

LECC

Law Enforcement
Conduct Commission

OPERATION KARIBA

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

JUNE 2019

LECC

Law Enforcement
Conduct Commission

Office of Commissioner for Integrity

45146/317

25 June 2019

The Hon John Ajaka 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 Kariba.

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

Yours sincerely



The Hon Lea Drake
Commissioner for Integrity

Encl.

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1 Introduction

1.1 Operation Kariba was an investigation by the Law Enforcement Conduct Commission ('the Commission') into the conduct of Officer 1 and Officer 2 following the arrest of Mr G on 2 April 2018.

1.2 The Commission gave consideration to the relevant provisions of the *Law Enforcement Conduct Commission Act 2016* ('the LECC Act') and determined that private examinations would occur.

1.3 On 21 August 2018, both Officer 1 and Officer 2 gave evidence at separate private examinations before the Commission. The general scope and purpose of the examinations was:

To investigate whether [Officer 1] and [Officer 2] engaged in serious officer misconduct in relation to their treatment of [Mr G] following his arrest and detention on 2 April 2018.

1.4 Officer 3 also attended a private examination on 8 November 2018 to give evidence to the Commission, with the same scope and purpose set out above.

1.5 The Commission did not consider it necessary to conduct an examination of any other person for the purposes of the investigation.

1.6 For the reasons set out later in this Report, the Commission is of the view that Officer 1 and Officer 2 engaged in serious police misconduct when they detained Mr G, transported him from Burwood to Chullora and abandoned him on the side of a road in a location where he was exposed to the risk of serious injury. The Commission is also concerned with the alleged approval of this conduct by a senior officer and its frequency.

1.7 The CCTV footage obtained by the Commission should be viewed prior to reading this Report. The footage has been uploaded to the Commission's website with this Report.

2 The Commission's Report

2.1 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*".

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.

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.

2.2 Part 4 of the LECC Act sets out the functions of the Commission. Pursuant to s 29 the Commission may, *inter alia*, make findings and form opinions on the basis of its investigations as to whether officer misconduct occurred and to make recommendations as to 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 or whether consideration should be given to the taking of action under Part 9 of the *Police Act 1990*. However, the Commission cannot include in a report under Part 11 of the LECC Act a finding or opinion that any conduct of a specified person is officer misconduct unless the conduct is serious misconduct.¹

2.3 Serious misconduct is defined in s 10 of the LECC Act as:

(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 repute 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

¹ Law Enforcement Conduct Commission Act 2016, s 29(6).

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

- 2.4 Pursuant to s 61, 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.
- 2.5 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.²
- 2.6 Section 143 requires the Commission, before including in a report under Part 11 any comment about a person that the Commission considers adverse, so far as practicable, to inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions.
- 2.7 The Commission is taken to have complied with s 143 if it has held an examination, at which the person who is the subject of the adverse comment concerned was informed of the substance of the grounds of the adverse comment, and given an opportunity to make submissions.
- 2.8 The Commission has provided the legal representatives of Officer 1 and Officer 2 with a copy of the Commission's draft report and invited them to make submissions in response. Submissions were received from the legal representative for Officer 1, and no submissions were received from the legal representative for Officer 2. The Commission considers that it has complied with s 143 of the LECC Act.
- 2.9 The Commission has made a determination to protect the identity of all persons involved. Accordingly the involved persons will be referred to by codenames in this Report.

3 Background

- 3.1 On 2 April 2018 at about 9:40 p.m. Officer 1 and Officer 2 were patrolling the Burwood area.
- 3.2 Both officers observed Mr G, who was previously known to them because of his extensive criminal history, seated on a styrofoam box outside a large unit complex on 1 Railway Parade. The officers approached Mr G and observed a number of baby formula cans and a pair of UGG boots inside the box. When questioned about these items Mr G claimed that the items belonged to him as he had found them in a nearby bin.

² *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

- 3.3 Both officers suspected that the items had been stolen. They submitted Mr G to a search and found additional items. These included a bottle of fish oil capsules, one Navman GPS and one 'Seak' kayak bag.
- 3.4 Mr G became agitated and swore at Officer 1 and Officer 2. The officers warned Mr G about using offensive language. Mr G persisted. Mr G was then arrested and placed into the police caged vehicle.
- 3.5 At about 9:57 p.m. the police caged vehicle arrived at Dasea Street in Chullora. Both officers unloaded Mr G from the vehicle and onto the side of the road. The officers returned to the vehicle, conducted a three point turn, and stopped next to Mr G, who was lying on the side of the road. Officer 1 exited the vehicle and dragged Mr G further away from the road, before getting back into the vehicle. Both officers then drove off.
- 3.6 These events on Dasea Street were recorded on CCTV cameras.

4 The Evidence

A. Arrest and movement of Mr G

- 4.1 The police Facts Sheet³ provided some factual background.
- 4.2 On 2 April 2018 at about 9:40 p.m., police officers patrolling the Burwood area observed Mr G sitting on a styrofoam box outside a unit complex at 1 Railway Parade in Burwood.
- 4.3 Police noticed a number of baby formula cans and a pair of UGG boots inside the box. As a result of their personal knowledge and previous dealings with Mr G those police officers suspected that the items had been stolen.
- 4.4 Mr G was questioned about the items and informed the police officers that he found them in a nearby bin. The police officers informed Mr G that they would be conducting a search of him and the items inside the box. Mr G complied with this request. In addition to the items previously identified, the police officers located one bottle of Swisse branded fish oil capsules, one Navman GPS and one Seak branded bag.
- 4.5 Police informed Mr G that he would be placed under arrest for being in possession of stolen goods. When informed that the goods would be seized Mr G became aggressive towards the police officers and began swearing.
- 4.6 Mr G was warned that using offensive language was an offence but he continued swearing. The police officers arrested Mr G and placed him into the rear of the police caged vehicle and removed him from the area.

³ Exhibits BHQ3C and BHR1C.

- 4.7 Officer 1 and Officer 2 were identified as the arresting officers. The informant was identified as Officer 2.
- 4.8 The arrest of Mr G was noted on a tasking sheet⁴, but was not recorded in the notebook of either officers.⁵
- 4.9 A log of the use of the computer system within the police caged vehicle was obtained by the Commission.⁶ It shows that on 2 April 2018 at 9:47:27 p.m. Officer 1 logged out of the system. The entry before this was a record of an unrelated incident at 9:01:39 p.m.
- 4.10 After logging out the system recorded the movement of the vehicle as follows:
- 9:51:37 p.m. - Current location changed from BU to SFD
 - 9:53:55 p.m. - Current location changed from SFD to BK
 - 9:54:20 p.m. - Current location changed from BK to SFD
 - 9:54:31 p.m. - Current location changed from SFD to BK
 - 9:58:11 p.m. - Current location changed from BK to BH
 - 10:10:07 p.m. - Current location changed from BH to BK
 - 10:10:21 p.m. - Current location changed from BK to BH
 - 10:10:45 p.m. - Current location changed from BH to SFD
 - 10:15:50 p.m. - Current location changed from SFD to BU
- 4.11 At 10:17:06 p.m. Officer 1 logged back into the system.
- 4.12 CCTV footage recording the incident on Dasea Street in Chullora at the relevant time was obtained by the Commission.⁷ The footage shows the following:
- (a) 9:57:20 p.m. - a police vehicle drives into Dasea Street
 - (b) 9:57:44 p.m. - a police vehicle stops in the left lane of Dasea Street
 - (c) 10:03:45 p.m. - a person appears momentarily at the rear of the police vehicle on the passenger side, before being obscured by the vehicle's headlights
 - (d) 10:04:45 p.m. - a person again appears momentarily at the rear of the vehicle on the passenger side, before being obscured by the vehicle's headlights
 - (e) 10:05:32 p.m. - a police vehicle commences driving off towards the CCTV camera;
 - (f) 10:06:05 p.m. - a police vehicle conducts three-point turn on Dasea Street and commences driving away from CCTV camera;
 - (g) 10:06:18 p.m. - a police vehicle headlights illuminate a body lying on the kerbside
 - (h) 10:06:27 p.m. - a police vehicle stops next to body on the kerbside
 - (i) 10:06:37 p.m. - a passenger and a driver exit the vehicle

⁴ Exhibits BHQ5C and BHR3C.

⁵ Exhibit BHQ4C and Exhibit BHR2C.

⁶ Exhibits BHQ6C and BHR4C.

⁷ Exhibits BHQ7C and BHR5C.

- (j) 10:06:40 p.m. – a passenger pulls a body along the ground and away from the kerb as a driver appears to observe
- (k) 10:06:50 p.m. – a passenger and a driver return to the police vehicle
- (l) 10:07:05 p.m. – the police vehicle is driven away from camera and out of sight

B. Officer 2's evidence before the Commission

4.13 Officer 2 gave evidence under objection pursuant to s 75 of the LECC Act in a private hearing before the Commission on 21 August 2018. His evidence is summarised below.

- (a) He joined the NSWPF in May 2011 and has since then been performing general duties.⁸
- (b) Typically it is the passenger who will log into the computer system within the police vehicle.⁹
- (c) The passenger is usually logged into the system during the entire shift, unless there are technical problems. This can happen quite often. The amount of time this causes a person to be logged out will vary.¹⁰
- (d) There are no rules or procedures governing police officers leaving the Police Area Command, but if he were to drive out too far he would notify either the police radio or his supervisor.¹¹
- (e) He has had previous dealings with Mr G prior to 2 April 2018.¹²
- (f) He prepared the Facts Sheet for the arrest on 2 April 2018. He did not believe Mr G resided at the address listed on the document. It was only used because Mr G nominated it.¹³
- (g) He was driving on the night of 2 April 2018 when Mr G was spotted with another male.¹⁴
- (h) He and Officer 1 got out of the caged police vehicle and approached Mr G. He saw that Mr G was sweating and had dilated pupils. Mr G started swearing and mentioned having a complaint ready to file against them.¹⁵
- (i) He informed Mr G of his suspicion that the items were stolen and advised Mr G that he would be searched.¹⁶

⁸ Examination BHQ at T6.

⁹ Examination BHQ at T7.

¹⁰ Examination BHQ at T7.

¹¹ Examination BHQ at T7-8.

¹² Examination BHQ at T8-11.

¹³ Examination BHQ at T12.

¹⁴ Examination BHQ at T12.

¹⁵ Examination BHQ at T13.

¹⁶ Examination BHQ at T13.

- (j) After the search Mr G became aggressive and started swearing. Both he and Officer 1 informed Mr G that it was an offence to do so.¹⁷
- (k) He thought that the only way to stop the repetition of that offence was to arrest Mr G. Subsequently Mr G was handcuffed and placed in the rear of the police caged vehicle, at which point Mr G swore again.¹⁸
- (l) Officer 1 then suggested to him the offence of breach of the peace.¹⁹
- (m) He agreed. He un-arrested Mr G for the offence related to the stolen items. He then removed Mr G from the area to prevent a further breach of the peace. He later issued a field Court Attendance Notice ('CAN') for the offences relating to the stolen items.²⁰
- (n) Mr G appeared to be healthy at this stage.²¹
- (o) He removed Mr G from the area by driving him to Dasea Street in Chullora. It was his idea. He chose that location because he knew nobody would be around so that Mr G could not engage in a breach of the peace there.²²
- (p) Once on Dasea Street, he sat in the caged police vehicle writing the field CAN. He and Officer 1 then went to the back of the caged police vehicle and asked Mr G to get out. Mr G refused. Officer 1 then grabbed Mr G's arm to pull him out.²³
- (q) Mr G went limp and fell to the ground. At this stage his handcuffs were removed and the court process was explained to him. Mr G then laughed at the officers.²⁴
- (r) Mr G refused to take the field CAN. It was therefore placed on the ground next to Mr G as he lay there either face down or on his side.²⁵
- (s) He and Officer 1 returned to the caged police vehicle and drove off towards the recycling centre, did a u-turn and saw Mr G had positioned himself so that his legs were partly on the roadway.²⁶

¹⁷ Examination BHQ at T14.

¹⁸ Examination BHQ at T14-15.

¹⁹ Examination BHQ at T15.

²⁰ Examination BHQ at T15.

²¹ Examination BHQ at T16.

²² Examination BHQ at T17.

²³ Examination BHQ at T17-18.

²⁴ Examination BHQ at T17-18.

²⁵ Examination BHQ at T18 and T27-28.

²⁶ Examination BHQ at T18.

- (t) He and Officer 1 got out of the caged police vehicle and asked Mr G to move. Mr G laughed at them, so they moved his legs off the roadway and left.²⁷
- (u) He wanted to move Mr G's legs off the roadway so that he would not be struck by a vehicle that did not see him.²⁸
- (v) He and Officer 1 drove off and returned to their local police station.²⁹
- (w) He expected Mr G to walk or get public transport to return to Burwood.³⁰
- (x) Mr G was conscious, laughing, and moving when they left him on Dasea Street.³¹
- (y) He recorded the event as a COPS entry, but did not make a record of it in his notebook because he felt that it was unnecessary.³²
- (z) Officer 1 completed the Tasking Sheet.³³
- (aa) Mr G only had \$5 on him and nothing else when he was left at Dasea Street.³⁴
- (bb) He could not recall Officer 1 logging out of the system in the caged police vehicle and could not think of a reason for him doing so.³⁵
- (cc) He did not notice any injuries on Mr G's body when he was left at Dasea Street.³⁶
- (dd) Mr G appeared to be slightly under the influence of drugs.³⁷
- (ee) He has removed people in a similar fashion in the past, including one other time involving Mr G.³⁸
- (ff) At the time of the hearing, he did not see any misconduct or inappropriate behaviour about leaving Mr G on Dasea Street, and could not see the possibility of any harm or danger being occasioned to Mr G.³⁹

²⁷ Examination BHQ at T18.

²⁸ Examination BHQ at T18.

²⁹ Examination BHQ at T19.

³⁰ Examination BHQ at T19.

³¹ Examination BHQ at T31.

³² Examination BHQ at T20-21.

³³ Examination BHQ at T22.

³⁴ Examination BHQ at T23.

³⁵ Examination BHQ at T24.

³⁶ Examination BHQ at T26.

³⁷ Examination BHQ at T27.

³⁸ Examination BHQ at T28.

³⁹ Examination BHQ at T31.

C. Officer 1's evidence before the Commission

4.14 Officer 1 gave evidence under objection pursuant to s 75 of the LECC Act in a private hearing before the Commission on 21 August 2018. His evidence is summarised below.

- (a) He joined the NSWPF in 2012 and has been in general duties for most of his career.⁴⁰
- (b) It is usually the passenger who logs into the system within a police vehicle.⁴¹
- (c) The passenger would remain logged in until the end of their shift unless there are difficulties which might cause the person to be logged out.⁴²
- (d) There is no requirement to notify anyone if travelling outside of the local Police Area Command.⁴³
- (e) He has had previous dealings with Mr G.⁴⁴
- (f) Mr G is homeless and does not reside at the address stated on the police Facts Sheet.⁴⁵
- (g) Officer 2 was driving on the night of 2 April 2018 when they spotted Mr G in Burwood in the company of another male.⁴⁶
- (h) He and Officer 2 stopped the vehicle to speak to Mr G, who immediately became hostile towards them.⁴⁷
- (i) When Officer 2 asked who the baby formula belonged to, Mr G claimed it was his as he found it in a bin.⁴⁸
- (j) He spoke to the other male while Officer 2 conducted a search of Mr G.⁴⁹
- (k) Officer 2 placed Mr G under arrest and informed him that the goods would be seized. At this point Mr G became angry and aggressive, and started swearing.⁵⁰

⁴⁰ Examination BHR at T6.

⁴¹ Examination BHR at T7.

⁴² Examination BHR at T7.

⁴³ Examination BHR at T7.

⁴⁴ Examination BHR at T8.

⁴⁵ Examination BHR at T9.

⁴⁶ Examination BHR at T9.

⁴⁷ Examination BHR at T9.

⁴⁸ Examination BHR at T9-10.

⁴⁹ Examination BHR at T10.

⁵⁰ Examination BHR at T10.

- (l) Officer 2 warned Mr G that he would be arrested if he continued swearing. Mr G continued swearing and was subsequently handcuffed and placed under arrest.⁵¹
- (m) Mr G did not appear to be sick or injured.⁵²
- (n) He did not know whether Mr G was under the influence of drugs, but he suspected he was.⁵³
- (o) After Mr G was placed into the caged police vehicle, he suggested to Officer 2 that they could arrest Mr G for a breach of the peace. A field CAN could then be issued for the offences of offensive language and goods in custody.⁵⁴
- (p) He was of the view that by removing Mr G for breach of the peace he was essentially un-arresting him for the goods in custody and offensive language offences by utilising s 105 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.⁵⁵
- (q) Mr G was taken to and left at a street just before Rookwood Road in Chullora.⁵⁶
- (r) It was a joint decision to take Mr G to that location.⁵⁷
- (s) He had been to that location previously for similar cases where he had to remove people for breaches of the peace.⁵⁸
- (t) He has never taken Mr G to that location in the past.⁵⁹
- (u) He used the common law power to arrest Mr G for a breach of the peace and to transport him to Chullora.⁶⁰
- (v) Once at the Chullora location, he asked Mr G to exit the caged police vehicle. Mr G refused. He then grabbed Mr G by the shoulder and pulled him out of the caged police vehicle with the assistance of Officer 2.⁶¹
- (w) Mr G went limp and fell to the ground. He removed the handcuffs from Mr G and then Officer 2 explained the field CAN to Mr G. Mr G swore at them. They then returned to the vehicle. Mr G was on the side of the road when this was happening.⁶²

⁵¹ Examination BHR at T10.

⁵² Examination BHR at T11.

⁵³ Examination BHR at T11.

⁵⁴ Examination BHR at T12.

⁵⁵ Examination BHR at T33.

⁵⁶ Examination BHR at T12.

⁵⁷ Examination BHR at T13.

⁵⁸ Examination BHR at T13 and T34.

⁵⁹ Examination BHR at T34.

⁶⁰ Examination BHR at T13 and T26.

⁶¹ Examination BHR at T14.

⁶² Examination BHR at T14-15.

- (x) They drove off and did a u-turn, when they observed Mr G had moved his body so that his legs were sticking out onto the road. They got out of their caged police vehicle and, either he or Officer 2, grabbed Mr G's legs to move them from the road and back onto the footpath to ensure Mr G did not get run over.⁶³
- (y) At this point Mr G was giggling.⁶⁴
- (z) Mr G did not have any personal belongings on him such as a wallet, phone or cash.⁶⁵
- (aa) At the time, he did not consider how Mr G would return to Burwood. He was only concerned about the possibility of Mr G breaching the peace.⁶⁶
- (bb) He did not record this event in his notebook because it was not his job and he did not think there was anything required to be put into his notebook.⁶⁷
- (cc) He completed the Tasking Sheet, the purpose of which is to act as a running sheet to be handed in at the end of the shift.⁶⁸
- (dd) He did not recall logging out of the computer system within the police vehicle on the night of 2 April 2018. It is possible there were technical errors that night which may have caused him to be logged out.⁶⁹
- (ee) He did not recall logging back into the system on the night of 2 April 2018.⁷⁰
- (ff) When shown the CCTV footage he agreed that he was the one who pulled Mr G further away from the road.⁷¹
- (gg) He agreed that the incident did not look good on the footage from the perspective of someone who was not aware of the circumstances.⁷²
- (hh) He considered that Mr G had moved his legs onto the road as a way of seeking attention.⁷³
- (ii) There are police resources entitled "*Constables (Investigators) Pocket Guide*" and "*Police Powers Handbook*" which highlight the

⁶³ Examination BHR at T15-16 and T22.

⁶⁴ Examination BHR at T21.

⁶⁵ Examination BHR at T16.

⁶⁶ Examination BHR at T17.

⁶⁷ Examination BHR at T18.

⁶⁸ Examination BHR at T19.

⁶⁹ Examination BHR at T20.

⁷⁰ Examination BHR at T20-21.

⁷¹ Examination BHR at T23.

⁷² Examination BHR at T24.

⁷³ Examination BHR at T24-25.

police common law power to arrest people for breaches of the peace.⁷⁴

- (jj) He relied on his understanding of the common law power to remove people from the scene identified in that booklet, and the fact that he had engaged in that conduct before at the direction of senior officers, to enable himself to take the action he did on this occasion in regard to Mr G.⁷⁵
- (kk) He has taken someone to Chullora before for a similar incident at the direction of Officer 3.⁷⁶
- (ll) He had concerns about leaving Mr G in Burwood.⁷⁷
- (mm) He believed that, under the common law, he had the power to remove people to prevent a breach of the peace.⁷⁸
- (nn) His understanding was that under the common law power he could remove people to prevent a breach of the peace.⁷⁹
- (oo) The location where Mr G was taken to has no nearby train stations but there may have been some bus stops along Rookwood Road.⁸⁰
- (pp) His evidence was that after Mr G was arrested for the offences of goods in custody and offensive language, he was arrested for breach of the peace, the common law power was then used to remove him. He was un-arrested for the offences of goods in custody and offensive language, after which he was served with a field CAN.⁸¹
- (qq) In a previous incident, he removed youths from Drummoyne and took them to the Strathfield train station.⁸²

D. Officer 3's evidence before the Commission

4.15 Officer 3 gave evidence under objection pursuant to s 75 of the LECC Act in a private hearing before the Commission on 8 November 2018. His evidence is summarised below.

⁷⁴ Examination BHR at T27 and T36-39.

⁷⁵ Examination BHR at T27.

⁷⁶ Examination BHR at T27.

⁷⁷ Examination BHR at T30.

⁷⁸ Examination BHR at T30-31.

⁷⁹ Examination BHR at T31.

⁸⁰ Examination BHR at T34.

⁸¹ Examination BHR at T35.

⁸² Examination BHR at T40.

- (a) He joined the NSWPF in 1994 and has been stationed at his current local police station since the end of 2005. His current role is the general duties supervisor.⁸³
- (b) He worked in other areas from 2000 and when he returned to general duties in 2005, he re-educated himself on general policing powers, including powers relating to breach of the peace matters.⁸⁴
- (c) He knows Mr G by name but does not think he has ever had any personal dealings with him. He understands Mr G to be a low level drug dealer in the local area who lives in any vacant premises he can find.⁸⁵
- (d) He did not have knowledge of Mr G's arrest on 2 April 2018 and had not spoken to Officer 1 or Officer 2 about it. He also had no knowledge of Mr G being transported from Burwood to Chullora on the same night.⁸⁶
- (e) After watching the CCTV footage, he described it as concerning because the person on the ground did not appear to be moving.⁸⁷
- (f) He believes that there is a common law power to arrest and remove someone for breaching the peace.⁸⁸
- (g) He stated that in using the common law power to remove someone, there were no specifics as to distance or time, and that it was down to the officer's discretion and the reasonableness of it.⁸⁹
- (h) In the last 12 or 13 years, he has only ever had to remove someone for a breach of the peace three or four times. On one of those occasions he directed for a person to be moved from Rhodes to Meadowbank. He made this decision based on two factors: so that his officers would not be away from their duties for too long, and so the person in question could not return to the area easily where they had been causing trouble. He noted that Meadowbank had a "*semi like industrial area*" with "*buses that run through*".⁹⁰
- (i) Other factors he takes into account are the number of people already in custody, the amount of staff within the police station, the distance to be travelled, the availability of public transport, the time of day and weather conditions.⁹¹

⁸³ Examination BIA at T5.

⁸⁴ Examination BIA at T25-26.

⁸⁵ Examination BIA at T6.

⁸⁶ Examination BIA at T7.

⁸⁷ Examination BIA at T10 and T15.

⁸⁸ Examination BIA at T10.

⁸⁹ Examination BIA at T11.

⁹⁰ Examination BIA at T12.

⁹¹ Examination BIA at T13-15.

- (j) Given the facts surrounding the arrest of Mr G, he was of the view that the removal of Mr G from Burwood to Chullora was reasonable.⁹²
- (k) He has never directed any officer to take people to Dasea Street in Chullora.⁹³
- (l) If Mr G had been affected by alcohol or drugs, then it would have been unreasonable to leave him on Dasea Street at that time of night.⁹⁴
- (m) He has never issued instructions to either Officer 1 or Officer 2 to leave people specifically on Dasea Street in Chullora.⁹⁵
- (n) His understanding of the common law power to remove someone for a breach of the peace is that the person is first arrested, removed, and then released.⁹⁶
- (o) Where there is an arrest and removal for a breach of the peace, the incident should always be recorded as a COPS Event as a minimum.⁹⁷
- (p) It would be difficult to search the COPS system for breach of the peace matters because it is not listed as a separate category under incidents or sub-incidents. It might be possible to conduct a search through the narrative, but without listing breach of the peace as an individual category, the search would be difficult.⁹⁸
- (q) His understanding is that junior officers are educated as to their powers in relation to a breach of the peace but there is not much awareness of the limitations of those powers.⁹⁹

5 Submissions made on behalf of Officer 1

5.1 Submissions were received from the legal representative for Officer 1 on 19 June 2019. In summary, the submissions stated the following:

- (a) Mr G threatened violence when he uttered the words *"let me out, I'll rob cunts. I'll fuck this place up. I'll bash people. I'll fuck Burwood and Strathfield up."*

⁹² Examination BIA at T16-17.

⁹³ Examination BIA at T18.

⁹⁴ Examination BIA at T21.

⁹⁵ Examination BIA at T22.

⁹⁶ Examination BIA at T22.

⁹⁷ Examination BIA at T22.

⁹⁸ Examination BIA at T23.

⁹⁹ Examination BIA at T24.

- (b) Officer 1 and Officer 2 knew Mr G's record, history of drug abuse, and behaviour he was capable of, and in this context Mr G's threats raised a reasonable apprehension that harm was likely to be done to a person.
- (c) At that point in time, Officer 1 suggested consideration of a breach of the peace and applied the first three points in the *Constables (Investigators) Pocket Guide*, namely formal arrest, temporary detention and removal from the area.
- (d) Once Mr G uttered his threats, police were entitled, or even compelled, to form the view that if Mr G was to be released then a likely breach of the peace would occur.
- (e) It was not to the point that Mr G did not present an actual threat while handcuffed outside the police truck or later inside the pod, but it was the threat of future violence, specifically directed at the inhabitants of the nominated suburbs with which police had to deal.
- (f) Bearing in mind Mr G's threats directed at Burwood and Strathfield, it was unsurprising that the officers took him to a sparsely populated area one suburb away to abate the possibility that a threat to breach the peace would evolve into an actual breach.
- (g) Mr G had enough funds for a bus fare. It would not be open to the Commission to find that it was unlikely that public transport would be easily available as there was no evidence before the Commission. It was further submitted that a Google search showed three bus stops within a relatively short distance.
- (h) There was no evidence that Mr G had to or intended to return to Burwood. He was homeless and also identified with Strathfield and perhaps other areas.
- (i) There was no suggestion in the evidence that Mr G was other than fully conscious, albeit possibly affected by drugs. Mr G made a conscious decision to refuse to get out of the police vehicle, and chose to go limp and fall to the ground after being removed. Mr G also made a conscious decision to manoeuvre himself so that his legs were partly on the road.
- (j) It was notable that after the police left, Mr G did not again put his legs onto the road. Mr G either chose to remain on the ground awake, or more likely he fell asleep. There is no evidence of him being other than conscious and lucid at all times.
- (k) With the benefit of hindsight and insight gained from the private examination, Officer 1 appreciates the view that a better location could have been chosen to leave Mr G at. However it is self-evident that Mr G was not in actual danger and the Commission

should not opine as to the legal position of the police in the event Mr G was injured.

- (l) It may be that removal of Mr G to the railway station would have been a better course but there can be no doubt that both officers were doing their best to interpret the law as best as they could, with the aid of written materials from the Commissioner of Police and the leadership and guidance of senior officers.
- (m) For the reasons above, the removal of Mr G was lawful and the conduct of Officer 1 does not constitute serious misconduct.

6 Consideration of the Evidence and the Relevant Law

6.1 The Commission invited the NSWPF to provide a submission setting out its position on the powers of NSW police officers to remove people for breaches of the peace. The Commission has considered the material listed below provided by the NSWPF on 15 January 2019 in response to that invitation:

- (a) 'Breach of the Peace' information from the Police Powers Handbook on the NSWPF Intranet and a Breach of the Peace Facts sheet provided by the Burwood Police Area Command;
- (b) A letter from Professional Standards Command dated 15 January 2019 enclosing:
 - i. Document titled 'PA008 Breach of the Peace';
 - ii. Document titled 'OP024 Police, Civil Disputes and Breach of the Peace';
 - iii. Document titled 'Police and Civil Disputes';
 - iv. Document titled 'OP021 Police, Civil Disputes and Breach of the Peace';
 - v. Document titled 'PA032 Breach of the Peace 2';
 - vi. Document titled 'Law Note 41 of 2002 – Crowd Control Part 1: Breach of the Peace';
 - vii. An internal email from the Inspector of the Burwood Police Area Command dated 19 November 2018;
 - viii. Document titled 'Breach of the Peace' from the Police Powers Handbook;
 - ix. Extract of *State of New South Wales v Bouffler* [2017] NSWCA 185;
 - x. Extract of *State of New South Wales v Tyszyk* [2008] NSWCA 107; and
 - xi. Extract of *Gibb-Smith v State of New South Wales* [2018] NSWDC 204.

- 6.2 The Commission has also considered a written submission provided by the NSWPF on 21 February 2019.
- 6.3 Consideration of these issues by the courts reveals the following. The police have a common law duty to keep the peace.¹⁰⁰ This common law power has been specifically preserved by statute.¹⁰¹ However the expression “*breach of the peace*” has never been precisely defined, although violence, or the threat of violence, is a feature of a breach of the peace. In *R v Howell*¹⁰² it was said that “*there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance*”. This is encapsulated in the *Constables (Investigators) Pocket Guide* referred to in evidence by Officer 1.¹⁰³
- 6.4 In this context peace does not equate to quietude or calm. It has been held that persistently knocking on a door¹⁰⁴, swearing¹⁰⁵, pestering¹⁰⁶ or urinating in public¹⁰⁷ would not constitute a breach of the peace. Mere annoyance, disturbance, insult, or abusive language without personal violence are generally not sufficient to establish a breach of the peace.¹⁰⁸
- 6.5 The *Constables (Investigators) Pocket Guide* is generally consistent with this approach. It states that “*loud noise, unruly behaviour and offensive words can amount to a breach of the peace but only if they raise a reasonable apprehension that because of it or as a consequence of it, harm is likely to be done to a person or in a person’s presence to that person’s property*”.¹⁰⁹
- 6.6 New South Wales police officers have the power to discontinue an arrest. Section 105 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides as follows:
- (1) *A police officer may discontinue an arrest at any time.*
- (2) *Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:*
- (a) *if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,*
- (b) *if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice*

¹⁰⁰ *DPP v Armstrong* [2010] NSWSC 885. See also *Nicholson v Avon* [1991] 1 VR 212.

¹⁰¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s 4.

¹⁰² [1981] 3 All ER 383.

¹⁰³ Exhibit BHR7C.

¹⁰⁴ *Baynes v Brewster* (1841) 2 QB 375.

¹⁰⁵ *R v Lockley* (1864) 4 F & F 155.

¹⁰⁶ *R v Dunn* (1840) 12 A & E 599.

¹⁰⁷ *Booth v Hanley* (1826) 2 C & P 288.

¹⁰⁸ *Rose v Wilson* (1823) 1 Bing 353.

¹⁰⁹ Exhibit BHR7C.

or, in the case of a child, dealing with the matter under the Young Offenders Act 1997.

(3) A police officer may discontinue an arrest despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law.

6.7 *Regina v Commissioner of Police, Ex parte North Broken Hill Ltd*¹¹⁰ suggests that the arrest of Mr G was unnecessary.

“This does not mean that they must always arrest and formally charge an individual picketer whose conduct amounts to a breach of the peace or is likely to do so. As Marks J said in Nicholson v Avon, “Arrest...is one thing; prevention of a breach or threatened breach of the peace is another.”

6.8 After quoting an extract from *Albert v Lavin*¹¹¹ the Court continued:¹¹²

“It is clear therefore that temporary detention of the kind mentioned is not necessarily to be equated with arrest as for an offence or a crime. It is a transitory preventive measure akin to self-help in abating a nuisance.”

6.9 Further, the Court went on to state:¹¹³

“As I have already said, if police do intervene at such a point, they do not have to arrest. They may be able to persuade the picketer to move away or they may be able to physically remove him before an actual offence has been committed. They have power to do this and do not commit an unlawful assault themselves in doing so.”

6.10 For the guidance of police officers the *Constables (Investigators) Pocket Guide* sets out the actions a police officer may take in respect of a breach of the peace. It provides:¹¹⁴

If a breach of the peace occurs, a police officer may take reasonable steps in order to keep the peace. This includes:

- *formal arrest;*
- *temporary detention;*
- ***removal from the area;***¹¹⁵
- *speaking with the person so as to persuade the person to keep the peace;*
- *removal of articles that could cause a breach of the peace; and*
- *form a barrier, etc.*

¹¹⁰ (1992) 1 Tas R 99.

¹¹¹ [1982] AC 546 at 565.

¹¹² (1992) 1 Tas R 99 at 110.

¹¹³ (1992) 1 Tas R 99 at 112.

¹¹⁴ Exhibit BHR7C.

¹¹⁵ The Commission’s emphasis.

- 6.11 The Guide references the case of *Reg v Commissioner of Police; Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99 (referred to above). This case concerned an industrial dispute that had arisen at a mill where the majority of workers had gone on strike and formed picket lines at all the entrances, preventing access in and out of the mill. The Court held that such action was a breach of the peace because it was likely to cause a person seeking entry or exit to initiate violent measures, and the police had the power to physically remove the people obstructing entry and exit.¹¹⁶
- 6.12 In that case there was a likely breach of the peace. Conflicts between unionists in the picket line and those often described as “scabs” are reasonably to be anticipated.
- 6.13 A police officer does not have power to direct a person under s 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to “move on” any further than is reasonably necessary to prevent injury or damage, to reduce or eliminate a risk to public safety or prevent the continuance of disorderly behaviour in a public place.
- 6.14 Except in particular circumstances, when exercising statutory powers, a police officer does not have power to physically move a person from one location to another unless that person is under arrest, in which case the arrest is only lawful if it is intended to charge that person, for which purpose they must be conveyed to a police station.
- 6.15 A person cannot be arrested or otherwise physically moved for the purpose of being taken to a random place where their conduct will not be a local problem. However, a police officer may take reasonable steps to prevent or stop a breach of the peace, including physically removing a person from where the breach is occurring or is about to occur. The restraint may only continue for as long as necessary to prevent or stop the breach of the peace.
- 6.16 On all occasions that a person is moved on they must be dealt with in such a manner as to ensure their safety and welfare.
- 6.17 A reasonable direction pursuant to s 197 of the *Law Enforcement (Powers and Responsibilities) Act 2002* can also be given to reduce or eliminate an obstruction to persons or traffic, or conduct amounting to harassment, intimidation or causing fear, or to stop drug supply or attempts to drug supply. Failure to comply with such a direction may also be an offence pursuant to s 199 of the same Act and could justify arrest, if the criteria in s 99 are met.
- 6.18 A move on direction pursuant to s 198 can only be given to an intoxicated person where the person’s behaviour as a result of the intoxication is likely to cause injury to another person or damage to property, or give rise to a risk to public safety or is disorderly. The direction must be reasonable in the circumstances for the purpose of preventing these occurrences. Section 198 does not authorise physical removal. Failure to obey a direction is an offence under s 199 and, subject to the usual limitations of s 99, the power

¹¹⁶ *Reg v Commissioner of Police; Ex P North Broken Hill Ltd* (1992) 1 Tas R 99 at 112.

to arrest can be used, with the effect of removal. However the power of arrest requires the person to be taken to a police station and dealt with according to law. It cannot be used just to effect a move.

- 6.19 Examples of other statutory powers to detain and remove persons from one location to another include powers under s 43 of the *Children and Young Persons (Care and Protection) Act 1998*, s 22 of the *Mental Health Act 2007* and s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- 6.20 The Commission rejects the submissions of Officer 1 and does not accept that there was a breach of the peace or a threatened breach of peace in the present circumstances. Prior to the police arrival, Mr G was sitting on a Styrofoam box on the street in the company of another male. There is no evidence that there was any sort of disorderly behaviour or other conduct which could amount to an actual or threatened breach of the peace at this stage.
- 6.21 The evidence is that Mr G only became agitated upon the arrival of the police officers. According to Officer 2's evidence, Mr G said "*look, here comes these two fucking blokes again. What do you two blokes want today with me? I've got a complaint I'm ready to file against you and the finger's on the trigger boys. Keep coming and see what happens*".¹¹⁷ Mr G was referring to his commencement of a complaint against these officers. There was no threat of harm to persons or property at this stage. There was no breach of the peace.
- 6.22 It was only after Mr G was handcuffed, arrested for offensive language and goods in custody and in the process of being placed into the rear of the police vehicle that, according to the evidence of both police officers, verbal threats of violence were made.
- 6.23 Mr G's reaction to his arrest, including his yelling obscenities, should not have been a surprise to the officers, particularly given their history of dealing with him. Once he was inside the vehicle, Mr G is alleged to have said to the police officers "*this is the best you've got against me. This is fucking bullshit. Let me out. I'll rob cunts. I'll fuck this place up. I'll bash people. I'll fuck Burwood and Strathfield up*".¹¹⁸ It was then that Officer 1 suggested consideration of the offence of breach of the peace.¹¹⁹
- 6.24 It could not be said that Mr G posed any threat once he was handcuffed and inside the rear of the police caged vehicle.
- 6.25 Setting aside the possible theft of property there was no anti-social behaviour by Mr G that could have amounted to a breach of the peace prior to the arrival of Officer 1 and Officer 2. At the time those words constituting the threatened breach of the peace were said Mr G was already under arrest for the offences of offensive language and goods in custody.

¹¹⁷ Examination BHQ at T13.

¹¹⁸ Examination BHQ at T14-15.

¹¹⁹ Examination BHQ at T15.

- 6.26 The Commission is satisfied and finds that there was no basis on which either police officer could conclude that there was likely to be a breach of the peace.
- 6.27 Officer 2 said in evidence to the Commission that, whilst in Burwood, he placed Mr G under arrest for the offences of offensive language and goods in custody.¹²⁰ Officer 1 then suggested the offence of breach of the peace. Officer 2 accepted this and un-arrested Mr G with a field CAN to be issued later for these offences. They then, when no breach of the peace was either occurring or threatened, made the decision to arrest and remove Mr G to prevent a breach of the peace.¹²¹ Officer 1's evidence was consistent with this version of events.¹²²
- 6.28 The document titled "*Law Note 41 of 2002*" tendered during the examination of Officer 1 states that, in response to a breach of the peace, "*the action you may take must be reasonable in the circumstances, but may include...removal from the area*".¹²³
- 6.29 Any removal must be reasonable and what is reasonable must be assessed in the circumstances of each case. In this instance the Commission is satisfied and finds that Mr G's removal was not only unlawful, but was also unreasonable.
- 6.30 To move Mr G from Burwood to Chullora was harsh. Mr G had no means to return to Burwood apart from walking the approximately six kilometre trip at 10 o'clock at night. A Google search also shows that, despite submissions of Officer 1 indicating there were bus stops nearby, there were no operating bus services after 10:00 p.m. at those bus stops.
- 6.31 Although Mr G did not have a permanent place of abode it was well known to both officers that he frequented the Burwood area. He would often stay in abandoned buildings located in that suburb. To take him six kilometres away to Dasea Street in Chullora was to remove him from the area he would identify as his local area, despite being homeless.
- 6.32 It was known to both police officers that Mr G had no practical means to enable him to travel back to Burwood in safety. He had no mobile phone, no Opal Card, no wallet and at most \$5 in cash.
- 6.33 Officer 2 said that the specific location was chosen because nobody was around so that the peace could not be further breached.¹²⁴ No one's peace could be disturbed in Chullora because no one was there. Apart from transport facilities, the area where he was taken to, and left, is an industrial area with no foot traffic. Mr G was left on the side of a road where there was no footpath. There are no train stations nearby, although Officer 1 said there may have been a bus stop nearby on Rookwood Road.¹²⁵ That was not something he established before he left Mr G on the side of the road.

¹²⁰ Examination BHQ at T14.

¹²¹ Examination BHQ at T14-15.

¹²² Examination BHR at T9-12.

¹²³ Exhibit BHR8C.

¹²⁴ Examination BHQ at T17.

¹²⁵ Examination BHR at T34.

This is to be contrasted to other circumstances where possible offenders have been left at a train station.¹²⁶

- 6.34 Mr G was left lying on the ground at the side of the road. Both officers said that Mr G was laughing at them. He had his legs sticking out partially onto the roadway.
- 6.35 Officer 1 said he believed Mr G did this intentionally to get their attention.¹²⁷
- 6.36 The fact that Officer 1 had to drag Mr G's legs persuades the Commission that Mr G was not fully conscious at the time he was left lying on the side of the road. Evidence available to the Commission from the CCTV footage supports this finding, as Mr G can be seen to remain lying on the dirt, with no visible movement, for a long time after the police depart.
- 6.37 Mr G could very easily have been killed. An unsuspecting truck driver could have been facing criminal charges for running him over. Both officers could have been facing criminal charges arising from that event.
- 6.38 Arising from the evidence of both officers the Commission was concerned that such removals were routine within the Burwood Local Area Command.
- 6.39 Engagement with the Local Area Commander has occurred in relation to these issues. Materials have been prepared which will hopefully deal with this issue in consultation with the Professional Standards Command.

7 Findings

- 7.1 Pursuant to s 133 of the *LECC Act*, the Commission will list below each affected person and the findings and recommendations made in respect of each.
- 7.2 Both officers dealt with Mr G in a manner likely to endanger his life. The Commission is satisfied and finds that the removal of Mr G to Chullora, and placing him on the side of the road in close proximity to the usual path of large transport vehicles, was an egregious failure of their obligation to ensure his welfare and safety. Both officers are affected persons.
- 7.3 The Commission is satisfied and finds that the removal of Mr G by Officer 1 and Officer 2 was without lawful excuse and was conduct which was serious misconduct.

¹²⁶ Examination BHR at T40.

¹²⁷ Examination BHR at T24-25.

8 Recommendations

- 8.1 The Commission is aware from its consultation with the Local Area Command that both officers have been withdrawn from full duties for some time and have therefore suffered a significant financial detriment. The Commission recommends that consideration should be given to the taking of non-reviewable action against Officer 1 and Officer 2 pursuant to s 173 of the *Police Act 1990* whilst taking that financial detriment into account.
- 8.2 The Commission recommends that the NSWPF should reconsider its training and education materials in this area.

Operation Kariba
Report pursuant to s 132
Law Enforcement Conduct Commission Act 2016
June 2019

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