses undertaken by officers throughout their careers that include CI Act training. Some of these have been extended as a result of the Commission's report. Police are reviewing all training packages to ensure that the CI Act training is contemporary.
- [51] If sufficiently resourced, the health check initiative has potential to identify specific weaknesses or gaps in understanding across the agency and feedback could be fed into training sessions to ensure that these gaps are addressed.
- [52] **The Commission considers this recommendation to be complete.**

Recommendation six

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

Commission report

- [53] The Commission's report identified as a systemic weakness, confusion between the rights of a witness and the rights of arrested suspects, as well as confusion about whether a person's actions might or might not give rise to a reasonable suspicion.

WA Police Force response

- [54] Police advised that while the Person of Interest (POI) strategy is embedded within the WA Police Force Investigation Doctrine (the Doctrine), the term POI has been removed and other terms used which align with the CI Act, ie arrested suspect, arrestable suspect and suspect.
- [55] As the Doctrine forms the foundation of WA Police Force Investigative Practices, it has been reviewed and awaits endorsement by the Commissioner of Police.
- [56] An extensive review of the use of the term POI concluded that it was threaded throughout all business areas and a project was established to eradicate its use. The removal of the term POI from the Doctrine was the subject of an agency-wide broadcast on 10 March 2017. In June 2017, the term and its variants were removed from the Police Manual. The project continues to remove this terminology from some peripheral documentation and forms.
- [57] Police consider this recommendation to be complete.

Commission review

- [58] The Commission noted that the WA Police Academy training now reinforce the terms used in the CI Act and the term 'Person of Interest' is no longer used.
- [59] The training also identified the need for officers to address the rights of a suspect once they form a reasonable suspicion that an offence has occurred. Officers were advised that this occurs even if suspicion arises when the person is being otherwise interviewed as a witness or as a suspect for another offence.

- [60] The judgment of *Rayney v State of Western Australia* [2017] WASC 367 demonstrates that the difficulty in identifying what constitutes a 'reasonable suspicion' remains a live issue for Police. In the training and presentation attended by the Commission, officers were encouraged to consider this issue and generally to err on the side of issuing a caution in the case of uncertainty. Professor Green's presentation also touched on other issues raised in that judgment, including cognitive and confirmation bias.
- [61] Police have taken a number of steps to align their strategies with the terminology used in the CI Act and assist in comprehension of the difference between categories of suspect and witness.
- [62] **The Commission considers this recommendation to be complete.**

Recommendation seven

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

Commission report

- [63] The Commission's 2015 report recognised as a systemic weakness the lack of transparency in the Police exercise of their discretion not to charge a suspect with an offence. In the case of Operation Aviemore, the discretion not to prefer a charge was exercised a number of times, but was not recorded or reviewed.

WA Police Force response

- [64] Police record decisions not to charge for an offence on a 'Discretion Register' specific to each policing district or division. Policy for the application of this register is available on the CKD, and forms part of the Good Governance Practice Guide. Discretion is the responsibility of the individual officer and the district/divisional office must ensure an appropriate register is maintained and annually reviewed.
- [65] This is complemented by the Police Management Audit Unit (MAU), which has responsibility for maintaining compliance with the Good Governance Practice Guide. The MAU conducted three audits of district/divisional offices during the 2016/17 financial year. They observed 100% compliance with the Discretion Register.
- [66] Police consider this recommendation to be complete.

Commission review

- [67] **The Commission considers this recommendation to be complete.**

Conclusion

- [68] The Commission's review of actions taken reveals that Police are taking seriously their responsibility to implement the Commission's recommendations and to address the issues arising out of Operation Aviemore.
- [69] The Commission considers five of the seven recommendations have been implemented and will review progress on two recommendations in 2019.
- [70] The importance of review and resolution of the issues raised is of ongoing significance to all officers in Western Australia, especially those stationed in regional or remote areas. The Commission recognises that many of these issues do not have a straightforward solution, nor are they likely to be resolved quickly.
- [71] The information provided to the Commission throughout this review however, and the enthusiasm of the Police and particularly the OIP in implementing these initiatives, is an encouraging indicator of the way forward.