

LECC

Law Enforcement
Conduct Commission

OPERATION FARO

REPORT TO PARLIAMENT PURSUANT TO SECTION
132 *LAW ENFORCEMENT CONDUCT COMMISSION
ACT 2016*

December 2021

LECC

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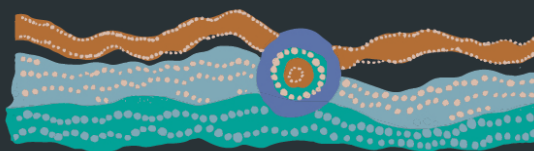
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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



Office of the Chief Commissioner

13 December 2021

The Hon Matthew Ryan Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker,

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016* ('the Act'), the Commission hereby furnishes to you a Report in relation to its investigation in Operation Faro.

Pursuant to section 142(2) of the Act, I recommend that this Report be made public immediately.

Yours sincerely,



The Hon R O Blanch AM QC
Chief Commissioner

Table of Contents

1. Introduction.....	1
2. The Commission’s Statutory Functions	1
3. The Commission’s Investigation.....	6
4. Summary of Evidence.....	8
5. Analysis of Evidence	41
6. Submissions	48
7. Findings	49
8. Affected Persons	52
9. Recommendations	53

1. Introduction

The Law Enforcement Conduct Commission's ('the Commission') Operation Faro arose from a complaint made by Ms FAR10 on 11 September 2020 in regard to the degree of force used by NSW police officers Senior Constable FAR1 and Probationary Constable FAR2, in the arrest of Mr FAR3 at the entrance to LOC1 on 27 January 2020 at about 2:15 am.

Following his arrest Mr FAR3 was conveyed to LAC1 where he was charged with having committed a number of offences, these being assault police, resist arrest, offensive behaviour and remain on enclosed lands. Mr FAR3 initially pleaded not guilty to all charges. When the matter came before the Local Court for hearing on 9 September 2020, following legal argument, the Magistrate ruled that in handcuffing Mr FAR3 at the scene, police had failed to comply with section 202 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and his arrest was therefore unlawful. Police subsequently withdrew all but two charges of offensive behaviour, to which Mr FAR3 pleaded guilty. Although these offences were proved, the Magistrate declined to record a conviction and they were dismissed. Police were ordered to pay Mr FAR3's legal costs.

On 16 September 2020, the Commission notified the NSW Police Force ('NSWPF') that pursuant to section 44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* ('LECC Act'), the Commission was taking over the investigation of the complaint.

2. The Commission's Statutory Functions

2.1. Section 26 of the LECC Act lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration.

2.2. Section 10 of the LECC Act defines "*serious misconduct*":

(1) *For the purposes of this Act, serious misconduct means any one of the following:*

(a) *conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,*

- (b) *a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good reputation of the NSW Police Force or the Crime Commission,*
- (c) *corrupt conduct of a police officer, administrative employee or Crime Commission officer.*

(2) *In this section:*

***serious disciplinary action** against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.*

***serious offence** means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.*

2.3. “Officer maladministration” and “agency maladministration” are both defined in section 11 of the LECC Act. “Officer maladministration” is defined in section 11(2) in these terms:

(2) ***Officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- (a) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (b) *arises, wholly or in part, from improper motives, or*
- (c) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (d) *arises, wholly or in part, from a mistake of law or fact, or*
- (e) *is conduct of a kind for which reasons should have (but have not) been given.*

2.4. The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or

improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

2.5. The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61(a).

2.6. Section 29 provides the authority for the Commission to make findings and express opinions:

(1) *The Commission may:*

(a) *make findings, and*

(b) *form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:*

(i) *has or may have occurred, or*

(ii) *is or may be occurring, or*

(iii) *is or may be about to occur, or*

(iv) *is likely to occur, and*

(c) *form opinions as to:*

(i) *whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*

(ii) *whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and*

(d) *make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and*

(e) *make recommendations for the taking of other action that the Commission considers should be taken in relation to*

the subject-matter or opinions or the results of any such investigations.

- (2) Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.*
- (3) The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (4) An opinion or finding that a person has engaged, is engaging or is about to engage in:*
 - (a) officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or*
 - (b) specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (5) Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*
- (6) The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.*
- (7) The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.*

2.7. This report is made pursuant to Part 11 of the LECC Act. Section 132(1) provides that the Commission may prepare reports *“in relation to any matter that has been or is the subject of investigation under Part 6”*.

2.8. Section 133 (Content of reports to Parliament) provides that:

(1) *The Commission is authorised to include in a report under section 132:*

(a) *statements as to any of the findings, opinions and recommendations of the Commission, and*

(b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*

(2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

(a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary infringement,*

(c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*

(d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*

(e) *the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

Note. See section 29(4) in relation to the Commission's opinion.

(3) *An “affected person” is a person against whom, in the Commission's opinion, substantial allegations have been made in*

the course of or in connection with the investigation (including examination) concerned.

- (4) *Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

- 2.9. In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.¹ Accordingly, findings can form the basis of opinions and recommendations, even if they do not reach the standard of beyond reasonable doubt.
- 2.10. The Commission has made a determination to protect the identities of all persons involved. Accordingly, all persons/places will be referred to by codenames in this report. There is to be no publication of the name or image of any of the codenamed persons/places in relation to the evidence given in Operation Faro or included in this report without further order of the Commission.

3. The Commission's Investigation

- 3.1 The initial scope and purpose of the Commission's investigation in Operation Faro was to investigate allegations that on 27 January 2020, members of the NSWPF unlawfully arrested and used excessive force against Mr FAR3. On 17 May 2021, the Commission expanded the scope and purpose of its investigation to also investigate the adequacy of the systems of the NSWPF for the recording, monitoring and review of taser use by police officers since 27 January 2020.
- 3.2 In furtherance of its investigation, the Commission served notices issued pursuant to section 55 of the LECC Act upon the NSWPF and the Registrar of the Local Court, Downing Centre, Sydney in connection with the police prosecution of Mr FAR3, and it subsequently reviewed the material produced in response.
- 3.3 The Commission also reviewed the relevant policies and procedures from the NSWPF and provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA').

¹ *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

3.4 On 11 March 2021, the Commission decided that it would hold examinations and that, because of the nature of the allegations and after taking into account the factors set out in section 63 of the LECC Act, those examinations would be held in private.

3.5 The Chief Commissioner of the Commission, the Hon R O Blanch AM QC, held private examinations on 16 March 2021, 17 March 2021 and 24 May 2021.

3.6 The scope and purpose of the examinations was initially:

To investigate allegations that on 27 January 2020, members of the NSWPF unlawfully arrested and used excessive force against Mr [FAR3] on 17 May 2021.

However, this was later expanded to also include the following:

To investigate the adequacy of the systems of the NSWPF for the recording, monitoring and review of taser use by police officers since 27 January 2020.

3.7 Pursuant to section 64 of the LECC Act, Mr Robert Tumeth was appointed as Counsel Assisting the Commission in Operation Faro.

3.8 The persons summoned to be examined were:

- Senior Constable FAR1
- Constable FAR2
- Sergeant FAR4
- Sergeant FAR5
- Inspector FAR6

3.9 Authorisation was sought and granted by the Chief Commissioner for all of the witnesses to be represented by Australian legal practitioners. Below is a summary of the evidence given by each witness.

3.10 All of the witnesses requested and were granted a declaration pursuant to section 75 of the LECC Act, to the effect that all evidence adduced would be regarded as having been given under objection by the witness.

- 3.11 Prior to the commencement of evidence being taken, Counsel for the Commissioner of Police sought and was granted leave to appear before the Commission, and handed up written submissions going solely to the issue of the application of handcuffs by police officers. Counsel did not seek to participate in the private examinations and was granted leave to be excused. The content of these submissions is dealt with later in the Commission's report.

4. Summary of Evidence

4.1 Evidence of Senior Constable FAR1

Senior Constable FAR1 was called to give evidence before the Commission in a private examination on 17 March 2021. In summary, his evidence was as follows:

- (1) Officer FAR1 joined the NSWPF in 2013 and obtained the rank of Senior Constable in 2018.
- (2) Officer FAR1 recalled the incident involving the arrest of Mr FAR3 in the early hours of the morning on 27 January 2020 at the grounds of LOC1.
- (3) Subsequently, Mr FAR3 was conveyed to LAC1 where he was charged with two counts of Assault Police, one count of Resist Arrest, three counts of Offensive Behaviour and one count of Remain on Enclosed Lands. In the course of this process a COPS Event was created on the NSWPF database.²
- (4) The COPS Event contained a narrative of the incident involving Mr FAR3. This was created by Officer FAR2, with Officer FAR1 assisting by discussing the events as they unfolded.
- (5) For the purpose of assisting in compiling the history of the events, Officer FAR1 refreshed his memory from his Body Worn Video ('BWV') footage, which was standard practice.
- (6) For the purpose of the prosecution of Mr FAR3, a NSW Police Fact Sheet was prepared by Officer FAR2,³ again assisted by Officer FAR1

² Ex DWR1C.

³ Ex DWR2C.

in the same way as he did in regard to the Narrative in the COPS Event. At the time of assisting Officer FAR2 in the preparation of these two documents, Officer FAR1 had not viewed any other BWV or the TaserCam footage.

- (7) For the purpose of the prosecution of Mr FAR3, Officer FAR1 prepared a typed statement dated 2 February 2020.⁴ In doing so he also had access to BWV footage from a security guard who had been present during the interaction between Mr FAR3 and police. He did not have access to any other statements. Officer FAR1's statement was tendered in evidence before the Commission.
- (8) In regard to the circumstances surrounding the arrest of Mr FAR3, Officer FAR1 said he commenced work with Officer FAR2 at 6 pm on 26 January 2020, with the shift running until 6 am on 27 January 2020. It had been a busier shift than usual because of Australia Day celebrations.
- (9) They had just finished attending a domestic violence incident when they were flagged down in LOC2 by a security guard, Mr FAR7. Mr FAR7 told Officer FAR1 that a man who had been behaving aggressively earlier in the evening had gone onto LOC1 Trust land and fallen asleep under a tree. The land was not public, but private property.
- (10) Shortly afterwards, Sergeant FAR4 arrived. She had been attending another job and pulled over when she saw Officer FAR1's police van stop. The Sergeant was the shift supervisor.
- (11) Officer FAR1 was wearing his BWC, but did not immediately activate it upon arrival at the scene. The officer said there were no specific guidelines as to when police should activate their BWV. It was a tool for gathering evidence or to protect the police. Officer FAR1 said that he used his BWV mostly every time he interacted with someone. He did not think there had been a time when multiple officers had attended a job and none of them had turned on their BWV. He also said it was not the case that the most senior officers attending an incident had the responsibility of telling other officers to activate their BWV.

⁴ Ex DWR3C.

- (12) An extract of the BWV taken by the security guard was played to Officer FAR1 and tendered in evidence.⁵ He agreed that he had previously seen the video a long time ago. Initially, the video was shot some distance away from Mr FAR3. The officer agreed the video showed Mr FAR3 seated on the ground, leaning up against a tree, with a police torch being shone on his face. Although the handcuffing of Mr FAR3 could not be seen clearly, or Mr FAR3's reaction to this, Officer FAR1 agreed that you could hear the ratchet closing on the handcuffs. Subsequently, Mr FAR3 was sprayed with oleoresin spray ('OC spray') by Officer FAR1, and the officer agreed that this was not clearly captured on the video, but Mr FAR3's reaction to this was visible. Finally, Officer FAR1 agreed the video did not capture Officer FAR2 place her boot on top of Mr FAR3's foot, but his reaction to this by kicking Officer FAR1 in the face, knocking his glasses off, could be seen.
- (13) After Mr FAR3 was sprayed with OC spray, the security guard moved in closer. Officer FAR1 agreed the video showed Mr FAR3 sitting on the ground, leaning back against the tree with his legs out in front but not kicking around, the handcuffs applied to the front of Mr FAR3 were clearly visible and it was also apparent that Mr FAR3 was in distress from the OC spray. Mr FAR3 had his arms up in front of him against his chest.
- (14) Officer FAR1 agreed the video recorded him warning Mr FAR3 that if he lashed out again he would be tasered. He further agreed the video showed Mr FAR3 swivel his torso a little bit, tense the muscles in his arms and whilst looking at the officer, yell '*I've done fucking*' at which time the taser is discharged.⁶
- (15) An extract of the BWV taken by Officer FAR1 was played and tendered as an exhibit.⁷ The officer was then taken through the events that it had captured. Initially, Mr FAR3 had his eyes closed. In an attempt to rouse him, Officer FAR2 pinched Mr FAR3's earlobe on three occasions, during which Mr FAR3 appeared to keep his eyes closed. Each time Mr FAR3 brushed Officer FAR2's hand away with increasing force. Officer FAR1 described these actions of Mr FAR3 as '*lashing out*' and on a scale of aggressiveness of between 1 and 10, he placed it in the middle.

⁵ Ex DWR4C.

⁶ Examination DWR at T14.

⁷ Ex DWR5C.

- (16) Officer FAR1 agreed that he was familiar with the NSWPF Tactical Operations Model. He agreed that one of the things the Model stressed was that the ultimate goal was control of the situation. In assessing a situation, Officer FAR1 agreed the Model contained a number of options to assist police when assessing a situation. Police presence and communication with a subject were two options. However, in the case of Mr FAR3, from his behaviour, it was apparent that he was affected by alcohol or drugs to a significant degree and did not comprehend his surroundings, and therefore the options of police presence and communication were not going to work.
- (17) Officer FAR1 agreed that another option referred to in the Tactical Operations Model was for police to de-escalate a situation, and that although this could mean a number of things, he agreed that one example would be for an officer to do no more than stand back. Indeed, earlier in his encounter with Mr FAR3, Officer FAR1 agreed that when Mr FAR3 pushed his hand aggressively towards him, he had taken a step back to *'de-escalate the situation'*.⁸
- (18) Officer FAR1 agreed that prior to Mr FAR3 being handcuffed, given his behaviour up to that point, an option that was available was for police to take a step back and call for backup and drag him out.⁹
- (19) Officer FAR1 agreed that from the video footage, it appeared Mr FAR3 only became more agitated when police touched him, either to awaken or move him.¹⁰ Apart from these occasions Mr FAR3 was passive, if not asleep. The physical contact by police provoked not only resistance from Mr FAR3 but also swearing.
- (20) Officer FAR1 said it was Officer FAR4 who suggested Mr FAR3 be handcuffed, but it was a mutual decision with himself. Officer FAR1 agreed his BWV showed that at the time Mr FAR3 was being handcuffed, he had his hands up, pulling them into his chest and this made it more difficult for the handcuffs to be applied. He was not, however, striking out in any physical way with his arms.¹¹

⁸ Examination DWR at T20.

⁹ Ibid and at T21.

¹⁰ Examination at T18

¹¹ Examination DWR at T19.

- (21) Officer FAR1 agreed the decision to handcuff Mr FAR3 was because he and the other officers present had heard from the security guard that earlier that night Mr FAR3 had thrown an object at a passing car, and from his behaviour since their arrival at the scene, whilst Mr FAR3 was not being particularly aggressive towards police, Officer FAR1 had a concern that if police attempted to touch or move him again, his behaviour might escalate.¹²
- (22) After removing Mr FAR3 from under the tree, Officer FAR1 said that it was his intention to arrest him and take him back to the police station because Mr FAR3 had committed a number of offences.¹³ The officer agreed that after Mr FAR3 had been handcuffed, further attempts were made by himself and Officer FAR2 to get Mr FAR3 onto his feet. However, Mr FAR3 resisted and the more police struggled, the more agitated Mr FAR3 became, to the point where he kicked Officer FAR1 in the shin. It was this kicking that led Officer FAR1 to use his OC spray on Mr FAR3, causing him distress.¹⁴
- (23) After Mr FAR3 was sprayed, he was informed by Officer FAR1 that he was under arrest for assaulting police. Shortly thereafter Officer FAR4 informed him that she would call for police backup. Officer FAR2 then set off to make the call but was called back by the Sergeant who then left the scene to radio for assistance.¹⁵ Officer FAR1 agreed that this was not a complex task and could easily have been done by Officer FAR2.
- (24) Whilst waiting for assistance to arrive, Mr FAR3 remained seated, complaining of pain in his eyes from the OC spray. Officer FAR1 agreed his BWV showed Mr FAR3 place his foot on a tree root and shortly afterwards, Officer FAR2 place her boot on top of Mr FAR3's foot. Mr FAR3's immediate response was to yell '*get off my fucking foot*' and he kicked out, striking Officer FAR1 in the face.¹⁶ Officer FAR1 agreed that by Officer FAR2 placing her boot on top of Mr FAR3's foot, trapping it, there was a risk that this could provoke a violent response from Mr FAR3.¹⁷

¹² Ibid.

¹³ Ibid.

¹⁴ Examination DWR at T22.

¹⁵ Examination DWR at T23.

¹⁶ Examination DWR at T24.

¹⁷ Examination DWR at T26.

- (25) By the time that Officer FAR4 had gone to call for backup, Mr FAR3 had been handcuffed, sprayed and was sitting on the ground. Officer FAR1 agreed that an option available at that time was for police to take a step backwards to de-escalate the situation. Mr FAR3 was never going to get up and run away.¹⁸ In fact, police could not get him to stand up. Putting some distance between police and Mr FAR3 was never going to create a flight risk.
- (26) Officer FAR1 was shown the video footage from the Tasercam which he had not previously seen. He agreed the footage showed that Mr FAR3 had both arms up against his chest, and immediately prior to the discharge of the taser he did not make any movement with his body except to slightly rotate his body, but not move towards the officer.¹⁹
- (27) Officer FAR1 was questioned about the powers of police under LEPR to arrest a person without a warrant, and an officer's use of handcuffs. In the case of Mr FAR3, Officer FAR1 said he believed that he had committed the offence of Trespass and most likely also the offence of Offensive Behaviour. He agreed that from the time Mr FAR3 was handcuffed, he was not free to leave, and was at that point under arrest.²⁰ Officer FAR1's attention was directed to the provisions of section 202 of the LEPR, which require police to inform a person of the reason for their being placed under arrest, and he agreed that Mr FAR3 was not told why he was under arrest when the handcuffs were applied.²¹
- (28) From when Officer FAR4 left to call for backup until additional officers, perhaps as many as six, arrived on the scene, Officer FAR1 estimated the time that had elapsed would have been no more than four minutes.²²
- (29) Officer FAR1 said that as a result of his encounter with Mr FAR3, he suffered redness to his right shin and lip. Photographs of these injuries were tendered in evidence.²³

¹⁸ Ibid.

¹⁹ Examination DWR at T27.

²⁰ Examination DWR at T30.

²¹ Examination DWR at T32.

²² Examination DWLR at T33.

²³ Ex DWR12C.

- (30) Officer FAR1 was next asked about the use of tasers. He said that he was familiar with the NSWPF Standard Operating Procedure for the use of tasers. Although he had drawn his taser on two prior occasions, the officer said his encounter with Mr FAR3 was the first time that he had fired it.
- (31) Officer FAR1 agreed that after drawing his taser and warning Mr FAR3 not to lash out, although Mr FAR3 had complied with this instruction, when he tensed his muscles, looked at the officer and yelled out, Officer FAR1 felt that Mr FAR3 posed an imminent threat and he therefore discharged his taser.²⁴
- (32) Officer FAR1 agreed the SOPs included an instruction that a taser should not be used where a target was handcuffed unless there were exceptional circumstances. In this case he thought that he had been punched in the face by Mr FAR3 and that he was aware that people had suffered serious injuries when punched with handcuffs. It was only later that he learned that he had been kicked in the face and not punched.²⁵
- (33) Upon returning to the police station with Mr FAR3, Officer FAR1 said that because a taser had been discharged, a COPS Event and Situation Report ('SITREP')²⁶ had to be created. An entry also had to be created on the Taser Incident Management System ('TIMS'), however this was not done by himself. The officer was shown the SITREP for the incident. However, he could not recall if it had been completed by himself or by the Inspector. The officer added that if the Inspector had done so, he would have referred to the narrative in the COPS Event.²⁷
- (34) Officer FAR1 understood that subsequently a Taser Review Panel ('TRP') was convened, but he did not have any involvement in that process. He was however told by one of the Inspectors that a review had been conducted. The officer said he had no input into the completion of the TRP Adjudication Form.²⁸

²⁴ Examination DWR at T39.

²⁵ Examination DWR at T47.

²⁶ Ex DWR14C.

²⁷ Examination DWR at T42.

²⁸ Ex DWR16C

- (35) Officer FAR1 was taken to the narrative in the COPS Event which he had helped Officer FAR2 create. The officer agreed that where it stated *'the accused then lashed out at Constable [FAR1] numerous times using the handcuffs placed on him'*, this activity was not captured on either of the two BWVs and furthermore, that it was not referred to in the statement that he had prepared for the police prosecution of Mr FAR3.²⁹ The officer agreed this excerpt in the narrative was not correct.
- (36) Although Officer FAR1 originally recorded in the narrative that he had been punched in the face by Mr FAR3, it was not until he had viewed the BWV of the security guard a few days later that he realised he had in fact been kicked and not punched.³⁰
- (37) The COPS Event narrative contained a passage stating that after Mr FAR3 was sprayed with OC spray he yelled at police *"I'm gonna fuckin run", he then raised his voice and moved towards Constable [FAR1]"*. In cross-examination the officer agreed that the first part of the narrative where Mr FAR3 was supposed to have said *"I'm gonna fuckin run"* was an error and that he corrected it by not including it the NSWPF Facts Sheet. He agreed that what Mr FAR3 in fact said was *I've done nothing wrong'*.³¹
- (38) The narrative in the COPS Event continued *'He then raised his voice and moved towards Constable [FAR1]*. Having previously agreed that Mr FAR3 did not *'move towards'* him but had rotated part of his body, Officer FAR1 agreed that this excerpt in the narrative was not accurate. Furthermore, Officer FAR1 agreed that an interpretation of the events open to a reader of the narrative was that after Mr FAR3 said *'I'm gonna run,'* followed by *'...he moved towards Officer FAR1'*, was that the situation was more volatile than perhaps it was at the time.³²
- (39) Officer FAR1 was shown the TRP Adjudication Form which contained a narrative of the incident with Mr FAR3. He agreed the summary of the facts reported in the document considered by the TRP contained significant errors,³³ namely:

²⁹ Examination DWR at T45.

³⁰ Examination DWR at T47.

³¹ Examination DWR at T47-48.

³² Examination DWR at T48-49.

³³ Examination DWR at T52-53.

- (a) Mr FAR3 did not strike Officer FAR1 numerous times, using the handcuffs placed on him, swinging his arms.
- (b) Mr FAR3 lashed out at Officer FAR1 with a closed fist and struck him in the face.
- (c) Mr FAR3 yelled at police *'I'm gonna fuckin run'*.
- (d) Mr FAR3 then raised his voice and swung his fists towards Officer FAR1 again.

(40) In regard to the narrative in the COPS Event, Officer FAR1 said that if it contained an error, it could be removed by the officer who had created it. If however, someone else wished to correct an entry, this had to be done by adding an additional narrative, not expunging any part of the first.

4.2 Evidence of Constable FAR2

Constable FAR2 was called to give evidence before the Commission in a private examination on 16 March 2021. In summary, her evidence was as follows:

- (1) Officer FAR2 joined the NSWPF in March 2019 and at the time of the incident involving the arrest of Mr FAR3, she held the rank of Probationary Constable.³⁴
- (2) The officer's evidence regarding her activities in the early hours of the morning of 27 January 2020, how she and Officer FAR1 came to be at the scene where Mr FAR3 was, his appearance and demeanour, and the attempts made by police to rouse him and get him on his feet, was similar to that given by Officer FAR1.
- (3) The BWV of the security guard and Officer FAR1 were played for Officer FAR2.
- (4) The Constable agreed that when the efforts of herself, Officer FAR1 and Officer FAR4 failed to get Mr FAR3 onto his feet, she decided it was necessary to handcuff Mr FAR3 and at this time she also received instruction from the Sergeant to apply handcuffs. As this was being done, Mr FAR3, who was seated on the ground leaning back against a tree, pulled his arms into his chest making it more

³⁴ Examination JVX at T8.

difficult for the handcuffs to be applied. However, the officer agreed that he was not at that time flailing his arms around or lashing out.³⁵

- (5) Officer FAR2 agreed the reason Mr FAR3 was handcuffed was not because he was at that time behaving in an aggressive manner or attempting to assault anyone, but rather it was done as a pre-emptive measure to control him in the event of him becoming more violent when further attempts were made to move him.³⁶ She agreed that at that time, Mr FAR3 appeared to be seriously affected by drugs and/or alcohol.
- (6) At the time the handcuffs were applied, Officer FAR2 considered that Mr FAR3 was being placed under arrest,³⁷ the reason being that police had been told by the security guard that Mr FAR3 had thrown an object at a car earlier in the evening, which would have constituted the offence of Offensive Behaviour, and further, that by entering and remaining on private property he had committed the offence of Trespass. Officer FAR2 agreed that under the provisions of LEPR, when police effect an arrest they are required to inform the person of the reason for their arrest. She agreed that when Mr FAR3 was handcuffed he was not told that he was under arrest, or the reason for the arrest.³⁸
- (7) Officer FAR2 said she was familiar with the NSWPF Tactical Operations Model and that one of the things police have to consider when assessing what tactics to use is whether it is appropriate to escalate or de-escalate a situation. In the case of Mr FAR3, once he was handcuffed, an option available was to call for back-up assistance, but it was not her decision to make as she was not the senior officer.³⁹ Calling for back-up assistance was not an unusual occurrence. The Constable further agreed that police could have taken a step back in an attempt to de-escalate things, but she did not know if additional police presence would have helped or made Mr FAR3 more aggressive.⁴⁰

³⁵ Examination JVX at T20.

³⁶ Examination JVX at T24-25.

³⁷ Examination JVX at T30.

³⁸ Examination JVX at T35.

³⁹ Examination JVX at T21.

⁴⁰ Examination JVX at T22-23.

- (8) A call for back-up assistance was ultimately made, and although this was done by Officer FAR4, Officer FAR2 agreed this was not a complex task and was one that she could have done herself.⁴¹ Further police assistance arrived within minutes.
- (9) Whilst Officer FAR4 was absent making a call for assistance, Mr FAR3 placed his foot on a tree root next to the Officer FAR2's boot. At this time the officer placed her boot on top of Mr FAR3's foot. This resulted in Mr FAR3 kicking out with his foot. Officer FAR2 agreed that this reaction of Mr FAR3 was a likely consequence of him trying to get her boot off him.⁴² The officer agreed that when Mr FAR3 moved his foot next to hers, rather than place her boot on top of Mr FAR3's foot, an available option was for her to take a step back.⁴³
- (10) Officer FAR2 was questioned in relation to a number of documents that she had created in relation to the incident involving Mr FAR3. Once Mr FAR3 was taken back to LAC1, the officer, with the assistance of Officer FAR1, created a COPS Event which contained a narrative.⁴⁴ In doing so she was also assisted by the BWV of Officer FAR1.⁴⁵
- (11) If it subsequently became necessary to amend the narrative, this could be done by creating another narrative, however, she could not remember if this became necessary in the case of Mr FAR3.⁴⁶
- (12) In addition to creating the narrative in the COPS Event, the Constable said that she, again with the assistance of Officer FAR1 and the BWV of that officer, prepared a Police Facts Sheet which contained a narrative of the incident.⁴⁷
- (13) In preparation of the prosecution of Mr FAR3, the Constable prepared a statement.⁴⁸

⁴¹ Examination JVX at T24.

⁴² Examination JVX at T34.

⁴³ Ibid.

⁴⁴ Ex JVX1C.

⁴⁵ Examination JVX at T10.

⁴⁶ Ibid.

⁴⁷ Ex JVC2C.

⁴⁸ Ex JVX3C.

- (14) After viewing the BWV of Officer FAR1 and the security guard, the Constable agreed that three passages in the COPS Event narrative were incorrect and did not happen,⁴⁹ namely:
- (a) *'the accused lashed out at Constable [FAR1] numerous times using the handcuffs placed on him.'*
 - (b) *'At one stage the Accused lashed out at Constable [FAR1] with a closed fist and struck him in the face.'*
 - (c) *'Police have called for further police to assist. The Accused then yelled at police "I'm gonna fuckin run".'*
- (15) In relation to the first point, the Constable agreed this description of Mr FAR3's actions had not been repeated in her police statement.
- (16) In relation to the second point, the Constable agreed this had been a mistake which she corrected in the Police Facts Sheet and her police statement, to the effect that Officer FAR1 had been *'kicked'* and not *'punched'* to the face.
- (17) As to the final point, the Constable agreed that upon viewing the BWV footage, the words *'I'm gonna fuckin run'* are incorrect, and what Mr FAR3 is heard saying is *'I've done nothing wrong'*. She agreed the last thing Mr FAR3 was going to do was get up on his own and run anywhere.⁵⁰
- (18) The Constable was examined about a passage in the COPS Event narrative which referred to Mr FAR3's actions immediately prior to Officer FAR1 discharging his taser:

'He then raised his voice and moved towards Constable [FAR1]'.

Officer FAR2 agreed that the footage in the two BWVs showed that contrary to the above statement,⁵¹ Mr FAR3:

- Does not move towards Officer FAR1 at all; and
- Is leaning back against a tree with his arms on his chest and Officer FAR1 is holding one of Mr FAR3's arms with one of his hands.

⁴⁹ Examination JVX at T36-37.

⁵⁰ Examination JVX at T37-38.

⁵¹ Examination JVX at T38.

- (19) Finally, the Constable was taken to the narrative in a NSWPF Taser Debrief Form prepared in relation to the discharge of the taser by Officer FAR1. The Constable agreed that part of the narrative appeared to come from the COPS Event narrative which she had prepared, and that it repeated the three actions of Mr FAR3 which she had earlier agreed in her evidence were errors.⁵²

4.3 Evidence of Sergeant FAR4

Sergeant FAR4 was called to give evidence before the Commission in a private examination on 24 May 2021. In summary, her evidence was as follows:

- (1) The Sergeant joined the NSWPF in 1992 and had held the rank of Sergeant for the last 5 years.
- (2) For the purpose of giving evidence before the Commission, the Sergeant said that she had refreshed her recollection from a statement she had prepared on 8 March 2020 in connection with the police charges against Mr FAR3,⁵³ and viewed the BWV of Officer FAR1.⁵⁴ The Sergeant had also previously viewed the BWV of the security guard, which, she agreed captured events from the time police arrived on the scene until back-up police arrived.⁵⁵ Excerpts from both BWVs were replayed for the Sergeant.
- (3) In regard to the incident involving Mr FAR3, the Sergeant said that in the early morning hours of 27 January 2020 she was returning to LAC1. The shift had been very busy, which was usual after Australia Day celebrations. She was conducting the duties of shift supervisor.
- (4) The Sergeant had been following the vehicle occupied by Officers FAR1 and FAR2 when it stopped abruptly. The Sergeant went to investigate. The three officers had a short conversation with a security guard and then accompanied him to a location where Mr FAR3 was seated on the ground with his legs out in front of him with his eyes closed. A number of attempts were made to wake Mr FAR3 up, which included Officer FAR2 rubbing Mr FAR3's sternum and then pinching his earlobe three times. Mr FAR3 reacted by brushing Officer FAR2's

⁵² Examination JVX at T36-37.

⁵³ Ex TRS2C.

⁵⁴ Examination TRS at T12.

⁵⁵ Examination TRS at T13.

hand away, each time with greater force.⁵⁶ From the Sergeant's observation of Mr FAR3 he appeared to be significantly affected by either drugs or alcohol, or a combination of both. Until Mr FAR3 was handcuffed by Officer FAR2, he did not respond to police questioning or directions and some of his responses were nonsensical, such as *'I'm getting dressed'*.

- (5) Officer FAR4 said that she was familiar with the NSWPF Tactical Operations Model, which amongst other things detailed use of force concepts. The Sergeant agreed the Model listed options for police to take charge and gain control of a situation. Two listed options are police presence and communication. However, in relation to Mr FAR3, because of his demeanour and lack of comprehension, these were not going to have the desired effect.⁵⁷
- (6) The Sergeant agreed that the more police physically touched Mr FAR3 the more agitated he became, and that when left alone, Mr FAR3 seemed content to stay laying down with his eyes closed.⁵⁸ She agreed that when she had said in her statement *'I feared a violent confrontation was imminent'*, this was in the context of what would happen if further attempts were made by police to move him,⁵⁹ and this was exactly what happened. However, leaving Mr FAR3 alone under a tree was not an option.
- (7) Although she was the senior officer, the Sergeant said that officers use their own tactical options. It was not a matter of her telling the officers what options to use, they make their own decisions.
- (8) At the time Mr FAR3 was being handcuffed the Sergeant agreed the BWV showed that although he had his hands up close to his chest, making it difficult for the handcuffs to be applied, he was not swinging his arms around or lashing out with his hands.⁶⁰
- (9) Officer FAR4 agreed that another option available to police in the Tactical Operations Model is to *'de-escalate'* which may be as simple as taking a step backwards. The Sergeant thought that at one point she and the other officers did this to enable Mr FAR3 to get out and

⁵⁶ Examination TRS at T20.

⁵⁷ Examination TRS at T21-22.

⁵⁸ Examination TRS at T23.

⁵⁹ Examination TRS at T26.

⁶⁰ Examination TRS at T24.

this worked in the sense that there was no more physical aggression from Mr FAR3. Up until Mr FAR3 was handcuffed, police did not know how he was going to behave and therefore at that point in time there was no need to get additional police. It was only after Mr FAR3 had resisted efforts by police to get him out that the Sergeant determined more help was needed.⁶¹

- (10) Officer FAR4 agreed that although Officer FAR2 originally set off to call for back-up, she was called back by the Sergeant who then went to make the call. The Sergeant agreed that making the call for back-up, ensuring an ambulance was on the way, and collecting water to de-contaminate from the effects of the OC spray on Mr FAR3, were tasks that Officer FAR2 was capable of performing. However, she could not redeploy resources from another area, and as it had been a busy night, that was a task the Sergeant would have to carry out if necessary.⁶²
- (11) After making the call for back-up, additional police arrived almost straight away.⁶³
- (12) The Sergeant was not present when Mr FAR3 was tasered. However, on viewing the BWV of Officer FAR1, she agreed that it appeared Mr FAR3 kicked out at Officer FAR1 as a reflex action to Officer FAR2 placing her boot on top of his foot.
- (13) From what she had learned about Mr FAR3's behaviour earlier in the evening, she formed the view that Mr FAR3 may have committed the offence of Offensive Behaviour, and furthermore, as Mr FAR3 was on property belonging to the LOC1 Trust, he was trespassing.⁶⁴
- (14) Officer FAR4 agreed that from the time Mr FAR3 was handcuffed he was effectively under arrest.⁶⁵ However, at that time he was not told why he was being handcuffed or why he was under arrest, notwithstanding that this was a requirement under the LEPRA and that the Sergeant was familiar with the relevant provision in the legislation.⁶⁶

⁶¹ Examination TRS at T28.

⁶² Examination TRS at T29-30.

⁶³ Examination TRS at T37.

⁶⁴ Examination TRS at T31-32.

⁶⁵ Examination TRS at T35.

⁶⁶ Examination TRS at T35-36.

- (15) The Sergeant was summonsed to attend court in connection with the prosecution of Mr FAR3, however on the day of the hearing she was informed that some of the charges had been withdrawn, but not told why. From media reports she learned that Mr FAR3's legal representatives were awarded costs in excess of \$100,000 against the NSWPF.⁶⁷

4.4 Evidence of Sergeant FAR5

Sergeant FAR5 was called to give evidence before the Commission in a private examination on 17 March 2021. In summary, his evidence was as follows:

- a. He was born in 1962 and joined the NSWPF in 1980. He held the rank of Sergeant and was currently a Weapons, Tactics Policy and Review Officer attached to the Operations Safety Skills Command ('WTPR').
- b. For the purpose of the prosecution of Mr FAR3 in the Local Court, the Sergeant prepared a statement dated 18 March 2020.⁶⁸
- c. In preparing his statement the Sergeant was provided with a number of items which included the BWV of Officer FAR1. He had not however viewed the Tasercam footage and was not aware of the existence of the BWV from the security guard.
- d. In preparing his statement the Sergeant was asked to express an opinion as to whether or not the use by police of handcuffs, OC spray and taser on Mr FAR3 complied with the guidelines of the NSWPF. He concluded that they did. The Sergeant was taken through his statement. From the information provided, the Sergeant understood that earlier in the evening Mr FAR3 had thrown an object at a passing car, and he thought that this conduct could amount to the offence of Offensive Behaviour. He further understood that Mr FAR3 had entered property of the LOC1 Trust and gone to sleep under a tree. When police arrived, verbal instructions/commands they gave to Mr FAR3 were met with no response. He agreed with their assessment that Mr FAR3 was well affected by drugs and/or alcohol.⁶⁹

⁶⁷ Examination TRS at T38.

⁶⁸ Ex IHC13C.

⁶⁹ Examination IHC at T9.

- e. He agreed that at the time Mr FAR3 was handcuffed, he pulled his arms into his chest, which the Sergeant described as '*minor resistance*', however he was not striking out.
- f. Although Officer FAR4 was the senior officer, each officer could make decisions for themselves. However, if a senior officer gave a lawful direction, it had to be followed by the other officers.
- g. In regard to the decision to handcuff Mr FAR3, the Sergeant agreed that this was a pre-emptive tactic because having regard to Mr FAR3's earlier behaviour, concerns were held that if officers continued to engage with him, he may become violent.⁷⁰
- h. Referring to the NSWPF Tactical Options Model, the Sergeant agreed that two options available to police (to gain control) are '*officer presence*' and '*communication*'. However, in the case of Mr FAR3, the Sergeant understood that Mr FAR3 did not comprehend where he was or what he was doing, and at the time the handcuffs were applied, these two options were going to have limited, if any, success. A third option referred to in the Tactical Options Model is '*de-escalation*' and that as officers are having to assess a situation, there is a need for them to continually assess what options should be used. The ultimate goal is to gain control.⁷¹
- i. The Sergeant agreed that another option available to police at the time the decision was made to handcuff Mr FAR3 was for police to call for backup and wait for assistance to arrive.⁷² This was particularly so given the size and strength of Mr FAR3 compared to that of the officers present.
- j. Officer FAR5 agreed that in his experience, where options such as officer presence and communication are not working, this can lead to the escalation of police force which may involve weaponless controls or control with weapons. However, the option of de-escalation is always on the table if circumstances permit. He further agreed the best outcome in a situation is where the options that are used by police not only protect the officers, but also minimise the risk of injury, or injury to a suspect.⁷³

⁷⁰ Examination IHC at T11.

⁷¹ Examination IHC at T13.

⁷² Ibid and T14.

⁷³ Examination IHC at T15.

- k. The Sergeant was asked about the techniques of weaponless control employed by police. He agreed with the proposition that when a subject's joint is manipulated, resulting in pain, the subject will try to move the limb away in order to relieve or lessen its effect. However, where this is not possible, it is foreseeable the subject will take some form of action to eliminate the source of the pain.⁷⁴
- l. In the case of Officer FAR2 placing her boot on top of Mr FAR3's foot, the Sergeant agreed that when a person is experiencing pain, they will move away from it, and that was what happened in this case. He accepted the action of Officer FAR2 did inflame the situation that was already in front of police, although he thought that due to her inexperience as an officer, she may not have foreseen the consequences of her action.⁷⁵
- m. The Sergeant agreed it could be seen from the BWV of Officer FAR1 that the use of OC spray upon Mr FAR3 caused him to become quite distressed.⁷⁶ He said the effect of the spray can have a variety of effects on different people, and that although its use can inflame a situation, police are looking to gain control.
- n. When the decision was made to call for backup and Officer FAR4 left the scene to make the call, leaving behind a young female Probationary Constable and a male Senior Constable, he agreed this was not a difficult task and that although it was not an unusual or unwise decision, with the benefit of hindsight it may have been better for the Probationary Constable to make the call and for Officer FAR4 to remain at the scene.⁷⁷
- o. An extract of the BWV taken by the security guard was played to Officer FAR5. He agreed the footage gave a much better view of Mr FAR3 immediately before he was tasered, rather than that taken by Officer FAR1. The Sergeant agreed the footage showed the following sequence of events:⁷⁸

(a) Mr FAR3 kicks Officer FAR1 in the face;

⁷⁴ Examination IHC at T16-17.

⁷⁵ Examination IHC at T18.

⁷⁶ Examination IHC at T19.

⁷⁷ Examination IHC at T19-20.

⁷⁸ Examination IHC at T21-22.

- (b) A brief struggle ensues following which Officer FAR1 gives Mr FAR3 a warning that if he does not stop struggling, he will be tasered;
 - (c) Mr FAR3 stops struggling and is seated on the ground, leaning back against a tree;
 - (d) Mr FAR3 has his arms up in the vicinity of his chest and they are handcuffed;
 - (e) Mr FAR3 is showing signs of distress from the OC spray;
 - (f) Mr FAR3 keeps talking about his eyes and repeating '*I've done nothing wrong*';
 - (g) Mr FAR3 does not move towards Officer FAR1 before the taser is fired;
 - (h) Mr FAR3 looks at Officer FAR1 and yells '*I've done fucking*', at which time the taser is fired. It is difficult to see if Mr FAR3 tenses the muscles in his arms.
- p. The Sergeant agreed the taser discharge was not because Mr FAR3 was at that time behaving violently, it was because the officer felt a violent confrontation was imminent.
- q. The Sergeant agreed it was clear that Mr FAR3 was not going anywhere under his own power, and that as he had been sprayed with OC spray and backup requested, an option that was available to the police was for them to withdraw, if only a metre or so, and await for additional resources to arrive. When asked whether this would have been the better option to adopt, the Sergeant replied '*in hindsight, possibly*',⁷⁹ however, whilst more police may have assisted in removing Mr FAR3 without deploying the taser, more injuries may have resulted to him or police. He said each tactical option has its own positives and negatives, depending on the outcome.
- r. The Sergeant was shown an extract from the NSWPF SOP in relation to the use of tasers,⁸⁰ and was asked the purpose of the direction that where a person has been handcuffed, a taser should not be used unless exceptional circumstances exist. The Sergeant replied that whilst handcuffs restrict movement of a person, and therefore the ability to assault someone, it does not eradicate that risk. Nevertheless, an officer must take into account a person is handcuffed, and so exceptional circumstances are needed before a taser is deployed.⁸¹

⁷⁹ Examination IHC at T23.

⁸⁰ Ex IHC4C.

⁸¹ Examination IHC at T25.

- s. The Sergeant agreed that when Mr FAR3 was handcuffed, he was at that time under arrest.⁸² He said he was aware of the provision in LEPRa which requires police to inform a person being placed under arrest, the reason for the arrest, and he agreed that on reviewing the BWV, at the time Mr FAR3 was handcuffed, police did not make the required announcement.⁸³
- t. Officer FAR5 was questioned about the effect of stress upon police and how they can become frustrated as events unfold. He responded that an example of this was to be seen in the BWV of Officer FAR1, where the Senior Constable could be heard swearing (at Mr FAR3). There were five instances of Officer FAR1 swearing. Although Officer FAR1 was not yelling or ranting at Mr FAR3, his continued swearing and the language that he used was consistent with an increasing level of stress, and coincidentally there was an escalating level of force being used, from hands-on, to OC spray and then to the use of the taser.⁸⁴ However, on watching the BWV of Officer FAR1, the Sergeant did not think that he was suffering unduly from stress and he provided examples from the officer's behaviour as to why he reached that conclusion. The Sergeant did however agree that the level of stress the officer was suffering at the time, which was indicated in his swearing, could have clouded his judgment in relation to the use of tactical options.⁸⁵
- u. The Sergeant was next examined in regard to police protocols following the discharge of a taser. He said that once an officer returns to the police station after firing a taser, the officer is required to inform the custody manager, create a COPS Event and download the Tasercam footage. The officer also completes a Taser Situation Report ('SITREP') which is inputted into the COPS. The Sergeant identified the SITREP completed by Officer FAR1.⁸⁶
- v. The Sergeant said the next step is for the taser deployment to be reviewed by the TRP, which generally consists of the Region Commander, a Professional Standards Officer, and, usually, a Senior Operational

⁸² Examination IHC at T30

⁸³ Examination IHC at T31.

⁸⁴ Examination IHC at T32-34.

⁸⁵ Examination IHC at T35.

⁸⁶ Ex IHC10C (Barcode 8424145-149).

Safety Instructor ('OSI') from a weapons training unit.⁸⁷

- w. The Sergeant was shown the document '*Taser Debrief Review Form*'⁸⁸ which contained a brief narrative of the taser deployment which had been completed by Officer FAR8. He said the main source of the information to create the narrative would have been the COPS Event.
- x. He said that generally, the TRP takes into account what is written (in the narrative) and puts that into context with the Tasercam footage. If there is BWV, as in Mr FAR3's case, they would also take this into consideration in arriving at their determination. He agreed that in the case of the Taser Review Panel Adjudication Form in Mr FAR3's case, there was nowhere in the form to indicate what other material may have been considered, such as the BWV.⁸⁹
- y. Following the creation of the narrative in the COPS Event, if it is subsequently discovered that it contains errors or mistakes, the Sergeant said that provided the COPS Event has been verified by the shift supervisor or the external supervisor, a second narrative has to be created as an addendum. The original narrative is not expunged.
- z. He said the Police Facts Sheet is normally created at the same time as the COPS Event, and that the narrative in both documents should be the same.⁹⁰ The officer who reviews the Police Facts Sheet may or may not be the same officer who reviews the COPS Event. The shift supervisor or external supervisor generally reviews the COPS Event. They may or may not also be the custody manager. The Police Facts Sheet is generally reviewed by the custody manager.⁹¹ The Sergeant agreed that if the two documents are reviewed by different officers, there is a risk that inconsistencies between the two documents will not be picked up.⁹²
- aa. Following the adjudication by the TRP, a Taser Debrief Review is conducted, the purpose being to cover off on all the circumstances of the incident, to ensure the deployment of the taser was appropriate. It is not necessarily the case that the officers involved in the TRP will also

⁸⁷ Examination IHC at T36.

⁸⁸ Ex IHC10C.

⁸⁹ Examination IHC at T37.

⁹⁰ Examination IHC at T39.

⁹¹ Ibid.

⁹² Examination IHC at T40.

form part of the Taser Debrief Review.⁹³ For the purpose of the creation of the narrative in the Taser Debrief Review Form, that would come from the COPS Event, and if there are mistakes in the COPS Event narrative, it is very possible that they would be carried through into the narrative created by the TRP, which in turn would flow into the Taser Debrief Review Form.⁹⁴

- bb. If there is other material available to the TRP such as BWV, it would be essential for it to be reviewed by the TRP because of limitations of the Tasercam, such as the narrow field of vision and impaired audio. In the case of Mr FAR3, the Sergeant was shown the Tasercam footage and he agreed the BWV provided much more information than the Tasercam footage.
- cc. Finally, the Sergeant was asked whether the sensible thing to have been done with Mr FAR3, after Officer FAR4 had left to call for assistance, would have been to withdraw and leave him where he was, until backup arrived. The Sergeant reiterated that what he was asked to advise in his statement was whether or not NSWPF policies had been complied with in regard to the deployment of tactical options (handcuffs, OC spray and taser), which he had said they did. However, he said the situation could have been handled differently. If police had backed away and given Mr FAR3 some space until more police arrived to assist, it may have resulted in a completely different outcome.⁹⁵

4.5 Evidence of Inspector FAR6

Inspector FAR6 was called to give evidence before the Commission in private examination on 24 May 2021. In summary, his evidence was as follows:

- (1) He was born in 1979 and joined the NSWPF in 2002. He attained the rank of Inspector in 2019, which he still held.
- (2) As at 6 February 2020, the Inspector said that he was acting in the capacity of Professional Standards Manager ('PSM') in LAC2. He relieved in this position for six weeks, during which time he participated in one TRP review, that being for taser usage in the previous month.

⁹³ Ibid.

⁹⁴ Examination IHC at T42-43.

⁹⁵ Examination IHC at T44-45.

- (3) The Inspector was shown the TRP SOPs which he had previously read.⁹⁶ He was not aware of any other documents governing the operation of or providing guidance to TRPs.
- (4) The TRP typically comprised the Region Commander, PSM, and an Operational Safety Instructor ('OSI'). In the Central Metropolitan Region there was also a PSM assist.
- (5) In terms of the skills each member brought to the Panel, the Commander brings his overall policing knowledge and also his responsibility for police within his region. The PSM's role is to convene the TRPs, consider the type of taser deployment, whether the probes are deployed or a drive stun is used, ensure that a review is done with the Commander within 72 hours of the incident, as well as ensure the administration of the process is correct. The role of the OSI is to provide expert advice on the use of force and the use of appointments, and in particular, the taser. The PSM assist is there to provide administrative support.⁹⁷
- (6) The Inspector said the Region Commander and the PSM are not especially trained in taser deployment, and whilst he had been trained in the use of a taser, he had never deployed one.
- (7) Whilst he was acting PSM for a period of 6 weeks, only one TRP was convened. He held the rank of Inspector, and the OSI held the rank of either Sergeant or Senior Sergeant.
- (8) He said that above the TRP sits an oversight committee, the Tactical Operations Review Committee, whose function is to review the decisions made by the TRPs across the state. He understood the committee reviews the minutes from the TRP, and that they would also have information from the Taser Incident Management System ('TIMS'), COPS Events and videos.
- (9) The Inspector said that when the TRP convened, it reviewed all the taser deployments for the preceding month in one batch.
- (10) The Inspector was referred to the purpose of the TRP as stated in the SOPs. He agreed its purpose revolved around the deployment of the

⁹⁶ Ex NKT1C.

⁹⁷ Examination NKT at T6-7.

taser and whether it had been appropriately used, good practices, bad practices and compliance with SOPs. It was not a specific focus of the TRP to review the use of other police appointments or compliance by police with the SOPs in regard to the use of appointments.

- (11) The Inspector was asked to outline the steps followed by police when a taser has been deployed. He said that when a police officer returns to the police station after deploying his taser, he provides the entire device to his supervisor who then downloads the Tasercam footage. A SITREP is created by the supervisor, and the officer creates a COPS Event. The Inspector was shown the COPS Event dated 27 January 2020 and created by Officer FAR2.⁹⁸ The Inspector was taken to the narrative in the document and he accepted that it appeared to have been created by Officer FAR2.
- (12) The Inspector was asked questions in relation to the TIMS. Typically, he said this would be created by the PSM assist, which in the case of the incident with Mr FAR3, was Officer FAR8. He said that it is created on the police computer database. It takes certain information from the COPS automatically. He described the TIMS as a *'living document'*. The narrative of the incident contained within it is entered manually, and in the case of the incident with Mr FAR3, it was entered after the TRP had met.⁹⁹ He agreed that as the TRP review progressed, a number of documents ended up containing a narrative of the incident.
- (13) In the case of Mr FAR3, the Inspector was shown a SITREP created by Inspector FAR9.¹⁰⁰ He said the purpose of this document is to provide a concise version of the events and report that situation up the command chain. The information the SITREP contained would come from the officers involved in the incident. The supervisor would also be a source of information. The SITREP has to be vetted by another officer. The purpose of this is to ensure that it meets the relevant guidelines in regard to spelling, punctuation, grammar and conciseness. The vetter would also be looking at the COPS Event, but they would not make the same level of inquiries as the author of the SITREP.
- (14) The officer who creates the COPS Event would generally go into far greater detail than what appears in the SITREP narrative, which the

⁹⁸ Ex NKT2C.

⁹⁹ Examination NKT at T15.

¹⁰⁰ Ex NKT4C.

Inspector agreed in the case of the narrative for Mr FAR3, ran for approximately three pages.¹⁰¹ He said that unlike the TIMS report, once the SITREP has been vetted, it is not a *'living document'*. It gets disseminated.

- (15) The material that is provided to the TRP is the Tasercam footage, the SITREP and any BWV. The COPS Event would have been reviewed by the TRP members, if not tabled. In the course of the review, a Taser Review Panel Adjudication Form is generated. The Inspector was shown the Panel Adjudication Form for the Mr FAR3 incident created by Officer FAR8.¹⁰² This contained a narrative of the incident which he said should be the same narrative that came out of the TRP minutes, being a concise version of what happened.¹⁰³
- (16) In regard to the Tasercam footage, the Inspector said that this would have been reviewed within 72 hours of the incident and again by the Panel at the time the formal review was conducted with the panel members sitting at the table. He agreed the adjudication form asked a number of questions. One question was *'Any significant inconsistencies between the COPS event and other information available'*. For the Panel to be able to answer, the Inspector said they look at the narrative in the COPS event, the Tasercam footage and BWV if available. By a *'significant inconsistency'* it means more than just passing, or technical.
- (17) The Inspector was shown the Minutes for the TRP meeting.¹⁰⁴ These were created by Officer FAR8. He agreed that it contained a narrative of the Mr FAR3 incident. He said that although some notes are taken at the time of the meeting, they would have been completed at some later stage. The narrative in the Minutes is created after the documents before the Panel and videos are viewed. He said it is an amalgamation of all these things. He said the narrative in the minutes is usually the same one that ends up in the TRP Adjudication Form.¹⁰⁵ The Inspector disagreed that the narrative in the COPS Event would be the same as that in the TRP Minutes, because the COPS Event is created by the officer involved (in the incident). The TRP Adjudication Form, SITREP, TRP Minutes and TIMS are independent of that officer.

¹⁰¹ Examination NKT at T19.

¹⁰² Ex NKT5.

¹⁰³ Examination NKT at T21.

¹⁰⁴ Ex NKT7C.

¹⁰⁵ Examination NKT at T25.

- (18) If there is a significant inconsistency between part of the narrative in the COPS Event and the material reviewed by the TRP, the Inspector agreed that there is a requirement for the TRP to go back and seek further information or inquire as to the reason for the inconsistency.¹⁰⁶
- (19) The Inspector said that reference in the TRP Minutes to 'BWV' meant that it was available and had been viewed. He recalled seeing the BWV from Officer FAR1 and from another officer who arrived as part of the backup team. However, the Inspector was unaware of the existence of the BWV from the security guard. He did not agree that this should necessarily have been picked up in the system that there was available BWV from another source.¹⁰⁷
- (20) At the meeting the TRP convened on 6 February 2020, it was put to the Inspector that 20 incidents were reviewed, 12 of which contained BWV. He said the panel would have had to watch every BWV. He said that generally, Panel members do not make individual notes of what they are reading or seeing, and so, in the case of Mr FAR3, the only record of what the Panel was thinking at the time it conducted its review was what appeared in the Minutes.
- (21) The Inspector said his understanding of the purpose of the Minutes was that it records what the TRP accepted as being the circumstances of the incident. He agreed that the narrative recorded in the Minutes related entirely to the incident involving Mr FAR3.
- (22) The Inspector was next referred to the TRP SOPs which contained the following passage:

'Taser review panel meetings are scheduled to occur once a month and will require the preparation of agendas and the generation of minutes as a record of discussion, deliberation, decision and action resulting from the review of taser deployments for the month under review.'

Looking at the TRP Minutes, the Inspector disagreed that they did not contain any record of discussion or deliberation of Panel members of the incident. As he recalled, there was not significant departure amongst the Panel members, of what the facts in the matter were, or

¹⁰⁶ Examination NKT at T26.

¹⁰⁷ Examination NKT at T27.

what was accepted by the Panel at that time. If there had been, it would have been reported. He did agree that if, from the information provided to the Panel, there are no significant inconsistencies, and if the use of the taser complies with the criteria for its discharge, there is no discussion or deliberation recorded in the Minutes, because the Minutes are kept with the Adjudication Form and Debrief Form and are read in conjunction with those. The Inspector disagreed that anyone reading the TRP Minutes would not be informed as to what discussion or deliberation had taken place. He said they would have to accept that that was the decision reached by the Panel unanimously.¹⁰⁸

- (23) In relation to the TRP Adjudication Form the Inspector agreed that whilst it contained a box to be ticked in regard to the viewing of the Tasercam, there was no box to indicate whether or not BWV has been viewed. He said that although such a box would have no practical effect because it was a process that was done every time, as a matter of completeness it would be of assistance.
- (24) The Inspector said that as BWV is stamped with the registered number of the officer, the Panel is able to identify whose BWV is being viewed. However, in the case where the source of the BWV is not a police officer, from a TRP perspective it would be useful for the Panel to know that such footage exists.¹⁰⁹
- (25) In regard to the use of CCTV footage by the panel, the Inspector said that he did not recall the TRP SOPs recommending that it be viewed. However, he said the policy was written when the Tasercam being used was of much lower resolution, and with the advent of the new Tasercam and BWV, it was less likely that he would use CCTV. He did agree that for the sake of completeness, a box could be placed in the TRP Adjudication Form to indicate whether or not CCTV was available or had been viewed.¹¹⁰
- (26) In the TRP Minutes, it is stated that before being tasered Mr FAR3 yelled '*I'm going to fucking run*'. The Inspector was asked if he heard Mr FAR3 in the BWV say those words. The Inspector said that he had trouble trying to work out what Mr FAR3 did say, it wasn't to the point where you couldn't say that it was not what he said. It was put to the Inspector that on listening to the BWV Mr FAR3 could be heard saying

¹⁰⁸ Examination NKT at T29.

¹⁰⁹ Examination NKT at T30.

¹¹⁰ Examination NKT at T31.

a number of times *'I've done nothing fucking wrong'*. The Inspector responded that without really good audio equipment, headphones, he could not say that Mr FAR3 definitely did not say that. However, on viewing the BWV, looking at the state Mr FAR3 was in at the time, and the fact that he was handcuffed to the front, he said that with the benefit of hindsight, it would be difficult for Mr FAR3 to run.¹¹¹

- (27) The Inspector was referred to the SOPs for tasers which listed a number of situations where a taser should not be used unless exceptional circumstances existed, one of those being against a subject who is handcuffed, and he was asked what he understood of why this was the case. The Inspector said that he assumed this was because of the subject being unable to prevent a fall if the subject suffered an intramuscular reaction to the taser. In the case of Mr FAR3, the Panel considered exceptional circumstances did exist, which warranted the use of a taser, those being:
- (a) Police had been informed that a very tall person had previously been displaying signs of aggression and had thrown a phone at a car;
 - (b) The person was trespassing on LOC1 grounds;
 - (c) Police had attempted to rouse him (and get him off the ground) without success;
 - (d) Police had been assaulted by the person whilst he was handcuffed, the assaults consisting of at least one kick which connected, and one which did not; and
 - (e) It was said that whilst in handcuffs, the person lashed out at police a number of times, striking one officer to the face.
- (28) The Inspector said the last point was significant, not only because the handcuffs constituted a weapon but also if, they were willing to strike out whilst restrained, it was an indication that they were a pretty violent person.
- (29) He said another exceptional circumstance considered by the TRP was that Mr FAR3 punched an officer with a closed fist, and the fact that other forms of weaponless control had not worked. OC spray had been deployed to no overall effect and then the violence had continued to the point where it was said the taser needed to be used.¹¹²

¹¹¹ Examination NKT at T33-34.

¹¹² Examination NKT at T35-36.

- (30) The Inspector disagreed that an officer's decision to deploy a taser was dependent upon the conduct of the subject immediately before or at the time the taser is fired. He said the subjective circumstances acting on the officer's mind has to be taken into account. That would include what police had been told about the subject's earlier behaviour, the subject's demeanour, the terrain and the circumstances and lighting levels. Specifically in regard to Mr FAR3, the Inspector could not now recall what conversation took place between the Panel members regarding the use of the taser whilst Mr FAR3 was handcuffed, and agreed it would have been of assistance to him in commenting on what factors were taken into account if contemporaneous notes had been taken by the Panel members.
- (31) Returning to the issue of the narrative of the incident that appeared in various documents, starting with the COPS Event, the Inspector agreed that it would have been important that it did not contain any false or misleading information. He further agreed this could have a '*knock on*' effect if relied upon by other officers to generate subsequent narratives in other documents. In the case of the narrative in the TRP Adjudication Form, this would definitely have an effect if there were things in it that were incorrectly recorded, deliberately or otherwise.¹¹³
- (32) The Inspector said that if an officer is creating the COPS Event narrative and also preparing a Police Facts Sheet for the person being charged, the documents would be created at the same time. The Facts Sheet would also have to be vetted by a supervisor, usually the custody manager. However, it would not always be the case that the supervisor who vets the COPS Event would be the same person as the one who vets the Facts Sheet. He said the main consideration of the Facts Sheet is that it is in a suitable format to go to court. The vetter is not extensively checking the facts in the Facts Sheet. Looking at the circumstances of the interaction between the person of interest and the police, he said in that respect he would expect the narratives in both documents to be very similar.¹¹⁴
- (33) The Inspector was taken to excerpts from the narrative in the COPS Event:

¹¹³ Examination NKT at T38.

¹¹⁴ Examination NKT at T40.

- (a) *'The accused lashed out at Constable [FAR1] numerous times using the handcuffs placed on him.'*
- (b) *'At one stage the accused lashed out at Constable [FAR1] with a closed fist and struck him in the face.'*
- (c) *'The accused then yelled at police "I'm gonna fuckin run."'*
- (d) *'Mr [FAR3] raised his voice and moved towards Constable [FAR1].'*

The Inspector agreed that each of the above actions of Mr FAR3 was a significant event.¹¹⁵

- (34) The Inspector was then shown a copy of the Police Facts Sheet.¹¹⁶ He said that he had not had previous access to this document. He agreed there was nowhere in the document reference to the actions of Mr FAR3 as recited above in paragraph 33. In relation to reference in the Facts Sheet that Mr FAR3 *'turned towards Senior Constable [FAR1], tensed his muscles, clenched his fists...'*, the Inspector considered the phrase implied that Mr FAR3 *'moved towards'* Officer FAR1, but said it was a fine line and that use of the phrase *'moving towards'*,¹¹⁷ was clumsy.
- (35) The Tasercam footage was played for the Inspector, which he had previously seen in preparation for giving evidence before the Commission. He agreed that it only ran for approximately 28 seconds and showed only the deployment of the taser. It did not provide context of the earlier interaction of Mr FAR3 and police. He also agreed the field of vision of the Tasercam was quite narrow, whereas the BWV, if the wearer is in the right place at the right time, will show a much wider angle of view. The level of assistance provided by the BWV depends upon when it is activated and the proximity of the wearer to the person of interest. If the officer is too close, the field of vision is restricted like the Tasercam.¹¹⁸
- (36) In conducting a TRP Review, the Inspector was referred to the TRP SOPs, where it stated the Panel had to be mindful of the subjective

¹¹⁵ Examination NKT at T42-43.

¹¹⁶ Ex NKT8C.

¹¹⁷ Examination NKT at T44.

¹¹⁸ Examination NKT at T47.

and objective elements of the incident. In regard to the '*objective elements*' the Inspector agreed this would include BWV provided it was properly seen. If the video field of vision was restricted, other sources of information would have to be taken into account.

(37) An extract of the BWV taken by the security guard from the time police arrived on the scene until after the taser was deployed was played to the Inspector.¹¹⁹ The Inspector agreed the footage which contained both audio and visual features, did not show Mr FAR3:

- (a) Swing his arms whilst in handcuffs at Officer FAR1; or
- (b) Punch Officer FAR1 in the face with a closed fist, although it was agreed the officer was kicked in the face.

The Inspector agreed that Mr FAR3 is heard saying a number of times '*I've done nothing wrong*'. He also agreed that given Mr FAR3's state of inebriation, it appeared from what is shown in the footage, at times he was quite disorientated. Furthermore, he agreed that throughout the encounter, rather than try and get up and run away, Mr FAR3 resists every attempt by police to get him up, and that after being sprayed with OC spray he becomes visibly more upset. Taking these matters into account it was put to the Inspector that what is heard being said by Mr FAR3 to Officer FAR1 prior to the deployment of the taser is '*I've done nothing wrong*' rather than '*I'm gonna run*'. However, the Inspector said that based purely on the videos he had seen, he believed that what Mr FAR3 said could be interpreted a number of different ways, and given that it was in the COPS Event '*I'm gonna fuckin run*', it could not be said that wasn't what Mr FAR3 said at the time.¹²⁰

(38) The Inspector agreed the BWV of the security guard showed fairly clearly the position Mr FAR3 was seated in immediately prior to being tasered. He also agreed that because the security guard was standing back a little from Mr FAR3, the audience gets a better view of what Mr FAR3 was doing at that time.

(39) The Inspector agreed that from the BWV (of the security guard) Mr FAR3 is heard to say '*I've done fucking*' and then the taser is deployed. As to whether or not Mr FAR3 did or did not move towards Officer

¹¹⁹ Ex NKT10C.

¹²⁰ Examination NKT at T49-50.

FAR1 after saying these words, the Inspector said that he would have to view the BWV again because he had previously watched the other BWV (of Officer FAR1) in detail.

- (40) The Inspector was then showed the BWV of Officer FAR1, which he had previously seen. He agreed that in that footage, Mr FAR3 was not seen swinging his arms in handcuffs at Officer FAR1, but added '*you don't see a lot of what happened on that footage*'. He also agreed that from the footage Mr FAR3 was not seen to punch the Constable in the face with a closed fist.¹²¹
- (41) Having viewed the BWV of Officer FAR1, the Inspector agreed that whether Mr FAR3 said '*I'm gonna run* (as appears in the narrative)' or '*I've done nothing wrong*' was open to interpretation.¹²²
- (42) Referring to the BWV of the officer, the Inspector agreed that immediately prior to the deployment of the taser, when Mr FAR3 raised his voice and pivoted his body towards Officer FAR1 and said '*I've done fucking*' at which time the taser was fired, Mr FAR3 is not seen to physically move towards the Constable.¹²³
- (43) The Inspector agreed the Senior Constable's BWV's field of vision of events immediately surrounding the deployment of the taser was somewhat narrow and that this was due to the fact the officer was standing less than a metre away from Mr FAR3 at the time.
- (44) The Inspector was referred to the narrative in the TRP Adjudication Form. Although it referred to Mr FAR3 striking Officer FAR1 '*numerous times using the handcuffs placed on him swinging his arms*', he agreed that was not shown on Officer FAR1's BWV. However, the Inspector said there was information the TRP had to support that proposition. There was evidence of a violent confrontation between Mr FAR3 and police, and because of the close proximity of the bodies it was not captured on the BWV, but you could hear sounds of a violent struggle. In addition, later in the video Officer FAR1 could be heard asking for his glasses which would be consistent with him being struck in the face. All that he was saying was what was before the TRP was footage that was consistent with a version provided contemporaneously by the arresting police. The Inspector was not however disputing the fact that

¹²¹ Examination NKT at T50.

¹²² Examination NKT at T52.

¹²³ Examination NKT at T52.

in actual fact Officer FAR1 was not punched in the face.¹²⁴

- (45) The Inspector agreed the BWV of Officer FAR1 did not show him being punched to the face.
- (46) In regard to the passage in the narrative in the TRP which stated that Mr FAR3 '*raised his voice and swung his fists towards Constable [FAR1] again*' immediately prior to the discharge of the taser, it was put to the Inspector that this was not seen to occur in the BWV. The Inspector stated that he could not recall and would need to see the video again, but he did agree that what anyone could see on the video is what happened.¹²⁵
- (47) The Inspector agreed the actions of Mr FAR3 referred to in the narrative, namely the swinging of the arms in handcuffs, punching the Constable with a closed fist, the expression '*I'm gonna run*', and the swinging of the fists before the discharge of the taser, were not in the Police Facts Sheet. The Inspector could not provide an explanation for the inconsistencies between the narrative in the COPS Event and the Police Facts Sheet and expressed surprise that there was. He agreed again that the instances referred to were of significance. He further agreed that if factual aspects in the narrative were incorrect, it could potentially influence the outcome of the TRP.¹²⁶ Without giving it some consideration the Inspector said that he could not think of a solution from a systems point of view to ensure the information being provided to the TRP is checked for things such as supporting evidence beforehand.
- (48) The Inspector said that if BWV cannot confirm or deny what is in the narrative, the TRP still has the Tasercam footage to rely upon, and in Mr FAR3's case there was audio available and supporting evidence from the officers moving in.¹²⁷
- (49) The Inspector agreed the Tasercam footage had limitations and because of the close proximity of the taser to Mr FAR3 when fired, it did not give much of a view of what Mr FAR3 was doing immediately before the taser was deployed. That being the case, what the TRP was left with was what had been put in the narrative or some other

¹²⁴ Examination NKT at T53-57.

¹²⁵ Examination NKT at T55-56.

¹²⁶ Examination NKT at T56-57.

¹²⁷ Examination NKT at T58.

document by the police and the BWV of Officer FAR1.

- (50) Although the TRP was concerned with the compliance with the taser SOPs the Inspector said that it also took into account the appropriateness of other tactical measures taken by police and that was why a weapons trainer is a member of the Panel to provide advice as to whether or not a particular defensive tactic was appropriate and if there were other options, and if so, were they viable.¹²⁸
- (51) The Inspector agreed that if there is a failure in relation to the information, in this case being the narrative, provided to the TRP, the panel only gets to find out about that when events (such as the Commission's investigation) occurs.
- (52) The Inspector was asked that with the benefit of hindsight, had he known about the discrepancies in the narrative beforehand what could have been done. He replied that if the BWV (of the security guard) had been before the TRP, the Panel would say there were significant inconsistencies between what was recorded in the COPS Event and what was recorded in the video, at which point the Panel would be asking for further information.¹²⁹
- (53) He agreed that if BWV from another source, not being a police officer, is available, this can assist the TRP in its deliberations.
- (54) The Inspector was asked if something could be added to the TRP Adjudication Form to assist the TRP to know if there is available some other form of mechanism capturing the events in question, to which he replied there may be, but that he was not the best person to ask, however, he could think of no reason against it.

5. Analysis of Evidence

5.1 In providing an analysis of the evidence it is appropriate to do this in the context of the scope and purpose of the Commission's investigation:

- (a) Whether or not the police unlawfully arrested Mr FAR3 on 27 January 2020;

¹²⁸ Examination NKT at T58-59.

¹²⁹ Examination NKT at T59.

- (b) Whether or not in the course of the arrest police used excessive force;
- (c) The adequacy of the systems of the NSWPF for the recording, monitoring and review of taser use by police officers since 27 January 2020.

- 5.2 In considering the lawfulness of the arrest of Mr FAR3 by police, the Commission was assisted by the evidence of the three officers involved, Officer FAR1, Officer FAR2 and Officer FAR4. The evidence of Officer FAR5 was also highly relevant for although he was not present at the time of the arrest, he is a weapons training instructor with more than 30 years' experience as a police officer. Furthermore, as Officer FAR5 was not a party to the arrest, his evidence could be truly regarded as independent.
- 5.3 The evidence given by the officers who attended the scene, was consistent. When they arrived at the scene they were informed of Mr FAR3's behaviour throwing a phone earlier in the evening in an aggressive manner at a passing car. They were also informed that Mr FAR3 had entered private property, where they located him. Each of the officers said they believed Mr FAR3 had committed criminal offences.
- 5.4 When attempts to rouse Mr FAR3 and get him on his feet failed, a decision was made to handcuff Mr FAR3. All of the officers said this decision was based upon Mr FAR3's increasing level of aggression each time they tried to get him up, and although he was sitting quietly when left alone, they were concerned that further attempts to move him would be met with violence. The decision to handcuff Mr FAR3 was therefore characterised as being pre-emptive.
- 5.5 The three officers agreed they were familiar with the powers given to police under the provisions of LEPPRA to arrest a person without a warrant and the use of force that could be applied. They also said they were aware of the provisions regarding the use by police of their arms and appointments, and in particular handcuffs, contained in NSWPF Handbook. As previously mentioned, the evidence of the officers was that they believed Mr FAR3 had committed a number of criminal offences. Importantly, they also believed that by handcuffing Mr FAR3, he was being placed under arrest, and that Mr FAR3 was

not free to leave of his own free will. Officer FAR1 and Officer FAR2 said that it was their intention to take him back to LAC1. They did not say that they intended to detain Mr FAR3 for the purpose of taking him to a mental health facility, or for any other purpose. All three officers gave evidence that at the time they arrested Mr FAR3 by placing him in handcuffs, they were aware that under the provisions of section 202 of the LEPR, they were required to inform him of the reason for the arrest, and yet they failed to do so.

- 5.6 Officer FAR5's evidence was that he was also familiar with the provisions of LEPR in regard to police powers of arrest without a warrant, use of force, and the obligation on the part of police to inform a person being arrested the reason for the exercise of that power. He was also familiar with the guidelines provided to police in regard to the use of handcuffs.
- 5.7 For the purpose of providing a statement the Sergeant had been provided with a copy of statements by police who attended the scene and had also viewed the BWV of Officer FAR1. The Sergeant agreed that based upon that material there was sufficient evidence to show that Mr FAR3 had committed criminal offences. The Sergeant agreed that at the time Mr FAR3 was placed in handcuffs he was under arrest. He agreed that at the time this was done, Mr FAR3 was not informed that he was under arrest or the reason for his arrest. He was however, subsequently informed.
- 5.8 From the evidence provided by the police, both subjectively and objectively, there can be no doubt that at the time Mr FAR3 was placed in handcuffs, he was under arrest because he had committed the offences of Offensive Behaviour and Trespass. Furthermore, the officers unanimously agreed that at the time of being arrested, Mr FAR3 should have been informed that he was under arrest and the reason, but that this did not happen.
- 5.9 The next matter for consideration by the Commission is whether or not in the course of the arrest of Mr FAR3, police used excessive force. A significant aspect of this incident is that the police patrol car was flagged down by the security guard so there was no warning to the police officers about what the incident involved, and no opportunity to plan ahead. It is also significant that the security guard had assessed Mr FAR3's behaviour as dangerous to the community, such that he called for the police to come and was

prepared to wait a considerable time at the scene to safeguard the community as best he could. He also conveyed to the police an account of the prior violent behaviour of Mr FAR3. Having received that information the police officers reasonably believed they had to deal with a violent offender. That belief could only have been reinforced when they came to where Mr FAR3 was sleeping under a tree.

- 5.10 The question then arises as to whether or not they should simply leave Mr FAR3 there asleep. To do so would risk him coming to and continuing his violent behaviour, thus causing a danger to the community. Nor was it practicable to stay there and guard him until he woke up. This was a busy night for the police which is why the security guards call for assistance had not been answered earlier. It is clear that the police had to take action to remove him from the park.
- 5.11 When the police came to where Mr FAR3 was sleeping they would have observed a powerfully built young man and, given the history they had been given of his violent and erratic behaviour, a decision had to be made as to how to handle the situation. The police present were two women and one man. A decision was made early to place him in handcuffs. This was done as a pre-emptive measure to gain control of Mr FAR3 as police feared that further attempts to move him would result in him becoming violent. They, however, also believed that he was under arrest and intended to convey him to the police station.
- 5.12 Once handcuffed, what followed was the attempts of the officers to rouse Mr FAR3 and get him to stand up and move. It was apparent at this stage that he was well affected by alcohol or drugs or both. His speech was slurred and he was clearly unaware of his surroundings. The question is what the police should have done at that point. It is clear that the two female and one male officer could not forcibly remove him if he resisted being moved, and he did resist being moved.
- 5.13 With the benefit of hindsight, the best solution would have been to call for back up to assist in moving Mr FAR3. In fact when the request for backup was made, backup arrived in a few minutes because the nearest police station was very close. The question then is did the police fail in their duty in any way?

- 5.14 The senior officer at the scene was Officer FAR4. She did realise after a number of failed attempts to move Mr FAR3 that the solution was to call for backup and she at first asked the junior officer, Officer FAR2, to do that. She then changed her mind and said she would do it herself. It might be suggested that as the senior officer, she should have remained to supervise what was happening at the scene of action. Indeed if a more pre-prepared and structured approach had been possible, that would normally be police protocol. On the other hand the Sergeant appears to have believed she had a better chance of a quick response to a request for support, and in this case there was a very quick response to her request. The Commission does not consider Officer FAR4 can be criticised for her decision to leave the scene and make the call for backup herself.
- 5.15 Once the Sergeant left the scene of action, events deteriorated rapidly. Officers FAR1 and FAR2 continued in their effort to get Mr FAR3 to his feet and Mr FAR3 continued to resist, at one stage kicking Officer FAR1 in the shin. In an effort to gain control of Mr FAR3, Officer FAR1 deployed his OC spray, which clearly caused Mr FAR3 distress. He did not however show any signs of trying to flee or behave violently towards police. He said repeatedly '*I've done nothing wrong*'.
- 5.16 Whilst police were awaiting the arrival of backup no further attempts were made by Officers FAR1 and FAR2 to get Mr FAR3 on his feet. They did however remain in close proximity to Mr FAR3. So much so that at one point Mr FAR3 placed his foot on top of a tree root, next to the boot of Officer FAR2. Officer FAR2 agreed that at this point she had the option of taking a step back to avoid any confrontation. After all, Mr FAR3 was on the ground, handcuffed and leaning against a tree. Instead, the Constable placed her boot on top of that of Mr FAR3, trapping it there. This prompted an immediate response from Mr FAR3 who struck out with his foot, kicking Officer FAR1 in the face. Officer FAR5 said in evidence that Mr FAR3's reaction was foreseeable, however, given that at the time Officer FAR2 was a Probationary Constable with limited experience, she should not be criticised for her failure to appreciate the potential consequences of her action.
- 5.17 In order to gain control of the situation, Officer FAR1 drew his taser and warned Mr FAR3 that if he did not stop struggling he would be tasered. This appeared to have the immediate desired effect, with Mr

FAR3 again sitting on the ground, feet out in front and leaning against a tree. He was still handcuffed to the front and his arms were being held up against his chest. From the BWVs it can be seen that Officer FAR1 was standing only about one metre away from Mr FAR3, holding one of Mr FAR3's wrists. In the COPS Event Narrative and Police Facts Sheet, Mr FAR3 is said at this time to have looked at Officer FAR1, tensed the muscles in his arms and moved towards the Constable. However, on viewing the BWVs, particularly that of the security guard, at no time is Mr FAR3 seen to '*move towards*' the Constable. There is only a slight pivot of Mr FAR3's torso in the direction of the officer. This was conceded by all of the officers who gave evidence before the Commission after viewing the BWVs.

- 5.18 When Mr FAR3 pivots towards Officer FAR1, Mr FAR3 is heard to yell '*I've done fucking*', at which time the taser is deployed. Mr FAR3 is immediately subdued. Officer FAR1 agreed that whilst immediately before the taser was fired, Mr FAR3 was not swinging his arms about or attempting to flee, when Mr FAR3 turned and looked at him, tensed his muscles and yelled, those actions together with Mr FAR3's previous behaviour led him to believe that a violent confrontation was imminent. Based upon the officer's belief and what could be seen on the BWVs, Officer FAR5 and Officer FAR6 both agreed the use of the taser complied with the SOPs for taser deployment.
- 5.19 Whilst the deployment of the taser by Officer FAR1 may have complied with the Police SOPs, a question troubling the Commission is how did things reach the point where it had to be fired? The three officers involved in the incident all agreed in evidence that they were familiar with the NSWPF Tactical Operations Model which details a number of options police have for gaining control of a situation. One of those options is for police to de-escalate a situation. In the case of Mr FAR3 they all agreed that at various times of their encounter an available option to them was to de-escalate the situation by taking a step back, call for assistance and await further police arrival. Officer FAR5 also agreed that in the case of Mr FAR3, there were a number of times police had available to them the option of de-escalation in this manner. Instead, as events unfolded, there was an escalation of force in the use of police appointments.
- 5.20 In exploring the decision making process behind the escalation in the use of police appointments, evidence was before the Commission in the form of the BWVs, particularly that of Officer FAR1, of a growing

sense of frustration on the part of this officer in not being able to get Mr FAR3 to comply with his commands. On five occasions the officer is heard to swear at Mr FAR3, the last time shortly before the taser is discharged. Officer FAR5 was asked about the signs one would commonly see where an officer is becoming increasingly stressed or frustrated. The Sergeant replied that an example *'from the body worn, the officer swearing.'* The Sergeant agreed that in the case of Mr FAR3, Officer FAR1 was not yelling and ranting at him, but the continued swearing and the words used was consistent with an increasing level of stress. He further agreed that coinciding with this was an escalation by police of forceful measures used.¹³⁰ The Sergeant was not however of the view that Officer FAR1 had lost control, although he agreed the level of stress the officer may have been suffering at the time, indicated through his swearing, could cloud his judgment in relation to the use of tactical options.¹³¹ The Commission considers this evidence compelling.

- 5.21 The final issue for consideration is the adequacy of the systems of the NSWPF for the recording, monitoring and review of taser use by police officers since 27 January 2020. The process governing the operation of a TRP is governed in detail by the NSWPF Taser Review Panel SOPs. These appear to encapsulate the requirements to be observed in the course of a TRP being conducted.¹³²
- 5.22 At the time the review into the taser deployment involving Mr FAR3 was conducted, Officer FAR6 was acting in the capacity of PSM in LAC2. He occupied that role for only 6 weeks, during which time the TRP only convened on one occasion, to review a total of 20 taser deployments, one of which involved Mr FAR3.
- 5.23 From the evidence adduced, principally from Officer FAR6, two main issues arise. The first relates to the importance of the accuracy of the information provided to the TRP upon which its evaluation is based. The second issue concerns the adequacy of police systems to provide all relevant information to the TRP and for the TRP to acknowledge that it has been considered.
- 5.24 The evidence of Officer FAR6 was that following the deployment of a taser, upon the return of the police officer who deployed it to the

¹³⁰ Examination IHC at T34.

¹³¹ Examination IHC at T35.

¹³² Examination NKT at T5.

police station, the device is given to the supervisor, who, with information provided by that officer, creates a SITREP which is a concise summary of the events surrounding its discharge. The officer also generates a COPS Event which will create a more detailed narrative of events. In this case, it would appear from the records that the SITREP was created by Inspector FAR9.¹³³ In the case of a person of interest being charged with offences, as in the case of Mr FAR3, the Inspector said he expected the narrative that appeared in the COPS Event would be the same as in the narrative in the Police Facts Sheet.¹³⁴ This appears not to have been the case in the incident involving Mr FAR3. No less than three significant inconsistencies were identified in the narratives provided in the COPS Event and the Police Facts Sheet.

- 5.25 In order to conduct their review, Panel members are provided with a copy of the SITREP, Tasercam footage, the COPS Event and any available BWV. If there is a serious inconsistency between part of a narrative in a COPS Event and material reviewed by the TRP, there is a requirement to seek further information or inquire as to the reason for the inconsistency.¹³⁵

6. Submissions

- 6.1 No written submissions were made on behalf of Officer FAR1.
- 6.2 Prior to any evidence being taken by the Commission, written submissions were made on behalf of the Commissioner of Police on the use of handcuffs. It was submitted that:
- (a) The application by police of handcuffs does not constitute an arrest – it is a use of force. As with any use of force by police, it must be justified and reasonable in the circumstances.
 - (b) The application of handcuffs does constitute detention. There is a common law obligation on police to inform any person upon their detention of the reason for that detention.

¹³³ Examination NKT at T17.

¹³⁴ Examination NKT at T39.

¹³⁵ Examination NKT at T32.

6.3 In regard to the apprehension of Mr FAR3 by police, the submissions refer to the ‘facts’ placed before Magistrate FAR11 in the Local Court in September 2020, in connection with the prosecution of Mr FAR3, specifically:

(a) *‘The police officers involved say that Mr [FAR3] was not under arrest, and there was no intention at that time to arrest him. This was a fact agreed upon before the parties during the course of argument before Magistrate [FAR11].’*

(b) *‘At that stage, police were concerned with Mr [FAR3]’s welfare. The police officers said the handcuffs were not for arrest, but to avoid a violent confrontation, to control Mr [FAR3] for his own protection and the protection of police.’*

6.4 After being provided with the Commission’s draft report, the Commissioner of Police was invited to make further written submissions in relation to the use of handcuffs upon Mr FAR3. The Commissioner of Police declined to do so.

7. Findings

A The lawfulness of the Apprehension of Mr FAR3 by police and Use of Force

7.1 The evidence does not support a finding of serious misconduct in regard to Officer FAR1, Officer FAR2 and Officer FAR4.

7.2 Written submissions were made on behalf of the Commissioner of Police on the use of handcuffs by police, both in general terms and in relation to Mr FAR3. The scope and purpose of this investigation, as announced at the commencement of each private examination, was limited in relation to the apprehension of Mr FAR3, to whether or not he was unlawfully arrested, and if in the course of doing so, police used excessive force. As mentioned earlier in this report, the submissions on behalf of the Commissioner of Police, were made prior to the taking of evidence by this Commission, and therefore, are not informed by what the three police officers involved in the apprehension of Mr FAR3, said under oath. The Commission is satisfied that based upon their oral evidence, at the time the handcuffs were applied, police were of the belief that Mr FAR3 was under arrest for committing two

criminal offences and that it was their intention to convey him to LAC1. All of the officers present were aware of the obligation imposed upon them by section 202 of the LEPRA to inform Mr FAR3 that he was under arrest and the reason for the arrest, however, they failed to do so. In those circumstances the Commission finds the detention of Mr FAR3 was unlawful. However, the Commission also finds that the arrest of Mr FAR3 was not borne out of malice or any other improper motive. It was an oversight. Police were endeavouring to do the right thing. The circumstances were unusual in that for his safety they could not leave him where he was. Furthermore, they had reasonable grounds to suspect that Mr FAR3 had committed the offence of Offensive Behaviour, and was potentially violent. Whilst he remained on LOC1 Trust property, he was continuing to commit the offence of trespass.

- 7.3 In regard to the handcuffing of Mr FAR3 and the subsequent application of OC spray, whilst the three officers at the scene did have an alternative option to them to gain control, namely to de-escalate the situation by taking a step back and awaiting the arrival of backup, the use of those police appointments does not constitute an excessive use of force.
- 7.4 In relation to the deployment of the taser, Officer FAR1 had never used his taser before and he has not used it since. It cannot be said that he is a serial offender or that he is 'trigger happy' with his taser. It seems to the Commission that what did occur, is that in the heat of the moment and from a sense of frustration, the officer deployed his taser when it was unnecessary, on a person who was handcuffed, on the ground, suffering from the effects of OC spray and whose faculties were clearly affected. The deployment of the taser caused severe discomfort to the victim of its use and, looked at objectively, it was not justified.

B The adequacy of the systems of the NSWPF for recording, monitoring and review of taser use by police

- 7.5 The Commission does not find any maladministration on the part of the NSWPF in regard to the process established to review the use of tasers by police. However, in the course of its investigation the Commission did find three matters which are of concern.

- 7.6 The first issue relates to the creation of the narratives in the COPS Event and the Police Facts Sheet. Both were created at roughly the same time, by the same people. However, evidence gathered by the Commission showed there were a number of significant discrepancies between the two documents in relation to the actions of Mr FAR3. In the course of private examinations, the Commission heard that when the abovementioned documents are created by a police officer, they need to be checked or 'vetted' by a more senior officer. However, the person doing the checking may not be the same one for each document, so that if there are 'differences' between the two they may not be discovered.
- 7.7 The COPS Event in question eventually found its way to the TRP in the course of its review into the deployment of a taser by Officer FAR1, and was relied upon by the panel as being factually accurate. No less than four 'actions' of Mr FAR3 during his encounter with police leading up to the firing of the taser, were described in evidence by TRP member, Officer FAR6, as '*significant*'.
- 7.8 The narrative contained in the Police Facts Sheet did not contain these four 'actions' of Mr FAR3, with the result that Mr FAR3's conduct towards police appeared to have been far less aggressive than that portrayed in the COPS Event narrative.
- 7.9 The three officers involved in the arrest of Mr FAR3 as well as Officer FAR5, a tactics, policy and review officer, viewed the BWVs taken by Officer FAR1 and the security guard. All agreed the four 'actions' attributed to Mr FAR3 in the COPS Event narrative, could not be seen to occur in either of the BWVs. The behaviour of Mr FAR3 seen in the two videos is consistent with the narrative in the Police Facts Sheet rather than the narrative contained in the COPS Event. Based upon the evidence of these witnesses and the Commission's own viewing of the videos, the Commission finds that the narrative in the Facts Sheet correctly depicts the actions of Mr FAR3.
- 7.10 The fact the COPS Event contained significant factual errors is a matter of concern, particularly when those errors were such as to provide greater justification for the use of the taser.
- 7.11 The second issue relates to the completeness of the information obtained by the TRP for the purpose of its review in taser use. The Commission heard the TRP was not aware of the BWV of the security

guard, and based its findings on the narrative in the COPS Event, BWV of Officer FAR1 and the Tasercam footage. In the course of giving evidence before the Commission, Officer FAR6 viewed the BWV of the security guard. He agreed that it gave a much clearer view of Mr FAR3's actions immediately before being tasered, than that shown in the BWV of Officer FAR1 or the Tasercam footage. He said that had the Panel had access to the security officer's video, given the significant discrepancies between the actions of Mr FAR3 shown in the video and that recorded in the COPS Event, the Panel would have requested further information. The Commission considers the non-disclosure of the BWV of the security guard to the TRP, was a serious failure in the police systems for the cataloguing of information in its possession.

- 7.12 Finally, in the course of the TRP conducting a review, its SOPs require Minutes of its meeting to be recorded. According to the TRP SOPs, Minutes are to be generated as '*a record of discussion, deliberation, decision and action resulting from the review.*' In the case of Mr FAR3, the Minutes that have been created are essentially the narrative contained in the COPS Event. There is no record in the Minutes of any '*discussion*' or '*deliberation*' by the Panel members, which the Commission considers to be unsatisfactory, as it makes it virtually impossible for anyone, or any body, reviewing the decision of the TRP, to understand the reasoning behind the Panel's decision. This is particularly the case involving Mr FAR3 where the narrative in the COPS Event was in conflict with the BWV of Officer FAR1 in a number of respects.

8. Affected Persons

- 8.1 In Part 2 of this report the Commission set out the provisions of section 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to '*affected persons*'.
- 8.2 The Commission is of the opinion that Officer FAR1 is an affected person within the meaning of section 133(2)(c) of the LECC Act, being a person against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.

9. Recommendations

- 9.1 Since the Commission considers the deployment of the taser by Officer FAR1 was a misjudgement in the heat of an unexpected police operation, it is recommended that Officer FAR1 undergo further training and counselling.
- 9.2 The NSWPF undergo a review of its systems and Standard Operating Procedures in regard to the recording, monitoring and review of taser use by police, and that this be undertaken in consultation with the Commission.

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