

Report into a
Tasering Incident
on 31 March 2017
at Fremantle

21 March 2018



ISBN: 978-0-9943035-6-1

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PART ONE

THE COMMISSION

INVESTIGATION

INTRODUCTION

- [1] On a late summer evening in March 2017, Mr Bill Holt,¹ his wife and a friend, Mr Alan Robbins, set out for dinner in Fremantle at the Don Tapa restaurant where they had made a booking for 8.00 pm. He was driving a modified green Jeep. They never made it.
- [2] Mr Holt stopped at a random breath test site on Beach Street, Fremantle being operated by members of Traffic Enforcement Group (TEG) Two. He had not been drinking but was directed to a car park where an officer issued a yellow sticker defect notice on the Jeep for outsized wheels, a cracked windscreen and a light bar installed on the top of the vehicle. He was then 'good to go'.
- [3] Shortly thereafter, Mr Holt, while sitting in the driver's seat of the stationary Jeep, was tasered, after which he was arrested, placed into a police van and taken to Fremantle police station where he spent several hours in the lock-up before being released.
- [4] The next day he was telephoned to say all charges had been dropped.
- [5] The Police Conduct Investigation Unit (PCIU) notified the Commission and directed the traffic branch to conduct an investigation. The traffic branch found that no offence had been committed by the tasering officer.
- [6] That investigation was reviewed by PCIU who also concluded that the tasering officer had done nothing wrong.
- [7] The Commission was dissatisfied with this conclusion and commenced an investigation into the conduct of officers involved in the incident.
- [8] The Commission's jurisdiction is in respect of serious misconduct which includes reviewable police action: 'any action taken by a member of the Police Force ... that is (a) contrary to law; or (b) is unreasonable, unjust, oppressive or improperly discriminatory'.²
- [9] During the week commencing 11 December 2017, the Commission took evidence on oath from most of the participants. Mr Robbins was unable to be located. However, the Commission had access to the incident video taken by him during the tasering incident and its aftermath. The incident video speaks for itself and forms part of this report.

¹ Names of civilians and some police officers have been anonymised.

² *Corruption, Crime and Misconduct Act 2003* s 3.

- [10] The incident video also shows a police officer attempting to stop the filming and concealing her face. At one stage, her identification badge was removed from her uniform.
- [11] The Commission concludes there was no lawful jurisdiction for Mr Holt to be tasered. The tasering was unreasonable and oppressive. The Commission has formed an opinion of serious misconduct by the officer who administered the taser.
- [12] The actions of the police officer who tried to prevent the filming, including her subsequent actions in preparing a possible prosecution brief, are being dealt with by the WA Police Force. For this reason, the Commission refrains from expressing an opinion.

CHAPTER ONE

A Jeep is stopped

- [13] On Friday 31 March 2017, Mr and Mrs Holt and Mr Robbins were driving down Beach Street, Fremantle shortly before 8.00 pm, on their way to Don Tapa restaurant, a short distance away.
- [14] Mr Holt is the CEO of a company, the main business of which is the supply and fitting of after-sale vehicle accessories. He specialises in Jeeps and owns a number of them.
- [15] On this night, he was driving a large green Jeep modified by him to include a 'lift kit' and an array of lights including a bar light above the windscreen.
- [16] At the same time, members of TEG Two, including Senior Constable (S/C) Keenan and S/C Arnold, were carrying out a random breath test operation on Beach Street, stopping and testing drivers travelling in both directions.
- [17] Beach Street runs approximately north/south and is bounded on the western side by a public car park.
- [18] S/C Keenan was the most experienced officer with 24 years of policing in the WA Police Force. Other officers had varying levels of experience, ranging from senior constables with 10 years' experience to a Probationary Constable (P/C) having merely three months as an officer.
- [19] Mr Holt was tested for alcohol. He had not been drinking and recorded zero. However, the Jeep had a broken windscreen and was fitted with accessories which apparently did not comply with Western Australian regulations.
- [20] These included a light array with two small pillar lights to the right and left hand side of the front windscreen, a 20" light bar behind the front grille and a 10" light bar on the front bumper. Topping the array was a 50" light bar above the windscreen which Mr Holt had installed.
- [21] At S/C Keenan's direction, the P/C ordered Mr Holt to drive into the public car park adjacent to Beach Street so a yellow sticker could be placed on the Jeep.³
- [22] The issuing of the defect notice and fixing the yellow sticker on the windscreen took only minutes. Mr Holt indicated to the P/C that they

³ The defect notice specified tyres 'sticking out of flare guard, single LED on top of windscreen; cracked windscreen'.

were pressed for time as they had a dinner booking they wanted to get to 'down the road'.⁴

- [23] The P/C was subject to some heckling from inside the vehicle during the process of issuing the defect notice, such as 'you are jealous of my car, you are too poor to afford this car'. It is unclear exactly who said these words as it may have been Mr Holt or his passenger, Mr Robbins or both. Mr Holt held the firm view that the positioning of the LED lights did not infringe Western Australian Design Rules, was therefore not illegal and should not have been part of the defect notice that was issued by the P/C. However, Mr Holt had been issued defect notices previously and to him, it was 'just another late night at the workshop'.⁵
- [24] In any event, the P/C decided this behaviour was not worth any formal intervention. The P/C let it wash over him in order to let the vehicle continue on its way: 'I just wanted to get them out of there. I believed my job was done ...'.⁶ He referred to the language used as not swearing but 'rubbish throwing'.⁷ S/C Keenan, overhearing, considered the behaviour was unacceptable but that it was 'a very minor bit of disorderly behaviour'.⁸ He decided to have a quick chat with Mr Holt. S/C Keenan did not communicate this decision to the P/C. It is highly questionable whether the alleged words can constitute disorderly behaviour, especially as it appears no swear words were used.
- [25] Before S/C Keenan could approach Mr Holt, the P/C finished issuing the defect notice and told Mr Holt that he was free to leave or 'good to go'.⁹ By then, the police had exhausted any powers available to them to stop and search the vehicle under road traffic legislation.¹⁰ S/C Keenan agreed in examination by the Commission that in the circumstances, Mr Holt was free to leave should he wish.
- [26] At this stage, S/C Keenan and the P/C were around the bonnet area of the Jeep which was parked front to kerb in the car park.

⁴ B Holt transcript, private examination, 11 December 2017, p 13.

⁵ Ibid p 15.

⁶ P/C transcript, private examination, 13 December 2017, p 11.

⁷ Ibid pp 8-12.

⁸ S/C Keenan transcript, private examination, 13 December 2017, p 9.

⁹ P/C transcript, private examination, 13 December 2017, p 13.

¹⁰ S/C Keenan did not have the power under the *Road Traffic (Administration) Act 2008* (RTA Act) s 39 to direct the vehicle to stop as that power may only be exercised for the purpose of exercising a power under a road law. The exercise of the power to detain the vehicle in order to exercise compliance with the RBT and the defect check no longer had effect. The RTA Act s 41(2)(b) did not apply.

The Jeep's lights flash

- [27] Before S/C Keenan could speak with Mr Holt about the 'minor bit of disorderly behaviour', Mr Holt flashed his vehicle lights. This fact is not in dispute, or that the lights flashed more than once in quick succession. Mr Holt said it was two to three times; S/C Keenan said the lights were flashed two times but the P/C said it 'was easily more than two times'.¹¹ A civilian witness saw a couple of flashes.
- [28] Mr Holt denied that he flashed the LED light bars but rather his standard headlights. The weight of evidence is against this proposition.
- [29] The LED light bars have 500 wattage power output. The civilian witness described the flashing as 'very bright', S/C Keenan stated that 'multiple LED light bars'¹² flashed and the P/C remembered 'the top bar of the LED flashing ... just blinding'.¹³ Another S/C saw one flash from the top of the vehicle that was 'dazzling'.¹⁴ On balance, the Commission is persuaded that the LED lights were activated from inside the vehicle rather than only the headlights and that they were very bright.
- [30] Mr Holt stated that he was motivated to flash the vehicle lights to warn S/C Keenan and the P/C that he was about to reverse his vehicle. Mr Holt proceeded to turn the steering wheel all the way to the right side in a full lock to reverse. He did not want to hit the police officers standing close to the front of the Jeep.
- [31] There is evidence to support Mr Holt's assertion.
- [32] One S/C states that the lights flashed just prior to the vehicle reversing. A civilian witness recalled:
- I remember he was about to take off, he was - I'm not too sure if he was let go or he was leaving or - I'm not too sure what happened, but he flashed his - he had big bar lights up the top and he flashed those, and they were bloody bright ...'*
- [33] S/C Keenan could not recall whether the light flashing occurred prior to the reversing of the vehicle. The P/C conceded it was possible as he was standing near the bonnet of the vehicle and could have been hit by the vehicle if Mr Holt reversed out of the parking space fully locking the steering wheel to the right.

¹¹ P/C transcript, private examination, 13 December 2017, p 14.

¹² S/C Keenan transcript, private examination, 13 December 2017, p 9.

¹³ P/C transcript, private examination, 13 December 2017, p 14.

¹⁴ S/C transcript, private examination, 14 December 2017, p 8.

- [34] Both S/C Keenan and the P/C were in the path of the illuminated LED lights. S/C Keenan described his eyes hurting and suffering 'temporary flash blindness'.¹⁵
- [35] The flashing of the lights in the manner described - deliberate, repeated and blinding - may be an assault¹⁶ (*Criminal Code* s 222). Assaulting a police officer is a defined serious offence attracting a penalty of seven years imprisonment.¹⁷ Arguably, S/C Keenan and the P/C had the power to arrest¹⁸ on a reasonable suspicion that Mr Holt had committed a serious offence.
- [36] However, there is no evidence that at this point S/C Keenan told Mr Holt he was under arrest or even mentioned the light flashing. While this is not a requirement of effecting arrest,¹⁹ it is a matter to take into account when considering S/C Keenan's state of mind and motivation for asking Mr Holt to stop his vehicle. If not seeking to use the power of arrest, the use of force by S/C Keenan that followed shortly thereafter, needed to be justified in some other way.
- [37] The weight of the evidence is that the flashing of the vehicle lights had ceased by the time Mr Holt was fully reversed from the parking space. It was then a short distance for the vehicle to move forward to the car park exit and out onto Beach Street. This was what Mr Holt wanted to do and what shortly before, the P/C had told him he could do.
- [38] Unfortunately, S/C Keenan made the decision to intervene rather than letting Mr Holt leave. The P/C was acting only to assist S/C Keenan, 'I approached the vehicle to try to help S/C Keenan achieve that result'.²⁰ The P/C had not come to an independent decision to arrest Mr Holt or to stop the vehicle and was unsure why S/C Keenan wanted to do so.

*I had no idea at the time. I was just trying to help Senior Constable Keenan to stop the vehicle. I didn't know what the - what resolution he was going to come up with, what he was going to say to him and how he would decide on coming up with a solution.*²¹

¹⁵ S/C Keenan transcript, private examination, 13 December 2017, p 11.

¹⁶ The deliberate, prolonged flashing of a light source to cause discomfort is an assault.

¹⁷ *Criminal Code* s 318(1)(e).

¹⁸ *Criminal Investigation Act 2006* s 128.

¹⁹ *Johnson v Staskos* [2015] WASCA 32; *Criminal Code* s 231(2)(b).

²⁰ P/C transcript, private examination, 13 December 2017, p 16.

²¹ *Ibid* p 22.

No power to require the vehicle to stop

- [39] S/C Keenan moved to stop the vehicle by raising his hand. At the same time, the P/C moved towards the vehicle and by chance ended up in front of the vehicle's bonnet after it finished reversing.
- [40] According to S/C Keenan, Mr Holt replied 'you can't fucking stop me'²² and the vehicle moved forward a metre. Mr Holt admits the vehicle reversed, then moved forward four to five metres before stopping, but denied to the Commission that he made this statement to S/C Keenan. His denial has some weight given that shortly after the tasering incident, and captured on video, Mr Holt denied the same accusation when put to him by S/C Keenan. The incident video depicts that he turned to his fellow vehicle passenger and asked in a surprised tone '[Alan], did I, did I say "get fucked" in response when he asked me to stop the vehicle?' Mr Robbins replied 'No'.
- [41] In any event, despite the question mark over whether police had the power to stop, or Mr Holt's reluctance to do so, Mr Holt complied with the request. He stopped the Jeep.
- [42] S/C Keenan and the P/C had exhausted police powers to stop a vehicle for the purposes of, or in connection with exercising their powers under a road law.²³ Theoretically, S/C Keenan had the power to arrest Mr Holt for flicking the LED lights on as the basis for the offence of assaulting a public officer. However, S/C Keenan's evidence is that he had formed the intention to speak to Mr Holt prior to seeing the light flashing and he had completely ruled out arrest as an option:

What was your intention of getting the vehicle to come to a stop?---It was, as I initially said, to have just a couple of very quick, quiet words with the driver about calling out swear words in a public place where people could hear him.

So what were you going to say to him?---I don't know, probably words to the effect of – just something along the lines of “Pull your head in. You can't – you can't be doing that, so just, you know - - -”

So you didn't - - -?--- “- - - take care; look after yourself, be careful,” and, “see you later.”

So you didn't have any other intention at that stage other than having a word with him?---Absolutely not. He – what he – what he had done was not worthy of having

²² S/C Keenan transcript, private examination, 13 December 2017, p 12.

²³ The RTA Act s 39(2) gives a police officer the power to direct the driver of a vehicle to stop for the purposes of or in connection with exercising their powers under a **road law**. Pursuant to s 42, a police officer may then direct a driver of a vehicle to vacate the driver's seat if they have failed to comply with s 39. Where a direction issued under ss 39 or 42 is not complied with, the driver may be issued a fine, s 44. However, the power must be lawfully exercised pursuant to s 39 in the first place.

*any further police application put upon him. It was I just wanted to have a couple of quick words and that was going to be it. It was in keeping with the level of his offending, which was very low.*²⁴

- [43] In a use of force report written a few days after the event, S/C Keenan stated 'I decided to approach and speak with [Mr Holt] about his disorderly behaviour. I had not decided to arrest or charge him at that stage as it had only been a minor breach'.²⁵
- [44] The *Criminal Investigation Act 2006* (WA) (CI Act) gives police a suite of powers to stop, search, detain and arrest persons suspected of committing an offence. However, the powers are only enlivened once the police officer personally forms a reasonable suspicion at the relevant time.²⁶
- [45] On S/C Keenan's own evidence, he did not have a reasonable suspicion that Mr Holt had committed or was committing a serious offence. Further, if the intention was to address Mr Holt's suspected disorderly conduct (by definition not a serious offence), it is clear that this behaviour had ceased prior to the vehicle reversing in preparation for being driven away. Further, the vehicle was not being used to commit an offence of disorderly conduct. Accordingly, the powers available to a police officer to stop a vehicle under the CI Act were not available.²⁷
- [46] Absent an intention to arrest for a serious offence, S/C Keenan's power to ask the driver to stop was not an exercise of police power but a mere request. From Mr Holt's point of view, it was an unexplained request. Mr Holt stated that after reversing out of the parking space, he changed into first gear and started to move forward about four to five metres before 'I noticed them sort of running towards me'.²⁸ Mr Holt stopped the vehicle and said 'What's the problem?'.²⁹
- [47] The unlawful application of force without consent is an assault.³⁰ An assault is unlawful unless it is authorised, justified or excused by law. It is lawful for a police officer to use force to make an arrest³¹ but only to the degree necessary to overcome the resistance. S/C Keenan did not intend

²⁴ S/C Keenan transcript, private examination, 13 December 2017, p 14.

²⁵ Summary of Incident Report by S/C Keenan, p 2.

²⁶ CI Act 2006 s 4.

²⁷ The CI Act also gives the police powers to stop a vehicle in ss 35, 36, 37, 38B, 38, 39, 68, 132 and 133. Of relevance are ss 35, 38, 39 and 132. Sections 38 and 39 require that the vehicle sought to be stopped is relevant to the offence. Sections 35 and 132 are not relevant to the offence of disorderly conduct which was the only offence S/C Keenan had turned his mind to at this stage.

²⁸ B Holt transcript, private examination, 11 December 2017, p 22.

²⁹ Ibid p 24.

³⁰ *Criminal Code* ss 222-223.

³¹ *Criminal Code* s 231 and CI Act ss 16 and 128.

to arrest Mr Holt and this was not the reason he asked for the Jeep to be stopped.

- [48] S/C Keenan did not have the power to force Mr Holt to stop the vehicle. Nor did he have the power to stop and enter the vehicle (effectively by removing the ignition key), unless he reasonably suspected the vehicle would or was likely to cause serious injury to a person³² or he was acting in defence of another. What followed must be seen in light of this conclusion.

Did Senior Constable Keenan reasonably suspect a physical threat?

- [49] The P/C found himself inadvertently standing at the front of the vehicle when it came to a stop. S/C Keenan at this point perceived a physical threat to the P/C from the moving vehicle:

... it then did travel forwards ... it wasn't far; it was about a metre, a metre and a half. The significance though was I looked to my right and saw that as it did start to move forward, it moved - it travelled directly towards where [the P/C] was standing.³³

- [50] S/C Keenan isolated two things as the basis for a reasonable suspicion that Mr Holt would use the vehicle to cause serious injury to the P/C: the movement of the Jeep forward for a metre and a half towards the P/C; and his evidence that the driver stated 'You can't fucking stop me'. In effect, S/C Keenan perceived Mr Holt as verbally aggressive and non-compliant.
- [51] The Commission does not accept these words were said by Mr Holt. No other witness heard them. Mr Holt denied saying them within minutes (as captured on the incident video) and later in evidence before the Commission. Furthermore, Mr Holt did bring the Jeep to a stop.
- [52] Absent the expletive statement from Mr Holt, was the movement of the vehicle forward one and a half metres sufficient basis for S/C Keenan to remove the ignition key in order to prevent an act that would cause the P/C serious harm? Without other actions, it was not. Mr Holt's control of the Jeep was an acceptable distance in which to bring a vehicle to a complete stop. S/C Keenan specifically stated there was nothing about the manner in which the vehicle had been reversed to cause alarm, and the P/C had not previously indicated to him that Mr Holt had been aggressive.

³² CI Act s 35.

³³ S/C Keenan transcript, private examination, 13 December 2017, pp 13-14.

- [53] Several witnesses saw the P/C in front of the Jeep as it stopped. This is not in dispute. It is also not in dispute that the P/C moved away from the front of the Jeep and around to the vicinity of the driver's door, behind S/C Keenan within a short time before S/C Arnold reached the Jeep and possibly before the driver's door was even opened. The perceived physical threat to the P/C did not last long enough to justify S/C Keenan's efforts to remove the ignition key.
- [54] One officer standing some distance away stated that when his attention was drawn to the Jeep in the car park, S/C Keenan and the P/C were both standing near the closed driver's door. Another officer stated 'S/C Keenan was there, [the P/C] was also there but moved round towards the driver's door ... He would've moved quickly. It's only a couple of steps, isn't it?'³⁴
- [55] The P/C stated that he moved from being by the bonnet of the vehicle 'around to the corner'³⁵ to see what was going on. The P/C stated: 'Yeah, I'm pretty sure I didn't see Holt's hands. I just saw a struggle going on between the two parties. I had no idea what exactly was going on.'³⁶ The incident video confirmed that the P/C was soon near the driver's door and was sufficiently disinterested in S/C Keenan's alleged struggle for the key to pick up an unknown item from the ground.
- [56] That the P/C was no longer in front of the vehicle appeared to have escaped S/C Keenan's notice until after he had reached into the vehicle to remove the ignition key.
- [57] S/C Keenan decided to open the Jeep door and take the ignition key to remove the threat to the P/C. It did not occur to him to yell out to the P/C to move, nor to ask Mr Holt to get out of the car. Rather, S/C Keenan told the Commission:

I leant forward with my left hand and grasped the key.

...

Did you tell him what you were going to do?---No, I didn't, sir.

Why was that?---I can't – I don't know. I can only answer that I didn't. I can't specifically say why I didn't do any – that specific thing.³⁷

- [58] Mr Holt's evidence was that S/C Keenan 'reached in for the key, like, instantly when the door was opened'.³⁸

³⁴ S/C transcript, private examination, 14 December 2017, pp 10-11.

³⁵ P/C transcript, private examination, 13 December 2017, p 19.

³⁶ Ibid pp 20-21.

³⁷ S/C Keenan transcript, private examination, 13 December 2017, p 21.

³⁸ B Holt transcript, private examination, 11 December 2017, p 27.

- [59] As expected, Mr Holt reacted. He questioned S/C Keenan 'What are you doing? What is the problem?' and then seeing him yank at the key trying to remove it, stated 'If you want me to remove the key, I'll remove the key.'³⁹ Mr Holt's evidence that he offered to help S/C Keenan remove the key is supported by the incident video in which Mr Holt is clearly heard to say 'Mate, let it go and I'll pull it out. You've just broken my key.'
- [60] S/C Keenan initially denied in evidence that Mr Holt offered to remove the key:
- Do you recall him saying, "Let it go and I'll get the key out," or words to that effect?---No. Had he said that, I'd have let it go and he – let him get the key out.*
- He didn't offer to get the key out for you or to turn the ignition off?---No, he did not.⁴⁰*
- [61] This denial together with the omission from his written use of force report of any reference to Mr Holt offering to assist him to remove the ignition key calls into question the reliability of S/C Keenan's evidence.
- [62] S/C Keenan later agreed in evidence before the Commission and after watching the incident video that he thought he did hear Mr Holt say it:
- Did you hear, just prior to the tasing, Mr [] say, "Mate, let it go and I will pull it out. You've just broken my key"?---I think I did, yes. The only bit on here that I didn't hear was there's a - the third line down was where, apparently, I say, "Listen to me." I didn't hear that bit, but yes, "Let it go and I'll pull it out," that was - yes.⁴¹*
- [63] Mr Holt's offer was an attempt to deescalate the situation.
- [64] One second after offering to remove the keys, Mr Holt was tasered.
- [65] S/C Keenan's actions were excessive in relation to any perceived threat to the P/C, as the P/C had removed himself from any danger well before Mr Holt was tasered.

Was Senior Constable Keenan acting in self-defence?

- [66] Mr Holt stated that his hands remained on the steering wheel and never touched S/C Keenan. There was some support for this evidence as two civilian witnesses, Mr and Mrs B, confirmed seeing Mr Holt's hands firmly on the steering wheel.
- [67] S/C Keenan stated to the contrary that Mr Holt put his right hand over S/C Keenan's hand on the ignition key and exerted such force against it

³⁹ Ibid pp 24-25.

⁴⁰ S/C Keenan transcript, private examination, 13 December 2017, p 21.

⁴¹ Ibid p 37.

that S/C Keenan could not move his left hand. Mr Holt then used his left hand and right knee to trap both S/C Keenan's hands. He stated that he was pulling hard with his hand to try to remove them from Mr Holt's grip.

- [68] If the Jeep's engine was running, turning the ignition key by clicking back towards the driver would stop the engine and engage the 'accessory mode'. However, to remove the key from the ignition, it needed to be pushed in towards the steering column and then turned back further towards the driver. If the extra push inwards was not done, the key would remain locked in accessory mode and the key would not be able to be removed.
- [69] Once the key is turned in the ignition from 'on' to the accessory mode, a chiming sound alerts the driver if a door is open, and that the engine is off.
- [70] In examination, S/C Keenan described the action he took attempting to grab the key. He tried to turn it towards Mr Holt, away from the bonnet and 'it just wouldn't turn'. Mr Holt's hand was 'pushing ... very hard towards the steering column ... into the ignition ... the force was going in that direction'.⁴² If Mr Holt did in fact reach down with the motivation of helping to remove the key, this is a good description of the action that would need to be taken to remove the key - turn the key to accessory mode, push in towards the steering column and turn once more.
- [71] The Commission does not accept that S/C Keenan's hand or hands were trapped by Mr Holt. The area in the Jeep around the ignition, steering column and driver is very limited and does not physically allow for the driver to place two hands on the ignition key while sitting in the driver's seat. The key was twisted and broken because its removal had likely been attempted whilst it was locked in accessory mode.
- [72] No other witnesses saw the placement of hands as described by S/C Keenan. The two closest witnesses, the P/C and S/C Arnold, saw only evidence of a 'struggle' which could equally be S/C Keenan yanking on the key (as described by Mr Holt) or S/C Keenan trying to free his trapped hand. The P/C stated in evidence: 'Yeah, I'm pretty sure I didn't see [Holt's] hands. I just saw a struggle going on between the two parties. I had no idea what exactly was going on.'⁴³ S/C Arnold gave evidence of seeing Mr Holt's hands and S/C Keenan's hands interlocked but was unable to specifically place them in the vehicle other than stating it was in the steering wheel area. She could not say whether it was one or two hands and agreed that her main attention was on the passenger. This is

⁴² Ibid p 23.

⁴³ P/C transcript, private examination, 13 December 2017, pp 20-21.

clearly confirmed in the incident video as her head is turned away from S/C Keenan towards the back of the vehicle.

[73] In order to free himself from Mr Holt's grip, there was nothing obstructing S/C Keenan from stepping backwards (except for the fact that he stated his hands were trapped keeping him pinned to the ignition key). Importantly, two witnesses described S/C Keenan stepping back prior to, and in preparation for firing the taser. The P/C stated '... but I saw a struggle between the two parties and then S/C Keenan sort of stepped back, got his Taser out and tasered Mr Holt. At the time, I did not know why he tasered him'⁴⁴ (emphasis added).

[74] Mr Holt stated:

*... he's sort of yanked at the key, he yanked at the key a couple of times and then sort of stepped back, removed his Taser from his belt and then he's - and then he's held his Taser in his right hand ...*⁴⁵

[75] A 'step back' is not possible if S/C Keenan was trapped. It is also inconsistent with having no option to preserve his own safety other than firing the taser.

[76] S/C Keenan repeatedly asserted in evidence that he became less fearful for the P/C's safety and more fearful of his own because Mr Holt was trapping his hand(s) in a running vehicle. It was on the basis that he needed to forcibly defend himself from this imminent threat that he discharged the taser. This reasoning requires acceptance of two issues: that S/C Keenan's hand was trapped to an extent that he could not free himself; and the vehicle engine was running.

Was the vehicle running at the time of the tasing?

[77] There is cogent evidence before the Commission that the Jeep engine had been switched off prior to the tasing. Without the vehicle engine running there was no danger to S/C Keenan; he did not need to defend himself and the use of the taser against Mr Holt was not necessary.

[78] S/C Keenan accepted in evidence that, as a matter of fact, if the Jeep engine is running, then the chiming is not activated and cannot be heard. The Commission has established that if the key in the ignition is switched to accessory mode or in the 'off' position, then the vehicle will chime. If the key is removed from the ignition altogether, the chiming sound ceases.

⁴⁴ Ibid p 19.

⁴⁵ B Holt transcript, private examination, 11 December 2017, p 24.

- [79] It was suggested to S/C Keenan that he could not remove the key because it was in accessory mode and locked (rather than its removal being prevented by Mr Holt's hands). He replied that this was not correct because 'the engine was still running'.⁴⁶
- [80] The evidence does not support a conclusion that the engine was running just prior to the tasing. As the incident video commences, a chiming sound can be heard in the background. This was accepted by S/C Keenan under examination. The chiming sound can only mean one thing; the engine was not running.
- [81] As the incident video progresses, the chiming sound stops. This coincides with Mr Holt clearly stating 'you have just broken my ignition barrel'. The chiming sound stopped because the key was taken out of the barrel. This is supported by S/C Keenan's evidence that the key was dropped by him into the driver's footwell.
- [82] If the engine was still running when Mr Holt was tasered, it was a risky response by S/C Keenan due to the loss of control Mr Holt would have experienced resulting from the firing of the taser probes.

Mr Holt is tasered

- [83] After telling Mr Holt 'You are about to be tasered' and stepping back, S/C Keenan discharged his taser successfully causing a painful electrical charge to immobilise Mr Holt temporarily.
- [84] Both the P/C and S/C Arnold stated that the firing of the taser took them by surprise. Further, S/C Keenan had not sought their assistance to free him from Mr Holt's grip, nor had he warned them of any imminent danger he perceived from the running vehicle.
- [85] The taser used on Mr Holt was armed by S/C Keenan a full 17 seconds prior to firing. A taser is worn on the support side of the utility belt. As S/C Keenan is right handed, his taser was worn on his left side to allow for a cross body draw with his right hand. S/C Keenan reached for the ignition key with his left hand. This left his right hand free to draw and arm the taser whilst his left hand attempted to retrieve the key from the ignition.

⁴⁶ S/C Keenan transcript, private examination, 13 December 2017, p 28.

The use of tasers as a force option

- [86] To use a taser to apply force lawfully, the subject should generally be warned that a taser is about to be discharged.⁴⁷ If a taser is discharged to gain control of a subject, it should be obvious to all that in the circumstances the person was out of control and needed to be contained. The person's behaviour had to be such that there was an imminent risk of serious injury to any person.
- [87] If a taser discharge takes witnesses by surprise and appears to be unexplained, then it may indicate the police officer used more force than was reasonably necessary in the circumstances. It may indicate there was no apparent danger to the police officer. It may also explain why the subject was resisting. Communication by the police officer with the subject prior to the taser discharge should involve clear and lawful directives.
- [88] When considering the level of force appropriate, a police officer is trained to make a decision based on the information and intelligence available to them, their appreciation of the situation and perception of the threat they face. Tactical communication is an important aspect of training so that police officers will attempt to deescalate a situation using communication skills and resolve conflict where possible without resorting to force.
- [89] The discharge of a taser is a significant force option. It is used by police officers as a means of reducing a threat and gaining control of a person in situations where there is an imminent risk of serious injury.⁴⁸ Implicit in the use of a taser is that the subject is not able to be controlled by other means, and the police officer is entitled lawfully to restrain the person.
- [90] The purpose of deploying a taser is to incapacitate temporarily. This is achieved by the loss of coordinated control of the affected muscles for a short period. It is a risky tactical option due to the physical and psychological stress it places on the person. The heightened risk when the target person is in control of a vehicle is evident.
- [91] Police officers use tasers sparingly. They are an aggressive use of force in the hands of law enforcement and their use is rightly subject to scrutiny.

⁴⁷ Police are trained to say words to the effect: 'Police. Don't Move. The red dot on you is a Taser. Get down on the ground.'

⁴⁸ WA Police Use of Force Policy Governing Use of Taser, FR-01.06 Taser, Protocols and Guidelines, Updated July 2015, p 3.

- [92] A police officer may use a taser to defend himself or another person from a harmful act or threat. However, the discharge of a taser must be a reasonable response in the circumstances to the harmful act or threat.⁴⁹
- [93] The question whether the tasering of Mr Holt was a lawful use of force by S/C Keenan is answered initially by determining whether the actions by S/C Keenan prior to the taser discharge were a proper exercise of police powers.
- [94] Prior to the tasering, S/C Keenan had not asked Mr Holt to stop the vehicle or given him any directions:
- I think your evidence was that when you were in front of the vehicle, you hadn't actually articulated the "stop" to him before the lights flashed?---I had with my hand and I'd started to try and say, but that was when that first flashing hit and I'd just turned away I stopped - I stopped saying that, yes.*⁵⁰
- [95] S/C Keenan attempted to seize the vehicle by opening the car door and removing the ignition key.
- [96] Did S/C Keenan require Mr Holt to:
- stop the vehicle?
 - get out of his vehicle?
 - hand over the keys to his vehicle?
- [97] If none of these requests was a proper exercise of police powers then S/C Keenan could not use force to overcome any resistance to the exercise of that power.⁵¹ However, it was still open to S/C Keenan to apply a reasonable and proportionate amount of force in his own or another's defence.

Senior Constable Keenan's state of mind

- [98] Any mistake by S/C Keenan about the extent of his power to detain Mr Holt and remove the keys from his vehicle is not relevant. The authorities⁵² have determined that the question whether particular conduct falls within the class of conduct that would be in the execution of the duty of a police officer is not a question of fact, but rather a

⁴⁹ *Criminal Code* s 248(4)(b).

⁵⁰ S/C Keenan transcript, private examination, 13 December 2017, p 18.

⁵¹ The CI Act s 16 provides that when exercising a power in the CI Act, a person may use any force reasonably necessary in the circumstances to exercise the power and to overcome any resistance to the exercise of that power.

⁵² *Ogbonna v Lay* [2013] WASC 266 citing *Semaan v Poidevin* [2013] NSWSC 226 [70]; *Ostrowski v Palmer* [2004] HCA 30; (2004) 205 ALR 422.

question of law. An honest and reasonable mistake can only apply to excuse a mistake of fact.⁵³

- [99] S/C Keenan either had the power to request Mr Holt to stop the vehicle and to request him to hand over the keys, or he did not. If he did not, then any mistaken belief held by S/C Keenan otherwise does not justify the purported exercise of that power.
- [100] If there is no express power conferred on a police officer, then it cannot be implied that a general power exists.⁵⁴ An express power must be clearly stated in 'unmistakable and unambiguous language'.⁵⁵ General words are not sufficient, but rather words that specifically deal with the question.
- [101] Police officers have a general power under road traffic legislation to direct drivers to stop vehicles. It may only be exercised for the purpose of or in connection with exercising another power under road traffic legislation.⁵⁶ There is no express power to demand keys of a vehicle.
- [102] If a police officer reasonably believes that a vehicle is creating an imminent risk of serious harm, the officer may direct the driver to do anything reasonably required to avoid or minimise the harm.⁵⁷ This may include the removal of the ignition key. S/C Keenan's evidence was that he was fearful that the vehicle might be driven forward by Mr Holt causing physical harm to the P/C.
- [103] S/C Keenan's intention in getting the vehicle to come to a stop was 'to have just a couple of very quick, quiet words with the driver about calling out swear words in a public place ...'⁵⁸ He was not purporting to exercise any particular power.
- [104] The Commission has reached the conclusion that S/C Keenan did not, as a matter of law, have the power to request Mr Holt to stop, nor to take his vehicle keys. Any mistake in S/C Keenan's mind as to this is not relevant. S/C Keenan's attempt to take the keys was unlawful. Any

⁵³ In *Ogbonna v Lay* [2013] WASC 266 Martin J held that *Criminal Code* s 24 should be read in the context of the *Criminal Code* s 22: 'It is clear from a plethora of case authority on s 24 that it does not apply to mistakes of law. It can only apply to excuse a mistake of fact.' [23]

⁵⁴ In *Coco v The Queen* (1994) 179 CLR 427 the majority cited with favour the observation of Lord Scarman in *Morris v Beardmore* [1981] AC 446, 463: 'When for the detection, prevention, or prosecution of crime Parliament confers upon a constable a power or right which curtails the rights of others, it is to be expected that Parliament intended the curtailment to extend no further than its express authorisation.'

⁵⁵ *Coco v The Queen* (1994) 179 CLR 427, 428.

⁵⁶ RTA Act s 39.

⁵⁷ RTA Act s 41(2)(b).

⁵⁸ S/C Keenan transcript, private examination, 13 December 2017, p 14.

purported use of force to attempt to take the keys is not justified under the CI Act.

[105] The tasering incident may be lawful if done in self-defence. The belief in S/C Keenan's mind that the tasering was necessary to defend himself from a harmful act must be based on reasonable grounds even if later found to be factually incorrect.

[106] S/C Keenan said he believed that the Jeep engine was still running at the relevant time; his hand was trapped; that he could therefore not escape; and that Mr Holt was likely to move the Jeep forward causing injury. S/C Keenan maintained during examination that this was his state of mind on 31 March 2017. However, this is not sufficient. There must objectively be reasonable grounds for S/C Keenan's beliefs.⁵⁹ The Commission does not accept these beliefs were reasonably held by S/C Keenan because:

- Mr Holt had stopped the vehicle in response to the earlier directive. There was no reason to believe he would start moving forward again contrary to instructions unless it was accepted that Mr Holt stated 'you can't fucking stop me'. On balance, the Commission does not accept this was said;
- S/C Keenan had acted to disable the vehicle without informing Mr Holt as to the reasons. Mr Holt had offered to assist despite this fact;
- S/C Keenan was not conscious of the offer of assistance despite it clearly being heard in the incident video;
- S/C Keenan did not engage in any intermediate steps of communication with Mr Holt to attempt to deescalate the situation (and actually ignored Mr Holt's attempts to deescalate the situation); and
- It is unlikely that in the circumstances, S/C Keenan's hand was trapped to an extent that he could not free himself.

Mr Holt's arrest

[107] The incident on Beach Street concluded with the arrest of Mr Holt.

[108] Police officers exercise a power of arrest that had origins in the common law but is now codified by the CI Act. Relevantly, police officers who arrest

⁵⁹ *Criminal Code* s 248(4)(c).

without warrant under any written law do so under Part 12 of the CI Act⁶⁰ that specifies a series of conditions which must be satisfied for an arrest without a warrant to be lawful.

- [109] The conditions that must be present before an arrest depend on the level of the target's suspected offending. Arrests without warrant may be made by police officers for serious offences,⁶¹ should the officer reasonably suspect that the person has committed, is committing or is just about to commit an offence attracting a penalty which includes imprisonment for five years or more.
- [110] Arrest for a non-serious offence is only permissible where the arresting officer suspects the person has committed, is committing or is just about to commit the offence and that if not arrested, will continue to commit an offence or endanger another person, or it will be impossible to obtain the person's name and personal details or the person will interfere with witnesses or physical evidence.⁶²
- [111] Absent an arrest warrant or the pre-conditions for arrest of serious or non-serious offences, there is no power to arrest a person.

An officer's state of mind - reasonable suspicion

- [112] The pre-conditions for arrest of serious or non-serious offences are largely the outcome of what is formulated in the mind of the arresting officer when the power is exercised. The arresting officer must hold a reasonable suspicion that the conditions mentioned above are present.⁶³
- [113] For the purposes of the CI Act, a police officer has a reasonable suspicion if at the time of arrest, the grounds for suspecting a thing are objectively reasonable, even if later, they are proved to be false or non-existent.⁶⁴
- [114] Suspicion has been defined judicially as 'a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove'. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief.⁶⁵ Further:

⁶⁰ The CI Act is 'the primary source of police powers' in Western Australia - *Wright v The State of Western Australia* [2010] WASCA 199 [118]; (2010) 43 WAR 1; 203 A Crim R 339.

⁶¹ A 'serious offence' means an offence the statutory penalty for which is or includes imprisonment for 5 years or more; or is an offence under the *Restraining Orders Act 1997* s 61(1) or (2a); or commits an offence of not complying with an order relating to an out of control gathering or involves an act of family or domestic violence (CI Act s 128).

⁶² CI Act s 128(3).

⁶³ *Cotchilli v The State of Western Australia* [2008] WASC 103 [24].

⁶⁴ *Fox v Beringer* [2011] WASC 38 [30]-[32]; *Johnson v Staskos* [2015] WASCA 32 [26]; CI Act s 4.

⁶⁵ *Hussein v Chong Fook Kam* [1970] AC 942, 948 (Lord Devlin).

A suspicion that a fact exists is less certain than a belief in the existence of that fact. A belief is held on information which is accepted as reliable and implies a reasonable satisfaction that the fact is at least more likely to be true than any other alternative fact or facts. On the other hand, a suspicion that a fact exists in the context of an investigation of the truth of that fact, is a working hypothesis for which there is some supporting material. There must be a rational connection between the supporting material and the suspicion. Mere curiosity, speculation or 'idle wondering' about the existence of the fact is not the same as a suspicion that it exists.⁶⁶

- [115] If the circumstances were such that S/C Keenan could not have reasonably held the suspicion that Mr Holt was committing an offence or causing danger to anyone, then he did not have a lawful basis to attempt to arrest him, disable his vehicle or even to order him to alight from the vehicle, in order to place him under arrest.
- [116] During the incident video and after the tasering, S/C Keenan informed Mr Holt that he was under arrest 'on suspicion of disobeying the directive of a police officer'. In evidence, S/C Keenan further specified that the directive disobeyed had been the initial directive to Mr Holt to stop the vehicle. For the reasons stated in depth earlier in this report, this direction was not a proper exercise of police power. Further, on S/C Keenan's own account, Mr Holt did stop the vehicle after moving forward for only a metre and a half. Therefore, it was not reasonable for S/C Keenan to hold a suspicion that Mr Holt was disobeying a police directive to stop the vehicle. An arrest based on disobeying such a directive is not a lawful arrest. The Commission concludes that S/C Keenan did not have a lawful basis to arrest Mr Holt.

The aftermath

- [117] S/C Keenan repeatedly asked Mr Holt to 'get out of the car'. Mr Holt said 'Step back so I can get out of the car'.
- [118] When S/C Keenan finally did step back, aiming the taser, Mr Holt got out of the car with his hands up in a gesture of surrender. He was instructed by S/C Keenan to turn around and did so. S/C Keenan pushed him in the back and said 'Stop fighting'.
- [119] There is no evidence that Mr Holt was fighting or resisting. The incident video does not show that Mr Holt was aggressive or fighting.
- [120] Mr Holt was handcuffed. S/C Keenan told him he was under arrest on suspicion of disobeying a direction of a police officer.

⁶⁶ *R v Nguyen* (2013) 117 SASR 432 [21].

- [121] Mrs Holt was told by a police officer: 'If you go anywhere near him, I'll arrest you too'.⁶⁷
- [122] Other officers attended in due course and took Mr Holt to Fremantle police station where he was lodged in the lock-up and confined to a cell for several hours.
- [123] His belongings were removed. He was fingerprinted and a DNA sample taken.
- [124] He was released later that night and made his own way home.
- [125] At the lock-up, he was told he would be charged with obstructing a police officer in the execution of duty and that the charges would come in the mail.
- [126] On Saturday 1 April 2017, he was telephoned and advised all charges would be dropped.

Opinion

- [127] In respect to S/C Keenan's actions, the Commission has found an opinion of serious misconduct.
- [128] In the Commission's opinion, S/C Keenan's actions in tasering, then arresting Mr Holt were unlawful. Moreover, they were unreasonable and oppressive.
- [129] A copy of the draft report was provided to S/C Keenan but no response was received by the Commission.

⁶⁷ Mrs Holt transcript, private examination, 11 December 2017, p 11.

CHAPTER TWO

The treatment of the passenger by Senior Constable Arnold

- [130] Mr Holt's passenger, Mr Robbins was advised by S/C Arnold that he would be summonsed for the offence of obstructing a police officer contrary to *Criminal Code* s 172. The gravamen of this offence is that the person must be hindering, preventing or resisting a police officer from performing their lawful duty.
- [131] During evidence, S/C Arnold was asked the basis upon which she came to a reasonable suspicion that Mr Robbins was committing this offence. S/C Arnold answered that Mr Robbins had been yelling, swearing and trying to get out of Mr Holt's vehicle after the tasing. S/C Arnold was also fearful that Mr Robbins would assault S/C Keenan. She also said that Mr Robbins was yelling but conceded that this could not be a basis for the charge.
- [132] S/C Arnold had no contact with Mr Robbins until a few seconds before the taser was discharged. Prior to and immediately after the tasing, Mr Robbins was sitting on the back seat of Mr Holt's vehicle filming S/C Keenan through the open door or window using a mobile phone. Mr Robbins was not physically attempting to make contact with S/C Keenan but repeatedly telling him that he was recording his actions.
- [133] It is evident from the incident video that Mr Robbins was shocked by the discharge of the taser. After the taser was discharged, Mr Robbins attempted to get out of the vehicle but was stopped by S/C Arnold who closed the door. Mr Robbins removed his foot from the door opening so that S/C Arnold could close the passenger door. Later when police had arrested Mr Holt, Mr Robbins followed S/C Keenan as Mr Holt was led away from the vehicle handcuffed. Mr Robbins continued to film but complied with S/C Keenan and S/C Arnold's requests to maintain a distance from Mr Holt.
- [134] The offence of obstruction requires proof of some act that is directed towards an officer or officers who are performing their lawful duty. The incident video is strong evidence of Mr Robbins' conduct during the period. S/C Arnold formed the view that he was obstructing police officers. It is not clear how the conduct of Mr Robbins (as described by S/C Arnold) hindered or prevented police from dealing with Mr Holt. Mr Robbins' commentary as he filmed may have been irritating. That is not enough.

- [135] Further, it is questionable as to whom Mr Robbins' conduct was preventing from performing their lawful duty as a police officer. Mr Robbins was filming S/C Keenan but not interfering with the physical arrest or removal of Mr Holt from the scene. Mr Robbins complied with S/C Arnold's initial request for him to remain in the vehicle although it is questionable whether she had a legal basis upon which to make this request. While there is no legal requirement for obstruction to involve physical interference with police, there must be a level of demonstrated non-cooperation with legitimate police activity. Filming police using a mobile device at a reasonable distance is not obstructive and cannot constitute an offence.
- [136] The Commission is concerned that a police officer with a decade of frontline policing experience failed to understand the elements of the offence of obstruction. S/C Arnold agreed under examination that swearing and yelling were not a basis upon which to allege per se that police were being hindered in the performance of their duty. Similarly, an apprehension that a person *may* commit another offence (such as assault) is not a basis upon which to allege an obstruction of a police officer's performance of duty.
- [137] The incident video does not corroborate S/C Arnold's evidence that Mr Robbins was swearing whilst in the vehicle or S/C Arnold's allegation that Mr Robbins intended to assault S/C Keenan should he be allowed out of the vehicle. While Mr Robbins was attempting to verbally engage with S/C Keenan, there is nothing that he said or did that indicated a threat of violence to S/C Keenan. Further, S/C Arnold appears to have a belief (incorrectly held) that it was a lawful police direction to require Mr Robbins to remain in the vehicle while Mr Holt was being arrested.

The Statement of Material Facts

- [138] S/C Arnold prepared a prosecution notice and a Statement of Material Facts (SMF) to support a charge of obstructing a public officer. This required her supervisor's approval. He pointed out the problems and declined to allow the charge to proceed. This was undoubtedly the correct decision.
- [139] There is considerable variance between the events recorded on the incident video and the SMF.
- [140] An SMF is an important legal document. It must be part of an initial disclosure to the accused by a prosecutor.⁶⁸

⁶⁸ *Criminal Procedure Act 2004* s 35.

- [141] If an SMF is false in a material particular, the course of justice may be perverted.
- [142] S/C Arnold gave evidence that she only saw a snippet of the incident video on the night and wrote the SMF from memory. Why she did this was not satisfactorily explained, especially as she had been the officer who seized Mr Robbins' phone for evidence. The SMF she prepared:

Obstructing Public Officer

Criminal Code 172(2)

Obstructed (a public officer) / a person lawfully assisting (a public officer), in the performance of the officers functions.

31 March 2017

Whilst conducting a traffic stop and dealing with a male driver, his male passenger (the accused) seated directly behind the driver started shouting at Police and instantly filming everything on his mobile phone.

When the accused announced he was recording, police clearly stated he had no permission to film officers. Three officers requested out loud the male cease recording.

As the driver became aggressive towards other officers an arrest had to be effected. SC ARNOLD placed a police hat in front of the phone, at this time the accused reached out and tried to grab the police hat. During this time the accused continued to shout at officers. SC ARNOLD requested the passengers (a third was also present) to stay inside the vehicle and let police do their job. The accused ignored the direction and opened his door with force into SC ARNOLDs body region.

Upon the door hitting SC ARNOLDs body, SC ARNOLD immediately pushed the door back to effect its closure to ensure the passenger stayed inside the vehicle as originally requested.

The accused applied further force in effort to push the door open again whilst yelling and swearing at officers. SC ARNOLD with the assistance of PC [] held the door with force towards the vehicle trying to keep the accused in the vehicle and to close it.

Both officers called out to the accused to stay in the vehicle again whilst the driver was being arrested.

The accused as a result had his leg temporarily trapped in the doors frame. Upon being told this Police released the door - enough to allow the accused to get back in the vehicle properly.

The accused continued to yell and swear at officers whilst they were trying to arrest the driver. At this point the accused was inside the vehicle with the door locked.

Once the driver was out of the vehicle and being dealt with, the accused got out and followed police whilst yelling and swearing and still recording.

The accused was asked several times by both SC ARNOLD and PC [] to get back into the vehicle.

The accused refused and continued walking towards officers at a pace. SC ARNOLD had both arms up indicating 'stop' and again requested the accused go back to his vehicle so police could do their job.

The accused did not listen nor comply with these directions/instructions. Instead the accused kept yelling at officers, walking towards at a pace and filming on his phone. This caused the other officers to focus on the accused and try to calm the situation. Another police unit was called in to assist.

The accused kept asking for officer names and was told to cease recording.

SC ARNOLD told the accused more than six times he did not have permission to record officers and he was obstructing police from doing their job and to move back.

SC ARNOLD attempted to push the accused back to gain space as the accused was not complying at all. The accused blocked this manoeuvre and yelled and shoved his phone in SC ARNOLDs head region. At this point SC ARNOLD snatched the phone and stated out loud 'This phone is now being seized in relation to the commission of an offence',

The accused attempted to grab SC ARNOLDs arm in effort to get the phone back. SC ARNOLD created distance and asked the accused to step back. This command was again ignored by the accused. Both SC KEENAN and PC [] called out to the accused and asked him step right back. At this time the officers had the driver finally secured (ready to place in a van) and the accused stepped back.

SC ARNOLD requested the accused stand at the rear of the police vehicle which was situated approximately 15m from where the driver was being dealt with. The accused accompanied police to the rear of the vehicle as requested.

The accused was advised he would be SUMMONSED for the offence.⁶⁹

- [143] There are many differences between the SMF and the incident video which are obvious on observation.
- [144] There was, as her supervisor correctly pointed out to her, no basis for the charge of obstruction.
- [145] The difference between the SMF, which may be presented to court, and the contemporaneous record of events evidenced by the incident video, is of concern and cannot be explained only on the basis of a defective recollection.
- [146] S/C Arnold's evidence to the Commission paralleled the substance of her explanation in a management interview, that the SMF reflected her

⁶⁹ S/C Arnold's Statement of Material Facts, 31 March 2017.

perception. It is difficult to understand how her perception could so differ from the incident video.

- [147] S/C Arnold could not satisfactorily explain the removal of her velcro name badge from her uniform, something she says she did not notice for three months until interviewed on 6 July 2017. She said she owned 10 name badges and had lost two others.
- [148] She conceded deliberate removal 'could be a possibility and if that is the case it would be an absolute error on my behalf'.⁷⁰
- [149] At no point was S/C Arnold engaged in a physical struggle. As she demonstrated to the Commission, the velcro badge is not easy to remove. The probabilities are that S/C Arnold deliberately removed her name badge as a continuation of her desire not to be identified.
- [150] S/C Arnold faces charges under police regulations. For this reason, the Commission refrains from expressing any opinion of serious misconduct.

⁷⁰ S/C Arnold transcript, private examination, 14 December 2017, p 17.

PART TWO

**THE POLICE INTERNAL
INVESTIGATIONS**

CHAPTER THREE

The criminal investigation

- [151] The investigation was allocated to State Traffic, who assigned the criminal investigation to the Major Crash Investigation Section and the managerial investigation to an investigator in a TEG other than TEG 2.
- [152] The officer in charge of the Major Crash Investigation Section made the first enquiries into the incident. He considered S/C Keenan's use of force report, a legal opinion provided by a senior solicitor, WA Police Force Prosecution Services Division, and advice from the use of force (UOF) capability advisor who reviewed S/C Keenan's use of force report.
- [153] The solicitor provided advice on 4 April 2017 as to whether a prima facie case existed to support charges against Mr Holt and Mr Robbins for obstructing police pursuant to the *Criminal Code* s 172 (obstructing public officer). This advice was based on a brief description of the incident provided by S/C Keenan's officer in charge. The solicitor did not view the incident video prior to providing advice. On the basis of the information provided, the solicitor advised:
- There was no identified legal basis for S/C Arnold to arrest Mr Robbins and therefore there was no prima facie basis for the charge of obstruction.
 - There was no prima facie case for the charge against Mr Holt, because immediately preceding the act said to obstruct (Mr Holt holding onto S/C Keenan's hand as he tried to remove the key from the ignition), S/C Keenan engaged in a questionable act by placing his hands onto the vehicle's ignition. A court would not accept S/C Keenan's justification that this was due to Mr Holt not obeying an order given under the CI Act as per s 153 (offence not to obey an order by an officer under that Act). Accordingly, S/C Keenan was not performing a function of his office as required to prove a charge of obstruction under the *Criminal Code* s 172.
- [154] The UOF capability advisor considered S/C Keenan's use of force report and incident summary and provided the following advice on 7 April 2017:
- S/C Keenan appeared to justify his use of force pursuant to the *Criminal Code* s 248 (self-defence), and self-defence of himself or another support the legitimacy of his actions.

- His explanation did not reference an intention to arrest Mr Holt for an offence, affording him legislative authority to use reasonable force under the CI Act s 16 (which allows a person to use reasonably necessary force when exercising a power under that Act) and the *Criminal Code* s 231 (which allows a person to use such force as may be reasonably necessary in the lawful execution of a sentence, process, warrant or in making an arrest).
- S/C Keenan correctly referenced his use of his 'situational appreciation' or 'subjective threat assessment' to determine the risk of injury in justifying the use of force in self-defence. However, this escalation in the conflict situation occurred as a result of his actions, specifically the opening of the vehicle door and his attempt to remove the key from the ignition to prevent the vehicle from moving forwards. Mr Holt grabbed S/C Keenan's hand as he questioned the lawfulness of such actions and, in doing so, assaulted S/C Keenan.
- When Mr Holt grabbed S/C Keenan's hand and used both hands to prevent S/C Keenan from removing the key, S/C Keenan could have articulated his intention to arrest Mr Holt for 'assault public officer'. Any subsequent use of force by S/C Keenan would be what he considered to be reasonably necessary in the circumstances to overcome the resistance offered by Mr Holt.
- There are risks with deploying a taser on a subject operating a vehicle. It requires the discharge to be subject to a greater degree of scrutiny. It would appear from the account given by S/C Keenan that at no time until he discharged the taser was he able to remove his hand from Mr Holt's grip and disengage from the situation.
- The use of force report was submitted three days after the incident occurred. Policy requires reports be submitted as soon as practicable or within 96 hours under the authority and direction of a supervisor.

[155] The Major Crash investigator viewed the CCTV footage of the Fremantle police station where Mr Holt was detained and considered the criminality of S/C Keenan's conduct. At this stage, neither Mr Holt nor Mr Robbins had lodged a formal complaint. On 10 April 2017, despite concerns raised by the solicitor and the UOF capability advisor, police decided not to proceed with a criminal investigation into the use of force, largely due to a lack of complaint from Mr Holt. The matter was handed to State Traffic to undertake a managerial investigation.

[156] On 13 April 2017, the TEG investigator assigned to the investigation attended Mr Holt's home and conducted an audio interview, during

which time Mr Holt said that he did wish to make a complaint. It appears that, from this point, the criminal investigation recommenced and was conducted by an investigator, concurrent to the TEG investigator's managerial investigation. Concurrent criminal and managerial investigations are permitted in the WA Police Force Conduct Investigations manual, which states that a criminal investigation should be conducted by the District in which the criminal behaviour occurs, and 'where practical the criminal investigation should be conducted concurrently to a managerial investigation by another business area to the subject officer's business area'.⁷¹

- [157] The investigator considered whether S/C Keenan's use of taser on Mr Holt could constitute an assault and provided his final report on 5 September 2017.
- [158] He read S/C Keenan's use of force report along with reports from police witnesses and statements from civilian witnesses Mr and Mrs Holt. Mr Robbins was unable to be located. The investigator also considered the incident video.
- [159] The investigator found that the accounts of the police officers were similar. He found that the accounts provided by Mr and Mrs B corroborated the police officer's accounts. He also found that the accounts provided by Mr Holt and his wife were similar to each other, and they corroborated that Mr Holt flashed his vehicle's lights and moved his vehicle before S/C Keenan placed his hand inside it to remove the keys.
- [160] The investigator considered the evidence of the above persons and found that the following had occurred:
- Mr Holt was applying pressure to S/C Keenan's left hand, not allowing him to remove his hand from inside the Jeep.
 - Mr Holt had already assaulted S/C Keenan by flashing the Jeep's lights at him causing him pain and discomfort. S/C Keenan was also of the belief that the P/C's safety was at risk, as Mr Holt moved the Jeep towards him.
 - S/C Keenan was attempting to turn the ignition off to prevent the Jeep from being driven into the P/C and thereby assaulting him.
 - S/C Keenan was also aware that Mr Holt was able to accelerate the Jeep while he had the grip on his left hand.

⁷¹ Police Conduct Investigation Manual - A Guide to Police Internal Investigations, p 17.

- S/C Keenan warned Mr Holt that he was to be tasered, Mr Holt did not release the grip on his left hand.
 - S/C Keenan deployed his taser striking Mr Holt's chest and stomach regions.
- [161] The investigator found that Mr Holt's assault of S/C Keenan was corroborated by:
- The report of the P/C where he stated that he observed Mr Holt's hand holding S/C Keenan's hand down onto the key/ignition.
 - The actions of S/C Keenan in the incident video, which shows S/C Keenan shaking his left hand and flexing his fingers on two occasions once he removed it from the Jeep. The investigator found this action to be indicative of someone regaining feeling/sense in a limb which had been the subject of pressure and/or pain.
- [162] The investigator considered the *Criminal Code* s 313 (common assault) and relevant defences. He found that pursuant to the *Criminal Code* s 223 (an assault is unlawful unless authorised, justified or excused by law) and s 247 (it is lawful for a person to use force to prevent the repetition of an act or insult of such nature as to be provocation to him for an assault), S/C Keenan was justified in deploying the taser as the most suitable force option in preventing the continuation of the assault upon himself by Mr Holt. He determined that no further action needed to be taken against S/C Keenan.

Commission review

- [163] The most serious offence that might be alleged against S/C Keenan was assault. Given the seriousness of this offence, the criminal investigation was not sufficiently thorough and did not consider all relevant evidence. The early legal opinion and the advice of the UOF capability advisor both called into question the lawfulness of S/C Keenan's actions. The criminal investigation report did not consider these advices and gives scant consideration to the legal questions which arose from the incident. It is noted that the solicitor provided a later, more detailed advice regarding the lawfulness of S/C Keenan's actions as part of the managerial investigation (discussed in more detail below). This legal advice found S/C Keenan's actions to be defensible but does not appear to have been considered by the investigator.
- [164] The investigator accepted S/C Keenan's version of events, which were supported in part by the P/C, but gave little to no consideration to Mr Holt's version. He also failed to identify discrepancies between

S/C Keenan's report and the events as depicted in the incident video. His report failed to consider or reference the powers that S/C Keenan was purportedly exercising when he stopped the vehicle, entered it to remove the keys or tasered Mr Holt. It also did not consider the option of putting this matter before the court for determination.

- [165] In the Commission's opinion, the criminal investigation barely skimmed the surface of the issues, did not appropriately weigh the evidence available and was an inadequate response to a very serious allegation.

The managerial investigation

- [166] While the criminal investigation was ongoing, a managerial investigation was being conducted by the TEG investigator. He conducted a more thorough investigation, in which he considered the reports mentioned above, and conducted audio-recorded interviews with all the officers involved. The TEG investigator was also unable to contact Mr Robbins, but noted in his report that 'it is assumed that Robbins' version of events would be similar to Holt's'.

- [167] The TEG investigator considered Mr Robbins' incident video, along with other relevant evidence, including:

- TEG's Firearm and Taser Register;
- taser download information;
- custody records;
- further advice provided by the UOF capability advisor after viewing the incident video;
- photographs of the taser wounds on Mr Holt; and
- a further legal advice provided by the solicitor regarding the lawfulness of S/C Keenan's actions.

- [168] The TEG investigator compiled this evidence to establish a proposed version of the events that resulted in S/C Keenan tasering Mr Holt. The version of events accepted by the TEG investigator is as follows:

- Five police officers from TEG Two conducted an RBT action on Beach Street, Fremantle on Friday 31 March 2017 at approximately 8.00 pm. S/C Keenan was the most senior officer present and therefore in charge. S/C Keenan was seated in a marked police vehicle monitoring the Automatic Number Plate Recognition system and the other four officers were standing on Beach Street testing drivers.

- Mr Holt drove through the line and, after providing a negative breath test, the P/C instructed him to drive into the car park where he inspected the Jeep for roadworthiness. At the same time, S/C Arnold, a First Class Constable (1/C) and another S/C became involved with a driver who supplied a positive breath test - Mr B and his wife.
- The P/C informed Mr Holt he would be getting a defect notice because of non-compliant modifications on the vehicle. The P/C had only graduated from the Academy three months earlier so he sought advice from S/C Keenan, who was still seated in the police vehicle, regarding the completion of the work order. Having received the advice, he walked back to the Jeep and placed the compliance notice on the windscreen.
- Mr Holt was swearing and acting in an aggressive manner towards the P/C, saying things similar to 'you're jealous and so poor you can't afford my car' (the tone of Mr Holt's voice indicated he was annoyed and frustrated). The other male in the vehicle, Mr Robbins, was also yelling and swearing, causing a commotion. The P/C did not feel threatened, proceeded to continue to act in a professional manner, and did not engage Mr Holt in unnecessary conversation.
- At this point, the other S/C and 1/C were dealing with Mr and Mrs B some 20-25 metres away and S/C Arnold was driving their vehicle into the car park. S/C Keenan decided to check on the P/C to ensure the work order was being issued correctly. As he approached the vehicle, he heard Mr Holt acting in a disorderly manner and made a decision to speak to him about his conduct.
- As he did this, the P/C completed the paperwork and Mr Holt began reversing the Jeep from the parking bay at a fast pace, flashing his lights several times illuminating S/C Keenan and the other officers. The available evidence suggests this was done to antagonise police.
- S/C Keenan continued to approach the vehicle and instructed Mr Holt to stop the vehicle; Mr Holt ignored this and continued to drive forward. The P/C on hearing S/C Keenan say this, and seeing Mr Holt continuing to drive off, moved in front of the vehicle causing Mr Holt to stop. S/C Keenan opened the door to the vehicle and reached in to turn the vehicle off.
- As he held the vehicle's key (whilst still in the ignition), Mr Holt grabbed S/C Keenan's forearm and hand with both of his hands and attempted to pull S/C Keenan's hand away from the key resulting in

a struggle. S/C Keenan instructed Mr Holt to let go of his hand; Mr Holt did not let go.

- S/C Keenan removed his taser from the holster and advised Mr Holt that he was about to be tasered, and within several seconds deployed the taser striking Mr Holt in the chest with both prongs resulting in Mr Holt releasing his grip on S/C Keenan. Mr Holt was then removed from the vehicle, arrested and handcuffed.

Commission comments on the Traffic Enforcement Group investigator's accepted version of events

- [169] The events leading up to the tasering were not captured by the incident video and therefore establishing these facts appeared to be very much determined by whose version of events were accepted; those of S/C Keenan, in some cases supported by the police witnesses, or those of Mr Holt and his wife. S/C Keenan's evidence appears to have been, for the most part, accepted by the TEG investigator.
- [170] The accounts agree that Mr Holt flashed his lights as he reversed from the car park and, although the manner of reversing, the number of flashes and the reason for flashing the lights was disputed, the TEG investigator accepted the police version of events that Mr Holt did so to antagonise them.
- [171] S/C Keenan's evidence focused heavily on the non-compliance of Mr Holt with his orders to stop the vehicle. There is difficulty in accepting that Mr Holt was being non-compliant when he was reasonably leaving the scene after being issued with the compliance notice, and came to a stop when the P/C stepped in front of his vehicle. The TEG investigator appeared, however, to have accepted the evidence that Mr Holt verbally abused S/C Keenan and revved the vehicle, driving it towards the P/C as he stood in front of the vehicle.
- [172] Given that Mr Holt stopped his vehicle when he saw the P/C ahead of him, it seems unlikely that he intended to inflict harm on the police officer. However, it is reasonable for a bystander in those circumstances, that a perception of danger to the P/C could arise, albeit self-inflicted given that the P/C placed himself in that situation. It is this perception of danger that S/C Keenan claimed justified him reaching into the vehicle to remove the keys.
- [173] The TEG investigator found that Mr Holt held onto S/C Keenan's hand and there was a struggle for the key. However, it appears more likely that Mr Holt's interference was to prevent the breakage of his ignition barrel

as he claimed, than to trap S/C Keenan in the vehicle. At the least, this alternative should have been carefully considered.

- [174] In his report, the TEG investigator did not comment on S/C Keenan's statement that, while this struggle occurred, he saw the P/C step away from the front of the vehicle and was aware that he was out of danger. S/C Keenan stated that he tried to remove his hand, but was unable to do because Mr Holt was trapping it in place. S/C Keenan then stated that Mr Holt manoeuvred the gear stick as if to drive away, causing S/C Keenan to fear that there was an imminent risk of harm to himself if the vehicle moved while his arm was trapped in the vehicle. It was this imminent fear of harm to himself, not to the P/C, that S/C Keenan claimed caused him to taser Mr Holt. No other officer or witness provided any evidence about this change in perception other than Mr Holt who stated that S/C Keenan could have moved away from the vehicle at any time.
- [175] S/C Keenan justified his taser discharge pursuant to the WA Police Force's Use of Force policy Fr-01.01, which states that a taser can be discharged when a member reasonably believes there is an imminent risk of serious injury to any person. S/C Keenan's perception of an imminent risk to himself in this situation was questionable because, despite Mr Holt's demeanour, there was little evidence to suggest that he intended to harm any officer. There was also a noticeable discrepancy in the incident video, which did not show S/C Keenan making any effort to pull away from the vehicle in the moments before the tasering. Immediately before tasering, he did step back. The TEG investigator's lack of comment on this critical part of the incident gave the appearance of having accepted S/C Keenan's justification of his use of force.
- [176] S/C Keenan detailed in both his report and interview how he thoroughly considered all of his use of force options pursuant to the WA Police Force's Situational Tactical Options model. The TEG investigator commented later that S/C Keenan had justified his actions. While this justification is in line with the Use of Force policy which requires WA Police Force officers to 'ensure the information provided in the incident summary supports their justification for the selection and use of a tactical option on a subject', it seems unlikely that such thorough consideration was given in such a fast paced and dynamic situation.
- [177] It is further noted that S/C Keenan sought permission from his supervisor to obtain extra time (three days) to complete his use of force report, which the UOF capability advisor noted should usually be completed as soon as practicable after the incident. S/C Keenan's supervisor gave evidence to the investigator that the initial use of force report did not mention preclusion (those circumstances that precluded him from using

other force options) until she prompted him to include this. The TEG investigator accepted that the use of the taser was reasonable given the perceived threat to the P/C and S/C Keenan.

[178] The account of events after the tasering is more easily verified as most of it is captured on the incident video. S/C Keenan reloaded the taser and pointed it at Mr Holt as he exited the vehicle. The Use of Force policy only allows an officer to 'draw and cover' with a taser when the officer reasonably suspects there is a risk of serious injury to any person. S/C Keenan justified this in his use of force report by stating that Mr Holt was non-compliant when he exited the vehicle and he feared the situation would deteriorate into a physical fight. The TEG investigator did not question or comment on this use of the taser to draw and cover.

[179] The TEG investigator described the events as depicted in the incident video as follows:

- Mr Holt gets out of the vehicle and is heard to say, 'I don't need to be cuffed, I'm not doing anything wrong'.
- S/C Keenan reloads his taser.
- S/C Keenan tells Mr Holt to turn around so that he can be handcuffed and attempts to take hold of his right hand. Mr Holt pulls his hand away and S/C Keenan uses his left hand to push the rear of Mr Holt's right upper shoulder to turn him around so that he is facing away and can be handcuffed.
- Mr Holt states that he is not resisting but appears to be using passive resistance by trying to pull his arm away.
- The P/C handcuffs Mr Holt.
- S/C Keenan tells Mr Holt he is under arrest on suspicion of disobeying the directive of a police officer to stop his vehicle.
- S/C Keenan attempts to walk Mr Holt away from the vehicle but Mr Holt tries to walk in the opposite direction back towards the vehicle and S/C Keenan pulls him away from it. Mr Holt is sat on a nearby kerb where he is spoken to further.

[180] This description of events did not accord with the incident video. The TEG investigator's description of Mr Holt using passive resistance to prevent being handcuffed is not evident in the incident video. Independent witness Mr B described Mr Holt's demeanour as he exited the vehicle as 'calm'. The TEG investigator failed to note occasions on the incident video where Mr Holt asks S/C Keenan to stop twisting the cuffs, indicating that

he may be in pain. The TEG investigator's description gave rise to a belief that Mr Holt was resisting arrest, which was not evident in the incident video.

- [181] In determining what took place in the escalation of events leading up to the tasering, it was open for the investigator to accept S/C Keenan's version of events. However, the TEG investigator's continued acceptance of S/C Keenan's evidence about the events following the commencement of the incident video, despite the discrepancies between that evidence and what was shown in the incident video, is concerning.
- [182] In its response to the draft report, the WA Police Force does not accept that the TEG investigator's description of events did not accord with the incident video. It is asserted that although Mr Holt's arm is shielded by his body from the camera, on balance, it does appear he pulled his arm away from S/C Keenan prior to being handcuffed.
- [183] The Commission stands by its conclusion that Mr Holt was not resisting arrest. In any event, the incident video speaks for itself.

Other evidence

- [184] During the managerial investigation, the TEG investigator sought clarification of previous advice received from both the UOF capability advisor and the solicitor. He asked that the UOF capability advisor consider the incident video. He did so and on 4 August 2017, provided the following advice:
- The incident video does not capture the actions or behaviour of Mr Holt preceding the tasering. These events are documented in detail in S/C Keenan's use of force report with S/C Keenan explaining the justification for his actions and his perception of the threat and risk, which resulted in the discharge of the taser.
 - There is no vision to confirm or deny the assault of Mr Holt on S/C Keenan by trapping his hand against the ignition barrel.
 - S/C Keenan appears to be very calm and controlled in what appears to be a tense conflict situation.
 - S/C Keenan can be heard warning Mr Holt that he is about to discharge his taser.
 - The events captured are consistent with the account in S/C Keenan's use of force report.

- There is no vision to support S/C Keenan's perception of risk so we are dependent on the subjective interpretation of events by S/C Keenan and his decision-making processes as documented in his use of force report.
- S/C Keenan's actions and response subsequent to the discharge of the taser appear to be reasonable, controlled and professional in the circumstances.

[185] The TEG investigator also sought clarification from the solicitor of his earlier legal advice and provided him with a detailed brief of the evidence gathered, although he did not provide the solicitor with a copy of the incident video. On 3 August 2017, the solicitor provided advice in relation to whether a court could hold that S/C Keenan acted in self-defence. The solicitor advised the following:

- After review of the available evidence, a court could find that S/C Keenan was lawfully responding to a disorderly offence by Mr Holt.
- The objective evidence could allow a trier of fact to conclude that S/C Keenan's acts of (a) shouting at Mr Holt to stop and (b) attempting to wrestle the ignition key were done in self-defence under the *Criminal Code* s 248 (self-defence).
- There remains an unresolved factual question of whether S/C Keenan was being restrained by Mr Holt or was holding onto the ignition key while Mr Holt tried to let go.
- However, on the available materials, S/C Keenan could discharge his evidential onus of raising self-defence under the *Criminal Code* s 248. On the available materials, self-defence is at least arguable and not fanciful. However, a key factual weakness arises from Mr and Mrs B's summary which indicates that there were other police officers present at the vehicle, which could point out the availability of another option; those police officers helping out.

[186] The decision not to provide the solicitor with a copy of the incident video means that his advice was not fully informed. He provided advice 'on the available evidence' but not all the evidence was available. The TEG investigator attached this advice to his investigation report but did not comment on how it influenced his conclusions.

The conclusions reached by the Traffic Enforcement Group investigator

[187] The TEG investigator reached the following conclusions regarding the use of force:

- The point of issue is whether, on the balance of probabilities, the use of force was reasonable.
- Without lawful justification, S/C Keenan's actions may constitute an offence.
- The evidence suggests that, on the balance of probabilities, Mr Holt was acting in a disorderly manner therefore S/C Keenan was lawfully entitled to request him to stop.
- The evidence suggests that, on the balance of probabilities, S/C Keenan's belief of imminent harm to the P/C was real and his intent to turn the vehicle off was justified.
- It can be argued that S/C Keenan had a number of use of force options open to him, however S/C Keenan has provided justification as to why he did not use other options.
- The Use of Force manual states that a taser can be discharged to reduce a threat and gain control of a subject where the member reasonably believes there is an imminent risk of serious injury. This belief is derived from an officer's perception of risk.
- Given the available evidence, it is reasonable for S/C Keenan to conclude he was at risk of imminent serious injury; therefore the use of the taser as a force option was justified.

[188] The investigator's analysis in the report included the following:

The first point for consideration is whether or not Keenan was justified in requiring [Holt] to stop his vehicle. The evidence of [] and Keenan suggests that on the balance of probabilities [Holt] was acting in a disorderly manner therefore Keenan was lawfully entitled to request [Holt] to stop.⁷²

[189] The 'disorderly manner' was not particularised and appeared to relate to the assertion that Mr Holt was making derogatory comments and swearing. The investigator gave no consideration to the evidence of S/C Keenan as to his actual intention which was just to talk.

[190] The investigator continued:

⁷² Internal Investigation Report by the TEG investigator, 21 August 2017, p 22.

As Keenan attempted to turn off the vehicle, [Holt] grabbed hold of Keenan's hand and wrist. [Holt] denies doing this, however the observational evidence of [the P/C] and Arnold combined with the evidence captured by [Robbins] suggests that this did occur. Keenan was unable to release [Holt]'s grip and he formed a belief should [Holt] drive off at that point he would likely sustain serious injury. As a result he removed his Taser from the holster told [Holt] he was about to be Tasered. [Holt] still not let go of Keenan and the Taser was deployed causing [Holt] to release his grip.⁷³

[191] The investigator did not appear to give any consideration to the lawfulness of S/C Keenan's actions in reaching into the Jeep to take the key, or whether the engine was on. He did not appear to have made any enquiries as to the significance of the chiming sound captured on the incident video before the taser was deployed.

[192] The investigator reached the following conclusions about Mr Holt:

[Holt] has been reluctant to assist with the investigation from the very beginning, he did not come forward and make a complaint, instead he had to be approached and one solicited. When questioned why he hadn't made a complaint earlier he stated he had been waiting to speak with his lawyer. He was requested to provide photographs of his vehicle, none were forthcoming. He was requested on 4 occasions to make appointments for his wife [] and [Robbins] to be interviewed but made excuses about his lawyer not being contactable, however he agreed to arrange a time for both of them to be interviewed. This did not happen and he failed to return calls and meet deadlines as requested.

...

The evidence further established Keenan did tell [Holt] to get out of the car and to let go of his hand prior to being warned he would be tasered, but [Holt] knowing what was coming still refused to adhere to instructions.

[Holt]'s evidence has been found to be less than credible and he has attempted to depict himself as the victim on the night by displaying a relaxed and totally compliant attitude and for no reason a police officer walked up opened his door and tasered him. The evidence has shown [Holt] was deceptive, untruthful and not willing to cooperate with the investigation when requested, which brings his actions and version of events into question.

As has previously been discussed each person will deal with a situation differently based on how they perceive and interpret things, in this case Keenan dealt with the situation based on his assessment considering all the facts. The use of force, when and how much to use is also very subjective and will change from person to person which will be assessed and dealt with differently based on the circumstances, there is no "one situation fits all" and Keenan in this instance has justified his actions.⁷⁴

⁷³ Internal Investigation Report by the TEG investigator, 21 August 2017, pp 22-23.

⁷⁴ Internal Investigation Report by the TEG investigator, 21 August 2017, p 25.

- [193] The dismissal of Mr Holt's evidence on the basis of his credibility is unwarranted.
- [194] His alleged non-cooperation and the fact that he did not immediately make a complaint are hardly relevant to an assessment of his credibility. Why should it be necessary for him to make appointments for his wife and Mr Robbins to be interviewed? In fact, Mr Robbins though initially cooperative with the Commission, proved uncooperative and actively avoided service of a witness summons.
- [195] Mr Holt and Mr Robbins are no longer friends.
- [196] The TEG investigator did not appear to consider that Mr Holt's attempt 'to depict himself as the victim'⁷⁵ may have been because he was a victim. Mr B, the civilian, described Mr Holt's demeanour: 'It seemed the tasering made no difference to his demeanour, he seemed calm'.
- [197] The summary 'for no reason a police officer walked up opened his door and tasered him' unfairly misconstrued the statement made by Mr Holt to the investigator consistent with his later evidence to the Commission that S/C Keenan had not given him any reasons for his actions. As set out earlier, S/C Keenan agreed in evidence that he did not explain to Mr Holt what he was doing.
- [198] Whether Mr Holt was deceptive or untruthful cannot be properly determined except in a court. The fact that his version of events was different from S/C Keenan's version does not make him deceptive or untruthful.
- [199] Apart from some contentious issues such as whether he was preventing S/C Keenan from removing his hand, Mr Holt's statement of events largely concurred with other statements.
- [200] Others such as the P/C, proffered a surmise as to the struggle but only Mr Holt and S/C Keenan can give direct evidence.

Commission review

- [201] The TEG investigator considered relevant evidence. In an investigation that largely involved balancing one version of events against another, he relied heavily on S/C Keenan's evidence in justifying his conduct and use of force. Despite testing S/C Keenan's evidence in interview and appearing to identify some discrepancies between his version of events and the incident video, these are not addressed in his investigation

⁷⁵ Internal Investigation Report by the TEG investigator, 21 August 2017, p 26.

report, which suggests the TEG investigator accepted S/C Keenan's explanation of his actions and perception of events.

- [202] The TEG investigator's flawed conclusions on Mr Holt's credibility as expressed in his report are such that questions remain whether it was open for him on the balance of probabilities to accept S/C Keenan's evidence, especially as he did not address any apparent inconsistencies. It is recognised that the TEG investigator took appropriate action in seeking legal advice from the solicitor and another opinion from the UOF capability advisor.
- [203] The UOF capability advisor did not give unqualified support to S/C Keenan's evidence prior to the tasering, noting dependency on S/C Keenan's perception of risk.
- [204] Without agreeing with those opinions, it is accepted that the TEG investigator could have reasonably been influenced by them in making his findings.

Professional Conduct Investigation Unit review

- [205] During the monitoring process, Commission officers engaged with the TEG investigator and his supervisor, along with officers from the PCIU. This early engagement enabled the Commission to raise some concerns in relation to the direction of the investigation. These concerns were raised with PCIU who, on receipt of the criminal and managerial investigation reports, decided to conduct an independent review before returning the matter to the Commission. The review was conducted by an Acting Inspector (A/Insp) and was completed on 10 November 2017.
- [206] In relation to the investigator's criminal investigation, the A/Insp made the following comments:
- There are no perceived issues with S/C Keenan refusing to participate in a video interview or provide a statement, other than his use of force report, to the investigator.
 - The police witnesses all refused to supply statements. This raises the question whether sworn police officers are in some way compelled to give statements in criminal matters. However, in this case they supplied their reports from the managerial process.
 - The findings that S/C Keenan's use of taser in the circumstances was lawful, was supported by the UOF capability advisor.

[207] In fact, the UOF capability advisor did not support S/C Keenan's use of force:

I have reviewed the Use of Force Report and Summary of Incident as submitted, however, this review has been conducted solely in consideration of the written account provided by the subject member and without the assistance of the CCTV footage which would enable the actions articulated by the subject member to be reconciled against the vision. Having reviewed the UOF Report I am able to offer the following observations and comments:

- In consideration of the incident as reported and the justification for the discharge of Taser in the circumstances, it would appear that SC KEENAN is attributing his justification for Use of Force on Section 248 of the Criminal Code Act and self-defence of himself or another to support the legitimacy of his actions.*
- The detailed explanation of his actions during the incident does not include any reference to an intention to arrest the subject [Holt] for an offence and thereby affording him legislative authority and powers to use reasonable force under Section 16 of the Criminal Investigation Act and Section 231 of the Criminal Code Act.*
- In consideration of SC KEENAN's Use of Force being justified in terms of self-defence, his references to the justification for use of Taser in consideration of WA Police policy are correct in that he has used his Situational Appreciation for subjective threat assessment to determine the risk of serious injury to himself or his colleague. However, this escalation in the conflict situation has subsequently occurred as a result of his actions and specifically the opening of the vehicle door and his attempt to remove the keys from the ignition to prevent the vehicle from moving forwards. The subject [Holt] responds by grabbing SC KEENAN's hand as he questions the lawfulness of such action and in doing so, assaults SC KEENAN.*
- Subject to the lawfulness of SC KEENAN's actions in terms of his justification for opening the vehicle door and attempting to remove the keys, when [Holt] grabbed his hand and used both hands with significant force to prevent SC KEENAN from removing the key, SC KEENAN could have articulated his intention to arrest [Holt] for Assault Public Officer and then any subsequent Use of Force by SC KEENAN would be that which he considered reasonably necessary in the circumstances to overcome the resistance offered or which he reasonably suspected was about to be offered by [Holt].*
- In terms of the discharge of the Taser and Taser deployment considerations where there are deployment risks associated with a subject which is operating a vehicle ([Holt] is in charge of the vehicle with the engine running), this requires that the discharge be subject of a greater degree of scrutiny as part of the quality assurance process to determine whether the discharge was reasonably necessary in the circumstances. Again, this will be dependent on the prevailing circumstances and the options available to the member at the time. It would appear from the account given by SC KEENAN that at no time until he was able to discharge the Taser was he able to remove his left hand*

from the grip of [Holt] which would have enabled him to tactically disengage from the situation.

- *There is no mention of a Taser Evidentiary Download having been conducted or any reconciliation of the Event Data and Trigger Activations (Firings) which would have been recorded, with the subject members' account. The UOF Report does not include the manufacturers serial number of the Taser (or the cartridge) so we are currently unable to identify which Taser was used and cannot search RMIS to establish whether a download has been conducted within 72 hours of the incident as per policy.*
- *The UOF Report was submitted at 1620 hours on Monday 3 April 2017 and the incident occurred at 2000 hours on Friday 31 March 2017. There is no explanation for the timeframe for submission of the UOF Report as policy requires the report should be submitted as soon as practicable, or within 96 hours under the authority and direction of a Supervisor.⁷⁶*

[208] In relation to the TEG investigator's managerial investigation, the A/Insp made the following comments:

- The investigation was adequate.
- The question at issue is whether it is accepted that what S/C Keenan did was lawful, by placing his hand into the open door to take the vehicle keys and then tasering Mr Holt while he sat in the driver's seat of his vehicle, when from the incident video there appeared to be very little resistance or risk to the officers present.

[209] The A/Insp went on to examine the incident in a different manner to either the investigator or the TEG investigators. He examined each of S/C Keenan's actions to determine if they were lawful. He found that the following laws applied:

- Stopping Mr Holt's vehicle during the random breath test and issuing the compliance notice were authorised pursuant to the *Road Traffic Act 1974* s 66 (police powers to require breath tests).
- Mr Holt yelling/swearing could constitute disorderly conduct pursuant to the *Criminal Code* s 74A.
- Mr Holt assaulted S/C Keenan when he flashed his lights at him pursuant to the *Criminal Code* s 222, 318 (serious assault of a public officer) and s 313 (common assault).
- S/C Keenan's order that Mr Holt stop his vehicle was lawful pursuant to the *CI Act* s 153 (not obeying the order of an officer).

⁷⁶ Use of Force capability advisor's advice, 7 April 2017.

- S/C Keenan was empowered to reach in and remove the vehicle's keys pursuant to the CI Act s 38 (powers to search a vehicle to prevent an offence).
- Mr Holt subsequently grabbing S/C Keenan's hand could constitute an assault pursuant to the *Criminal Code* ss 313, 318 or 317 (assault causing bodily harm).
- S/C Keenan's decision to taser Mr Holt was authorised by the *Criminal Code* s 247 (use of force to prevent the repetition of an insult).
- Mr Robbins' actions could constitute obstruction pursuant to the CI Act s 172. (It is assumed that the A/Insp meant to refer to the *Criminal Code* s 172 - obstructing a public officer).

[210] The A/Insp reviewed the incident video and made the following comments:

- There is no apparent action from S/C Keenan to try to disengage from Mr Holt. That is not to say it didn't happen prior to the incident video.
- At the time of the taser deployment, the P/C and S/C Arnold were standing behind S/C Keenan and at no risk of being run over by the vehicle.
- Therefore, it appears the taser was being used more as a compliance tool as opposed to prevent injury, grievous bodily harm or death.
- When Mr Holt alights from the vehicle, it appears he is man-handled by S/C Keenan in order to turn him around. It didn't appear as if this was totally necessary. Although Mr Holt is a large person he also appears quite a slow person by nature; he didn't appear as if he was wilfully passively resisting.
- A breathless S/C Keenan then advises Mr Holt that he's 'under arrest for disobeying a direction from a police officer.' It is undetermined if legal rights were afforded to the arrested person.

[211] The A/Insp reached the following conclusions:

- It is without question the events in this case are questionable and open to scrutiny. In any case, where police officers deploy force against another, it rarely looks good and requires justification. Balancing this with the community expectations and perceptions is a difficult task. In this case, S/C Keenan has displayed poor judgment in his actions which contributed to the agitated, elevated state-of-affairs whereby he was required to use force to temper the situation.

Although questionable, S/C Keenan's actions have been deemed lawful and in line with the policies and procedures as stipulated by the WA Police Force.

- S/C Keenan has been dealt with to the very limits of the managerial processes and will receive no sanction due to none of the matters being proved or sustained.
- Therefore, other than early intervention from the Behaviour Assessment Unit and ongoing management from his direct commanders, S/C Keenan remains a frontline police officer.

Commission comments on the Acting Inspector's review

- [212] The review made a retrospective justification of S/C Keenan's actions when S/C Keenan's own reports do not mention an intention to exercise powers under the above provisions, or even knowledge of them.
- [213] The A/Insp's brief analysis of the facts and the incident video indicates that he better recognised the discrepancies between it and S/C Keenan's account, and properly raised concerns with S/C Keenan's conduct. However, he did not go on to address those concerns. For example, his finding that S/C Keenan was using his taser as a compliance tool contradicted his statement that S/C Keenan's actions have been deemed in line with the WA Police Force policies and procedures. The WA Police Force Policy only permits the discharge of a taser in circumstances where an officer reasonably believes there is imminent risk of serious injury to a person; not as a compliance tool.
- [214] While PCIU appears to have better recognised the concerns regarding the lawfulness of S/C Keenan's actions, these have not been followed through by taking steps to address those concerns.
- [215] Despite PCIU engaging positively with the Commission throughout the monitoring process and appearing to appreciate the concerns with this matter, the Commission does not agree with the conclusions reached in the review about the lawfulness of S/C Keenan's actions in attempting to pull the key from the Jeep's ignition; then tasering Mr Holt; arresting him on a charge of doubtful validity; and causing him to be detained in custody for several hours.

The managerial investigation into Senior Constable Arnold

- [216] During the managerial investigation, the TEG investigator also considered the conduct of S/C Arnold during the incident.

- [217] While the Commission did not refer an allegation against S/C Arnold back to the WA Police Force for active oversight, consideration has been given to the action taken in relation to her, for the sake of completeness and to provide a comparison to the action taken in relation to S/C Keenan.
- [218] The incident video and evidence of the witnesses raised concerns that during the incident S/C Arnold:
- held her police cap over her face when Mr Robbins tried to film the incident;
 - told Mr Robbins he was not permitted to film the incident;
 - tried to force Mr Robbins to remain in the vehicle; and
 - removed her name badge.
- [219] The TEG investigator conducted a thorough enquiry.
- [220] As a result of the investigation, S/C Arnold has been charged pursuant to the *Police Act 1892* s 23. This process is still underway.
- [221] For this reason, the Commission will not comment further or form any opinion of serious misconduct.

Commission comments on the investigations

- [222] WA Police Force officers are permitted to use force in certain circumstances when exercising their powers arising from law. The circumstances in which that force can be used, and how much force can be used, is further articulated in WA Police Force Policy. When S/C Keenan used force to taser Mr Holt, his justification for doing so relied heavily on the Use of Force policy and focused on his perceived risk of harm. This justification was, for the most part, accepted by the WA Police Force investigators during the criminal and managerial investigations. It is evident that a high level of validity has been afforded to S/C Keenan's evidence and perception of the situation, despite evidence from Mr Holt, other witnesses and the incident video, which in parts contradicts S/C Keenan's account.
- [223] Consideration of the powers S/C Keenan was exercising in dealing with Mr Holt, and the question of whether he was acting under lawful authority, was not properly considered until the criminal and managerial investigations were reviewed by the A/Insp who stretched to find provisions that could retrospectively justify S/C Keenan's actions, and managed to do so, despite no evidence that S/C Keenan was himself aware of those provisions or the powers he was exercising.

- [224] The WA Police Force had three opportunities to investigate S/C Keenan's conduct, and instead used these opportunities to identify and apply reasons that would make it lawful and justified.
- [225] Given the rigorous action taken against S/C Arnold for less serious conduct, the action taken by the WA Police Force in relation to S/C Keenan appears to be inadequate and influenced in his favour.
- [226] The investigation report relied on S/C Keenan's belief that the P/C was subject to imminent physical harm from Mr Holt's vehicle as justification for S/C Keenan reaching into the vehicle to remove the keys. However, this analysis failed to resolve evidence that was inconsistent with S/C Keenan reasonably holding this belief. This evidence was available to investigators as a result of the recorded managerial interviews. S/C Keenan did not communicate to Mr Holt what he was doing even as removal of the keys became physically difficult. The P/C moved quickly away from the front of the vehicle once it had come to a stop and it was only once the vehicle came to a stop, that S/C Keenan could reach in for the keys.
- [227] The police investigators took a view that Mr Holt was 'less than credible', 'deceptive and untruthful' and not willing to cooperate with the investigation.⁷⁷ The basis of this assessment of Mr Holt was not explained with reference to any specific conduct beyond merely a preference for S/C Keenan's version of events. The investigators state that Mr Holt was reluctant to be interviewed. However, Mr Holt made himself available to be interviewed by internal investigators only 13 days after the incident.
- [228] The police investigators further relied on the evidence of the P/C and S/C Arnold combined with the incident video captured by Mr Robbins to corroborate S/C Keenan's evidence that Mr Holt grabbed hold of S/C Keenan's hand.⁷⁸ The investigators concluded:
- As S/C Keenan attempted to turn off the vehicle, [Mr Holt] grabbed hold of S/C Keenan's hand and wrist. [Mr Holt] denies doing this, however the observational evidence of [the P/C] and S/C Arnold combined with the evidence captured by [Mr Robbins] suggests that this did occur.*⁷⁹
- [229] The reliance on the evidence of the P/C and S/C Arnold was not reasonable given that it was contrary to the information provided by the P/C and S/C Arnold to the police investigators during their managerial interviews.

⁷⁷ WA Police Internal Investigation Report, 31 August 2017, p 26.

⁷⁸ WA Police Internal Investigation Report, 31 August 2017, p 23.

⁷⁹ WA Police Internal Investigation Report, 31 August 2017, pp 23-24.

- [230] In the P/C's managerial interview, he did not corroborate S/C Keenan's account of physical restraint. Rather, the P/C states, after being further questioned, that he never saw Mr Holt's hand on S/C Keenan's hand but rather 'I saw the motion of the twist, so I assumed it was being twisted and pulled into the vehicle'.⁸⁰ This assumption could be explained by the fact that the P/C talked with S/C Keenan about the event later on in the evening at Fremantle police station. Later in the interview, the P/C was asked the leading question 'So S/C Keenan has his arm caught, what was Holt doing?'⁸¹ At no stage during the earlier interview had the P/C stated he had seen S/C Keenan's 'arm caught'.
- [231] S/C Arnold similarly could not place Mr Holt's hands on S/C Keenan's in a restraint hold. S/C Arnold told the investigators that she could not say how many hands Mr Holt had on S/C Keenan and that S/C Keenan's hands were not on Mr Holt's but on the 'steering wheel area'.⁸² Further, the investigators concluded that generally S/C Arnold continued with 'a select memory and deceptive behaviour throughout the interview and was not honest'.⁸³ By their own assessment, the investigators considered S/C Arnold an unreliable witness. It was dangerous for the police investigators to use her evidence on the very issue at the heart of the justification for the use of force to corroborate S/C Keenan's account.
- [232] The statement by the investigators of reliance on the incident video to establish that Mr Holt did grab hold of S/C Keenan's hand and wrist is troubling. The incident video did not capture this occurring. Further, the incident video did not show S/C Keenan moving in a manner that would suggest he was trying to disengage from Mr Holt's grip. The incident video commences only seconds before the tasering incident with S/C Keenan holding the drawn taser in his right hand.
- [233] The lack of vision to support the alleged altercation between Mr Holt and S/C Keenan, and to support S/C Keenan's perception of the imminent threat to himself, means that investigators were forced to rely on S/C Keenan's version of events, supported by corroboration from S/C Arnold and the P/C. In the Commission's opinion, their evidence to the internal investigators failed to establish the necessary corroboration.
- [234] It is also difficult to resolve the 17 second delay between the arming of the taser gun and firing the probes into Mr Holt. Only S/C Keenan could arm the taser. This is a significant delay for an incident that the P/C stated

⁸⁰ Record of Interview between the TEG investigator and the P/C 21, June 2017, p 6.

⁸¹ Record of Interview between the TEG investigator and the P/C 21, June 2017, p 7.

⁸² Record of Interview between the TEG investigator and S/C Arnold, 6 July 2017, pp 9-10.

⁸³ WA Police Internal Investigation Report, 31 August 2017, p 27.

started and finished in seconds.⁸⁴ The police investigation report recorded that the taser was triggered 17 seconds after the taser was switched on. However, it failed to reconcile this time lapse with the evidence of Mr Holt, the P/C and S/C Arnold that the exchange at the vehicle door was of a short duration and only one taser warning was heard just a second prior to discharge.

- [235] The investigators had the benefit of a report from the UOF capability advisor who observed that in the incident video there was no vision to support the alleged assault against S/C Keenan by Mr Holt and that S/C Keenan appeared calm and controlled.⁸⁵ The Evidentiary Taser Download data establishing the 17 second time lapse was never provided to the UOF capability advisor even though he expressly asked for it on two occasions.⁸⁶

Conclusion

- [236] The Commission works closely with the WA Police Force, particularly IAU and PCIU, and will continue to do so despite occasional differing conclusions as exemplified in this investigation. It is inevitable that differences of view will arise from time to time.
- [237] The Commission recognises that it is not possible for PCIU to investigate every allegation of improper behaviour by a police officer. Many allegations must be returned to branches. In doing so, there is a risk that the investigation may be carried out by officers not specifically trained to do so and that a subsequent review by PICU may necessarily be limited to process rather than outcome.
- [238] The Commission does not suggest that the various investigations were influenced by improper motives. It considers each investigation was flawed for the reasons that are set out earlier.
- [239] The outcome on this night was that an ordinary citizen, on his way to dinner with his wife and a friend, was tasered in his vehicle for no good reason, arrested and locked up.
- [240] The anonymised incident video can be viewed on the Commission's website at <https://www.ccc.wa.gov.au>

⁸⁴ Record of Interview between the TEG investigator and the P/C, 21 June 2017, p 7.

⁸⁵ WA Police Internal Investigation Report, 31 August 2017, p 20.

⁸⁶ Use of Force capability advisor transcript, private examination, 12 December 2017, pp 13-14.