

Report on an incident in
the Fremantle Offender
Management Area
1 January 2017

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TABLE OF CONTENTS

| | |
|--|-----------|
| INTRODUCTION | 1 |
| An overview | 1 |
| CHAPTER ONE..... | 5 |
| The arrest and its aftermath | 5 |
| Assessment of Ms Duncan's injury at the scene | 5 |
| The Fremantle Police Station Offender Management Area..... | 7 |
| Recommendation | 8 |
| Assessment of injury at Fremantle Police Station..... | 9 |
| Comment..... | 10 |
| CHAPTER TWO..... | 11 |
| Ms Duncan remains in custody | 11 |
| CHAPTER THREE..... | 13 |
| Policies and procedures | 13 |
| Training..... | 14 |
| CHAPTER FOUR..... | 15 |
| Conclusion | 15 |

INTRODUCTION

An overview

- [1] New Year's Eve 2017 was not an ordinary night for Ms Duncan.¹ She and her daughter had been to a New Year's Eve function. At about 2.00 am, her daughter was driving home. Ms Duncan was a passenger. The daughter was stopped by police and following a preliminary breath test, was required to accompany the police officers to Fremantle Police Station. Staffing levels had increased in anticipation of New Year's Eve celebrations.
- [2] Ms Duncan asked First Class Constable (1/C) Ball if he could give her a breath test so she could consider driving home. He declined. What happened then is controversial. Ms Duncan was charged with failing to provide her personal details and assaulting 1/C Ball by blows to the head as he attempted to restrain her.
- [3] After trial, she was acquitted of all charges, the Magistrate making adverse comments about the credibility of the police officers, while finding that the evidence of Ms Duncan and her daughter had the ring of plausibility.
- [4] In any event, on the night in question, there was a physical interaction between Ms Duncan and police officers. During the course of the struggle, Ms Duncan's hip was dislocated, causing her immediate and continuing pain.
- [5] What then followed was extraordinary. It is extraordinary in part because it followed the Coroner's inquest on the death of Ms Dhu in police custody. In the case of Ms Dhu, the Coroner delivered her findings on 16 December 2016, just 14 days before Ms Duncan's arrest. The findings were the subject of extensive publicity. Among other things, the Coroner found that the standard of care in the lockup fell well below the standards that should be expected of the WA Police Force.
- [6] The Coroner also found that the behaviour of a number of police officers was unprofessional and inhumane. The publicity ought to have heightened awareness in custody officers as to the care to be taken in cases of suspected medical issues.
- [7] Ms Duncan was conveyed in a police security van to Fremantle Police Station. She was physically assisted from the police vehicle into the

¹ All names have been replaced by pseudonyms to preserve anonymity.

Offender Management Area (OMA). The OMA in Fremantle does not comply with policy and is unsuitable for disabled people, among others.

- [8] Ms Duncan was held for over five and a half hours, during which she constantly complained of pain associated with her injury. Ms Duncan made requests to contact a lawyer, to see her daughter and for drinks of water. The majority of Ms Duncan's requests were ignored by the staff entrusted with her care. Her frequent complaints of pain were met with scorn by Police Auxiliary Officer (PAO) Lewis.
- [9] The *Criminal Investigation Act 2006* s 137 provides that an arrested person has a right to any necessary medical treatment.
- [10] WA Police Force policy AR-05.01.2 expands on the legislative requirement and is also binding on police officers.
- [11] Neither the *Criminal Investigation Act 2006* nor the policy were followed, either by the arresting officer, custody supervisor or anyone else until the shift change.
- [12] Incredibly, the only reason she was detained for a lengthy period was because she was unable to stand at the counter to have her fingerprints taken. It was not until she was due to be transferred to the Perth Watch House that Ms Duncan received the medical treatment to which she was entitled, when she was taken by ambulance to Fiona Stanley Hospital.
- [13] Although the incident occurred on 1 January 2017, the Commission was not notified until 20 November 2017 after Ms Duncan made an online complaint to the WA Police Force on 16 November 2017.² The Commission decided to conduct an investigation in cooperation with the WA Police Force's Internal Affairs Unit (IAU).
- [14] The Commission has a statutory requirement to investigate or oversight allegations of police misconduct, which includes reviewable police action:
- reviewable police action** means any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that —
- (a) is contrary to law; or
- (b) is unreasonable, unjust, oppressive or improperly discriminatory.³
- [15] IAU has concluded a comprehensive investigation and made recommendations for disciplinary proceedings in respect of a number of officers. The Commission has decided that there is a public interest in

² *Corruption, Crime and Misconduct Act 2003* s 28.

³ *Corruption, Crime and Misconduct Act 2003* s 3.

reporting to Parliament even though the matter has not yet been finalised.

- [16] There were so many failures by many officers to afford Ms Duncan timely medical attention, that it is pointless for the Commission to form an opinion of misconduct in respect of any one individual. Collectively, the actions on the night justify an opinion that the treatment of Ms Duncan was oppressive, unjust and contrary to law.
- [17] Ms Duncan was in police custody for over five hours. The Commission has selected portions of CCTV footage to illustrate some aspects of her time in custody.
- [18] A citizen interacting with police is entitled to humane treatment. Ms Duncan's experience while in police custody breached a duty of care owed to her. It should not be repeated.

CHAPTER ONE

The arrest and its aftermath

- [19] At about 2.00 am on 1 January 2017, Ms Duncan was the passenger in a vehicle being driven by her daughter. As they travelled home from a New Year's Eve celebration, her daughter was stopped by police and following a preliminary breath test, was required to accompany the police officers to Fremantle Police Station for a formal breath analysis.
- [20] With her daughter being detained, Ms Duncan asked 1/C Ball to permit her to take a breath test so she may consider driving the vehicle from where they had been stopped. 1/C Ball refused and Ms Duncan remonstrated with him over the matter to the extent that 1/C Ball formed the belief her behaviour was disorderly. He requested her personal details with the intention of issuing Ms Duncan an infringement notice.
- [21] When Ms Duncan allegedly failed to provide her details, 1/C Ball went to arrest her. It was alleged Ms Duncan struck 1/C Ball to the head twice as he attempted to restrain her. 1/C Ball was assisted by Senior Constable (S/C) Graham and during the struggle, Ms Duncan suffered a dislocated hip. She immediately complained of pain in her leg.
- [22] Ms Duncan was charged with failing to provide her personal details and assaulting a public officer. She pleaded not guilty and a trial was held before Fremantle Magistrates Court in August 2017. The Magistrate dismissed the charges and in doing so, commented on the presentation and reliability of the police evidence, along with his concerns in relation to the lack of care Ms Duncan received whilst in police custody.
- [23] The Commission reviewed the IAU investigation of the circumstances of the arrest and subsequent acquittal. It has concluded that the investigation was adequate and the conclusions reached are open to be drawn.
- [24] The decision by the Magistrate indicates at the very least, he entertained a reasonable doubt as to Ms Duncan's guilt. It is not possible to say more.
- [25] The Commission's investigation focussed on the conduct of police officers following the initial struggle when Ms Duncan sustained her injury.

Assessment of Ms Duncan's injury at the scene

- [26] Ms Duncan states she felt hip pain whilst still on the ground following her arrest and that she told 1/C Ball and S/C Graham, using words similar to

“get the fuck off me, you’re hurting me or you’ve hurt me”. Ms Duncan states she was dragged to an awaiting police van. She was not able to identify the officers who moved her. Her daughter stated she did not see her mother being moved to the police van, but recalled she complained of an injury and asked to go to hospital whilst still on the ground.

- [27] 1/C Ball stated that whilst she was on the ground, Ms Duncan did not make any comment in relation to being injured or wanting medical attention. It was his recollection that she continued to shout abuse at him and S/C Graham, including after she was given her *Criminal Investigation Act 2006* rights during which she was advised she could seek medical attention.
- [28] S/C Graham told IAU investigators that once Ms Duncan was in handcuffs, most of his attention was on dealing with her daughter. He said he was aware Ms Duncan was complaining of a sore thigh and claimed she had been kned by the arresting officers. He assessed that she did not need immediate medical attention and felt she was exaggerating her pain. This assumption of exaggeration was subsequently made by others.
- [29] During the arrest of Ms Duncan, one of the officers made a police radio call requesting urgent assistance. As a result, numerous other police officers arrived at the scene shortly after and observed Ms Duncan.
- [30] 1/C Ball stated that he walked alongside Ms Duncan as she moved towards the police vehicle and did not have to provide her with any assistance to walk. He denied she was dragged or carried to the waiting police vehicle. He stated that as they walked, he provided a briefing to one of the officers who conveyed Ms Duncan away from the scene. He stated Ms Duncan complained her leg was sore and admits he told the other police officer that he thought Ms Duncan was 'bunging it on'.
- [31] The officer who 1/C Ball spoke with as they walked towards the vehicle may have been S/C Lowe. When interviewed by IAU, S/C Lowe recalled Ms Duncan was walking at the scene and one of the officers had suggested she was faking the injury. S/C Lowe was unable to recall the incident in detail but believed, independently of what he had been told, that Ms Duncan did not need medical attention at that time.
- [32] 1/C Harris told IAU investigators that she searched Ms Duncan before she was placed into the police vehicle. 1/C Harris stated she was shouting that her hip was injured and she was favouring her other side. 1/C Harris acknowledged the injury but did not sense it required an ambulance to attend.

- [33] The observations of S/C Lowe and 1/C Harris are similar to some of the other officers who attended the scene. Those that were aware Ms Duncan was injured stated they did not believe the injury was of such an extent that it required immediate medical attention.

The Fremantle Police Station Offender Management Area

- [34] In mid-2012, a decision was made to vacate the Fremantle Police Complex (Henderson Street) due to a range of building related problems. A number of critical maintenance issues including the need for air conditioning plant replacement, electrical system and switchboard upgrade, asbestos removal and termite damage, resulted in the need to vacate the site. Operations were relocated to various temporary commercial leases in the Fremantle CBD, Myaree and Bibra Lake. The complex was vacated in early 2013.
- [35] Fremantle is the second major CBD within greater Perth, after the Perth CBD. It has a high degree of commercial and entertainment activity. It has a significant stock of social housing. It is an area of high demand for police services and is expected to remain so.
- [36] The Commission is advised the efficiency and effectiveness of service delivery in and around Fremantle is being impaired and compromised by the constraints imposed by operating from a number of inadequate premises, which fail to provide safe and secure custodial facilities or timely vehicle movements.
- [37] It was necessary to find premises to house the OMA. The OMA is currently housed in a former bank building.
- [38] The OMA includes stairs and sliding glass doors, which are contrary to safe and recommended standards for custody, and place staff and prisoners at risk. Interim works have been undertaken to improve the situation. However, it remains noncompliant with best practice and WA Police Accommodation Standards.
- [39] The custody area is serviced by a single set of stairs from the basement car park which is also shared with other tenants of the building. This is another safety and security risk that needs to be managed.
- [40] Construction of a new purpose built facility has not yet been approved. An Expression of Interest process is currently underway to identify premises that will meet the WA Police Force requirements for a new District Police Complex. A shortlisting process has been completed.

- [41] The OMA is accessed directly from Leake Street through a nondescript glass sliding door which opens onto the public footpath. Officers do not have access to a lockup or other security controls to isolate individuals in custody from other members of the public.
- [42] Officers experience difficulties in complying with their requirement to offer arrested persons some protection from the mass media.⁴
- [43] From the CCTV footage on 1 January 2017, it is observed that not all officers have swipe card access to open the glass sliding door and officers must stand in the doorway to prevent it from closing.
- [44] There are nine steps to be negotiated from street level to the landing area where another swipe access door leads into the entrance of the OMA.
- [45] The room used to conduct breath analysis tests is contained within the OMA. The room is without a door and there is little protection or privacy either for a person undergoing breath analysis or an arrested person.
- [46] The Commission is aware that the physical construction of the holding cells within the OMA has been deemed unsuitable to be used for noncompliant persons in custody. As a result, Fremantle Police Station management have implemented processes to accommodate the frailties in their infrastructure.
- [47] The risk to police officers escorting a noncompliant arrested person up stairs is obvious.
- [48] The inadequacy of the building for an arrested person with a physical impairment is apparent in the CCTV footage where Ms Duncan must ascend the steps.
- [49] Proper lockup facilities would include disabled access.

Recommendation

- [50] Ms Duncan will not be the only person with an injury or physical impairment to be processed in the OMA. Her pain was exacerbated by the stairs and lack of other facilities.
- [51] The Commission recommends that the Government give urgent consideration to upgrading the Fremantle OMA to a standard compliant with the Police Building Code.

⁴ *Criminal Investigation Act 2006* s 137(3)(b).

Assessment of injury at Fremantle Police Station

- [52] Ms Duncan was conveyed to Fremantle Police Station by S/C Lowe, S/C Parry and Constable Hill. From the moment the police security van in which Ms Duncan was transported arrived at Fremantle Police Station, all activity surrounding her detention is captured on CCTV footage.
- [53] For about five minutes following their arrival at the police station, the conveying officers and S/C Graham encouraged Ms Duncan to remove herself from the rear of the police vehicle.
- [54] After Ms Duncan told the officers she was unable to get herself out of the vehicle, Constable Hill entered the security pod with her and assisted her to get out. Once on the footpath, Ms Duncan was unable to bear weight on her leg or stand unassisted. With S/C Graham and Constable Hill supporting her on either side, Ms Duncan was encouraged to walk into the police station, although she appears unable to step.
- [55] The conveying officers asserted Ms Duncan was complaining of being in significantly more pain than she had been minutes earlier when she was placed in the pod.
- [56] Because of New Year's Eve celebrations, Fremantle Police Station had extra staff specifically assigned to deal with the anticipated increase in custodial events. These officers were Sgt Mayer and PAO Lewis. They made an assessment of Ms Duncan as she attempted to stand on the footpath.
- [57] Following negotiation between Ms Duncan, S/C Graham and Constable Hill, with Sgt Mayer, PAO Lewis and others watching on, they part carried and part dragged Ms Duncan backwards, with her legs trailing along the ground.
- [58] The incident in the street was witnessed by Inspector Morrissey who was also the Forward Commander for the South Metropolitan District and responsible for 290 officers.
- [59] He spoke with the Custody Sergeant to ensure that Ms Duncan was appropriately assessed. When he became aware of Ms Duncan's medical outcomes later, he was bitterly disappointed that the professional trust he had placed in the Custody Sergeant had been misplaced.
- [60] Supported by the officers, Ms Duncan was dragged backwards up the stairs. She was screaming in pain the whole time.

- [61] The CCTV footage accompanying this report has been pixelated to preserve privacy. In the original footage, Ms Duncan's face can be seen, clearly contorted with pain as her leg hits each step.
- [62] From their statements and other material, it appears the officers present formed the opinion that Ms Duncan was feigning her injury, trying to avoid the process that would follow her arrest.
- [63] Both Sgt Mayer and PAO Lewis told IAU investigators they were aware Ms Duncan had stated she was injured and could not walk before she was brought into the OMA. Independently of any other person, both of these officers formed an opinion that Ms Duncan was feigning her injury.

Comment

- [64] Officers involved in removing Ms Duncan from the police van, observing her on the footpath and dragging her up the stairs, all had an opportunity to assess her medical condition. While one possibility was that she was exaggerating or feigning her symptoms, an equal possibility was that she had suffered a genuine injury. An assessment by the custody officers or others in the street might have recognised that any injury to Ms Duncan's hip might be exacerbated by the stairs.
- [65] There was a collective failure to comply with the *Criminal Investigation Act 2006* or WA Police Force policy.
- [66] S/C Lowe in his response considers it would be more appropriate to say that there were some failures on the night in a manner which does not implicate every officer who was involved in the incident.
- [67] The Commission agrees that some officers had greater responsibility for Ms Duncan's welfare than others who have less culpability. But no officer ever voiced the possibility that Ms Duncan's injury and complaints of pain may be genuine.
- [68] The comment that there was a collective failure remains.

CHAPTER TWO

Ms Duncan remains in custody

- [69] Ms Duncan was detained at Fremantle Police Station for over five hours. During this time, numerous officers entered the OMA and had an opportunity to assess her condition, including the three officers who were involved in her arrest and the station's Officer in Charge. Although Ms Duncan clearly and often stated she was in pain, none of the officers acted, believing that Sgt Mayer and PAO Lewis had control and responsibility for the situation.
- [70] It was reasonable for them to think that the custody officers would attend to the medical requirements of arrested persons. However, the law is quite clear. Under the *Criminal Investigation Act 2006*, the Officer in Charge of the investigation must, as soon as practicable after the arrest of an arrested suspect, afford that person the right to necessary medical treatment.⁵ That duty may be delegated to another officer but the Officer in Charge of the investigation must ensure that the other officer performs the duty.⁶
- [71] After being placed into a holding cell by the escorting officers, Ms Duncan 'refused' to stand and leave the cell so she could be searched and processed. With the Officer in Charge watching on, Sgt Mayer and PAO Lewis lifted Ms Duncan and walked her out of the cell where she collapsed to the ground. After being searched, Ms Duncan was lifted and dragged back into the cell by Sgt Mayer, PAO Lewis and S/C Graham.
- [72] The force used by the officers is minimal and would be reasonable in circumstances where a detainee was being noncompliant. However, the force was inappropriate for a person with an injured hip. Ms Duncan was screaming with the pain of being moved and said she could not comply with the order. Neither Sgt Mayer nor PAO Lewis seemed to have given a thought to whether Ms Duncan was genuinely in pain. They appear to treat her protests with indifference.
- [73] There was only one reason for Ms Duncan being detained for so long and not released to bail: she could not stand at the counter to have her fingerprints taken. Sgt Mayer and PAO Lewis planned to have Ms Duncan conveyed to the Perth Watch House where she could be seen by a nurse and provide her identifying particulars. However, this happened very slowly.

⁵ *Criminal Investigation Act 2006* ss 137(3)(a), 138(3).

⁶ *Criminal Investigation Act 2006* s 12.

- [74] Aside from the failures arising from not giving Ms Duncan medical attention, the CCTV footage inside the OMA established numerous other deficiencies in the actions of Sgt Mayer and PAO Lewis including: failure to provide Ms Duncan her right to seek legal advice; insufficient handover of responsibility; and significant unprofessional behaviour by PAO Lewis in the manner in which Ms Duncan was spoken to and treated.
- [75] On numerous occasions, PAO Lewis declined to give Ms Duncan drinks of water. When interviewed by IAU, she stated she was concerned Ms Duncan had been aggressive towards her and she did not want to open the cell door. The CCTV footage indicates Ms Duncan's conduct is largely in response to the lack of medical care and taunting from PAO Lewis. Regardless, PAO Lewis did not ask for assistance from another officer or seek alternatives.
- [76] Ms Duncan's ordeal ended when the OMA shift changed. The incoming shift took immediate and appropriate action. Her request for water, refused by PAO Lewis, was responded to with "no worries" and an immediate cup of water.
- [77] A paramedic conducted a medical assessment before Ms Duncan was stabilised, then taken by ambulance to Fiona Stanley Hospital.

CHAPTER THREE

Policies and procedures

[78] WA Police Force policy DC-01.00 relates to a duty of care to people who are detained by police. At the time of Ms Duncan's detention, the policy instructed an officer in relation to their statutory obligations within the *Criminal Code* s 262 and *Criminal Investigation Act 2006* s 137. The latter specifically dealt with an arrested person's rights to medical attention. Policy DC-01.00 underwent amendments after Ms Duncan was detained and now has an instruction that the officer's duty of care 'also includes ongoing assessment as to a need for medical treatment AND, if applicable, access to any necessary medical treatment'.

[79] WA Police Force policy AR-05.01.2 relates to the Rights of Arrested People. This policy replicates the *Criminal Investigation Act 2006* s 137 and expands upon that statutory requirement. In part, AR-05.01.2 reads:

It is the policy of WA Police to afford all people arrested by police the following additional rights:

- *If detained in police custody, to have safety and welfare needs determined by Police at regular intervals:*
 - *If a member has cause to arrest a person who has been injured, all reasonable action must be taken to obtain details relating to the nature and severity of such injury so as to minimise the possibility of aggravation of the injury and unnecessary pain to that person*
 - *It is the responsibility of the arresting officer to cause that person to be examined by a medical practitioner as soon as possible and remain with that person until suitable arrangements for bail or alternative custody arrangements are organised or can be made*
- *To be treated in a dignified and humane way*
- *To complain about mistreatment to the ombudsman and to be provided with material necessary to make the complaint.*

[80] WA Police Force policy LP-04.04.1 relates to detainees admitted to a police station who are suffering from a serious injury or illness. The policy instructs the officer that in these circumstances, the detained person is to be conveyed to a medical facility for assessment.

[81] The Fremantle Police Station OMA does not fit the definition of a 'lockup' as the area is not compliant with the Police Building Code for that purpose. As a result, WA Police Force policies and procedures in relation to lockup management do not apply. However, the officers involved in the detention of Ms Duncan were instructed by the Fremantle Police Station Offender Management Area Operations Manual (OMA Manual),

which mirrors the Police Manual and WA Police Force policy in relation to lockups.

- [82] Section 3.1 of the OMA Manual gives instruction to police officers as to what requirements are to be met before a person may be admitted to the OMA. In part, section 3.1:

Any DETAINEE believed to be in need of medical treatment will not be admitted to the Fremantle OMA.

The arresting or conveying officer is responsible for the care of the DETAINEE and is to obtain medical treatment for the detainee prior to admission.

- [83] Section 6.3 of the OMA Manual:

The supervisor will assess and gather information as to whether the DETAINEE is fit to remain in the Fremantle OMA. Should a DETAINEE present in a condition that requires medical treatment or psychological assessment, the Arresting/Conveying Officers are to be directed to Fremantle Hospital to obtain a 'Fit for Custody' clearance prior to admittance to Fremantle OMA.

Arresting/Conveying Officers are responsible for obtaining any medications required by DETAINEES during their detainment prior to admittance.

- [84] These policies were not adhered to on the night.

Training

- [85] PAO Lewis completed a three month training period at the Police Academy before commencing work at the Perth Watch House in May 2014 as a police auxiliary officer. Her role at the Watch House was primarily custodial management. PAO Lewis transferred to Fremantle Police Station in February 2016.

- [86] All police officers receive training in custodial management and are required to have an awareness of lockup and custodial management. The specific training of the police officers involved in the detention of Ms Duncan differed slightly, depending on when they were recruited and their differing experience. That said, it was established during the IAU interviews that all officers were aware of a requirement that if an individual requires medical attention, they are to be afforded it.

CHAPTER FOUR

Conclusion

- [87] Numerous officers involved in the arrest or detention of Ms Duncan failed to acknowledge the seriousness of her injury and acted contrary to the requirements of WA Police Force policy. In some cases, they failed to afford Ms Duncan her rights under the *Criminal Investigation Act 2006*. It is open to the Commission to establish that these actions constitute reviewable police action, which itself is serious misconduct.
- [88] Many of the officers involved in the detention of Ms Duncan did not know each other prior to the event. For example, Sgt Mayer had not met PAO Lewis prior to the New Year's Eve operation. There is no evidence to suggest that any of the officers have colluded to prevent Ms Duncan from receiving medical attention.
- [89] However, as interviews confirm, every officer was aware an injured detainee should be given medical attention. Each independently failed to acknowledge Ms Duncan was injured or failed to ensure she received medical attention.
- [90] Many officers assumed that Sgt Mayer and/or PAO Lewis would ensure Ms Duncan would receive medical attention if it was required.
- [91] Although such an assumption might be reasonably held by officers with peripheral contact with Ms Duncan, it cannot absolve the arresting officer of his statutory responsibility, or those in rank higher than Sgt Mayer and PAO Lewis from proper supervision.
- [92] The officers involved conceded their failings when interviewed by IAU. The IAU investigation has been thorough and identified many internal issues outside the scope of the Commission's investigation.
- [93] Current WA Police Force policies and procedures in relation to dealing with injured detained persons are comprehensive and sufficient. Had they been followed, Ms Duncan would have received immediate medical attention.
- [94] What happened to Ms Duncan was a cascading failure of duty from the roadside beside the car, until the ambulance took her to hospital.
- [95] Together, the failure of duty amounts to serious misconduct in the form of reviewable police action.

- [96] It is not necessary to identify the officers in order to highlight the collective failing of the night. It is sufficient that the incident be made public. It is more important that lessons be learned than blame be assigned. Different considerations may apply if there is a future substantial failure of duty of care in a custody setting.
- [97] The Commission recommends that the Government give urgent consideration to upgrading the Fremantle OMA to a standard compliant with the Police Building Code.
- [98] The Commission's edited version of the CCTV footage can be viewed on the Commission's website at <https://www.ccc.wa.gov.au>.