LECC
Law Enforcement
Conduct Commission

OPERATION BENDOC

A report under section 132 of *Law Enforcement Conduct Commission Act 2016* concerning the excessive use of force and destruction of evidence by a Constable, and the failure of fellow officers to report suspected misconduct

November 2025

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ISBN 978-1-74003-081-6

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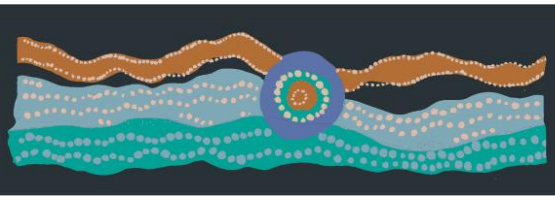

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Office of the Chief Commissioner

17 November 2025

The Hon Ben Franklin, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Operation Bendoc

In accordance with s 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act), the Commission provides you with a copy of its Report:

> Operation Bendoc
>
> A report pursuant to section 132 *Law Enforcement Conduct Commission Act 2016* concerning the excessive use of force and destruction of evidence by a Constable, and the failure of fellow officers to report suspected misconduct.

I presided at the private examinations held in aid of the investigation.

In accordance with s 142(2) of the LECC Act, I recommend that this report be made public immediately.

Yours sincerely

The Hon Peter Johnson SC
Chief Commissioner

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Executive Summary

The issues considered in this report are of fundamental importance to contemporary policing in this State.

The investigation in Operation Bendoc has 2 main aspects. They are:

- The repeated excessive use of force by a Constable in a 2 month period in 2024 and his disposal of 2 body-worn video (BWV) devices containing incriminating evidence.
- The failure of other serving NSW Police Officers to report his misconduct.

Excessive use of force and destruction of evidence

In May 2024, the Law Enforcement Conduct Commission (Commission) commenced an investigation into a Constable (Officer BEN1) when concerns were raised that he engaged in excessive use of force during the arrest of a young person in February 2024 and disposed of BWV devices that captured the events.

Concerns were bought to the Commission's attention of other instances where Officer BEN1 may have engaged in excessive use of force during the exercise of his policing duties.

In June 2024, Officer BEN1 gave evidence in a private examination before the Commission. He admitted excessive use of force and disposal of BWV devices and also his problematic use of force on other occasions in 2024.

The Commission has found that Officer BEN1:

- engaged in excessive use of force on 6 occasions between the period 16 February 2024 and 25 April 2024; and
- threw 2 BWV devices into the water to conceal or destroy evidence of his misconduct.

The Commission is satisfied that Officer BEN1's conduct in this regard amounts to serious misconduct.

The Commission has referred the matter to the Director of Public Prosecutions (DPP) for advice about initiating criminal proceedings against Officer BEN1 arising from his actions.

The Commissioner of Police accepted Officer BEN1's resignation from the NSW Police Force on 6 June 2024.

Failure to report Officer BEN1's misconduct

Officer BEN1 told the Commission he had discussed aspects of his conduct with 4 other serving NSW Police Force Officers. Those Officers also gave evidence before the Commission in private examinations.

The Commission has found that each of the 4 officers failed to meet their statutory duty under s 211F *Police Act 1990* (Police Act) to report the reasonably suspected misconduct of Officer BEN1. The Commission is satisfied that this amounts to serious misconduct and has recommended that the Commissioner of Police take reviewable action against each of these officers under s 173 of the Police Act.

Examination of issues arising and further recommendations

Against this background, the report examines important issues including excessive use of force by police officers, the need to use and protect BWV evidence of policing activities and the rationale for, and need for strict compliance with, the duty of police officers to report reasonably suspected misconduct on the part of other police officers.

The Commission makes recommendations in the report for:

- the NSW Police Force to provide additional support to operational officers who may be experiencing excessive stressors and potential mental health concerns. The Commission endorses and repeats the recommendations made by the Audit Office in June 2025 in its performance audit report titled: '*The mental health and wellbeing of NSW police*'.
- enhanced training by the NSW Police Force of police officers concerning the duty to report reasonably suspected misconduct on the part of another police officer, the importance of complying with the duty and the potential for

prosecution or disciplinary consequences for officers who fail to comply with this statutory duty.

- The extension of the limitation period for commencing a prosecution for an offence under s 201 of the Police Act to at least 12 months.
- The Commission to have direct access to NSW Police Force BWV footage without the matter being the subject of a misconduct complaint. This is a repeat of the recommendation made in the Commission's March 2025 report titled: '*Review of NSW Police Force body-worn video policy and practice.*'

1. Introduction

1.1. In the early hours of 16 February 2024, NSW Police Officers from a metropolitan police station responded to a report alleging that 4 young persons were at a train station with a gun and knives trying to fight with another person. On arrival the officers engaged in a foot pursuit of 4 young persons and arrested, CIV1 (then aged 14 years) and CIV2 (then aged 15 years). The other 2 young persons could not be located.

1.2. Relevantly, BWV devices worn by the officers were activated during the pursuit and arrest of CIV1 and CIV2.

1.3. CIV1 and CIV2 were taken to Police Station 1. A personal search of each young person was conducted. A knife was found in CIV1's waistband, and a hammer was found in CIV2's waistband. A balaclava and gloves were also found in CIV2's possession.

1.4. Constable DOC1 (Officer DOC1) and Officer BEN1 were 2 of the officers that responded to the incident on 16 February 2024. Whilst at Police Station 1 they placed their BWV devices in the docking station to upload the footage recorded.

1.5. CIV1 and CIV2 were later taken to Police Station 2. Officer DOC1 accompanied them, whilst Officer BEN1 remained at Police Station 1.

1.6. There was a social gathering later that day, which was attended by several officers, including Officers DOC1 and BEN1.

1.7. Some time later, Officer DOC1 reported to senior officers that Officer BEN1 had used excessive force during the arrest of CIV2. Officer DOC1 also reported that at the social gathering, Officer BEN1 told her that he had thrown both his and her BWV devices, which were worn during the arrests of CIV1 and CIV2, into the 'ocean'.

1.8. Following receipt of Officer DOC1's report on 25 April 2024, the NSW Police Force decided to commence a criminal investigation into the matter.

1.9. During the early stages of the NSW Police Force investigation, they determined to widen the scope of their investigation to include subsequent instances where

it had been alleged that Officer BEN1 used excessive force. This included:

- an allegation by CIV3 that whilst he was riding his bike past a police station on 3 April 2024, Officer BEN1 removed his facemask and scratched his face for no apparent reason; and
- an allegation that Officer BEN1 assaulted CIV4 during his arrest on 25 April 2024.

1.10. On 13 May 2024, pursuant to s 44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* (LECC Act), the Commission determined to take over the matter on the basis that if the allegations were true, they were likely to meet the threshold of serious misconduct.

1.11. On 15 May 2024, the Commission commenced an investigation under Part 6 of the LECC Act into the allegations concerning Officer BEN1 under Operation Bendoc.

1.12. On 24 May 2024, the Commission determined to hold a private examination and Officer BEN1 was summonsed to give evidence on 3 June 2024.

1.13. As explained later in this report, Officer BEN1 made a number of admissions regarding his conduct while giving evidence at the private examination. This included admitting to assaulting both CIV1 and CIV2 and disposing of the BWV devices on 16 February 2024.

1.14. Further, Officer BEN1 told the Commission that he discussed his conduct in relation to the assaults on the young persons and the disposal of the BWV devices with several people, including 4 other NSW Police Force officers.

1.15. The evidence discloses that none of the 4 officers made a report under s 211F of the Police Act of suspected misconduct of Officer BEN1.

2. The Commission's Statutory Functions

2.1. The relevant provisions of the LECC Act are set out in Appendix 1 to this report.

2.2. The Commission does not sit as a criminal or civil court. It does not determine the rights of any person. However, the Commission may make findings which are adverse to persons and their reputation. The standard of proof to be applied by

the Commission making findings of fact is the civil standard of proof, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test is whether the facts have been proved to the reasonable satisfaction of the Commission.[1]

2.3. An important function for the Commission is to determine whether any police officer has engaged in 'serious misconduct' as defined in s 10 of the LECC Act.

2.4. In addition, the Commission may make findings, express opinions and make recommendations under s 133 of the LECC Act.

2.5. For reasons explained in Appendix 2 to this report, all persons referred to in the report will be described by pseudonym and their names will not be used. In addition, for reasons outlined in Appendix 2, police stations will not be identified by name in this report.

2.6. There is to be no publication of the name or image of any person assigned a pseudonym in relation to the evidence given in Operation Bendoc or included in this report without further order of the Commission.

3. The Commission's Investigation

3.1. As noted above, on 15 May 2024, the Commission decided to investigate this matter under Operation Bendoc.

3.2. In the course of Operation Bendoc, the Commission obtained evidence from the NSW Police Force's initial investigation, including:

- Original complaint documents.
- Available BWV and CCTV footage of the events.
- BWV asset and audit reports pertaining to 16 February 2024.
- Relevant COPS Events.
- Directed statements of other officers involved in the events.

[1] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34; *Rejfek v McElroy* (1965) 112 CLR 517 at [521]; [1965] HCA 46; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at [171]–[172]; [1992] HCA 66.

3.3. Several witnesses attended private examinations at the Commission. All examinations were conducted before the Chief Commissioner, the Hon. Peter Johnson SC.

3.4. Ms Lisa-Claire Hutchinson of Counsel was appointed Counsel Assisting the Commission for the purpose of the Operation Bendoc investigation.

Events of 16 February 2024

Material available to the Commission before private examinations were conducted

3.5. The Commission had access to directed statements of other officers involved in the events of 16 February 2024. These included statements from Officer DOC1 and Probationary Constable DOC2 (Officer DOC2).

3.6. In summary, Officer DOC1's statement contained the following:

- She worked a rostered 6:00 pm to 6:00 am shift on Thursday 15 – Friday 16 February 2024.
- At about 1:45 am on 16 February 2024, she responded to a call reporting 4 boys with guns and knives trying to fight another person. After exiting the police vehicle, she activated her BWV device and started to run across the road with Officers BEN1 and DOC2.
- She observed Officer DOC2 handcuffing CIV1 and continued past Officer DOC2 in the direction taken by Officer BEN1.
- CIV2 was laying on the ground 10 metres ahead of her and Officer BEN1 told her to arrest him. She placed CIV2 in handcuffs to the rear of his body and he was compliant.
- She escorted CIV2 to an awning attached to a nearby building, where he sat against a wall. He was compliant and didn't attempt to escape. Officer DOC1 waited there for Officer BEN1.
- When Officer BEN1 approached, he looked 'angry' and picked up CIV2 by the collar, and dragged him a couple of metres away from the wall. Officer DOC1 did not hear what Officer BEN1 said to CIV2, however he was 'having a go' at CIV2 and speaking through gritted teeth. At this time CIV2 was screaming in fear.
- Holding CIV2 by the collar, Officer BEN1 physically threw the young person to the ground. CIV2 was then laying on the ground with his hands

restrained behind his back in handcuffs. Officer BEN1 then, standing over CIV2, pulled his right leg back behind his body and kicked CIV2 on the ground with force. The foot of Officer BEN1 connected with the mid back area of CIV2 and the impact made a sound.

- CIV2 was screaming in what Officer DOC1 described as fear and pain. Officer DOC1 told Officer BEN1 to 'stop' and stepped forward to intervene, but Officer BEN1 had stopped by this time.
- Officer BEN1 grabbed CIV2's collar and picked him back up off the ground and walked him to Police Station 1, with Officer DOC1 following shortly afterwards.
- Officer DOC1 returned to Police Station 1 and had a conversation with CIV1 while her BWV was recording. CIV2 was with Officer BEN1 in the station and Officer DOC1 believes she heard CIV2 say to Officer BEN1 'you didn't have to beat me up just because you slipped over'.
- Officer DOC1 removed the BWV device from her Integrated Light Armour Vest (ILAV) and placed it in the docking station at Police Station 1 using her palm print to check it in. Officer DOC1 checked the screen above the docking station and saw that it was checked in and commencing an upload.
- Officer DOC1 returned to Police Station 2. Later that same morning, she received a phone call from what she believed was Officer BEN1's personal phone (or from the police station number) to her personal phone. Officer DOC1 recalls the following conversation:

    Officer BEN1: I think your body-worn isn't uploading properly.

    Officer DOC1: I will come back and get it then.

    Officer BEN1: Don't worry about it.

- Officer DOC1 described the call from Officer BEN1 as 'random' and when he called her, she was tired and therefore 'did not really put it together about the incident and the footage'.
- On the evening of 16 February 2024, Officer DOC1 attended a work social function with fellow officers. Later in the evening, Officer BEN1 joined the group and asked to speak with Officer DOC1 alone. Officer DOC1 agreed,

and Officer BEN1 explained that he wanted to talk to her about the incident that had happened earlier that day.

- Officer DOC1 said she told Officer BEN1 she thought it was 'shocking', and he agreed it was 'a bit much' then stated that he had thrown her BWV device in the ocean because it captured everything that had happened. Officer DOC1 said she was shocked, thought he was joking, and did not believe him. Officer DOC1 states they both had been consuming alcohol that evening and she 'just did not really believe what he had told me'.
- Officer DOC1 realised her BWV footage from the event was missing in mid-March 2024 when she attempted to conduct a review of the BWV footage. It was then that she thought that Officer BEN1 was perhaps telling the truth.

3.7. Relevant records confirmed that Officer BEN1 used his personal mobile phone to call Officer DOC1 at 2:36 am on 16 February 2024.

3.8. The Commission obtained from the NSW Police Force, a copy of a report relating to the BWV devices issued to and used by Officers BEN1 and DOC1 on 15-16 February 2024.

3.9. Relevantly, the report reveals:

- On 15 February 2024, Officers BEN1 and DOC1 each signed out a BWV device and each device bore its own unique serial number.
- Officer DOC1 activated her BWV device at 1:52 am on 16 February 2024. The BWV device was recording until it was switched off at 02:23 am.
- Officer BEN1 activated his BWV device at 1:52 am on 16 February 2024. The BWV device was recording until it was switched off at 2:16 am.
- Officer DOC1's BWV device was checked in at 2:24 am and removed at 3:34 am.
- Officer BEN1's BWV device was checked in at 3:39 am. There is no record of it being removed again.
- Four files from Officer DOC1's BWV device for the time period 1:52 am to 2:23 am, were not uploaded to the system and were marked as 'No reason to keep'.

- Five files from Officer BEN1's BWV device for the time period 1:52 am to 2:16 am, were not uploaded to the system and were marked as 'No reason to keep'.
- A further file for the time period 2:26 am – 2:30 am was not uploaded to the system and was marked as 'No reason to keep'.

3.10. The BWV report confirms that the BWV devices of Officer DOC1 and Officer BEN1 were activated and recording at the time of Officer BEN1's interaction with CIV1 and CIV2 on 16 February 2024.

3.11. The BWV devices used by Officers DOC1 and BEN1 have not been used or connected to the NSW Police Force BWV system since they were respectively removed at 3:34 am and sometime after 3:39 am on 16 February 2024. They are effectively missing NSW Police Force assets and remain unaccounted for.

3.12. Officer DOC2 was also directed to provide a statement relating to the events of 16 February 2024. In summary he stated:

- He arrested one of the male suspects [CIV1] and escorted him to an undercover area where Officer DOC1 was also located with CIV2.
- CIV2 was approached by Officer BEN1.
- Officer BEN1 grabbed CIV2 by the left shoulder, pulling him upwards before losing grip and dropping him. Officer BEN1 told CIV2 to get up, kicking the male [CIV2] 2 or 3 times in his stomach with force causing him to scream.
- At Police Station 1, Officer DOC2 observed that Officer BEN1 did not check in his BWV device as the docking station did not recognise his palm print and instead, he clipped it back onto his vest.
- Officer DOC2 successfully checked in his BWV device and later that day linked the BWV recording to the COPS event.
- At the end of the shift at 7:00 am, it was observed by Officer DOC2 that Officer BEN1 was still wearing his vest, however it was unclear to him whether the BWV device was still attached.
- Around 2:00 pm on 16 February 2024, Officer DOC2 attended the work social function for approximately 1 hour. No discussions regarding the arrest and events that occurred earlier that morning were observed.

3.13. The Commission obtained Officer DOC2's BWV footage of the arrest from the NSW Police. The BWV footage depicts:[2]

- Officer DOC2 conveying CIV1 towards Police Station 1, with CIV1 advising Officer DOC2 that he is carrying a knife.
- Officer DOC2 stopping and turning as a result of the screaming between CIV2 and Officer BEN1. Although the interaction is not captured on the BWV footage due to Officer DOC2's body facing southward at the time, the audio is captured.
- The audio consists of CIV2 screaming 'what did you do that for, what the fuck did I do?', Officer BEN1 asking, 'what the fuck you doing?' and CIV2 responding 'I didn't do nothing', followed by Officer BEN1 yelling words to the effect of 'Get up, get up'.
- Following this, Officer DOC2 continues to escort CIV1 in the direction of Police Station 1.

3.14. The Commission also obtained relevant CCTV footage of the area. The CCTV footage has no audio but relevantly depicts that:[3]

- CIV2 and 2 unknown people were running. CIV2 stopped, put his hands in the air and laid down. BEN1 approached and stood next to CIV2 for a few seconds before he continued to run with another unidentified Officer. Officer DOC1 handcuffed CIV2 to the rear and moved him to an undercover area where he sat on the ground against the wall.
- Officer DOC2 escorted CIV1 to where CIV2 and Officer DOC1 were located.
- Following this, Officer BEN1 walked towards the undercover area where Officer DOC1, Officer DOC2, CIV1 and CIV2 were located.
- Officer DOC2 escorted CIV1 away from Officer DOC1 and CIV2 and Officer BEN1 walked past them towards Officer DOC1 and CIV2.
- Officer BEN1 pulled CIV2 up from the ground, walked him a small distance and appeared to throw him onto the ground before he kicked him once with his right foot. He then picked CIV2 up off the ground and escorted him towards Police Station 1.
- Officer DOC1 was seen heading in the same direction shortly after.

[2] Exhibit ZLJ5C.
[3] Exhibit ZLJ4C.

3.15. The Commission also obtained a copy of an affidavit prepared by CIV5, a solicitor with the Aboriginal Legal Service. In his affidavit he stated that:

- He attended Surry Hills Children's Court on 16 of February 2024 and spoke to CIV2.
- During this conversation, CIV2 disclosed that during his arrest, he was assaulted by a police officer.
- CIV2 showed him a graze on his cheek and other marks on his face and said they were the result of the assault by the police officer.
- He took 4 photos of CIV2's face and attached them to his affidavit.

The photos show an abrasion on CIV2's left cheek and another smaller abrasion below his right eye.[4]

Evidence of Officer BEN1

3.16. Officer BEN1 gave evidence before the Commission at a private examination on 3 June 2024. Officer BEN1 was legally represented and gave evidence with the benefit of a declaration under s 75 of the LECC Act. Accordingly, his evidence before the Commission is not admissible in any court proceedings against him.

3.17. Officer BEN1 was 31 years old at the time of the incident and his examination. He joined the NSW Police Force in December 2020, and at the time of his examination held the rank of Constable.[5]

3.18. Officer BEN1 told the Commission that a few days prior, being 31 May 2024, he had resigned from the NSW Police Force. However, he was aware that given he was under investigation, it was a matter for the Commissioner of Police to determine whether his resignation would be accepted. At the time of his examination, there had been no indication from the Commissioner of Police as to whether Officer BEN1's resignation would be accepted.[6]

3.19. In addition to the requirement to attend before the Commission to give evidence, Officer BEN1 was also required to produce the 2 BWV devices he and Officer DOC1 were wearing on 16 February 2024. The production of these items was

[4] Exhibit ZLJ6C.
[5] Examination of Officer BEN1 at T6.
[6] Examination of Officer BEN1 at T6–7. The Commissioner of Police accepted Officer BEN1's resignation on 6 June 2024.

called for during Officer BEN1's examination. However, he was unable to produce them.[7]

3.20. Officer BEN1 confirmed that he was rostered to work the night shift at Police Station 1 on 15 February 2024. His shift started at 7:00 pm and finished at 7:00 am the next morning (16 February 2024).

3.21. Officer BEN1 told the Commission that he commenced his shift at Police Station 2. It was at Police Station 2 that he checked out a BWV device from the docking station and clipped it to his ILAV.[8] Officer BEN1 was aware that there was an individual identifier or serial number attached to each BWV device.

3.22. Officer BEN1 told the Commission that he and Officer DOC2 then drove to Police Station 1 and commenced their usual duties. Officer BEN1 confirmed that in the early hours of 16 February 2024, he received a broadcast on the police radio regarding persons of interest involved in a robbery.[9]

3.23. Officer BEN1 then produced various items to the Commission, including a handwritten list of names and a copy of entries from his police notebook.

3.24. The entries from his police notebook comprised 4 pages.[10] The document was read by Officer BEN1 to the Commission as follows: [11]

> 3:16AM, 16/2/2024.
> Re: Assault/juveniles with guns/knives.
> CAD job.
> 4 boys just at the train station with guns and knives – trying to fight the [informant].

3.25. The note continued: [12]

> Heard word on radio that 4 POIs [persons of interest] running down towards [a location]. I went down to the bottom of [street]--
> -- and then to the top of [street] Intersection of [another street].

[7] Examination of Officer BEN1 at T8.
[8] Examination of Officer BEN1 at T10.
[9] Examination of Officer BEN1 at T12.
[10] Examination of Officer BEN1 at T17, T21.
[11] Examination of Officer BEN1 at T22–T23.
[12] Examination of Officer BEN1 at T23.

> I returned down to [street] and I saw 4 males in black run out from corner of [a building]. 4 ran away from me. I ran after them and –
> […]
> Caught up with 1 slowest mulleted.

3.26. Referring to the first person of interest (CIV1), Officer BEN1 read:[13]

> I attempted to grab him to the ground with a tackle but he jumped flat to the floor and went under me. I scraped my right elbow. I activated my [body-worn] at that time. I pursued the remaining 3 males at that time. I noticed another male who also was on the floor. I ran past both of them and I yelled out to Officer [DOC2] to arrest the 1st [POI] - -.

3.27. In relation to the second person of interest (CIV2), Officer BEN1 continued: 'and I told [Officer DOC1] to arrest the 2nd.'[14]

3.28. Officer BEN1 kept reading:[15]

> I ran past the 2nd male and I noticed [another POI] ran as well into the [park]. I continued to run after the other 2 male POIs but they were nowhere to be seen as I had arrest at 01:53. I returned to the 2 other POIs and brought them to [Police Station 1], searched POI and seized hammer. POI black […] gloves, hammer located in stomach jumper area. Conveyed later on.

3.29. Officer BEN1 informed the Commission that these notes were 'not correct' and were 'deceptive notes.'[16] Officer BEN1 said that he wrote them at the time, but that they did not include the full details of what had occurred on that night.

3.30. He told the Commission that when he created the notes, it was with the intention of creating a false record of the events, omitting the assaults from the entries of the evening.[17]

[13] Examination of Officer BEN1 at T23 – T24.
[14] Examination of Officer BEN1 at T24.
[15] Examination of Officer BEN1 at T24.
[16] Examination of Officer BEN1 at T25.
[17] Examination of Officer BEN1 at T26.

3.31. Officer BEN1 was then questioned about what in fact happened in the early hours of 16 February 2024.

Evidence of Officer BEN1 – use of force on CIV1

3.32. Officer BEN1 said he omitted to record in the notes an intervening event between attempting to tackle CIV1 and pursuing the other 3 persons of interest. He described that intervening event:[18]

> So I stood up, after falling on my elbow, and I turned to the male, who was, I believe, flat on the floor, I can't recall a hundred per cent, but he was definitely in a sort of crouching position or perhaps flat on the floor but definitely sort of beneath me, and I delivered three kicks to his stomach region with, I believe, my right foot, and he sort of screamed in pain from those kicks.

3.33. Officer BEN1 agreed that he kicked CIV1 under the left pectoral muscle around the middle of the left ribcage.[19]

3.34. In response to questions from Counsel Assisting, Officer BEN1 gave further details of the incident involving CIV1 (emphasis added):[20]

> Q. After you had tackled – sorry, after you attempted to tackle the first POI --
> A. Yes.
>
> Q. -- you would have had to get back to your feet in order to kick him; correct?
> A. Correct, yeah.
>
> Q. So you had time to get up and were standing, and he was still on the ground, either lying or crouched?
> A. Correct, yeah.

[18] Examination of Officer BEN1 at T28.
[19] Examination of Officer BEN1 at T29.
[20] Examination of Officer BEN1 at T33 – T34.

Q. And you say that your motivation was to bring him at least, if not the other three men, to justice?
A. Well, yeah, definitely to stop and arrest them, yeah.

Q. Wouldn't you have had an opportunity, then, when you were standing, before delivering the three kicks to his mid-section, to, in fact, arrest him?
A. I would have. **But I was too angry at that stage. So I was kind of blinded.**

Q. You were kind of blinded, did you say?
A. Yeah, well, **I certainly felt so angry that my response was to lash out and kick him.**

Q. At the point that you lashed out and kicked him, you must have been satisfied that he did not pose an immediate danger to you at this point; is that correct?
A. I mean, I wouldn't say 'satisfied' but I would just say, like, yeah, I mean he stopped and that – that's a good result, right?

Q. Had you been concerned about him producing any weapon, you would have sought to actually stop his hands from moving or being able to access any part of his body, wouldn't you?
A. Yeah, well, I would have jumped on him – sort of fallen and try to restrain his hands as quickly as possible, but he didn't seem, to be reaching – he seemed to more – to be sort of pressing down and lifting his body up as in – as in getting up off the ground. Yep.

Q. And you do accept that kicking him three times while he was on the ground did not bring him closer to being arrested?
A. I think it incapacitated him. I think it stopped him. I think it did bring him to being arrested because he stopped from getting up [from] the ground.

Q. You don't say that was a lawful use of force, do you?

A. **No, no, no it was excessive. It was excessive. But it achieved a function.**

3.35. On 4 December 2024, Commission Investigators met with CIV1. CIV1 was given an opportunity to recount his version of the events. CIV1 did not mention being kicked 3 times. Rather, he said he was either 'pushed over or tackled from behind' by an unidentified police officer. He told Commission investigators that the officer placed his knee on his back and pulled his arms before placing him in handcuffs.

Evidence of Officer BEN1 – use of force on CIV2

3.36. After Officer BEN1 had told Officer DOC2 to arrest CIV1, he pursued CIV2. He said he saw CIV2 had stopped and sat himself down or was at least crouched down about 20 metres away from where CIV1 was being arrested. Officer BEN1 thought he exchanged words with CIV2, and he said words to the effect of 'I've given up'. Officer BEN1 told the Commission that at that point he continued after the remaining 2 young persons and told Officer DOC1 to arrest CIV2.

3.37. Officer BEN1 said that he could not find the other 2 as they had kept running and he turned back shortly after and returned to where Officer DOC1 and CIV2 were.

3.38. Officer BEN1 noticed CIV2 was handcuffed and seated underneath the awning of a restaurant attached to a building where Officer DOC1 and CIV2 were situated.[21]

3.39. At this point, Officer BEN1 described the following physical interaction with CIV2 (emphasis added):

A. Well, he was sort of wriggling around. Like, I don't know, maybe he was – he just was using his hands, the hands weren't still, I suppose, they were sort of touching his body and stuff and perhaps he was straining against the handcuffs, I can't remember, sure – for sure. Essentially that's what I surmised, and I approached him and grabbed him by the neck and lifted him up and threw him to the ground and then kicked him [...] two times, to the stomach.

Q. Did you use your right hand to pick him up by the neck?

[21] Examination of Officer BEN1 at T39.

A. Yeah, I did. I'm stronger in my right hand.

Q. How were you able to pick him up by the neck?
A. I – I grabbed his neck, then I sort of turned in that motion (indicating), and then with the strength of sort of the turn I threw him to the ground.

Q. Was your right hand clasped around skin or clothing or both on his neck?
A. I don't – I think it was more clothing, but in truth I can't remember.

Q. When you say you picked him up, did you pick him up and throw him in one motion or did you pick him up until he was standing?
A. No, I would have – would have picked him up and threw him in one motion. I don't think I have the strength to literally – to literally lift him up.

Q. What did you say while [you] were you doing that?
A. Maybe I swore at him saying, 'fuck you, cunt', or something like that.

Q. What police function were you exercising when you picked him up by the neck and threw him on the ground and possibly said, 'fuck you, cunt'?
A. I think the only police function I could possibly say I was using was he was he was using his hands in a manner which he may have reached for a weapon or a gun, potentially, so I was lifting him up and throwing him down with such force that he would not do such a thing. But apart from that, I mean, it's excessive.[22]

Q. He was handcuffed.
A. Yes, but he still had access to his pockets.

Q. Are you seriously telling the Chief Commissioner that at the time that you picked him up and threw him to the ground, you were

[22] Examination of Officer BEN1 at T40 – T41.

motivated by the purpose of preventing him from taking his handcuffed hands and removing a weapon from his pocket?

A. **I - at that time I wasn't motivated by that.**

Q. **What were you motivated by?**

A. **More anger.**

Q. **On reflection, Mr [BEN1], wasn't it all anger that motivated you to do that to that person of interest?**

A. **On reflection, yes.**

3.40. Officer BEN1 was played the CCTV footage of his altercation with CIV2.[23] Officer BEN1 accepted that the CCTV depicted CIV2 handcuffed to the rear and that he was not 'wriggling' as he had described earlier in his evidence. Officer BEN1 accepted that the CCTV footage showed him pick CIV2 up from the ground, throw CIV2 to the ground, and kick CIV2 once.[24]

3.41. The BWV of Officer DOC2 was also played. Officer BEN1 accepted that in the BWV footage CIV2 can be heard saying to Officer BEN1 'What did you do that for? What the fuck did I do?'. Further, Officer BEN1 accepted in evidence that in the BWV footage, he can be heard saying words to the effect of 'What the fuck are you doing?' to which CIV2 replied, 'I didn't do nothing' with Officer BEN1 then saying either 'Get up, get up' or 'shut up'.[25]

3.42. Officer BEN1 told the Commission that back at the station he thought CIV2 said to him 'You assaulted us, like your mates at PTC [Police Transport Command]'.[26]

3.43. Officer BEN1 was shown the images of CIV2 attached to CIV5's Affidavit. However, he could not recall any injuries on the night. Officer BEN1 was asked if he did not make any inquiries as to whether he had injured either CIV2 or CIV1 because, by that point, he had decided to conceal the fact of doing so. Officer BEN1 denied this stating 'More I didn't care; I just did not care at all about these people who had been robbing'.[27]

[23] Examination of Officer BEN1 at T48 – T49.
[24] Examination of Officer BEN1 at T53.
[25] Examination of Officer BEN1 at T55 – 56.
[26] Examination of Officer BEN1 at T59.
[27] Examination of Officer BEN1 at T61 – 62.

Evidence of Officer BEN1 – disposal of BWV devices

3.44. Officer BEN1 told the Commission that he believed his BWV device was recording at the time he assaulted CIV1 and was still recording when he assaulted CIV2. He thought he switched his BWV device off as he walked CIV2 to Police Station 1 but then turned it on again later when they conducted a person search.[28]

3.45. Officer BEN1 remained at Police Station 1 whilst the young persons were taken to Police Station 2 by other officers. Officer BEN1 told the Commission that during this time he 'began to panic thinking this [his actions with the young persons] was very, very excessive'.[29]

3.46. He told the Commission: [30]

> What came to mind was Constable Ryan Barlow[31] of Surry Hills police area command, who had performed a leg sweep on a young Aboriginal person and that had been captured on some sort of - a video phone or some video recording, anyway, he ended up being accused of assault, ABH, and found guilty and sentenced to a CCO, and I think he - I don't know -if he lost his job but I think he would have lost his job. So I began to panic excessively and thought to myself, 'well, what can I do?' I kind of need to conceal this to maintain my employment as a police officer.
>
> So I wasn't in my - in my year as coming - as a probationary constable, there had been talk of disposal of body-worns. So I thought that might be a good option and so I – I like - sorry, I need to return - return a little bit, rewind slightly.
>
> The body-worns had been planted - my body-worn and other police officer's body-worns had been planted on a dock in the police station, [Police Station 1], so they were currently uploading. So, yeah, I was there

[28] Examination of Officer BEN1 at T59.
[29] Examination of Officer BEN1 at T62 – 63.
[30] Examination of Officer BEN1 at T62 – T63.
[31] The name of Constable Ryan Barlow appears in this report as he has been named in media reports of his criminal proceedings. See, for example C. Sibthorpe, "'Considerable' degree of violence: Officer sentenced for assaulting Indigenous teen", Sydney Morning Herald, 15 December 2023.

> in [Police Station 1], just sort of fretting excessively, and I thought, 'I'll get - I'll get those body-worns and dispose of them'.
>
> As luck would have it the body-worn of myself and Officer DOC1 were uploading and they hadn't uploaded fully, so they were continuing to upload, so I thought, 'well, look, it's now or never'. So I grabbed the body-worns and Constable DOC2 was sort of sitting there as well but he was oblivious to the fact, what I was doing, so I said to him, 'I'm just going for a walk', so I walked out of the police station [...] and had the two body-worns on me, one in my pocket, one on my chest region, and grabbed both of them and threw them into the water, in an effort to destroy those body-worns so they would never be found and the evidence never be obtained, so forth, and I could avoid, you know, the consequences type thing and - I sort of, after that, dusted myself off and just thought, you know, 'you've got to live with this and this - is the action you've taken and that's it', and just walked back to the police station.

3.47. Officer BEN1 admitted to the Commission that he threw the BWV devices in the water knowing that the footage on the devices was 'incriminating' and of evidentiary value.[32]

3.48. Officer BEN1 was asked what he meant when he said there had been talk of disposal of body-worn devices when he was a Probationary Constable. He told the Commission that in jest some people had said 'if you're in trouble, just throw it into the water.' He continued:[33]

> ... Maybe another source was hearing from – from Wollongong that someone, a police officer, had thrown a body-worn -into - somewhere in - down south -in the Wollongong area, and that body-worn had washed up -in – on a beach, or something, and then he'd been - that police officer had been prosecuted. That's a - that was a sort of well-known story...

3.49. Officer BEN1 confirmed that he attended the social function later on the evening of 16 February 2024 and had a discussion with Officer DOC1 about what he had done.

[32] Examination of Officer BEN1 at T70.
[33] Examination of Officer BEN1 at T64.

3.50. Officer BEN1 admitted he:[34]

- Broke the law by assaulting CIV1 and CIV2.
- Contravened the requirements of the NSW Police Force Code of Conduct to behave in a way that upholds the values and good reputation of the police, the requirement to act with care and diligence when on duty, and the requirement to treat everyone with respect, courtesy and fairness.
- Contravened the requirements of the NSW Police Force Use of Force procedure to use force only in the circumstances prescribed by law and to record the use of force in COPS.
- Broke the law by destroying the BWV devices and therefore all the files on those devices.
- Contravened the requirements of the NSW Police Force Standard Operating Procedures as they relate to the tagging and storage of footage on the BWV devices.

Evidence of Officer BEN1 – disclosure of his misconduct to other officers

3.51. Officer BEN1 was asked about the list of names he had produced to the Commission. He agreed that these were persons to whom he had told the 'unedited' and 'unredacted' version of events on 16 February 2024, being the assault on 2 young persons (CIV1 and CIV2) and the removal and destruction of the BWV devices.[35]

3.52. The list included the names of other NSW police officers, including Sergeant BEN2 (Officer BEN2), Sergeant BEN3 (Officer BEN3), Constable BEN4 (Officer BEN4), and Constable BEN5 (Officer BEN5).[36]

3.53. Officer BEN1 told the Commission that he had contacted Officers BEN2 and BEN3 2 or 3 days after the events of 16 February 2024. He said he explained the situation to them and sought their advice. Officer BEN1 told the Commission that Officers BEN2 and BEN3 effectively told him to report it. However, he could not recall if they told him to report the BWV devices as 'lost', 'damaged', or

[34] Examination of Officer BEN1 at T73 – 74, T77.
[35] Examination of Officer BEN1 at T79 – 80.
[36] Exhibit ZLJ2C.

'destroyed'. Further, he said that Officer BEN2 advised him the other option was to deny it.[37]

3.54. Officer BEN1 said that Officer BEN2 was not on duty at the time of the phone call and therefore the phone call was 'confidential'.[38] He further said that Officer BEN3 thought it was not true and was a 'prank'.

3.55. Officer BEN1 said he told Officer BEN4 about the events of 16 February 2024 about a month later, and then Officer BEN5 maybe 2 months later.

3.56. There is no evidence before the Commission to suggest that these 4 officers had fulfilled their obligations to report Officer BEN1's misconduct. The Commission subsequently determined that it was appropriate to summons these witnesses to give evidence to explore this issue. Their evidence will be discussed later in this report.

Incident with a cyclist on 3 April 2024

3.57. On 3 April 2024, CIV3 made a complaint to the NSW Police Force. In his complaint, CIV3 stated he was riding past Police Station 2 when a police officer pushed his facemask off causing scratches to his face. CIV3 stated he did not do anything wrong and he considered the incident may have been racially motivated.[39]

3.58. CCTV footage from outside Police Station 2 on 3 April 2024 at 5:14 pm depicts the incident complained of, and revealed the following events[40]:

- A male police officer (Officer BEN1) walked from the vicinity of Police Station 2 and stopped a male (CIV3) who was riding a bike.
- Officer BEN1 and CIV3 appear to have a short discussion before Officer BEN1 half turned to walk away before reaching out with his right hand and placing it on CIV3's face and pulling down his face mask.
- Officer BEN1 then walked away and CIV3 cycled away in the opposite direction.

[37] Examination of Officer BEN1 at T81 – 84.
[38] Examination of Officer BEN1 at T84 – 85.
[39] Complaint of CIV3 dated 3 April 2024.
[40] Exhibit ZLJ10C.

3.59. During his examination, Officer BEN1 was asked about this incident. He recalled that he was on shift at Police Station 2. Officer BEN1 had a recollection of dealing with a man on a bicycle just outside of Police Station 2.

3.60. It was Officer BEN1's evidence that a food delivery driver on a bicycle 'nearly ran into [him]'.[41] Officer BEN1 said that he 'pulled [the driver's] face mask down' in response. Subsequently, Officer BEN1 said words to the effect of, 'what are you doing wearing a face mask' and 'why do you have a face mask on whilst you are riding around on [food delivery]? Like, this is somewhat suspicious. You don't need a face mask'.[42]

3.61. Officer BEN1 was asked how he felt when he was nearly run into, and he told the Commission:[43]

> A. again - well, threatened. It's a pretty common occurrence. I'm sure many people in this room have almost been run into by Uber delivery drivers in the city, and yeah, I thought, "Geez, you're also breaking the law by riding on the footpath, like, what's going on, like", yeah.
>
> Q. Did you caution him about what you apprehended was a breach of the law, riding on the footpath?
> A. No, I think it's ineffective, given that taking police action wouldn't stop that problem, from occurring or – the Uber riders, delivery riders ride in the city no matter how many fines or any action we would take, they simply have to make their deliveries and - yeah.
>
> Q. So do you remember any words that you exchanged with him?
> A. No. Not really. Other - well other than, "Why are you wearing a mask? Take this mask off", something like that.
>
> Q. Was that before or after you removed his mask, you said that you pulled it down?
> A. I pulled it down, yeah.

[41] Examination of Officer BEN1 at T89.
[42] Examination of Officer BEN1 at T89.
[43] Examination of Officer BEN1 at T90 – 91.

Q. Why did you pull it down?
A. Because why would - for me, a person wearing a face mask - indicates criminality or - to me, in my mind, it indicates he's hiding his identity.

3.62. Officer BEN1 told the Commission that after his interaction with CIV3 he 'let him walk away'. Officer BEN1 denied that CIV3 was detained until that point in time and said that there was 'nothing official' about the interaction with CIV3.

3.63. Officer BEN1 was asked (emphasis added):[44]

Q. When you touched him, did he give you consent?
A. No, he didn't give me consent.

Q. So you touched him without his consent and removed the mask from his face?
A. Pulled it down, yes.

Q. Had you asked him to remove his mask prior to that?
A. No, no. But I was - yeah, abruptly - almost ran into, from what I can remember, and reacted very rapidly.

Q. What power were you exercising when you touched him without his permission and pulled his mask down?
A. **I wasn't exercising any power, but - yeah, it was outside the realm of police powers**, but however, if he's masked, as I said, it's - I wanted to see If I - you know, if I recognised him or not, perhaps, could have been a POI, but - anyway.

Q. So you're now telling the Chief Commissioner that the purpose in removing his mask - that is, of you removing his mask - was to see whether or not you could identify him?
A. No, I retract that. But it just - it's just – as I said, just - it's a - I've removed his mask. **I didn't use police powers.** That's all I can say, really. And then he – he left and the interaction ceased.

[44] Examination of Officer BEN1 at T92 – 93.

Q. **Did it make you angry when he nearly ran into you?**

A. **It did, yeah. I think - yeah, it did.**

3.64. The CCTV footage was played during Officer BEN1's examination.[45] He confirmed it depicted him and the interaction he was referring to in his earlier evidence. He conceded that he was not hit by CIV3 but rather he [Officer BEN1] walked towards CIV3.[46] Officer BEN1 told the Commission he did not record his interaction with CIV3 as it was 'so minor'.[47]

3.65. Ultimately during the course of giving evidence, Officer BEN1 conceded that he had no power to remove CIV3's mask, that it was an unwanted touching, and he did assault CIV3.[48]

Incident during an arrest on 25 April 2024

3.66. On 2 May 2024, Constable DOC3 (Officer DOC3) reported his concerns to a superior officer about another incident where Officer BEN1 may have used excessive force.

3.67. Subsequently, Officer DOC3 made a statement in which he said he was involved in the arrest of a suspect (CIV4) who was in possession of bolt cutters and a knife. The other officers involved in the arrest were Constable DOC4 (Officer DOC4), Officer BEN1 and a caged vehicle car crew.[49]

3.68. Officer DOC3 stated he observed CIV4 being restrained on the ground as officers attempted to effect the arrest, however it appeared he was refusing to put his hands behind his back and was laying on them. Officer DOC3 said he saw Officer BEN1 deliver at least 2 knee strikes to CIV4 while he was on the ground.[50]

3.69. Officer DOC3 was directed to make a statement about the incident and did so on 6 May 2024. Much of what was in his initial email outlining his concerns was repeated in his statement.

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[45] Exhibit ZLJ10C.
[46] Examination of Officer BEN1 at T95.
[47] Examination of Officer BEN1 at T98.
[48] Examination of Officer BEN1 at T98 – 101.
[49] Statement of Officer DOC3, 6 May 2024.
[50] Statement of Officer DOC3, 6 May 2024.

3.70. Notably, Officer DOC3's statement said that:

- CIV4 was tackled to the ground by Officer DOC4 and restrained with the assistance of Officer BEN1, and 2 other officers.
- He distinctly remembered seeing Officer BEN1 use 2 knee strikes into the side of CIV4. However, he struggled to recall if he saw Officer BEN1 strike CIV4.
- When CIV4 was brought to his feet by Officers, he appeared to have a leg injury and was not weight bearing on his right leg and it was bent towards his left leg.
- He was told sometime later that CIV4 had been conveyed to hospital.

3.71. Officer DOC1 was also directed to provide a statement in relation to this incident. Although Officer DOC1 was not involved in the arrest of CIV4, she was on shift at the time and engaged in a relevant conversation with Officer DOC4 following the incident.

3.72. Relevantly, Officer DOC1 states she had a conversation with Officer DOC4 where he said, 'I took it [the CIV4 arrest charge] from [Officer BEN1], cause he towelled the bloke up'. Officer DOC4 also told Officer DOC1 that he 'practically had to pull [Officer BEN1] off the guy to stop him'.

3.73. CCTV footage from a business near the arrest location depicted the incident complained of, and showed the following events:[51]

- CIV4 walking on a footpath when he's stopped by a NSW Police Force Officer. There appeared to be a short interaction before CIV4 turned and ran from the Officer and into [another] street as other NSW Police Force officers gave chase.
- CIV4 ran down the other street and stopped in front of a NSW Police Force caged truck which came from the opposite direction. CIV4 put his arms out to the side and was tackled to the ground by Officer DOC4.
- Officer DOC4 had CIV4 on the ground, as another officer got out of the caged truck and went to the ground to assist Officer DOC4. Officer BEN1 arrived at the same time.

[51] Exhibit ZLJ11C.

- Officer BEN1 delivered 2 knee strikes to the back area of CIV4 and then approximately 14 closed hand strikes to the same area. Officer BEN1 then held CIV4 back as the other officers continued to make the arrest.

3.74. During his examination, Officer BEN1 was asked about the CIV4 incident on 25 April 2024.

3.75. Officer BEN1 recalled that he was rostered on for a night shift, and was in Police Station 2 when he heard there was a group of juveniles riding around on bicycles robbing people. He said that he ran out of the station and commenced a long foot pursuit before he jumped in a police car. [52]

3.76. Whilst he was in the police car, an officer was narrating over the radio and said that CIV4 had been spotted on CCTV at a city location.[53] CIV4 (then aged 22 years) was stopped by officers from the Police Transport Command, with an officer grabbing CIV4 and performing a tackle.[54]

3.77. While CIV4 was on the ground, Officer BEN1 told the Commission: [55]

> I came in and I delivered a knee strike to his back and yelled, 'Stop resisting', and after that, afterwards he put his hands behind his back, and we placed handcuffs on him.
>
> I searched him and found another knife and housebreaking implements, balaclava, I believe, and gloves, and also I - I think - no, correction, I also grabbed him towards his face and sort of, like, sort of grabbed his face in - whilst he was saying, 'Stop resisting' – whilst I was saying, 'Stop resisting' afterwards he put his hands behind his back and that was it.

3.78. Officer BEN1 agreed that there were 2 officers on CIV4 before he came in, but said that CIV4's hands were free and not behind his back. When asked why he performed a knee strike Officer BEN1 said:[56]

[52] Examination of Officer BEN1 at T102.
[53] Examination of Officer BEN1 at T103.
[54] Examination of Officer BEN1 at T103.
[55] Examination of Officer BEN1 at T103.
[56] Examination of Officer BEN1 at T105.

A. Why? To gain compliance, inflicting an academy-taught technique of a knee strike to a person of interest.

Q. So, you thought that by delivering a knee strike to his left glute area, that would encourage him to do what with his hands?
A. To put his hands behind his back and stop resisting, which I verbally told him to do.

3.79. When asked about the purpose of grabbing CIV4's face, Officer BEN1 said that he grabbed CIV4's face to 'inflict a bit more pain so he would put his hands behind his back'.[57]

3.80. Counsel Assisting asked Officer BEN1 (emphasis added):[58]

Q. Do you accept that the knee strike that you delivered to his glute region was excessive in the circumstances?
A. I would say that's - it was to gain compliance and pain compliance is a part of - of a way of gaining - getting a person of interest who doesn't want to do what he wants us - what we want him to do, to make him comply.

Q. So you stand by that?
A. I think that was - that was - yeah.

Q. And how about grabbing his face?
A. That was also academy taught. No, I don't stand by - **I think that was excessive, yeah**.

3.81. Officer BEN1 was shown the CCTV footage depicting the incident. He accepted that at the time he came into physical contact with CIV4, 2 officers were already either on top of CIV4 or in physical contact with him. CIV4 was detained on the ground but with his hands free. Officer BEN1 accepted, as depicted on the CCTV footage, that he then delivered 2 knee strikes with his right knee.[59] He also

[57] Examination of Officer BEN1 at T104.
[58] Examination of Officer BEN1 at T106 – 107.
[59] Examination of Officer BEN1 at T109.

admitted that he saw himself punch CIV4 in the CCTV footage. He accepted that he punched CIV4 about 14 times with his fists in alternative motions.[60]

3.82. Officer BEN1 was asked why he punched CIV4 some 14 times. He stated that it was excessive and that he barely remembered doing it. Officer BEN1 was asked if he deliberately omitted these aspects of his use of force from his earlier evidence:[61]

> Q. Did you deliberately omit the further knee strike from the account that you gave?
> A. No, I did not, I honestly did not remember. I - I can't - I can barely recall this. It seems like a world away, to be honest.
>
> Q. Did you deliberately omit the 14 or so strikes that you delivered with your fists, alternating right, left, right, left, because inclusion of those punches would have undermined your claim that you used reasonable force in apprehending this man?
> A. No. As - as I've said, I've - I completely barely recall this incident other than I - there was - there was knees used. I'd forgotten that I used fists. This - that's the honest truth. I have been truthful throughout this, this - this hearing, to the best of my knowledge. If I -if omitted it, it's not due to a planned thing, it's literally because I can't remember, so –

3.83. When asked about CIV4's condition following the arrest, Officer BEN1 said that CIV4 was 'sore' and 'he didn't look like a good way'. Officer BEN1 was also aware that paramedics were called in relation to CIV4's injuries and that he was reviewed by hospital staff.[62]

3.84. Officer BEN1 was questioned about the motivations behind his actions (emphasis added):[63]

> Q. You talked about this being the sort of moment that is a moment of extreme adrenaline, to use your words. **Was there any issue of**

[60] Examination of Officer BEN1 at T109 – 110.
[61] Examination of Officer BEN1 at T110 – 111.
[62] Examination of Officer BEN1 at T117.
[63] Examination of Officer BEN1 at T114 – 115.

anger that featured in your feelings at around about 2am on this date, when you were –

A. **Yeah, there was, yeah, yeah.**

Q. When did you realise that, at what point in the pursuit?

A. I think when I - I yelled something like, "Smash him", like, the - we went from [street 2]- sorry, we went from [street 1] into [street 2], [Officer DOC4] was chasing him, he was quicker than me, so he was in front of me. I was kind of a bit exhausted from the extensive chase beforehand, and I said - **I yelled out, "Look, smash him", like, at the top of my voice, and I thought, "Fuck, what am - why did I say that? Why did I - what am I talking about?" Yeah, and I was –**

Q. At the point where you had that realisation, where you said those words but **you thought to yourself, "Why am I saying that", you could have stepped aside at that point, recalling that on 16 February 2024, only a few months earlier, your anger had caused you to pick up and throw on the ground a young person and to kick two young people while they were down?**

A. That's right, yeah. **That's right, but I continued to do it**.

Q. Uncomfortable though it may be for you to admit, **was there any part of you that enjoyed laying into Mr [CIV4] in the way that we've just seen you do on the CCTV?**

A. I think - **I think I took a view that these people were very low-life people. I didn't think highly of them. Very, very low life, and also, in a sense, they deserved a bit of extra-curial punishment,** and I fully admit that this is a - this was my view at a time. Also, I especially believe with - **I especially thought with juveniles -in particular, they would simply be given a youth caution or be given a very lenient time with the courts.**

Q. And that angered you?

A. That - **that definitely angered me, yeah, because we have such a problem. I really hold that - with our youth justice system, so –**

Q. **So to summarise that, you were particularly angry at young offenders, suspected or proven, because you held a view that they would get off lightly, and that fed into your practice of visiting a little bit of extra-curial punishment on young offenders, in the form of violence?**

A. **I think you could - in those words, that's a pretty decent summary of my mindset at that time, yeah.**

3.85. Officer BEN1 said he did not record his use of force against CIV4 on COPS. He accepted that he was under an obligation to record his use of force but did not make any record.[64]

3.86. Officer BEN1 accepted that the combination of 2 knee strikes and approximately 14 punches to CIV4 was grossly excessive and completely disproportionate to any aim of applying handcuffs to CIV4 in the circumstances.[65]

3.87. After Officer BEN1's evidence, the Commission sought the relevant hospital records of CIV4. The medical records indicate that:

- CIV4 was brought into the Emergency Department in police custody following a head injury after being tackled by police to apprehend him.
- he had a short episode of Loss of Consciousness (LOC) but no following episodes of LOC or vomiting, and no bleeding from ears.
- on examination he appeared well and alert, there was a small abrasion to his right forehead and no other injuries.
- CIV4 was declared medically fit for discharge to police and Corrective Services officers (Corrective officers).

Other incidents of excessive use of force admitted by Officer BEN1

3.88. During Officer BEN1's examination he was asked about other occasions where he had used excessive force. In particular, he was asked if he had ever kicked a person of interest while they were laying on the ground or crouched. Officer BEN1 admitted that he had done so on 2 occasions.

[64] Examination of Officer BEN1 at T119.
[65] Examination of Officer BEN1 at T112.

3.89. Officer BEN1 gave evidence that the first of these occasions was in relation to 'a male who was going berserk in corrective services and fighting with multiple corrective service officers.'[66] Whilst Officer BEN1 admitted that this was the closest thing to him kicking someone on the ground, he did not think it was excessive in the circumstances given that the individual was 'fighting corrective services, fighting five of them'.[67]

3.90. Officer BEN1 said the second incident was in relation to an individual who had been arrested for stealing. He said:[68]

> ...when he got out of the caged truck he became extremely aggressive and ran up to me. I had my body-worn on at that time and I was using de-escalation techniques, saying, like, "Stop, stop." I held my hand up to his - to him but he kept on advancing at me and he came very close and I was saying "Stop", with my hand raised, and he kept on coming closer, so I lifted - I went - at that moment sort of went underneath him and took his legs up and tackled him to the floor, because I feared I was going to be assaulted further, and then he was on the floor and I kicked him and punched him, I believe.

3.91. Following Officer BEN1's evidence, the Commission sought to identify these 2 incidents to assist an assessment of Officer BEN1's evidence about them.

Corrective Services incident – 25 February 2024

3.92. The Commission ascertained that the incident described by Officer BEN1 related to a man in the custody of Corrective Services and had occurred on 25 February 2024. The man was identified as CIV6, and the NSW Police Force received a complaint concerning the conduct.

3.93. Commission enquiries revealed that CIV6 had been arrested earlier on 25 February 2024. He was detained at Police Station 2 and later conveyed by Officer BEN1 and Probationary Constable DOC5 (Officer DOC5) to a cell in an area controlled by Corrective officers.

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[66] Examination of Officer BEN1 at T87.
[67] Examination of Officer BEN1 at T87.
[68] Examination of Officer BEN1 at T87 – 88.

3.94. The Commission obtained relevant CCTV and BWV footage. The CCTV footage has no audio but relevantly depicted:[69]

- CIV6 entering the cell with 2 Corrective officers, whilst another remained at the door. CIV6 squatted and interacted with the Corrective officers.
- A third Corrective officer entered the cell, and a fourth one crossed the threshold. The first 3 Corrective officers then used physical force against CIV6 to take him to the floor, and the fourth Corrective officer also assisted after donning gloves.
- A fifth Corrective officer entered the cell and supported the officers.
- Officer BEN1 entered the cell about 20 seconds after the initial use of force by Corrective officers, with Officer DOC5 following behind him.
- Officer BEN1 approached CIV6 and the Corrective officers on the floor and used force including approximately 6 knee strikes and about 10 punches on CIV6.
- Officer DOC5 appeared not to physically interact with CIV6 throughout the incident.

3.95. The Commission summonsed Officer DOC5 to give evidence and he did so on 17 July 2024. Officer DOC5 was legally represented during his examination, and gave evidence with the benefit of a declaration under s 75 of the LECC Act.

3.96. Officer DOC5 told the Commission he met Officer BEN1 when he commenced with the NSW Police Force in August 2023. They worked together on the same team from August 2023 to May 2024, but they did not socialise outside of work.[70]

3.97. Officer DOC5 recalled an incident that occurred on 25 February 2024. The incident involved an individual being strip searched. Officer DOC5 was present during the incident and gave the following evidence:[71]

> Q. And what can you recall happened once you entered the room?
> A. I entered the room, I turned on my camera to start recording. There was the prisoner on the ground. I believe he was, like, kicking, like, resisting and a couple of corrective guys on top of him, I can't remember how many exactly. There was a lot of, like, gear scattered

[69] Exhibit GXP6C.
[70] Examination of Officer DOC5 at T13.
[71] Examination of Officer DOC5 at T14 – 15.

on the floor, like, there was one of the corrective services' body cameras on the floor, so - it looked pretty messy. Me and [BEN1] kind of like ran over to help. I was at, like, the feet of the prisoner. I couldn't really help much because there were, like, corrective guys already, you know, trying to restrain him. I just put my foot on the prisoner's ankle, like, one of his ankles, because I couldn't help any other way. I just put my hand, I think, on another corrective services' back, just to support him, and I think [Officer BEN1] was at the kind of the head or like upper body area. Yes.

Q. Could you see any actions that [Officer BEN1] took?
A. No.

3.98. Officer DOC5's BWV footage of the incident was played to the Commission.[72] Officer DOC5 agreed that during the BWV footage, he saw Officer BEN1 deliver several knee and arm strikes to the individual. Officer DOC5 said the strikes Officer BEN1 delivered were of concern and 'look[ed] bad'.[73]

3.99. In relation to the number of knee strikes which Officer BEN1 delivered, Officer DOC5 said 'the high number was quite excessive'.[74] He considered that the force used by Officer BEN1 was not reasonable nor appropriate and amounted to misconduct.[75]

3.100. Officer DOC5 did not report what Officer BEN1 had done to the person in custody on 25 February 2024. However, Officer DOC5 said if he saw similar conduct in future, he would make a report.[76]

3.101. Officer DOC5 said he had heard rumours of Officer BEN1 disposing of his BWV device. He heard the rumours after Officer BEN1 had been 'stepped down' (suspended). Officer DOC5 said the incident surrounding the disposal of the BWV devices occurred prior to him commencing with the NSW Police Force and he did not have any discussions about the disposal of BWV devices with Officer BEN1. Officer DOC5 was of the view that disposing of a BWV device 'sounds criminal in

[72] Examination of Officer DOC5 at T16.
[73] Examination of Officer DOC5 T19 – T20.
[74] Examination of Officer DOC5 at T26.
[75] Examination of Officer DOC5 at T27.
[76] Examination of Officer DOC5 at T27.

nature' and displayed an officer 'trying to cover up something'.[77] Had Officer DOC5 held a suspicion that an officer had disposed of their BWV device, he said he would make a report.[78]

3.102. The Commission accepts Officer DOC5's evidence that he did not see Officer BEN1 kicking and punching CIV6 on this day as his view was obstructed. The Commission makes no adverse findings concerning Officer DOC5.

Incident involving arrest of a young person for stealing on 5 April 2024

3.103. The Commission confirmed that the incident described by Officer BEN1 concerning the arrest of a man for stealing occurred on 5 April 2024. The man was identified as CIV7.

3.104. The Commission obtained BWV footage of the incident. The footage depicted:

- Officer BEN1 and another officer conveyed CIV7 to Police Station 2.
- On arrival, Officer BEN1 instructed CIV7 to get out of the police van and walk towards a lift. CIV7 was handcuffed to the front.
- While walking towards the lift, Officer BEN1 and CIV7 engaged in a verbal confrontation. Once at the lift, Officer BEN1 lifted his right hand to eye level stating: 'Stop'.
- CIV7 delivered a headbutt to Officer BEN1's palm.
- Officer BEN1 then pushed CIV7 to the ground. While CIV7 was on the ground, the doors to the lift opened and Officer BEN1 said: 'Get inside you fucking [inaudible].' CIV7 is seen on the floor in the foetal position and said about 4 times: 'I'm sorry'.
- Officer BEN1 kicked CIV7 at least once and pushed him inside the lift with his foot.

4. Use of Force by NSW Police Force Officers

4.1. Police officers in NSW are allowed by law to use a level of force in the discharge of their duties. This reflects the myriad circumstances which may confront police officers in their work.

[77] Examination of Officer DOC5 at T30.
[78] Examination of Officer DOC5 at T30.

4.2. Part 18 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) states:

> **230 Use of force generally by police officers**
>
> It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.
>
> **231 Use of force in making an arrest**
>
> A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

4.3. To arrest without warrant under s 99 of LEPRA, a police officer must suspect on reasonable grounds that a person is committing or has committed an offence and also be satisfied that the arrest is reasonably necessary for one or more purposes including to stop the person fleeing from a police officer or to enable inquiries to be made to establish the person's identity. Section 99(1)(b) of LEPRA requires an arresting officer to engage in a process of evaluative judgment and be satisfied that the arrest is 'reasonably necessary' for a reason stated in the provision.

4.4. The term 'reasonably necessary' implies more than convenient but does not mean essential or indispensable. Section 99 introduces a requirement of proportionality into a police officer's decision-making – the officer must consider proportionate responses including alternatives to arrest.[79]

4.5. The test is whether a reasonable person in the position of the police officer would not consider the use of force by the police officer to be disproportionate to the risk or danger sought to be presented.[80]

4.6. Force by a police officer cannot be 'reasonably necessary' under ss 230 and 231 of LEPRA if it is used to punish[81] (as opposed to reasonably control) a person or it is delivered as a form of 'extra curial punishment'. The use of excessive force by

[79] *Jankovic v Director of Public Prosecutions* [2020] NSWCA 31 at [53] – [62].
[80] *Director of Public Prosecutions v Greenhalgh* [2022] NSWSC 980 at [186].
[81] A. Krajewski, J. Worrall and R. Scales *Threat Dynamics and Police Use of Force* (2024) 61 (6) Journal of Research in Crime and Delinquency 900 at 901.

police officers to 'punish the bad guys' as a form of 'street justice'[82] is clearly unlawful and involves the use of more force than is reasonably necessary.

4.7. Punishment of offenders is a matter for the courts after guilt is admitted or proved. It is no part of the function of police officers to operate, like the fictional Judge Dredd, who declares 'I am the law' and acts as the dispenser of 'coercive investigative, adjudicatory and punitive powers'. [83]

4.8. Although there may be fine points of distinction between legitimate and illegitimate levels of force in some circumstances,[84] there is no question that punitive use of force or use of force as extra-curial punishment crosses the line of legality and is both unlawful and improper. As Terrill has observed:[85]

> When the police act as a mechanism to distribute coercion for illicit reasons (e.g. to punish suspects, to play out individual prejudice, to harass etc) their legitimacy is undermined. When police coercion is applied legally to those who break the law or otherwise threaten safety and good order, police legitimacy is substantially enhanced.

4.9. Unless the use of force meets the statutory expectations set out in LEPRA, it is (absent any other possible defence) an assault under s 61 of the *Crimes Act 1900* (Crimes Act). Further, where the force used causes injury to the person, the act may constitute an offence of assault occasioning actual bodily harm under s 59 of the Crimes Act.

NSW Police Force Policy and Procedure

4.10. Relevantly, the NSW Police Force Use of Force Procedure also provides (emphasis added): [86]

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[82] L. Westmarland and S. Conway *Police ethics and integrity: Keeping the 'blue code' of silence* (2020) 22(4) International Journal of Police Science and Management 378 at 379 – 380.
[83] Hon Robert French *Executive Power in Australia – Nurtured and Bound in Anxiety* (2018) 43(2) University of Western Australia Law Review 16 at 17.
[84] W. Terrill '*Police Coercion'*, Chapter 12 in the *Oxford Handbook of Police and Policing*, 2019, Oxford University Press, 260 at 268 – 273.
[85] W. Terrill '*Police Coercion'*, Chapter 12 in the *Oxford Handbook of Police and Policing*, 2019, Oxford University Press, 260 at 275.
[86] NSW Police Force 'Use of Force Procedure' (1 August 2022), page 2.

- Police should use no more force than is reasonably necessary to exercise their policing functions. Force that is reasonable is necessary and appropriate to the circumstances.
- Where possible police should attempt to de-escalate a situation, taking the time to disengage, review the situation and consider tactics.
- Each officer is personally responsible for any force they use and must be able to justify it. **They must not use force to inflict punishment.**
- Every use of force must be recorded in COPS, including the type of force used and why that force was necessary.
- If any person is injured during the course of a police operation, whether from the use of force or otherwise, it must be reported to the supervisor immediately and must be recorded on COPS, including details of the injury and how it was sustained.

4.11. Further, the NSW Police Force Use of Force Procedure requires police to take into consideration a number of circumstances when considering what level of force should be used in a given situation. These circumstances are:[87]

- The threat, including the presence of weapons
- The age of the person
- The number of persons
- The number of officers present
- Whether the person is affected by alcohol or drugs
- Whether the person is suffering mental illness
- Gender
- Size

5. Analysis of Evidence – Use of Force

5.1. The Commission is assessing the actions of Officer BEN1 when effecting an arrest or otherwise using force in the course of the officer's duty. Events of this type frequently involve a fast-moving and dynamic process with physical interaction between the officer and the other person. It is necessary to keep in mind the fact that arrests are frequently made in circumstances of excitement

[87] NSW Police Force 'Use of Force Procedure' (1 August 2022), page 7.

and turmoil so that a hindsight analysis of events must take into account the rapid and fluid nature of events surrounding an arrest.[88]

5.2. The evidence of witnesses concerning these incidents was given in reasonably close proximity to the events in question. The events would have been relatively fresh in the minds of the officers at the time of making their statements. The Commission considers the evidence of the witnesses involved in these events to be generally reliable. It should be accepted unless inconsistent with images depicted on BWV or CCTV where available.

5.3. The Commission also accepts that some of the incidents occurred in the dark and minor inconsistencies are to be expected in the evidence of a witness as to what they heard, saw or otherwise perceived.

Use of Force

5.4. As outlined earlier in this report, the Commission has evidence of 6 separate occasions where Officer BEN1 used force against a member of the public in his capacity as a police officer.

5.5. In the context of Officer BEN1's conduct in this matter and for the purpose of any findings of serious misconduct, the Commission must consider on each occasion whether a reasonable person in the position of Officer BEN1 would not consider the use of force by Officer BEN1 to be disproportionate to the risk or danger sought to be presented.[89]

5.6. Because of the definition of serious misconduct, the Commission will also make an assessment of the extent of the injury to any person because of Officer BEN1's use of force.

16 February 2024 – CIV1

5.7. There is no CCTV or BWV evidence depicting Officer BEN1's use of force in respect of CIV1. Officer BEN1 disposed of his BWV camera soon after the arrest of CIV1. As a result, it is not available for evidentiary purposes.

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[88] *Woodley v Boyd* [2001] NSWCA 35 at [37]; Operation Mantus Report concerning alleged excessive use of force and issues concerning police interviews of young persons in custody, December 2023, para 4.46.
[89] *Director of Public Prosecutions v Greenhalgh* [2022] NSWSC 980 at [186].

5.8. Officer BEN1 was frank and forthcoming in his evidence before the Commission. He told the Commission in respect of CIV1: [90]

> So I stood up, after falling on my elbow, and I turned to the male, who was, I believe, flat on the floor, I can't recall a hundred per cent, but he was definitely in a sort of crouching position or perhaps flat on the floor but definitely sort of beneath me, and I delivered three kicks to his stomach region with, I believe, my right foot, and he sort of screamed in pain from those kicks.

5.9. In his statement to Commission officers, CIV1 did not mention being kicked by Officer BEN1. Instead, he said he was either 'pushed over or tackled from behind' by an unidentified police officer. CIV1's statement was not available at the time of the Commission's examinations. Further, there had been a longer passage of time since the event in question and the taking of CIV1's statement.

5.10. Officer BEN1's evidence (where he admitted he attempted to tackle CIV1 and delivered 3 kicks) was tested before the Commission. He was forthcoming in his evidence, given less than 4 months after the event, and there was no indication that his evidence on this point was unreliable.

5.11. The Commission accepts Officer BEN1's evidence about his interaction with CIV1 on 16 February 2024 and is satisfied to the requisite standard that he attempted to tackle CIV1 and, once back on his feet, delivered 3 kicks to CIV1's stomach region with his right foot.

5.12. The use of force under consideration involves Officer BEN1 attempting to tackle CIV1 and delivering 3 kicks with his right foot to CIV1's stomach region.

5.13. The Commission accepts that the incident occurred after police received a police radio broadcast of an alleged robbery. The CAD job reported the persons of interest were carrying a gun and knives and trying to fight the informant.

5.14. At the material time, Officer BEN1 was confronted by 4 persons of interest. The persons of interest fled, and Officer BEN1 was only able to apprehend CIV1 after a foot pursuit. Officer BEN1's initial attempt to detain CIV1, by tackling him, failed and he sustained minor injuries to his elbows.

[90] Examination of Officer BEN1 at T28.

5.15. After the attempted tackle, CIV1 was either lying or crouched on the ground. At this point, Officer BEN1 had effectively gained control of the situation. The Commission accepts that there was an urgent need to apprehend CIV1, in light of the circumstances presented to Officer BEN1 at the time. The Commission finds that Officer BEN1's attempted tackle of CIV1 was reasonable and proportionate in the circumstances.

5.16. Following Officer BEN1's attempt to tackle CIV1, the young person remained on the ground. Although CIV1 may have attempted to get up at this stage, he was not fleeing. At this point, Officer BEN1 was able to stand while CIV1 was still on the ground. CIV1 was not handcuffed at the time nor was he reaching to produce a weapon. Officer BEN1 conceded that at this point he had an opportunity to arrest CIV1. However, in anger he kicked him. Officer BEN1 said '[i]t was excessive. But it achieved a function'.[91]

5.17. At the relevant time, Officer BEN1 was exercising a power within the course of his policing duties. The Commission is satisfied that a reasonable person in the same position as Officer BEN1 would not have believed that delivering 3 kicks to CIV1 was proportionate or reasonably necessary in the circumstances.

5.18. Further, Officer BEN1 himself did not reasonably believe the force he exercised was necessary for the purpose of effecting the arrest, rather he was motivated by anger. Officer BEN1 conceded during his examination that the force he used on CIV1 was excessive.

5.19. The Commission is satisfied that the 3 kicks to CIV1 were excessive and not justified in the circumstances.

16 February 2024 – CIV2

5.20. There is CCTV footage depicting Officer BEN1's use of force on CIV2. There were also 2 witnesses, Officers DOC1 and DOC2. They made statements about what they saw.

5.21. While the accounts of Officers BEN1, DOC1 and DOC2 are largely consistent on the use of force that occurred, there is some variation in the accounts about the

[91] Examination of Officer BEN1 at T33 – T34.

number of kicks delivered. As a result, the Commission prefers the objective evidence of the CCTV footage in this regard.

5.22. The CCTV footage depicts Officer BEN1 picking CIV2 up by the collar, walking him a few meters before throwing him to the ground and delivering a single kick with his right leg.

5.23. The use of force under consideration involves Officer BEN1:

- picking CIV2 up by the collar;
- throwing him to the ground; and
- delivering one kick to his stomach region.

5.24. At the time Officer BEN1 approached CIV2, the young person was sitting under the awning of a nearby building and was under arrest. CIV2 was handcuffed to the rear and generally compliant. Officer DOC1 was present and monitoring the situation. The Commission finds that at this time CIV2 did not pose any immediate risk or danger to the officers who were present or to the public, nor was he trying to escape. There was no legitimate reason for Officer BEN1 to use force at this point in time.

5.25. The Commission is satisfied that a reasonable person in the same position as Officer BEN1 would not believe that such force was proportionate to the risk CIV2 posed.

5.26. At the time CIV2 was thrown to the ground he was handcuffed to the rear and unable to break his fall. The Commission accepts that the minor abrasions CIV2 sustained to his face occurred when Officer BEN1 threw him to the ground.

5.27. Officer BEN1 acknowledged in evidence that his actions in respect of CIV2 were excessive and motivated by anger.

5.28. The Commission is comfortably satisfied to the requisite standard that the acts of Officer BEN1 in picking CIV2 up by the collar, throwing him to the ground and delivering a kick to his stomach region were excessive and not necessary in the circumstances.

25 February 2024 – CIV6

5.29. There is CCTV footage and BWV footage depicting Officer BEN1's use of force on CIV6 in Corrective Services custody on 25 February 2024. Further, the Commission heard the evidence of Officer DOC5 who was also in the custody cell at the time of the incident.

5.30. Officer BEN1's evidence before the Commission concerning this incident was limited. At the time of his examination, the Commission did not have the complaint about this matter and, as a consequence, did not have the CCTV and BWV footage available. When speaking about this event, Officer BEN1 did not accept the incident involved excessive use of force, instead telling the Commission he delivered an Academy taught knee strike.[92] This was not consistent with what the CCTV and BWV footage later revealed.

5.31. The BWV footage reveals that prior to Officers BEN1 and DOC5 entering the cell, 5 Corrective officers were restraining CIV6 on the floor. Officer BEN1 rushed in to assist and, while doing so, delivered multiple knee strikes and punches to CIV6. The Commission is satisfied that Officer BEN1 delivered at least 6 knee strikes and 10 punches to CIV6.

5.32. Accordingly, the use of force under consideration involves Officer BEN1 delivering 6 knee strikes and 10 punches to CIV6 while 5 Corrective officers and Officer DOC5 were present and assisting to restrain CIV6 to varying degrees in a custody cell.

5.33. At the time of these events, CIV6 was in the custody of Corrective officers. He was in a cell and not in possession of any weapon. Although he did not appear to be complying with requests to assist with the strip search Corrective officers were seeking to undertake, there was a sufficient number of trained Corrective officers present to ensure compliance and control of the situation.

5.34. After considering the evidence available, the Commission is satisfied that a reasonable person in the position of Officer BEN1 would not believe that such force was necessary in the circumstances. The acts of delivering 6 knee strikes and 10 punches were excessive and not necessary in the circumstances.

[92] Examination of Officer BEN1 at T87

3 April 2024 – CIV3

5.35. The evidence before the Commission in relation to this event is the CCTV footage of the incident, Officer BEN1's examination, and CIV3's complaint to the NSW Police Force.

5.36. The CCTV footage depicts Officer BEN1 leaving Police Station 2 and intentionally flagging CIV3 down. CIV3 stopped and they had a brief interaction. Officer BEN1 commenced to walk away before turning back and pulling down CIV3's face mask with his right hand. The use of force under consideration is the pulling down of the face mask.

5.37. Officer BEN1 gave evidence that CIV3 ran into him. That evidence is contrary to images depicted in the CCTV footage and is not accepted by the Commission.

5.38. In his evidence, Officer BEN1 described the interaction as a 'brief conversation' with 'nothing official about it'. He said that the cyclist 'could have walked away at any time' and that there was no detainment or arrest.[93] The Commission does not accept this evidence. Officer BEN1 actively stopped and engaged with CIV3. Officer BEN1 was in his police uniform and on duty at the time. A reasonable person would assume that Officer BEN1 was acting in his capacity as a police officer and that the person could not simply leave the scene while the interaction with the police officer continued.

5.39. Officer BEN1 agreed that CIV3 did not consent to being touched when he pulled his face mask down.[94] Further, Officer BEN1 agreed that he was not exercising any police power when he did so.[95] In fact, Officer BEN1 started to walk away from CIV3 before turning back and pulling down his mask. He accepted it was 'almost [...] an afterthought' that he turned back. Officer BEN1 said it was a 'response of anger and frustration'.[96]

5.40. On the evidence, it was not reasonably necessary for Officer BEN1 to use force against CIV3 in order to exercise a legitimate police function. In fact, it appears that Officer BEN1 was prepared to walk away from the interaction before deciding at the last minute to pull down the face mask and he turned back to do

[93] Examination of Officer BEN1 at T92.
[94] Examination of Officer BEN1 at T92.
[95] Examination of Officer BEN1 at T92.
[96] Examination of Officer BEN1 at T93.

so. If CIV3 posed any real risk or threat, Officer BEN1 would not have started to turn his back and walk away from him.

5.41. The Commission is satisfied that CIV3 did not pose any risk or threat to Officer BEN1. Officer BEN1 acted in a high-handed manner in confronting CIV3 and pulling down his face mask for no good or lawful reason. The Commission is of the view that a reasonable person in the same position as Officer BEN1 would not believe that the removal of CIV3's mask was proportionate or reasonably necessary in the circumstances.

5 April 2024 – CIV7

5.42. There is BWV footage depicting Officer BEN1's interaction with CIV7 on 5 April 2024.

5.43. Whilst the BWV is not completely clear, when taken into account in conjunction with Officer BEN1's evidence about this incident, the series of events become clearer. Officer BEN1 told the Commission that he 'tackled him to the floor…and then he was on the floor and I kicked him and punched him I believe.'

5.44. On the evidence, the Commission is satisfied to the requisite standard that CIV7 headbutted Officer BEN1's palm and in response Officer BEN1 pushed CIV7 to the ground and then shortly after kicked CIV7 and used his boot to push CIV7 into the nearby lift.

5.45. The Commission is not satisfied to the requisite standard that Officer BEN1 punched CIV7.

5.46. When considering the circumstances surrounding these events, the Commission is satisfied that the act of pushing CIV7 to the ground was not excessive. This is because CIV7 was of a large build, he was being argumentative, there was only one other Officer present, and CIV7 had just headbutted Officer BEN1's palm despite being handcuffed.

5.47. The Commission accepts that the decision to push CIV7 to the ground was a quick response that allowed Officer BEN1 to gain control of the situation. Following the push to the ground, CIV7 was in the foetal position and apologising for his actions. The situation had been effectively controlled and there was no immediate risk to warrant further use of force. Yet, Officer BEN1 kicked CIV7 and

then used his boot to push or nudge him into the opening lift. In the Commission's opinion, these 2 acts were wholly unnecessary and involved the use of gratuitous force.

5.48. The Commission is of the view that a reasonable person in the same position as Officer BEN1 would not have considered the further use of force following the push to the ground proportionate to the risk presented at that point in time.

5.49. It follows that the Commission finds this to be an excessive use of force.

25 April 2024 – CIV4

5.50. Officer DOC3 witnessed Officer BEN1's use of force during the arrest of CIV4 on 25 April 2024. He distinctly recalled seeing Officer BEN1 deliver 2 knee strikes. The CCTV footage confirms that Officer BEN1 delivered 2 knee strikes and about 14 punches to CIV4.

5.51. Officer BEN1's initial evidence was that he delivered a single knee strike to gain compliance, and grabbed CIV4's face to 'inflict a bit more pain'.[97] Following review of the CCTV, Officer BEN1 accepted he in fact delivered 2 knee strikes and about 14 punches to CIV4. Officer BEN1 acknowledged that his actions were excessive and explained to the Commission that he considered that these people deserved 'a bit of extra-curial punishment'.[98]

5.52. On the evidence the Commission is satisfied that Officer BEN1 delivered 2 knee strikes and at least 14 punches to CIV4. However, the Commission is not satisfied that Officer BEN1 grabbed CIV4's face.

5.53. The immediate circumstances surrounding CIV4's arrest make it abundantly clear that Officer BEN1's use of force on this occasion was excessive. CIV4 was of slight stature. He put up his hands at the approach of the caged truck indicating that he was resigned to the fact that he was to be arrested and did not appear to be resisting at that point. There were a number of officers in the immediate vicinity, including the caged truck crew and Officers DOC3 and BEN1. There were 2 other officers already effecting the arrest of CIV4 when Officer BEN1 came in and delivered the knee strikes and punches.

[97] Examination of Officer BEN1 at T105.
[98] Examination of Officer BEN1 at T114.

5.54. Officer BEN1 told the Commission that he felt that CIV4 was the type of person who deserved a bit of extra-curial punishment. This motivation supports a conclusion that Officer BEN1's decision to use force against CIV4 was punitive and involved a gratuitous use of force. As observed earlier in this report, where force is used to punish it cannot be reasonably necessary.

5.55. The Commission is comfortably satisfied that a reasonable person in the position of Officer BEN1 would not have felt the risk posed by CIV4 was sufficient to warrant the delivery of 2 knee strikes and 14 punches.

5.56. It follows that the Commission finds that the use of force by Officer BEN1 on CIV4 was excessive and his motivations for doing so improper and highly concerning.

A recurring theme of anger and infliction of punishment

5.57. During his private examination before the Commission, Officer BEN1 volunteered comments about his motivation and thought processes on occasions when he used excessive force in the course of his duties. A number of these comments appear in the emphasised extracts from his evidence set out earlier in the report. His evidence confirmed that he repeatedly used a gratuitous level of force for punitive reasons. A punitive and angry theme emerged from Officer BEN1's evidence concerning these incidents.

5.58. In explaining the reasons for his anger, Officer BEN1 referred, amongst other things, to personal and family concerns as well as 'reasons for dissatisfaction with the job I was doing. I worked very hard as a police officer, however, I always seemed to be unable to keep up with the paperwork and therefore I sort of felt I was slowly failing as a police officer'.[99]

5.59. Later in his evidence, Officer BEN1 was asked by the Chief Commissioner about his anger and his capacity to control himself (emphasis added):[100]

> Q. Is it the fact that you effectively can't control yourself when you're in these situations?

[99] Examination of Officer BEN1 at T44.
[100] Examination of Officer BEN1 at T113.

A. I think there right be some - **there -is an element of that, your Honour**. But --

Q. And that would have been apparent to you back on 16 February, wouldn't it?
A. That's right, your Honour.

Q. Well, did you try and do anything about that? You've told me you talked to your priest, but didn't you think that there was something more fundamental you needed, namely, some medical assistance, if you were to stay a police officer?
A. I think, your Honour, **I might have definitely assisted from professional medical anger management and medical assistance, but I simply kept on plugging away, as I always had done, and kept on going, and I think, your Honour, I was supremely dissatisfied with the job I was doing. I really tried to convince myself I liked being a police officer but I found it extremely difficult with the night shifts and the amount of paperwork and I was very burnt out and perhaps I should have just stopped being a police officer instead of being a continued to - continue to do it and get medical assistance, if it was at that stage. So, yeah, I a hundred per cent admit this anger management would have been so, so crucial in not having these things occur or leaving the police force, for that matter.**

5.60. The Commission has kept in mind the cautious approach required when assessing the use of force in dynamic policing settings (see paragraph 5.1 above). The evidence points to a recurring theme to Officer BEN1's conduct when it came to the use of force explored in this report. His conduct was sometimes motivated by anger, which appeared to be fuelled by a belief that individuals (especially young persons) were dealt with too leniently by the criminal justice system. Thus, Officer BEN1 felt that he was, in a sense, justified in his use of punitive and gratuitous force. Added to this were the pressures he felt in his work as explained in the last mentioned extract from his evidence.

5.61. There is no doubt that Officer BEN1's conduct when acting in this manner was both unlawful and improper. It is regrettable that he did not seek any effective

assistance or support with the NSW Police Force which would have either removed him from operational activities for a period or implemented a management plan to address his anger issues which had led to repeated excessive use of force.

5.62. In a sense, Officer BEN1's telephone calls to police colleagues on 17 February 2024 were an attempt by him to obtain assistance and support for his undoubted problems. It will be seen, however, that this contact went nowhere with the 4 contacted officers, in effect, leaving it to Officer BEN1 to take any necessary action to address his difficulties.

5.63. What happened (and did not happen) after 16 February 2024 did not serve the public interest or the interests of the NSW Police Force.

6. NSW Police Force – BWV Devices

6.1. Police Officers have clear obligations regarding the use of BWV devices under the BWV Standard Operating Procedures (SOPs).

6.2. Officers are required to wear BWV devices when operationally deployed in uniform to perform responsive policing duties.[101] While officers must activate their BWV devices when it is 'practicable' to do so, this requirement is affected by practical considerations such as camera availability, whether cameras can be properly attached to uniforms, and the nature of police work being undertaken.

6.3. The current BWV SOPs specify a number of circumstances in which an officer should activate their BWV device although not strictly obliged to do so. These include: when they would normally use their official police notebook to record information, to capture evidence or record something of relevance, when police powers are anticipated or exercised, during first response crime and incident investigation, for licensed premises inspections and patrols, during policing incidents involving antisocial behaviour, vehicle stops, conversations with members of the public that may relate to an incident or investigation, when use of force is anticipated, when using a taser and when conducting strip searches.[102]

[101] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 5.
[102] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 8.

6.4. Relevantly, the BWV SOPs permit officers a level of discretion around making the decision to activate the BWV camera. A police officer will use their own judgement and take into account a number of factors, including officer safety and protection, the need to capture evidence, accountability, community expectations, contentious situations, involvement of vulnerable people, protection for offenders and the community and any other relevant factors that exist.[103]

6.5. The BWV SOPs also establish how officers should manage BWV footage. Police officers are required to check their BWV devices into the docking station, which automatically uploads the footage to the NSW Police Force computer database.[104] Officers must then ensure each file is properly labelled through a process known as 'tagging'.[105] That is, labelling the footage as either evidence, WHS or complaint. Once the footage is tagged, and a relevant COPS event is created, then the database is re-entered, and the footage is linked to the COPS event.[106] Officers who fail to properly tag material which is of evidentiary value may face managerial or disciplinary action.[107]

6.6. The Commission has emphasised the importance to contemporary policing of proper use and retention of BWV evidence. In a March 2025 Report, the Commission said:[108]

> Body-worn video (BWV) cameras are an invaluable tool in contemporary policing. BWV allows police officers to capture accurate, high-quality visual and audio recordings of incidents and interactions with the public. Such recordings provide crucial evidence to assist criminal prosecutions, coronial inquests, and the investigation of allegations of police misconduct. Appropriate use of BWV is thus vital to support the safety of police officers

[103] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 7.
[104] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 12.
[105] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 12.
[106] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p 13.
[107] Technology Command, NSW Police Force, Body-Worn Video Standard Operating Procedures, version 2.7, November 2023, p. 12.
[108] *Review of NSW Police Force body-worn video policy and practice,* March 2025 at page 3.

and community members. It is equally useful in ensuring public confidence in the police.

6.7. In that March 2025 Report, the Commission explained the need for a clearer and simpler requirement to activate BWV and recommended that the NSW Police Force mandate, at a minimum, that officers must activate BWV when using statutory powers, or when it is likely that an interaction may lead to the exercise of statutory powers.[109] The NSW Police Force is still considering recommendations made in the Commission's March 2025 report.

6.8. The Commission has no independent access to NSW Police Force BWV files. It may request such a video file only after a complaint allegation is made of a particular matter. No random or targeted review of NSW Police Force BWV by the Commission is therefore possible. The ability to independently review and monitor, perhaps through a random audit process, would provide a higher degree of confidence to the public of effective oversight.

6.9. The valuable technology of BWV is a friend to the honest police officer acting properly and the potential enemy of the officer behaving criminally or improperly. The obligation to activate (and keep activated) BWV, and to ensure that it is retained and downloaded, are important features of a police officer's duty. Any action taken by a police officer to avoid proper use of BWV or to destroy or dispose of it when used, should be condemned and acted upon by the NSW Police Force by way of disciplinary action and criminal prosecution in appropriate cases.

7. Analysis of the Evidence – BWV Devices

7.1. Officer BEN1 was aware that during his interactions with both CIV1 and CIV2 on 16 February 2024 his BWV device was activated and recording. The BWV report obtained from the NSW Police Force supports that the BWV device was so engaged.

7.2. Officer BEN1's evidence before the Commission revealed his thought processes after his physical interaction with the 2 young persons. He told the Commission

[109] *Review of NSW Police Force body-worn video policy and practice,* March 2025 at para 2.7.3 and Recommendation 4.

that he thought he needed to conceal any evidence of his use of force on the 2 youths to maintain his employment as a police officer.

7.3. Officer BEN1 was alive to the fact that the footage captured on his BWV device was of evidentiary value and incriminating. He also believed that Officer DOC1's BWV device did, or was likely to, capture the evidence of the assault on CIV2.

7.4. In his evidence, Officer BEN1 admitted that he disposed of both his and Officer DOC1's BWV devices by throwing them into the water. He agreed that he disposed of the BWV devices with the intention of preventing investigators or a judicial body from accessing the incriminating footage.[110]

7.5. Officer BEN1 also gave evidence that during a social event he attended on 16 February 2024, he admitted to Officer DOC1 that he disposed of her BWV device in the ocean. Officer BEN1 also gave evidence that he told Officers BEN4, BEN3, BEN2 and BEN5 that he disposed of the BWV devices. In this respect, Officers BEN3, BEN2, and BEN4 gave evidence which, to varying degrees, confirmed that Officer BEN1 either expressed concerns that the incident was captured on BWV footage or that he told them that he disposed of the BWV devices.[111]

7.6. Officer BEN1 also accepted that he contravened the requirements for storage and tagging in the NSW Police Force BWV SOPs and that he did not behave in a way that upheld the values and good reputation of the NSW Police Force. [112]

7.7. The BWV audit reports are also consistent with the BWV devices being removed from the docking station in the early hours of 16 February 2024 and never being reconnected to the NSW Police Force system.

7.8. The Commission finds that Officer BEN1 disposed of 2 BWV devices on 16 February 2024, for the purpose of concealing or destroying evidence of his own unlawful use of force during his interactions with CIV1 and CIV2. This conduct demonstrated consciousness of guilt on his part (by disposal of

[110] Examination of Officer BEN1 at T80.
[111] Examination of Officer BEN4 at T14; Examination of Officer BEN3 at T28; Examination of Officer BEN2 at T16 – T17.
[112] Examination of Officer BEN1 at T77.

important evidence) concerning his excessive use of force during the arrests of those young persons.[113]

7.9. The Commission also finds that Officer BEN1 was aware of his obligations under the NSW Police Force BWV SOPs and that he knowingly contravened the requirements in respect of storage and tagging.

8. The Problem of Destruction or Alteration of BWV Evidence by Police Officers in Australia and overseas

8.1. There have been other recent cases where BWV evidence has been destroyed (or altered by turning it off) by police officers in an effort to avoid detection of their illegal conduct as police officers.

8.2. In February 2025, 2 former officers in the London Metropolitan Police were sentenced for perverting the course of justice after lying about the circumstances surrounding a police pursuit.[114] A press release by the London Metropolitan Police stated:[115]

> On 5 July 2023, the officers were on patrol in a police car in Hayes when they came to be involved in a pursuit with a motorcycle which failed to stop. The pursuit concluded with the passenger sustaining injuries to her leg. In the subsequent reporting of the incident, the former officers misled their colleagues as to who was driving the police vehicle at the time of the pursuit. Former PC Salmon went on to destroy the bodyworn cameras belonging to both officers, which may have contained evidence of the pursuit. Partial remains of the cameras were subsequently recovered from his garden.
>
> Some hours later, PC Churchley reported this matter to his line manager, who in turn referred it to the Directorate of Professional Standards.

[113] *The Queen v Baden-Clay* (2016) 258 CLR 308 at [72] – [77].
[114] Metropolitan Police *Two former officers sentenced for lying and destroying evidence*, 28 February 2025 https://news.met.police.uk/news/two-former-officers-sentenced-for-lying-and-destroying-evidence-494579 (accessed 30 April 2025).
[115] Metropolitan Police *Two former officers sentenced for lying and destroying evidence*, 28 February 2025 https://news.met.police.uk/news/two-former-officers-sentenced-for-lying-and-destroying-evidence-494579 (accessed 30 April 2025).

PC Salmon was arrested at his home address on 6 July 2023 for perverting the course of justice and theft. He was interviewed under caution at a police station and was suspended from duty on the same day. He remained suspended until his retirement in September 2023.

Former PC Churchley was interviewed under caution on 9 July 2023. He was placed on restricted duties until he resigned in November 2024.

They were both charged with perverting the course of justice on 9 October 2024 and were convicted as above. An accelerated misconduct hearing held on Friday, 31 January found that they had breached Standards of Professional Behaviour in relation to honesty and integrity and discreditable conduct at the level of gross misconduct.

They would have been dismissed without notice if they were still serving and have been placed on the College of Policing's barred list.

8.3. In the United States, a former Columbus, Ohio police officer offered a guilty plea in January 2025 for offences of destroying or altering records related to a criminal investigation. A press release issued by the US Attorney's Office, Southern District of Ohio, described the officer's conduct:[116]

> Nicholas P. Duty, 35, of Commercial Point, Ohio, admitted to two counts of the crime. The plea agreement includes a sentencing recommendation of 18 to 48 months in prison.
>
> According to court documents, on two occasions, Duty destroyed, altered or falsified records by purposefully deactivating or removing his police body worn camera. Duty's actions were intended to impede, obstruct or influence a federal investigation.
>
> In February 2024, Columbus police officers were working street-level prostitution crimes in the area of Sullivant Avenue on the west side of

[116] Press release by US Attorney's Office, Southern District of Ohio, *Former Columbus police officer pleads guilty to destroying, altering records by turning off body worn camera during encounters with women while on duty*, 22 January 2025, https://www.justice.gov/usao-sdoh/pr/former-columbus-police-officer-pleads-guilty-destroying-altering-records-turning-body

Columbus when a witness expressed concerns about Duty's on-duty activities. Duty was positively identified during the administration of a blind photo array.

Further investigation revealed that, on Oct. 31, 2023, and March 22, 2024, Duty deactivated or removed his body worn camera during interactions with two women, including during a sexual encounter.

During the incidents, Duty was on duty, wearing a police uniform, in a marked police vehicle and assigned a body worn camera. He knew he was required to comply with Columbus Division of Police policies for wearing the division-issued camera.

On Halloween 2023, the first woman had called Columbus police and asked for assistance, stating her boyfriend was attempting to kill himself. Duty transported the woman following the call and disabled his body worn and in-car cameras. Duty and the woman exchanged phone numbers and Duty reached out to her, including in April 2024 a few days before his arrest.

On March 22, 2024, video footage shows Duty speaking with the second woman near the Sunoco station at Sullivant and Clarendon avenues. The woman confirmed that Duty had money with him and asked if he wanted to go to their "normal spot." Duty drove away in his police vehicle, relocated to a different alley, and met up with the woman. Duty removed his body worn camera and blocked it from recording video. The camera, however, still recorded audio from the incident. The audio recording reveals Duty asking the woman several times to have sex. She declines but performs oral sex on Duty. The two discuss meeting up later for sex and Duty is reported to have paid the woman $20.

Duty was indicted by a federal grand jury in April 2024. He had been employed with the Columbus Division of Police since June 2018.

8.4. In a recent NSW case, Senior Constable Nathan Black (Black) and Constable Timothy Trautsch (Trautsch) pleaded guilty to offences arising from their vicious and sustained assault on a 48 year old mentally ill woman in January 2023.

8.5. Black and Trautsch were on duty and responding to a call by a member of the public who was concerned about the woman's welfare. The assault included kicking the vulnerable woman to the head and back, dragging her by her hair, and dispensing 2 cans of OC spray on her - including to her genital region and along abrasions on her back.

8.6. Black and Trautsch both had BWV devices in their possession. Only Black activated his BWV device during the incident. However, he turned it off on at least 3 occasions during the course of the incident. At one point during the incident, Trautsch said to Black 'That's enough, there could be cameras'.

8.7. Without CCTV footage being obtained from a close location, it is likely that the full extent of the attack on the victim would have remained unknown.

8.8. Black and Trautsch were initially suspended without pay before each resigned from the NSW Police Force before criminal proceedings were completed. Each former officer pleaded guilty to assault and misuse of a prohibited weapon (OC spray) and Black pleaded guilty as well to 2 counts of intentionally publishing protected information (sharing his BWV footage with a police colleague).

8.9. On 8 August 2025, both were sentenced to lengthy terms of imprisonment by his Honour Judge Turnbull SC sitting at the Penrith District Court. Black was sentenced to imprisonment for 5 years and 9 months with a non-parole period of 3 years and 3 months. Trautsch was sentenced to imprisonment for 5 years and 6 months with a non-parole period of 3 years. The sentencing Judge was scathing in his condemnation of the conduct of the 2 police officers. His Honour found that the conduct of Black and Trautsch involved 'gratuitous cruelty' and showed 'complete and utter contempt for the victim'.[117] In commenting on the offences after sentencing, Acting Commissioner Hudson said the conduct 'was one of the worst examples of contravening our core values and ethics I have ever seen.'[118]

8.10. His Honour Judge Turnbull SC made direct reference to the BWV footage in his sentencing remarks, noting 'the exhibits which were of most significance were three videos, two from a body-worn video and the third being CCTV from a

[117] *R v Nathan Black*; *R v Timothy John Trautsch* [2025] NSWDC 447 at [56], [116] – [121].
[118] J. McKinnell "Former NSW police officers jailed over assault, pepper spray of mentally unwell woman" ABC, 8 August 2025; R. Jackson, ""Disgraceful": Cops put behind bars", Western Weekender Penrith, 14 August 2025.

proximate business.'[119] His Honour's sentencing remarks further confirmed the manipulation of BWV devices in this case stating, 'during the course of the incident, the offender Black at times turned off the audio recording function of his body-worn video or turned off the video completely.'[120]

8.11. It is apparent from these examples, that the destruction or manipulation of BWV devices by officers who have done the wrong thing is a real risk in contemporary policing, not only for the NSW Police Force but for police forces around the world.

8.12. It is essential that the NSW Police Force ensure that police officers use BWV and then comply strictly with requirements to download and retain BWV footage. Strong action is necessary to deter officers who do not comply with these important requirements.

9. Possible Offences Committed by Officer BEN1

9.1. Officer BEN1's actions in disposing of 2 BWV devices, to conceal or destroy evidence of his own unlawful use of force in the arrests of CIV1 and CIV2, may amount to one or more criminal offences under the Crimes Act, including:

- **The offence of larceny under s 117** – an offence punishable by imprisonment for 5 years.
- **The offence of larceny by a bailee under s 125** – an offence punishable by imprisonment for 5 years.
- **The offence of destroying or damaging property under s 195** – an offence punishable (relevantly to this case) by imprisonment for 5 years.
- **The offence of dishonestly destroying or damaging property under s197** – an offence punishable (relevantly to this case) by imprisonment for 7 years.
- **The offence of tampering etc with evidence under s 317** – an offence punishable by imprisonment for 10 years.
- **The general offence of perverting the course of justice under s 319** – an offence punishable by imprisonment for 14 years.

[119] *R v Nathan Black*; *R v Timothy John Trautsch* [2025] NSWDC 447 at [6].
[120] *R v Nathan Black*; *R v Timothy John Trautsch* [2025] NSWDC 447 at [30].

10. Statutory Findings – Officer BEN1

10.1. As indicated earlier in this report, the Commission is comfortably satisfied to the requisite standard that Officer BEN1's use of force on the following occasions was not 'reasonably necessary' for the purpose of s 230 of LEPRA and was excessive:

(a) The 3 kicks delivered to the stomach region of CIV1 on 16 February 2024.
(b) The act of picking up CIV2 by the collar, throwing him to the ground and delivering one kick on 16 February 2024.
(c) The 6 knee strikes, and 10 punches delivered to CIV6 on 25 February 2024.
(d) The pulling down of CIV3's mask on 3 April 2024.
(e) The kick and subsequent pushing by the foot of CIV7 on 5 April 2024.
(f) The 2 knee strikes and 14 punches inflicted on CIV4 on 25 April 2024.

10.2. Further, the Commission is comfortably satisfied that Officer BEN1 took his and Officer DOC1's BWV devices and disposed of them on 16 February 2024, in an effort to conceal or destroy the evidence of his excessive use of force against CIV1 and CIV2.

11. Should a Finding of 'Serious Misconduct' be Made in Respect of Officer BEN1?

11.1. The term 'serious misconduct' is defined in s 10 of the LECC Act and includes conduct of a police officer that could result in prosecution of the officer for a 'serious offence' or 'serious disciplinary action'.[121]

11.2. 'Serious disciplinary action' against an officer or employee means termination of the employment, demotion or reduction in rank, classification or grade of the office or position held by the officer or reduction in the remuneration payable to the officer.[122]

11.3. A 'serious offence' means a serious indictable offence, being an offence punishable by 5 years imprisonment or more.[123]

[121] LECC Act s 10(1)(a).
[122] LECC Act s 10(2).
[123] Crimes Act s 4(1).

11.4. In considering whether serious misconduct may be found, it must be kept in mind that the Commission cannot find a person is guilty of, or has committed, a criminal offence.[124] However, an opinion or finding that a person has engaged in serious misconduct is not a finding or opinion that the person has committed a criminal offence.[125] For the purpose of considering whether a finding of serious misconduct should be made, it is necessary to consider whether Officer BEN1 has engaged in conduct that could result in prosecution for an offence punishable by 5 years imprisonment or more. In this way, the Commission considers the elements of potential criminal offences but this is not for the purpose of finding, to the criminal standard of proof, that he has committed a criminal offence.

11.5. These findings may be made despite the fact that Officer BEN1 is no longer a member of the NSW Police Force.[126]

Use of force – serious misconduct?

11.6. If the incidents of use of force set out at paragraph 10.1 above are not excused by LEPRA, then each may constitute an assault. The question is whether the conduct of Officer BEN1 in each case amounts to serious misconduct.

11.7. The Commission must consider what may be the appropriate offence in each case of excessive use of force.

11.8. An offence of assault under s 61 of the Crimes Act is punishable by a maximum of 2 years imprisonment. The potential for prosecution for a s 61 offence would not bring Officer BEN1's actions within the meaning of serious misconduct.

11.9. Where there is evidence that a person sustained actual bodily harm because of an assault, the potential charge to be considered is assault occasioning actual bodily harm contrary to s 59 of the Crimes Act. An offence of assault occasioning actual bodily harm (not in company) under s 59 of the Crimes Act is punishable by a maximum of 5 years imprisonment. It is a 'serious offence' for the purposes of 'serious misconduct' in s 10 of the LECC Act.

[124] LECC Act s 29(3).
[125] LECC Act s 29(4).
[126] LECC Act s 9(5).

Use of force – CIV1

11.10. Is the excessive use of force against CIV1 a foundation for a finding of serious misconduct against Officer BEN1?

11.11. There is no evidence before the Commission that CIV1 sustained actual bodily harm as a result of the 3 kicks delivered by Officer BEN1. CIV1 was not assessed at the hospital for any injuries and there are no photographs of any injuries sustained. Further, CIV1 did not tell the Commission that he sustained any injuries that may constitute actual bodily harm.

11.12. In these circumstances, a potential prosecution would be for assault under s 61 of the Crimes Act. An offence of assault under s 61 is punishable by a maximum of 2 years imprisonment. Potential prosecution for a s 61 assault would not bring Officer BEN1's actions within the meaning of serious misconduct.

11.13. It is necessary to consider the second pathway to a finding of serious misconduct by way of potential serious disciplinary action. Officer BEN1's conduct was in breach of the NSW Police Force Code of Conduct, which requires a police officer to:

- Behave honestly and in a way that upholds the values and good reputation of the NSW Police Force.
- Act with care and diligence when on duty.
- Treat everyone with respect, courtesy and fairness.
- Comply with the law.

11.14. The actions of Officer BEN1 in respect of CIV1 could result in serious disciplinary action if he remained a member of the NSW Police Force. For this reason, the Commission finds that the 3 kicks Officer BEN1 delivered to CIV1 amount to serious misconduct.

Use of force – CIV2

11.15. If the acts of grabbing the handcuffed CIV2 by the collar, throwing him to the ground and kicking him once, are not excused by LEPRA, then they may constitute an assault.

11.16. CIV2 was not assessed for injuries at the hospital. However, photographs were taken of him following the event. The photographs show an abrasion on CIV2's left cheek and another smaller abrasion below his right eye.

11.17. Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the victim. It need not be permanent but must be more than merely transient or trifling. Bruises and scratches to a victim are typical examples of injuries that can amount to actual bodily harm.[127]

11.18. In these circumstances, the conduct of Officer BEN1 could result in prosecution for assault occasioning actual bodily harm contrary to s 59 of the Crimes Act. A s 59 offence is punishable by a maximum of 5 years imprisonment. It is a serious offence within s 10 of the LECC Act. In these circumstances, a finding that Officer BEN1 has engaged in serious misconduct is both open and appropriate.

11.19. Officer BEN1's conduct also breached aspects of the NSW Police Force Code of Conduct set out at paragraph 11.13 above. The Commission considers that the actions of Officer BEN1 against CIV2 would warrant serious disciplinary action if he remained a member of the NSW Police Force. For this separate reason, the Commission finds that the acts of throwing CIV2 to the ground and delivering a kick whilst he was on the ground, also amount to serious misconduct.

Use of force – CIV6

11.20. If the 6 knee strikes and 10 punches to CIV6 were not excused by LEPRA, then they may constitute an assault.

11.21. There is no evidence before the Commission that CIV6 sustained actual bodily harm as a result of the knee strikes and punches delivered by Officer BEN1 during the restraint attempt.

11.22. Officer DOC5 did not witness the use of force during the incident. Upon reviewing the BWV footage, he agreed that the number of knee strikes was excessive, and said the force used was not reasonable.

11.23. On the evidence, the charge to be considered is assault under s 61 of the Crimes Act. A s 61 assault is punishable by a maximum of 2 years imprisonment.

[127] *McIntyre v R* (2009) 198 A Crim R 549; [2009] NSWCCA 305 at [44].

Potential prosecution for a s 61 offence would not bring Officer BEN1's actions within the meaning of serious misconduct.

11.24. Officer BEN1's conduct was in breach of aspects of the NSW Police Force Code of Conduct set out at paragraph 11.13 above. The Commission considers that the actions of Officer BEN1 in respect of CIV6 would warrant serious disciplinary action, if he was still a police officer. On this basis, the Commission finds that the 6 knee strikes and 10 punches which Officer BEN1 delivered to CIV6 whilst he was on the ground and being restrained by 6 other officers, amount to serious misconduct.

Use of force – CIV3

11.25. If the forcible removal of a facemask is not excused by LEPRA, then it may constitute an assault. Does this conduct constitute serious misconduct?

11.26. The Commission does not hold any independent evidence of the scratches CIV3 said he sustained to his face as a result of BEN1 pulling down his mask.

11.27. There is sufficient evidence for a charge of assault under s 61 of the Crimes Act. A s 61 assault is punishable by a maximum of 2 years imprisonment. A finding of serious misconduct is not available on the first basis in s 10 LECC Act.

11.28. Officer BEN1's conduct was in breach of aspects of the NSW Police Force Code of Conduct set out at paragraph 11.13 above. The Commission is satisfied that the actions of Officer BEN1 in respect of CIV3 would be enough to warrant serious disciplinary action if he remained a police officer. On this basis, the Commission finds that the forcible removal of CIV3's mask amounts to serious misconduct.

Use of force – CIV7

11.29. If the acts of pushing CIV7 to the ground and kicking him were not excused by LEPRA, then they may be an assault. Does this conduct constitute serious misconduct?

11.30. On assessment of the BWV footage of the incident involving CIV7, a potential prosecution for a s 61 assault would arise for consideration. A charge of assault laid under s 61 is punishable by a maximum of 2 years imprisonment and is not a serious offence. The potential for a s 61 prosecution would not bring Officer

BEN1's actions within the meaning of serious misconduct under s 10 of the LECC Act.

11.31. Officer BEN1's conduct was in breach of aspects of the NSW Police Force Code of Conduct set out in paragraph 11.13. The Commission is satisfied that the actions of Officer BEN1 towards CIV7 could result in serious disciplinary action if he was still a police officer. On this basis, the Commission finds that his conduct amounts to serious misconduct.

Use of force – CIV4

11.32. If the 2 knee strikes and 14 punches were not excused by LEPRA, then they may be an assault. Does this constitute serious misconduct?

11.33. CIV4 was taken to the Emergency Department in police custody following his arrest. The records indicate that he had an episode of loss of consciousness and a small abrasion to his right forehead.

11.34. A temporary loss of consciousness falls within the ordinary meaning of actual bodily harm regardless of duration or lasting nature.[128] Furthermore, bruises and scratches to a victim are also typical examples of injuries that can amount to actual bodily harm.[129]

11.35. In these circumstances the conduct of Officer BEN1 could result in prosecution for assault occasioning actual bodily harm contrary to s 59 of the Crimes Act. A charge of assault occasioning actual bodily harm is punishable by a maximum of 5 years imprisonment. A s 59 offence is a serious offence within s 10 of the LECC Act. In these circumstances, a finding that Officer BEN1 has engaged in serious misconduct should be made.

11.36. Officer BEN1's conduct was also in breach of aspects of the NSW Police Force Code of Conduct, set out at paragraph 11.13 above. The Commission considers that the actions of Officer BEN1 in respect of CIV4 would warrant serious disciplinary action. For this additional reason, the Commission finds that the conduct of delivering 2 knee strikes and 14 punches to CIV4 amounts to serious misconduct.

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[128] *R v Donovan* [1934] 2 KB 498 at 509.
[129] *McIntyre v R* (2009) 198 A Crim R 549; [2009] NSWCCA 305 at [44].

Disposal of BWV devices

11.37. As noted in paragraph 9.1 above, Officer BEN1's conduct in disposing of 2 BWV devices could result in prosecution for a number of offences. Offences under ss 117, 125, 195, 197, 317 and 319 of the Crimes Act carry with them penalties of imprisonment ranging from 5 to 14 years so that each is a serious indictable offence.[130]

11.38. Each of these offences is a serious offence within s 10 of the LECC Act. A finding that Officer BEN1 has engaged in serious misconduct is appropriate upon the basis that his conduct could result in prosecution for any one or more of these offences.

11.39. Further, the destruction of BWV devices for the purpose of concealing an unlawful act is of great concern. It is contrary to the values of the NSW Police Force[131] and the standards which the community expects of members of the NSW Police Force. Conduct of this nature could result in serious disciplinary action if Officer BEN1 was still a police officer. The Commission also finds that Officer BEN1 engaged in serious misconduct on this basis.

12. Affected Persons – Officer BEN1

12.1. In Appendix 1 to this report the Commission notes the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Section 133(2), (3) and (4) relate to an 'affected person'.

12.2. The Commission is of the opinion that Officer BEN1 is an affected person within the meaning of s133(3), being a person against whom substantial allegations have been made in the course of the investigation.

Consideration of affected persons under s 133(2) LECC Act

12.3. When tabling a report under s 132 of the LECC Act, s 133 provides that the Commission must consider whether it should take further steps or

[130] Crimes Act s 4.
[131] Police Act s 7.

recommendations as a result of its findings against any affected person. The Commission must set out whether consideration should be given to:

(a) obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence;

(b) taking action against the person for a specified disciplinary infringement;

(c) taking action including the making of an order under s 181D of the Police Act 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; and

(d) taking reviewable action within the meaning of s 173 of the Police Act against the person as a police officer.

Section 133(2)(a) consideration concerning Officer BEN1

12.4. The Commission has considered whether Officer BEN1's actions should be referred to the DPP under s 133(2)(a). In deciding this question, the Commission must disregard the evidence of Officer BEN1. Subject to certain statutory exemptions, that evidence is not admissible in any criminal proceedings against him: ss 57(2) and (5)(a) and 74(3) and (6)(a) of the LECC Act. However, the evidence given under objection by other witnesses may be taken into account by the Commission in determining whether another person should be referred to the DPP for advice as to prosecution.[132] The admissible evidence in respect of each matter considered for referral is noted below.

Use of force on CIV1 – 16 February 2024

12.5. There is no CCTV or available BWV footage of Officer BEN1's interaction with CIV1. No other officers who were present during the pursuit have raised concerns about Officer BEN1's interaction with CIV1, nor did they provide any details of it in their directed statements.

12.6. Further, when CIV1 gave his version of events to Commission investigators it did not include any disclosures in relation to him being kicked by a police officer on 16 February 2024.

[132] LECC Act s 74(5)(d).

12.7. The Commission does not consider that there is sufficient admissible evidence to warrant a referral to the DPP for advice on whether a prosecution should be initiated, for an offence of assault contrary to s 61 of the Crimes Act in respect of CIV1.

12.8. In these circumstances, no referral has been or should be made to the DPP in respect of Officer BEN1's use of force on CIV1.

Use of force on CIV2 – 16 February 2024

12.9. Officer DOC1 saw Officer BEN1 pick CIV2 up by the collar and drag him a couple of metres away from the wall. Officer DOC1 then saw Officer BEN1 throw CIV2 to the ground and kick him with his right foot. Officer DOC1 confirmed that CIV2 was handcuffed to the rear during this interaction and was generally compliant prior to Officer BEN1's use of force.

12.10. Officer DOC2 saw Officer BEN1 pull CIV2 up and lose his grip resulting in CIV2 falling to the ground. Officer DOC2 then saw Officer BEN1 kick CIV2 2 or 3 times while CIV2 was laying on the ground.

12.11. Officers DOC1 and DOC2 made directed statements to the above effect and the Commission is entitled to take their evidence into account.

12.12. Further the available CCTV footage captures this use of force and shows a male officer (Officer BEN1) picking CIV2 up and throwing him to the ground and delivering a kick to CIV2 with his right foot.

12.13. The photographs of CIV2 taken on 16 February 2024, and attached to CIV5's affidavit, show an abrasion on CIV2's left cheek and another smaller abrasion below his right eye.

12.14. In respect of the use of force on CIV2, the Commission is satisfied that there is sufficient admissible evidence to warrant a referral to the DPP for advice on whether a prosecution should be initiated, for an offence under s 59 or s 61 of the Crimes Act.

12.15. Having regard to the stage reached in the investigation, the Commission made such a referral to the DPP on 30 April 2025 under s 28(1)(a) and s 29(1)(c)(i) of the LECC Act and is currently awaiting advice from the DPP.

Use of force on CIV6 – 25 February 2024

12.16. Officer DOC5 gave evidence before the Commission. However, he did not have an independent recollection of seeing Officer BEN1 deliver any knee strikes or punches to CIV6.

12.17. The Commission has Officer DOC5's BWV footage of the incident and the CCTV footage from inside the cell where the incident occurred. The footage indicates that Officer BEN1 performed approximately 6 knee strikes and about 10 punches whilst Corrective officers were trying to restrain CIV6 on the ground and complete the strip search.

12.18. There is no admissible evidence of any injuries to CIV6 in the incident on 25 February 2024.

12.19. In respect of the use of force against CIV6, the Commission is satisfied that there is sufficient admissible evidence to warrant a referral to the DPP for advice on whether a prosecution should be initiated, for an offence contrary to s 61 of the Crimes Act.

12.20. The Commission made a referral to the DPP concerning this matter on 30 April 2025 under s 28(1)(a) and s 29(1)(b) of the LECC Act, and is awaiting advice from the DPP.

Use of force against CIV3 - 5 April 2024

12.21. The Commission has a copy of the complaint CIV3 made to the NSW Police Force describing his interaction with Officer BEN1.

12.22. The Commission also holds CCTV footage from Police Station 2 depicting Officer BEN1 stopping CIV3, engaging in a brief conversation and turning to walk away before returning to pull down CIV3's face mask with his right hand.

12.23. The Commission does not hold any independent evidence of the scratches which CIV3 said he sustained to his face as a result of BEN1 pulling down his mask.

12.24. The Commission is satisfied that there is sufficient admissible evidence to warrant a referral to the DPP for advice on whether a prosecution should be initiated for an offence of assault under s 61 of the Crimes Act.

12.25. The Commission has made this referral to the DPP on 30 April 2025 under s 28(1)(a) and s 29(1)(c)(i) of the LECC Act, and is awaiting advice from the DPP.

Use of force on CIV7 – 5 April 2024

12.26. The Commission obtained evidence of the incident concerning CIV7, including BWV footage. However, that evidence was obtained as a direct result of the evidence of Officer BEN1 during his examination in which he disclosed this incident which was otherwise not known to the Commission. That evidence was given under objection and cannot be used against him.[133]

12.27. Accordingly, there is no admissible evidence to warrant a referral to the DPP in this instance, and a referral in respect of this incident has not and will not be made.

Use of force on CIV4 – 25 April 2024

12.28. Officer DOC3 saw Officer BEN1 deliver at least 2 knee strikes to CIV4 while he was on the ground. He also observed that CIV4 had sustained a leg injury during the arrest.

12.29. Officer DOC3 made a directed statement to the above effect and the Commission is entitled to take that evidence into account.

12.30. Further, the available CCTV footage captures this use of force and depicts Officer BEN1 delivering 2 knee strikes and about 14 punches to CIV4.

12.31. The Commission is also entitled to take into account the medical records obtained from CIV4's presentation following his arrest. Those records indicate that he had an episode of loss of consciousness and a small abrasion to his right forehead.

12.32. In respect of this use of force, the Commission is satisfied that there is sufficient admissible evidence to warrant a referral to the DPP for advice on whether a prosecution should be initiated, for an offence contrary to either s 59 or s 61 of the Crimes Act.

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[133] LECC Act s 74(3). S 74(3) 'extends to any further information, document or other thing obtained as a direct or indirect consequence of the answer made or document or other thing provided'. In this way, s 74(3) provides for a form of use and derivative use protection: *Rogan v Hyde* (1995) 84 A Crim R 519 at 524; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [50].

12.33. The Commission has made this referral to the DPP on 30 April 2025 under s 28(1)(c)(i) and s 29(1)(c)(i) of the LECC Act and is awaiting advice from the DPP.

Disposal of BWV devices – 16 February 2024

12.34. The Commission is also satisfied there is sufficient admissible evidence to warrant the seeking of advice from the DPP concerning possible prosecution for offences contrary to ss 117, 125, 195, 197, 317, and/or 319 of the Crimes Act with respect to Officer BEN1's disposal of the BWV devices.

12.35. Put shortly, this evidence (summarised at paragraphs 3.5 to 3.104 above) includes the alleged admissions made by Officer BEN1 to Officer DOC1 and other police officers to whom he disclosed his disposal of the BWV devices, on and after 16 February 2024 as well as technical and electronic evidence concerning the initial docking of the BWV devices and their removal from the docking station at Police Station 1.

12.36. The Commission made this referral to the DPP on 30 April 2025 under s 28(1)(a) and s 29(1)(c)(i) of the LECC Act and is currently awaiting advice from the DPP.

Section 133(2)(b)-(d) consideration concerning Officer BEN1

12.37. The Commission notes that, on 6 June 2024, the Commissioner of Police accepted Officer BEN1's resignation from the NSW Police Force. In these circumstances, no further action is required under s 133(2)(b)-(d) of the LECC Act in respect of Officer BEN1.

13. Submissions – Officer BEN1

13.1. The Commission furnished the draft report to the legal representative for Officer BEN1 to allow submissions to be made concerning proposed adverse findings made in this report concerning their client.

13.2. The Commission was informed that Officer BEN1 did not wish to make any submissions in response to the draft s 132 report.

14. The Obligation for Police Officers to Report Misconduct by Other Police Officers

14.1. Officer DOC1 and Officer DOC2 were directly involved in the events of 16 February 2024, and each came to provide accounts of what happened to senior police officers. Officer DOC5 was involved in the incident of 25 February 2024 where Officer BEN1 used excessive force against a person in Corrective Services Custody. However, Officer DOC5 did not observe the conduct directly. No issue under s 211F Police Act arises concerning these police officers.

14.2. The focus of attention in the following analysis is the responsibility (if any) of each of the officers whom Officer BEN1 told of the events after 16 February 2024.

14.3. Officer BEN1's evidence was that he disclosed his excessive use of force and disposal of BWV devices on 16 February 2024 to a number of people, including 4 serving NSW Police Officers. However, none of these officers reported the disclosure to any superior officer. This led the Commission to explore the important issue of a police officer's obligation to report misconduct by other police officers.

The phenomenon of a 'code of silence' in police forces

14.4. The reluctance (or refusal) of police officers to report knowledge or suspicion of criminal conduct or misconduct on the part of other police officers has been a widely reported phenomenon over many years both in Australia and overseas. The term 'code of silence' has been used in different inquiries to describe this phenomenon.

14.5. Why police officers may fail to speak up when they see or learn of other officers misbehaving or breaking the law has been described by UK commentators as 'a long-running conundrum'.[134] In explaining this phenomenon, Westmarland and Conway refer to 'insider culture' which maintains an 'impenetrable curtain of silence' explained by, amongst other things, a belief that police officers are

[134] L. Westmarland and S. Conway *Police ethics and integrity: Keeping the 'blue code' of silence* (2020) 22(4) International Journal of Police Science and Management 378 at 378 – 379.

'enacting street justice which can be termed noble cause corruption' with, at times, use of 'excessive force to punish the bad guys'.[135]

The Fitzgerald inquiry in Queensland

14.6. The 1989 Report of the Fitzgerald Inquiry in Queensland addressed the 'code of silence' issue. The relevant reform introduced in Queensland after the Fitzgerald Inquiry was explained as follows:[136]

> **Officers' legal obligation to report misconduct**
>
> Another change to emerge from the Fitzgerald Inquiry was a strengthening of the legal obligation on police to report suspected misconduct by fellow officers. The Inquiry argued that the then Police Rules couched the obligation of police to report misconduct in unduly restrictive terms.
>
> > Rule [81] only requires police to report knowledge, not suspicion, or what they have been told or overheard. That limitation has been exploited by police, who, when asked why they did not report their suspicions, have taken refuge in the excuse that they have no proof of misconduct, only suspicion (1989:285)
>
> This rule was replaced by s.7.2 of the *Police Service Administration Act*, which requires any sworn or unsworn member of the QPS who knows or reasonably suspects that misconduct has occurred to report that misconduct to the Commissioner of Police and the CJC. It is also the duty of all police officers to take appropriate action under the regulations when a breach of discipline or misconduct is suspected. A related provision, s.7.3, makes it an offence for a person to take any form of retribution against a person who has made a report under s.7.2. A similar provision is to be found in the *Criminal Justice Act*.

[135] L. Westmarland and S. Conway *Police ethics and integrity: Keeping the 'blue code' of silence* (2020) 22(4) International Journal of Police Science and Management 378 at 389 – 390.
[136] D. Brereton and A. Ede *The Police Code of Silence in Queensland – The Impact of the Fitzgerald Inquiry Reforms*, 8(2) Current Issues in Criminal Justice 107 (November 1996), page 110.

14.7. It will be observed that the reform in s 7.2 of *Police Service Administration Act 1990* (Qld) (now contained in s 6A1(2) of that Act) is similar to that enacted in NSW in 2016 in s 211F of the Police Act, to which further reference will be made.

The Wood Royal Commission

14.8. In the 1997 Final Report of the Royal Commission into the NSW Police Service, Justice Wood referred to the 'code of silence':[137]

> Although the code of silence is not peculiar to the NSW Police Service, the evidence shows it came to be particularly well developed, in no small measure due to the CIB factor. So persuasive was its influence that it came, in the minds of some witnesses to be synonymous with the 'police culture'.

14.9. Earlier in the Final Report, Justice Wood said:[138]

> ...the significance of the code of silence, which is an incontrovertible and universal product of police culture, cannot be understated. The code of silence and other negative aspects of police culture need to be vigorously addressed as part of the reform process.

14.10. Justice Wood found that 'the strength of the code of silence was very evident during Commission hearings'[139] and stated:[140]

> The code of silence is strengthened by an 'us and them' attitude which encourages police to adopt an adversarial position to anyone who is not a police officer or who challenges police activity. It was described as a 'siege mentality' by several witnesses.

14.11. Justice Wood linked the 'code of silence', in some ways at least, to the tendency to protect the reputation of the NSW Police Service by suppression of information and amongst other things, 'iron fisted control over the release of information to Parliamentary committees and to external watchdogs, which

[137] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 191, [6.12].
[138] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 33.
[139] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 192.
[140] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 192, [6.15]

helped to maintain the conviction that the Service and its members, were laws unto themselves'.[141] Justice Wood continued:[142]

> This kind of defensive mentality was an inevitable recipe for collapse of command responsibility for the maintenance of integrity, and for reinforcement of a 'them and us' attitude. It sent a very powerful message to the ranks not only that the rhetoric to which they were exposed was empty, but that the opposite was what was truly expected. What must now be understood is that public disclosure of successful investigations into misconduct is not an indicator of failure. Rather, it should be seen as evidence that the system is working, and that there is a brake being applied to problems which would otherwise fester and multiply before the inevitable scandal. Similarly, it must be understood that adverse internal audits provide a valuable opportunity for nipping management problems in the bud, as well as encouraging honesty.

14.12. It may be said now, as it was in 1997, that there is a relationship between encouragement of police officers to report knowledge or suspicion of criminal conduct and misconduct and the need for an open (and not defensive) approach by the NSW Police Force for the reasons outlined by Justice Wood in 1997. These observations have continuing application to the NSW Police Force in 2025. It is important that the NSW Police Force adopt an open and co-operative approach with the Commission which is entrusted by the community with oversight and integrity functions under the LECC Act with the object, amongst other things, of promoting the integrity and good repute of the NSW Police Force.[143] To adopt a defensive mentality and an 'us and them' attitude would be contrary to the objects of the LECC Act and the public interest.

Statement of values in the Police Act

14.13. Section 7 Police Act lays down a statement of values for police officers, and appeared first in the *Police Service Act 1990*. Section 7 states:

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[141] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 193.
[142] Final Report of Royal Commission into NSW Police Service, Volume 1: Corruption, May 1997, page 194, [6.19].
[143] LECC Act s 3, especially s 3(a), (e).

7 Statement of values of members of NSW Police Force

Each member of the NSW Police Force is to act in a manner which—

(a) places integrity above all,

(b) upholds the rule of law,

(c) preserves the rights and freedoms of individuals,

(d) seeks to improve the quality of life by community involvement in policing,

(e) strives for citizen and police personal satisfaction,

(f) capitalises on the wealth of human resources,

(g) makes efficient and economical use of public resources, and

(h) ensures that authority is exercised responsibly.

14.14. In the 1990 second reading speech for the *Police Service Act 1990*, the Attorney-General Mr Dowd noted that the concept of stating the values of police in legislation was first raised in the 1981 Report of Justice Lusher following the Commission to Inquire into the NSW Police Administration. The Attorney-General said that:[144]

> the legislation provides the Police Service with a statement of values to guide everyday police activity and set forth the current philosophy of policing. ... The statement of values has been an important tool in making police more accountable for their actions. As part of promoting the doctrine of professional responsibility, the inclusion of the statement of values in the legislation will assist in reinforcing the fact that the Police Service is a values-driven organisation.

14.15. Despite the powerful message that should have been communicated by the enactment of s 7 in 1990 (in particular, placing integrity above all) the findings of the Wood Royal Commission suggested that the provision looked good but had little practical impact on the way in which the NSW Police Service operated up to the time of the Royal Commission.

[144] Hansard, Legislative Assembly, 15 May 1990, page 3356.

14.16. In the Final Report of the Royal Commission, Justice Wood recounted the enactment of the statement of values in the following way:[145]

> In 1985, on the initiative of then Commissioner John Avery, the Police Service adopted a Statement of Values to provide an ethical basis for policing. The Statement was embodied in the *Police Service Act* and contained a broad statement of expected ethical ideals.
>
> The Statement of Values was supplemented by a Code of Conduct in the form of a pledge by members of the Service which repeated the substance of the Statement and went on to deal with several specific matters of ethical conduct.
>
> The evidence received by this Royal Commission suggests that neither document had much practical impact in reducing corruption. In hindsight, it seems that:
>
> - they gave little by way of practical guidance to officers in the workplace;
> - they were not tested for their relevance and impact upon police;
> - their generality meant that they were, in real terms, incapable of enforcement; and
> - they had little meaning to the recalcitrant or corrupt officer, or to the subversive supervisor;
>
> yet their existence was somewhat blithely seen by the Service as the solution to the problem.

14.17. Courts have recognised the importance of community confidence in the integrity of a police force. In a passage cited in later decisions, Brennan J said:[146]

> The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the

[145] Final Report of Royal Commission into NSW Police Service, Volume II: Reform, May 1997, page 496, [8.22 – 8.24].
[146] *Police Service Board v Morris* (1985) 156 CLR 397 at 412.

police force, upon their assiduous performance of duty and upon the judicious exercise of their powers.

14.18. The High Court has emphasised, by reference to s 7(a) of the Police Act, that 'integrity is a value of the NSW Police Force'.[147]

14.19. Spigelman CJ[148] distinguished between the language of 'personal integrity' in s 7(a) and of 'institutional integrity' in s 181F(3)(b) of the Police Act which requires the Industrial Relations Commission (NSW) to have regard to the public interest including 'the interest of maintaining the integrity of the NSW Police Force'.

14.20. Section 7 has been described as an indication of expectations or goals which are aspirational in nature and not the imposition of a tortious duty of care owed to individuals in the community to fulfil all or any of the matters there set out.[149] The Commission has observed that it is the clear responsibility of the NSW Police Force to assist and support police officers in seeking to meet the goals or expectations in s 7.[150]

14.21. As will be seen, s 7 of the Police Act has had an increasing impact on policing in the years since the Wood Royal Commission and, importantly, since the enactment in 2016 of s 211F of the Police Act.

Relevant NSW statutory provisions concerning the obligation to report before and after the Wood Royal Commission

14.22. At the time of the Wood Royal Commission, the obligation for NSW police officers to report misconduct was located in clauses 30 and 31 of the *Police Service Regulation 1990* (NSW) which stated (emphasis added):

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[147] *Commissioner of Police v Eaton* (2013) 252 CLR 1; [2013] HCA 2 at [53] (Crennan, Kiefel and Bell JJ)
[148] *Commissioner of Police v Industrial Relations Commission* (NSW) (2009) 185 IR 458; [2009] NSWCA 198 at [69] – [72]. See also *Toshack v Commissioner of Police* (2009) 181 IR 420; [2009] NSWIRComm 31 at [43] – [49]; *Vouden v Commissioner of Police* [2014] NSWIRComm 25 at [316] – [328].
[149] *State of NSW v Tyszyk* [2008] NSWCA 107 at [74] – [75]; *AD v State of NSW* [2023] NSWCA 115 at [101] – [102].
[150] Operation Mantus – A report under s 132 *Law Enforcement Conduct Commission Act 2016* (NSW) concerning alleged excessive use of force and issues concerning police interviews of young person in custody, December 2023, para 5.41.

Police officer to report misconduct

30. (1) If:

(a) an **allegation is made** to a police officer that another police officer has engaged in conduct which, **in the opinion of the officer** to whom the allegation is made, constitutes a criminal offence or other misconduct; or
(b) a police officer **has reasonable grounds to believe** that another **police officer has engaged in any conduct of that kind**, the officer is required to report the conduct or alleged conduct by the other officer to a senior police officer (being a police officer who is more senior in rank than the officer making the report).

(2) This clause does not apply to conduct or alleged conduct:

(a) that has been made the subject of a complaint under the *Police Regulation (Allegations of Misconduct) Act 1978*; or
(b) that has been the subject of evidence or other material given, or submissions made, in the course of criminal proceedings; or
(c) that has already been reported under this clause to a senior police officer.

Misconduct to be reported to Internal Affairs Branch

31. A senior police officer to whom conduct (or alleged conduct) by a police officer is reported as referred to in clause 30 is required to report it promptly to the Officer-in-Charge of the Internal Affairs Branch if the senior police officer believes that the conduct (or alleged conduct):

(a) constitutes (or would constitute) a criminal offence by the officer; or
(b) would provide sufficient grounds for preferring a departmental charge against the officer.

14.23. The requirement in clause 30 involved technical elements including evidence that 'an allegation' had been made to an officer who then formed the relevant

'opinion' or a police officer having 'reasonable grounds to believe' that the relevant conduct had occurred. As in Queensland before the Fitzgerald Inquiry, these elements could provide excuses for not reporting relevant conduct.

14.24. Clause 20 of the *Police Regulation 2000* (NSW) replaced the 1990 provision with the principal change being the insertion of the words 'sincerely believes' instead of 'reasonable grounds to believe' (emphasis added):

> **20 Police officer to report misconduct**
>
> (1) If:
>
> (a) an allegation is made to a police officer that another police officer has engaged in conduct which, in the opinion of the officer to whom the allegation is made, constitutes a criminal offence or other misconduct, or
> (b) **a police officer sincerely believes** that another police officer has engaged in any conduct of that kind,
>
> the officer is required to report the conduct or alleged conduct by the other officer to a senior police officer (being a police officer who is more senior in rank than the officer making the report).
>
> (2) This clause does not apply to conduct or alleged conduct:
>
> (a) that has been made the subject of a complaint under Part 8A of the Act, or
> (b) that has been the subject of evidence or other material given, or submissions made, in the course of criminal proceedings, or
> (c) that has already been reported under this clause to a senior police officer.
>
> (3) A senior police officer to whom conduct (or alleged conduct) by a police officer is reported is required to report it promptly to the Commissioner or a police officer nominated by the Commissioner if

the senior police officer **believes** that the conduct (or alleged conduct):

(a) constitutes (or would constitute) a criminal offence, or
(b) could provide sufficient grounds:

(i) for taking section 80 dismissal action, or
(ii) for making a reviewable section 173 order or a section 181D order.

14.25. Clause 20 of the *Police Regulation 2000* (NSW) was replicated in clause 49 of the *Police Regulation 2008* (NSW).

14.26. This remained the requirement for disclosure until replaced by clause 50 of the *Police Regulation 2015* (NSW) which stated (emphasis added):

50 Police officer to report misconduct

(1) If:

(a) **an allegation is made in writing** to a police officer that another police officer has engaged in conduct which, **in the opinion of the officer to whom the allegation is made,** constitutes a criminal offence or other misconduct, or
(b) a police officer **sincerely believes** that another police officer has engaged in any conduct of that kind

the officer is required to report the conduct or alleged conduct by the other officer to a senior police officer (being a police officer who is more senior in rank than the officer making the report).

(2) This clause does not apply to conduct or alleged conduct:

(a) that has been the subject of a complaint under Part 8A of the Act, or
(b) that has been the subject of evidence or other material given, or submissions made, in the course of criminal proceedings, or

(c) that has already been reported under this clause to a senior police officer.

(3) A senior police officer to whom conduct (or alleged conduct) by a police officer is reported is required to report it promptly to the Commissioner or a police officer nominated by the Commissioner if the senior police officer believes that the conduct (or alleged conduct):

(a) constitutes (or would constitute) a criminal offence, or
(b) could provide sufficient grounds:

(i) for taking section 80 dismissal action, or
(ii) for making a reviewable section 173 order or a section 181D order.

14.27. It will be observed that the obligation in clause 50(1)(a) of the *Police Regulation 2015* (NSW) was only triggered when 'an allegation is made in writing to a police officer'. In this way, clause 50(1)(a) was narrower than Clause 49(1)(a) of the *Police Regulation 2008* (NSW).

14.28. The obligation in clause 50(1)(b) was only activated if 'a police officer sincerely believes' that another officer had engaged in criminal conduct or other misconduct. Although lower than the objective standard of 'reasonable grounds to believe' in the 1990 Regulation, the threshold of 'sincere belief' (introduced in 2000) was an unusual standard.[151] It was clearly inconsistent with the test of reasonable suspicion adopted in Queensland following the Fitzgerald Inquiry.

14.29. The technical requirements of some of these provisions were explained in decisions which considered them. In a 2004 Administrative Decisions Tribunal decision,[152] it was found that there was no evidence of an 'opinion' being formed by the officer to whom the allegation was made under clause 20(1)(a) of the *Police Regulation 2000*.

[151] When considering the requirements for the formation of a 'sincere belief' in the reporting provision in Clause 253(1)(b) of the *Crimes (Administration of Sentences) Regulation 2014*, the Hon Peter McClellan AM KC observed that it was unclear that there was any practical difference between 'believes' and formation of a sincere belief: Report of the Special Commission of Inquiry into Offending by Former Correctional Officer Wayne Astill at Dillwynia Correctional Centre, 2024, paragraph 260.
[152] *KO v Commissioner of Police* (NSW) [2004] NSWADTAP 21 at [12]– [18].

14.30. In a 2011 decision of the Industrial Relations Commission (NSW),[153] Staff J affirmed a s 181D decision of the Police Commissioner on grounds which included a breach of clause 20 of the *Police Regulation 2000*. Staff J referred to the statement of values in s 7 Police Act (including placing integrity above all in s 7(a)) and said:[154]

> 74. In my view, the applicant's admitted failures to report his knowledge of misconduct and illegal activity, were ongoing and raised serious integrity issues.
>
> 75. Police officers must act in accordance with the clear obligation to treat "integrity above all" by reporting the misconduct of their fellow officers.
>
> 76. On the admissions alone made by the applicant in his response and his evidence to the PIC, in my view, it is clear that the respondent was entitled to conclude that the applicant had full knowledge of the use and importation of steroids by Mr McCulloch. It is also clear, as I will demonstrate, that he had been told, and seems to have believed as true, information that other persons, both police officers and members of the public, were involved in the illegal use or supply of steroids.

Enactment of s 211F of the Police Act in 2016

14.31. Section 211F of the Police Act was enacted in 2016 by Schedule 5 of the LECC Act. The origin of s 211F is not clear, although it is similar in an important respect to the Queensland provision enacted following the Fitzgerald Inquiry.

14.32. The second reading speech for the LECC Act did not refer to the inclusion of s 211F in Part 5.

14.33. However, the Explanatory Note for the LECC Act said:

> Schedule 5 makes consequential amendments to the *Police Act 1990* and the *Police Regulation 2015*. It also inserts a new provision into the Act (proposed section 211F) making it a duty for members of the NSW Police

[153] *Walsh v Commissioner of Police* [2011] NSWIRComm 26 at [72] – [77].
[154] *Walsh v Commissioner of Police* [2011] NSWIRComm 26 at [74] – [76].

Force who have reasonable grounds to suspect that a police officer has engaged in police misconduct or officer maladministration to report the misconduct or alleged misconduct or maladministration to a more senior officer.

14.34. Section 211F and 211G of the Police Act, as enacted in 2016, provide as follows (emphasis added):

> **211F Members of NSW Police Force under duty to report misconduct of police officers**
>
> (1) **A police officer who has reasonable grounds to suspect that another police officer has engaged in police misconduct or serious maladministration is under a duty to report** that police misconduct or maladministration or alleged misconduct or maladministration in writing to another police officer who is of the rank of sergeant or above and is more senior in rank than the police officer with a duty to report (a ***senior police officer***).
>
> (2) The senior police officer to whom a report is made must report it in writing promptly to the Commissioner (or a police officer nominated by the Commissioner for the purposes of this section) **if the senior police officer has reasonable grounds to suspect** that the conduct (or alleged conduct)—
>
> (a) constitutes (or would constitute) a criminal offence or is (or could be) other police misconduct or serious maladministration, or
> (b) could provide sufficient grounds—
>
> (i) for taking dismissal action against a probationary police officer under section 80 (3), or
> (ii) for taking reviewable action under section 173 or making an order under section 181D.
>
> (3) An administrative employee who **has reasonable grounds to suspect** that a police officer has engaged in police misconduct or serious

maladministration is under a duty to report that police misconduct or maladministration or alleged misconduct or maladministration in writing to a police officer who is of or above the rank of sergeant.

(4) A police officer to whom a report is made under subsection (3) must report it in writing promptly to the Commissioner (or a police officer nominated by the Commissioner for the purposes of this section) if the police officer **has reasonable grounds to suspect** the conduct or alleged conduct is of a kind described in subsection (2) (a) or (b).

(5) This section does not apply to misconduct or maladministration or alleged misconduct or maladministration —

(a) that has been the subject of a misconduct matter received by the LECC under the *Law Enforcement Conduct Commission Act 2016* or the Commissioner under Part 8A or of which the LECC or the Commissioner is already aware, or
(b) that has been the subject of evidence or other material given, or submissions made, in the course of criminal proceedings, or
(c) that has already been reported under this section to a senior police officer, or
(d) that has been the subject of a voluntary public interest disclosure within the meaning of the *Public Interest Disclosures Act 2022*.

(6) A report must be provided in accordance with this section despite any prohibition in, or any requirement of, any Act or law (in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*) but only if it contains information that is relevant to the officer misconduct or serious maladministration concerned.

(7) An expression used in this section which is defined in the *Law Enforcement Conduct Commission Act 2016 has* the meaning it has in that Act.

211G Referral of other misconduct matters to Commissioner

(1) Section 211F does not prevent any police officer or administrative employee (within the meaning of Part 8A) from referring any misconduct matter of which the officer or employee becomes aware that the officer or employee is not under a duty to report under that section to the Commissioner.

(2) Section 211F (6) applies to and in respect of a misconduct matter referred under this section in the same way as it applies to a report under section 211F.

14.35. Section 211F creates a statutory duty on all police officers to comply with the requirement to report reasonably suspected misconduct. The provision does not state that a criminal offence is created if a police officer fails to comply with the relevant duty.

14.36. However, s 201 Police Act creates a general offence of neglect of duty. Section 201 provides:

201 Neglect of duty etc

A police officer who neglects or refuses to obey any lawful order or carry out any lawful duty as a police officer is guilty of an offence.

Maximum penalty—20 penalty units.

14.37. Courts have emphasised the hierarchical and disciplined nature of the NSW Police Force when construing provisions in the Police Act. In *State of NSW v Fahy*,[155] Gummow and Hayne JJ said (referring to the Police Act by its then title Police Service Act):

> Read as a whole, the *Police Service Act* demonstrated that the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence

[155] (2007) 232 CLR 486; [2007] HCA 20 at [21].

for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.

14.38. It is clear that the enactment of s 211F in 2016 was intended to impose a solemn statutory duty on police officers to report reasonably suspected misconduct. The statutory obligation far exceeds mere guidance or policy. It represents an express duty inserted by Parliament in the last decade. The provision is an emphatic statement of a minimum requirement for police officers in NSW for modern day policing.

14.39. This enactment reinforced the important duty of a police officer to report misconduct of another police officer. As a matter of statutory construction, an enforcement provision for failure to comply with the s 211F duty to report lies in s 201 Police Act. There is certainly no statutory or other indication to the contrary. The general offence provision in s 201 can comfortably pick up, as an enforcement measure, failure to comply with the important duty contained in s 211F Police Act.

14.40. The Commission considers that a failure to comply with the duty under s 211F can constitute an offence of neglecting or refusing to carry out a lawful duty as a police officer. The maximum penalty for a s 201 offence is a fine of 20 penalty units ($2200).[156] This maximum penalty is modest for a criminal offence which is capable of extending to serious breaches of duty. Of course, the offence of misconduct in public office is able to be utilised in cases of wilful neglect of duty.[157] The Commission observed in its Operation Eacham report that the limitation period of 6 months to bring a s 201 prosecution is quite inadequate with the Commission recommending that the limitation period for a s 201 offence should be extended to at least 12 months.[158]

14.41. Reference should also be made to the Standards of Professional Conduct of the NSW Police Force which emphasise the statement of values in s 7 of the Police Act and conclude with the following provision:

[156] Section 17 *Crimes(Sentencing Procedure) Act* 1999.
[157] Commission Report in Operation Eacham dealing with indifference to an Aboriginal man's self-harm in custody, June 2025, para 4.12.
[158] Operation Eacham Report, June 2025, paras 4.9-4.11, 5.11-5.12.

10. An employee of the NSW Police Force must report the misconduct of other NSW Police Force employees.

All NSW Police Force employees must report misconduct. This includes criminal offences, corrupt or unethical conduct, serious mismanagement and substantial waste of public resources.

Further, employees are encouraged to challenge inappropriate behaviour.

Further to the Code of Conduct, all NSWPF employees have a legislated duty to report misconduct. Under section 211F of the *Police Act 1990*, a police officer or administrative employee who has reasonable grounds to suspect that a police officer has engaged in police misconduct or serious maladministration is under a duty to report that police misconduct or maladministration (or alleged misconduct or maladministration), in writing, to a police officer who is of the rank of sergeant or above and is more senior in rank than the reporting officer.

14.42. A challenge to removal of a police officer under s 181D, based substantially upon failure to report the misconduct of others, was dismissed in a 2021 decision of the Industrial Relations Commission (NSW) where reference was made to clause 50 of the *Police Regulation 2015* and s 211F of the Police Act, with one or other of these provisions applying to an extended course of conduct. Commissioner Webster said:[159]

> 100. As stated above, the applicant admitted that the group chat contained evidence of misconduct that he failed to report in accordance with his obligations to do so. Accordingly, he did not deny the allegation as such. Rather, his case was that he could not be held responsible for not reporting the conduct because he did not know it to be misconduct at the time. It was concerning that the applicant maintained throughout the proceedings ignorance with respect to the inappropriateness of his and his colleagues conduct through their participation in the group chat, particularly as the most senior person in the group chat.

[159] *Calvin Dunne v Commissioner of Police* [2021] NSWIRComm 1020 at [100] – [101].

101. For the reasons set out above, I do not accept that the applicant did not know that he and his colleagues engaged in misconduct. Even if he did not know that what he was observing was misconduct, he ought to have known it was.

14.43. Significantly, Commissioner Webster stated:[160]

123. I reject the applicant's argument that he was a product or victim of a poor culture within the NSW Police Force which somehow made him blind to the fact that he was doing the wrong thing or misunderstood what was expected of him. As an experienced officer, it was not open to the applicant to say that he had observed others breaching the respondent's policies, so he thought he could too. Instead what was required and reasonably expected of him was that he comply with the respondent's policies.

124. The NSW Police Force has been on a journey towards a more positive work culture in recent decades, with recommendations arising from the Wood Royal Commission (Wood Commission), a report published by Chris Ronalds SC into sexual harassment and sex discrimination (the Ronalds Report) and more recently a review by former Sex Discrimination Commissioner, Elizabeth Broderick AO into the promotions system and its impact upon women (the Broderick Report). In addition, in 2018 and 2019, there was a NSW Parliamentary inquiry into bullying in the emergency services agencies, which resulted in various recommendations being made, including to the NSW Police Force (Bullying Inquiry). Each of these bodies of work has pointed towards aspects of the culture of the NSW Police Force that could do with improvement.

125. The efforts of the respondent to address the issues identified by the Wood Commission, the Ronalds and Broderick Reports and the Bullying Inquiry were documented in the evidence of AC Talbot. The respondent has put in place policies and other initiatives aimed at driving a positive work culture within the NSW Police Force including training the

[160] *Calvin Dunne v Commissioner of Police* [2021] NSWIRComm 1020 at [141] – [143].

applicant had the benefit of, informing him of how he was to behave and his obligation to report the misbehaviour of others.

126. I find that on balance, the applicant was exposed to aspects of the NSW Police Force culture that were not consistent with the respondent's stated values or policies. However, I also find that he was aware of what was expected of him and to the extent that he experienced those aspects of the NSW Police Force culture that were inconsistent with those expectations, his personal decision to not report it, but instead embrace poor conduct himself and perpetuate poor conduct among other police officers, is evidence that he is (sic) does not have the personal qualities required to be a NSW Police Officer.

14.44. Commissioner Webster said soon after:[161]

141. In addition to the interests of the applicant, the Commission in the review is required to take into account the public interest (which is taken to include the interest of maintaining the integrity of the NSW Police Force, and the fact that the Commissioner made the order pursuant to section 181D (1)).

142. AC Talbot gave evidence setting out how the NSW Police Force is actively seeking to eradicate sexual harassment from the workplace, in addition to inappropriate behaviour more generally. I agree that there is a strong public interest in ensuring the NSW Police Force is a workplace free from harassment and bullying. In this regard, the Order sends a message to other Police Officers that the kind of conduct engaged in by the respondent is serious and will not be tolerated by the respondent.

143. I agree with the respondent that it is important for all Police Officers to follow policies and procedures to ensure that the NSW Police Force is complying with its legislative requirements and upholding its reputation. Further, it is important that Police Officers, particularly those in leadership positions, report misconduct when it occurs. The

[161] *Calvin Dunne v Commissioner of Police* [2021] NSWIRComm 1020 at [141] – [143].

statutory obligation to do so followed the findings of the Wood Royal Commission and is designed to ensure public faith in the NSW Police Force can be maintained. There is a clear public interest in ensuring the public trusts the NSW Police Force.

14.45. In a later decision, a failure to comply with s 211F led to reviewable action against the officer and this decision was upheld by the Industrial Relations Commission (NSW).[162] Commissioner Sloan made the following finding:[163]

> 107. I find that DSS Lambert has not provided sufficient grounds on which to overturn the factual basis of Allegation 1, that through his review of the Investigator's Note he "must have become aware" that the call had been recorded. Further, in light of his knowledge of the warrants then in place he would have known that the recording was unlawful. He had an obligation under ss 7 and 211F of the Police Act, and under point 10 of the NSW Police Force Code of Conduct and Ethics, to report Mr Jubelin's misconduct. There is no basis on which to challenge with (sic) the conclusions in the Order that DSS Lambert conducted himself in a manner contrary to those provisions. His failure to report Mr Jubelin's misconduct was also contrary to points 1, 2 and 6 of the NSW Police Force Code of Conduct and Ethics. That constituted misconduct by DSS Lambert.

The threshold of 'reasonable grounds to suspect' in s 211F Police Act 1990

14.46. Unlike its more complex NSW predecessors, s 211F of the Police Act contains a well recognised threshold of reasonable grounds for suspecting that another officer has engaged in police misconduct or maladministration or alleged misconduct or maladministration. These terms are defined in ss 9 and 11 of the LECC Act which appear in Appendix 1 to this report.

14.47. The concept of reasonable suspicion should be well known to police officers given its importance to the power of arrest without warrant in s 99 of LEPRA and the exercise of other police powers.

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[162] *Lambert v Commissioner of Police* [2022] NSWIRComm 1078.
[163] *Lambert v Commissioner of Police* [2022] NSWIRComm 1078 [107].

14.48. In *R v Minh Quoc Le*,[164] Barr J (Bryson JA and Hoeben J agreeing) said:

> 11. The meaning of the term "reasonably suspects" which, I think, is not materially different from the expression "with reasonable cause suspects" as used in s352, was considered in *R v Rondo* (2001) 126 A Crim R 562. The Court of Criminal Appeal made the following statement-
>
> (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
>
> (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
>
> (c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

14.49. In another case dealing with the power of arrest, the Court of Appeal said:[165]

> 15. The challenge to the lawfulness of the arrest was pleaded as a wrongful arrest and false imprisonment. The wrongfulness of the conduct was sought to be established by an absence of justification

[164] [2005] NSWCCA 40 at [11]; (2005) 151 A Crim R 564.
[165] *Hrdavec v State of New South Wales* [2022] NSWCA 52 at [15] – [16].

under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("Law Enforcement Act"). Section 99 confers power on a police officer to arrest a person without a warrant if the officer "suspects on reasonable grounds that the person … has committed an offence" and the officer "is satisfied that the arrest is reasonably necessary" for a specified purpose. The challenge to the arrest in the present case turned on the first limb, namely whether the officers who arrested the appellant in fact suspected on reasonable grounds that he had committed an offence.

16. It has been pointed out on many occasions that the long-standing test of a suspicion based on reasonable grounds involves both a subjective and an objective element. A suspicion is something less than a belief that the person has committed an offence. If challenged, the officer must be able to demonstrate some factual basis for holding the suspicion, being a basis which a reasonable person would accept as providing support for the suspicion, whether or not such a person would necessarily draw the relevant inference.

14.50. The meaning of reasonable suspicion has been considered in a decision concerning a provision in Commonwealth law:[166]

41. Authorities concerning these terms in the context of the issue of search warrants appears to apply to this function as well. Suspicion is a "state of conjecture or surmise" or a "slight opinion but without sufficient evidence": *George v Rockett* [1990] HCA 26; 170 CLR 104 at 115. However, some factual basis for the suspicion must be shown - it must be something which, in all the circumstances, ought create in the mind of a reasonable person an actual apprehension of the relevant fact: *George v Rockett* at 115-116.

42. It is the magistrate who is required under s.3ZQZB(3) to be satisfied that there are reasonable grounds for suspecting the relevant matters. The notion of reasonable grounds for suspicion imports an objective test: *Williams v Keelty* [2001] FCA 1301; 184 ALR 411 at 446 [166]. By

[166] *Paphos Providores Pty Limited v Constable Aziz Ladha* [2014] NSWSC 1788 at [41] – [42].

requiring reasonable grounds for suspicion, s.3ZQZB(3) calls for the existence of facts which are sufficient to induce that state of mind in a reasonable person: *George v Rockett* at 112.

Obligations under s 211F Police Act

14.51. It can be seen that the s 211F threshold is activated even where the police officer does not know for sure or even believe that misconduct has occurred. It is not necessary for the police officer to have witnessed the act.

14.52. There is a subjective component - the officer must suspect that misconduct has occurred. Suspicion is a state of conjecture or surmise or a slight opinion but without sufficient evidence. There is an objective component as well – some factual basis for the suspicion must be shown and it must be something which, in all the circumstances, ought create in the mind of a reasonable person an actual apprehension that misconduct has occurred.

14.53. The present inquiry concerns the police officers who were contacted by Officer BEN1 and to whom he disclosed information about what he had done on 16 February 2024. It is the standard of 'reasonable grounds to suspect' that Officer BEN1 engaged in misconduct which is to be applied in assessing the action (or inaction) of police officers who heard from Officer BEN1 about his conduct, including excessive use of force and disposal of BWV devices.

15. Did Any Officer Report Officer BEN1's Suspected Misconduct?

15.1. As a result of Officer BEN1's evidence that he had told Officers BEN4, BEN5, BEN2, and BEN3 the full 'unredacted' and 'unedited' version of what had occurred on 16 February 2024 with the young persons and the BWV devices, the Commission determined to summons those Officers to give evidence before the Commission.

15.2. The 4 officers were legally represented during their respective examinations, and each gave evidence with the benefit of a declaration under s 75 of the LECC Act. Accordingly, their evidence is not admissible in any criminal proceedings against them. Their evidence, however, may be used for the purposes specified in s 74(5) LECC Act including in deciding whether consideration should be given to

the taking of disciplinary action against each of them under s 133(2)(b), (c) or (d) of the LECC Act.

Officer BEN4

Evidence before the Commission

15.3. Officer BEN4 gave evidence at a private examination on 25 June 2024. He joined the NSW Police Force as a Probationary Constable in June 2021.[167] At the time of his examination he was stationed at Police Station 2 and held the rank of Constable.

15.4. Officer BEN4 was asked about his understanding as at February-April 2024 of his obligations in relation to reporting misconduct by other police. He told the Commission, correctly, 'If I reasonably suspect that misconduct has been engaged in by another officer, I have a duty to report that to a superior.'[168]

15.5. Officer BEN4 was asked about his understanding of this duty:[169]

> Q. if you're able to answer this question from what you knew or believed back then, if someone had asked you at that period of time, "What does misconduct mean for the purposes of the duty that you outlined", how would you have described misconduct? How would you have defined misconduct?
>
> A. Doing something outside the scope of our day-to-day duties, doing something outside of the scope of what we're authorised to do.
>
> Q. The duty that you described, did you understand that that duty applied to you?
>
> A. Yes.
>
> Q. If you accept for a moment that, on a spectrum of certainty, there might be suspicion towards one end and concrete knowledge on the other, what level of knowledge did you understand that you needed to have in order to enliven that duty?

[167] Examination of Officer BEN4 at T6.
[168] Examination of Officer BEN4 at T7.
[169] Examination of Officer BEN4 at T8.

A. I believe it would be a reasonable suspicion, same as if I were to arrest someone or charge them.

Q. What level of obligation did you believe applied to the duty that you outlined to the Chief Commissioner in February, March and April this year - and by that, I mean did you believe it to be voluntary, mandatory, or something else?

A. It's always mandatory.

Q. And as at February, March and April this year, if you suspected or believed that misconduct had been committed by a police officer, what did you understand you were obliged to do pursuant to that duty?

A. Report it.

Q. And was there a particular form of report that you understood you had to make or complete?

A. It needs to be reported to a superior officer and at least of the rank of sergeant.

Q. And in terms of the form of the report, whether it be spoken, written or something else, did you understand there to be an obligation around the form of the report?

A. I believe it must be written.

15.6. Officer BEN4 confirmed that he knew that the source of the duty he had described came from s 211F of the Police Act, and he knew that in February- April 2024.[170]

15.7. Officer BEN4 told the Commission that he first learnt about s 211F 'quite early on' in his policing education, likely 'early session 1 or session 2' of his Police Academy training. He could not recall if there had been any formal or informal refresher training about this obligation since his time at the Academy. However, he recalled the 'Speak Up Campaign' run by the police that he thought referenced the s 211F obligation.[171]

[170] Examination of Officer BEN4 at T9.
[171] Examination of Officer BEN4 at T9 – 10.

15.8. Officer BEN4 gave evidence of his association with Officer BEN1. He told the Commission that he and Officer BEN1 were briefly on the same general duties team when he commenced at Police Station 2 in 2021.[172] He considered himself a friend of Officer BEN1 and told the Commission they would sometimes meet outside of work for social activity.[173]

15.9. Officer BEN4 told the Commission that one such occasion that he met with Officer BEN1 was on 18 February 2024. According to Officer BEN4, Officer BEN1 told him on that occasion that he had been engaged in 'an extended foot pursuit' and that there 'was a wrestle.'[174]

15.10. Officer BEN1 told Officer BEN4 that he was worried that the incident had been captured on BWV. Officer BEN1 did not tell him who was involved in the wrestle, how many people were involved or any of the characteristics of the people who were involved. Officer BEN4 understood that Officer BEN1 was potentially worried about the force he used during the wrestle and that he did not realise his BWV was activated at the time.[175] Officer BEN4 told the Commission that this was a conversation that they 'were sort of having in passing' and he did not ask 'many follow up questions'.[176]

15.11. Officer BEN4 told the Commission that a 'wrestle' is cop slang to indicate someone who is resisting arrest or is where you had to use force of some kind.[177]

15.12. Officer BEN4 said that he did not speak to Officer BEN1 about this matter again, nor did he tell any other person, or record it anywhere. He maintained that the only time he discussed this matter with Officer BEN1 was in person on 18 February 2024.[178]

15.13. Officer BEN4 said he heard rumours subsequently around the station that Officer BEN1 destroyed BWV devices by throwing them into the water.[179] He said he learnt this information through 'just general gossip around the station'.[180]

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[172] Examination of Officer BEN4 at T12.
[173] Examination of Officer BEN4 at T13 – T14.
[174] Examination of Officer BEN4 at T14.
[175] Examination of Officer BEN4 at T15 – 16.
[176] Examination of Officer BEN4 at T16 – 17.
[177] Examination of Officer BEN4 at T17 – 18.
[178] Examination of Officer BEN4 at T189.
[179] Examination of Officer BEN4 at T19.
[180] Examination of Officer BEN4 at T20.

Upon hearing about the notion that Officer BEN1 threw a BWV device into the water, he thought there was a possible connection between this and what Officer BEN1 had told him on 18 February 2024. However, he confirmed that he did not speak to anyone about it or make a report in any form.[181] Officer BEN4 said he did not do so as he did not 'know' they were linked.[182]

15.14. After Officer BEN1 had been examined and ahead of the examination of Officer BEN4, the Commission had obtained call charge records which disclosed the existence of telephone calls between Officer BEN1 and Officers BEN4, BEN3, BEN2 and BEN5 in the period 17 February 2024 to 7 June 2024. The records contained the calling and receiving telephone numbers and the time and duration of calls. The content of the calls was not recorded- these were not calls intercepted under warrant.

15.15. The call charge records revealed that Officer BEN1 attempted unsuccessfully to call Officer BEN4 at 10:35 am on 17 February 2024 and Officer BEN4 returned the call, again unsuccessfully, at 3:25 pm that day. Officer BEN1 called Officer BEN4 at 3:58 pm that day and they spoke for 2 minutes and 44 seconds.

15.16. Officer BEN4 was asked about this telephone call with Officer BEN1 on 17 February 2024. Officer BEN4 told the Commission he had no independent recollection of a telephone call between him and Officer BEN1 on 17 February 2024 and could not recall what topics were discussed during that call.[183]

15.17. The call charge records disclosed that Officer BEN1 also called Officer BEN4 twice on 18 February 2024 and they spoke (or a message was left) at 2:40 pm (for 40 seconds) and at 2:46 pm (for 16 seconds).

15.18. Officer BEN4 was also asked about his telephone communication with Officer BEN1 on 18 February 2024. Officer BEN4 could not remember what was said but he believed these calls were about meeting up on that date.[184]

15.19. The call charge records revealed later occasions when Officer BEN1 called Officer BEN4 either unsuccessfully or with a short message on 29 February 2024 (3 seconds), 27 March 2024 (4 seconds) and 2 April 2024 (2 seconds).

[181] Examination of Officer BEN4 at T23.
[182] Examination of Officer BEN4 at T23 – 24.
[183] Examination of Officer BEN4 at T25 – 26.
[184] Examination of Officer BEN4 at T26 – 27.

15.20. It is noteworthy that the call charge records show that Officer BEN1 called or attempted to call Officers BEN4, BEN5, BEN3 and BEN2 on 17 February 2024. An inference is clearly available that Officer BEN1 was troubled by his conduct the previous night and, as a result, contacted each of his 4 police colleagues to discuss what he did. That is, in fact, what Officer BEN1 said happened at least in so far as his conversations with Officers BEN3 and BEN2. The Commission is satisfied the inference that he also did so with Officers BEN4 and BEN5 (when he reached them that day) is available.

15.21. It was Officer BEN1's evidence that he told Officer BEN4 the 'full, unredacted version' of the events that occurred on 16 February 2024. As a result of that evidence, Officer BEN4 was asked:[185]

> Q. Constable BEN4, there has been evidence in this Commission that there were a number of police officers to whom [Officer BEN1] told the full, unredacted version of what he did on 16 February or early on 17 February 2024 (sic), and that you are one of those officers to whom he told the full, unredacted version, which included three elements – the first being that he assaulted two young persons in the course of chasing and/or apprehending them on the night of 16 February 2024; the second element being that he deliberately made a false record in his police notebook of those arrests and those chases, one which deliberately omitted any details of the violence that he visited upon those two young people; and, thirdly, that he removed not only his but another officer's body-worn camera and threw them both in the [water]. What would you say to the suggestion that around about one month after 16 February, Constable [BEN1] called you and told you in some sort of words that full, unredacted version with those three elements?
>
> A. I don't recall a full, unredacted version with those elements being told to me.
>
> Q. Do you recall any discussion with Constable [BEN1] in which, in any form of words, he told you about making a false note of an arrest or certain arrests?

[185] Examination of Officer BEN4 at T30 – 31.

A. No.

Q. And do you remember any conversation with [Officer BEN1] where he told you in any form of words about the disposal of one or two body-worn cameras?
A. He said that he was worried about the recording. I don't recall any specific other elements of the conversation. I remember that part.

Q. Accepting that you don't remember other specific elements of that conversation, had an officer told you that he had, in fact, or intended to throw a body-worn camera into the [water], you would have heard that and recognised that as at least a criminal offence, wouldn't you?
A. Yes, that's correct.

Q. In the sense that it would amount to destruction or damage of police property?
A. Yes, that's correct.

Q. And had you have heard that in the context of that officer being worried about what the recording captured, you might have reasonably suspected that that crime would also extend to concealing or destroying evidence?
A. If he were to throw it in the -

Q. Yes, if he had told you that he had done so or that he intended to do so?
A. Yes.

15.22. The Chief Commissioner then asked Officer BEN4:[186]

Q. Could I just ask you this. We're talking about events that took place in February this year, March through to May this year. That's not that long ago in the general sense of memory of incidents. You've used the term, "I don't recall", things like that. If he said to you, "I

[186] Examination of Officer BEN4 at T32 – 33.

assaulted two young people, I made a false record in a notebook and I threw body-worn videos in the [water]", do you say they're things, if said to you three or so months ago, that you would recall?

A. If that was said to me, yes.

Q. So what I'm asking is, thinking of all of that, is it your evidence that he did not say things like that to you?

A. With those particular words that you've said?

Q. Or those elements, even - those concepts, throwing body-worns into the [water], assaulting two young people, making a false record in a notebook?

A. I don't recall a mention of making a false record, I don't recall him saying that he had assaulted two young people, no.

Q. Well, now, you've mentioned he'd said to you that he was worried about the body-worn?

A. (Witness nods).

Q. Did he say anything to you about throwing body-worn videos into the [water]?

A. I can't recall that specifically.

Q. Well, you see, I'm not wanting to be difficult, but we're not talking about events one or two or three years ago, which is pretty common in police practice, although you haven't been in the police all that long. Memories can fade with the passage of time, but we're talking about pretty recent events. If he had said to you, "I threw the body-worn video devices into the [water]", that's something you would definitely recall, isn't it?

A. That's correct.

Q. Well, are you saying that, searching your memory, he did not say that to you?

A. Trying to remember the exact specifics of the words that he said has been difficult for me. The last few months, there's been a lot that's come in and out of my life.

Q. And I understand, you have a family, you've got a new child, I think, from what you have said?
A. Yes.

Q. So quite a lot going on in your life, and perhaps beyond. But this is a - it would be an almost extraordinary thing to have one of your colleagues say he had thrown some body-worn devices into the [water], wouldn't it?
A. Yes, that's correct.

Q. It might be said that that would be one of the most memorable things, even allowing for all the other things in your life, that one of your colleagues may have said to you in recent times. Is that a fair comment?
A. That is a fair comment.

Q. So is it your evidence, then, that your best recollection is he did not say that to you?
A. It's been somewhat difficult for me to separate what I've heard from other people and what was said to me specifically on that exact date.

Q. Or on any other date?
A. That I spent with [Officer BEN1]?

Q. Yes.
A. Yes, that's correct.

Analysis

15.23. Officer BEN4's evidence indicated that he understood his legislative obligations under s 211F Police Act to report suspected misconduct by other police officers. He understood the threshold to enliven his duty to report was reasonable

suspicion, telling the Commission 'I believe it would be reasonable suspicion, same as if I were to arrest someone or charge them.'[187] Officer BEN4 knew that if he held a reasonable suspicion, he was obliged to report it, in writing, to a superior.

15.24. Officer BEN1 gave evidence that he spoke to several police colleagues including Officer BEN4, and told each of them what had happened in an 'unedited' and 'unredacted' form. Officer BEN1 used these terms to contrast his admitted false notes where he left out incriminating information. The call charge records corroborate the fact that Officer BEN1 contacted or attempted to contact Officers BEN4, BEN5, BEN3 and BEN2 on 17 February 2024 and spoke to each of Officers BEN5, BEN2, BEN3 and BEN4 during the course of that day.

15.25. Although the contents of these telephone calls are not available, there is a strong inference that Officer BEN1 called each of these police colleagues to tell them what had happened the night before (about which he was very worried) and to seek their advice or response as to what he should do about it and that this, in fact, is what occurred in each case.

15.26. There was a conversation of some 2 minutes and 44 seconds between Officer BEN1 and Officer BEN4 on the afternoon of 17 February 2024, less than 24 hours after the events involving use of excessive force against 2 young persons and disposal of 2 BWV devices depicting that conduct.

15.27. Officer BEN4 gave evidence before the Commission about 4 months after the 17 February 2024 telephone conversation. The phone call lasted 2 mins and 44 seconds and was followed (on Officer BEN4's evidence) by an in person meeting the next day. In these circumstances it is improbable that Officer BEN4 would have no independent memory of the phone call.

15.28. The evidence of Officer BEN4 was quite unconvincing in asserting limited memory of the conversation. His evidence suggested a claim of vagueness of recollection because he perceived it was not in his interest to give a full and frank account.

15.29. The Commission is satisfied that Officer BEN1 gave Officer BEN4 sufficient information to reveal he had used excessive force during arrests and had

[187] Examination of Officer BEN4 at T8.

disposed of BWV devices because they revealed what he had done. It Is clear that Officer BEN4 did not report this information to any senior officer.

15.30. The Commission is satisfied that the information given to Officer BEN4 was sufficient to found a reasonable suspicion that Officer BEN1 had engaged in misconduct. The obligation to report under s 211F of the Police Act arose and no such report was made by Officer BEN4.

15.31. The Commission is conscious that the disclosure was made to Officer BEN4 in a telephone call from Officer BEN1 made at a time when both officers were off duty. This aspect did not absolve Officer BEN4 from the duty of reporting the matter under s 211F of the Police Act.

15.32. Apart from any disciplinary consequences for Officer BEN1, there were likely welfare issues affecting Officer BEN1 which needed to be addressed by the NSW Police Force. These issues went, as well, to his fitness to exercise the powers and duties of a police officer as well as any possible disciplinary or criminal consequences. However, no report was made by Officer BEN4 which would have allowed decisions to be made about, amongst other things, the placement and welfare of Officer BEN1.

15.33. The Commission is satisfied to the requisite standard that Officer BEN4 failed to discharge his duty under s 211F of the Police Act.

Officer BEN3

Evidence before the Commission

15.34. Officer BEN3 gave evidence at a private examination on 27 June 2024. He joined the NSW Police Force in December 2007.[188] At the time of his examination he held the rank of Sergeant.

15.35. Officer BEN3 was asked about his understanding of his obligations in relation to the reporting of misconduct by other police and the on reporting of misconduct that was reported to him in his capacity as a sergeant. On that point the following exchange took place:[189]

[188] Examination of Officer BEN3 at T6.
[189] Examination of Officer BEN3 at T8.

Q. Officer BEN3, as at February this year, what did you understand your obligations to be in relation to either the reporting of misconduct by other police or the reporting of misconduct which was reported to you?

A. If there was some misconduct, you have to report it.

Q. When you say, "If there was some misconduct", you had to report it, who did you understand that that obligation applied to?

A. To every member of the NSW Police Force.

Q. And when you say "If there was some misconduct", just in your own words, what did you understand the word "misconduct" to mean, such that it would enliven that obligation?

A. Pretty much anything that's – that's been done that's wrong or – whether it's criminal or, I guess – yeah, anything that's – you're not supposed to do, pretty much

Q. Just to be clear, when you said "whether it's criminal or" and then you went on to say something else, did you understand that the misconduct needed to rise to the level of criminal wrongdoing before it needed to be reported?

A. No. So it's pretty much any misconduct, you have to report it, yes.

Q. As at February this year, what level of knowledge or belief or suspicion or something else did you believe that you would have needed to have before that obligation was enlivened?

A. If I believed that something has happened, then I need to report it, yes.

Q. Did you, as at February this year, think that you needed to be certain that the misconduct had occurred?

A. At the time, yes, at the time, in February, had to believe that something would have happened before I spoke to someone about it.

15.36. Soon after, counsel assisting asked Officer BEN3 (emphasis added):[190]

> Q. As at February this year, did you think you need only suspect the misconduct, or to be certain of the misconduct, or something in between?
>
> A. Because I've never been put in that position, so I wasn't sure at that time, but don't know what to say. I - I guess, if I suspect something, I should have reported it. If I suspect something. Yeah, I should report it, if - based - if you are giving example of the power of arrest, reasonable suspicion, then, if I suspected something, if it's the same along those lines, I should have reported it, if I suspect something, yes.
>
> Q. And, to be clear, are you answering that now, as you sit here today, on 27 June, with hindsight, on is that approximately what you believed in February this year?
>
> A. Now that I'm sitting in this chair, I'm - like you said, I'm thinking about it hard now and answering it in hindsight, yeah.
>
> Q. Are you able to tell the Chief Commissioner what you thought about what level of certainty, suspicion, belief, certainty. Or something else, you thought you needed back in February this year before you were obliged to report police misconduct?
>
> A. At the time, Commissioner, **I thought I had to be 100 per cent sure of what's happened.** The level of – the level of my understanding was that I thought it was – well, not referring to that incident**, I thought I had to be 100 per cent sure of something that has happened, not just suspect. I didn't believe such incident happened, so that's why – we're here now, I guess.**
>
> Q. Just returning to your understanding that your obligation to report misconduct in February this year, you say that you thought that you had to be 100 per cent sure of something in order to report it; is that your evidence?
>
> A. Yes.

[190] Examination of Officer BEN3 at T10 – 12.

Q. So are you saying that, effectively, you would have had to see it happen before you were obligated to report it?
A. No. No.

Q. What about if someone confessed something to you, sincerely, that they had done that was criminally wrong and they were a police officer; would that have led to certainty, such that you believed that you would have had to report that misconduct?
A. Am I - is this a "Yes" or "No" answer or can I give an explanation?

Q. You can give an explanation.
A. Can you repeat the question, please?

Q. I'm trying to unpack your evidence --
A. Yes.

Q. -- that as at February this year, you thought that you needed to be 100 per cent certain that the underlying misconduct had occurred?
A. Mmm-hmm.

Q. Before you were obliged to report it.
A. Yes.

Q. **By that, are you intending to say that you would have had to see the misconduct committed?**
A. **No, I don't have to see it.**

Q. So you do accept that there are other ways that the misconduct could have been made known to you, such that you would have been 100 per cent certain that it happened?
A. If - sorry, could you repeat that last question? I'm sorry.

Q. **As at February this year, was there any other way that you could have been 100 per cent certain about the occurrence of misconduct, other than by seeing it with your own eyes?**

A. **Well, I guess if I spoke to other people about what's happened I will probably get more Information about what's happened, but I didn't.**

15.37. Counsel assisting sought clarification from Officer BEN3 (emphasis added):[191]

Q. How did you come to believe that you needed to be 100 per cent sure about the misconduct, before reporting it?
A. That's – I guess that's just how – or I guess that's how I knew about – I wasn't thinking about it that much at the time and that's how I just kind of like knew how it was, I guess.

Q. When was the last time, before February 2024, that you received any form of training about your obligation to report misconduct?
A. Sorry, I'm just thinking. I think it was probably - probably - I'm not sure, I'm not really sure. Probably a few months, probably, some online training, before --

Q. Do you recall that online training or are you giving your best guess?
A. My best - my best of my recollection.

Q. What makes you say that it was a few months before February 2024 that you received your training about your obligation to disclose --
A. Because we do a lot of online training, yeah.

Q. And do you remember online training about your duty to report misconduct at some point late in 2023? I'm just tracking a few months back from February 2024.
A. Quite possibly, I'm not sure.

Q. You say that you do a lot of online training. Do you regularly receive training concerning your obligation to report misconduct?
A. No.

[191] Examination of Officer BEN3 at T12 – 13.

Q. What about informally, is your obligation as a sergeant of police to report police misconduct a matter that is raised with you informally, such as through briefings or information, separate to training?
A. Sorry, can you repeat that again?

Q. Do you have any informal discussions or refreshers about your obligation to report misconduct, separate to formal training?
A. I don't - I don't remember, I don't recall.

Q. Do you recall any campaigns - that is, knowledge or awareness campaigns - within the NSW Police about the obligation to report misconduct?
A. There's been, yes. There have been, but I can't give you exact dates, but - yes.

Q. **Just returning to your understanding of the content of this duty as at February 2024 --**
A. **Yes.**

Q. **-- if you were certain that police misconduct had occurred, 100 per cent certain, what did you understand was your obligation to do with that information?**
A. **I have to report it.**

Q. **How?**
A. **I'd speak to my duty officer first and then go through the chain of command.**

15.38. Counsel assisting persisted in an effort to obtain from Officer BEN3 a clear explanation of his duty under s 211F of the Police Act (emphasis added):[192]

Q. As at February this year, if you were by some means 100 per cent certain that police misconduct had occurred, did you understand that you needed to make that report over the phone or in writing or on any particular document?

[192] Examination of Officer BEN3 at T14 – 15.

A. As in record it?

Q. Yes.
A. **I – if I was 100 per cent sure that has happened, yes, I should - I should have reported and recorded it.**

Q. **Recorded it where?**
A. **On my notebook somehow.**

Q. So as at February this year, you didn't have any belief that a report by you of your certainty of police misconduct having occurred had to be in writing, for example?
A. Sorry, can you just slow down, please?

Q. Did you, in February this year, believe that any report by you of misconduct had to be in writing?
A. Well, that's how I've normally done things, to record, is by writing on my notebook. I guess there might be other means to record something.

Q. When you say you've never been in that position before, are you saying that you have never been 100 per cent certain that police misconduct has occurred, since the time that you joined the police in 2007?
A. Well, I've never been in this position. I mean --

Q. Have you ever witnessed police misconduct in the whole course of your career as an officer?
A. I - I can't recall.

Q. Have you ever made a report of police misconduct in your entire career as a police officer?
A. Have I made, sorry?

Q. Have you ever reported police misconduct by another police officer throughout the whole --

A. Yes.

Q. -- course of your career?
A. Yes, yes, yes.

Q. When was that?
A. Back in - I'm just trying to remember the year. I'm not really sure. It could be 2015 or - probably 2015, '16 or '17, yes.

Q. And did that relate to police misconduct --
A. Yes.

Q. -- that you witnessed --
A. Yes.

Q. --or that you became aware of by some other means?
A. Yes. I've witnessed the misconduct, yes.

Q. And did you make a report of that misconduct?
A. Yes.

Q. In what form did - did you speak to someone --
A. Yes.

Q. -- or make a written report?
A. Yes, I spoke to a duty officer.

15.39. Officer BEN3 was unable to expressly identify the source of the duty to report misconduct under s 211F of the Police Act. [193]

15.40. Officer BEN3 said that he received online training regarding the obligation to report misconduct a few months prior to February 2024, however he could not recall whether the duty was raised informally during briefings nor was it within

[193] Examination of Officer BEN3 at T17 – 18.

the specific training to obtain the rank of Sergeant.[194] He also noted that there have been campaigns regarding the obligation to report misconduct.[195]

15.41. Officer BEN3 gave evidence that before the date of his examination, he was not aware that the level of belief required to report misconduct is 'reasonable grounds to suspect.'[196]

15.42. Officer BEN3 gave evidence of his association with Officer BEN1. He noted that he was more senior than Officer BEN1 and described their relationship as that of 'work friends'. He worked alongside Officer BEN1 at Police Station 2 for under 2 years and socialised with him strictly during work and at work events.[197]

15.43. Officer BEN3 was not involved in the events of 16 February 2024. However, while working at Police Station 3, he said that Officer BEN1 called him and explained he had 'done something wrong'.[198]

15.44. The call charge records disclose that Officer BEN1 called Officer BEN3 at 10:59 am on 17 February 2024 and spoke to him for 4 minutes and 48 seconds. It should be inferred that this was the call about which both Officer BEN1 and Officer BEN3 gave evidence. Officer BEN3 explained what Officer BEN1 had said:

> A. […] He said he's got pretty heavy - I don't - I can't remember, this is - this is how I remember the words that he used. He said he got pretty heavy handed with a bunch of kids, a few kids, and then he - he threw his body-worn into the water, and that's when I went - excuse my language - I said, you know, 'this is BS. Is this really [Officer BEN1]? You're lying. This is a prank', pretty much. Because I have - you know, every time -not every time, sorry, let me just rephrase that word. When I hung around with people at work, we always just joke around. Like, I'm a bit of a larrikin at work, so - sorry, I'm just - I'm - sorry, I've got a lot of stress at the moment, sorry.[199]

[194] Examination of Officer BEN3 at T12 – 13, T20.
[195] Examination of Officer BEN3 at T12 – 13.
[196] Examination of Officer BEN3 at T21.
[197] Examination of Officer BEN3 at T26.
[198] Examination of Officer BEN3 at T26.
[199] Examination of Officer BEN3 at T28.

15.45. Officer BEN3 continued:

> A. Sorry, give me - I told him - so because - I - I remember this, at the end of the phone call, I said - I'll tell you what's happening, you know, but I didn't really believe it was him. I told him - I told him - I told him, 'this is bullshit. This is a prank. This is not [Officer BEN1]', and I hung up, but - I hung up. But in the middle of the phone call, I did tell him that, 'if what you are saying is true, then you just have to report it. Don't lie.' That's it.[200]

15.46. From their conversation, Officer BEN3 understood that Officer BEN1 had thrown his BWV device into the water, and the BWV device had captured him being heavy handed with 2 young persons. [201]

15.47. Officer BEN3 explained that he was not motivated to tell anyone about Officer BEN1's disclosure because he wanted to maintain trust and confidentiality between himself and Officer BEN1. He said he 'just [...] didn't think it was real'.

15.48. At the time of their conversation, Officer BEN3 said he thought Officer BEN1 was 'joking'. Officer BEN3 did not accept that his belief that Officer BEN1 was 'joking' was unreasonable at the time, although he agreed in hindsight, it appeared to be unreasonable.[202]

15.49. Counsel Assisting pressed Officer BEN3 on his claim that what Officer BEN1 was saying was a 'joke':

> Q. Did you really believe it was a joke?
> A. At that time, yes.
>
> Q. Is it perhaps more accurate to say that you wanted it to be a joke?
> A. No. I - I thought it was a joke the whole time.
>
> Q. Do you understand the concept of turning a blind eye or wilful blindness?
> A. Yes.

[200] Examination of Officer BEN3 at T30.
[201] Examination of Officer BEN3 at T31.
[202] Examination of Officer BEN3 at T35.

Q. Is it more accurate to say, Sergeant, that you didn't want him to have told you this serious misconduct --

A. No.

Q. --so you chose to believe it was a joke?

A. No. The whole time I thought it was a joke.

Q. Do you think that your belief that it was a joke was reasonable, in circumstances where he stayed on the call and said, "This is real"?

A. Sorry, can you repeat that?

Q. Do you think it was reasonable for you to end that call and tuck it away as a joke in circumstances where he said to you, "This is [Officer BEN1] and this is real"?

A. I - yes. What are you - what are you trying to ask?

Q. Do you accept that it was unreasonable for you to think that it was a joke, given what he told you?

A. Well, that's my belief at the time. I don't know whether it's - whether it's reasonable, not reasonable - I don't know. That's what I believed at the time.

Q. But do you accept that that belief was unreasonable, given that he told you that it wasn't a joke?

A. Yes. Well, if you are asking me now, now that I'm thinking about it, yes.

15.50. The Chief Commissioner asked Officer BEN3:[203]

Q. After this call where [Officer BEN1] spoke to you in this way, did you talk to anyone else about the fact that [Officer BEN1] had called you and said these things?

A. I'm trying to remember, Chief Commissioner, because -I can't remember anyone else at the moment, Chief Commissioner, but --

[203] Examination of Officer BEN3 at T37 – 38.

Q. Well, from what you have said about this call, did you think it was a strange call?

A. Yes.

Q. Why?

A. I - I don't know if it's just how I see things or I think about things. It was - it was - I don't know if I'm using the right words to express that, but it seems like an outrageous kind of like claim or something you'd probably only see in the movies or something like that, or like a TV, like, TV series or something like that. And I - I was just - and I was just -in the middle of my shift, you know, just - it just - I just didn't have time to process it all in one go and - and I don't - I don't normally talk to [BEN1] on a regular basis, and for him to come out of the blue, especially when I'd just got my - you know, when I'd just got transferred to [Police Station 3], and -it's just out of the blue and that's why I thought it was strange.

Q. As you have described it, you got this call out of the blue and he's admitted to you that he's done something very serious?

A. Yes.

Q. And he wasn't laughing?

A. Yes.

15.51. Counsel assisting asked Officer BEN3:[204]

Q. Is any part of why you didn't tell anyone, after [Officer BEN1] made that disclosure to you, your sense that doing so would have violated confidentiality?

A. Sorry?

Q. Were you motivated not to tell anyone what [Officer BEN1] had told you because you wanted to observe confidentiality as between the two of you?

[204] Examination of Officer BEN3 at T39 – 40.

A. Between the - me and [Officer BEN1]?

Q. Yes. Your evidence earlier on, I believe, was that people saw you as a trusted source?
A. Yep.

Q. Is that really why you kept it quiet, because you wanted to maintain his trust?
A. No. I just - like I said, I didn't think it was real at the time.

Q. If it were true that you believed that it was a joke, wouldn't that be a joke so inappropriate that it would warrant a further discussion with him?
A. Further discussion - sorry.

Q. If you thought -it was a joke, why didn't you speak to [Officer BEN1] again and say, "Mate, -if you're going to be making jokes, maybe don't make jokes about destroying evidence"?
A. Just didn't think of it.

15.52. During his evidence before the Commission, Officer BEN3 was told there was evidence that within 2 days after the events of 16 February 2024, Officer BEN1 called him to tell him the unedited and unredacted version of events, being that Officer BEN1 assaulted 2 young persons, disposed of 2 BWV devices and that he (Officer BEN3) told Officer BEN1 to report the BWV devices as lost, damaged or destroyed.[205] Officer BEN3 said that he did not tell Officer BEN1 to report the BWV devices as lost to 'cover up' the destroyed devices.[206]

15.53. Officer BEN3 said he told Officer BEN1 the following:[207]

A. I didn't tell him to report the body-worn as lost. I said, if we have any lost equipment', and I stress -it, I didn't tell him to cover up, that if you throw the body-worn away, I don't - I never ever told him to cover

[205] Examination of Officer BEN3 at T42.
[206] Examination of Officer BEN3 at T42.
[207] Examination of Officer BEN3 at T42 – 43.

that up. I told him, 'if we have lost equipment, if you've lost your - if that's what happened, if you've lost your body-worn equipment, -if you've lost it, I didn't say throw -it, or whatever, cover - you should do a - when we lose equipment, we do a report, sign a report, but I've never told him to cover it up.

Q. And did you advise him in any form of words, that one option available to him was to conceal the fact of how he had disposed of those body-worn cameras? Did you say to him in any form of words --
A. Maybe as a joke, but I don't recall. I don't recall the whole conversation.

Q. What might it have been that you said to him as a joke?
A. I can't remember. If I say things, it's most of it's a joke, but I never do those kinds of things, so I can't remember.

Q. Is it possible that you joked to him about covering it up? Is that what you are saying?
A. No.

Q. When I asked you whether you had advised him in any other form of words that he could say nothing about disposing of those two body-worns, you said, "Maybe as a joke". Is that the sort of thing that you are likely to have joked to him about, covering it up?
A. No. I can't - I can't recall. I can't remember. But I never told him to cover it up.

15.54. Officer BEN3 did not report to any police officer what Officer BEN1 had told him about his misconduct on the evening of 16 February 2024.

Analysis

15.55. Officer BEN3 was an unimpressive witness. His evidence revealed that at the time of his conversation with Officer BEN1 on 17 February 2024, he did not have an accurate understanding of his obligations under s 211F of the Police Act. His evidence displayed confusion concerning this important statutory duty applying to all police officers.

15.56. Disconcertingly, Officer BEN3 told the Commission that he 'thought he had to be 100% sure of what's happened'. He said that, if he was a 100% sure, then he knew he had to report it and he would do so by contacting the duty officer in the first instance and he would make a record in his police notebook.

15.57. Officer BEN3 had received training concerning the s 211F obligation and he held the rank of Sergeant. To perform his duties responsibly and effectively, it was essential that he had a clear understanding of the s 211F duty which could involve as well, given his rank, the statutory function of receiving a report and then acting on it in accordance with the Police Act.

15.58. On Officer BEN3's own evidence, he was told by Officer BEN1 that:

- he had got heavy handed with a bunch of kids; and
- he had thrown his BWV device in the water.

15.59. Officer BEN3 told the Commission he did not think what Officer BEN1 was telling him was real. This evidence was unconvincing. Nonetheless, he states that he offered Officer BEN1 advice during the call saying 'if what you are saying is true, then you just have to report it. Don't lie'. He told the Commission he wanted to maintain trust and confidentiality with Officer BEN1.

15.60. The Commission does not accept that Officer BEN3 held a genuine belief that what was being disclosed to him was false. If Officer BEN3 genuinely believed that what he was being told was false, he would not have offered advice or felt compelled to maintain trust and confidentiality around the disclosure.

15.61. The Commission is satisfied that the disclosures made to Officer BEN3 were such that he held the relevant suspicion and that a reasonable police officer in the position of Officer BEN3 would suspect that Officer BEN1 had engaged in misconduct such as to trigger the s 211F obligation for Officer BEN3 to report the matter.

15.62. The s 211F duty is not removed by a sense of confidentiality on Officer BEN3's part. As observed concerning Officer BEN4 (at paragraph 15.32 above), the s 211F duty to report permits the NSW Police Force to consider placement and welfare issues as well as possible disciplinary or criminal action against Officer BEN1. Issues had been raised with Officer BEN3 which involved possible protection of

the public who may come into contact with Officer BEN1 in the course of his duties. The failure of Officer BEN3 to report the matter meant that these issues remained unaddressed, and this approach was damaging to the reputation of the NSW Police Force as well.

15.63. The Commission finds that Officer BEN3's failure to report Officer BEN1's disclosures to him in the telephone call on 17 February 2024 breached his statutory duty under s 211F of the Police Act.

Officer BEN2

Evidence before the Commission

15.64. Officer BEN2 gave evidence at a private examination on 27 June 2024. He joined the NSW Police Force in May 2012.[208] At the time of his examination he held the rank of Sergeant.

15.65. Officer BEN2 was asked about his understanding of his obligations in relation to either the reporting of misconduct by other police or the reporting of misconduct that was reported to him. On that point the following exchange took place (emphasis added):[209]

> Q. As at February this year, [Officer BEN2], what was your understanding as to your obligation to report misconduct?
>
> A. I must report it at all times.
>
> Q. When you say that you must report it at all times, do you know what the source or the sources of that obligation were in February this year?
>
> A. Code of Conduct of ethics.
>
> Q. "Code of conduct of ethics", did you say?
>
> A. Yeah, that's right, yes.

[208] Examination of Officer BEN2 at T6.
[209] Examination of Officer BEN2 at T8 – 10.

Q. Did you understand that obligation to have any legislative basis as well?

A. Yes, but I can't tell you off the top of my head.

Q. When you said that you understood your obligation as at February this year to be that you must report misconduct at all times, just in your own words, what did you understand "misconduct" to mean such as to enliven that obligation?

A. Oh, any type of criminal matter.

Q. Did you understand that the obligation only applied when the misconduct that you were aware of was criminal in nature?

A. No, it doesn't have to be criminal.

Q. What, then – just in your own words did you understand to be sufficient to give rise to the duty to report at all times?

A. Any type of misconduct, whether, I guess, on or off duty, criminal or non-criminal, just – yeah. Pretty much that's it, yeah.

...

Q. **Did you believe that you had to be certain that the misconduct had occurred before you had to report it, in February?**

A. **No, could also be reasonable.**

Q. **Reasonable what?**

A. **I reasonably suspect it.**

Q. As at February this year, if you were to reasonably suspect that a police officer had engaged in misconduct, what was your understanding of any form that the report needed to take, whether spoken, written or both?

A. I believe it's got to be written.

Q. And to whom did you understand, as at February this year, that any such report needed to be made?

A. to whom?

Q. Yes.

A. What do you mean?

Q. Either a person or the sort of person, whether by rank or otherwise?

A. Oh, to an inspector or professional standards manager.

Q. So, people who were more senior than you?

A. That's correct.

Q. But specifically, those two people?

A. Just – I guess, no, I think anyone more senior.

15.66. Officer BEN2 informed the Commission that there are online PETE Learning and iLearn modules covering training on the obligation to report police misconduct. He also recalled he would have undertaken training either prior to or upon becoming Sergeant relating to the duty to report misconduct, however he could not recall the date of his last training module specific to the duty to report misconduct.[210]

15.67. Officer BEN2 indicated that before the date of his examination, he was vaguely aware that the duty to report police misconduct resides in the Police Act in section 211F.[211] He was also aware that the duty was and is reproduced in the NSW Police Force Handbook.[212]

15.68. Officer BEN2 informed the Commission that he has reported at least 2 incidents of police misconduct in his role as Sergeant; one of these being a witnessed incident whilst the other was reported to him.[213]

[210] Examination of Officer BEN2 at T10 – T11.
[211] Examination of Officer BEN2 at T12.
[212] Examination of Officer BEN2 at T13.
[213] Examination of Officer BEN2 at T26 – 27.

15.69. Officer BEN2 gave evidence of his association with Officer BEN1. He noted that he was more senior than Officer BEN1 and described their relationship as that of work colleagues. He worked alongside Officer BEN1 at Police Station 2 in 2021 and socialised with him strictly during work.[214]

15.70. The call charge records disclosed that Officer BEN1 made an unsuccessful call to Officer BEN2 at 11:13 am on 17 February 2024. However, Officer BEN2 called back and a telephone conversation ensued at 12:13 pm that day which occupied 11 minutes and 19 seconds. Officer BEN2 said he did not discuss the phone call, formally or informally, with anyone else.[215]

15.71. According to Officer BEN2, during the phone call to Officer BEN2, Officer BEN1 told him that 'he had done something wrong'.[216] Officer BEN2 said:

> He - when he first called, he goes, 'hey, -it's [Officer BEN1]'. He asked - first or a couple of minutes or so, it was about how am I liking [police station omitted], how's my family, how's my kids, and he seemed really panicked, and I was like, '[Officer BEN1], what's going on?' And then he goes, 'I've stuffed up'. And then I said, 'what - what's going on? What have you done?' And he goes, words to the effect of that, 'I was in [Police Station 2] and there was a robbery job somewhere in the city.' He's run out of [Police Station 2] and he's arrested two robbery offenders. And I was like, you know, 'Good work', and then he goes, 'I might have used a bit of extra force'. I said - I said, 'well, mate, that's - that's not the end of the world. We can - you know, hopefully, you can justify your actions', and he goes, 'Oh, but it gets worse'. I said, 'Oh, how can it get worse?' Then he goes he and his partner chucked his body-worn -in the [water], and then that's when I called him an effing idiot. I was like, basically, 'what were you thinking', and he goes, 'I wasn't'. And that's pretty much when he's asked for my advice, and what he should do, and should he not report it or report it. And that's when I'm like, 'well, mate, at the end of the day, you've - you've stuffed up', like, 'you've got to come clean, pretty much', and - yeah. Sorry, I'm trying to remember the details of that phone call. And that's when I've asked, 'what have you done', like, I didn't even know when

[214] Examination of Officer BEN2 at T14 – 15.
[215] Examination of Officer BEN2 at T34.
[216] Examination of Officer BEN2 at T15.

> that incident took place. I said, 'what have you done since', because obviously -it's the middle of the day. He said he's already spoken to a sergeant. I said, 'who have you spoken to?' He goes '[Officer BEN3]', I know [Officer BEN3], [...]. I said 'okay, what did he tell you?' And he goes he should do a report. I said, 'oh, that's good', in relation to losing his body-worn. I was like, 'well, no, that's not good. You obviously can't lie -in the report. You should not be doing that'. And we did talk about - like, he goes 'well, what options do I have?' 'Well, at the end of the day, realistically, you have got two options, it is not to talk or talk. Obviously, what you have done here, it's going to come out. You don't, pretty much, have any choice but to talk, and it's probably better coming from you.' That's pretty much the conversation, like, not word for word detail though.[217]

15.72. Officer BEN2 said Officer BEN1 'seemed panicked' in his voice which was 'fast' and 'wasn't coherent at the start'.[218] He said that Officer BEN1 'sounded scared'.[219]

15.73. Officer BEN2 agreed that Officer BEN1 was confessing his concerns about his 'heavy handedness' during the 2 arrests of the young persons, and that he disposed of or destroyed evidence of the use of force by throwing his BWV camera into a body of water.[220] Officer BEN2 was aware, in the course of the phone call, that Officer BEN1 committed at least one offence, being deliberately disposing of the BWV camera. He also agreed Officer BEN1 may have committed a second and third offence, in using a 'bit of extra force' to arrest the 2 young persons.[221]

15.74. Officer BEN2 did not report the misconduct of Officer BEN1. When questioned as to why, he noted that given the personal nature of the phone call which was received off-duty, and that Officer BEN1 no longer worked in the same command as himself, it did not cross his mind to report the misconduct nor follow up with

[217] Examination of Officer BEN2 at T16 – T17.
[218] Examination of Officer BEN2 at T17.
[219] Examination of Officer BEN2 at T22.
[220] Examination of Officer BEN2 at T18.
[221] Examination of Officer BEN2 at T19.

Officer BEN1, urging him to report the incident. He stated, in hindsight, he should have reported it.[222]

15.75. Counsel Assisting explored Officer BEN2's reasons for not reporting what Officer BEN1 had told him:[223]

> Q. You understood at the time that you received the call that by the mere fact of him telling you those things, that you were under a duty to report them?
>
> A. Yes.
>
> Q. And you chose not to report them, nonetheless?
>
> A. Yes.
>
> Q. Why?
>
> A. Like - I guess when I took that phone call that day, I was - being at home, I didn't have my police hat on, I didn't - I didn't think. And then, I guess I believed at the end of that phone call, I thought it was sufficient enough for Constable [BEN1] to come forward or – that he's already spoken to Sergeant [BEN3]. But no, I - I should have reported it.
>
> THE CHIEF COMMISSIONER:
>
> Q. Did you think that this was a type of private conversation where he was confiding in you and seeking your advice? I'm just trying to get a better understanding of what was running through your mind and why you didn't take any further action. Is that --
>
> A. I - I suppose so. Like, I felt like it was a – a personal call where I was just offering him some support and, yeah, -it didn't even - I didn't even think, to be honest, to report it.

[222] Examination of Officer BEN2 at T23 – 29.
[223] Examination of Officer BEN2 at T23 – 24.

Q. Did any part of your thinking involve, "Well, what if he doesn't report it? What if he keeps quiet about it"? Did that possibility run through your mind?

A. No. No, it didn't.

15.76. The Chief Commissioner asked Officer BEN2 concerning welfare and fitness issues arising from what he had been told by Officer BEN1:[224]

Q. From what you have said about this call, Constable [BEN1] sounded like a man under stress at the time, who was anxious and making, in the terms of the criminal law, admissions against interest - he was effectively confessing things to you. Were you worried at that time that there may be welfare issues, that his state of mind may be such that there was a worry, having apparently done the things he said, but now making contact with you and apparently having made contact with Sergeant [BEN3] as well, that he may be a troubled person whose mental state may need consideration?

A. It didn't occur to me at the time, but now, looking back, yeah, it would have been.

Q. Although section 211F doesn't talk about welfare issues, it may be seen as a byproduct, that if there's a police officer who's engaged in misconduct of some sort, there may be things going on which could need to be addressed, and so a byproduct of section 211F is to bring that to attention, in case there is such a thing. Is that something that you had thought of in this context before?

A. Not before, but bringing it to my attention today, that does make sense.

Q. So although the word "welfare" doesn't appear in this section, it's a factor that may well be considered, certainly by senior police who have brought to their attention a particular incident, a serious incident, that should be investigated?

[224] Examination of Officer BEN2 at T36 – 37.

A. I agree with that comment, yes.

Q. Another issue which might arise - and I raise this because it may arise from the context of this one - is, on the face of it, he had said to you that there had been what appeared to be excessive use of force, coupled with a reaction where he had disposed of the body-worn video. Did you think that if this isn't addressed in some way, there's a risk of repetition by him of conduct which may involve a use of excessive force against others or, in effect, going off the rails in some way in the performance of his duty?

A. I suppose the gravity of the situation didn't hit me at that time.

Q. And again, and I'm conscious that I am effectively asking you questions about the things that may bear on section 211F and you are not holding yourself out as an expert on that, but you are a serving police officer who deals with these things, that if information that indicates misconduct, in particular if it shows something like excessive use of force, that another byproduct of that, in looking at the purpose of section 211F, is to consider whether steps need to be taken to guard against repetition, to protect the community, so that if there is a risk that someone's becoming violent, a police officer becoming violent, using excessive force, there is a risk that unless it is addressed, it will go on, placing the community at risk?

A. I agree with that comment, yes, Commissioner.

Q. Did any thoughts of that sort occur to you, that these sorts of considerations may arise with respect to what Constable [BEN1] had said to you?

A. No, unfortunately not.

Analysis

15.77. Officer BEN2 was cooperative and forthcoming in his evidence before the Commission.

15.78. It was apparent that in February 2024 Officer BEN2 understood his obligations to report misconduct. He was conscious of the requisite threshold, telling the Commission he had to report it if 'I reasonably suspect it'.

15.79. On Officer BEN2's own evidence, it was during his call with Officer BEN1 on 17 February 2024 that Officer BEN1 told him:

- He used a bit of extra force when arresting 2 robbery offenders; and
- He and his partner chucked his body-worn in the water.

15.80. In the Commission's opinion, sufficient disclosures were made to Officer BEN2 to cause him to suspect misconduct and also to cause a reasonable police officer to suspect that Officer BEN1 had engaged in misconduct.

15.81. The Commission finds that Officer BEN2's failure to report Officer BEN1's disclosures to a superior officer breached his duty under s 211F of the Police Act.

Officer BEN5

Evidence before the Commission

15.82. Officer BEN5 gave evidence at a private examination on 17 July 2024. He joined the NSW Police Force in June 2021.[225] At the time of his examination he held the rank of Constable.

15.83. Officer BEN5 was asked about his understanding of his obligations concerning the reporting of misconduct by other police. He displayed a seriously flawed understanding of the obligation (emphasis added):[226]

> Q. As at February this year, what was your understanding of your obligations in relation to reporting misconduct by other police officers?
>
> A. That if you were to come across something you thought was misconduct, that you are to report it in writing to a senior officer.

[225] Examination of Officer BEN5 at T6
[226] Examination of Officer BEN5 at T8 – 9.

Q. What was your understanding, as of February this year, of what constituted misconduct?

A. Anything that an officer of the law would do that was, I guess – would be constituted as misconduct by the general public.

Q. Could you give us an example?

A. An example would be tampering with evidence, use of force, those things that were on the list of the summons.

Q. …And if you would accept from me on a spectrum of certainty you might have knowledge at one end and suspicion at the other –

A. Mmm-hmm.

Q. **--what level of certainty did you understand in February of this year that you needed to have in order to enliven that duty to report misconduct?**

A. **Knowledge.**

Q. **Knowledge? So does that mean you felt that you had to witness the conduct occur?**

A. **No, or be told of it, that it had happened.**

Q. **But you thought it had to be more than a suspicion?**

A. **Yeah.**

Q. And what level of obligation did you believe applied to that duty, and by that, I mean did you understand it to be a voluntary duty, a mandatory one, or something else?

A. Mandatory.

Q. And what did you understand to be the source of that duty?

A. How do you mean?

Q. Did you believe that it was enshrined in legislation, or did it come from the police handbook?

A. Legislation.

15.84. Officer BEN5, confirmed that he knew that the source of the duty he had described came from s 211F of the Police Act.[227]

15.85. Officer BEN5 said he had first learnt about s 211F during his time at the Police Academy through Zoom lectures conducted during the COVID-19 pandemic. He said that since then, there has been no official refresher training, nor could he recall any campaigns regarding the duty to report misconduct.[228]

15.86. As at February 2024, Officer BEN5's understanding of s 211F was that knowledge of misconduct was required in order to enliven the duty to report and that his understanding of s 211F had not changed since February 2024. [229]

15.87. When shown an extract from the NSW Police Handbook concerning the duty to report, Officer BEN5 could not recall seeing the document despite it being readily available at police stations and on the police intranet.[230]

15.88. Officer BEN5 informed the Commission that he and Officer BEN1 worked together on the same team for 9 months when they were both Probationary Constables.[231] He said that Officer BEN1 'probably over the course of his career' had 'a reputation for being heavy handed'.[232] Officer BEN5 was aware of this reputation through gossip and he himself did not observe such conduct directly. Officer BEN5 said the gossip stemmed from Officer BEN1's OSG Course at the end of 2023 where he displayed 'red mist' during a scenario and 'threw stuff back at the role players'.[233]

15.89. Officer BEN5 said that he considered Officer BEN1 to be a friend, having socialised with him outside work on numerous occasions. However, when asked about the function on the evening of 16 February 2024, he could not recall

[227] Examination of Officer BEN5 at T9.
[228] Examination of Officer BEN5 at T10.
[229] Examination of Officer BEN5 at T10 – 11.
[230] Examination of Officer BEN5 at T11.
[231] Examination of Officer BEN5 at T13.
[232] Examination of Officer BEN5 at T14.
[233] Examination of Officer BEN5 at T14.

whether Officer BEN1 attended nor whether Officer BEN1 had revealed that he had done something wrong at work.[234]

15.90. The call charge records disclosed a call from Officer BEN1 to Officer BEN5 at 10:35 am on 17 February 2024 with a conversation occupying 3 minutes and 32 seconds. Officer BEN5 could not recall what was discussed during this phone call. He said that it was not unusual for Officer BEN1 to call him.[235] The call charge records reveal 2 unsuccessful calls from Officer BEN1 to Officer BEN5 on 28 February 2024 followed by a successful call at 3 pm on 29 February 2024 with a conversation lasting 1 minute and 18 seconds.

15.91. Officer BEN5 was examined by Counsel Assisting about what was said in the conversation on 17 February 2024:[236]

> Q. As you can see, the Commission has been exploring 12 calls that Constable BEN1 made to other persons soon after the incident and soon after the disposal of the body-worn video evidence on 16 February 2024. As you can see, he called you on 17 February 2024 at 10.35am, and you spoke for three minutes and 32 seconds?
>
> A. Mmm-hmm.
>
> Q. This is a call that's some months ago – we're not talking years ago. Do you recall what was told to you in that call.
>
> A. No I don't.
>
> Q. You don't recall anything that was said in that conversation?
>
> A. No, I don't.
>
> Q. And if he had told you in that call that he had disposed of body-worn video, would that be memorable to you?
>
> A. Yes.

[234] Examination of Officer BEN5 at T15.
[235] Examination of Officer BEN5 at T17 – 18.
[236] Examination of Officer BEN5 at T27 -29.

Q. And if he had disclosed to you that he had had an incident with young persons, whether a wrestle or perhaps alluded to some excessive use of force, would that have been memorable to you?

A. Yes.

Q. So your evidence is at no point in that phone call that took place on 17 February 2024 did Constable [BEN1] disclose to you anything that had occurred in his shift on 16 February?

A. Yes, nothing that I recall.

THE CHIEF COMMISSIONER:

Q. Well, what did he say to you? It's only a few months ago, Constable. A three and a half minute phone call.

A. Yeah, I actually don't have any recollection of that.

Q. Well, let's just look at this document. Do you see the first line, [BEN4], do you know that person?

A. Yes.

Q. Who is it?

A. He is a police officer at the same station as us as -

Q. According to this schedule, just not long before Constable [BEN1] rang you, he attempted to ring Constable [BEN4], but apparently unsuccessfully because there's no contact established. And then he rings you at 10.35am the morning after, this Commission is now aware, he used excessive force, which was recorded on body-worn video, which he then disposed of. Are you saying you've got no recollection of what he discussed with you?

A. No.

Q. About 20 minutes later he calls [BEN3]. Do you know that person?

A. He is another police officer at the city.

Q. And he speaks to him for four minutes and 48 seconds. Then, soon after that, he attempts to ring [BEN2]. Do you know who [BEN2] is?

A. Another police officer at the city.

Q. Well, here we are, the morning after he has used excessive force and disposed of body-worn video, he's ringing a string of police officers, including you. That's right?

A. Yes.

Q. I remind you, it's your obligation to tell the truth, the whole truth and nothing but the truth, and that if your evidence is false or misleading, you can be prosecuted for it. I remind you of that. What is your recollection of the phone call between [BEN1] and yourself that ran for three minutes and 32 seconds on the morning of 17 February?

A. I don't have any recollection of the phone call being made, but I would say that it was a conversation that was similar to all our other conversations on the phone, therefore, not memorable.

Q. Well, what do you mean by that?

A. That it was light-hearted, it was catching up or organising a catch-up or - yeah.

Q. Did you consider that you did have something in common with Constable [BEN1] because you had both had an army background?

A. Yeah.

Q. Do you consider that, so far as you knew, he was closer to you than he was with [BEN4], [BEN3] and [BEN2]?

A. I wouldn't say that, no.

Q. He had something -in common with you, though?

A. Yes.

Q. And you had come to the police when you were in your 30s?

A. Yes.

Q. And he had come to the police when he was in his late 20s?

A. Yes.

Q. In that sense, you were in a different category to others joining the police who tended to be younger; is that a fair comment?

A. Yeah, that's fair.

Q. Well, it sounds as though you had a fair bit in common with him and he thought he had a fair bit in common with you; is that a fair comment?

A. That's fair.

Q. Well, on a morning after this incident, when this Commission is aware he's making a string of phone calls and talking about what had happened the night before involving body-worn with at least some, are you saying that's not what happened with you?

A. Yes. It didn't happen with me, not to my recollection.

15.92. Officer BEN5 said that he and Officer BEN1 had a meal at a hotel in March 2024. According to the evidence of Officer BEN5, Officer BEN1 told him that he was 'in a wrestle recently with some juveniles'. Officer BEN5 understood the term 'wrestle' to mean an incident involving Officer BEN1 'going hands on in the course of an arrest'.[237] As a result of the conversation, Officer BEN5 said he did not hold a reasonable suspicion that any misconduct may have occurred. He said that Officer BEN1 made no reference to BWV footage during this conversation.

[237] Examination of Officer BEN5 at T 18 – 19.

15.93. Officer BEN5 gave evidence of an occasion when he was in a police changing room and heard that Officer BEN1 had been involved in a 'wrestle with some juveniles. He understood that Officer BEN1 had potentially been overly aggressive and subsequently disposed of a BWV device by throwing it into the water.[238]

15.94. Officer BEN5 was informed of evidence before the Commission that, after the events of 16 February 2024, Officer BEN1 had told him the whole, unedited and unredacted version of the events. In response, Officer BEN5 said 'I don't recall that conversation ever taking place'.[239]

15.95. The Chief Commissioner asked Officer BEN5:[240]

> Q. By that, do you mean that it could have taken place but you don't recall it, or that, if it did take place or that it didn't take place?
>
> A. If it did take place, I don't recall it.
>
> Q. Well, if it did take place, it would be pretty memorable, wouldn't it?
>
> A. Yeah.
>
> Q. So are you denying that it took place?
>
> A. I - all I'm saying is I don't recall.
>
> Q. Well, I understand there are things that one recalls and things that one doesn't recall?
>
> A. Yes.
>
> Q. But we're talking about the last few months.
>
> A. Yes.
>
> Q. Have you got any health problems that impact on your memory?
>
> A. No.

[238] Examination of Officer BEN5 at T23.
[239] Examination of Officer BEN5 at T30.
[240] Examination of Officer BEN5 at T30 – 31.

Q. I will raise with you directly: are you being careful to avoid saying anything that may suggest that [BEN1] told you that he had used excessive force and disposed of body-worn video; that you are being careful not to say that by saying you don't recall conversations?

A. I'm just saying what is my recollection of events and I'm just - yeah, I'm just trying to be honest to the best of my ability of what I recall of those events.

15.96. Officer BEN5 did not report to any police officer what Officer BEN1 had told him about his interactions with the young persons.

Analysis

15.97. Officer BEN5's evidence demonstrated a significantly flawed understanding of the threshold to enliven the duty to report suspected misconduct under s 211F of the Police Act. He told the Commission that he understood the threshold to be 'knowledge' or, at least, more than suspicion.

15.98. Officer BEN1 called Officer BEN5 at 10:35 am on 17 February 2024, a period of hours only after the events involving excessive use of force and disposal of BWV devices.

15.99. Officer BEN1 spoke to Officer BEN5 for 3 mins and 32 seconds during the telephone call on 17 February 2024. This conversation between Officer BEN5 and Officer BEN1 occurred just 21 minutes prior to Officer BEN1 calling Officer BEN3 and making disclosures to him about his conduct on 16 February 2024, including his disposal of the BWV devices. Further, it was just over one and half hours prior to the discussion Officer BEN1 had with Officer BEN2 where he also made admissions about his misconduct on 16 February 2024.

15.100. It should be inferred that Officer BEN1 called Officer BEN5 on 17 February 2024 for a similar purpose, to disclose his conduct and seek advice and that this is what occurred. The evidence of Officer BEN1 is supported by the fact that a telephone conversation took place with Officer BEN5 as one of a series of calls made by the troubled and anxious Officer BEN1 to raise with colleagues his misconduct on 16 February 2024.

15.101. The evidence of Officer BEN5 was quite unconvincing and the Commission rejects his claimed lack of recollection of the conversation on 17 February 2024.

15.102. The Commission is satisfied to the requisite standard that Officer BEN5 was informed of sufficient material by Officer BEN1 to cause Officer BEN5 to suspect misconduct and to cause a reasonable police officer to suspect misconduct on Officer BEN1's part. This was sufficient to trigger the obligation to report reasonably suspected misconduct under s 211F Police Act.

15.103. The Commission finds that Officer BEN5 failed to comply with his duty under s 211F Police Act.

Section 211F obligations – a general observation

15.104. Officers BEN4, BEN3, BEN2 and BEN5 gave evidence, to varying degrees, of their understanding (or misunderstanding) of the threshold required to enliven their duty to report misconduct under s 211F of the Police Act.

15.105. This evidence reveals inconsistencies in officer understanding on the threshold under s 211F Police Act. There was a disturbing level of confusion on the part of some officers especially where the test has been, since 2016, based on reasonable suspicion, a concept that should be well known to all police officers.

15.106. This observation forms the basis for recommendations made later in this report.

16. Findings – Other Officers

16.1. Findings have been made that each of Officers BEN4, BEN3, BEN2 and BEN5 did not comply with their duty to report the suspected misconduct of Officer BEN1, as required by s211F of the Police Act.

16.2. This requirement also arises under the NSW Police Force Code of Conduct and Standards of Professional Conduct, as set out in paragraph 11.13 above.

Serious misconduct

16.3. Should a finding of serious misconduct be made in respect of Officers BEN4, BEN3, BEN2 or BEN5?

16.4. As explained in paragraphs 11.1 to 11.3; to constitute serious misconduct the act of a police officer must be one that could result in prosecution for a serious offence, or lead to serious disciplinary action.

16.5. Section 211F of the Police Act creates a legislative duty for police officers to report reasonably suspected misconduct or criminal conduct. A failure to carry out the s 211F duty is capable of constituting an offence under s 201 of the Police Act. The maximum penalty for a s 201 offence is a fine of 20 penalty units. A s 201 Police Act offence is not a serious offence under s 10 LECC Act.

16.6. The second leg of 'serious misconduct' arises where the conduct could result in 'serious disciplinary action' against an officer which includes termination of employment, demotion or reduction of rank, classification or grade of the officer or reduction of the remuneration payable to the officer.

16.7. The Commission has found that Officer BEN1 disclosed to each of Officers BEN4, BEN3, BEN2 and BEN5 that he had used excessive force against some young people and subsequently thrown his BWV device into the water. The disclosure of this information to experienced police officers should have undoubtedly prompted each of them to report the matter to a superior officer.

16.8. Had Officers BEN4, BEN3, BEN2 or BEN5 acted promptly after Officer BEN1's respective disclosures to them on 17 February 2024, it is likely that the NSW Police Force would have taken action in respect of Officer BEN1 that would not have left him in a position to repeat excessive use of force as he did in April 2024. If appropriate action was taken by at least one of these officers in accordance with s 211F of the Police Act, it is possible that the 4 subsequent assaults may have been prevented, and (at the least) an appropriate Interim Risk Management Plan implemented for Officer BEN1.

16.9. These significant failures could result in serious disciplinary action, and on this basis, a finding of serious misconduct is made against each of Officers BEN4, BEN3, BEN2 and BEN5.

17. Other Affected Persons

17.1. The position of Officer BEN1 as an affected person was considered earlier in this report.

17.2. The Commission considers that each of Officers BEN4, BEN3, BEN2 and BEN5 are also affected persons within the meaning of s133(3), being a person against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.

Consideration of affected persons under s 133(2) of the LECC Act

17.3. As noted at paragraph 12.3 above, when tabling a report under s 132 of the LECC Act, the Commission must consider whether it should take further steps or recommendations as a result of its findings against any affected person. Including, whether consideration should be given to obtaining advice from the DPP about initiating criminal proceedings, or the taking of disciplinary action.

17.4. Section 133(2)(e) of the LECC Act clearly has no application in respect of a police officer.

17.5. To the extent that the failure of each officer to comply with s 211F may constitute an offence under s 201 Police Act, the limitation period of 6 months applicable to that offence means that no s 201 prosecution could be initiated in this case. Accordingly, action under s 133(2)(a) does not arise for consideration.

17.6. The Commission must consider whether disciplinary action should be taken against each of the 4 officers under s 133(2)(b) to (d) LECC Act.

17.7. The Commission recommends that the Commissioner of Police take disciplinary action against each of Officers BEN4, BEN3, BEN2 and BEN5. This recommendation is made on the basis that they each had a duty to report Officer BEN1's reasonably suspected misconduct under ss 7 and 211F of the Police Act, and under point 10 of the NSW Police Force Code of Conduct and Ethics and each did not do so.

17.8. As stated earlier, this statutory duty to report plays an important role in ensuring public confidence in the NSW Police Force. It follows, that a failure to meet this duty should attract appropriate disciplinary consequences if s 211F of the Police Act is to have its desired impact.

17.9. The matters disclosed to each of Officers BEN4, BEN3, BEN2 and BEN5 by Officer BEN1 were, in the Commission's view, very serious.

17.10. Officers BEN3 and BEN2 are both experienced officers holding the rank of Sergeant. Each should be well aware of the importance of compliance with the duty under s 211F of the Police Act, particularly as they are superior officers who can receive reports under s 211F from more junior officers.

17.11. Although Officer BEN4 and BEN5 hold a lesser rank, the duty to report is a core obligation for police officers which has, since 2016, been an express statutory duty for all police officers.

17.12. The failure of each of Officers BEN4, BEN3, BEN2 and BEN5 to report Officer BEN1's suspected misconduct is sufficient to warrant consideration of the taking of reviewable action under s 173 of the Police Act against each of these officers.

17.13. Accordingly, the Commission is of the opinion that action should be taken against each of Officers BEN4, BEN3, BEN2 and BEN5 under s 133(2)(d) but not under s 133(2)(a), (b) or (c) of the LECC Act.

18. Submissions – Other Officers

18.1. The Commission furnished the draft report to the legal representatives for Officers BEN4, BEN3, BEN2 and BEN5 to allow them to make submissions concerning proposed adverse findings against their client in the draft report.

18.2. The Commission was informed that Officers BEN3 and BEN5 did not wish to make any submissions in response to the draft s 132 report. It was noted in correspondence to the Commission that despite not making submissions, Officers BEN3 and BEN5 did not necessarily accept the accuracy of the findings proposed to be made in the draft report and the recommendations therein.

18.3. The Commission received detailed submissions from the legal representatives of Officers BEN4 and BEN2, which are summarised and addressed below.

Submissions - Officer BEN4

18.4. It was submitted on behalf of Officer BEN4 that the proposed findings in relation to Officer BEN4 in the Commission's draft report, namely:

(a) in a telephone call on 17 February 2024, 'Officer BEN1 gave Officer BEN4 sufficient information to reveal he had used excessive force during arrests and had disposed of BWV devices because they revealed what he had done'
(b) the 'information given to Officer BEN4 was sufficient to found a reasonable suspicion that Officer BEN1 had engaged in misconduct' and BEN4 failed to discharge his duty under s 211F of the *Police Act 1900*
(c) a finding of serious misconduct,

are not available on the evidence and should not be made by the Commission.

18.5. In making these submissions, the legal representative for Officer BEN4 reminded the Commission of the standard of proof the Commission must apply citing *Briginshaw v Briginshaw* (1938) 60 CLR 336 and emphasising that 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

18.6. As noted at paragraph 2.2 of this report, the Commission applies the civil standard of proof, proof on the balance of probabilities, and acknowledges (consistent with the principles of *Briginshaw v Briginshaw*) the more serious an allegation, and the gravity of its consequences, the more substantial proof may be required in order to prove such an allegation on the balance of probabilities.[241] This is the approach that the Commission has adopted.

18.7. It was submitted on behalf of Officer BEN4 that the Commission could not properly make the proposed findings unless it is satisfied:

(a) there is a proper evidential basis to make them,
(b) the evidence on which they are based is cogent and reliable, and not what may be described as 'inexact proofs, indefinite testimony, or indirect inferences,'
(c) Officer BEN4's evidence is actually untrue, and
(d) Officer BEN1's evidence that he fully confessed his misconduct to Officer BEN4 is actually true.

[241] See for example *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; [1992] HCA 66 or *Lim v Lim* [2023] NSWCA 84 at [17]- [27] per Bell CJ, Kirk JA and Griffiths AJA.

18.8. The Commission agrees with points 18.7(a)-(b) but does not accept points 18.7(c)-(d). This is because Officer BEN4's evidence to the Commission was not firm that Officer BEN1 did not disclose the 'unredacted' and 'unedited' version to him with the elements being: he assaulted two young persons, made a false record in his police notebook, and threw his and another officer's BWV devices into the water. Rather, Officer BEN4's evidence was that he could not recall a full, unredacted version with those elements being told to him. Even when pressed by the Chief Commissioner about how extraordinary and memorable a revelation like that just 4 months earlier would be, Officer BEN4 still did not outright reject that he was told this information by Officer BEN1, instead he maintained that he could not recall.[242]

18.9. The Commission does not accept that it needs to be satisfied that Officer BEN1's evidence that he *fully* confessed his misconduct to Officer BEN4 is true. Rather, the Commission needs to be satisfied that it is true that Officer BEN1 confessed enough about his conduct to Officer BEN4 to create a reasonable suspicion that misconduct had occurred to enliven Officer BEN4's duty under s 211F of the Police Act.

18.10. Officer BEN4's legal representative submitted that the only evidence before the Commission that is inculpatory of Officer BEN4 is the evidence of Officer BEN1 in their private examination, specifically:

(a) On a single page he had written the names of more than 20 people who he said were 'all the persons who I have told about this whole incident, the unedited and unredacted version of events which I'm sure you guys are going to hear soon'.
(b) Some of those people were police officers, including '[Officer BEN4]', who was said to be [Officer BEN4].
(c) He had told the people on the list the same version ('Yeah, pretty much, yeah – the truth'), which included that he had assaulted two young persons on 16 February 2024 ('It did, yeah') and that he had removed and destroyed two body-worn video devices knowing they contained evidence of crimes committed ('Yeah'). That evidence was given in a cursory manner way (sic) in response to leading questions intended to elicit what BEN1

[242] Examination of Officer BEN4 at T31-33.

had meant when he had earlier referred to the 'unedited unredacted version of events'.

....

(g) The disclosure to BEN4 was 'probably maybe a month later'.

18.11. Officer BEN4's legal representative stated that beyond the timing 'probably maybe a month later', Officer BEN1 gave no other meaningful evidence about his supposed disclosure to Officer BEN4.

18.12. It was further observed by Officer BEN4's legal representative that:

> The evidence Officer BEN1 gave about disclosing his misconduct to Officer BEN4 is so vague and lacking in detail that it does not provide a sufficient evidential basis for the serious findings the Commission proposes to make against Officer BEN4.
>
> Further, the little detail it does include (that the disclosure occurred 'probably maybe a month later') is contrary to the proposed finding that the disclosure was made in a telephone call on the afternoon of 17 February 2025 (sic). While there was a phone call between the two officers on that day, BEN1 made no claim that that was when he made the disclosures to BEN4. This is the fundamental difficulty with the proposed findings: they can only be made if the Commission ignores the only evidence BEN1 gave about his disclosure to BEN4 that had a degree of specificity.

18.13. Officer BEN4's legal representative submitted that the Commission's findings assume the truth of Officer BEN1's generalised assertions without subjecting them to real scrutiny and there is no consideration as to what weight should be given to his assertions, despite the fact they are uncorroborated, lack detail and denied. Officer BEN4 submits that little weight should be afforded to Officer BEN1's assertions.

18.14. Officer BEN4's submissions went on to highlight that caution should be applied to any of Officer BEN1's evidence that was not corroborated, and cited aspects that weigh against Officer BEN1's credibility in making this submission.

18.15. Officer BEN4's legal representative then highlighted aspects of Officer BEN4's evidence, including that:

- In February, March or April of 2024, Officer BEN1 had not explicitly told him he had done anything wrong. He did, though, have a conversation with Officer BEN1 on 18 February 2024 while they were watching the UFC where Officer BEN1 mentioned a foot pursuit, a wrestle and that 'he was worried it had been captured on body-worn'.
- What Officer BEN1 said did not make him suspicious that Officer BEN1 had 'excessively used force'.
- He did not speak to Officer BEN1 about it again.
- Officer BEN1 did not tell him anything about notes made about the event or what he may have done with the footage or the body-worn cameras. He had, however, heard rumours about Officer BEN1 destroying body-worn cameras by throwing them into the water from gossip around the station.
- He thought it was possible there was a connection between the rumour he had heard and what Officer BEN1 had said on 18 February 2024, but that possibility fell short of a reasonable suspicion.
- He had no independent memory of receiving a call from Officer BEN1 on 17 February 2024 at 3:58pm. In fact, he commenced a shift at 4:00pm that day.

18.16. Officer BEN4's legal representative then went on to make 5 points about Officer BEN4's evidence, specifically the evidence extracted at paragraphs 15.21 – 15.22 above, which they say the Commission's draft report implicitly rejects. In summary these points are:

- Officer BEN4's testimony is consistent with his previous statements regarding Officer BEN1's disclosures on 18 February 2024. The Commission's questioning focused on whether Officer BEN1 had revealed other specific details to Officer BEN4. Officer BEN4 stated that he did not recall any conversation where Officer BEN1 admitted to assaulting 2 young people, making false notes, or disposing of BWV devices. The report's extracts should be understood in the context of Officer BEN4's full evidence, which includes rumors Officer BEN4 had heard about Officer BEN1 disposing of BWV devices.

- it is not correct to characterise Officer BEN4's evidence as suggesting 'a claim of vagueness of recollection because he perceived it was not in his interests to give a full and frank account'. The correct view is that he was a witness who was being careful to give the Commission accurate answers to questions put to him, particularly in circumstances where some time had passed between his conversation with Officer BEN1 on 18 February 2024 and he also felt a need to separate 'what I've heard from other people and what was said to me specifically on that exact date.'
- There is no evidence (apart from that of Officer BEN1) that goes against Officer BEN4's denials.
- There were inaccuracies in the propositions put to Officer BEN4 as reproduced in the first question quoted at paragraph 15.21. Specifically, that Officer BEN1 did not suggest the level of detail articulated in respect of the first element. That Officer BEN1's evidence was not that his unredacted version included that he had created a false record in his police notebook and that it was not Officer BEN1's evidence that he has made these disclosures to Officer BEN4 in a telephone call.
- Although the allegation put to Officer BEN4 and reproduced at paragraph 15.21 appeared to embrace Officer BEN1's evidence that the disclosures were made maybe a month later, the proposed finding by the Commission is that it occurred on 17 February 2025.

18.17. Officer BEN4's legal representative goes on to submit that the Commission cannot assume or infer that the telephone conversation between Officers BEN1 and Officer BEN4 on 17 February 2024 was of the same nature as the calls he had with Officers BEN2 and BEN3 earlier that day because unlike Officers BEN2 and BEN3, Officer BEN4 is not superior to Officer BEN1. And the phone calls suggest that he was not animated by a confessing spirit, but rather a sense of self preservation as the disclosures were made to assess the risk of detection or to help avoid exposure.

18.18. Officer BEN4's legal representative submits that the opposite is more likely, because the conversation was shorter in duration and at a time when Officer BEN4 was about to commence a shift at the police station, Officer BEN1's own evidence was that he told Officer BEN4 maybe a month later not 17 February

2024, and given that Officer BEN4 was not a superior what could be gained by further disclosing these matters to Officer BEN4.

18.19. The Commission accepts that Officer BEN1 did not give precise evidence that he disclosed the unedited and unredacted version of events on the phone to Officer BEN4 on 17 February 2024. However, the Commission maintains that on the totality of the evidence available the inference that he did so is both open and appropriate. This is because:

- Officer BEN1 also did not give precise evidence that he disclosed the unedited and unredacted version of events on the phone to Officers BEN2 and BEN3 on 17 February 2024.[243] Instead he said it was maybe 2-3 days later. However, as the evidence reveals that is precisely what happened.
- The Commission acknowledges that Officer BEN4 was not senior to Officer BEN1. Their relationship can be characterised as one of friendship. The evidence of Officer BEN1, which the Commission accepts, is that he was in a state of stress and panic about the events that occurred on 16 February 2024. It logically follows that he would decide to first reach out to a fellow police officer whom he considered a friend to disclose what he had done and seek his advice about next steps. As can be seen below, the call charge records support that it was in fact Officer BEN4 who Officer BEN1 attempted to reach first. When he did not succeed, he immediately called Officer BEN5, another officer whom he considered a friend. Within 21 minutes of ending his discussion with Officer BEN5, Officer BEN1 called and spoke to Officer BEN3 where he disclosed sufficient information about what he had done to enliven Officer BEN3's obligations under s 211F of the Police Act. Within about 10 minutes of that call concluding, Officer BEN1 attempted to contact Officer BEN2 without success. When he did speak to Officer BEN2 about an hour later, Officer BEN1 again disclosed sufficient information about what he had done on 16 February 2024 to enliven Officer BEN2's obligations under s 211F of the Police Act. About 3 hours and 34 minutes later Officer BEN1 spoke to Officer BEN4 for 2 minutes and 44 seconds. Given the close proximity of these calls the inference is available that the content of the calls were similar. Having regard to all the evidence, a strong inference to this effect is available to

[243] Examination of Officer BEN1 at T81.

the Commission, as part of its fact-finding function, and should be drawn. This is a clear inference and not mere conjecture or speculation.[244]

Caller	Receiver	Date	Time	Duration	Type
BEN1	BEN4	17/02/2024	10:35AM	0 min	Voice
BEN1	BEN5	17/02/2024	10:35AM	3 min 32 s	Voice
BEN1	BEN3	17/02/2024	10:59AM	4 min 48 s	Voice
BEN1	BEN2	17/02/2024	11:13AM	0 min	Voice
BEN2	BEN1	17/02/2024	12:13PM	N/A	SMS
BEN2	BEN1	17/02/2024	12:13PM	11 min 19 s	Voice
BEN4	BEN1	17/02/2024	3:25 PM	0 min	Voice
BEN1	BEN4	17/02/2024	3:58PM	2 min 44 s	Voice

- The evidence of Officer BEN4 of a meeting with Officer BEN1 on 18 February 2024 to watch a UFC fight at which Officer BEN1 referred to a 'foot pursuit', a 'wrestle' and his worry about what may have been captured on BWV fortifies the likelihood of these topics being discussed during their telephone conversation the previous day.
- Officer BEN1 gave evidence about the single page he had written that listed the names of more than 20 people who he said were all the people he had told about this whole incident, the 'unedited' and 'unredacted' version of events. He was asked if there was any significance to the order of the names on the list. Officer BEN1 said, 'I mean, at the start I think -it was sort of the order, but then -it just sort of becomes listing.'[245] He was confident, at least, that the order of the first 6 was correct. It is notable that the reference to Officer BEN4 appears as the seventh name in the list, immediately after Officers BEN2 and BEN3.[246] This is consistent with the inference that he disclosed the unedited version of events to Officer BEN4 on the phone on 17 February 2024.
- The Commission rejects the submission that the phone calls suggest that Officer BEN1 was not animated by a confessing spirit. Officer BEN2 agreed with the characterisation by Counsel Assisting that Officer BEN1 was 'confessing' to him.[247] The appearance 'JMJ' on the list who Officer

[244] The distinction between inferences and mere conjecture or speculation has been emphasised: *Seltsam Pty Limited v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [84] – [88]; *Coastwide Fabrication & Erection Pty Ltd v Honeysett* [2009] NSWCA 134 at [60] – [64]; *Crane v R* [2025] NSWCCA 93 at [203].
[245] Examination of Officer BEN1 at T21.
[246] Exhibit ZLJ2C.
[247] Examination of Officer BEN2 at T18.

BEN1 confirmed represented Jesus, Mary, and Joseph as well as reference to his priest further supports that he was embracing a confessing spirit in his discussions with people about the events of 16 February 2024.[248]

18.20. The Commission is satisfied that when it considers and weighs all of the evidence in Operation Bendoc, the findings made about Officer BEN4 as summarised at paragraph 18.4 are both open and appropriate and do not offend against the principles expressed in *Briginshaw v Briginshaw*.

Submissions - Officer BEN2

18.21. The submissions made to the Commission on behalf of Officer BEN2 acknowledge and accept that Officer BEN2 failed to meet his statutory duty under s 211F of the Police Act. However, it is primarily submitted on behalf of Officer BEN2 that this failure does not amount to 'serious misconduct' under s 10 of the LECC Act.

18.22. It is submitted on behalf of Officer BEN2 that the omission does not fall within s 10(1)(a) of the LECC Act (the definition of 'serious misconduct') as neither ss 211F nor 201 of the Police Act give rise to a serious indictable offence. Furthermore, the submissions note that the Commission did not recommend prosecution of Officer BEN2 for his inaction. Section 10(1)(a) also includes conduct which could be subject to serious disciplinary action, and it is submitted that Sergeant BEN2's omission does not reach this threshold given several mitigating factors (outlined in paragraph 18.25 below).

18.23. It was also submitted on behalf of Officer BEN2, that the omission did not fall within s 10(1)(b) of the LECC Act as Officer BEN2's inaction was an isolated incident and therefore did not show a pattern of officer misconduct, or involvement of more than one participant. The Commission accepts this submission, and notes in accordance with paragraph 16.9 above this is not the basis for the finding of serious misconduct in respect of Officer BEN2.

18.24. Further, it was submitted that s 10(1)(c) of the LECC Act also did not apply as Officer BEN2's conduct is not corrupt conduct. The Commission acknowledges this submission and notes that as outlined in paragraph 16.9 of this report,

[248] Examination of Officer BEN1 at T21; Exhibit ZLJ2C.

s 10(1)(c) is not the basis for the finding of serious misconduct in respect of Officer BEN2.

18.25. While the submissions received stated that Officer BEN2 recognised he is a senior police officer and therefore holds serious responsibility, it is submitted that mitigating factors should be considered. The mitigating factors which were raised to argue against the finding of serious misconduct were as follows:

- Officer BEN2 was open and cooperative through the course of the Commission's investigation.
- The context of the disclosure from Officer BEN1 shows that Officer BEN2's misconduct was less severe than other officers. These contextual factors were the fact that Officer BEN2 was off-duty, mentally fatigued, had his focus on his young children, had not worked with Officer BEN1 for over two years, saw the call as a request for guidance, was informed by Officer BEN1 that he had previously spoken to another Sergeant, had made clear to Officer BEN1 that he should report the misconduct, and had gone to sleep and proceeded to attend another night shift shortly after the call so had not turned his mind to the issue again. The submissions note that this does not excuse the inaction but provides some context for comparison to the actions of other officers.
- Officer BEN2 had no malicious intent. Rather it was a 'misjudgement in a complex situation'.
- Officer BEN2 has a commendable service record and has reported misconduct on previous occasions (in separate cases), and that this investigation has taken a serious toll on Officer BEN2's wellbeing.

18.26. On this primary submission, Sergeant BEN2 argues that the recommendations by the Commission should be altered. That is, there should not be a finding of serious misconduct and the appropriate action ought be targeted non-reviewable action, as set out in Schedule 1 of the Police Act. However, if this action is deemed inappropriate, it is submitted that action under section 173(2)(d) would be appropriate.

18.27. The Commission acknowledges the mitigating factors outlined, including fatigue and Officer BEN2's focus on non-work-related matters at the time of the call. While there is no doubt that Officer BEN2 has a commendable service record, an

accurate understanding of his obligations under s 211F of the Police Act and was cooperative with the Commission, these factors do not lessen the significance of the omission to take the actions he was obliged to do so under s 211F of the Police Act. As stated in this report, the statutory obligation under s 211F of the Police Act far exceeds mere guidance or policy. It represents an express duty inserted by Parliament in the last decade. The provision is an emphatic statement of a minimum requirement for police officers in NSW for modern day policing.

18.28. In the Commission's opinion the revelations of Officer BEN1 should have been so extraordinary and memorable that even if impacted by fatigue and other obligations, Officer BEN2 should have taken steps to ensure the suspected misconduct was reported to a superior. This was a conscious failure on the part of Officer BEN2 to comply with a very important statutory duty which he understood.

18.29. In these circumstances, it is conduct that could result in serious disciplinary action. In fact, as explored in the report, a failure to report under s211F has been the basis for the dismissal of officers under s 181D of the Police Act (see paragraphs 14.43 – 14.45). The Commission maintains that the finding that Officer BEN2 engaged in serious misconduct is both open and appropriate.

18.30. What disciplinary action is taken in respect of Officer BEN2 is a matter that rests with the Commissioner of Police. At least some of the matters raised by Officer BEN2 will assist a decision concerning the form of reviewable action which is appropriate in this case.

19. Recommendations

Duty to report misconduct under s 211F Police Act

19.1. During the examinations, Officers BEN4, BEN3, BEN2, BEN5 and DOC5 gave evidence, to varying degrees, of the threshold to enliven their duty to report misconduct. There are clear inadequacies in the understanding of some of these officers of the s 211F duty to report. The misunderstanding of the s 211F threshold is likely shared by other members of the NSW Police Force.

19.2. The evidence reveals that each officer received training on their s 211F duty to report misconduct while at the Police Academy. On the evidence before the

Commission, any refresher training concerning the s 211F duty has had mixed effectiveness.

19.3. The Commission recommends that the NSW Police Force implement refresher training, utilising the Operation Bendoc report, to reinforce for all police officers the importance of reporting misconduct through the appropriate channels and ensuring a thorough understanding of the threshold requirements in s 211F together with the prospect of possible prosecution for a s 201 offence and/or serious disciplinary consequences if an officer fails to comply with the duty under s 211F Police Act.

Officer mental health and work pressures contributing to excessive uses of force

19.4. The evidence of Officer BEN1 revealed recurring anger and punitive thought processes when acting as a police officer, including the desire to inflict gratuitous force in the form of 'extra-curial punishment'. His evidence referred as well to dissatisfaction with his work as a police officer.

19.5. The evidence of Officer BEN1 indicated he may have been suffering from mental health issues, exacerbated by external personal pressures and internal policing pressures which, in combination, contributed to his anger and his clear and repeated use of gratuitous force.

19.6. One of the purposes in reporting of suspected misconduct under the s 211F duty is to inform the NSW Police Force of potential problematic behaviour on the part of the officer which may require a welfare as well as a disciplinary response. The investigation in Operation Bendoc has exposed pressures and stressors which may arise and impact adversely on police officers and which the NSW Police Force should recognise and address by way of welfare support and ongoing scrutiny of the conduct of officers.

19.7. The Commission recommends that the NSW Police Force provide additional support to operational officers who may be experiencing excessive internal and external stressors and potential mental health concerns.

19.8. In June 2025, the NSW Auditor General reported on the impact of policing, fatigue and workload burden on the psychological wellbeing of NSW Police

officers. The comments of Officer BEN1 echo the evidence gathered by the Auditor General in that performance audit.[249]

19.9. In its June 2025 report, the Audit Office recommended that by July 2026, the NSW Police Force should:

(1) develop and implement a responsive workforce allocation model that matches police numbers to command–level workload demands (call-out volumes and crime rates), and ensure that staff levels are regularly reviewed and revised according to changing workload levels;
(2) fully implement the health and safety incident notification system and regularly report on the causal factors that lead to psychological incidents and injury claims in the police workforce;
(3) investigate and report on the factors that contribute to police role overload and burnout, and use this information to adjust policy settings, practices, and controls; and
(4) implement a strategy, process, and evaluation framework that links police wellbeing initiatives and resources to evidence-based psychological risk factors.

19.10. Utilising its powers under s 133(1)(b) of the LECC Act, the Commission endorses and repeats the recommendations made by the Audit Office in its June 2025 report. The evidence in this investigation, and the findings of the Commission, reinforce the need for the NSW Police Force to adopt and implement the recommendations made by the Audit Office.

Training

19.11. The Commission recommends that the NSW Police Force use the Operation Bendoc report in training at the Police Academy (and in refresher courses) by way of case studies concerning:

(a) the lawful and proper use of force in the course of policing duties;
(b) the vital importance of use and retention of BWV evidence;

[249] NSW Auditor General Report, 11 June 2025, at page 9 *Performance audit of the mental health and wellbeing of NSW police* <https://www.audit.nsw.gov.au/sites/default/files/documents/REPORT%20-%20The%20mental%20health%20and%20wellbeing%20of%20NSW%20police.pdf>.

(c) the importance of compliance with the duty to report under s 211F of the Police Act; and
(d) the potential adverse consequences for individual police officers and the reputation of the NSW Police Force if officers fail to comply with the lawful and proper exercise of their duties in these areas of vital importance to contemporary policing in NSW.

Section 201 Police Act

19.12. The Commission endorses the recommendation made to the Minister for Police and Counter-terrorism in the Operation Eacham report and recommends that the limitation period for commencing a prosecution for an offence under s 201 Police Act be extended from 6 months to at least 12 months.

Access to NSW Police Force body-worn video footage

19.13. In a March 2025 report,[250] the Commission addressed the need for prompt access to NSW Police Force BWV to allow the Commission to carry out its functions effectively. The Commission acknowledged improvements in access since September 2023 but noted the desirability of automatic access to BWV footage. The Commission said:[251]

> Therefore the Commission maintains that enabling direct access to all BWV footage related to all of the Commission's legislated functions, including critical incident monitoring, and investigation and oversight of misconduct matters, is preferable, and would help minimise delays and unnecessary use of resources for both the Commission and the NSW Police Force.

19.14. The present investigation supports the need for the Commission to have direct access to NSW Police Force BWV footage. This will allow the Commission to locate and view BWV footage which would facilitate identification of misuse of police powers including excessive use of force without the matter being subject of a misconduct complaint. This is an important capacity for an integrity body such as the Commission exercising oversight of policing in NSW and will promote integrity and enhance public confidence in the NSW Police Force.

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[250] *Review of NSW Police Force body-worn video policy and practice,* March 2025, at para 4.4.
[251] *Review of NSW Police Force body-worn video policy and practice,* March 2025, at para 4.4.

19.15. The Commission recommends to the NSW Police Force that the Commission have direct and automatic access to the NSW Police Force BWV footage.

Appendix 1 – The Commission's Statutory Functions

1. The LECC Act lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.

2. Section 9 of the LECC Act defines "police misconduct", "administrative employee misconduct" and "Crime Commission Officer misconduct":

9 Police misconduct, administrative employee misconduct and Crime Commission officer misconduct

(1) Definition — police misconduct For the purposes of this Act, **police misconduct** means any misconduct (by way of action or inaction) of a police officer —

(a) whether or not it also involves participants who are not police officers, and

(b) whether or not it occurs while the police officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

(2) Definition — administrative employee misconduct For the purposes of this Act, **administrative employee misconduct** means any misconduct (by way of action or inaction) of an administrative employee —

(e) whether or not it also involves participants who are not administrative employees, and

(f) whether or not it occurs while the administrative employee is officially on duty, and

(g) whether or not it occurred before the commencement of this subsection, and

(h) (d) whether or not it occurred outside the State or outside Australia.

(3) Definition — Crime Commission officer misconduct For the purposes of this Act, **Crime Commission officer misconduct** means any misconduct (by way of action or inaction) of a Crime Commission officer —

(a) whether or not it also involves participants who are not Crime Commission officers, and
(b) whether or not it occurs while the Crime Commission officer is officially on duty, and
(c) whether or not it occurred before the commencement of this subsection, and
(d) whether or not it occurred outside the State or outside Australia.

(4) Examples Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively —

(a) conduct of the officer or employee that constitutes a criminal offence,
(b) conduct of the officer or employee that constitutes corrupt conduct,
(c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),
(d) conduct of the officer or employee that constitutes a disciplinary infringement.

(5) **Former police officers, administrative employees and Crime Commission officers** Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer, administrative employee or Crime Commission officer involved is no longer a police officer, administrative employee or Crime Commission officer (but only in relation to conduct occurring while he or she was a police officer, administrative employee or Crime Commission officer).

Accordingly, references in this Act to a police officer, administrative employee or Crime Commission officer extend, where appropriate, to include a former police officer, administrative employee and Crime Commission officer, respectively.

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

> (2) 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.
>
> (3) 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.

4. “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 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.

5. 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).

6. 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).

7. 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.

8. 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".

9. 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.

10. Section 146 provides:

"**146 Notification of proposed action on reports**

(1) As soon as practicable after the Commissioner of Police or Crime Commissioner receives a report under section 27, 32, 132, 134, 135 or 136 or a copy of the report is laid before a House of Parliament, the Commissioner of Police or Crime Commissioner, respectively, must notify the Commission of the nature of the action taken, or to be taken, as a result of the report.

(2) If the Commission has provided a copy of the report to the Commissioner of Police or Crime Commissioner and the Commission is of the opinion —

(a) that the Commissioner of Police or Crime Commissioner has unreasonably delayed notifying the Commission of the nature of the action taken, or to be taken, as a result of the report, or

(b) that the nature of the action taken, or to be taken, as a result of the report is, in the circumstances of the case, unreasonable or inadequate, or

(c) that the Commissioner of Police or Crime Commissioner has unreasonably delayed taking action as a result of the report,

the Commission is to advise the Commissioner of Police or Crime Commissioner accordingly by notice in writing served on that Commissioner.

(3) If the Commission and the Commissioner of Police do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Police Act 1990 that the issue is unresolved.

(4) If the Commission and the Crime Commissioner do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Crime Commission Act 2012 that the issue is unresolved.

(5) The issue may be the subject of a Commission's special report under section 138.

Appendix 2 – Use of Names and Witnesses or Pseudonyms in this Report

1. All witnesses who gave evidence in Operation Bendoc did so in private examinations. Having considered matters relevant to the choice between a private and public examination under s 63 of the LECC Act, the Commission had determined that each examination should take place in private.[252]

2. There is a legal restriction in s 177 of the LECC Act concerning the disclosure and use of evidence given at a private examination.

3. As Operation Bendoc was the subject of private examinations under Part 6 of the LECC Act, the Commission may prepare a report in relation to the investigation.[253] The Commission may prepare a public report[254] or an effectively private report to the Minister for Police and Counterterrorism and the Commissioner of Police.[255]

4. As Operation Bendoc did not involve a public hearing, the Commission is not obliged to prepare a public report concerning the investigation.[256] However, having regard to the issues raised in the investigation and the report, the Commission has determined that a public report is appropriate in this case.

5. The question arises as to whether persons (including witnesses) should be named in the report or should referred to by reference to a pseudonym.

6. It should be kept in mind that the Commission is not a court hearing adversarial civil or criminal proceedings. The Commission is empowered to hold public or private examinations in aid of its investigatory functions under the LECC Act. The principle of open justice, which applies to court proceedings, has no application to Commission examinations.[257]

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[252] Factors relevant to the choice of private and public examinations under s 63 LECC Act were considered in the *Public Decision Concerning Public and Private Examinations in Aid of an Investigation in Operation Mantus* (3 March 2023) ("Operation Mantus Public Examination Decision").
[253] LECC Act s 132(1).
[254] LECC Act ss 132(3), 133.
[255] LECC Act s 135.
[256] LECC Act s 132(2).
[257] Paragraph 10, Operation Mantus Public Examination Decision.

7. Although the LECC Act does not provide expressly for the making of pseudonym orders, this step is incidental to the power to conduct private examinations, to make orders under ss 176 and 177 and to issue a public report under s 132 of the LECC Act.

8. The use of pseudonyms is simply a mechanism to identify different persons in the report without using names. This is a necessary step to facilitate a meaningful and informative report without detracting from analysis of the important issues arising in the context of the investigation.

Witnesses

9. The starting point is that each witness gave evidence in a private examination and there is, subject to further order of the Commission, a statutory restriction upon revelation of that evidence including disclosure of the identity of the witness.

10. With respect to possible naming of police officers in public reports of the Commission, guidelines have been prepared by the Commission for general use.[258]

11. Several factors were also referred to in the Operation Mantus Public Examination Decision and are relevant to the question of naming persons and the use of pseudonyms in a public report under s 132 of the LECC Act.[259]

12. For the purposes of this report, the Commission has determined that Officers DOC1, DOC2, DOC3, DOC4 and DOC5 should not be identified. No adverse findings has been made with respect to any of them. As they are not 'affected persons' within the meaning of s 133(3) of the LECC Act, the Commission has utilised a separate class of pseudonyms with the prefix 'DOC' for these officers to assist in distinguishing them from the 'affected persons' identified in paragraph 13 below and allocated the prefix 'BEN'.

[258] Guidelines on the use of pseudonyms and non-publication orders in Commission reports (November 2023).
[259] Paragraphs 38 – 66 Operation Mantus Public Examination Decision. See also paragraphs 4 – 5, 9 Operation Mantus Confidential Examination Decision (3 March 2023).

13. Adverse findings are made in this report concerning Officers BEN1, BEN4, BEN3, BEN2 and BEN5.

14. The Commission acknowledges there can be detrimental consequences flowing to the officer and the officer's family through identification in a public report of the Commission. There is also an argument that transparency points to identification of an officer against whom adverse findings have been made.

15. In this case the conduct of Officer BEN1 has been referred to the Office of the Director of Public Prosecutions to seek advice as to possible prosecution. In the circumstances it is both open and appropriate to describe Officer BEN1 by use of a pseudonym to reduce the risk of prejudice to any future prosecution.

16. The Commission has also determined that Officers BEN4, BEN3, BEN2 and BEN5 should also be described by a pseudonym. Each remains a serving officer in the NSW Police Force. The importance of compliance with the s 211F duty to report can be explained in this report without naming these officers.

Civilians

17. Civilians whose identity was revealed during the course of evidence given by witnesses, should not be identified. It is not necessary to identify any of the civilians mentioned in this report to understand their role in the events under investigation.

18. Further, where young persons under 18 years of age are mentioned in a report, the Commission should adopt the same approach, by analogy, as that taken in courts where there are statutory restrictions upon identification of young persons.[260] A pseudonym will be used with respect to the young persons referred to in this report.

19. All civilians, regardless of their age, will be referred to by a pseudonym with the prefix 'CIV' followed by a number. This is to assist in distinguishing them from the police officers referred to in this report.

[260] See, for example, s 15A *Children (Criminal Proceedings Act) 1987*.

Locations

20. In line with the Commission's Guidelines on the use of pseudonyms and non-publication orders in Commission reports, a pseudonym has been used for specific police stations.

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