



# CORRUPTION AND CRIME COMMISSION



## REPORT ON THE INVESTIGATION OF ALLEGED PUBLIC SECTOR MISCONDUCT BY WESTERN AUSTRALIA POLICE OFFICERS IN RELATION TO INCIDENTS THAT OCCURRED AT BROOME POLICE STATION ON 29 MARCH AND 19 APRIL 2013

23 DECEMBER 2013

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## CORRUPTION AND CRIME COMMISSION

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Dear Mr Lake  
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), the Commission hereby transmits to you a copy of its *Report on the Investigation of Alleged Public Sector Misconduct by Western Australia Police Officers in Relation to Incidents that Occurred at Broome Police Station on 29 March and 19 April 2013*, with accompanying DVD.

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

Yours faithfully

A handwritten signature in black ink, appearing to read 'Roger Macknay'.

Roger Macknay, QC  
**COMMISSIONER**

23 December 2013



## ABBREVIATIONS AND ACRONYMS

("the CCC Act")	<i>Corruption and Crime Commission Act 2003</i>
CCTV	Closed-Circuit Television
("the CIA")	<i>Criminal Investigation Act 2006</i>
("the Commission")	Corruption and Crime Commission of Western Australia
("the Parliament")	Parliament of Western Australia
("the PSM Act")	<i>Public Sector Management Act 1994</i>
("the Special Report")	<i>Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the "Corruption and Crime Commission Act 2003" (WA), 21 October 2010</i>
WAPOL	Western Australia Police



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# CHAPTER ONE BACKGROUND

## Genesis of Commission Investigation

- [1] On 23 April 2013, officers at Western Australia Police (WAPOL)'s Internal Affairs Unit (IAU) contacted the Corruption and Crime Commission ("the Commission") directly to report the alleged excessive use of force by a police officer on a detainee, which occurred on 19 April 2013. Following a meeting with IAU and a viewing of the CCTV footage, the Commission decided to investigate the matter and issued a section 42 notice upon WAPOL, instructing IAU to refrain from investigating the matter any further.
- [2] The incident of 29 March 2013 was brought to the attention of Commission officers whilst they were investigating in Broome. At the same time, the matter was also identified through the normal assessment process of excessive use of force allegations within the Commission. Due to the involvement of the Broome Police Station and the same police officer, the matter was investigated alongside the incident of 19 April 2013. The two incidents are dealt with chronologically in this report.

## Why the Commission Investigated

- [3] One of the Commission's primary purposes, as set out in section 7A(b) of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), is "to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector". Consequently, the Commission has a number of functions under the CCC Act, including an educative and preventative function under section 17, a misconduct function under section 18 and oversight of WAPOL reviewable police action under section 21A.
- [4] As a result of the reporting of the two incidents, the Commission commenced an investigation under section 33(1)(a). The use of excessive force allegations reported to the Commission could, if established, be considered serious misconduct, or misconduct. However, the Commission's main focus was on the action or inaction of the other police officers present, including physical or verbal intervention, the duty of care to a detainee, reports and record keeping. The Commission was also concerned with the adequacy of the supervision, the use of padded cells, stripping of detainees, restraints, use of force, and care, and WAPOL policies in relation to those matters. The treatment and care of detainees in a police lockup was of particular interest. The adequacy of supervision within WAPOL is an area of ongoing evaluation, and any reluctance on the part of police officers to intervene or report the conduct of another officer is an issue of significance. In the course of the investigation, the Commission examined the systems and processes in place in WAPOL and the Broome Police Station in particular, which are covered in detail later in this report.

- [5] The role of the Commission is explained in more detail in Appendix 1, while Appendix 2 sets out the approach taken by the Commission in determining whether misconduct has occurred.
- [6] It should be said at the outset that WAPOL submitted that had the investigation of these incidents been left to IAU, there would have been a thorough review of the matter. The Commission rejects this submission and notes the Commissioner of Police's reported public comments referring to the incidents as "a straight up assault in custody or an alleged assault in custody". The purpose of this inquiry was to consider issues of supervision and accountability and the Commission has demonstrated that there were significant failures in relation to these, as is evidenced by WAPOL's response in bringing disciplinary charges. This suggests that failure of supervision may be a serious systemic issue warranting close attention from WAPOL.
- [7] Furthermore, the Commission has considered, but does not accept WAPOL's submissions that the recommendations in Chapter Four of this report were not necessary because, in WAPOL's view, the incidents occurred due to personal failures by individual officers rather than systemic issues.
- [8] WAPOL has asserted that there were inconsistencies between senior counsel's closing submissions to the Commission's public examinations and this report. That is not the case.
- [9] WAPOL also criticised the Commission for not making more findings of misconduct to reflect the disciplinary proceedings instigated by WAPOL; however, this criticism is based on a misinterpretation of section 4(d)(vi) of the CCC Act, which requires a higher threshold than relevant *Police Force Regulations 1979*, before such a finding can be made, whilst the definition of reviewable police action in the CCC Act is of a narrow compass. The Commission's opinions are not determinative; that WAPOL has taken independent action to hold its officers appropriately to account is a matter for it.

## **Conduct of the Investigation**

- [10] During the course of the investigation, the Commission:
- interviewed a number of witnesses;
  - undertook research into broader issues of interest directly related to the incidents;
  - obtained information and documents from the Department of Corrective Services, Royal Perth Hospital and Broome Hospital by issuing notices under section 95 of the CCC Act; and
  - conducted fourteen examinations between 10 June and 18 July 2013.

## Public Examinations

[11] Under section 140 of the CCC Act, the Commission can hold public examinations, "if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so". Following review of the CCTV footage and the interviews of witnesses, and Counsel Assisting's advice, the Commission determined that it was in the public interest for the examinations to be held in public, subject to review before each witness, for the following reasons:

- the issues explored by the examinations were of significant public interest;
- awareness of these issues could cause members of the public to report other similar incidents;
- all conduct explored in the public examinations was conduct that occurred or did not occur in the course of the performance of the officers' public duties;
- examinations in public meant more effective and immediate education of police officers; and
- holding examinations in public would maintain public confidence that these types of incidents are being investigated thoroughly and transparently.

[12] Public examinations were held at the Commission between 10 and 14 June 2013. An additional private examination was held on 18 July 2013 to hear from a witness who had been unavailable during the original hearing dates.

[13]

<b>Date and Time</b>	<b>Name</b>
10 June 2013 at 11.08am	Senior Constable Duncan Carter
10 June 2013 at 2.50pm	Constable Anthony Garcia
11 June 2013 at 10.31am	D5 (name and identity suppressed)
12 June 2013 at 10.21am	Senior Constable Ian Maw
12 June 2013 at 12.36pm	Constable Danielle McGoldrick
12 June 2013 at 2.31pm	Senior Sergeant Brendon Barwick
12 June 2013 at 2.42pm	Sergeant William Withers
12 June 2013 at 3.22pm	First Class Constable Eoin Carberry
13 June 2013 at 10.15am	D6 (name and identity suppressed)
13 June 2013 at 11.11am	Sergeant Troy Kendall
13 June 2013 at 12.05pm	Senior Constable Julie Radwell
14 June 2013 at 10.01am	Sergeant Terry Townsend
14 June 2013 at 11.24am	Superintendent Michael Sutherland
18 July 2013 at 10.10am	Senior Constable Alan Ingram

- [14] During the course of the public hearings, the names and identities of certain people involved were suppressed. The Commission has replaced their names with ciphers.

D1	The subject of the first incident on 29 March 2013.
D4	The subject of the second incident on 19 April 2013.
D5	The First Class Constable involved in both incidents.
D6	The Probationary Constable involved in the second incident.

- [15] Counsel Assisting's submissions were provided to the Commission on 3 August 2013 and were sent to the relevant witnesses for their comments on or around 23 August 2013. Those comments have been considered in the writing of this report.
- [16] It should be noted that pixelated and edited CCTV footage of both incidents form part of this report.

## Western Australia Police

### Overview

- [17] WAPOL is comprised of two regions, 14 districts and 158 police stations and its jurisdiction covers 2.5 million square kilometres.
- [18] In the Kimberley Region, the District Officer is Superintendent Michael Sutherland. He oversees six police stations and six remote police stations, including the Broome Police Station. He is responsible for around 198 staff, both sworn and unsworn personnel.

### WAPOL Policies

- [19] All police officers are subject to the WAPOL Code of Conduct, which imposes a duty upon each police officer to report unprofessional behaviour, both his/her own and that of others, including failure to report unprofessional behaviour. The Code of Conduct sets out the various reporting mechanisms available to police officers, including options to remain anonymous.
- [20] WAPOL officers are also subject to the *WA Police Manual*, which sets out in detail the WAPOL policies in relation to all aspects of police work, including use of force, reporting of use of force, use of padded cells, strip searching, duty of care and record-keeping.
- [21] According to FR 1.1 of the *WA Police Manual*, members are held individually accountable for any use of force. They must ensure that they do not use excessive force, and in particular, do not use:
- Any force where none is needed;
  - More force than is necessary; and

- Any force or a greater level of force after the necessity for it has ended.
- [22] The *WA Police Manual* also states that a head or neck hold should only be used where the member reasonably believes that there is an imminent risk of grievous bodily harm or death to any person. This is because of the dangers of serious injury or death resulting from asphyxia or too much pressure on the vascular system.
- [23] The use of handcuffs is considered a use of force and as such, handcuffs are not to be left on detainees longer than is reasonably necessary. The *WA Police Manual* expressly warns against leaving a detainee lying face down with hands restrained behind their backs due to the risk of positional asphyxia.
- [24] The reporting protocols in relation to use of force depend on the force used, e.g. Taser, baton, OC spray, or as in these cases, empty hand tactics. In the *WA Police Manual*, the reporting protocol for empty hand tactics is that a use of force report should be done when the use of empty hand tactics on a person causes "bodily injury requiring medical care". "Bodily injury" means damage to bone, muscle, tendon, skin, organ or any part of the body but has to be more than merely pain. "Medical care" means any professional treatment for injury or illness.
- [25] According to the *WA Police Manual*, padded cells are for temporary detainee management only, to restrain violent or aggressive detainees, in the interests of their own safety and the safety of others.
- [26] Management of detainees at risk of self-harm is covered by LP 3.6 of the *WA Police Manual*, which states that where a real risk of self-harm is assessed, and if the detainee's clothing could be used for self-harm, it can be removed. The duties of the shift supervisor listed under LP 1.1 of the *WA Police Manual* include ensuring that every prisoner is treated in a humane and dignified manner having due regard to the need for security and that every prisoner affected by alcohol or drugs is treated with tolerance and patience.
- [27] The Commission has not been able to identify any guidelines in relation to removing a detainee's clothing where the detainee is at risk for self-harm. There are rules in relation to strip-searching contained in Part 8 of the *Criminal Investigation Act 2006* ("the CIA"), which the Commission considers should be extended to cover the stripping of a detainee at risk of self-harm. This would mean that, for example, if practicable, those present should be of the same gender as the person being stripped (section 72(3)(b) of the CIA).
- [28] Police officers owe a duty of care to detainees in their care, and while a detainee may not technically be in custody, he or she may still be the responsibility of an officer. The *WA Police Manual* states that if a detainee is apparently intoxicated to such an extent that he or she requires medical treatment, they are to be afforded such treatment. A detainee who is unconscious or semi-conscious is not to be admitted to a lockup until he or

she is medically assessed. In all cases, a detainee should not be admitted to a lockup if they require medical treatment and the officer responsible for their care is to obtain that medical treatment for them prior to admission. The Broome Police Station Lockup Procedures contain similar requirements.

- [29] The *WA Police Manual* provides that complete lockup admission details must be entered into the custody records system. Cell checks and observations are to be recorded in the custody system as well as on the detainee running sheet.

### **Broome Police Station**

- [30] The Commission recognises that the police in Broome face unique challenges, including the highest rate of assaults on police, and that the most significant policing issues for the Kimberley region are alcohol-related.
- [31] For the purposes of the Commission investigation, it was important to understand the role and responsibilities of the shift supervisor at Broome Police Station. As shift supervisor, the Sergeant on duty was responsible for the lockup and detainees. He assessed and allocated jobs from the Police Operations Centre and calls from the public. He checked briefs for charges, as well as incident reports from the public. He was responsible for managing his staff, making sure they were doing everything they should and giving them advice as required. If any serious matters occurred, he would contact the Officer in Charge of Broome Police Station, Senior Sergeant Barwick, who would then decide whether the detectives were needed.

## **Main Participants**

- [32] The police officers involved in these incidents were all public officers within the definition in section 1 of *The Criminal Code 1913 (WA)* and section 3 of the CCC Act.

### **D5**

- [33] D5 was a First Class Constable on duty as a patrol officer on both 29 March and 19 April 2013. D5 resigned on 27 May 2013.

### **Sergeant William Withers**

- [34] On 29 March 2013, Withers was the shift supervisor at the time of the incident.

### **Senior Constable Duncan Carter**

- [35] On 29 March 2013, Carter was partnered with Constable McGoldrick. They arrested D1 at the Broome Time Lodge before transporting him to the police station. Carter was present when D1 was removed from the police van, taken to the padded cell and his clothing removed.

**Senior Constable Alan Ingram**

- [36] On 29 March 2013, at the time of the incident, Ingram was in the charge room at the Broome Police Station, processing a female detainee.

**Constable Anthony Garcia**

- [37] On 29 March 2013, Garcia was on patrol duty. He was present when D1 was removed from the police van, conveyed to the padded cell and his clothing removed.

**Constable Danielle McGoldrick**

- [38] On 29 March 2013, McGoldrick was partnered with Carter. She was present when D1 was removed from the police van, conveyed to the padded cell and his clothing removed.

**D6**

- [39] On 19 April 2013, D6 was a Probationary Constable on her second, but first operational shift, at Broome Police Station. She was working with D5, during the arrest and subsequent transport of D4 to the police station. She was present when D4 was restrained in the sallyport and taken to the charge room.

**First Class Constable Eoin Carberry**

- [40] On 19 April 2013, Carberry was on duty as the Computer Aided Dispatch (CAD) operator at the station. He assisted with processing D4 through the custody system until D4 was detained in a cell.

**Senior Constable Ian Maw**

- [41] On 19 April 2013, Maw was the designated spare officer for his shift. He was the officer who processed D4 through the custody system.

**Sergeant Aaron Troy Kendall**

- [42] On 19 April 2013, Kendall was the shift supervisor at the Broome Police Station.

**Sergeant Terry Raymond Townsend**

- [43] On Saturday, 20 April 2013, Townsend was on duty at the Broome Police Station.

**Senior Constable Julie Lee-Ann Radwell**

- [44] On Saturday, 20 April 2013, Radwell was on duty and had the responsibility of downloading CCTV footage from the Broome Police Station and burning the footage to disks as requested.

**Senior Sergeant Brendon Barwick**

- [45] Barwick was the Officer in Charge (OIC) of the Broome Police Station.



## **CHAPTER TWO INCIDENT OF 29 MARCH 2013**

### **The Allegations**

[46] This chapter deals with allegations that, on 29 March 2013:

- D5 used excessive force in his handling of D1 during the removal of D1 from the police van, through the station and into the padded cell;
- D5 used a neck hold to restrain D1, which was unsafe, unnecessary in the circumstances, and contrary to the *WA Police Manual*;
- other officers present failed to intervene when D5 was allegedly using a neck hold on D1;
- other officers present failed to report the alleged use of excessive force;
- the padded cell was used without appropriate discussion or consideration; and
- D1 was stripped naked in the padded cell without proper regard for his privacy and dignity.

### **Incident of 29 March 2013**

#### **Overview of Events**

[47] On 29 March 2013, D1 had been celebrating his 18<sup>th</sup> birthday at the Broome Time Lodge and there is evidence that he was intoxicated. Having been asked to leave the Lodge, D1 refused to comply. The police were called and D1 was eventually arrested, handcuffed and later charged with obstructing police officers.

[48] Upon arrival at the Broome Police Station, D1 refused to get out of the van, holding his feet on the roof of the van and shouting abuse. Despite numerous requests to drop his feet down so he could be removed, D1 refused. There were six police officers present in the sallyport<sup>1</sup>, including D5, Carter, Garcia, and McGoldrick. Carter was the senior officer present.

[49] D5 told D1 to get out of the van, and asserted that he gave D1 "more than ample opportunity" to move, agreeing that by this he meant two minutes. D5 reached inside the van to remove D1. In the CCTV footage, the van was seen to be shaking before D5 emerged with his right arm around D1's neck, with his right hand over D1's left shoulder and D5's elbow beneath

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<sup>1</sup> The sallyport is a secure garage area in a police station where detainees are unloaded and taken into the charge room of the lockup.

D1's chin. D1 was facing away from D5's body, with D1's back bent over D5's right side so that D1 was off balance. D1 was then manoeuvred through the sallyport door, through the charge room and into the passage by D5, with Carter following behind. Throughout he was held by D5 with his right arm around D1's neck. At one point, in the passage, both of D1's feet left the floor and shortly after this, while at the door of the padded cell, D1 appeared to slump. There was insufficient evidence for the Commission to conclude whether D1 lost consciousness at this point.

- [50] D5 then opened the door to the padded cell with his left hand, while also holding D1 with his right arm. At this point, Carter took some of D1's weight by holding D1 up by D1's right arm. There was no discussion about whether D1 should be put into the padded cell. No officer admitted to making the decision to place D1 in the padded cell, and D5 said someone told him to take D1 there but could not identify the officer.
- [51] Once in the padded cell, D1 was stripped of his clothes by five officers, with other officers immediately outside or walking past the open cell door, including a female officer, McGoldrick, who held the door open. At some point before having his clothes removed, D1 had defecated in his shorts, but there was insufficient evidence for the Commission to establish when that occurred or the cause.
- [52] Approximately an hour and a half later, D1 was given boardshorts to wear, a blanket and a mattress and moved into a normal cell on his own. He was advised by Withers that he would be released when sober, but he was still intoxicated at that time. He was released on bail at 4:15am on 30 March 2013, having been charged with obstructing police officers.

## **Analysis and Conclusion**

### **Use of Force**

- [53] The Commission heard considerable evidence regarding the type of hold D5 used. It was D5's evidence that he did not use a neck hold on D1, and for the most part, he denied that his arm was in contact with D1's neck, even when shown various still shots and the CCTV footage. D5 admitted at one point that his arm was around D1's neck but he could not say whether any pressure was being applied to D1's neck as a result. D5 stated that he was unaware that his arm was in contact with D1's neck but that he would not have been concerned about it, even if he had seen the footage afterwards.
- [54] Superintendent Sutherland, the District Officer for the Kimberley region and a police officer of some 35 years' experience, stated that it was a neck hold "without a doubt". It is the Commission's view that the hold used by D5 was a neck hold from the point of D1's removal from the van to being placed into the padded cell.
- [55] During the course of the hearings, it became apparent that the policy with respect to the use of neck holds was not well understood. Numerous

witnesses said they thought that the restriction only applied where an officer was attempting to “choke out” a person, as distinct from using a neck hold to restrain a violent prisoner where there is an imminent risk of grievous bodily harm or death. It is understood that this issue is already being addressed by the Operational Safety and Tactics Training Unit at the Police Academy.

- [56] The Commission considered whether force was required to remove D1 from the van. Other options were available, as stated by Superintendent Sutherland. One option would have been to leave him there for a longer period. However, there was no discussion between the officers about how they might work together to remove D1.
- [57] Once D1 was removed from the van, there were five other officers present who could have assisted in conveying D1 to the cells in a less forceful manner. Superintendent Sutherland said that whether D1 was "playing up or not", he did not present a difficulty once removed from the van. Upon D1's removal, Garcia moved towards D1 and D5, and asked D5 if he needed assistance. Garcia said he intended to take D1's arm, but D5 told him he was fine. None of the other officers attempted to intervene in any way.
- [58] D5 then took D1, still in the same hold, through the charge room. Ingram was in the charge room, and saw the hold, albeit briefly, but did not intervene. Ingram did not consider that D5's hold was a neck hold at the time, although when shown stills from the CCTV footage, he agreed that D5's arm was around D1's neck.
- [59] The Commission accepts Ingram's evidence that he had not been present in the sallyport to know what had occurred with D1 and therefore was not in a position to know whether D5's hold was reasonable in the circumstances.
- [60] D1 was then taken, still in this hold, into the north passage to the padded cell, followed closely by Carter. At times on the CCTV footage, D1's head seems to be pulled back by the force of the hold and the motion. At one point, both of his feet are off the ground in the passage. It appears that Carter did not make any effort to intervene, other than to support D1's right arm while D5 was opening the padded cell door with his left hand (while still holding D1 in the neck hold with his right arm). Superintendent Sutherland said that to take D1 backwards, particularly when he was handcuffed, was a concern and a risk, and Carter should have directed D5 to stop and then helped to move D1. The Commission does not accept Carter's excuses in that regard.
- [61] As stated, WAPOL policy limits the use of neck holds to instances where the police officer reasonably believes that there is an imminent risk of grievous bodily harm or death. In this instance, it is the Commission's view that there was no justification for that type of hold as D1 was handcuffed behind his back and there was no risk of imminent grievous bodily harm or death to any person, as confirmed by D5.

- [62] Whatever belief D5 might have had as to the policy restrictions in relation to neck holds, the Commission considers that the neck hold was more force than was reasonably required for D1's removal from the van and his transport to the cell, and therefore, amounted to a use of excessive force.
- [63] While the Commission acknowledges the difficulties in removing an uncooperative D1 from the van, nonetheless the Commission considers that other, less forceful options were available to D5 and the other officers present, which would not have involved a neck hold, including opening both doors and approaching D1 from both sides. Once out of the van, one option would have been for D5 to stand D1 up in the sallyport, as Superintendent Sutherland suggested, so that the other officers present could assist to escort D1 safely to the cells using the minimum amount of force necessary.
- [64] The Commission concludes that, while the incident occurred relatively quickly, there were opportunities which could have been taken to prevent D5's transport of D1 to the cell by the neck hold.

#### **Reporting Use of Force and Unprofessional Behaviour**

- [65] No use of force report was made in relation to this incident, and according to WAPOL policy, none was required as D1 sustained no bodily injury requiring medical care.
- [66] However, each officer had the obligation to report unprofessional behaviour, including use of excessive force, under the WAPOL Code of Conduct.

#### **Padded Cell and Removal of Clothing**

- [67] There was no discussion about whether D1 should be placed in the padded cell. D5 said he was told to put D1 there but, as stated, none of the other officers took responsibility for the decision.
- [68] According to WAPOL policy, a padded cell may be used for temporary detainee management only, to restrain violent or aggressive detainees in the interests of their own safety, the safety of other detainees or police personnel. While D1 was described as violent and aggressive due to his verbal abuse and refusal to get out of the van, he was restrained by handcuffs and the CCTV footage does not show any apparent struggling or non-compliant behaviour whilst being moved.
- [69] All witnesses were aware that a person cannot be placed in the padded cell unless the particular criteria as stated above are met. When asked for the reason D1 was placed in the padded cell, Carter stated that it was due to the risk of self-harm, based on his aggressive and non-compliant behaviour that night. That was corroborated by D5 and Withers. Garcia said that he was placed in the padded cell as a precaution due to "his attitude and his behaviour".

- [70] Once in the padded cell, D1's clothing was removed. Carter stated that the removal of D1's clothing was not a strip search but due to D1 having soiled himself and concerns of self-harm. This was confirmed by Garcia.
- [71] However, Carter later said "[D1's] behaviour was not such that he could be stood up and asked nicely to take his shirt off; otherwise he wouldn't have needed to have had it taken off." This suggests that the reason D1 had his clothes removed was not due to self-harm concerns, but aggression or non-compliance. It is the case that D1 did offer some resistance to the removal of his clothes.
- [72] It is not clear to the Commission on what basis D1 was assessed as at a real risk of self-harm, necessitating the removal of his clothing. D1 had not previously been involved with the police, so there was no background information about him available to the officers that night. The evidence suggests that D1's aggressive and non-compliant behaviour was the only information available. In the Commission's view, this is indicative that officers were not consciously assessing each individual detainee for indications of self-harm behaviour before acting.
- [73] Numerous officers gave evidence that it was standard procedure to remove the clothing from a person to be held in the padded cell. However, both Superintendent Sutherland and Withers contradicted this evidence, stating that there was no standard practice in Broome to strip a detainee of their clothing before placing them in the padded cell.
- [74] At one point, the CCTV footage shows up to four male officers and a female officer (McGoldrick) standing outside the padded cell, looking inside. McGoldrick stood at the doorway of the padded cell for about 30 seconds before she moved to hold the door open. After others leave, two of the male officers entered the padded cell to assist with the removal of D1's clothing and at that point, the only person left outside was McGoldrick, holding the door for around 50 seconds.
- [75] According to section 72(3)(b) of the CIA, if practicable, officers of the opposite gender should not be present when a detainee is being strip-searched. Given the number of male officers available in the station at the time, McGoldrick's presence was not necessary at the cell door, and another male officer should have been assigned to assist. Her presence demonstrated a lack of consideration for D1's privacy and dignity.

### **Supervision**

- [76] Generally, there was a lack of discussion between the police officers regarding how to proceed in removing D1 from the van and there seemed to be reluctance by any officer to take a leadership role, including the most senior officer present, Carter. Superintendent Sutherland expressed concern about the lack of control by senior officers, and the absence of any discussion of alternative strategies. There was, as Superintendent Sutherland said, a lack of command and control, which encompassed D1's removal from the van, passage into the lockup, introduction to the padded cell, and the stripping of his clothes.

- [77] In the absence of any officer prepared or able to claim responsibility and give an explanation for it, it is the Commission's view that the decision to place D1 in a padded cell cannot be said to be warranted. Further the Commission does not consider that there was any justification for assessing D1 as being at risk of self-harm and removing all of his clothing.
- [78] There was then a further failure in reporting and accountability. It is the responsibility of the shift supervisor to review the need for the use of the padded cell and the removal of a detainee's clothing.<sup>2</sup> The shift Sergeant on 29 March 2013 was Withers and following the handover from the afternoon shift supervisor, Withers was aware that two people had been arrested and were coming back to the lockup for processing. The CCTV footage shows that Withers walked past the padded cell, pausing to look in as D1's clothes were being removed. He was subsequently informed that D1 was placed in the padded cell due to his non-compliant and abusive behaviour, and that D1's clothing was removed due to soiling his shorts and the risk of self-harm, but Withers failed to make any further inquiry.

## **Commission Opinions as to Misconduct**

- [79] The Commission forms opinions of misconduct in accordance with the CCC Act. Appendix 2 sets out the relevant provisions.

### **D5**

- [80] In relation to D5 and the use of excessive force on D1, it is the opinion of the Commission that D5's conduct constituted misconduct in that it constituted a breach of duty and hence a breach of the trust under section 4(d)(iii), which could constitute an assault, which is an offence under a written law under section 4(d)(v) of the CCC Act.

### **Senior Constable Carter**

- [81] It follows from the foregoing that the Commission does not accept that Carter had no opportunity to intervene or could reasonably have thought that excessive force was not being used towards D1. Carter's failure to intervene in any way when D5 was moving D1 from the van to the cell constitutes a breach of the trust placed in him as a police officer under section 4(d)(iii), but it is the Commission's view that the failure is not such as to constitute a disciplinary offence providing reasonable grounds for termination pursuant to section 4(d)(vi) of the CCC Act.<sup>3</sup> Therefore this failure to intervene, although regrettable, does not amount to misconduct under the CCC Act.
- [82] It is the opinion of the Commission that Carter's failure to report the use of excessive force by D5 constitutes a breach of the trust placed in him as a

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<sup>2</sup> *WA Police Manual* LP 3.6 and LP 11.5.

<sup>3</sup> Section 4(d)(vi) of the CCC Act provides that the test to be applied is whether the conduct constitutes or could constitute a disciplinary offence providing reasonable grounds for termination of a person's office under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is... a person whose office or employment could be terminated on the grounds of such conduct).

public officer, as defined by section 4(d)(iii), but the failure is not such as to constitute a disciplinary offence providing reasonable grounds for termination pursuant to section 4(d)(vi) of the CCC Act. Therefore Carter's inaction does not amount to misconduct in the Commission's view.

### **Constable Garcia**

[83] The Commission accepts that Garcia attempted to assist D5 immediately following D1's removal from the van, but that D5 rejected his assistance. The Commission considers that Garcia had little opportunity to intervene after the sallyport, as he stepped in to assist with the other detainee in the charge room. In the circumstances, it is the Commission's view that Garcia's failure to intervene did not amount to misconduct under the CCC Act.

[84] In the opinion of the Commission, Garcia ought to have formed the view D5 used excessive force but his evidence that he had a genuine misapprehension that the degree of force used was not of concern is accepted.

### **Constable McGoldrick**

[85] In the Commission's view, McGoldrick's failure to intervene in any way with regard to D5's hold on D1 did not amount to misconduct under section 4 of the CCC Act. Her position against the wall at the rear of the van meant that she was not in an easy position to intervene with D5's hold on D1 upon his removal from the van, and subsequently, she did not have an opportunity to intervene. McGoldrick was junior to D5 and the Commission understands that it would have been challenging for her to have intervened, particularly in circumstances where there were more senior officers present.

[86] It is the Commission's view that McGoldrick bears some personal responsibility for her presence holding the cell door while D1's clothes were removed, even though she is a junior officer. There were several other male members of staff present at various times and she could have asked one of the others to hold the door. However, the Commission does not consider that this inaction amounts to misconduct under the CCC Act.

### **Senior Constable Ingram**

[87] The Commission accepts Ingram's evidence that he had not been present in the sallyport to know what had occurred with D1 and therefore was not in a position to know whether D5's hold was reasonable in the circumstances.

### **Sergeant Withers**

[88] It is the opinion of the Commission that the absence of any action by Withers to ensure there was a proper assessment of D1 in relation to a risk of self-harm, and to ensure that D1's privacy and dignity was maintained while his clothing was removed was a failure in his duty of care towards D1 and regrettable. However, the Commission does not consider that this failure amounts to misconduct under the CCC Act.



## **CHAPTER THREE INCIDENT OF 19 APRIL 2013**

### **The Allegations**

[89] This chapter deals with allegations that, on 19 April 2013:

- D5 used excessive force in dealing with a detainee, D4, in the sallyport and in the charge room of the Broome Police Station;
- D5 failed in his duty of care towards D4 by not reporting to anyone that D4 may have been hurt or injured;
- D5 used abusive language towards D4; and
- other police officers present failed in their duty of care towards D4 by:
  - (i) failing to assess D4 for injuries when finding him motionless on the floor of the charge room;
  - (ii) failing to remove the handcuffs from D4 at an earlier time; and
  - (iii) not taking D4 to hospital;

and that, on 20 April 2013:

- Radwell and Townsend failed in their duty of care to D4 by failing to tell Serco<sup>4</sup> officers, into whose custody D4 was given, what they had viewed on the CCTV footage; and
- Radwell and Townsend failed to report the excessive use of force by D5.

### **Incident of 19 April 2013**

#### **Overview of Events**

[90] On 19 April 2013, D5 and his partner, D6, arrested D4, a 30 year old Aboriginal man from a remote community south of Broome, for the offences of consuming liquor and refusing to supply his personal details. D4 was transported to the Broome Police Station in the rear of a police van. On arrival in the sallyport of Broome Police Station, D4 got out of the van unaided, and was able to stand and walk unassisted.

[91] There appeared to be a verbal exchange between D4 and D5 in the sallyport, although there is insufficient evidence to establish what was said. As D5 moved towards the door of the charge room, D4 struck him with his left forearm with some force. The blow hit D5 on the nose.

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<sup>4</sup> A private contractor who manage the prison.

- [92] D5 claimed he had blood running down his face, on to his pants and shirt from D4's blow to his face. This evidence was contradicted by other officers who saw very little blood, and the evidence as a whole indicates that D5 was bleeding very little. However, the Commission accepts that D5 was bleeding from his nose.
- [93] D5 threw several punches at D4. There was a physical exchange, which resulted in D4 lying on the ground in the sallyport. From at least that point, D4 did not try to hit either of the officers.
- [94] Whilst D4 was on the ground, D5 punched D4 several times to the head and upper body, and drew his arm fully back before delivering the blows. D5 also dropped his knee onto D4's head on two occasions. On the second occasion, he first raised himself upwards before dropping his knee down.
- [95] At this point, D4's feet, which he had been waving in the air, dropped to the ground, and he remained motionless until he was stood to his feet outside the charge room door by D5 and D6.
- [96] D5 said that D4 went limp only after the handcuffs were on, but that is not supported by the CCTV footage.
- [97] While D4 was motionless on the floor, D5 pulled D4 to his feet using a hold on D4's hair, with his left arm linked under D4's right arm. D6 took some of the weight by holding D4's left arm. Before the door was reached, D5 dropped his hold on D4's hair. D5's explanation for holding onto D4's hair was to stop D4 from spitting at him.
- [98] D5 and D6 dragged D4 to the charge room door, and opened it. D4 regained his footing just as they reached the door. As they went through the door into the charge room, D5 drew back slightly and then threw D4 onto the floor, face down, with his hands handcuffed behind his back. Slightly before throwing D4 to the ground, he shouted: "You're a piece of shit". D6 was still holding D4 as he was thrown and fell to her knees with him.
- [99] D5 denied that he threw D4 to the floor and said that he dropped D4, but the CCTV footage reveals that clearly not to be the case. Superintendent Sutherland said of D5's action: "That is disturbing to say the least ... it's very unprofessional, and it's excessive force to the extreme".
- [100] D5 knelt down beside D4, holding him by the head. D6 knelt down and held his left arm. Carberry entered the charge room and assisted in moving D4 across the room by taking hold of his T-shirt. D5 apparently moved D4 by holding him under his jaw, and the CCTV footage is inconsistent with D5's assertion that he was simply checking on D4's welfare.
- [101] After D4 had been moved across the floor of the charge room, D5 exited the charge room and another officer, Maw, entered. D4 was face down with his hands handcuffed behind his back, motionless and silent. Carberry removed D4's shorts and searched them. Maw then moved D4

onto his side and Carberry asked D6: "did he head-butt him". D6 replied that "he just punched D5 in the face".

- [102] The shift Sergeant, Kendall, came into the room and asked if D4 was awake or just drunk. He was told D4 was breathing. D4 was motionless and unresponsive, despite attempts to rouse him, and made no noise for nearly two minutes. During that time, he remained handcuffed.
- [103] Kendall told the officers to take D4 to hospital and left the charge room. D4 then began mumbling unintelligibly, and Carberry assisted him to sit and then stand. D5 re-entered the charge room and said: "I just had to calm down cos [sic] I was going to kill this cunt". He then left.
- [104] Just over a minute later, D5 re-entered the charge room and informed Maw and Carberry that Kendall was content for D4 to be admitted into custody. Carberry assisted D4 to stand before putting him in a holding cell and telling him to sit up.
- [105] Whilst D4 was being processed by Maw and Carberry, D5 made further abusive remarks to D4:
- "nice face, cunt"; and
  - "see mine, nothing wrong with mine, you punch like a faggot".
- [106] When D5 made the last comment, he leaned into the holding cell in which D4 was seated and gesticulated towards D4, who stood and said: "I'm not a faggot". Carberry pointed at the camera and told D4 that everything was being recorded, and Maw said to D5 that that meant him too.
- [107] D5 and D6 left and Maw and Carberry processed D4. D4 at that time answered questions with reasonable coherence. Carberry wiped D4's face and checked the cut over his eye. About 13 minutes after entering the charge room, D4 was escorted to a cell.
- [108] The next morning, 20 April 2013, just after 8:00 a.m., D4 and four other detainees were placed in the custody of Serco officers for transfer to the Broome Regional Prison. In response to a question from Serco officers about his eye injury, D4 said that he had been bitten by a bug. Radwell and Townsend were both present and within hearing range when this exchange took place.
- [109] During the transfer of custody, Radwell downloaded the CCTV footage in relation to the incident involving D5 and D4 from the station's cameras onto a disk using a laptop. She and Townsend viewed parts of the footage several times.
- [110] Once the Serco officers left, Radwell pointed to the laptop screen and said to Townsend: "As soon as I realised the connection, 'big bug'". There was no apparent response from Townsend.

- [111] A short time later, Radwell said to Townsend: "He looks remarkably unbruised, doesn't he". Townsend responded to Radwell and viewed the footage on the laptop.
- [112] Neither Townsend nor Radwell informed the Serco officers of what appeared on the CCTV footage.
- [113] Radwell provided a disk of the CCTV footage to Barwick on the basis that it showed an assault of a police officer. Barwick reviewed the footage on the following Monday afternoon, 22 April 2013. He immediately made a report of his concerns.
- [114] Prison records indicate that D4 was medically assessed on 21 April 2013, two days after his arrest. He had swelling around the upper and lower lids of his right eye and the cornea was significantly bloodstained. He also had a swollen and sore right fifth finger.
- [115] On 29 April 2013, upon his release from prison, D4 went to the Broome Regional Hospital. He was found to have a comminuted and displaced fracture to the proximal phalanx, requiring internal fixation. He was also diagnosed with a subconjunctival haemorrhage. The Commission is unable to establish the cause of these injuries.

## **Analysis and Conclusion**

### **Use of Force**

- [116] While the blow from D4 would have been a shock, D5's evidence regarding the effect of the blow was inconsistent with the CCTV footage. He stated that the pain was excruciating and the blow caused his head to snap backwards, almost knocking him out, whilst his knees buckled and he felt the extremities of his vision go dark. That is also inconsistent with D5's ability to get D4 to the ground in the sallyport, punch him forcefully, co-ordinate two knee strikes to D4's head, and drag a limp D4 to his feet with little assistance from D6. D5 was also able to resume his patrol duties within 15 minutes of the blow.
- [117] The Commission accepts that D5's initial reaction to D4's blow was justifiable in the circumstances, but considers that the force used by D5 once D4 was on the ground in the sallyport was disproportionate. D4 was curled in the foetal position and did not resist other than resisting being handcuffed, by not freely releasing his arms. D5's assertion that the knee drops involved minimal force is not accepted. The force used by D5 in punching D4 and dropping his knee onto D4's head was more force than necessary and was excessive.
- [118] D5 lifted D4 from the floor of the sallyport by his hair as well as his arm, which was unnecessary and an excessive use of force. D5's explanation that he was preventing D4 from spitting on him is not credible.

- [119] When D4 was thrown to the charge room floor by D5, he was handcuffed behind his back and unable to prevent his face and head from hitting the floor. D5's conduct was without justification, and an excessive use of force.
- [120] The CCTV footage shows D5 dragged D4 across the charge room floor by his head and the Commission considers this act another unnecessary and unreasonable use of excessive force by D5.
- [121] D4 remained handcuffed until he was placed in a cell. Initially, he was in a position where there was a potential danger of positional asphyxia, as he was lying face down on the floor, with his arms behind his back, until moved on to his side by Maw. As D4 was unresponsive and motionless for just under two minutes in the charge room and was not a threat to anyone, failure to remove the handcuffs was an excessive use of force, being force that continued to be applied for longer than was necessary.
- [122] Carberry agreed that D4 did not present a danger to anyone as he lay face down on the floor of the charge room, with his hands handcuffed behind his back, as did D6. They both said they understood the risk of positional asphyxia and admitted the situation required immediate action. Carberry agreed that the risk was increased if the person was suffering from the effects of alcohol.
- [123] Carberry admitted he should have removed D4's handcuffs. By failing to do so, the Commission considers that he allowed a use of force to continue for longer than necessary. Carberry pulled D4 to a sitting position using D4's handcuffed arms, but admitted he should not have done that.
- [124] Maw said that D4 was not presenting a danger to anyone as he lay on the floor of the charge room, with his hands handcuffed behind his back. He understood the dangers of positional asphyxia, and admitted that, in hindsight, it was not necessary for D4 to remain in handcuffs. In failing to remove the handcuffs, he permitted a use of force to continue for longer than necessary.
- [125] Kendall said in hindsight, he did not think it was necessary to leave the handcuffs on, but at the time, he did not even think about it.
- [126] The failure to remove the handcuffs from D4 while he was lying face down on the floor of the charge room is considered an excessive use of force, which was unnecessary and unreasonable as well as potentially dangerous due to the risk of positional asphyxia. In the Commission's opinion, each of D6, D5, Maw and Carberry should have removed the handcuffs, in the absence of action by any other officer, as soon as they assessed that D4 was motionless and unresponsive, and therefore not a threat.

### **Reporting Use of Force**

- [127] There is no evidence to suggest that Kendall, Maw and Carberry saw any of the CCTV footage of the incident in the sallyport or the entry into the charge room where D4 was pushed to the floor in handcuffs.

- [128] On 19 April 2013, D5 and D6 were the only two people who knew what had happened to D4. Despite this, neither of them reported any use of excessive force to Kendall, or anyone else. D6 admitted that she should have reported it but it did not occur to her at the time because she was shocked by the events.
- [129] Under the WAPOL use of force reporting protocols, D4 did not receive medical attention immediately following the use of force and therefore, the incident did not require formal reporting. However, given the possibility of a head injury and other injuries, D4 should have been assessed and treated by a medical professional. In the Commission's view, D5 and D6 knew or ought to have known that D4 did require medical attention and therefore a formal use of force report should have been completed by them both.
- [130] D5 said that he had a conversation with Kendall after the incident and that he thought he told Kendall that:
- D4 had punched him and almost knocked him out;
  - there had been a fight in the sallyport, where he had overpowered D4 and restrained him in handcuffs; and
  - he dropped D4 who was handcuffed, face down onto the charge room floor.
- [131] D5 could not remember whether he told Kendall that D4 might have hit his head on the ground.
- [132] However, Kendall's recollection was that:
- he did not recall that D5 told him there had been a fight, and thought that he would have remembered it if he was told that;
  - he did not remember D5 telling him he had overpowered D4 and restrained him;
  - D5 did not tell him he had "dropped" D4 on the charge room floor; and
  - he would certainly have remembered if D5 said anything to him about what he had done to D4.
- [133] It is unclear to the Commission what was said during the conversation between Kendall and D5 because neither had a good recollection. However, even on his own account, D5 did not discharge his obligation to report what had occurred to D4 following his assault on D5.
- [134] On 20 April 2013, Radwell and Townsend viewed parts of the CCTV footage from the previous night, including seeing D5 throw D4 to the floor of the charge room. CCTV footage from 20 April 2013 records Radwell and Townsend viewing the 19 April 2013 CCTV footage. On the basis of

the 19 April 2013 footage alone, individually Radwell and Townsend must have recognised the force used as excessive.

- [135] Both Radwell and Townsend said that, if they had seen knee drops, punches to the face or head or D5 throwing D4 to the floor of the charge room, they would have reported that conduct. However, they did see footage of that conduct and neither of them reported it.
- [136] Radwell had downloaded the CCTV footage because she was aware that D5 had been assaulted the previous evening, and that the CCTV footage would need to be saved to disk to preserve the evidence and for review by Barwick.
- [137] Having viewed the footage of D5 throwing D4 to the charge room floor on at least four occasions, the Commission considers that Radwell had a duty to report the use of excessive force immediately. That Townsend watched that piece of footage with her at least twice is insufficient in the Commission's view to discharge her responsibility for reporting the incident.
- [138] While there is some variation as to what Radwell told Barwick when giving him the CCTV footage, it was common ground that she did not tell him what had occurred to D4 following his assault on D5. Radwell should have told Barwick what she had seen on the CCTV footage.

### **Duty of Care**

- [139] The officers who came into contact with D4 on the night of 19 April 2013 all had a duty of care to him but failed to properly fulfil that duty.
- [140] D5 and D6 failed in their duty of care by failing to notify anyone that D4 may have been injured, particularly to the head, due to the knee drops to his head in the sallyport and being thrown into the charge room, landing face first on the floor.
- [141] Maw agreed that he could not say whether or not D4 was conscious when he arrived in the charge room. Nonetheless, the first act of care for D4 was Maw rolling him on to his side.
- [142] Prior to that, D5, D6 and Carberry did nothing to care for D4. Instead Carberry removed D4's shorts and searched them. Carberry was unable to explain why he did not immediately put D4 on to his side and admitted he should have. D6 said she was in shock and did not think of it, but admitted that she should have. D5 left the charge room after helping to move D4 across the charge room floor.
- [143] As said, D4 was initially motionless and unresponsive. He did not make a noise until one minute and 52 seconds after he hit the charge room floor. Kendall confirmed that, when he entered the charge room, D4 was not making any noises, was motionless and not responding to attempts to rouse him. When D4 began to mumble incoherently, Kendall instructed Maw that D4 had to go to hospital and exited the charge room.

[144] Maw and Carberry both thought at the time that D4 was extremely intoxicated, and did not consider any other possible explanation, including whether D4 was unconscious. Kendall, who also considered D4 to be extremely intoxicated, said that D4 may have been “lying doggo”, saying he always considered that possibility. However, he did not consider the possibility D4 had suffered a head injury.

[145] Maw saw blood on D4’s face and a fresh cut over his eye, as did Carberry. This did not cause them to consider any other explanation for D4’s presentation. Carberry admitted that his frequent experiences with intoxicated people may have made him become complacent.

[146] Maw said that many people they dealt with came in with minor cuts from either fighting with each other, or being heavily intoxicated and falling over. He admitted that the presence of blood suggested some force had occurred, and that he was aware of the risk that a person who fell down and hit their head could have a slow brain bleed and later die as a result. Despite that knowledge, it did not occur to him to consider that D4 might have had a head injury.

[147] Kendall saw blood in the corner of D4’s mouth, but this did not cause him to consider any other explanation other than intoxication. He admitted he did not ask anyone what had happened and even on reflection, did not think he should have:

*because at that time I had formed an opinion that [he] was a very drunk detainee. I had no information to hand and my experience told me that that was a common occurrence there, and I had no inkling that anything else had gone on.*

[148] Maw and Carberry said that D4’s change in presentation did not cause them to reflect on what else might have been causing his initial presentation. They both admitted that they should have tried to find out what had happened to D4 and that the change in D4’s presentation should have made them question their assumption that D4 was just heavily intoxicated. Despite his comments, Carberry denied that he failed, or may have failed, in his duty of care to D4.

[149] Carberry said that although an extremely intoxicated person was a high risk, he did not agree that they should go to hospital. He said they would usually do extra cell checks where a detainee was intoxicated, but admitted that the cell checks would be nothing more than a check that the person was breathing.

[150] Maw said that an extremely intoxicated person would not usually be sent to hospital because the hospital would only indicate whether the person was fit to detain in custody. When asked why D4 did not go to hospital, he said he was not aware that D4 had been unconscious, and had just assumed D4 was heavily intoxicated.

[151] Maw accepted that it is part of WAPOL policy that where a person has been motionless and unresponsive (whether or not they have been

unconscious), that person should go to hospital. He said that if he was presented with a similar situation again, he would ensure that the person was taken to hospital.

[152] The Commission acknowledges the care that Maw and Carberry did show D4, in rolling him onto his side, trying to rouse him, assisting him to sit and later stand, and cleaning his face. Nonetheless, in the Commission's opinion, Maw and Carberry failed in their duty of care by:

- assuming that D4 was merely intoxicated;
- failing to enquire why he was unrousable and motionless;
- failing to have him medically assessed; and
- failing to think critically about the rapid change in his demeanour and seek an explanation for it.

[153] Kendall said that an unconscious person, or a person who might be unconscious, would not be admitted into the lockup. When asked about intoxicated people, he responded:

*---Really drunk people present a huge problem for us because we have a duty of care to them. It's not always feasible to just take them to a hospital because we're tying up resources for an outside agency on something which may not necessarily require their - their attention. However, if someone was drunk to the extent that they can no longer look after themselves ... there's no way that I would let someone that was too drunk to look after themselves enter the lockup.*

*If someone is extremely intoxicated does that make them too drunk to look after themselves?---I think if you're to the point where you can't answer questions or stand up or sit up, then it's possible that you're at a point where if you were to vomit you couldn't roll over and clear your airway. So yeah, I would say that if you're that intoxicated then you could not look after yourself.*

(emphasis added)

[154] Kendall also said that if he was to make a cell check and found D4 to be unrousable, but snoring and breathing easily, then he would make a notation on the cell check of his condition. It thus appears that Kendall did not consider that an unrousable prisoner presented a possible medical emergency.

[155] Kendall originally ordered that D4 be taken to hospital. He later changed his mind, but could not remember why, except that at some point, he saw on the CCTV monitor that D4 was not as intoxicated as he had first assumed. He said he saw D4 standing and decided D4 could be admitted into custody without immediate medical attention. He said that he decided he could personally check on him later to make a final assessment. It did not apparently occur to him that D4 was not as drunk as he had originally

assumed and there must be some other explanation for his previous condition.

- [156] Kendall did not recall how he communicated his view that D4 no longer needed medical attention, believing he may have told one of the staff. The CCTV footage showed D5 telling Maw and Carberry that "[Kendall] is happy to lodge him".
- [157] The Commission notes that Kendall initially directed that D4 be taken to hospital and that he was not in possession of the full facts surrounding D4's condition. However, the Commission considers that, given his seniority and experience, Kendall breached his duty of care by failing to treat D4 as his top priority, failing to consider the possibility of a head injury, and failing to ask any questions of officers, despite seeing blood in D4's mouth and knowing that his original assessment of D4's condition was wrong.
- [158] D4 was transferred into the custody of Serco officers on the morning of 20 April 2013. Townsend testified that he checked on the welfare of each prisoner in the lockup that morning. He admitted that he did not notice the injury to D4's eye. Accordingly, the Commission's view is that whatever check he did make was inadequate given the extent of the injury to D4's eye.
- [159] Both Townsend and Radwell were within hearing distance of the Serco officer asking D4 about his eye injury and heard D4's response that he had been "bitten by a bug". Having watched the CCTV footage, Radwell was aware that D4 had not been bitten by a bug. Despite that, she did not tell the Serco officers what had happened to D4, who was now in their care. Radwell admitted she should have told the Serco officers what she had seen on the laptop, but said she had not thought of it at the time. Her failure to alert Serco to what had occurred to D4 was a breach of her duty of care.
- [160] Townsend said he did not recall the comments made by Radwell, but admitted knowing that Radwell was referring to D4 being injured in the scuffle with D5 when she commented to him about D4 being "remarkably unbruised". He said that it did not cause him to make any enquiries about the incident or check D4's medical condition before Serco departed the Broome Police Station.
- [161] It is the view of the Commission that Townsend, having viewed the footage of what had occurred the previous night, and having failed to ensure that the Serco officers were told what had happened to D4, also failed in his duty of care to D4.

### **Record Keeping**

- [162] Maw was responsible for admitting D4 into custody. He understood that the health and welfare questions, which form part of the electronic custody record, were designed to assist police to make an assessment of a

detainee and to provide Serco (who manage the prison) with the information that they need.

- [163] Maw understood that the question "have you received a blow to the head in the last 24 hours" was asked because it was known a person could suffer a blow 24 hours before but not manifest any signs of it until later. Maw could not explain why, as shown on the CCTV footage, he had not asked a number of the mandatory questions. He could not explain why he had recorded the answer "no" to the questions he had not asked.
- [164] Maw did not make any entry in the custody record that D4 had initially been motionless, that they had had difficulty in rousing him, or that there was a period of him being unresponsive, possibly unconscious. He admitted that, as the person entering the information, he was in control of what information Serco would receive. He recorded only that D4 had a small cut to his face.
- [165] Maw's failure to input relevant details into the custody record was unacceptable and could have had serious consequences for D4's health and wellbeing.
- [166] At the end of the shift, Kendall submitted a district awareness system note in relation to the incident with D4. This was later found to contain incorrect information, but the Commission accepts Kendall's explanation for it.

### **Unprofessional Behaviour**

- [167] There is no doubt that D5's verbal and physical abuse of D4 was unprofessional.
- [168] D6 was the only witness to the altercation between D5 and D4 in the sallyport and D5's comment of "you're a piece of shit" as he pushed D4 into the charge room. Under the WAPOL Code of Conduct, she should have reported D5, as should D5 himself. Neither of them did.
- [169] Maw and Carberry, as well as D6, were present for D5's later comments:
- "I had to leave cos [sic] I was going to kill this cunt";
  - "nice face, cunt"; and
  - "you punch like a faggot".
- [170] Carberry did not remember all of what D5 said to D4, but admitted that he had heard the comment about "punching like a faggot". He admitted it sounded aggressive, and that D5's body language looked "pretty aggressive". Carberry said that his comment to D4 that everything was being recorded was meant for D5, although he did not directly address D5 about his disrespectful comments.
- [171] Following Carberry's comment to D4, Maw then said: "That includes you, D5." Maw denied he was warning D5 he could get caught, and said that his comment was to tell D5 to tone down his behaviour.

[172] D6, although present, did not report D5's unprofessional behaviour. Neither Maw nor Carberry reported what D5 said to D4 as they did not think it was serious enough to be reported. Maw admitted the abuse was unprofessional, but said that he considered that the obligation to report unprofessional conduct only arose if the officer thought the conduct was serious enough or worthy of being reported. He admitted that it was difficult to report another officer when he worked with them. Failure to report unprofessional behaviour is itself unprofessional behaviour under the WAPOL Code of Conduct. Arguably, by not reporting D5, either formally or informally, Maw, Carberry and D6 were acting unprofessionally.

[173] It is the Commission's view that D5 should have been challenged more directly about his unacceptable behaviour by both Maw and Carberry. The Commission accepts that it would have been more difficult for D6 to criticise D5's behaviour as she was relatively junior.

[174] It was Superintendent Sutherland 's opinion that the officers had become:

*desensitised ... because it's so repetitive I think they would become desensitised to what's in front of them and I don't know how we could address that in some form, and actually other than just reminding them and this is what I'm saying about this review is that that would be a timely reminder.*

[175] While the Commission accepts the assessment that the officers had become desensitised, the Commission also supports Superintendent Sutherland's view that each officer had personal responsibility for their actions or inactions.

[176] Radwell denied making a joke about D4's explanation for his eye injury. She said she did not remember saying to Townsend, when Serco were not in the room: "[a]s soon as I realised the connection, 'the big bug'". Yet the CCTV footage shows that she said that, and that she pointed at the laptop as she did. Townsend denied knowing at the time that D4 had been assaulted by D5, and claimed he did not remember Radwell making a comment about a big bug.

[177] Even if Radwell's comment was not a joke, the Commission considers that she understated the seriousness of the incident, and the comment was indicative of the insensitive attitude with which she approached the incident she viewed on the CCTV footage. Although this is unprofessional behaviour, the Commission does not consider that this amounts to misconduct.

### **Supervision**

[178] Kendall was the shift Sergeant on 19 April 2013 and while he did take an interest in D4 lying motionless and unresponsive on the charge room floor, he did not view D4 as his top priority, only as one of several. Kendall had also seen blood in the corner of D4's mouth but he did not ask any questions about what had happened to D4. Instead, Kendall relied upon his experienced officers to deal with D4, whom he had assumed was

drunk, and focussed on his responsibilities in relation to assessing and assigning incoming jobs.

[179] Kendall initially directed that D4 be taken to hospital, but later revoked this decision on the basis of the change in D4's presentation. Kendall confirmed that it was the shift supervisor's responsibility to decide whether medical care is required following a use of force at the lockup, but said that making an informed assessment is dependent on being made aware of all the facts. Kendall testified that had he been told about the fight in the sallyport and D5 "dropping" a handcuffed D4 face-first on the charge room floor, he would have made different decisions at the time.

[180] Kendall admitted that the incident would have been a distressing event for D6, but he did not speak with her until the end of her shift, when he said: "how was tonight? It's a bit different working with D5 than it is working with me" and her reply was: "yes, it was". He said that he did not ask her how she was going or any other questions about what had happened because he assumed that if she had concerns, she would have come to him and raised them.

[181] It is the view of the Commission that Kendall should have asked questions of D6 in light of her first operational shift resulting in her partner being assaulted by a detainee, who ended up lying unresponsive on the charge room floor. If he had taken more time to speak with D6, it is possible that D6 would have provided more information about what had occurred between D5 and D4.

## **Commission Opinions as to Misconduct**

[182] The Commission forms opinions of misconduct in accordance with the CCC Act. Appendix 2 sets out the relevant provisions.

### **D5**

[183] It is the Commission's opinion that D5 used excessive force on D4 on several occasions, including:

- the punches to D4's head and upper body in the sallyport;
- the knee drops to D4's head in the sallyport;
- gripping onto D4's hair to assist in lifting D4 from the sallyport floor;
- throwing D4 through the charge room door while he was handcuffed behind his back; and
- dragging D4 across the charge room floor by his jaw.

It is the Commission's view that D5's conduct constitutes misconduct under section 4 of the CCC Act as it was a breach of the trust placed in a public officer by reason of his office or employment as a public officer, under section 4(d)(iii), and could constitute a common assault (section 313

of *The Criminal Code*), an offence under a written law as required by section 4(d)(v) of the CCC Act.

- [184] The Commission's view is that D5 did have an obligation to formally report his use of excessive force against D4 under the WAPOL Use of Force policy because he knew or ought to have known that D4 should have received medical treatment. The Commission also considers that D5 had an obligation to report his use of excessive force as unprofessional conduct under the WAPOL Code of Conduct. In the opinion of the Commission, the failure to report his use of excessive force, either under the protocols or as unprofessional conduct, constitutes misconduct as defined by sections 4(d)(iii) and (vi) of the CCC Act, because his conduct constitutes a breach of the trust in him as a police officer, and a disciplinary offence providing reasonable grounds for termination in accordance with the test in section 4(d)(vi) of the CCC Act.<sup>5</sup>
- [185] D5 also had a duty of care towards D4 and it is the Commission's opinion that he should have promptly advised Carberry, Maw and Kendall what had happened to D4 so that D4 could be afforded appropriate medical treatment. In the Commission's opinion, D5's failure to fulfil his duty of care towards D4 constitutes misconduct under the CCC Act as his failure amounts to a breach of the trust placed in him as a police officer, and to a disciplinary offence providing reasonable grounds for termination in accordance with the test in section 4(d)(vi) of the CCC Act.

## **D6**

- [186] D6 failed to remove D4's handcuffs when he was lying motionless and unresponsive, face down on the charge room floor, resulting in an excessive use of force. In the Commission's opinion, this conduct amounted to a breach of the trust placed in her as a police officer, but the Commission does not consider that her failure could constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi). Therefore, the Commission does not consider that D6's conduct in this respect amounts to misconduct under the CCC Act.
- [187] The Commission is of the view that D6 had an obligation to formally report D5's use of excessive force against D4 under the WAPOL Use of Force policy because she knew or ought to have known that D4 required medical assessment. Alternatively, the Commission considers that she had an obligation to report D5's use of excessive force as unprofessional conduct under the WAPOL Code of Conduct. This failure to report the use of excessive force upon D4 to a senior officer or any other officer was a breach of her duty of care to D4 and amounts to a breach of trust pursuant to section 4(d)(iii) but the Commission does not consider that her failure could constitute a disciplinary offence providing reasonable grounds for

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<sup>5</sup> Section 4(d)(vi) of the CCC Act provides that the test to be applied is whether the conduct constitutes or could constitute a disciplinary offence providing reasonable grounds for termination of a person's office under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is... a person whose office or employment could be terminated on the grounds of such conduct).

termination in accordance with section 4(d)(vi). Therefore, the Commission does not consider that D6's conduct in this respect amounts to misconduct under the CCC Act.

- [188] In the opinion of the Commission, D6's failure to report D5's verbal abuse of D4 as unprofessional conduct does not amount to misconduct in the circumstances. While this failure constitutes a breach of trust, as defined by section 4(d)(iii), it does not constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi) of the CCC Act. D6's failure to report D5's verbal abuse does not amount to misconduct under the CCC Act in the Commission's opinion, although it would amount to unprofessional conduct under the WAPOL Code of Conduct. It is the Commission's view that D6's conduct is mitigated by the fact that she was on her second shift in the Broome Police Station, she was junior in rank and shocked as a result of the incident.

### **First Class Constable Carberry**

- [189] Carberry failed to remove D4's handcuffs when he was lying motionless and unresponsive, face down on the charge room floor, resulting in an excessive use of force. Carberry frankly admitted that he ought to have responded differently. In the Commission's opinion, this conduct amounted to a breach of the trust placed in him as a police officer, but the Commission does not consider that his failure could constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi). Therefore, the Commission does not consider that Carberry's conduct in this respect amounts to misconduct under the CCC Act.
- [190] In the opinion of the Commission, Carberry failed to fulfil his duty of care to D4 by:
- assuming D4's level of intoxication, rather than enquiring why he was unresponsive on the charge room floor;
  - failing to move D4 into the recovery position to minimise the risk of positional asphyxia; and
  - failing to consider whether D4 required medical attention given his period of unresponsiveness.

This failure constitutes a breach of trust under section 4(d)(iii) but does not constitute a disciplinary offence providing reasonable grounds for termination under section 4(d)(vi) of the CCC Act. In the opinion of the Commission, Carberry's failure does not amount to misconduct under the CCC Act.

- [191] Under the WAPOL Code of Conduct, Carberry had an obligation to report D5's verbal abuse as unprofessional conduct. In the opinion of the Commission, this failure constitutes a breach of trust, as defined by section 4(d)(iii), but does not constitute a disciplinary offence providing reasonable grounds for termination, as defined by section 4(d)(vi) of the

CCC Act. Carberry's failure to report D5's verbal abuse does not amount to misconduct under the CCC Act, in the Commission's opinion, although it would amount to unprofessional conduct under the WAPOL Code of Conduct.

### **Senior Constable Maw**

[192] Maw failed to remove D4's handcuffs when he was lying motionless and unresponsive, face down on the charge room floor, resulting in an excessive use of force, although he did place D4 on his side. In the Commission's opinion, this failure to remove the handcuffs amounts to a breach of the trust placed in him as a police officer, but the Commission does not consider that his failure could constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi). The Commission does not consider that Maw's conduct in this respect amounts to misconduct under the CCC Act.

[193] The Commission considers Maw failed in his duty of care to D4 by:

- assuming that D4 was extremely intoxicated without asking questions about how he ended up on the charge room floor;
- failing to seek an explanation for the injury to D4's eye;
- failing to ask D4 questions relating to his health and welfare and recording answers to questions that were not asked;
- failing to record D4's period of unresponsiveness in the custody record; and
- failing to consider whether D4 needed a medical assessment before being admitted to the lockup.

Maw's conduct does not constitute misconduct as defined by sections 4(d)(iii) and (vi) of the CCC Act, because, although his conduct was a breach of the trust placed in him as a police officer, it did not amount to a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi). However, Maw's failure to ask D4 questions relating to his health and welfare and recording answers to questions that were not asked was unreasonable and constitutes reviewable police action.

[194] Under the WAPOL Code of Conduct, Maw had an obligation to report D5's verbal abuse as unprofessional conduct. In the opinion of the Commission, this failure constitutes a breach of trust, as defined by section 4(d)(iii), but does not constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi) of the CCC Act. Maw's failure to report D5's verbal abuse does not amount to misconduct under the CCC Act, in the Commission's opinion, but would amount to unprofessional conduct under the WAPOL Code of Conduct.

## **Sergeant Kendall**

[195] In the opinion of the Commission, Kendall as the shift Sergeant, had the ultimate responsibility for D4's care, but failed in his duty by:

- failing to make a motionless and apparently unrousable detainee his top priority;
- failing to make further enquiries after becoming aware that D4 was not as intoxicated as first thought;
- failing to consider the possibility D4 may have sustained a head injury;
- failing to ensure that D4 received medical care prior to being admitted to the lockup; and
- failing to ensure that D4's period of unresponsiveness was recorded in the custody record.

The Commission does not accept any suggestion that D5 was responsible for D4's welfare, to the exclusion of Kendall, or that D4's later appearance justified the reversal, without proper inquiry, of Kendall's initial assessment that he ought to go to hospital. In the opinion of the Commission, the above failures amount to a breach of the trust placed in Kendall by reason of his office as a public officer within the meaning of that term in section 4(d)(iii) of the CCC Act, but does not constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi) of the CCC Act. The Commission therefore, does not make any finding that Kendall engaged in misconduct.

## **Senior Sergeant Barwick**

[196] Barwick reviewed the CCTV footage of the 19 April 2013 incident on the afternoon of 22 April 2013, and immediately reported his concerns. It did not occur to Barwick to contact the prison to advise them of what he had seen. He explained that this:

*was now two days after [D4] had left our custody. I would have thought that when he was being released from my lockup, either my officers or Serco would have identified it and the prison has a medic I believe on duty at all times, so they should have picked that up as well. ... it didn't occur to me at all because I was involved in watching the video and then acting on what I'd seen immediately.*

[197] In the opinion of the Commission, this explanation was not unreasonable in the circumstances, and accordingly, the failure of Barwick to advise the prison of what he had seen on the CCTV footage does not constitute either serious misconduct or misconduct as defined by sections 3 and 4 of the CCC Act.

### **Senior Constable Radwell**

- [198] As she acknowledged, Radwell failed in her duty of care to D4 by allowing him to be released into the custody of Serco officers without advising them of what had occurred to D4. In the opinion of the Commission, her conduct constitutes a breach of trust within the meaning of that term in section 4(d)(iii) of the CCC Act. The Commission is not, by the finest of margins, satisfied that Radwell's conduct could constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi) of the CCC Act, and therefore, does not make any finding that Radwell engaged in misconduct.
- [199] Radwell provided the CCTV footage to Barwick, but failed to advise him of what she had seen. That action was unreasonable and constitutes reviewable police action.

### **Sergeant Townsend**

- [200] It is the opinion of the Commission that Townsend failed in his duty of care to D4 by allowing him to be released into the custody of Serco officers without advising them of what had happened to D4. His failure to do so constitutes misconduct as defined by sections 4(d)(iii) and (vi) of the CCC Act because his conduct constitutes a breach of the trust placed in him as a police officer and, being an officer of senior and supervisory rank, his conduct could constitute a disciplinary offence providing reasonable grounds for termination in accordance with section 4(d)(vi).
- [201] Townsend, being an officer of senior and supervisory rank, having seen part of the CCTV footage, had an obligation to review the footage in full and then to report what he had seen up the chain of command. In the Commission's opinion, his failure to do so constitutes misconduct as defined by sections 4(d)(iii) and (vi) of the CCC Act for the same reasons as above.

## **CHAPTER FOUR MISCONDUCT PREVENTION AND EDUCATION**

### **Background**

- [202] The preceding chapters of this report present the findings from Commission investigations into the two incidents that occurred on 29 March and 19 April 2013.
- [203] In the exercise of the Commission's prevention and education function this chapter highlights the broader issues arising with respect to its investigations and recommends actions for improvement.<sup>6</sup>
- [204] In this context the Commission acknowledges the challenges which arise for policing in remote and isolated parts of Western Australia.

### **The Context**

- [205] Police lockups are volatile environments providing opportunity for potential misconduct and presenting a unique set of misconduct risks. The pressures prevalent in lockup environments, for both officers and detainees, can lead to highly charged situations which can escalate quickly. In some cases, detainees may remain in the lockup for an extended period of time and they may also be alcohol or drug affected. In remote communities, police officers may work with less supervision. All of these circumstances can lead to increased risks which need to be properly managed.
- [206] Proper policies, training about those policies, appropriate supervision and management, appropriate reporting in accordance with policy and subsequent action to address conduct falling short of policy is essential.
- [207] WAPOL policies which are relevant to the Commission's investigations of the two incidents which are the subject of this report were not causative factors. Rather, the lack of compliance with those policies is the primary issue which has arisen.
- [208] There are, however, some areas of policy with respect to which the Commission makes recommendations.

### **Use of Force**

- [209] The investigation established that force was used in both incidents.
- [210] Relevant sections of the WAPOL Code of Conduct and the *WA Police Manual* set out the use of force requirements for WAPOL officers (see

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<sup>6</sup> *Corruption and Crime Commission Act 2003* (WA), s.17(2)(ab) and (d).

paragraphs [16] to [26]). The Broome Police Station is additionally governed by a set of specific Lockup Procedures.

- [211] These policies and procedures make no specific reference to handling violent detainees or incidents of violence, nor is reference made to the importance of de-escalating conflict by using tactical communication options such as negotiation and tactical disengagement.
- [212] De-escalation techniques ought to be highlighted in policies and procedures as the preferred method for scaling down any increasing tension and aggression within a lockup facility. The current Queensland Police Service Operational Procedures Manual includes specific reference and guidance for lockup staff for the management of violent detainees.

#### **Recommendation 1**

It is recommended that WAPOL policies and procedures which apply to the management of violent incidents in lockups, including local lockup manuals and the Use of Force Manual, be revised to provide guidance about de-escalating incidents in lockups.

Further, it is recommended that WAPOL ensure that de-escalation practices are supported by appropriate risk management measures and that appropriate ongoing training is provided.

### **Use of Force Reports**

- [213] As highlighted in paragraph [21] of this report, use of force is required by WAPOL policy to be reported if it causes "bodily injury requiring medical care".<sup>7</sup>
- [214] If medical care is not provided or thought to be necessary, this may lead to a failure by police officers to make a formal use of force report in relation to an incident where one should be made. A proper assessment of whether medical care is or is not required is therefore a critical part of the proper application of this policy.
- [215] As the second incident illustrates, not all use of force matters required by the current policy to be reported are in fact reported.

#### **Recommendation 2**

It is recommended that appropriate ongoing training to WAPOL officers is provided regarding their obligations to make a use of force report and to report excessive force.

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<sup>7</sup> And also if weapons involving projectiles are discharged or used for cover.

## **Duty of Care to Provide Medical Attention**

- [216] Chapter Three illustrated that the officers on duty at the Broome Lockup underestimated D4's need for medical attention; it was assumed D4 was intoxicated, though he may have been unconscious or stunned (see paragraph [141]).
- [217] WAPOL policy outlines an officer's duty of care to provide medical attention to detainees as required. This policy is considered by the Commission to be sufficient but the application of it requires independent medical opinion.
- [218] Police officers are trained in first aid and are expected to be able to assess whether detainees require medical attention. However they are not medically trained and therefore, there will be limitations to the screening of detainees.
- [219] Some areas of the South Australian and international (including New Zealand) jurisdictions have adopted the role of custody nurses. In that regard, the Commission acknowledges that Perth Watch House avails itself of medical personnel. However, this practice does not extend to regional lockups.
- [220] The Commission also notes that best practice literature cites drunkenness as a reason for detainees not receiving a thorough risk assessment.
- [221] The lack of medical attention in D4's case did not occur because of a lack of guidance from WAPOL manuals, but from an assumption that D4 was merely extremely intoxicated. However, even had he been so intoxicated as to be unresponsive, D4 should have been taken to hospital under the WAPOL guidelines. D4's situation highlighted a divergence of views among police witnesses as to whether it was necessary to send an intoxicated person to hospital and the practicality and value of doing so. D4's life was potentially at risk because he did not receive the medical attention he should reasonably have expected.
- [222] The consequence of unconscious or stunned detainees being wrongly assessed as very intoxicated could be fatal. It is therefore, imperative that all police officers have the same level of awareness to properly assess a detainee's condition. Certainly, it is the Commission's view that officers should not admit an unresponsive detainee to the lockup without a medical assessment.
- [223] In that regard, it follows that the proper recording and communication of information about detainees is particularly important and, as emphasised by the Royal Commission into Aboriginal Deaths in Custody, the need for a consistent process around gathering and communicating knowledge about a detainee's vulnerabilities is paramount, whether of indigenous origin or not.
- [224] The Commission makes the following recommendation in relation to the medical treatment of detainees in lockups:

### **Recommendation 3**

The Commission recommends that specially trained professionals, such as custody doctors and nurses, be engaged by WAPOL to assess the medical needs of vulnerable detainees and detainees whose physical condition is unable to be determined by police officers.

The Commission acknowledges the difficulty this may pose with respect to regional lockups and recommends that WAPOL take necessary action to explore reasonable alternatives to attempt to achieve the same standard of medical care for detainees at lockups throughout Western Australia.

## **Duty of Care in Police Lockups**

- [225] The WAPOL Lockup Manual is clear in its expectations of WAPOL officers and states that every detainee is to be treated in a "humane and dignified manner" and that "no unnecessary restraint is to be used on a detainee".
- [226] The *WA Police Manual* provides that "custodial care begins from the moment a person is taken into police custody as a detainee or arrested person".
- [227] The stripping of D1 and the treatment of an unresponsive D4 highlight duty of care issues and as outlined in other parts of this report, the Commission's opinion is that, with respect to both D1 and D4, WAPOL officers did not appropriately discharge their duty of care.
- [228] WAPOL policy regarding the management of detainees at risk of self-harm states that where a real risk of self-harm is assessed, and if the detainee's clothing could be used for self-harm, it can be removed. In the case of D1, it is not clear on what basis he was assessed as a real risk of self-harm or if that assessment was properly made.
- [229] The Commission makes the following recommendation in relation to the treatment of and duty of care owed to detainees:

### **Recommendation 4**

The Commission recommends that appropriate ongoing training for WAPOL lockup staff is provided to ensure that all elements of their duty of care, both medical and humanitarian, are adequately met for all detainees.

## Supervision

- [230] Responsibilities around supervision were explored in detail by WAPOL, who dedicated considerable resources to review these in 2002.<sup>8</sup> This review acknowledged that "effective staff supervision underpins [WAPOL's] obligation to provide quality policing to the community", and that "inadequate supervision can allow inefficiency and even corruption to flourish".
- [231] While acknowledging WAPOL's attentiveness to the issue of supervision at a corporate level, the supervision at the local level requires strengthening as exemplified by each incident at the Broome Lockup.
- [232] Supervision is linked to the issue of accountability, including responsibility to report and record incidents. While a level of personal responsibility is central to an officer's role, as stated by Superintendent Sutherland, supervision remains a critical part of ensuring professional accountability in preventing misconduct.
- [233] Lines of reporting and accountability should be clearly detailed in the *WA Police Manual* and local procedures so that the chain of command is maintained at each stage of the detention process, including within and between shifts.
- [234] Supervision should include independent inspections from senior non-lockup staff to provide independent and objective oversight of the detention process.
- [235] The Commission makes the following recommendation concerning the supervision of lockups by WAPOL:

### **Recommendation 5**

It is recommended that WAPOL critically assess the roles of supervisors within lockups with a view to clearly defining the supervisory responsibilities, duties and accountabilities of each rank and ensuring that supervisors are properly aware of all managerial obligations attached to their rank.

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<sup>8</sup> Management Audit Unit 2002. "Doing it right", a review of supervision. *Professional Standards Portfolio, Western Australia Police, May 2002.*



## **APPENDICES**



**APPENDIX 1**  
**Role of the Commission**



## Role of the Commission

- [236] The main purposes of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), which came into effect on 1 January 2004, are to:
- (a) *combat and reduce the incidence of organised crime; and*
  - (b) *improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*<sup>9</sup>
- [237] Pursuant to section 7B(1) of the CCC Act, the above purposes are to be achieved primarily by establishing a standing or permanent commission of inquiry, the Corruption and Crime Commission ("the Commission"). The Commission is a body corporate with perpetual succession and so has a continuing existence.<sup>10</sup>
- [238] Section 7B(3) of the CCC Act states that the purpose of the CCC Act in relation to improving integrity and reducing the incidence of misconduct in the public sector is to be achieved by the Commission helping "public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct".<sup>11</sup>
- [239] Pursuant to section 16 of the CCC Act, the Commission has two functions, which are performed by the Commissioner in the name of the Commission.<sup>12</sup> Whilst the Commissioner may delegate some powers to Commission officers, the most important powers are non-delegable.<sup>13</sup> These include the power: to conduct examinations on oath, or by affirmation; to approve an assumed identity; to authorise an integrity testing programme; to make recommendations; to make an exceptional powers finding; and the powers of the Commission under the *Surveillance Devices Act 1998*.
- [240] First, the Commission has a function of helping to prevent misconduct. The CCC Act refers to this as the prevention and education function.<sup>14</sup>
- [241] One way in which the Commission performs its prevention and education function is by conducting reviews or inquiries, or analysing systems used within public authorities to prevent misconduct, to assess the capacity of public authorities to deal effectively and appropriately with misconduct, that is, to assess their capacity to prevent, identify and manage misconduct. Also, the Commission by providing advice and training to

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<sup>9</sup> Section 7A of the *Corruption and Crime Commission Act 2003*.

<sup>10</sup> *Ibid*, section 8.

<sup>11</sup> "Misconduct" is defined by section 4 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"). "Serious misconduct" is defined by section 3 of the CCC Act as being misconduct of a kind described in sections 4(a), (b) or (c) of the CCC Act.

<sup>12</sup> Sections 9(1) and 9(2) of the *Corruption and Crime Commission Act 2003*.

<sup>13</sup> *Ibid*, section 185.

<sup>14</sup> *Ibid*, section 17(1).

public authorities generally increases the capacity of those authorities to prevent misconduct.<sup>15</sup> Other ways include: analysing intelligence gathered in support of Commission investigations, and the results of investigations; providing information to, consulting with, and making recommendations to public authorities; providing information to the general community; and by reporting on ways to prevent misconduct.<sup>16</sup>

- [242] Secondly, the Commission has a function “to ensure that an allegation about, or information or matter involving, misconduct [by public officers] is dealt with in an appropriate way”. The CCC Act refers to this as the misconduct function.<sup>17</sup> An allegation can be made to the Commission or made on its own proposition. The term “public officer” is defined by section 3 of the CCC Act by reference to the definition given by section 1 of *The Criminal Code*. The term “public officer” includes: Ministers of the Crown; members of either House of the Parliament of Western Australia (“the Parliament”); members, officers or employees of any authority, board, local government or council of a local government; police officers; persons holding office under, or employed by, the State of Western Australia, whether for remuneration or not; and public service officers or employees within the meaning of the *Public Sector Management Act 1994*.
- [243] One way in which the Commission performs its misconduct function is by making recommendations and furnishing reports on the outcome of investigations.<sup>18</sup> As the Commission is a permanent body, unlike an *ad hoc* commission of inquiry, it has the capacity to follow-up and report upon what action has been taken in relation to its recommendations. Also, as a consequence of an investigation, criminal charges can be laid by Commission “authorised officers” pursuant to section 184 of the CCC Act,<sup>19</sup> and the Commission may prosecute those charges in the Magistrates Courts of Western Australia or refer them to and liaise with the Director of Public Prosecutions for prosecution on indictment in the District Court of Western Australia or Supreme Court of Western Australia.<sup>20</sup>
- [244] Other ways that the Commission performs its misconduct functions include: receiving and initiating allegations of misconduct; investigating or taking other action if it is appropriate to do so, or referring allegations or matters to appropriate authorities so that they can take action themselves or in cooperation with the Commission; and monitoring the way in which

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<sup>15</sup> *Ibid*, section 17(2)(cb).

<sup>16</sup> *Ibid*, section 17.

<sup>17</sup> *Ibid*, section 18(1).

<sup>18</sup> *Ibid*, section 18(2)(f).

<sup>19</sup> Also, pursuant to Part III of the *Police Act 1892* Corruption and Crime Commission officers can be appointed as Special Constables, who have “all of the powers, duties and obligations that a police officer or a member of the Police Force has under any written law ...”.

<sup>20</sup> Whilst criminal prosecutions may be a consequence of an investigation they are not part of the “core business” of the Corruption and Crime Commission and are incidental to its statutory prevention and education and misconduct functions.

appropriate authorities take action in relation to allegations and matters that are referred to them by the Commission.<sup>21</sup>

- [245] The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, conduct searches, compel the production of documents and other things, compel attendance at examinations and to compel responses to questions on oath, or by affirmation, in examinations conducted by the Commission.
- [246] Section 84 of the CCC Act provides that the Commission “may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct”.
- [247] The Commission may include in such a report, statements as to any of its assessments, opinions and recommendations and its reasons for them (see paragraph [262] of Appendix 2 of this report).<sup>22</sup>
- [248] A Commission report, prepared under section 84 of the CCC Act, may be laid before each House of Parliament<sup>23</sup> or, if Parliament is not sitting, the Commission may transmit its report to the Clerk of each House and the report is thereupon deemed to have been laid before each House – that is to say, tabled in the Parliament.<sup>24</sup>
- [249] This report has been prepared and presented pursuant to sections 84 and 93 of the CCC Act. The decision to report on the investigation by the Commission of alleged public sector misconduct in relation to incidents that occurred at Broome Police Station on 29 March and 19 April 2013, during the arrest and detention of D1 and D4 respectively, involving D5, goes to its statutory purpose of improving continuously the integrity of, and reducing the incidence of misconduct in, the public sector. Reporting on the investigation is also necessary in the public interest to enable informed action to address the misconduct risks identified by the circumstances revealed in this report.
- [250] The Commission takes decisions about releasing information to the public very seriously. Consistent with the considerations to which it is required to have regard in deciding whether or not an examination (hearing) should be conducted in public, when considering the disclosure of information in a report the Commission takes into account the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.<sup>25</sup>

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<sup>21</sup> Section 18 of the *Corruption and Crime Commission Act 2003*.

<sup>22</sup> *Ibid*, section 84(3).

<sup>23</sup> *Ibid*, section 84(4).

<sup>24</sup> *Ibid*, section 93.

<sup>25</sup> Although the *Corruption and Crime Commission Act 2003* refers to examinations (of persons for the purpose of obtaining information to advance an investigation), there is a general tendency for those examinations to be described by the media as “hearings”. Examinations or “hearings” conducted by the Corruption and Crime Commission are compulsory examinations of persons before it.



**APPENDIX 2**  
**Commission Opinions of Misconduct**



# Commission Opinions of Misconduct

## Definition of Misconduct

[251] The term “misconduct” has a particular and specific meaning pursuant to sections 3 and 4 of the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC Act states that:

*Misconduct occurs if —*

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or*
- (d) *a public officer engages in conduct that —*
  - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
  - (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
  - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
  - (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

*and constitutes or could constitute —*

- (v) *an offence against the “Statutory Corporations (Liability of Directors) Act 1996” or any other written law; or*
- (vi) *a disciplinary offence providing reasonable grounds for the termination of a person’s office or*

*employment as a public service officer under the “Public Sector Management Act 1994” (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).*

- [252] Misconduct, as defined by section 4 of the CCC Act applies only to the conduct of public officers (see paragraph [242] of Appendix 1 of this report).
- [253] In section 3 of the CCC Act, “**serious misconduct**” is defined as “misconduct of a kind described in section 4(a), (b) or (c)”.
- [254] Misconduct of a kind described by sections 4(d)(i) – (iv) must not only involve the type of conduct described there, but must also be serious enough to meet the criteria set out in sections 4(d)(v) or (vi).
- [255] Section 4(d)(v) says that the conduct must be serious enough so that it constitutes, or could constitute, an offence against a written law.
- [256] Section 4(d)(vi) is more complex. It says that the conduct must be serious enough so that it constitutes or could constitute “a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”.
- [257] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, and subject to the *Public Sector Management Act 1994* (“the PSM Act”), the test is notional – that is, although it cannot then apply directly, the Commission must assess the public officer’s conduct against the objective criteria set out in the PSM Act, as if that person were a member of the public service.
- [258] In Cox v Corruption and Crime Commission [2008] WASCA 199, Martin CJ at [63] stated that:

*... [s]ection 4(d)(vi) [of the CCC Act] expressly provides that the definition of “misconduct” applies whether or not the public officer is a public service officer whose employment could be terminated on the grounds of a disciplinary offence under the PSMA [the PSM Act]. It is therefore clear that the conduct defined as “misconduct” by s 4(d) of the [CCC] Act is that which would provide reasonable grounds for termination if the public officer was liable to termination under the PSMA, irrespective of whether or not the public officer is so liable. In the case of a public officer who is not a public service officer covered by the PSMA, the definition imposes a hypothetical standard of conduct – the hypothesis being that the officer could in fact be liable to dismissal under the terms of the PSMA.*

Steytler P at [116] stated that:

*... there is nothing in s 4(d)(vi) of the CCC Act that requires the public officer in question to have been a public service officer under the PSM Act.*

*That is made plain by the words “(whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”. It is consequently irrelevant whether Dr Cox was, or was not, a public service officer for the purpose of the PSM Act.*

- [259] Further, the Commission refers to and incorporates into this report paragraphs [28] to [30] inclusive, of the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”), tabled in the Parliament on 21 October 2010.<sup>26</sup>

## **Publication of an Opinion**

- [260] The Commission fully appreciates that any expression of opinion by it in a published report that a public officer has engaged in misconduct is serious. The publication of such an opinion or any adverse matter against a public officer, or any other person, may have serious consequences for the public officer, or person, and their reputation.
- [261] The Commission is careful to bear these matters in mind, when forming opinions, when conducting investigations, reviews and inquiries, and when publishing the results of investigations, reviews and inquiries.
- [262] It should be noted, however, that as a standing or permanent commission of inquiry, section 7B(1) of the CCC Act, which, *inter alia*, conducts administrative investigations, the Commission does not determine whether any person has committed a criminal or disciplinary offence. The opinions of the Commission are confined to whether or not a public officer has engaged in misconduct according to the particular definition pursuant to sections 3 and 4 of the CCC Act.

## **Balance of Probabilities**

- [263] The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation, and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.
- [264] The balance of probabilities is defined as:

*[t]he weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the*

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<sup>26</sup> Sections 83-86 of the *Public Sector Management Act 1994* (“the PSM Act”) were deleted by Amendment No. 39 of 2010 s. 99. Any reference to these sections in the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”) should be disregarded. In addition, parts of paragraphs [31]-[38] of the Special Report are no longer applicable as a result of other amendments made to the PSM Act by Amendment No. 39 of 2010.

*balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability ...*<sup>27</sup>

[265] The balance of probabilities is a standard used by courts when considering civil matters. It is a standard which is less than the criminal standard of beyond reasonable doubt. This was confirmed by the High Court in a unanimous judgment in Rejfeek v McElroy (1965) 112 CLR 517, as detailed below:

*... The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ...*

[266] Furthermore, the Commission refers to and incorporates into this report paragraphs [55]-[57] of its Special Report.

### **Section 4(c), Section 23(1) and Section 23(2) of the *Corruption and Crime Commission Act 2003***

[267] Section 23(1) of the CCC Act prohibits the Commission from publishing or reporting a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence. However, section 23(1) of the CCC Act allows the Commission to publish or report that a person has been convicted of, or pleaded guilty to, a criminal offence or disciplinary offence. In such a case the Commission would be reporting a fact, not its opinion, as to that. Further, section 23(2) of the CCC Act provides that an opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

(emphasis added)

[268] In the Commission's opinion section 23(2) allows the Commission to publish or report a finding or an opinion that the relevant conduct constitutes misconduct under section 4(c) of the CCC Act without the person having been convicted of an offence punishable by two or more years' imprisonment. Acknowledging that whether a criminal offence has been committed can only be determined by a court and that the elements of the offence must be proved beyond reasonable doubt, and further acknowledging that the Commission is not a court, does not make legally binding determinations and may form an opinion as to misconduct on the balance of probabilities, the Commission, in expressing and reporting an opinion that the misconduct constitutes serious misconduct under section

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<sup>27</sup> Butterworths *Concise Australian Legal Dictionary* (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

4(c) of the CCC Act is expressing and reporting an opinion that facts, if proved beyond a reasonable doubt in a court, could satisfy the elements of an offence, not that a particular person has committed an offence.

### **Expression of an Opinion**

[269] The Commission has borne all of the foregoing considerations (as set out in paragraphs [260]-[268] above) in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.

