

Report into inadequate use of force reporting at Hakea Prison on 21 March 2016

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INTRODUCTION

- [1] Hakea Prison manages adult male prisoners who are remanded in custody while waiting to appear in court. It also accommodates recently convicted and sentenced offenders who are waiting to be placed in another State prison.
- [2] Prison Officer (PO) Zainal Omar Mattar has been employed by the Department of Justice (DoJ) since 2013 and works at Hakea Prison.
- [3] On 21 March 2016, PO Mattar and four other prison officers were working in Unit 1, Hakea Prison's Management Unit, under the supervision of an experienced Senior Prison Officer (SPO) Robinson.¹
- [4] SPO Robinson was the senior officer in charge of Unit 1, a position he had held since December 2014. This unit accommodates the more difficult prisoners.
- [5] On 21 March 2016, a prisoner was transferred into Unit 1 after allegedly assaulting another prisoner. PO Mattar led the induction process to bring the prisoner into Unit 1. This included a strip search.
- [6] While undertaking the prisoner's strip search, PO Mattar used physical force against him. CCTV cameras caught what happened during the incident. The CCTV footage speaks for itself and forms part of this report.
- [7] The Commission received an allegation of serious misconduct in relation to PO Mattar and commenced an investigation. As part of the investigation, CCTV footage was closely studied. Officers were privately examined.
- [8] The Commission's investigation was directed at the integrity of the reporting of the use of force, rather than the actual force PO Mattar used against the prisoner.
- [9] Reporting on use of force incidents is mandated and forms part of a prison officer's positive statutory duties. It is fundamental to the security of the prison as well as the welfare and safe custody of prisoners.
- [10] Each officer must submit an Incident Description Report (IDR). The senior prison officer is required to summarise these reports into Incident Minutes (IMs) in addition to preparing their own IDR.
- [11] The IDRs and IMs form part of the Incident Report (IR) which is submitted electronically to DoJ's database, the Total Offender Management

¹ Except for PO Mattar, all names of prison officers and senior prison officers have been anonymised. Superintendents and Assistant Commissioners have not been anonymised.

Solution (TOMS). The records comprising the IR are official records. The reports may be relied upon for the purposes of legal and disciplinary proceedings.

- [12] During the prisoner's induction and processing in Unit 1, PO Mattar used force against him. Two significant uses of force against the prisoner were not recorded accurately in the IDRs of PO Mattar and other officers.
- [13] PO Mattar's first application of force involved him forcefully pushing his elbow and forearm into the prisoner's neck and head region which led to the prisoner's head colliding with the cell wall.
- [14] PO Mattar's second application of force was the rapid and forceful grounding of the prisoner to the cell floor after the prisoner had complied with his order to place his t-shirt in a plastic bag.
- [15] The *Prisons Act 1981* (Prisons Act) sets out the circumstances in which an officer may lawfully use force against a prisoner. Whether such circumstances existed in this instance is questionable, as is whether the force used was excessive.

First use of force incident

- [16] The IDRs of three officers omitted the first use of force. SPO Robinson did not submit an IDR despite a requirement to do so. PO Hunter gave evidence that he did not see this use of force, which is consistent with the CCTV footage. PO Hunter was outside the cell.
- [17] PO Mattar and PO Palmer's IDRs minimised the force used against the prisoner by saying that PO Mattar applied his body weight against the prisoner's body, when in fact, the force used was more significant. Each stated that the prisoner was posing a threat to PO Mattar at the time when there was no reasonable basis for claiming that a threat existed.
- [18] The IDRs of PO Mattar and PO Palmer were inconsistent with the CCTV footage, and served to deflect attention away from the actual force PO Mattar used against the prisoner.

Second use of force incident

- [19] The IDRs and IMs recorded the second use of force inaccurately, in that they represented the prisoner clenched his t-shirt and threw it aggressively into the bag, raising his hands and showing aggressive behaviour. The descriptions of the threat posed by the prisoner in each IDR submitted were exaggerated and unsupported by the CCTV footage.

- [20] The officers' descriptions of the force used by PO Mattar were vague and served to obscure and minimise what occurred.
- [21] The IDRs of all officers were strikingly similar in the description of the second use of force incident but inconsistent with the CCTV footage. The IDRs of PO Mattar and PO Palmer were identical in critical parts, leading to an inference of collusion.
- [22] The IR as a whole perpetuated an implausible version of events, and sought to provide justification for the use of force by PO Mattar, and minimise the degree and nature of the force actually used.

Department of Justice's response

- [23] The incidents were brought to the attention of DoJ. A DoJ review meeting was called by senior department personnel, during which some of the officers present were asked to explain why their reports 'did not match the footage'.
- [24] The justification given by PO Mattar, that there was a significant passage of time between the events and the reporting, was not supported by DoJ's records. However, no further action was taken by DoJ. The officers who were present at the meeting may have been verbally counselled.
- [25] No further action was taken in relation to these particular incidents. However, PO Mattar was subject to disciplinary proceedings in relation to another incident.
- [26] The DoJ acknowledge that this matter should have been included in that disciplinary process.
- [27] The prisoner made a complaint to the Western Australia Police Force. However as he would not speak with police or provide a statement nothing eventuated.
- [28] It is accepted that in a custodial environment, use of force may be required from time to time. Sometimes the force used will be significant to overcome threats to the safety of officers and prisoners or to ensure compliance with lawful orders. But any use of force must be honestly and accurately recorded.
- [29] Like every other citizen, prison officers have no right to use more force than is reasonably necessary. Covering up conduct through false reporting and collusion is a serious offence.

- [30] The purpose of this report is to bring attention to weaknesses in the documentation surrounding use of force incidents and the inadequate response by DoJ.
- [31] Because DoJ chose to take 'improvement action' by way of review hearing, they are precluded from taking disciplinary action.²

² *Public Sector Management Act 1994*, s 81.

CHAPTER ONE

The incidents

- [32] The regulatory framework and procedures relating to reporting on the use of force by prison officers in State prisons has been set out in the Commission's Report entitled *Report into inadequate use of force reporting at Eastern Goldfields Regional Prison in May 2017*. It is unnecessary to reproduce it here.
- [33] On 21 March 2016, the prisoner was brought to Unit 1 at about 2.30 pm for allegedly assaulting another prisoner.
- [34] The prisoner was brought into a cell in handcuffs for 'processing' and 'induction'. This involved a strip search. What happened when the prisoner entered the cell is seen on CCTV.

Application of force used against the prisoner's head and neck

- [35] The witnessing officers' evidence to the Commission and in their IDRs was that PO Mattar told the prisoner to be compliant and his response was to the effect of "yeah righto cunt".
- [36] PO Mattar forcibly applied his elbow and forearm against the prisoner's head and neck causing his head to collide with the cell wall. The prisoner was handcuffed and held by two other officers when this happened.
- [37] Just over an hour later, PO Mattar prepared his IDR. As justification for this use of force, he stated, 'As I believed the prisoner was about to assault me I placed my body weight against him'.
- [38] PO Mattar was given an opportunity to explain what led to his belief that he was going to be assaulted, as reflected in his IDR. His responses were inadequate.
- [39] In summary, PO Mattar told the Commission he believed the prisoner might assault him due to:
- his previous experience as a prison officer;
 - his belief that any prison officer can be assaulted at any time;
 - the prisoner coming to the unit as a result of assaulting someone;
 - the prisoner being "verbally non-compliant"; and

- the prisoner saying "Prison officers are fucked and I'm going to get you", although this matter was not recorded in any contemporaneous records of the incident.

[40] The evidence before the Commission does not establish the prisoner was a threat.

[41] PO Mattar provided a response to a draft report on 25 May 2018, in which he maintained his position that:

... the prisoner was a threat by reason of his non-compliant body language, non-compliant language, his aggression, the prisoner coming to the unit due to assaulting someone, and his [Mr Mattar's] belief that any person can be assaulted in a prison at any time.

Mr Matter tried to de-escalate the situation by talking to the prisoner as soon as he arrived at the Unit. The prisoner remained verbally non-compliant. He was in an agitated state, using disrespectful language and he was not responding to the directives given to him. Mr Mattar perceived that the prisoner may use his head to head-butt him. He had also seen the prisoner look to the prisoner officer to his left. The prisoner sized-up that prison officer, as though demonstrating that he wanted to fight.³

[42] In the Commission's view, PO Mattar's description of this use of force as a leaning of body weight is deceptive and inaccurate. It minimises the amount of force he used and obscures the fact that the prisoner was restrained and handcuffed at the time.

The forceful grounding and restraint of the prisoner

[43] After the first use of force incident, PO Mattar removed the prisoner's handcuffs. The prisoner was turned around to face him.

[44] Complying with an order given by PO Mattar, the prisoner removed his t-shirt in readiness to place it in a bag. As he put his t-shirt in the bag, PO Mattar rapidly joined his two hands together behind the prisoner's neck and forcefully pulled him down. This grounded the prisoner, face down, where he was held by five officers.

[45] In his reponse, 'Mr Mattar maintains that the prisoner's arm was above the prisoner's shoulder. The prisoner's arm and hand contacted the bag with a closed fist. Mr Mattar maintains that it was an aggressive act, and that this was not clear from the footage.'⁴

³ Zainal Omar Mattar, submissions on draft report, 25 May 2018 p 3.

⁴ Ibid p 3-4.

[46] This is not shown on the CCTV. PO Mattar did not describe the prisoner's arm and hand making contact with the bag in either his IDR or his evidence before the Commission.

[47] In PO Mattar's response:

Mr Matter maintains that the use of force was necessary in the situation to ensure his lawful orders were complied with. He perceived that the prisoner was a threat as the shirt was placed into the bag in a sudden and aggressive manner. It is his understanding that section 14(1)(d) Prisons Act 1981 (WA) entitles a prison officer to use such force as they believe, on reasonable grounds, to be necessary to ensure those orders are complied with. He maintains that he acted within his authority as a prison officer and in accordance with the training of a Unit 1 officer.⁵

[48] PO Mattar described his actions in his IDR as follows: 'Spontaneously, [the prisoner] clenched the shirt and threw it aggressively into the bag, **raising his hands** and showing **aggressive** behaviour' (**emphasis added**).⁶ The CCTV footage does not support this statement.

[49] Other witnessing officers' IDRs described this incident using strikingly similar language. However, after viewing the CCTV footage, PO Palmer and PO Turner admitted that the prisoner did not raise his hands aggressively.

[50] PO Mattar and PO Keith told the Commission that the prisoner 'clipped' PO Mattar's hand with his own after throwing his t-shirt in the bag.⁷ This was not in their IDRs. This is a significant omission, which neither officer explained adequately. PO Hunter maintained he saw an aggressive hand movement but could not be more specific.⁸

[51] In his response to the Commission's draft report, PO Keith said:

... he omitted to include that the t-shirt clipped Officer Mattar's hand in his IDR. He states that this was not the act that prompted the use of force. Mr [Keith] maintains that the prisoner made a sudden and unnecessary hand movement to aggressively throw his shirt into the bag when he was clearly asked to place the shirt into the bag. The prisoner was given a clear direction on entering the processing cell that any sudden movements would be deemed a threat.⁹

[52] All officers agreed that their IDRs were inaccurate. Mr Keith 'reiterates that the inaccuracy was due to human error and not malicious intent.'¹⁰

⁵ Ibid 2018 p 5.

⁶ Z Mattar IDR.

⁷ B Keith transcript, private examination, 9 November 2017 p 17; Z O Mattar transcript, private examination, 8 November 2017, p 9.

⁸ J Hunter transcript, private examination, 10 November 2017, pp 17-18.

⁹ B Keith, submissions on draft report, 25 May 2018, p 4.

¹⁰ Ibid.

CHAPTER TWO

Reporting the application of force to the prisoner's head and neck

- [53] SPO Robinson did not provide an IDR about the use of force against the prisoner. This omission was a failure to discharge his duties and contrary to DoJ Policy Directives (PDs).¹¹ He accepts this.¹²
- [54] SPO Robinson provided a plausible explanation that he had been involved in a violent use of force incident earlier in the day with another prisoner, which resulted in him being pre-occupied.¹³
- [55] The CCTV shows that all prison officers, with the exception of PO Hunter, observed PO Mattar forcefully apply his elbow and forearm against the prisoner's head and neck for about 10 seconds. This use of force was required to be accurately reported.¹⁴
- [56] Despite this, PO Keith and PO Turner did not record PO Mattar using this application of force against the prisoner in their IDRs.
- [57] When questioned about the omission, PO Keith considered it a "minimal use of force" and an "oversight" in the context of the more significant force PO Mattar used.¹⁵ PO Turner had similar views.¹⁶
- [58] The omission of this use of force from IDRs was significant.

Prison Officer Mattar

- [59] PO Mattar's IDR minimised the force used and omitted that the prisoner was handcuffed and held by two other prison officers at the time.
- [60] PO Mattar acknowledged this to the Commission "again my actions in my report - what I've said in the report doesn't reflect to the – to the footage".¹⁷
- [61] PO Mattar inaccurately described his use of force in circumstances where:
- the justification for the use of force was implausible;
 - his inaccurate description served to obscure this fact; and
 - he was under a statutory duty to accurately report his use of force.

¹¹ *Policy Directive 41*, pp 4-5 [6].

¹² R Robinson transcript, private examination, 8 November 2017, p 8.

¹³ *Ibid* p 11.

¹⁴ *Policy Directive 41* p 2; *Prisons Act* s 12; *Criminal Code* s 173.

¹⁵ B Keith transcript, private examination, 9 November 2017, p 29.

¹⁶ J Turner transcript, private examination, 9 November 2017, pp 16.

¹⁷ Z O Mattar transcript, private examination, 8 November 2017, p 8.

- [62] Reporting on this use of force was part of PO Mattar's positive duties and functions as a prison officer.
- [63] PO Mattar created an official DoJ record, an IDR that others, including internal investigators, ought to have been able to rely on as accurate.
- [64] His reporting of the incident deflected attention away from the use of force he actually used.
- [65] PO Palmer's identically deceptive reporting of the incident gave greater evidential value and weight to PO Mattar's IDR.
- [66] PO Mattar denies that he provided an inaccurate description of events to obscure or minimise the use of force. He states 'his IDR was written to the best of his ability when it was written. He maintains that the quality of the written word in his report was the result of it being a busy day where he faced multiple competing priorities'. He also stresses that his 'training inadequately addressed the standard of report writing required as well as the level of detail required'. In particular, PO Mattar claims that his 'competency in relation to incident report writing expired on 17 May 2014 and he did not receive any further training'.¹⁸

Prison Officer Palmer

- [67] PO Palmer's IDR was strikingly similar to PO Mattar's. He described this use of force, 'The prisoner **appeared he was about to assault** Officer Mattar, Zainal and he **placed his body weight against** [the prisoner].' (**Emphasis added**)
- [68] Before the Commission, PO Palmer acknowledged that it was the verbal rather than the physical actions of the prisoner that led him to record that PO Mattar was about to be assaulted.¹⁹ He also acknowledged that the use of force was not necessary to restrain the prisoner.²⁰
- [69] PO Palmer was given an opportunity to explain the deficiencies in his reporting of this use of force. He said:

Do you have any recollection of reading anyone else's incident description?---No. Well, I pride myself on non-collusion and I try to word the report in the best way I can, yeah.

So do you generally read other people's incident descriptions when you do a report or not?---No.

...

¹⁸ Zainal Omar Mattar, submissions on draft report, 25 May 2018 p 5-6.

¹⁹ D Palmer transcript, private examination, 9 November 2017, pp 12-13.

²⁰ Ibid p 13.

You've said here, "The prisoner appeared to be about to assault Officer Mattar Zainal and he placed his body weight against [the prisoner]"?---Yeah.

Do you recall that?---I think – no. Sorry, no, no - - -

Are those your words: "He placed his body weight against" [the] Prisoner?---I just can't, yeah – I'm trying, yeah, I'm just using my memory, trying to remember the incident. It was – yeah, I just – yeah, I can't remember. And yes, I – yeah, I probably – yeah, I could have used those words.²¹

[70] Given that:

- there were striking similarities between the IDRs of PO Palmer and PO Mattar in respect to this particular force used against the prisoner;
- there were sentences in both PO Palmer and PO Mattar's IDRs that were identical;
- PO Palmer's IDR was inconsistent with the CCTV; and
- PO Palmer's IDR was created at 5.22 pm, after PO Mattar's was created at 3.35 pm,

the Commission has inferred that PO Palmer either colluded with PO Mattar as to how to describe this use of force, or otherwise copied this aspect of PO Mattar's report into his own. The latter is a regular occurrence according to evidence received by the Commission.

[71] PO Palmer did not provide a plausible explanation for the almost identical reports. His evidence before the Commission on this, and other material matters, was vague and did not adequately address the issue.

[72] The Commission is satisfied that PO Palmer did not prepare his IDR independently, despite his denial that he colluded with or otherwise copied PO Mattar's report.

[73] Little weight can be given to PO Palmer's IDR. He has placed his integrity into question.

[74] PO Palmer was under a statutory duty to accurately report on matters concerning the security of the prison or the welfare of prisoners. This was a function of his office. He did not prepare his report independently. Instead, he copied PO Mattar's IDR or otherwise colluded with him about the evidence. He was aware his IDR may be used in legal or other proceedings.

[75] PO Palmer was provided with an opportunity to respond to the Commission's draft report prior to finalisation, he did not do so.

²¹ D Palmer transcript, private examination, 9 November 2017, pp 6, 8.

- [76] In his reponse 'Mr Mattar adamantly denies that he discussed the contents of his IDR with PO Palmer or colluded with him. He states that after the incident occurred, the prison officers and senior supervisors met for a "hot debrief" in accordance with general procedure', the inference being this is where the similarity stemmed from.²²
- [77] However, in his evidence before the Commission, PO Mattar could not recall whether a 'hot debrief' occurred.²³ PO Palmer was questioned extensively about the similarities between the two IRs. He did not mention a 'hot debrief' and ultimately had 'no explanation' for them.²⁴ PO Keith could not remember whether there was a debrief directly after the incident (a 'hot debrief').²⁵ Officers Turner and Hunter could not recall a 'hot debrief' occurring.²⁶ SPO Robinson's evidence was that there was a 'hot debrief'.²⁷ None of the IRs mentioned a 'hot debrief', nor did the IMs.
- [78] The evidence as to whether or not a 'hot debrief' occurred is at best inconsistent. If one did occur, the Commission is of the view that it would not explain the almost identical nature of the IRs of PO Mattar and PO Palmer in any event.

Reporting the forcible grounding of the prisoner

- [79] All the IDRs and IMs described the prisoner throwing his t-shirt into a bag held by PO Mattar and then raising his hands aggressively.
- [80] These similarly worded parts of the IDRs were inconsistent with the CCTV footage of the incident. It is implausible that several officers recalled the events in the same manner when the events did not occur.
- [81] Each officer had an opportunity to explain the discrepancy during examinations before the Commission.

Prison Officer Mattar

- [82] PO Mattar told the Commission that the prisoner raised his hands and clipped him as he threw his t-shirt into the bag. This was not reflected in his IDR, nor the IDRs of any other witness, although PO Keith corroborated it in his evidence before the Commission. PO Mattar

²² Zainal Omar Mattar, submissions on draft report, 25 May 2018 p 6.

²³ Z O Mattar transcript, private examination, 8 November 2017, p 10.

²⁴ D Palmer transcript, private examination, 9 November 2017, pp 14-16.

²⁵ B Keith transcript, private examination, 9 November 2017, p 12.

²⁶ J Turner transcript, private examination, 9 November 2017, p 13 and J Hunter transcript, private examination, 10 November 2017, p 4.

²⁷ R Robinson transcript, private examination, 8 November 2017, p 15.

accepted that this version of events was not apparent from the CCTV footage.

[83] In his response to the Commission's report, 'Mr Mattar reiterates that the CCTV footage does not provide an accurate view of the incidents'.²⁸ Mr Keith's explanation was that 'from his perspective this action was not the justification for the use of force. He says further that this [failure to report] was in no way an intentional act to hinder the reporting process of this incident'.²⁹

[84] The Commission does not accept the evidence given by PO Mattar and PO Keith that PO Mattar's hand was clipped by the prisoner. These were self-serving statements well after the event. It was a materially significant event and ought to have been identified in the IDRs or other contemporaneous official records.

[85] When asked to justify why his IDR was contrary to the CCTV footage, PO Mattar said:

*Yeah, you still can't – when he's – he's raised his hand, which you're not supposed to do, you're ordered to place your clothes into the bag. That was not – that's not placing. The direct order for every prisoner that comes into unit 1, "you are to place", so the hand is not supposed to go up and then come into a fist and throw it into the bag. You're – when you take your shirt off, you're actually supposed to place the clothes in there ...*³⁰

[86] PO Mattar said he would react in the same way in the future on the basis that his perception at the time was that he was threatened.³¹ In response to his counsel's question at the Commission examination, PO Mattar said "but my perception is that when he threw that t-shirt down I, out of instinct, reacted and, yes, it looks bad on the footage ..."³²

[87] There was no reasonable basis on which PO Mattar could have believed the prisoner was presenting a physical threat to PO Mattar when he was complying with an order to put his t-shirt in a bag.

[88] PO Mattar's description in his IDR that the prisoner was 'aggressively *throwing* his t-shirt into the bag' is made in the context of his statement in the same IDR that he '*placed* him [the prisoner] to the ground position'. This was not accurate, in that it exaggerated the force used by the prisoner and minimised the force used against the prisoner.

²⁸ Zainal Omar Mattar, submissions on draft report, 25 May 2018 p 6.

²⁹ B Keith, submissions on draft report 25 May 2018, p 5.

³⁰ Z O Mattar transcript, private examination, 8 November 2017, p 18.

³¹ Ibid p 27.

³² Ibid.

- [89] PO Mattar was under a positive duty to accurately report the force he used against a prisoner. This was a matter that not only had the potential to jeopardise the security of the prison, it also concerned the welfare and safe custody of the prisoner.
- [90] PO Mattar's description of his use of force against the prisoner was inconsistent with the CCTV footage. His description, and the descriptions given by other officers, concealed what actually happened. In the absence of CCTV footage, his IDR had enhanced evidential value and weight and may have been used in legal and disciplinary proceedings. Having regard to the CCTV footage, PO Mattar's official record of what happened did not reflect what occurred.

Prison Officer Palmer

- [91] After viewing the CCTV footage, PO Palmer accepted that the prisoner did not raise his hands.³³ When asked why his IDR recorded that he did, PO Palmer said "[b]ecause that's what I remembered at the time ... Because it happened quite quickly, and there may have been a split [sic] after that".³⁴
- [92] PO Palmer was given an opportunity to explain to the Commission why the material matters in his IDR were strikingly similar, and in some cases, identical to the IDR of PO Mattar:

Is it your evidence that it's just a coincidence that your incident description report is so similar to Mr Mattar's?---Yeah; well, I believe so, yes.

...

That's clearly a typo is it not, a typographical error? The prisoner's name is not [...] J.?---That's correct, yeah.

It's [...] K.?---[...] K., yes. Correct.

You both did the same typographical error - - -?---No.

- - - in exactly the same spot?---Yeah. No, mine's - yeah.

Can you explain that?---No, mine - yeah, that one's got a full stop and that one's got a comma so - so they're not exactly the same.

You've both made the same error?---And "spontaneously" is not there and, yeah, so - - -

I'm not saying to you the entire reports are identical, I'm saying there are passages which are identical and the reports are very similar overall?---Okay.

³³ D Palmer transcript, private examination, 9 November 2017, pp 13-14.

³⁴ Ibid p 14.

*The reason I'm bringing this to your attention is that there is a possibility that a person may come to the view, it is open on the facts that a view may be taken that you copy-and-pasted or somehow copied Mr Mattar's statement, or that you and Mattar - Mr Mattar, that is – wrote your statements together. Now I'm giving you an opportunity to provide an alternate version of events. Have a think about it. Think carefully, take the time that you need and see if you can explain to the commission how this has occurred?---I've got no explanation.*³⁵

(Emphasis added)

- [93] When the two IDRs were compared and the officers' explanations were considered, the only reasonable inference available is that the officers colluded, or PO Palmer copied PO Mattar's IDR. It was implausible that the wording of the IDRs could have been so strikingly similar, and in some cases identical, without collusion or copying, particularly where the statements were at odds with what was depicted in the CCTV footage.
- [94] The Commission does not accept that PO Palmer prepared his IDR independently.
- [95] PO Palmer failed to discharge his duty to accurately report the use of force. His inaccurate report perpetuated PO Mattar's deception and sought to protect his actions from scrutiny.

Prison Officer Keith

- [96] PO Keith was given an opportunity to respond to the Commission's report prior to finalisation. He said that he believed:

*... the usefulness of the CCTV footage is limited. The camera is positioned in the top corner of the tight and small processing cell. He has viewed the footage and recalls that he was standing to the left of Mr Mattar. He was facing away from the camera. He recalls that his body unintentionally blocked a portion of the visual. He states that the full circumstances of the incidents cannot be evaluated by watching a silent replay of the event on CCTV footage.*³⁶
- [97] PO Keith informed the Commission that he saw the prisoner's t-shirt hit PO Mattar's hand. This was not reflected in his IDR nor the CCTV footage.
- [98] When PO Keith was asked why he did not include this in his IDR, he said: "I don't know. At the time of writing the report I guess I just didn't – I didn't put it in. I don't - I don't know. I don't know why it's not in there".³⁷

³⁵ D Palmer transcript, private examination, 9 November 2017, pp 15-16.

³⁶ B Keith, submissions on draft report, 25 May 2018, p 3.

³⁷ B Keith transcript, private examination, 9 November 2017 p 17.

- [99] During his evidence, PO Keith was given an opportunity to explain why his description of this use of force was inconsistent with the CCTV footage. He said:

And you can see the prisoner does not raise his hands after he throws the shirt?---
*No. Yeah, like I said **I've obviously not written that correctly.***

...

He might have thrown and hit the hand of Officer Mattar as you now say today, but you don't put that in your report?

---Yeah.

It could have been all sorts of things but the one thing you do put in your report is that he raised his hands aggressively?---It was that quick, sudden movement which they are warned prior to being in that cell that there's no sudden movements or you will be restrained on the ground. That's the spiel that they're given when they come in.

*That may well have been a justification for the use of force, but it's not the one that you wrote?---Yeah, I don't – honestly, I think that's – **I've not written that correctly, yeah.***³⁸

(Emphasis added)

Prison Officer Turner

- [100] PO Turner accepted that the prisoner did not raise his hands aggressively, blaming poor expression for the inaccuracies in his report, stating "really it's probably a pretty poorly written report".³⁹
- [101] When the Commission suggested that aspects of the report were not poorly written but were in fact wrong, PO Turner said:

I can't argue. Yeah, I hadn't seen the footage of it and I still haven't. We – when the incidents happen, it happens in a very quick way. We don't get a second look at it. We kind of go with what we thought happened. Hindsight, it's a lot easier if you get to see the footage ...

(Emphasis added)

- [102] PO Turner was provided with an opportunity to respond to the Commission's draft report prior to finalisation, he did not do so.

Prison Officer Hunter

- [103] PO Hunter acknowledged that his IDR did not describe the prisoner's movement accurately, stating "it doesn't appear that that's what

³⁸ B Keith transcript, private examination, 9 November 2017, p 25.

³⁹ J Turner transcript, private examination, 9 November 2017, p 15.

happened but again my recollection was down and up". He was given an opportunity to explain this inaccuracy during his examination:

Why does your report say, "He lifted his hands in an aggressive manner," as a way of justifying the use of force, when that's not what happened?---I don't know. I don't know.

Were you trying to protect Mr Mattar?---No. It's -- I guess, I believed that the throwing of the clothes in the bag was aggressive, and I wanted to convey that it was aggressive, and it was a continuation of his attitude when he came in.

...

*What I'm really asking you is did you see him raise his hands in an aggressive manner, or did other officers tell you that happened?---Well, it's the hands in and up quickly but I put "aggressive manner" in and I asked again, "**Should I leave that in there?**" and I was told, "**Yes, leave that in there,**" because if I felt it was aggressive, then I should leave it in there and I felt that he was aggressive through the whole process, including that.*

(Emphasis added)

- [104] PO Hunter was provided with an opportunity to respond to the Commission's draft report prior to finalisation, he did not do so.

Senior Prison Officer Robinson

- [105] SPO Robinson acknowledged that his IMs were inaccurate. However, he maintained he did not have a clear view of what happened and that he based them off the other officers' reports.
- [106] SPO Robinson told the Commission "I remember saying to the Assistant Super[intendent] Operations afterwards when this incident was being reviewed a few days later - I was saying 'Hey, the tape doesn't look good, the reports are crap'". Following his statement, the following exchange occurred:

It's not just that the reports are crap, is it, Mr [Robinson]? They're not correct statements in the reports?---No, they're not.

That's more significant, isn't it?---Yeah.

And it's under your watch?---Yeah.⁴⁰

- [107] To his credit, SPO Robinson took responsibility for the failure of his staff, stating:

*... I -- I didn't do my job properly. I was the senior officer. I was responsible for the incident. **I was responsible for the incident report writing.** I didn't -- I didn't do my job properly. I can't -- I can't say anything else. ... I should've intervened. I should've*

⁴⁰ R Robinson transcript, private examination, 8 November 2017, p 18.

*pulled him and said, "Hey, that's not – you're – you're aggravating the situation. Out you go," like – I should've read the reports better and I should've waited for all reports to be submitted. If I didn't wait, I should've written a report. I – I've got no excuse.*⁴¹

(Emphasis added)

- [108] SPO Robinson's supervision of the officers was inadequate and fell short of what is expected of a senior prison officer. SPO Robinson failed to carry out his duties to accurately report use of force incidents and to adequately supervise officers.
- [109] SPO Robinson was provided with an opportunity to respond to the Commission's draft report prior to finalisation, he did not do so.

Prison Officer Mattar's Response

- [110] In his response to the Commission's draft report PO Mattar stressed that 'Unit 1 holds prisoners who have not been compliant, prisoners who have been involved in misconduct, and prisoners who are in protection within the prison. Most prisoners in the Unit are normally in lock down for 23 hours of the day.'⁴²
- [111] PO Mattar's response further says:

Mr Mattar states that due to the nature of the prisoner population in Unit 1, officers in this Unit face extremely challenging behaviours and they are more likely to be victims of assault or be required to use necessary force to ensure the safety of both staff and other prisoners.

Mr Mattar states that there are a variety of competing pressures placed on Prison Officers within Unit 1 and there is a high staff turnover. He states that Hakea often operates at short-staff and is struggling with daily prisoner numbers that are far beyond the design capacity of the prison.

Mr Matter states that there is no official training provided by the Department of Justice for such a specialised Unit, including what is expected of prison officers and how to complete various aspects of the job. Despite Hakea Prison Local Order 21 stating that all prison officers shall be given ongoing training in relation to the use of force, cell extractions, instruments of restraint, suicide prevention and mental health first aid, ongoing training opportunities are virtually non-existent. He states that the Department places prisoners and prison officers in vulnerable positions. Prison officers do not receive specialised training and ongoing refresher training necessary to do the job well.

In particular, Mr Matter further states that he is currently not up to date with his use of force training yet still allowed to be operational. He states that he received initial 12-month annual training on 11 April 2013. He was unqualified for 8 months and

⁴¹ Ibid p 17.

⁴² Zainal Omar Mattar, submissions on draft report, 25 May 2018, p 2.

completed further 12-month annual training on 14 January 2015. He was retrained on 3 August 2016.

He states that he received cell extraction training and was qualified from 15 May 2013 to 17 May 2014, however, he has not received any further training.⁴³

- [112] PO Mattar does not accept the allegation that he 'minimised and concealed his use of force' and denies 'falsifying or deliberately framing his report in an inaccurate manner'.⁴⁴
- [113] PO Mattar contends that he completed his IDR to the best of his ability in the circumstances, denies the allegation of serious misconduct and states that after this incident he supervised the same prisoner for a period of seven and half months without incident.⁴⁵

Conclusion

- [114] PO Mattar's IDR did not accurately record the incident. This served to minimise and conceal his questionable use of force.
- [115] He exploited DOJ's reporting processes by:
- creating false and inaccurate government records;
 - attempting to deflect a proper inquiry into his use of force against a prisoner; and
 - neglecting his duties to accurately report use of force incidents.
- [116] PO Mattar attempted to justify his use of force through official records. This was an abuse of his position and a dereliction of his duties as a prison officer.
- [117] PO Mattar attempted to use the reporting process to advance his own interests, rather than advancing the security of the prison or the welfare or safe custody of prisoners.
- [118] The Commission reviewed the CCTV again following the responses by PO Mattar. The CCTV is clear enough to form an opinion as to the incident, contrary to that submitted in PO Mattar's and the other IDRs.

⁴³ Ibid p 2-3.

⁴⁴ Ibid p 6-7.

⁴⁵ Ibid p 7.

- [119] The Commission has considered whether to form an opinion of serious misconduct in respect of PO Mattar's actions in reporting his use of force. Having regard to the circumspection necessary before such an opinion can be formed, the Commission is not persuaded that PO Mattar's wrongful actions can necessarily be described as 'corrupt'.⁴⁶
- [120] An equal conclusion is that PO Mattar was following an unauthorised but established practice to collude or copy reports and to minimise use of force. If there is such a practice, prisons officers are on notice that it must cease immediately. The inference of corruption will be easier to draw in future following this series of Commission reports.

⁴⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 366.

CHAPTER THREE

The flaws in the reporting process

[121] The officers' IDRs were prepared in the control room in the presence of each other.

[122] This was customary and accepted practice at several prisons in this State, including Hakea Prison.

[123] This practice was not conducive to ensuring IDRs were prepared independently.

[124] Several officers gave evidence of discussions about the incident in the control room while they prepared the IDRs.

[125] PO Turner surmised:

The only thing that can come to mind is that someone's mentioned it while they were typing their report; said it out aloud et cetera or forget "et cetera" but it's been said, the words have been said at some point and it's possibly clicked in with all of us. I wasn't instructed to say specifically, using those words, that. If I got instructed, I'm pretty sure I would have remembered it.⁴⁷

[126] PO Palmer's evidence was:

... as I've said earlier, yeah, you don't – never colluded as such. However, there's questions asked, "When did this happen, when did that happen? How did you word this? What time did that happen? What time have you got that happening?" ...⁴⁸

[127] PO Hunter said his usual practice was to read other officers' IDRs before finalising his own but just as a "refresher".⁴⁹ He said "I remember asking Mr [Robinson] if – because I put in 'raises hands in an aggressive manner', I remember asking Mr [Robinson] if that was a good description and he said yes".⁵⁰

[128] PO Turner acknowledged that he probably read the incident descriptions of other officers who had completed theirs before him, but only in case he had forgotten anything.⁵¹

[129] PO Keith said:

I guess the only logical explanation for it would be that during the end of the day when we're all sat down writing our reports, we've all – you know, we're debriefing

⁴⁷ J Turner transcript, private examination, 9 November 2017, p 23.

⁴⁸ D Palmer transcript, private examination, 9 November 2017, p 16.

⁴⁹ J Hunter transcript, private examination, 10 November 2017, p 5.

⁵⁰ Ibid p 5.

⁵¹ J Turner transcript, private examination, 9 November 2017, pp 13-14.

*and trying to, you know, recall incidents with each other; yeah, you know, and going through it and we've all acknowledged it and we haven't changed the words but we've, you know, put it into our reports to ...*⁵²

- [130] The reporting process is done electronically on TOMS. The first officer to complete an IDR initiates the IR as a whole. Each subsequent IDR is then attached to this IR. When an officer is writing their IDR, they can view and copy any existing IDRs.
- [131] The IDRs were not completed independently in relation to this use of force incident. In this respect, they were unreliable and officers did not discharge their duties under the Prisons Act to independently report on matters.⁵³ Nor had the officers followed DoJ's PDs.
- [132] Without recourse to the CCTV footage, these IDRs would have been given enhanced evidential value and weight. This is because prison officers have given an oath and are discharging statutory duties in reporting on matters concerning the security of the prison or welfare or safe custody of prisoners.
- [133] Material facts surrounding the use of force were consistent in several IDRs but inconsistent with the CCTV footage. The Commission has inferred that the prison officers did not prepare their IDRs independently. They were in an environment where this could have occurred.⁵⁴

⁵² B Keith transcript, private examination, 9 November 2017 pp 27-28.

⁵³ Prisons Act s 14.

⁵⁴ See *Rosebanner Pty Ltd v Energy Australia* (2009) 223 FLR 460 [326]; *Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 [90]; and *Seamez v McLaughlin* [1999] NSWSC 9 [40].

CHAPTER FOUR

Department of Justice's response to the incident

- [134] The Assistant Commissioner of Custodial Operations, Mr Steven Southgate, believed that PO Mattar's use of force was inappropriate.
- [135] However, DoJ's senior personnel were aware the Western Australian Prison Officer Union (WAPOU) intended to 'fight the matter' if DoJ investigated it. DoJ did not investigate the incident.
- [136] With the support of WAPOU, DoJ treated the incident in a 'pro-active' and 'outcome focussed' way by holding a review meeting on 29 April 2016.
- [137] Mr Southgate together with the then Assistant Director Custodial Operations, Superintendent (Supt) John Hedges and Hakea Prison's Supt Jim Schilo attended the review meeting. Supt Hedges made a written record of the meeting dated 3 May 2016.
- [138] SPO Robinson, PO Mattar, PO Hunter and PO Keith attended the meeting. It is unclear why PO Turner and PO Palmer were not present; they should have been. An industrial officer from WAPOU also attended.
- [139] In his evidence to the Commission, PO Mattar described the meeting. He said:
- Yeah, I was counselled basically by Mr Southgate and Mr Schilo. It was basically saying in a way your reports, you need to basically remember as much as you can. In a way, this didn't look good and it doesn't match up to my reports so they're sort of saying that you need to be careful and basically it was like a verbal warning, as such, within agreements of that staff need further training in unit 1 for all aspects - which none of the training happens whatsoever, so.⁵⁵*
- [140] The record of the meeting indicated that Mr Southgate told the officers that DoJ's view was "staff actions were unprofessional and the written reports were not good enough. Officers had embarrassed themselves, the Superintendent, ACCO [Assistant Commissioner Custodial Operations], Commissioner and the Department".
- [141] During the meeting, Mr Southgate enquired about why the prison officers' reports did not match the footage. PO Mattar said that the officers were very busy that day and it was a long time between the incident and when staff completed the report writing.

⁵⁵ Z O Mattar transcript, private examination, 8 November 2017, p 25.

- [142] DoJ policy requires that IDRs be done prior to the cessation of duty unless otherwise approved by the Superintendent.⁵⁶ This ensures prison officers' recollections are untainted by the passage of time and that the descriptions are accurate and clear.⁵⁷
- [143] The use of force incident took place just after 2.30 pm. The TOMS records showed that each prison officer created their IDR between 3.35 pm and 5.23 pm. SPO Robinson actioned all the prison officers' IDRs between 4.52 pm and 5.39 pm. He created the IMs at 5.21 pm and actioned it at 7.24 am the following day.
- [144] This data did not support PO Mattar's claims. However, DoJ took no further action in relation to this use of force incident.
- [145] The review meeting was essentially a 'slap on the wrist'; there were no material consequences for the officers. There has never been a proper investigation.
- [146] Because the DoJ chose to deal with the matter by taking improvement action, they are now precluded from taking disciplinary action in relation to it.⁵⁸
- [147] Although the matter was referred to Western Australia Police Force, the prisoner would not cooperate and so the complaint could not proceed.
- [148] The prisoner was charged with posing a threat to the security of the prison and was penalised.

⁵⁶ *Policy Directive 41*, p 4 [6.4].

⁵⁷ *Ibid* [6].

⁵⁸ *Public Sector Management Act 1994* s 81.

CHAPTER FIVE

Recommendations

[149] The Commission recommends DoJ:

- a) Consider whether specialised training is needed for officers assigned to specialised units.
- b) Conduct mandatory training for prison officers in relation to independent, accurate and factual reporting of use of force incidents that includes:
 - i) the use which can be made of a prison officer's reports in legal, administrative, disciplinary and prison offence proceedings;
 - ii) the consequences of colluding, making false or inaccurate statements or omitting material matters; and
 - iii) the interrelation between reporting on use of force incidents and an officer's duties and oath under the Prisons Act.
- c) Continue to take action against prison officers who make inaccurate statements or material omissions from IDRs, or who do not submit an IDR when required to do so and maintain a register of the action taken.
- d) Update, monitor and audit systems (including TOMS), processes and physical spaces to reduce the opportunity for prison officers to collude about their IDRs or otherwise view or copy the IDRs of others.
- e) Support and regularly promote awareness of confidential mechanisms for staff to report potential criminal activity and misconduct concerning prison officers using force against prisoners.

[150] The extract of the CCTV footage can be found on the Commission's website at <https://www.ccc.wa.gov.au>.

[151] The DoJ 'agrees that the process for dealing with this matter was inconsistent with the Department's processes for assessing allegations of misconduct.' They have informed the Commission that 'Changes have been made to the assessment process to ensure that all matters are properly triaged, recorded and reported accurately and transparently.'⁵⁹

⁵⁹ Letter from Director General Adam Tomison to Commissioner, 25 May 2018, p 2.

- [152] The DoJ intend to undertake a review of the report writing training for officers and are currently reviewing their overall management of misconduct.⁶⁰
- [153] The Commission proposes to report on the implementation of these recommendations in one year.

⁶⁰ Ibid p 4.