



# **CORRUPTION AND CRIME COMMISSION**

## **REPORT ON THE INVESTIGATION OF ALLEGED PUBLIC SECTOR MISCONDUCT IN RELATION TO THE USE OF TASER<sup>®</sup> WEAPONS BY OFFICERS OF WESTERN AUSTRALIA POLICE AND THE DEPARTMENT OF CORRECTIVE SERVICES**

**16 April 2012**

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## CORRUPTION AND CRIME COMMISSION

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Mr Peter John McHugh  
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Dear Mr Peacock  
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* (WA) ("the CCC Act"), the Commission hereby transmits to you a copy of its *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Use of Taser® Weapons by Officers of Western Australia Police and the Department of Corrective Services*.

The Commission notes that under section 93(3) of the CCC Act a copy of a report transmitted to a Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mark Herron'.

Mark Herron  
**ACTING COMMISSIONER**

16 April 2012



## ABBREVIATIONS AND ACRONYMS

ALS or ALSWA (“the CCC Act”)	Aboriginal Legal Service of Western Australia (Inc.) <i>Corruption and Crime Commission Act 2003 (WA)</i>
CCTV (“the CIA”)	Closed-Circuit Television <i>Criminal Investigation Act 2006 (WA)</i>
CMS (“the Commission”)	Custody Management System Corruption and Crime Commission
DCS	Department of Corrective Services
DPP	Director of Public Prosecutions for Western Australia
DVD	Digital Versatile (or Video) Disc
ECD	Electronic Control Device
ESG	Emergency Support Group
FR	Force Options (as per WAPOL <i>Police Manual</i> ).
IAU	Internal Affairs Unit (WAPOL)
IDR	Incident Description Report
MAP	Management Action Plan
MIM	Management Intervention Model
NPR	Notice to Produce Records
OC	Oleoresin Capsicum
OIC	Officer-in-Charge
(“the Parliament”)	Parliament of Western Australia
PD (“the PSM Act”)	Prisons Policy Directive (DCS) <i>Public Sector Management Act 1994</i>
PWH	Perth Watch House
RPH	Royal Perth Hospital
SMF (“the Special Report”)	Statement of Material Facts <i>Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)</i>
(“Instruction A19”)	<i>Superintendent’s Official Instruction A19 (DCS)</i>
TIG	Tactical Investigation Group (WAPOL)
(“the Timeline”)	Timeline of Events or Flow Chart (Compiled by IAU.)
TOMS	Total Offender Management Solution
WAPOL	Western Australia Police
1/C	First Class



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# EXECUTIVE SUMMARY

## Introduction

- [1] This is a report on the investigation by the Corruption and Crime Commission (“the Commission”) of alleged public sector misconduct: by officers of Western Australia Police (WAPOL) and the Department of Corrective Services (DCS) in relation to the use of Taser weapons on, and treatment of, Mr Kevin John Spratt between 30 August and 6 September 2008; associated matters; and by officers of DCS in relation to the use of Taser weapons on Prisoner X on 2 August 2010.

## Use of Taser Weapons on Mr Kevin John Spratt

- [2] The genesis of the Commission investigation of alleged public sector misconduct in relation to the use of Taser weapons on, and the treatment of, Mr Spratt by WAPOL was the Commission report and accompanying summary report, which resulted from a research project undertaken by the Commission on the use of Taser weapons by WAPOL, tabled in the Parliament of Western Australia (“the Parliament”) on 4 October 2010. Widespread public interest and media reporting followed, most particularly about the repeated use of Taser weapons on Mr Spratt in the Perth Watch House (PWH) by WAPOL officers on 31 August 2008.
- [3] WAPOL notified the Commission of that incident on 16 September 2008 in accord with obligations pursuant to sections 21A and 28 of the *Corruption and Crime Commission Act 2003* (WA) (“the CCC Act”). WAPOL instituted an internal investigation on 23 September 2008, to be undertaken by the Internal Affairs Unit (IAU), and forwarded the report of that investigation to the Commission for review on 10 November 2009.
- [4] The Commission determined that it would not finalise its review of the WAPOL investigation until the aforementioned Commission research project on the use of Taser weapons by WAPOL had been finalised, so that the investigation review could be informed by any findings arising out of the research project. Following tabling of its report on 4 October 2010 the Commission moved to finalise its review of the WAPOL IAU investigation.<sup>i</sup> That, however, was overtaken by events.
- On 18 October 2010 a media conference was convened by WAPOL, during which a Timeline of Events (“the Timeline”) or Flow Chart said

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<sup>i</sup> Although the Corruption and Crime Commission (“the Commission”) draft report on the use of Taser weapons by Western Australia Police (WAPOL) of May 2010, provided to WAPOL, at that time, for comment as part of the process pursuant to section 86 of the *Corruption and Crime Commission Act 2003*, contained a paragraph in which views were presented about the adequacy of the investigation undertaken by the WAPOL Internal Affairs Unit (IAU) into the incidents which occurred at the Perth Watch House on 31 August 2008 in relation to Mr Kevin John Spratt, that paragraph was not part of the final report tabled in the Parliament of Western Australia on 4 October 2010 as it did not, at any time, represent the concluded views of the Commission about the adequacy of the IAU investigation. The concluded views of the Commission about that investigation are presented in this report.

to show Mr Spratt's criminal history and his interaction with WAPOL officers, was presented.

- The public debate that followed led to the revelation of other incidents in which Taser weapons were said to have been used on Mr Spratt by WAPOL and DCS personnel, and other serious allegations about the treatment of Mr Spratt by WAPOL officers.

- [5] As a consequence, on 12 November 2010 then Commissioner Len Roberts-Smith, RFD, QC,<sup>ii</sup> authorised an investigation pursuant to section 33(1)(a) of the CCC Act into the use of Taser weapons on, and treatment of, Mr Spratt by WAPOL and DCS between 30 August and 6 September 2008, the conduct of internal investigations subsequently undertaken, independently, by WAPOL and DCS, and applicable WAPOL and DCS policies and procedures.
- [6] The Commission investigation encompassed public and private examinations,<sup>iii</sup> which were conducted during 2010 and 2011 (refer Chapter One and Appendix 1).

### **31 August and 6 September 2008**

- [7] The use of Taser weapons on Mr Spratt by WAPOL officers occurred essentially on Sunday 31 August 2008 at the PWH, and by DCS officers on Saturday 6 September 2008 during a cell extraction at the PWH. In total, there were 14 deployments of Taser weapons on 31 August and 11 deployments on 6 September 2008. Table 1 below is a summary of the first nine deployments which occurred on 31 August and Table 2 is an overview of the 11 deployments which occurred on 6 September during the cell extraction at the PWH.

**Table 1: Deployment Summary (First Nine Deployments)**

No.	Approximate Times	Mode	Officer
1.	12:09:33 p.m.	"Drive-Stun"	Senior Constable Tomlin
2.	12:09:49 p.m.	"Drive-Stun"	Senior Constable Tomlin
3.	12:09:51 p.m.	"Drive-Stun"	Senior Constable Tomlin
4.	12:09:53 p.m.	"Drive-Stun"	Senior Constable Tomlin
5.	12:09:57 p.m.	"Probe"	Senior Constable Strahan
6.	12:10:09 p.m.	"Drive-Stun"	Senior Constable Strahan
7.	12:10:29 p.m.	"Drive-Stun"	Senior Constable Strahan
8.	12:10:41 p.m.	"Drive-Stun"	Senior Constable Strahan
9.	12:10:48 p.m.	"Drive-Stun"	Senior Constable Strahan

<sup>ii</sup> Commissioner Roberts-Smith, RFD, QC, retired on 31 January 2011. Mr Mark Herron was appointed by commission dated 25 January 2011 to act in the office of Commissioner of the Corruption and Crime Commission, with effect from 27 January 2011.

<sup>iii</sup> Although the *Corruption and Crime Commission Act 2003* (WA) refers to examinations (of persons for the purpose of obtaining information to advance an investigation), there is a general tendency for those examinations to be described by the media as "hearings". Examinations or "hearings" conducted by the Commission are compulsory examinations of persons before it.

- [8] As mentioned above, in total there were 14 deployments of Taser weapons on 31 August 2008 at the PWH by WAPOL officers. Nine of these deployments were video recorded and are summarised in Table 1 above, while five deployments were not recorded as they occurred in the padded cell.<sup>iv</sup> Senior Constable Tomlin was responsible for the first four deployments and Senior Constable Strahan was, according to Taser Data Port download records, responsible for 10 deployments (five during the period 12:09:57 p.m. and 12:10:48 p.m. and five after that period in the padded cell). However, this is disputed by Senior Constable Strahan who gave evidence during a public examination that his “recollection was” that it was only “three times” in the padded cell, that is, eight (and not 10) deployments overall.<sup>v</sup> Thirteen of the deployments were in the “Drive-Stun” Mode, which affects the Sensory Nervous System and causes pain to the subject, but does not achieve incapacitation in the same manner as “Probe” Mode.<sup>vi</sup>

**Table 2: Overview of Deployment of Taser Weapons  
During Cell Extraction  
(Taser Data Port Download Record and Video Footage)**

No.	Taser Weapon Start Time, <sup>vii</sup> Approximate Video Record Time and Duration of Deployment (in Seconds)			Mode	Officer
1/2.	14:18:15	2:06 Minutes	8	“Probe” and “Drive-Stun” Mode	Senior Officer B
3.	14:18:32	2:26 Minutes	5	“Drive-Stun” Mode	Senior Officer B
4.	14:19:03	2:57 Minutes	5	“Drive-Stun” Mode	Senior Officer B
5.	14:19:21	2:05 Minutes	5	“Probe Mode”	Senior Officer A
6.	14:19:28	2:12 Minutes	5	“Drive-Stun” Mode	Senior Officer A
7.	14:19:42	2:26 Minutes	5	“Drive-Stun” Mode	Senior Officer A
8.	14:20:35	3:20 Minutes	5	“Drive-Stun” Mode	Senior Officer A
9.	14:21:05	3:48 Minutes	5	“Drive-Stun” Mode	Senior Officer A
10.	14:21:23	4:07 Minutes	5	“Drive-Stun” Mode	Senior Officer A
11.	14:21:35	4:19 Minutes	5	“Drive-Stun” Mode	Senior Officer A

- [9] In total there were 11 deployments of Taser weapons on Mr Spratt at the PWH on 6 September 2008 during the cell extraction by ESG officers. Senior Officer B was responsible for four deployments and Senior Officer A for seven deployments. According to Taser Data Port download records, the 11 deployments occurred between 14:18:15 and 14:21:40. Two deployments were in “Probe Mode” (one by Senior Officer B at

<sup>iv</sup> There is no recorded footage of Mr Kevin John Spratt in the padded cell at the Perth Watch House (PWH) on 31 August 2008, as, for privacy reasons, the cell is monitored in real time via CCTV cameras. Prisoners detained in the padded cell at the PWH often have their clothing removed for safety reasons.

<sup>v</sup> Refer [140], Chapter Two, of this report.

<sup>vi</sup> Western Australia *Police Manual* 2010, FR-1.6, and Corruption and Crime Commission Summary Report, *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

<sup>vii</sup> Taser Data Port download record.

14:18:15 and one by Senior Officer A at 14:19:21) and nine deployments were in the “Drive-Stun” Mode (three by Senior Officer B and six by Senior Officer A, at times indicated in Table 2 above). In all, Taser weapons were deployed for a total of 53 seconds of shock over a period of 205 seconds, with a Taser weapon deployed on average every 18.36 seconds. Senior Officer B was responsible for four deployments during a 53-second period, with a total of 18 seconds of shock, and Officer A was responsible for seven deployments during a 139-second period with a total of 35 seconds of shock. There was a 13-second gap between the last deployment by Senior Officer B and the first deployment by Senior Officer A.

## **Associated Matters**

[10] The Commission investigation also included consideration of associated matters. These include:

- preparation and release of the Timeline or Flow Chart by the Commissioner of Police to assembled media outlets on 18 October 2010;
- treatment of Mr Spratt by medical staff at Casuarina Prison after his extraction from a cell by members of the DCS Emergency Support Group (ESG) at the PWH on 6 September 2008 and by medical staff at Royal Perth Hospital, with Mr Spratt being admitted on Sunday 7 September 2008;
- the cause of injuries incurred by Mr Spratt during the period he was in the custody of either WAPOL or DCS, ultimately diagnosed on 7 September 2008 by medical staff at Royal Perth Hospital;
- the preparation of the Statement of Material Facts (SMF), which resulted in the conviction of Mr Spratt on a charge of Obstruct a Public Officer recorded on 30 January 2009, but set aside on 24 February 2011 by the Supreme Court of Western Australia; and
- identification of Mr Spratt by the media as being the person on whom Taser weapons were deployed by WAPOL officers at the PWH on 31 August 2008.<sup>viii</sup>

These matters are considered in detail in Chapter Five, with additional information relating to the preparation of the SMF being contained in Chapter Three.

## **Use of Taser Weapons on Prisoner X by DCS Officers**

[11] The matter in relation to the use of Taser weapons on Prisoner X by DCS ESG officers on 2 August 2010 during a cell extraction at Hakea Prison

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<sup>viii</sup> Refer Case Study Five of the Corruption and Crime Commission report on *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

was identified by the Commission in January 2011 as part of a broad review of the use of Taser weapons by DCS officers.

- [12] At the time of the cell extraction by ESG in August 2010 there were a total of 199 Incident Reports on the Total Offender Management Solution (TOMS), a restricted-access DCS database which contains details about prisoners in Western Australia, about Prisoner X, and as at May 2010 Prisoner X had a total of 59 prison-related charges and had 33 active alerts on TOMS. Prisoner X was reported as a prisoner with a disregard for prison rules and regulations, with a propensity for non-compliance with orders and instructions. Prisoner X was classified as a High Security Escort prisoner, which meant that whenever Prisoner X left the confines of Hakea Prison he was to be escorted by ESG officers.
- [13] The incidents which occurred in relation to Prisoner X are set out in Chapter Two at [94]-[96], and considered in detail in Chapter Four at [307]-[313].

## **Commission Opinions as to Misconduct**

- [14] Commission opinions as to misconduct in relation to the use of Taser weapons on Mr Spratt between 30 August and 6 September 2008 by officers of WAPOL and DCS, associated matters, and by officers of DCS in relation to the use of Taser weapons on Prisoner X on 2 August 2010 are set out below, and are dealt with in detail in Chapters Two to Five of this report.

### **30 August 2008: Senior Constable Mayger**

[15]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force,<sup>ix</sup> including the threatened use of the Taser weapon, by Senior Constable Rebecca Mayger in the circumstances in relation to Mr Spratt on 30 August 2008 was reasonable and in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

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<sup>ix</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

## 31 August 2008: Senior Constable Tomlin and Senior Constable Strahan

[16]

### Commission Opinion as to Misconduct

In the opinion of the Commission the use of force by the initial deployment of a Taser weapon in “Drive-Stun” Mode by Senior Constable Troy Gregory Tomlin in the circumstances in relation to Mr Spratt on 31 August 2008 was use of undue and excessive force for the purpose of compliance contrary to Force Option requirements contained in the *Police Manual* 2008 and constitutes misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the initial deployment of a Taser weapon, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Tomlin for offences relating to Mr Kevin John Spratt on 31 August 2008.

The Commission notes that Senior Constable Tomlin was charged with using undue and unnecessary force against Mr Spratt at the PWH pursuant to Regulation 609(b), *Police Force Regulations* 1979, and that on 26 November 2009 he was found guilty after a disciplinary hearing (as he had pleaded not guilty) and fined \$1,200.

[17]

### Commission Opinion as to Misconduct

In the opinion of the Commission the use of force by the subsequent deployment of a Taser weapon on three occasions in “Drive-Stun” Mode by Senior Constable Troy Gregory Tomlin in the circumstances in relation to Mr Spratt on 31 August 2008 was unreasonable and unjustified, was on each occasion contrary to Force Option requirements contained in the *Police Manual* 2008, constitutes excessive use of force and misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the subsequent deployment of a Taser weapon on three occasions in “Drive-Stun” Mode, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Tomlin for offences relating to Mr Kevin John Spratt on 31 August 2008.

Further, it is the opinion of the Commission that the subsequent deployment of a Taser weapon by Senior Constable Tomlin on three occasions occurred in circumstances that were unlikely to have arisen but for the initial deployment of a Taser weapon at approximately 12:09:33 p.m., and that each separate deployment served as a provocation to Mr Spratt and caused him to react as he did, leading to the confrontation between Mr Spratt and the WAPOL officers.



[18]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force by the initial deployment of a Taser weapon in “Probe” Mode by Senior Constable Aaron Grant Strahan in the circumstances in relation to Mr Spratt on 31 August 2008 was use of undue and excessive force for the purpose of compliance, without warning, contrary to Force Option requirements contained in the *Police Manual 2008* and constitutes misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the initial deployment of a Taser weapon, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Strahan for offences relating to Mr Kevin John Spratt on 31 August 2008.

The Commission notes that Senior Constable Strahan was charged with using undue and unnecessary force against Mr Spratt at the PWH pursuant to Regulation 609(b), *Police Force Regulations 1979*, and that on 26 November 2009 he was found guilty after a disciplinary hearing (as he had pleaded not guilty) and fined \$750.

[19]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force by the subsequent deployment of a Taser weapon in “Drive-Stun” Mode on four occasions by Senior Constable Aaron Grant Strahan in the circumstances in relation to Mr Spratt on 31 August 2008 were unreasonable and unjustified, was on each occasion contrary to Force Option requirements contained in the *Police Manual 2008*, constitutes excessive use of force and misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the subsequent deployment of a Taser weapon in “Drive-Stun” Mode on four occasions, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Strahan for offences relating to Mr Kevin John Spratt on 31 August 2008.

Further, it is the opinion of the Commission that the subsequent deployments of a Taser weapon by Senior Constable Strahan in “Drive-Stun” Mode on four separate occasions served as a provocation to Mr Spratt and caused him to react as he did, leading to the confrontation between Mr Spratt and the WAPOL officers.

[20]

### **Commission Opinion as to Misconduct**

In relation to the deployment of a Taser weapon by Senior Constable Aaron Grant Strahan on at least three occasions in “Drive-Stun” Mode on Mr Spratt on 31 August 2008 in the padded cell at the PWH the Commission, due to absence of CCTV footage (of which the Commission is not critical) and any corroborating evidence, expresses no opinion as to whether the use was reasonable or unjustified.

- [21] Although the conduct of Senior Constable Tomlin and Senior Constable Strahan does not fall within the meaning of “serious misconduct” as defined by section 3 of the CCC Act, that is, meaning misconduct of a kind described in section 4(a), (b) or (c) of the CCC Act, in the opinion of the Commission the misconduct was serious and represents a serious departure from, and falls significantly short of, the standard of conduct the public is entitled to expect from WAPOL officers. Any reasonable person viewing the CCTV footage of the use of Taser weapons on Mr Spratt by WAPOL officers at the PWH on 31 August 2008 is left with a feeling of considerable disquiet, if not outrage.<sup>x</sup>

### **6 September 2008: Constable Taylor**

[22]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force by the use of a Taser weapon by Constable Alan Mark Taylor in the circumstances in relation to Mr Spratt on 6 September 2008 was reasonable and in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

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<sup>x</sup> Research findings in relation to risks associated with use, and multiple deployments, of a Taser weapon are presented in detail in the Corruption and Crime Commission report on *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

## **6 September 2008: Senior Constable Skelton**

[23]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission and in the absence of independent evidence to suggest otherwise, the use of force by the deployment of a Taser weapon in “Drive-Stun” Mode by Senior Constable Darren Lee Skelton on two occasions in the circumstances in relation to Mr Spratt on 6 September 2008 was reasonable, given the reported behaviour of Mr Spratt, his previous history and the potential for Mr Spratt and WAPOL officers to incur injury, and was in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **Preparation of Use of Force Report by Senior Constable Strahan**

[24]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of Senior Constable Aaron Grant Strahan in relation to the preparation of a Use of Force Report, and the inconsistencies contained therein, about the use of force by the deployment of Taser weapons on Mr Spratt on 31 August 2008 does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **Inconsistencies in Evidence by Senior Constable Tomlin and Senior Constable Strahan**

[25]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of Senior Constable Aaron Grant Strahan and of Senior Constable Troy Gregory Tomlin in relation to reporting Mr Spratt’s references to “God” and the “devil” on 31 August 2008 whilst at the PWH does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **Supervision at the Perth Watch House (PWH) on 31 August 2008**

[26]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the standard of supervision provided by Sergeant Gary Christopher Thwaites and Acting Sergeant Ronald Allen Moore at the PWH during the time that incidents involving Mr Spratt occurred on 31 August 2008 does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

However, the Commission is mindful of the fact that a number of officers on duty at the PWH during the relevant time were junior officers and relatively new to the role of police officer, and in the assessment of the Commission the lack of physical assistance provided by these officers at critical times contributed to the circumstances leading to multiple deployments of Taser weapons on Mr Spratt. Given this, in the opinion of the Commission, Sergeant Thwaites, as the Sergeant-in-Charge, and Acting Sergeant Moore during those times that Sergeant Thwaites was absent from the Reception Area, should have been more proactive and given specific instructions to the junior officers to provide the required support to restrain Mr Spratt.

It is acknowledged by the Commission that since 30 August 2008 changes have been made by WAPOL to transition the custodial care of detainees at the PWH to Level 2 Custody Officers and Band 1 Auxiliary Officers instead of Constables.

## **Statement of Material Facts (SMF) and Major Incident Briefing Note**

[27]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of 1/C Constable Brett Andrew Fowler in relation to preparation of the SMF does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

This opinion is not altered by the fact that the SMF resulted in the conviction of Mr Spratt on a charge of Obstruct a Public Officer recorded on 30 January 2009, but set aside on 24 February 2011 by the Supreme Court of Western Australia, in Spratt -v- Fowler [2011] WASC 52, and substituted by a verdict of “Not Guilty” on the grounds Mr Spratt’s plea of guilty was induced by false allegations made by the prosecution, and there was no proper basis for the obstruction charge, resulting in a miscarriage of justice.

[28]

**Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of 1/C Constable Brett Andrew Fowler in relation to preparation of the Major Incident Briefing Note does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

**Investigation by the Internal Affairs Unit (IAU)**

[29]

**Commission Opinion as to Misconduct**

In the opinion of the Commission, although the failure of IAU investigators to determine, reveal and/or follow-up on the inconsistency between the Statement of Material Facts and other supporting documentation, and the CCTV footage was unsatisfactory, it does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act, but could be indicative of a systemic deficiency in relation to record keeping (whether they be written or otherwise) and the way in which internal investigations are conducted.

**Use of Taser Weapons on Mr Spratt by Emergency Support Group (ESG) Officers on 6 September 2008**

[30]

**Commission Opinion as to Misconduct**

In the opinion of the Commission the use of Taser weapons on seven occasions between 14:18:15 and 14:19:42 on Mr Spratt during a cell extraction on 6 September 2008 at the PWH by ESG officers did not amount to the use of excessive force and that the Taser weapons were used “to control the situation or behaviour” (PD5) on “reasonable grounds ... to ensure that ... lawful orders are complied with” (section 14(1)(d) of the *Prisons Act 1981* (WA)), and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

In relation to use of a Taser weapon by Senior Officer A on Mr Spratt on four occasions between 14:20:35 and 14:21:35 the Commission, due to insufficient evidence, expresses no opinion as to whether the use was unjustified or reasonable.

Further, although the Commission remains concerned as to whether sufficient consideration was given to the use of negotiation and conflict resolution techniques outlined in *Prisons*

*Policy Directive 5 — Use of Force (PD5) and Superintendent's Official Instruction A19 — Deployment of Taser* and, in particular, whether or not Senior Officer A attempted to communicate and/or negotiate with Mr Spratt prior to opening the cell door at the PWH on 6 September 2008, a failure to do so would not be in contravention of PD5 and does not, therefore, constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

#### **Use of Taser Weapons on Prisoner X by ESG Officers on 2 August 2010**

[31]

##### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of Taser weapons on Prisoner X during a cell extraction on 2 August 2010 at Hakea Prison by ESG officers did not amount to the use of excessive force and that the Taser weapons were used “to control the situation or behaviour” (PD5) on “reasonable grounds ... to ensure that ... lawful orders are complied with” (section 14(1)(d) of the *Prisons Act 1981* (WA)), and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

#### **Timeline of Events (“the Timeline”) or Flow Chart**

[32]

##### **Commission Opinion as to Misconduct**

In the opinion of the Commission the release of the Timeline of Events on 18 October 2010 by the Commissioner of Police, Dr Karl Joseph O’Callaghan, APM, was in line with provisions of administration policy AD-40 of the *Police Manual 2010* relating to media and news services and, although the Timeline contained errors, does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **Recommendations**

- [33] As a consequence of the investigation of alleged public sector misconduct in relation to the use of Taser weapons by officers of WAPOL and DCS, the Commission makes the following recommendations.

[34]

### **Recommendation 1**

That WAPOL review the process for submission of Use of Force Reports and establish procedures to ensure that: Use of Force Reports are submitted in the prescribed manner and in accordance with FR-1.6.1, *Police Manual*, requirements; and a record of submission is maintained by the Officer-in-Charge, manager or supervisor.

It is further recommended that the Officer-in-Charge, manager or supervisor undertakes a cross-check of the details contained in each Use of Force Report and the associated Taser Data Port download record as part of the assessment of the Use of Force Report and the circumstances during which the Taser weapon was used.

[35]

### **Recommendation 2**

That WAPOL review processes and procedures in relation to investigations undertaken by IAU to ensure that all relevant documentation, such as Major Incident Briefing Notes, Use of Force Reports and any other reports, Crime and Occurrence Books and Statements of Material Facts (where applicable), and any other relevant evidence, such as CCTV footage, are reviewed and cross-checked to ensure consistency and where inconsistencies are determined any matters related to the outcome of investigations be reviewed in light of the identified inconsistencies. This includes charges which are brought in the context of an IAU investigation, which should be monitored and reviewed to ensure that the facts upon which the charges are based are accurate.

[36]

### **Recommendation 3**

That WAPOL review the process by which it is determined that officers should be charged with disciplinary offences and/or criminal offences to ensure that:

- all relevant material is taken into account during the decision-making process;
- reasons for the decision are clearly documented; and
- the complainant is advised in writing of the outcome of the decision-making process to avoid any misunderstanding about the planned course of action.

[37]

#### **Recommendation 4**

It is recommended that WAPOL continues to evaluate work practices and reporting systems at the PWH in order to enhance efficiency and accountability, and it is the intention of the Commission to monitor and review the action undertaken by WAPOL in this regard, including the action outlined in a letter to the Commission of 4 July 2011 (refer Footnote 128) relating to custodial care, issue of Taser weapons, nursing services and cell extractions by ESG.

[38]

#### **Recommendation 5**

That DCS review the shortcomings outlined in this report regarding video recording and reporting of incidents involving the use of force by ESG officers, and undertake appropriate action to address those shortcomings to ensure compliance with the requirements of *Prisons Policy Directive 5 — Use of Force* (PD5) in relation to the use of force and *Superintendent's Official Instruction A19 — Deployment of Taser* ("Instruction A19") in relation to the deployment of a Taser weapon by ESG and other authorised officers. The specific shortcomings set out in this report relate to the:

- failure to include in the video recording of the cell extraction of Mr Spratt on 6 September 2008 the "briefing of the cell extraction team and the operation of the cell extraction (including the mediation process)" as required by PD5 and Instruction A19; and
- inconsistencies between Incident Description Reports and Video footage in relation to the cell extractions of both Mr Spratt on 6 September 2008 and Prisoner X on 2 August 2010.

Further, in the view of the Commission the above specific shortcomings may be indicative of the need for broader systemic improvements that need to be addressed by DCS to ensure compliance with the requirements of PD5 and Instruction A19, particularly in relation to reporting and review of Incident Description Reports and Video footage, and recording of incidents and preparation for incidents involving the use of force by ESG and other authorised officers. The Commission is concerned that, if proper care and attention is not given to the preparation for deployment of Taser weapons and the subsequent accurate reporting of incidents involving the use of Taser weapons, the need to comply with relevant processes and procedures will in time be ignored.

It is recommended that DCS undertake appropriate action, including a systemic review of current applicable processes and procedures, to ensure compliance with the requirements of PD5 and Instruction A19.



[39]

#### **Recommendation 6**

That DCS reconsider the timeline for review, by the Standards and Review Branch, of incidents involving the use of Taser weapons where circumstances prevent the review from occurring “within one week of the incident” as presently prescribed by Notice No. 48/2010. DCS should, however, in all circumstances, ensure that the review process allows the reviewer to critically evaluate any written reports and Video footage and, if necessary, interview individual officers in relation to the use of force incidents, and prepare a review report.

Nonetheless, the review process should be both effective and efficient, including being completed without delay in order to ensure that the review is contemporaneous.

[40]

#### **Recommendation 7**

That DCS give consideration to amending *Prisons Policy Directive 5 — Use of Force* to make it mandatory for officers to issue orders or instructions to the prisoner(s) concerned, allowing sufficient time for them to comply with the orders or instructions, use negotiation and conflict resolution techniques and issue a warning to the prisoner(s) that force may be used prior to the use of force against the prisoner(s).

[41]

#### **Recommendation 8**

It is recommended that DCS review the period of time that officers can be attached to the ESG and give consideration to the introduction of a tenure period for officers attached to the ESG.

[42]

#### **Recommendation 9**

That DCS review internal processes and procedures relating to the operation of the Infirmary within the Casuarina Prison Health Centre, and infirmaries within other prisons, with respect to the assessment of a patient’s medical condition and the provision and availability of services or avenues for investigation that would assist with the timely and accurate determination of the cause(s) of a patient’s complaints, thereby facilitating the provision of appropriate and adequate nursing and medical care.

## Conclusion

- [43] The Commission notes that a number of changes have been made to policies and procedures by DCS and WAPOL as a consequence of the Commission investigation and by WAPOL in response to the Commission report on the use of Taser weapons by WAPOL, and accompanying summary, tabled in Parliament on 4 October 2010. In relation to DCS, changes have been made to the process for the review and video recording of incidents involving the use of Taser weapons, and for subsequently securing Video footage of those incidents. These changes are detailed in the Assistant Commissioner Custodial Operations Notice No. 48/2010, issued on 1 December 2010. In relation to WAPOL changes, highlighted in its section 86 representations, include: a higher threshold for the use of Taser weapons; more stringent requirements in relation to the submission and review of Use of Force Reports; establishment of the Corporate Use of Force Committee; more robust review processes and procedures in relation to investigations undertaken by IAU, changes to procedures for the preferring of criminal charges against WAPOL officers; changes in relation to custodial management at the PWH; and an ongoing review of agency-wide recording and reporting of custody episodes.
- [44] The Commission acknowledges that recent Systems-Based Evaluation of systems and processes used by WAPOL IAU to manage misconduct and reviewable police action confirm that WAPOL IAU investigation practices and management have significantly improved since the last Systems-Based Evaluation conducted by the Commission during 2008-2009.
- [45] Although WAPOL and DCS have made a number of changes to policies, and procedures as a consequence of the Commission investigation, the organisational change required to fully implement Recommendations 1–9, as outlined above, and to address the issues raised in this report, will take time. Therefore, it is the intention of the Commission to monitor the action taken by DCS and WAPOL to address the issues and implement the recommendations; monitoring which will occur within the context of an ongoing relationship between the Commission and DCS and WAPOL. Monitoring the implementation of recommendations is a normal part of the Commission's work subsequent to an investigation.
- [46] The Commission recognises the commitment by both DCS and WAPOL to continuously improve systems and processes, and the willingness of both organisations to work, and fully cooperate, with the Commission in an effort to do so.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background

- [1] This is a report on the investigation by the Corruption and Crime Commission (“the Commission”) of alleged public sector misconduct:
- by officers of Western Australia Police (WAPOL) and the Department of Corrective Services (DCS) in relation to the use of Taser weapons on, and treatment of, Mr Kevin John Spratt between 30 August and 6 September 2008;
  - associated matters; and
  - by officers of DCS in relation to the use of Taser weapons on Prisoner X on 2 August 2010.
- [2] The Commission investigation encompassed a review of documentation and materials obtained by the Commission from WAPOL and DCS. These included reports, records, relevant policies and procedures, files and Closed-Circuit Television (CCTV) footage.
- [3] In addition to a review of documentation and materials the Commission investigation encompassed interviews of various persons, conducted by Commission investigators, and public and private examinations (hearings),<sup>1</sup> which were conducted by the Commission pursuant to sections 137, 139 and 140 of the *Corruption and Crime Commission Act 2003* (WA) (“the CCC Act”) during 2010 and 2011.

#### **1.1.1 Commission Investigation in Relation to the Use of Taser Weapons on Mr Kevin John Spratt and Associated Matters**

- [4] The genesis of the Commission investigation of alleged public sector misconduct in relation to the use of Taser weapons on, and the treatment of, Mr Spratt by WAPOL was the Commission report and accompanying summary report, which resulted from a research project undertaken by the Commission on the use of Taser weapons by WAPOL, tabled in the Parliament of Western Australia (“the Parliament”) on 4 October 2010. Widespread public interest and media reporting followed, most particularly about the repeated use of Taser weapons on Mr Spratt in the Perth Watch House (PWH) by police on 31 August 2008.
- [5] WAPOL notified the Commission of that incident on 16 September 2008 in accord with obligations pursuant to sections 21A and 28 of the CCC Act. WAPOL instituted an internal investigation on 23 September 2008, to be

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<sup>1</sup> Although the *Corruption and Crime Commission Act 2003* (WA) refers to examinations (of persons for the purpose of obtaining information to advance an investigation), there is a general tendency for those examinations to be described by the media as “hearings”. Examinations or “hearings” conducted by the Commission are compulsory examinations of persons before it.

undertaken by the Internal Affairs Unit (IAU), and forwarded the report of that investigation to the Commission for review on 10 November 2009.

- [6] The Commission determined that it would not finalise its review of the WAPOL investigation until the aforementioned Commission research project on the use of Taser weapons by WAPOL had been finalised, so that the investigation review could be informed by any findings arising out of the research project. Following tabling of its report on 4 October 2010 the Commission moved to finalise its review of the WAPOL IAU investigation. That, however, was overtaken by events.
- [7] The Commissioner of Police took part in a series of radio and television interviews. On 18 October 2010 a media conference was convened by WAPOL, during which a Timeline of Events ("the Timeline") or Flow Chart, said to show Mr Spratt's criminal history and his interaction with WAPOL officers, was presented. The public debate that followed led to the revelation of other incidents in which Taser weapons were said to have been used on Mr Spratt by WAPOL and DCS personnel. Other serious allegations were made about the treatment of Mr Spratt by WAPOL officers.
- [8] The Commissioner of Police announced that he had sought further advice from the Director of Public Prosecutions for Western Australia (DPP) on whether or not charges should be laid against WAPOL officers involved in the 31 August 2008 incident and that he had initiated a further internal investigation into the other instances of police interaction with Mr Spratt which had been put into the public arena.
- [9] As a consequence, on 12 November 2010 then Commissioner Len Roberts-Smith, RFD, QC,<sup>2</sup> authorised an investigation pursuant to section 33(1)(a)<sup>3</sup> of the CCC Act into the use of Taser weapons on, and treatment of, Mr Spratt by WAPOL and DCS between 30 August and 6 September 2008, and the conduct of internal investigations subsequently undertaken, independently, by WAPOL and DCS. The reasons why Commissioner Roberts-Smith authorised the investigation are evident in the following extract from an Assessment Form.<sup>4</sup>

*Following the publication of the Commission report on [T]he Use of Taser Weapons by WA Police [sic: Western Australia Police], matters involving Mr Spratt have generated significant public interest. The matters involving Mr Spratt are serious. Given the involvement of two agencies and the number of individual incidents, it is considered that the Commission is best placed to conduct an examination that*

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<sup>2</sup> Commissioner Roberts-Smith, RFD, QC, retired on 31 January 2011. Mr Mark Herron was appointed by commission dated 25 January 2011 to act in the office of Commissioner of the Corruption and Crime Commission, with effect from 27 January 2011.

<sup>3</sup> Pursuant to section 33(1)(a) of the *Corruption and Crime Commission Act 2003* (WA) the Commission, having made an assessment of an allegation, may decide to investigate or take action without the involvement of any other independent agency or appropriate authority.

<sup>4</sup> *Corruption and Crime Commission Assessment Form — New Allegation*, 10 November 2010.

can look at all relevant matters across both agencies, whilst at the same time giving a level of transparency and objectivity to an investigation which will have a high level of public interest.

(emphasis added)

The reasons are also evident in the following extract from the Commissioner's remarks at the start of the December 2010 public examinations.

*... I came to the view that the Commission should conduct a comprehensive investigation of all ... matters excepting only the issue which had been referred to the DPP for advice. It is to be clearly understood that this Commission has no agenda ... The Commission will act as it considers reasonable and proper and not in response to any other agenda or pressure, political or otherwise.*

*The Commission's role ... is to conduct an independent and objective investigation, ascertain the facts and ultimately to form opinions and make recommendations. It will do so fairly and without fear or favour.<sup>5</sup>*

[10] In addition to the use of Taser weapons on, and treatment of, Mr Spratt by WAPOL and DCS between 30 August and 6 September 2008, and the conduct of internal investigations subsequently undertaken, independently, by WAPOL and DCS, the Commission investigation also included consideration of associated matters, such as:

- matters relating to the preparation and release of the Timeline by the Commissioner of Police to assembled media outlets on 18 October 2010 which purported to outline the interaction between Mr Spratt and WAPOL officers, and Mr Spratt's criminal history;
- treatment of Mr Spratt by medical staff at Casuarina Prison after his extraction from a cell by members of the DCS Emergency Support Group (ESG) at the PWH on 6 September 2008 and by medical staff at Royal Perth Hospital, with Mr Spratt being admitted on Sunday 7 September 2008;
- the cause of injuries incurred by Mr Spratt during the period he was in the custody of either WAPOL or DCS, that is, a "large left pneumothorax ... with associated collapse of the lung ... [f]ractures of the anterior end of the left 6<sup>th</sup> and possibly other ribs ... anterior dislocation of the shoulder ...", ultimately diagnosed on 7 September 2008 by medical staff at Royal Perth Hospital;<sup>6</sup>
- the preparation of the Statement of Material Facts, which resulted in the conviction of Mr Spratt on a charge of Obstruct a Public Officer

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<sup>5</sup> Transcript of Proceedings, Public Examination, Opening Remarks by Commissioner Roberts-Smith, RFD, QC, on 9 December 2010, pp.3-4.

<sup>6</sup> Royal Perth Hospital Medical Imaging (X-Ray) Report, Mr Kevin John Spratt, 7 September 2008 [CCC 1172].

recorded on 30 January 2009, but set aside on 24 February 2011 by the Supreme Court of Western Australia, in Spratt -v- Fowler [2011] WASC 52, and substituted by a verdict of “Not Guilty” on the grounds Mr Spratt’s plea of guilty was induced by false allegations made by the prosecution, and there was no proper basis for the obstruction charge, resulting in a miscarriage of justice;

- policies and procedures in relation to the review of incidents involving the use of Taser weapons by DCS;
- compliance with policies and procedures in relation to the use of Taser weapons by members of the DCS ESG;
- training provided by DCS in relation to the use of Taser weapons; and
- identification of Mr Spratt by the media as being the person on whom Taser weapons were deployed by WAPOL officers at the PWH on 31 August 2008.<sup>7</sup>

#### **1.1.2 Commission Investigation in Relation to the Use of Taser Weapons on Prisoner X**

- [11] The matter in relation to Prisoner X was identified by the Commission in January 2011 as part of a broad review of the use of Taser weapons by DCS officers.
- [12] On the 15 February 2011 Acting Commissioner Mark Herron made a proposition of misconduct pursuant to section 26 of the CCC Act in relation to the incident of Taser use on Prisoner X.<sup>8</sup>
- [13] That proposition approved by Acting Commissioner Herron on 15 February 2011 was that:

*That DCS Officers [B (name suppressed)] and [A (name suppressed)] may have engaged in conduct amounting to misconduct pursuant to section 4 of the “Corruption and Crime Commission Act 2003” [WA], by using ... Taser weapons on [Prisoner X (name suppressed)], a prisoner at Hakea Prison and providing false information in written incident reports relating to his extraction from a prison cell on 2 August 2010.<sup>9</sup>*

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<sup>7</sup> Refer Case Study Five of the Commission report on *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

<sup>8</sup> Pursuant to section 26 of the *Corruption and Crime Commission Act 2003* (WA) the Commission may make a proposition that misconduct: has or may have occurred; is or may be occurring; is or may be about to occur; or is likely to occur. Such a proposition may be based on the Commission’s own experience and knowledge, or assessment of a received matter, and independently of any allegation referred to in section 25 (whereby a public officer or any other person may report to the Commission any matter which that person suspects on reasonable grounds concerns or may concern misconduct).

<sup>9</sup> Proposition Proposal Pursuant to Section 26 of the *Corruption and Crime Commission Act 2003* (WA) of 10 February 2011.

- [14] On 17 February 2011 Acting Commissioner Herron authorised an investigation into the use of Taser weapons on Prisoner X by DCS ESG officers on 2 August 2010 during the course of his extraction from a cell at Hakea Prison and the subsequent review of that incident by senior DCS officers, pursuant to section 33(1)(a) of the CCC Act.<sup>10</sup> That investigation was not undertaken as a separate investigation but became part of the existing investigation, approved by then Commissioner Roberts-Smith on 12 November 2010, of alleged public sector misconduct by officers of WAPOL and DCS in relation to the use of Taser weapons on, and treatment of, Mr Spratt between 30 August and 6 September 2008, and associated matters.

### **1.1.3 Scope and Purpose of Commission Investigation**

- [15] Before the Commission conducts an examination, either private or public, pursuant to section 138 of the CCC Act, it is to inform the witness of the general scope and purpose of the investigation, unless the Commission considers that in the circumstances it would be undesirable to so inform the witness. Accordingly, prior to the commencement of the December 2010 examinations, and the examination of each witness, then Commissioner Roberts-Smith stated that the general scope and purpose of the Commission investigation was to determine:

*if any member of the Western Australia Police or the Department of Corrective Services has engaged in misconduct in connection with the arrest, detention and investigation of matters involving Mr Kevin Spratt.*

- [16] Due to developments subsequent to those examinations the general scope and purpose was broadened to include additional matters. Consequently, Acting Commissioner Herron prior to the commencement of the examinations conducted in 2011 stated that the general scope and purpose of the Commission investigation was to determine:

*in relation to Mr Kevin John Spratt whether any employee of the Western Australia Police or the Department of Corrective Services has engaged in misconduct with respect to their dealings with him on or after [30] August 2008, including but not limited to, any arrest, detention, use of force, internal investigation and any public release of information pertaining to these matters; and further*

*whether any employee of the Department of Corrective Services has engaged in misconduct with respect to the extraction of a prisoner from his cell at Hakea Prison on 2 August 2010, the internal reporting thereof and any subsequent internal investigation conducted.*

- [17] The section of the broadened general scope and purpose that refers to the “extraction of a prisoner from his cell at Hakea Prison on 2 August 2010”,

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<sup>10</sup> Corruption and Crime Commission *Assessment Form — New Allegation*, 16 February 2011.

as outlined above, was added as an additional matter to that scope and purpose on 7 April 2011.

## **1.2 Commission Examinations**

### **1.2.1 Private Examinations**

[18] As aforementioned, for the purposes of the investigation the Commission conducted private examinations pursuant to sections 137 and 139 of the CCC Act. These private examinations were conducted on:

- 9 December 2010;
- 15 December 2010;
- 21 December 2010;
- 22 March 2011; and
- 25 August 2011.

[19] The witnesses called to give evidence under oath or by affirmation during the above mentioned private examinations, pursuant to section 141 of the CCC Act, are detailed in Appendix 1 to this report.

### **1.2.2 Public Examinations**

[20] As aforementioned, for the purposes of the investigation the Commission conducted public examinations pursuant to sections 137 and 140 of the CCC Act. These public examinations were conducted during:

- 9 December 2010;
- 13-17 December 2010;
- 11-15 April 2011; and
- 18-19 April 2011.

[21] The witnesses called to give evidence under oath or by affirmation during the above mentioned public examinations, pursuant to section 141 of the CCC Act, are detailed in Appendix 1 to this report.

#### **1.2.2.1 Decision to Conduct Public Examinations**

[22] Section 139(1) of the CCC Act stipulates that, “[e]xcept as provided in section 140”, an examination is not to be open to the public. Section 140(2) allows the Commission to “open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so”. That weighing process must be applied with respect to the examination of each witness.



[23] In this case the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements in respect of **each** person to be examined, and decided that it was in the public interest to conduct examinations of most (41 out of 44) witnesses in public.

[24] In his remarks at the start of the December 2010 public examinations then Commissioner Roberts-Smith provided a number of reasons why those examinations should be conducted in public, including those outlined below.

*... I am satisfied that it is in the public interest for these witnesses to be examined publicly; in particular, as to the benefits of public exposure and public awareness ... —*

- (1) There has already been widespread media exposure of these particular events and issues which has generated serious public concern. Many allegations have been made publicly. There is considerable community disquiet. These matters are said to be generating a lack of confidence in WA Police. There is a need for these matters to be seen to be dealt with objectively and fairly and in a transparent way.*
- (2) There is no doubt the incidents in which Tasers were used on Mr Spratt occurred in fact. The pertinent issues will have to do with the justification or otherwise for that, the policies or protocols which did or did not apply and whether or not they were complied with.*
- (3) The allegations of misconduct are serious. At their highest they effectively include allegations of serious assaults by public officers that police records have been falsified and that false or misleading evidence has been put before a court. Those allegations have already been made publicly as have others which I have mentioned.*
- (4) It is already the case that ongoing public attention has led to the revelation of additional relevant matters or information. Public examinations are likely to result in individuals coming forward with further information or material which will advance the Commission's investigation.*
- (5) Public exposure of the circumstances of these incidents and how they came to occur will afford immediate and pertinent knowledge to police officers throughout the state about Taser use.*
- (6) It will also enable police and DCS to consider and rectify in a timely way any systemic weaknesses or issues which may be identified in relation to the use of Tasers, the conduct of internal investigations or otherwise as the investigation progresses.*
- (7) Dealing with these issues before the broader community in a transparent way will serve to maintain public confidence that they are being dealt with properly.*
- (8) The public exposure of the extent to which force by public officers is authorised and the constraints to which it is subject will increase community awareness of those matters.*

Factors going to the potential for prejudice or privacy infringements are generally more particular to individual witnesses. However, here they do include the following ... —

- (1) *Potential prejudice to the fair hearing of any criminal or disciplinary offences which may be laid against public officers. At this stage it is not known whether any such charges are likely. Some disciplinary action has been taken against some police officers.*

*Even were disciplinary charges to be laid against other officers, they are not likely to be prejudiced by these public examinations. Evidence given before the Commission, whether publicly or in private, can be relied upon in disciplinary proceedings. Should criminal charges be laid, these public examinations would not prejudice any trial before a magistrate or judge alone. Any trial before a judge and jury would not be likely for many months, if not a year or longer; and if prejudice or privacy issues were to arise, they could be dealt with then by appropriate orders or directions.*

- (2) *As to privacy, no doubt individuals involved in these incidents would prefer not to be publicly identified. That is something properly to be taken into account. On the other hand, the only conduct of theirs which will be subject to scrutiny is their conduct in the performance of their roles as public officers. Mr Spratt is in a different position in that regard.*<sup>11</sup>

(emphasis added)

- [25] In his remarks at the start of the April 2011 public examinations Acting Commissioner Herron stated that the reasons for conducting public examinations as outlined by then Commissioner Roberts-Smith in December 2010 remain relevant.

*In deciding to conduct these further examinations in public I have reviewed and had regard to the matters considered by former Commissioner Roberts-Smith when deciding to conduct the initial examinations in public and have also considered afresh the balancing factors that I am required to take into account in accordance with section 140 of the CCC Act.*

*I am satisfied that the specific considerations outlined by former Commissioner Roberts-Smith in his opening remarks to the December 2010 examinations in relation to weighing the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements in respect of each person to be examined remain relevant.*<sup>12</sup>

(emphasis added)

- [26] Further, Acting Commissioner Herron stated in his remarks at the start of the April 2011 public examinations that “[s]ince the occurrence of the

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<sup>11</sup> Transcript of Proceedings, Public Examination, Opening Remarks by Commissioner Roberts-Smith, RFD, QC, on 9 December 2010, pp.7-9.

<sup>12</sup> Transcript of Proceedings, Public Examination, Opening Remarks by Acting Commissioner Herron on 11 April 2011, p.7.

December 2010 examinations there have been several developments which have added considerable weight to the decision to conduct further examinations in public at this time". The developments were:

- (1) *comments made in the parliament of Western Australia on 17 February this year by a member of the legislative assembly in relation to the commissioner of police, the deputy commissioner of police, the release of public information pertaining to Mr Spratt referred to as a litany of lies in the legislative assembly by the member, and police treatment of Mr Spratt which sparked considerable further public debate; and*
- (2) *on 24 February this year the Supreme Court in Spratt -v- Fowler [2011] WASC 52 ordered that the conviction recorded on 30 January 2009 against Mr Spratt for the offence of obstructing a public officer be set aside and that a verdict of not guilty be substituted as Mr Spratt's plea of guilty was induced by the false allegations made by the prosecution and there was no proper basis for the obstruction charge resulting in a miscarriage of justice.*<sup>13</sup>

[27] The general scope and purpose of the Commission investigation was broadened to include matters emanating from those developments (refer [10] above).

#### **1.2.2.2 Commissioner Terence Cole, RFD, QC**

[28] Concern has been expressed in the past when Commission examinations have been conducted in public. Commissioner Terence Cole, RFD, QC, in his conduct of the Royal Commission Into the Building and Construction Industry, in addressing the need to conduct hearings by Royal Commissions in public stated:

*In deciding to conduct hearings primarily in public, I was conscious that the conduct of hearings in public has the capacity to injure the reputation of both people about whom evidence was given and people who gave evidence. Often any damage to such a person's reputation resulted simply from the public revelation of his or her conduct. In that circumstance, it was really the person's conduct, rather than the Commission's revelation of it, that damaged their reputation. In other circumstances, however, where for example false, misleading or unfounded evidence was given to the Commission, people's reputations were damaged through no fault of their own.*

*It was necessary for me to weight the risk that reputations might be unfairly damaged against the public interest in the matters that I was required by my Terms of Reference to investigate. I had to make a judgment regarding the competing interests. Reasonable minds may differ in relation to which portions of evidence should be taken in public and which in private. But the public interest in a Royal Commission conducting its hearings in public should not be underestimated. Public hearings are important in enhancing public confidence in a Royal Commission as they allow the public to see*

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<sup>13</sup> Transcript of Proceedings, Public Examination, Opening Remarks by Acting Commissioner Herron on 11 April 2011, pp.9-11.

*the Commission at work. They also enhance the ability of Commissions to obtain information from the public, as they demonstrate to the public the types of matter with which the Commission is concerned, and they allow potential witnesses to see that they would not be alone in giving assistance to a Commission. Summarising concerns of this type, Mason J emphasised in the Australian Building Construction Employees' and Builders Labourers' Federation case that conducting Royal Commission hearings in private:*

*"seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report".*

*The Commission was required to inquire into a subject matter of widespread public interest and importance. In my judgment, because of the factors outlined above, it was appropriate that hearings were conducted in public wherever possible.*

- [29] The Commission agrees with the comments made by Commissioner Cole and has taken those considerations into account in deciding to hold public examinations.

#### **1.2.2.3 Sections 139 and 140 of the Corruption and Crime Commission Act 2003 (WA)**

- [30] As explained earlier, pursuant to section 139(1) of the CCC Act an examination is not open to the public, except as provided in section 140 of that Act. Section 140(2) allows the Commission to "open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so".
- [31] Further to section 140(2), section 140(3) states that: "[a] decision to open an examination to the public may be made at any time before or during the examination" and section 140(4) states that "[i]f the Commission decides to open an examination to the public, the Commission may close the examination for a particular purpose".
- [32] Accordingly, the Commission in deciding to hold examinations in public considers and weighs the potential for prejudice or privacy infringements of **each** person to be called as a witness during the examinations, reviewing the position of **each** witness before they are called to give evidence as to whether it is in the public interest for that person to be examined in public or whether to close the public examination.

### **1.3 Jurisdiction of the Commission**

- [33] The Commission is an executive instrument of the Parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the CCC Act faithfully and impartially. The Commission cannot, and does not, have any agenda, political or otherwise, other than to comply with the requirements of the CCC Act.

- [34] It is a function of the Commission, pursuant to section 18 of the CCC Act, to ensure that an allegation about, or information or matter involving misconduct by public officers is dealt with in an appropriate way. An allegation can be made to the Commission or made on its own proposition pursuant to section 26 of the CCC Act. The Commission must deal with any allegation of, or information about, misconduct in accordance with the procedures set out in the CCC Act.

## 1.4 Definitions

### 1.4.1 Misconduct

- [35] The term “misconduct” has a particular and specific meaning in the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC Act states that:

*Misconduct occurs if —*

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or*
- (d) *a public officer engages in conduct that —*
  - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
  - (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
  - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
  - (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

*and constitutes or could constitute —*

- (v) *an offence against the “Statutory Corporations (Liability of Directors) Act 1996” or any other written law; or*
- (vi) *a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the “Public Sector Management Act 1994” (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).*

- [36] Misconduct, as defined in section 4 of the CCC Act applies only to the conduct of public officers.
- [37] In section 3 of the CCC Act “**serious misconduct**” is defined as “misconduct of a kind described in section 4(a), (b) or (c)”.
- [38] Misconduct of a kind described in section 4(d)(i) – (iv) must not only involve the type of conduct described there, but must also be serious enough to meet the criteria set out in section 4(d)(v) or (vi).
- [39] Section 4(d)(v) says that the conduct must be serious enough so that it constitutes, or could constitute, an offence against a written law.
- [40] Section 4(d)(vi) is more complex. It says that the conduct must be serious enough so that it constitutes or could constitute “a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”.
- [41] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, and subject to the *Public Sector Management Act 1994* (“the PSM Act”), the test is notional – that is, although it cannot then apply directly, the Commission must assess the public officer’s conduct against the objective criteria set out in the PSM Act, as if that person were a member of the public service.
- [42] In Cox v Corruption and Crime Commission [2008] WASCA 199, Martin CJ at [63] stated that:

*... [s]ection 4(d)(vi) [of the CCC Act] expressly provides that the definition of “misconduct” applies whether or not the public officer is a public service officer whose employment could be terminated on the grounds of a disciplinary offence under the PSMA [the PSM Act]. It is therefore clear that the conduct defined as “misconduct” by s 4(d) of the [CCC] Act is that which would provide reasonable grounds for termination if the public officer was liable to termination under the PSMA, irrespective of whether or not the public officer is so liable. In the case of a public officer who is not a public*

*service officer covered by the PSMA, the definition imposes a hypothetical standard of conduct – the hypothesis being that the officer could in fact be liable to dismissal under the terms of the PSMA.*

Steytler P at [116] stated that:

*... there is nothing in s 4(d)(vi) of the CCC Act that requires the public officer in question to have been a public service officer under the PSM Act. That is made plain by the words “(whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”. It is consequently irrelevant whether Dr Cox was, or was not, a public service officer for the purpose of the PSM Act.*

- [43] Further, the Commission refers to and incorporates into this report paragraphs [28] to [30] inclusive, of the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”), tabled in the Parliament on 21 October 2010.<sup>14</sup>

#### **1.4.2 Public Officer**

- [44] The term “public officer” is defined in section 3 of the CCC Act by reference to the definition in section 1 of *The Criminal Code*, which states that the term “public officer” means any of the following:

- (a) *a police officer;*
- (aa) *a Minister of the Crown;*
- (ab) *a Parliamentary Secretary appointed under section 44A of the “Constitution Acts Amendment Act 1899”;*
- (ac) *a member of either House of Parliament;*
- (ad) *a person exercising authority under a written law;*
- (b) *a person authorised under a written law to execute or serve any process of a court or tribunal;*
- (c) *a public service officer or employee within the meaning of the “Public Sector Management Act 1994”;*
- (ca) *a person who holds a permit to do high-level security work as defined in the “Court Security and Custodial Services Act 1999 [(WA)]”;*

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<sup>14</sup> Sections 83-86 of the *Public Sector Management Act 1994* (“the PSM Act”) were deleted by Amendment No. 39 of 2010 s. 99. Any reference to these sections in the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”) should be disregarded. In addition, parts of paragraphs [31]-[38] of the Special Report are no longer applicable as a result of other amendments made to the PSM Act by Amendment No. 39 of 2010.

- (cb) *a person who holds a permit to do high-level security work as defined in the “Prisons Act 1981”;*
- (d) *a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; [and]*
- (e) *any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not ...*

[45] By definition, therefore, WAPOL officers are “public officers” and DCS officers are “public officers” as they are included in the category of “a public service officer or employee within the meaning of the” PSM Act. By section 64(1) of the PSM Act “... the employing authority of a department or organisation may in accordance with the Commissioner’s instructions appoint for and on behalf of the State a person as a public service officer ... on a full-time or part-time basis —”:

- (a) *for an indefinite period as a permanent officer; or*
- (b) *for such term not exceeding 5 years as is specified in the instrument of his or her appointment.*

### **1.4.3 Use of Force**

[46] WAPOL officers and certain DCS officers (including ESG officers) are authorised by law to use force in the exercise of their duties as public officers. Use of force by such officers, or control tactics, can be considered as a continuum of force from low to high, for example, mere presence, verbal commands and use of handcuffs at the lower end to use of a Taser weapon, baton or firearm at the higher end. The *Criminal Investigation Act 2006* (WA) (“the CIA”),<sup>15</sup> *The Criminal Code*, the *Police Act 1892* (WA) and the *Court Security and Custodial Services Act 1999* (WA) are all sources of authority permitting WAPOL and certain DCS officers to use force in certain circumstances. All provisions and powers of the CIA are subject to the provisions of *The Criminal Code*. In relation to DCS, section 14 of the *Prisons Act 1981* (WA) is a further authority permitting certain DCS officers (including ESG officers) to use force in certain circumstances.

[47] Section 16 of the CIA relates to the use of force when exercising powers and states:

- (1) *When exercising a power in this Act, a person may use any force against any person or thing that it is reasonably necessary to use in the circumstances —*
  - (a) *to exercise the power; and*

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<sup>15</sup> The *Criminal Investigation Act 2006* (WA) is an Act to provide powers for the investigation and prevention of offences and for related matters.



(b) *to overcome any resistance to exercising the power that is offered, or that the person exercising the power reasonably suspects will be offered, by any person.*

(2) *If under subsection (1) a person uses force, the force may be such as causes damage to the property of another person.*

(3) *Any use of force under subsection (1) against a person is subject to “The Criminal Code” Chapter XXVI.*

(emphasis added)

[48] Sections 135(4) and 135(5) of the CIA permit an officer to conduct a strip search of a person in custody. Although it is implicit in any power to conduct a non-consensual strip search that reasonable force may be used, the general authority to use such force is contained in section 16 of the CIA, as outlined above. Sections 135(4) and 135(5) of the CIA state:

(4) *If a person is in custody, an authorised officer may search the person for a security risk item.*

(5) *For the purpose of searching a person under subsection (4) an authorised officer may, as often as is reasonably necessary —*

(a) *... do a basic search or a strip search of the person;*

(b) *if authorised to do so ... do an internal forensic procedure on the person ...*

[49] Chapter XXVI (sections 221-261) of *The Criminal Code* deals with assaults and violence to the person generally, and justification, excuse and circumstances of aggravation. In relation to excessive force section 260 states that:

*In any case in which the use of force by one person to another is lawful, the use of more force than is justified by law under the circumstances is unlawful.*

Therefore, the use of more force than is reasonably necessary in the exercise of duties by WAPOL officers and certain DCS Officers, as public officers, is unlawful pursuant to section 260 of *The Criminal Code*.

[50] The *Court Security and Custodial Services Act 1999* (WA) contains various provisions in relation to court security and custodial services which may impact upon the powers of WAPOL officers and DCS officers in relation to persons who are in custody (including in prisons, police stations, lock-ups and other custodial places). The *Court Security and Custodial Services Act 1999* (WA) has, in particular, an important role to play in the “conferral” of various powers on contract workers acting pursuant to contracts for court security or custodial services (refer, for example, section 22 of that Act).

[51] The operation of the *Court Security and Custodial Services Act 1999* (WA), however, is not generally the same for WAPOL officers and DCS

officers. While there may be some circumstances in which the *Court Security and Custodial Services Act 1999* (WA) confers additional powers on such officers, that Act generally proceeds upon the basis that the power of those officers will generally be found in other legislation. For example, the *Criminal Investigation Act 2006* (WA) in the case of WAPOL officers and the *Prisons Act 1981* (WA) in the case of DCS officers.

- [52] In that regard, the powers set out in Schedule 2, Division 1, of the *Court Security and Custodial Services Act 1999* (WA), in relation to persons in custody, are generally “descriptive” of powers that derive elsewhere. In this regard, refer, for example, the definition of “authorised person”, in section 3 of that Act, which makes clear that an “authorised person” is a person who “is” authorised to use the Schedule 2 powers; whether the person “is” in fact authorised is to be found elsewhere.
- [53] As stated above, however, there are circumstances in which the *Court Security and Custodial Services Act 1999* (WA) actually confers the authority so as to make a person an “authorised person”. Section 22 of that Act, dealing with contract workers, is the obvious example. Similarly, section 23 of the same Act confers additional powers on WAPOL officers under certain arrangements.
- [54] The provisions of the *Court Security and Custodial Services Act 1999* (WA) apply to a “person in custody”, which is defined in section 3 as being a person held in a “custodial place”, that is, a person “who is in custody under a law of the State”. Section 26 of the *Court Security and Custodial Services Act 1999* (WA) permits an authorised person, which in certain circumstances will include WAPOL officers and DCS officers (including ESG officers), to “use such reasonable force as is necessary” in certain circumstances including the moving of a person in custody between custodial places.
- [55] Section 26 of the *Court Security and Custodial Services Act 1999* (WA) relates to the use of reasonable force by authorised persons, and states —
- (1) *An authorised person may use such reasonable force as is necessary for the purpose of exercising a Schedule power.*
  - (2) *A person who is authorised to issue an order to a person in custody may use such reasonable force as is necessary to ensure that the order is complied with.*

Therefore, the overriding consideration is that only reasonable force may be used by WAPOL officers and DCS officers.

#### **1.4.4 Reasonable Force**

- [56] “Reasonable force” is defined in the *Butterworths Concise Australian Legal Dictionary* (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.365, as: “That degree of force which is not excessive but is fair, proper, and reasonably necessary in the circumstances. At common law a person is entitled to use reasonable force in self-defence or to protect another

person where there is actual danger or a reasonable apprehension of immediate danger”.

(emphasis added)

- [57] Beech AJA in Quartermaine -v- State of Western Australia [2008] WASCA 22 canvassed the degree of objectivity imported into the words “reasonably necessary” both under section 31(3) (repealed in 2008) and section 248 of *The Criminal Code*. Beech AJA said in relation to section 31(3) at [25]-[27]:

*There appear to be very few cases concerning section 31(3). In Dudley -v- Ballantyne (1998) 28 MVR 209, 214 Owen J observed that “the words ‘reasonably necessary’ in section 31(3) indicate a degree of objectivity in assessing this defence”.*

*Denton -v- Bodycoat* [2000] WASCA 424 concerned an offence of carrying pepper spray. In that context, Roberts-Smith J held [68] that section 31(3) connotes a sense of immediacy or a reasonable apprehension of imminent attack or danger, so that there is a temporal nexus between the threat giving rise to the excuse and the conduct the subject of the offence.

*Consistently with that, in Quartermaine -v- Marsh [2006] WASC 303 [16], a case concerning being armed with an offensive weapon, Miller J stated that, in that case, “it was critical that there be evidence to raise this defence in the form of a reasonable apprehension of imminent attack or danger”.*

## 1.5 Reporting by the Commission

- [58] The Commission refers to and incorporates into this report paragraphs [40] to [41] inclusive of its Special Report.
- [59] Section 86 of the CCC Act requires that before reporting any matters adverse to a person or body in a report under section 84, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.
- [60] A number of persons and bodies were notified by letter, variously dated,<sup>16</sup> of possible adverse matters which it was proposed to include in this report. They were invited to make representations about those and other matters about which they might wish to do so by Friday 17 February 2012. They were advised that they and/or their legal adviser could inspect the transcripts of examinations before the Commission and evidentiary material going to matters identified. A number of persons and bodies provided representations by the due date, with one person providing a representation on 12 March 2012, as an extension to the due date for submission of representations had been granted.
- [61] The Commission has taken all representations into account in finalising this report.

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<sup>16</sup> Notification letters were variously dated: Friday 13 January 2012; Wednesday 1 February 2012; or Thursday 2 February 2012.

- [62] A list of persons and bodies who received notifications under section 86 of the CCC Act is detailed in Appendix 2 to this report.

## **1.6 Disclosure**

- [63] The Commission refers to and incorporates into this report paragraphs [43] to [45] inclusive of its Special Report.
- [64] The Commission takes decisions about releasing information to the public very seriously. Consistently with the considerations to which it is required to have regard in deciding whether or not an examination (hearing) should be conducted in public, when considering the disclosure of information in a report the Commission takes into account the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice (refer [22]-[32] above).
- [65] The decision to report on the investigation by the Commission of alleged public sector misconduct by officers of WAPOL and DCS in relation to the use of Taser Weapons on, and treatment of, Mr Spratt between 30 August and 6 September 2008 and associated matters, and by officers of DCS in relation to the use of Taser weapons on Prisoner X on 2 August 2010 goes to its statutory purpose of improving continuously the integrity of, and reducing the incidence of misconduct in, the public sector. The decision to report is also necessary in the public interest to enable informed action to address the corruption and other misconduct risks identified by the circumstances revealed in this report.

## **1.7 Privacy Considerations**

- [66] In formulating this report the Commission has considered the benefit of public exposure and public awareness and weighed this against the potential for prejudice and privacy infringements. As a result of these considerations the Commission has decided not to include names of various individuals in this report who either assisted the Commission during its investigation or whose names have been suppressed in accordance with Suppression Orders issued by then Commissioner Roberts-Smith or Acting Commissioner Herron during the course of the 2010 and 2011 public examinations respectively, pursuant to section 151(3) of the CCC Act. Section 151(3) of the CCC Act states that:

*[u]nless the Commission orders otherwise, a restricted matter may be disclosed if that matter has already been disclosed at a part of an examination that was open to the public.*

## **1.8 Opinions of Misconduct**

### **1.8.1 Publication of an Opinion**

- [67] The Commission refers to and incorporates into this report paragraphs [49] to [51] inclusive of its Special Report.

### **1.8.2 Balance of Probabilities**

- [68] The Commission refers to and incorporates into this report paragraphs [52] to [57] inclusive of its Special Report.

### **1.8.3 Section 4(c), Section 23(1) and Section 23(2) of the *Corruption and Crime Commission Act 2003* (WA)**

- [69] Section 23(1) of the CCC Act prohibits the Commission from publishing or reporting a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence. However, section 23(1) of the CCC Act allows the Commission to publish or report that a person has been convicted of, or pleaded guilty to, a criminal offence or disciplinary offence. In such a case the Commission would be reporting a fact, not its opinion, as to that. Further, section 23(2) of the CCC Act provides that an opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

(emphasis added)

- [70] In the Commission's opinion section 23(2) allows the Commission to publish or report a finding or an opinion that the relevant conduct constitutes misconduct under section 4(c) of the CCC Act without the person having been convicted of an offence punishable by two or more years' imprisonment. Acknowledging that whether a criminal offence has been committed can only be determined by a court and that the elements of the offence must be proved beyond reasonable doubt, and further acknowledging that the Commission is not a court, does not make legally binding determinations and may form an opinion as to misconduct on the balance of probabilities, the Commission, in expressing and reporting an opinion that the misconduct constitutes serious misconduct under section 4(c) of the CCC Act is expressing and reporting an opinion that facts if proved beyond a reasonable doubt in a court could satisfy the elements of an offence, not that a particular person has committed an offence.

### **1.8.4 Expression of Opinion**

- [71] The Commission has borne all of the foregoing considerations (as set out in 1.8.1 to 1.8.3 above) in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.



## **CHAPTER TWO OVERVIEW OF EVENTS**

### **2.1 Introduction**

[72] As mentioned in Chapter One, this is a report on the investigation by the Commission of alleged public sector misconduct in relation to the use of Taser weapons by officers of WAPOL and DCS. This chapter presents an overview of events which occurred:

- between 30-31 August 2008 and 6-7 September 2008 in relation to Mr Spratt, involving officers of WAPOL and DCS; and
- on 2 August 2010 in relation to Prisoner X, involving DCS officers.

[73] A chronology of events is detailed in Appendix 3 to this report.

### **2.2 30-31 August 2008 and 6-7 September 2008: Mr Spratt**

#### **2.2.1 30 August 2008 (Saturday)**

[74] At approximately 4:00 p.m. WAPOL officers attended the Graham Farmer Freeway (“the Freeway”) near the Northbridge Tunnel (“the Tunnel”) eastern entrance in response to three reports that a man (later identified as Mr Spratt) was running into and out of traffic.

- The attending officers, Senior Constable Rebecca Mayger and Constable Aaron Drake, attempted to speak with Mr Spratt who ran across nearby railway tracks, but was not pursued due to the volume of traffic. However, a short time later Mr Spratt returned to the Freeway and officers from the WAPOL Rail Unit attempted to apprehend him, but Mr Spratt again ran into traffic (causing vehicles to swerve and brake suddenly).
- Senior Constable Mayger and Constable Drake pursued Mr Spratt on foot and apprehended him westbound just prior to the Tunnel entrance. At that time Mr Spratt appeared to have breathing difficulties and Senior Constable Mayger returned to the police vehicle to obtain asthma medication while Constable Drake remained with Mr Spratt.
- Whilst Senior Constable Mayger was preparing the inhaler for Mr Spratt it was reported by WAPOL officers that Mr Spratt jumped up and ran into traffic. Senior Constable Mayger and Constable Drake again attempted to apprehend Mr Spratt who was resisting violently and attempting to pull them onto the roadway. Senior Constable Mayger drew a Taser weapon and aimed it at Mr Spratt and, as required by the WAPOL *Police Manual 2008* FR-1.6.5, issued a verbal warning, “Taser, Taser” prior to deploying the weapon.

- However, Senior Constable Mayger did not deploy the Taser weapon as Mr Spratt stopped resisting and moved to the side of the road as directed.
- Mr Spratt was subsequently arrested, handcuffed and conveyed to the Perth Police Station (Curtin House) where he was formally charged with disorderly conduct and obstructing a public officer.

[75] Mr Spratt was released on bail at approximately 5:04 p.m.

### **2.2.2 31 August 2008 (Sunday)**

[76] At approximately 11:05 a.m. WAPOL officers were called to King William Street in Bayswater in response to reports that a man (later identified as Mr Spratt) was acting suspiciously near private residences.

- The attending officers, Senior Constable Aaron Grant Strahan and 1/C Constable Brett Andrew Fowler, located Mr Spratt and spoke with him near the intersection of Guildford Road.
- Mr Spratt provided personal details which were checked by 1/C Constable Fowler.
- Mr Spratt was arrested by Senior Constable Strahan on suspicion of trespassing on private property. It was reported by Senior Constable Strahan that immediately prior to the arrest Mr Spratt had become increasingly agitated, and gave evidence to this effect during a public examination.<sup>17</sup>

[77] At approximately 11:30 a.m. Mr Spratt was observed running across Guildford Road and colliding with a stationary vehicle, and then continuing to run.

- Mr Spratt was apprehended by officers from the Central Metropolitan Tactical Investigation Group (TIG).
- Senior Constable Strahan and 1/C Constable Fowler arrived shortly thereafter and Mr Spratt was handcuffed by 1/C Constable Fowler.
- Senior Constable Strahan and 1/C Constable Fowler escorted Mr Spratt to the police vehicle, but as they attempted to assist him into the vehicle he collapsed and was assisted to the ground. An ambulance was requested by 1/C Constable Fowler.
- The TIG officers left the scene when they considered that Mr Spratt had been subdued and was under control.
- After departure of the TIG officers it was reported by Senior Constable Strahan and 1/C Constable Fowler that Mr Spratt jumped to his feet,

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<sup>17</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.118.



shouted and became aggressive. Senior Constable Strahan drew a Taser weapon but did not deploy it. Mr Spratt reportedly kicked Senior Constable Strahan and 1/C Constable Fowler, causing minor injuries.

[78] At approximately 11:37 a.m. 1/C Constable Fowler advised WAPOL Communications to disregard the earlier call for an ambulance and requested a secure police vehicle to convey Mr Spratt to the PWH on charges of obstructing a public officer (x1) and assaulting public officers (x2).

- Senior Constable Brett McKay and Constable Nadia Anna Okis attended the scene to provide assistance to convey Mr Spratt to the PWH. Constable Okis gave evidence during a public examination on 13 December 2010 in relation to Mr Spratt's "aggressive" behaviour at the scene.

*When you arrived on the scene, you said you observed two Bayswater police officers. Is that correct?---Yes.*

*What were they doing?---When we arrived I saw Mr Spratt on the ground and he was being held on the ground by the two officers.*

*Was he struggling at that point?---Not that I remember. He was just being held in place.*

*How was he was on the ground, can you - - -?---He was laying on his front.*

*Laying on his front. And the two police officers presumably were holding him down?---Yes.*

...

*Okay. You've said that when you arrived, Mr Spratt was being restrained, however he wasn't struggling. What happened once you arrived?---Myself and my colleague got out of our car and I remember Mr Spratt being told he was going to be placed into the back of the secured vehicle, and at that point Mr Spratt, he didn't - clearly didn't want to go into the back of the vehicle and started to kick around.*

...

**COUNSEL ASSISTING:** *Kicking around. Was it kicking around?---He started to move around and he was yelling abuse, trying to thrash his arms and legs around and he - I just remember him trying to stop himself from being placed in to the back of the van.*

*So he was vigorously resisting arrest?---Yes.*

*Would you say at that time that he had been aggressive or violent towards the police officers or to yourselves?---He just had an aggressive, violent demeanour, I guess, just in general, and he was - just the way he was yelling abuse. I can't remember exactly what he was saying but he was carrying on and kicking around.*

*So you've moved Mr Spratt. How did you get him from where he was being restrained to the van?---He was assisted by the officers.*<sup>18</sup>

(emphasis added)

- Senior Constable Strahan gave the following evidence in relation to Mr Spratt's behaviour during the time that he and Constable Fowler were attempting to place him into the back of the secure police vehicle.

*... Senior Constable McKay and Constable Okis arrived in a secure vehicle from Morley. ... We went to put Mr Spratt in the back of the van. We went to put him in feet first but he didn't want to get in. So he put his - he basically braced himself with one foot on either side of the van. We ended up having to put him in head first. Then once we got him in the van and put the yardarm across and locked it, I think he started to kick out then, like started to beat the back of the van.*

*At the closed door?---At the closed door, yeah ...*<sup>19</sup>

(emphasis added)

- Constable Okis called PWH to warn the receiving officers that Mr Spratt was acting violently in the secure police vehicle. In relation to this Constable Okis gave the following evidence.

*On the way to the watch-house I - I don't remember which order it was in but I made a radio call to police communications, VKI, and I advised them that for the benefit of the tape Mr Spratt was thrashing around in the back of the van, hitting his arms and legs in the inside of the van. I also made a phone call to the Perth watch-house and just advised them that we were bringing in a detainee who was acting quite aggressively.*<sup>20</sup>

(emphasis added)

- Senior Constable Strahan and 1/C Constable Fowler followed the secure police vehicle to the PWH. Senior Constable Strahan gave evidence about Mr Spratt's behaviour during the time that he was being conveyed to the PWH in the secure police vehicle.

*... We've basically followed the van into East Perth lockup from there. The whole time - I remember seeing Mr Spratt's - the soles of his feet on the [P]erspex glass, and the [P]erspex glass is probably that by that.*

**THE COMMISSIONER:** *What, about 20, 30 centimetres square - - -?---Yeah, probably 30 - - -*

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<sup>18</sup> Transcript of Proceedings, Public Examination of Constable Nadia Anna Okis on 13 December 2010, pp.181-183.

<sup>19</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, pp.121-122.

<sup>20</sup> Transcript of Proceedings, Public Examination of Constable Nadia Anna Okis on 13 December 2010, p.185.

*--- something like that?--- - - - centimetres by about 10 to 15 centimetres; and you can see one foot after another and the van was rocking from side to side. I don't think that they were actually doing the 60 kilometres to get there because the van was rocking from side to side so much.*<sup>21</sup>

(emphasis added)

1/C Constable Fowler gave similar evidence.

*Yes. Just generally Mr Spratt kicking the back of the [P]erspex door, and I remember seeing the van rocking from side to side a couple of times.*<sup>22</sup>

[79] At approximately 12:00 p.m. (Noon) Mr Spratt arrived at the PWH, and according to Constable Okis was “calm and got out ... on his own accord” and walked “to the doors that go into the watch-house reception area”.<sup>23</sup>

- Senior Constable McKay and Constable Okis departed the PWH.
- In attendance at the PWH were: Senior Constable Strahan and 1/C Constable Fowler (the arresting officers); Senior Constable Troy Gregory Tomlin; Sergeant Gary Christopher Thwaites; Acting Sergeant Ronald Allen Moore; Senior Constable Emanuel Bakovic; Probationary Constable Geoffrey Nicholas Toogood; Constable Kate Marie Naylor; and 1/C Constable Leigh Michael Woods.
- Mr Spratt walked into the PWH Reception Area and sat down, as directed. Mr Spratt's handcuffs were replaced with handcuffs that were attached to the seat on which he was sitting. Senior Constable Strahan questioned<sup>24</sup> Mr Spratt about his date of birth.
- 1/C Constable Fowler left the Reception Area, as did Sergeant Thwaites.
- Mr Spratt was released from his handcuffs and was asked by Senior Constable Strahan to move into a nearby room to be strip searched. Mr Spratt initially complied by walking towards the room, but then turned around and walked back to the seat, sat down and locked his arms onto the armrests of the seat.
- Mr Spratt was asked by Senior Constable Strahan and Senior Constable Bakovic, to move to the room where he was to be strip searched. Attempts were made by Senior Constable Tomlin to

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<sup>21</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, pp.121-122.

<sup>22</sup> Transcript of Proceedings, Public Examination of 1/C Constable Brett Andrew Fowler on 15 December 2010, p.404.

<sup>23</sup> Transcript of Proceedings, Public Examination of Constable Nadia Anna Okis on 13 December 2010, pp.188 and 190.

<sup>24</sup> 24 April 1969.

release Mr Spratt's grip on the armrests by "wrenching" his fingers off the armrests, but these attempts were unsuccessful. In relation to this Senior Constable Tomlin gave the following evidence.

*From my recollection and perception at the time, I've approached Mr Spratt, I've bent over and tried to wrench his fingers off the bar. At that time Mr Spratt said, "I'm the devil," or "I'm God, I'm going to kill you." I then - he's tensed up, moved his elbows into his - into his sides, and to that indicates to me, prior to other physical altercations that I've had, people have tensed up, so that's a risk sign that he may be about to launch an attack, may be about to come combative.<sup>25</sup>*

Attempts were also made by Acting Sergeant Moore to release Mr Spratt's grip on the armrests. In relation to this Acting Sergeant Moore gave the following evidence.

*... So ... how many times did you try and release his fingers?--- About two or three times, and that was each finger. So I'd pull one back and then pull another one, and then he'd grab it again so I'd go back to pulling that one off. Then you'd get to like the last finger and then he'd grab it again. So he kept grabbing the bar.*

*...*

*Was he making any other gestures or was he verbalising anything at that point?---He was mumbling and you could hear like words like "God" and "kill" and like I don't know what language he was talking in either, and he was just mumbling all the time.<sup>26</sup>*

- Senior Constable Tomlin said to Mr Spratt "give us your hand or you're going to get fucking tasered, do you understand ..." and within seconds deployed a Taser weapon, for the first time, in "Drive-Stun" Mode on Mr Spratt (at approximately 12:09:33 p.m.). In relation to this initial deployment Senior Constable Tomlin gave the following evidence.

*... I believe[d] there was a real risk of injury to Mr Spratt at that time with the level of force that was going to be used upon him, so then I've made a conscious decision to apply the Taser to him to prevent injury to him.<sup>27</sup>*

- Acting Sergeant Moore immediately after the deployment of the Taser weapon by Senior Constable Tomlin at approximately 12:09:33 p.m. "kicked above his [Mr Spratt's] hand on the bar hoping that he would ... let go and then some of the officers would grab him and pull him off

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<sup>25</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, p.217.

<sup>26</sup> Transcript of Proceedings, Private Examination of Acting Sergeant Ronald Allen Moore on 25 August 2011, p.21.

<sup>27</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, p.217.

the bench”.<sup>28</sup> Acting Sergeant Moore described this as a “distractionary technique”, applied just before “Senior Constable Tomlin tasered”.<sup>29</sup> However, in the Commission’s view, CCTV footage clearly shows that Acting Sergeant Moore “kicked ... the bar” just after and not before the deployment of a Taser weapon by Senior Constable Tomlin. The Commission, therefore, does not accept Acting Sergeant Moore’s evidence in this regard.

- After deployment of the Taser weapon, Mr Spratt stopped resisting and was placed in the prone position on the floor. Senior Constable Tomlin and Senior Constable Bakovic held Mr Spratt by the arms, and Mr Spratt struggled. Without warning Senior Constable Tomlin deployed a Taser weapon in “Drive-Stun” Mode (for the second time at approximately 12:09:49 p.m.).
- Senior Constable Strahan and Probationary Constable Toogood held Mr Spratt by the legs. Without warning Senior Constable Tomlin again deployed a Taser weapon in “Drive-Stun” Mode (for the third time at approximately 12:09:51 p.m.).
- Mr Spratt broke from the control of the four aforementioned officers and attempted to stand. Senior Constable Tomlin again deployed a Taser weapon in “Drive-Stun” Mode (for the fourth time at approximately 12:09:53 p.m.), immediately followed by deployment of a Taser weapon in “Probe” Mode at approximately 12:09:57 p.m. by Senior Constable Strahan, which caused Mr Spratt to fall to the floor.
- After asking Mr Spratt if he wanted “to go again”, Senior Constable Strahan deployed a Taser weapon twice more in “Drive-Stun” Mode, once at approximately 12:10:09 p.m. and once at approximately 12:10:29 p.m.
- Sergeant Thwaites, having returned to the Reception Area at approximately 12:09:55 p.m., instructed officers to physically restrain Mr Spratt, in order to take him to the padded cell. Mr Spratt physically resisted and a Taser weapon was deployed on two further occasions in “Drive-Stun” Mode, once at approximately 12:10:41 p.m. and once at approximately 12:10:48 p.m. by Senior Constable Strahan.
- An officer shouted “stop, stop” at approximately 12:10:49 p.m. The officer was identified by 1/C Constable Woods and Constable Naylor during public examinations as being Sergeant Thwaites.<sup>30</sup>

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<sup>28</sup> Transcript of Proceedings, Private Examination of Acting Sergeant Ronald Allen Moore on 25 August 2011, p.21.

<sup>29</sup> *Ibid.*

<sup>30</sup> Transcript of Proceedings, Public Examination of 1/C Constable Leigh Michael Woods on 14 December 2010, p.335, and Transcript of Proceedings, Public Examination of Constable Kate Marie Naylor on 14 December 2010, p.351.

- Mr Spratt was physically restrained. Mr Spratt was escorted to the padded cell by six officers. Although there is no CCTV footage of Mr Spratt in the padded cell (that is, there is no recorded footage as, for privacy reasons, the cell is monitored in real time via CCTV cameras),<sup>31</sup> the Commission investigation has established, through a review of Taser Data Port download records, that Senior Constable Strahan's Taser weapon was deployed a further five times in "Drive-Stun" Mode while he was in the padded cell with Mr Spratt and other officers.<sup>32</sup>

[80] In total, there were 14 deployments of Taser weapons on Mr Spratt at the PWH on 31 August 2008. Nine of these deployments were video recorded and can be clearly seen on CCTV footage (as summarised below), while five deployments were not recorded as they occurred in the padded cell. Senior Constable Tomlin was responsible for the first four deployments and Senior Constable Strahan was, according to Taser Data Port download records, responsible for 10 deployments (although this is disputed by Senior Constable Strahan who gave evidence during a public examination that his "recollection was" that it was only "three times" in the padded cell, that is, eight (and not 10) deployments overall (refer [140])). Thirteen of the deployments were in the "Drive-Stun" Mode, which affects the Sensory Nervous System and causes pain to the subject, but does not achieve incapacitation in the same manner as "Probe" Mode.<sup>33</sup>

**Table 1: Deployment Summary (First Nine Deployments)**

No.	Approximate Times	Mode	Officer
1.	12:09:33 p.m.	"Drive-Stun"	Senior Constable Tomlin
2.	12:09:49 p.m.	"Drive-Stun"	Senior Constable Tomlin
3.	12:09:51 p.m.	"Drive-Stun"	Senior Constable Tomlin
4.	12:09:53 p.m.	"Drive-Stun"	Senior Constable Tomlin
5.	12:09:57 p.m.	"Probe"	Senior Constable Strahan
6.	12:10:09 p.m.	"Drive-Stun"	Senior Constable Strahan
7.	12:10:29 p.m.	"Drive-Stun"	Senior Constable Strahan
8.	12:10:41 p.m.	"Drive-Stun"	Senior Constable Strahan
9.	12:10:48 p.m.	"Drive-Stun"	Senior Constable Strahan

[81] Mr Spratt was released on bail at 7:45 a.m. on 1 September 2008, that is, the next morning.<sup>34</sup>

<sup>31</sup> Prisoners detained in the padded cell at the Perth Watch House often have their clothing removed for safety reasons.

<sup>32</sup> The Taser X-26 has a Data Port which enables complete and accurate documentation of the date, time and duration of each deployment of a Taser weapon to be downloaded. FR-1.6.12, *Police Manual*, outlines the responsibilities of officers in relation to Taser Data Port downloads.

<sup>33</sup> Western Australia *Police Manual* 2010, FR-1.6, and Corruption and Crime Commission Summary Report, *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

<sup>34</sup> Western Australia Police Memorandum of 12 December 2008 to Inspector Steven Stingemore from Detective Senior Sergeant Rodney J Klanjscek, p.7 [CCC 0004].

### 2.2.3 6 September 2008 (Saturday)

[82] Between 7:00 a.m. on 5 September 2008 and 1:10 a.m. on 6 September 2008 a possible intruder (later identified as Mr Spratt) attempted to gain entry into three premises in Guildford Road, Bayswater.

[83] At approximately 4:57 a.m. (on 6 September) WAPOL officers were called to a disturbance in Guildford Road, Bayswater, and subsequently located Mr Spratt in a nearby park. Acting Sergeant Carol Patricia Eaton and Constable Alan Mark Taylor attempted to restrain Mr Spratt who, according to Acting Sergeant Eaton and Constable Taylor, kicked and attempted to bite and punch them. Mr Spratt broke free and ran from the officers.

- He was pursued by Constable Taylor who deployed a Taser weapon in “Probe” Mode about three metres from Mr Spratt. The Taser weapon was ineffective and Mr Spratt continued running.
- Constable Taylor pursued Mr Spratt for about a further 50 metres and when he attempted to apprehend Mr Spratt a struggle resulted. Constable Taylor deployed a Taser weapon several times in “Drive-Stun” Mode.
- Mr Spratt again ran from Constable Taylor and was again apprehended and another struggle occurred. Constable Taylor reported that during the struggle Mr Spratt seized his Taser weapon (that is, Constable Taylor’s Taser weapon).
- “Backup” was called. 1/C Constable Fowler and Constable Ashleigh Elizabeth Gray attended to assist. Eventually Mr Spratt was restrained and handcuffed.
- Constable Taylor gave evidence at a public examination on 15 December 2010 that Mr Spratt assaulted both 1/C Constable Fowler and himself during the time that he was being put into a secure police vehicle.

*... Mr Spratt managed to kick everybody, as far as I'm aware. He's a very strong individual. We struggled with him for quite some time. We got him halfway into the van. He was still kicking out at us. He injured Constable Fowler - I watched him kick Constable Fowler three or four times. I'd been kicked three or four times.*<sup>35</sup>

(emphasis added)

- Constable Taylor deployed a Taser weapon in “Probe” Mode from a short distance, through the vehicle’s side-hatch. In relation to this Constable Taylor gave evidence explaining that Mr Spratt “carried on

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<sup>35</sup> Transcript of Proceedings, Public Examination of Constable Alan Mark Taylor on 15 December 2010, p.446.

kicking” after the deployment and that he (Constable Taylor) “gave up” and “pulled the wires out”, as it “didn’t work”.

*I gained access to the side door so that I could get behind Mr Spratt, then deployed the Taser again in the probe mode, cycled the Taser in probe mode. This time I can assure you, because I saw both of the probes firmly attached into his back, that it did not achieve the incapacitation, although he did show signs of pain and that he was reacting to it, he just carried on kicking out.*

...

*... It didn't work. I gave up. I just pulled the wires out, shut the door. He carried on fighting. He carried on kicking us. Took us another minute or so ... to get him into the van.*<sup>36</sup>

(emphasis added)

[84] At approximately 6:30 a.m. Mr Spratt arrived at the PWH, being conveyed in the secure police vehicle.

- In attendance at the PWH were: Sergeant Wesley John Bell; Sergeant Nicholas Rowe; Senior Constable Christopher Bown; Constable Dean Leslie Turner; Constable Anthony Kapsanis; Probationary Constable Jennifer Katherine Grigg; and Senior Constable Darren Lee Skelton.
- Mr Spratt was processed through the custody system without incident and detained in custody in a padded cell. Mr Spratt was charged with attempted burglary, obstructing a public officer, escaping lawful custody and assaulting public officers.

[85] At approximately 10:20 a.m. Mr Spratt was being moved from the padded cell to another cell by Probationary Constable Grigg, Constable Kapsanis and Constable Turner.

- Mr Spratt requested use of the telephone, but as it was in use he was advised by Constable Turner that he could make a telephone call at a later time.
- Constable Turner gave evidence during a public examination on 16 December 2010 that Mr Spratt “lunged with his left hand out and ... made contact with the left side of my chest, forcing me backwards”.<sup>37</sup> Constable Turner and Constable Kapsanis restrained Mr Spratt, during which time Mr Spratt sustained a minor injury to his nose and/or mouth. Bleeding occurred as a result of the injury.
- Mr Spratt spat blood at the officers.

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<sup>36</sup> Transcript of Proceedings, Public Examination of Constable Alan Mark Taylor on 15 December 2010, pp.446-447.

<sup>37</sup> Transcript of Proceedings, Public Examination of Constable Dean Leslie Turner on 16 December 2010, pp.484-485.



- Senior Constable Skelton, Senior Constable Bown and Probationary Constable Grigg assisted Constables Turner and Kapsanis to restrain Mr Spratt, who resisted violently. During a public examination Senior Constable Skelton said that Mr Spratt was “extremely strong and extremely violent”.<sup>38</sup>
- Mr Spratt was moved back to the padded cell, where he continued to resist violently and to spit blood. During the struggle Senior Constable Skelton asked for a Taser weapon (handed to him by Probationary Constable Grigg) and deployed it in “Drive-Stun” Mode on Mr Spratt.
- Mr Spratt continued to struggle. Senior Constable Skelton deployed the Taser weapon again in “Drive-Stun” Mode on Mr Spratt.
- Eventually Mr Spratt calmed down sufficiently to enable officers to withdraw from the padded cell.

[86] At approximately 10:30 a.m. Sergeant Bell checked on Mr Spratt and entered the padded cell, in an attempt to speak with him about the court process and to return his clothes (which had been removed, except for boxer shorts, prior to officers leaving the padded cell, as required by PWH procedures).

- Senior Constable Skelton gave evidence that he “saw him [Mr Spratt] lash out and kick him [Sergeant Bell] in the leg”.<sup>39</sup> Sergeant Bell left the cell immediately thereafter.
- Approximately 10 minutes later Sergeant Bell returned to the padded cell to speak with Mr Spratt. Upon seeing that Mr Spratt was dressed Sergeant Bell opened the cell door, at which time Mr Spratt “sprayed blood and saliva from his mouth” into Sergeant Bell’s face, and “got blood in and around the eye area and ... spittle on ... [the] mouth”.<sup>40</sup>
- Sergeant Bell withdrew from the padded cell.
- Sergeant Bell sought medical treatment.
- Sergeant Rowe determined that Mr Spratt could not be safely extracted from the padded cell by PWH officers due to his behaviour nor be safely conveyed to the Magistrates Court of Western Australia. The Magistrates Court was accordingly advised and Mr Spratt was remanded in custody.
- Sergeant Rowe made the decision to make a request for the DCS ESG to attend the PWH to extract Mr Spratt from the padded cell and

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<sup>38</sup> Transcript of Proceedings, Public Examination of Senior Constable Darren Lee Skelton on 16 December 2010, pp.544-545.

<sup>39</sup> *Ibid*, p.551.

<sup>40</sup> Transcript of Proceedings, Public Examination of Sergeant Wesley John Bell on 16 December 2010, pp. 583-586.

to convey him to Casuarina Prison. The request was approved by the DCS Superintendent Custodial Services, through the Superintendent ESG.

[87] At 2:00 p.m. ESG officers attended the PWH to extract Mr Spratt from the padded cell and convey him to Casuarina Prison. In order to extract Mr Spratt the ESG used Taser weapons on multiple occasions.

- The cell extraction was undertaken by six ESG officers. An additional officer operated a Video Camera to record the cell extraction.
- The Video Camera was activated at approximately 2:15 p.m. in the Foyer of PWH, adjacent to the corridor leading to the padded cell in which Mr Spratt was being held (in custody).
- Approximately 13 minutes and 22 seconds later Mr Spratt was further restrained by chains<sup>41</sup> (having been restrained by handcuffs and hobbles to his ankles during the extraction), taken to the PWH sallyport and secured in a DCS escort vehicle.

[88] By 2:40 p.m. Mr Spratt had been transferred to the custody of ESG (PWH Occurrence Book).

[89] At approximately 3:30 p.m. Mr Spratt arrived at Casuarina Prison. Mr Spratt was admitted to the Infirmary within the Casuarina Prison Health Centre, accompanied by a Registered Nurse and a Mental Health Nurse.

- An assessment of Mr Spratt's medical condition was undertaken by the Registered Nurse by approximately 4:00 p.m. and observations about his mental state were made by the Mental Health Nurse. Mr Spratt complained of pain during the medical assessment by the Registered Nurse.<sup>42</sup>
- The Registered Nurse sent an E-Consult to the on-call doctor at approximately 4:22 p.m. The on-call doctor replied at 4:27 p.m.

#### **2.2.4 7 September 2008 (Sunday)**

[90] At approximately 6:20 a.m. it was noted by another Registered Nurse that Mr Spratt had complained of severe pain in one arm, but had not complained of pain throughout the night.<sup>43</sup>

[91] At approximately 9:00 a.m. it was noted by a third Registered Nurse that Mr Spratt's "arm remains swollen, bruised and ... unable to move shoulder ... [p]ain score of 10/10. E-Consult with ... [on-call doctor]".<sup>44</sup>

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<sup>41</sup> Mr Spratt was further restrained by chains or by a "connecting chain", that is , a chain designed to secure ankles to wrists, and then wrists to the waist.

<sup>42</sup> Casuarina Recovery Unit: Video Record.

<sup>43</sup> Department of Corrective Services, Health Services, Casualty Report and Progress Notes, Mr Kevin John Spratt [CCC 0893].

- The on-call doctor replied at 9:20 a.m., to which the Registered Nurse replied at 9:28 a.m.
- At some time prior to 11:00 a.m. the on-call doctor arrived at the Infirmary and examined Mr Spratt. The on-call doctor diagnosed that Mr Spratt had an obvious deformity of the right proximal humerus and bronchitis, but did not diagnose any rib fractures or pneumothorax (collapsed lung) injuries

[92] At approximately 1:34 p.m. Mr Spratt arrived at Royal Perth Hospital, having been escorted by the ESG.

- Mr Spratt was admitted to the Emergency Department and examined by the Resident Medical Officer, and after undergoing a Medical Imaging procedure and being treated for a dislocated shoulder and pneumothorax injuries (in association with rib fractures) was examined by the Cardiothoracic Department Registrar.

[93] Mr Spratt was discharged from Royal Perth Hospital on 12 September 2008 and returned to Casuarina Prison.

## **2.3 2 August 2010 (Monday): Prisoner X**

[94] At approximately 9:50 a.m. Prisoner X was escorted by the ESG from Hakea Prison to the Perth Magistrates Court, where he became “non-compliant” and “acted in an aggressive manner ...”.<sup>45</sup> Prisoner X was subsequently escorted back to Hakea Prison by the ESG.

- Prisoner X remained non-compliant (posing a threat to staff and other prisoners) and was placed in secure cell in Unit 1.<sup>46</sup>
- Prisoner X continued to be non-compliant (continued misuse of the cell Emergency Intercom).<sup>47</sup>
- Prisoner X was placed on a restraint bed (which is similar to a hospital stretcher, but is fitted with a series of straps, fastened by Velcro, to secure the prisoner).<sup>48</sup>
- Prisoner X broke free from the restraint bed and used it as an implement to cause severe damage inside the secure cell in Unit 1

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<sup>44</sup> Department of Corrective Services, Health Services, Casualty Report and Progress Notes, Mr Kevin John Spratt [CCC 0893].

<sup>45</sup> Incident Description Report I1175612, Total Offender Management Solution (TOMS), 2 August 2010 [CCC 0659].

<sup>46</sup> Record of Interview of Assistant Superintendent, Hakea Prison, by the Corruption and Crime Commission on 5 May 2011.

<sup>47</sup> Incident Report Minutes I1175688, Total Offender Management Solution (TOMS), 2 August 2010, [CCC 0172].

<sup>48</sup> Digital Video Disc (DVD) Footage [CCC 0174].

(including damage to parts of the wall, the glass viewing-hatch in the cell door, the monitoring camera and the lock on the cell door).<sup>49</sup>

[95] At approximately 4:00 p.m. the Senior Officer Operations requested ESG assistance to extract Prisoner X from the secure cell in Unit 1.

- Approval for the cell extraction was sought, and it was granted by the Deputy Superintendent of Hakea Prison and Superintendent ESG. The approval extended to consent being given for the use of Taser weapons, if required to execute the extraction.

[96] During the extraction of Prisoner X from the secure cell in Unit 1 Taser weapons were deployed by ESG officers in the “Probe” Mode on two occasions, once by Senior Officer A and once by Senior Officer B.

- Prisoner X was placed in mechanical restraints (that is, handcuffs, security chain around the ankles and joining chain between the two restraint devices).
- Prisoner X was removed from the secure cell in Unit 1 and placed in Cell D11 in Unit 1.
- Taser probes were removed and Prisoner X was assessed for injuries by a medical officer, who did not note any injuries.<sup>50</sup>

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<sup>49</sup> Incident Report Minutes I1175688, Total Offender Management Solution (TOMS), 2 August 2010, [CCC 0172].

<sup>50</sup> Incident Description Report I1175612, Total Offender Management Solution (TOMS), 2 August 2010 [CCC 0659].

## CHAPTER THREE

### WESTERN AUSTRALIA POLICE (WAPOL)

#### 3.1 Introduction

[97] As mentioned in Chapter One, this is a report on the investigation by the Commission of alleged public sector misconduct in relation to the use of Taser weapons by officers of WAPOL and DCS. This chapter examines alleged public sector misconduct by officers of WAPOL in relation to:

- the use of Taser weapons on, and treatment of, Mr Spratt on 30 August, 31 August and 6 September 2008; and
- associated matters.

#### 3.2 Use of Taser Weapons by WAPOL

[98] The Taser<sup>®</sup> X26<sup>™</sup> Electronic Control Device (ECD) used by WAPOL is manufactured by TASER<sup>®</sup> International Inc., and is referred to by WAPOL as an Artificial Incapacitation Device, alongside Oleoresin Capsicum (OC) Spray.<sup>51</sup> Taser weapons were provided for the general use of WAPOL officers in June 2007, use of which is governed by the Force Options as detailed in the WAPOL *Police Manual*, and can “incapacitate a subject at a safe distance and ... assist in reducing a threat and gaining control of a violent subject”.<sup>52</sup>

[99] Taser weapons are considered to be an additional and alternate non-lethal use of force option, preferred in serious situations to the use of lethal force (such as use of a firearm). WAPOL *Police Manual* FR-1.2.14 states that officers “who carry WAPOL issued firearms in the performance of their duties shall carry both lethal and all less than lethal force options i.e. handcuffs, extendable baton and, where available, OC Spray and/or Taser [weapon]”.

[100] The Taser<sup>®</sup> X26<sup>™</sup> ECD uses “propelled wires or direct contact to conduct energy to affect the sensory and motor functions of the nervous system”.<sup>53</sup> The Taser weapon can be deployed in “Probe” Mode or “Drive-Stun” Mode.

- **“Probe” Mode**

In “Probe” Mode the Taser weapon uses a replaceable cartridge ... to deploy two small metal probes (or darts) that remain attached to the weapon by insulated and conductive wires. When the probes make

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<sup>51</sup> TASER<sup>®</sup> X26<sup>™</sup> and TASER<sup>®</sup> are registered trademarks of TASER International Inc., registered in the United States of America. All rights reserved.

<sup>52</sup> Western Australia Police *Police Manual* 2010, FR-1.6.

<sup>53</sup> *Ibid.*

contact with the subject “electrical impulses are transmitted along the wires and into the subject’s body ... and affect the sensory and motor functions of the Peripheral Nervous System ... the subject will lose coordinated control of the affected muscles and Neuro Muscular Incapacitation is achieved” or “the subject is incapacitated”.<sup>54</sup>

- **“Drive-Stun” Mode**

In “Drive-Stun” Mode the Taser weapon affects “the Sensory Nervous System when direct contact is made between the electrodes located at the front of the device and the subject”. “Drive-Stun” mode causes pain to the subject, but does not achieve incapacitation in the same manner as “Probe” Mode.<sup>55</sup>

[101] Taser weapons are available for use by officers suitably qualified to carry and use such equipment, that is, when officers:

- have successfully completed the Taser training program;
- are authorised to do so; and
- are current in Critical Skills (Police Life Support).<sup>56</sup>

Training involves a combination of operational and theoretical aspects of Taser weapon use during initial, and requalification, training sessions.

### **3.2.1 Force Options Applicable to Taser Use**

[102] The *Police Manual* 2008, relevant at the time of the incidents involving Mr Spratt in August and September of that year, included the following Force Options applicable to the use of Taser weapons.

#### **FR–1.1: Use of Force — Generally**

*Members shall not use more force on persons than is reasonably necessary to perform their lawful duties.*

...

*In any circumstances where the use of force is reasonably necessary, members should use the minimal amount of force required to establish control. Once control has been achieved, lower force options are to be employed at the earliest opportunity.*

*Members must ensure that they do not use excessive force and, in particular, do not use:*

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<sup>54</sup> Western Australia Police *Police Manual* 2010, FR–1.6.

<sup>55</sup> Western Australia *Police Manual* 2010, FR–1.6, and Corruption and Crime Commission Summary Report, *The Use of Taser® Weapons by Western Australia Police*, tabled in the Parliament of Western Australia on 4 October 2010.

<sup>56</sup> Western Australia Police *Police Manual* 2008 and 2010, FR–1.6.

- *any force where none is needed;*
- *more force than is needed; and*
- *any force or a greater level of force after the necessity for it has ended.*<sup>57</sup>

#### **FR–1.6.1: Responsibilities**

- *When a Taser is deployed operationally an entry shall be made in the Station/Unit Occurrence Book ... recording the quantity of cartridges expended[,] the serial number of the cartridge/s and nature of the circumstances warranting the expenditure.*
- *When a Taser is deployed operationally, a “Use of Force” Report ... shall be submitted [to the Officer-in-Charge, manager or supervisor in accordance with FR–1.1.1].*

#### **FR–1.6.4: Use of Taser**

*The use of the Taser should be reasonable and appropriate in the circumstances and members will be accountable for any excessive use of force.*

***THE TASER SHALL ONLY BE USED TO PREVENT INJURY TO ANY PERSON AND SHALL NOT BE USED AS A COMPLIANCE TOOL.***

*Consideration must be given to the nature of the incident, the location of the person of interest and any overt susceptibilities of the person of interest.*

...

*Specific risks emerge from the use of Taser and operators are reminded ... [of the following].*

- *Not [to] deploy the weapon to the face and/or genital groin region of the target.*
- *Not to deploy in the near vicinity of flammable liquids or fumes.*
- *To deploy additional members within a safe distance with a view to supporting the target at the earliest opportunity.*

(original emphasis)

#### **FR–1.6.5: Warning Prior to Use**

*Unless it is impractical to do so in the circumstances, members are to issue a verbal warning, “**Taser, Taser**” prior to discharging the Taser at another person.*

(original emphasis)

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<sup>57</sup> Refer Point 1.4.4 of this report for definition of “reasonable force”.

### FR–1.6.6: Cautions

*When the use of [a] Taser results in an arrest, members must ensure that a formal caution is given immediately and repeated when the arrested person has had time to sufficiently recover from the effects of the Taser and is capable of understanding.*

### FR–1.6.7: Aftercare

*As soon as is practically possible after a Taser is deployed, medical assistance shall be provided by a Medical Practitioner in circumstances where the subject:*

- does not recover within a reasonable time;*
- asks for medical attention;*
- is reasonably suspected of suffering from a medical condition; or*
- has the probes embedded in their genitals, breasts, eyes, ears, tongue, lips or any other sensitive body part.*

[103] FR–1.6.8-1.6.12 provide directions regarding: reporting and procedures for retention and disposal of cartridges (including unauthorised discharge); safety; security, storage and transport; carriage on aircraft; and Taser Data Port downloads respectively.

[104] In conclusion, it is significant to note that the application of the 2008 WAPOL FR–1.6.4, which stated that “[t]he Taser shall only be used to prevent injury to any person and shall not be used as a compliance tool” (original emphasis), was largely subjective. This resulted in instances where the Taser weapon was used on subjects who were physically resisting arrest, as, in the opinion of WAPOL officers at the time, obtaining compliance was necessary to prevent injury. Such instances appear to have been considered acceptable by WAPOL, as the officers’ perception was that injury could occur if the subject continued to resist arrest and the intention was to prevent injury.<sup>58</sup>

#### 3.2.1.1 Interim Changes to WAPOL Taser Use Policy

[105] The Commission report tabled in the Parliament on 4 October 2010 entitled *The Use of Taser® Weapons by Western Australia Police* contained a number of recommendations, one of which was that the “WAPOL threshold for Taser weapon use be increased” and that, therefore, FR–1.6.4 include wording such as:

*The use of a Taser weapon is reserved to those situations where no other option would bring about a safe resolution. The use of a Taser*

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<sup>58</sup> Corruption and Crime Commission Summary Report, *The Use of Taser® Weapons by Western Australia Police*, October 2010, p.10.



*weapon is reserved for those situations where there is a real and imminent risk of serious harm either to a member of the public, a police officer or (in the case of self-harm) the person on whom the Taser weapon will be used.*

- [106] Although at the time WAPOL disagreed that a threshold of “serious risk” or “harm” be applied to the use of a Taser weapon, in December 2010, subsequent to the first *tranche* of public examinations conducted by the Commission in relation to the use of Taser weapons on Mr Spratt by officers of WAPOL and DCS, the Commissioner of Police issued an interim change, as outlined below, to the *Police Manual*.

*The Taser must only be used to reduce a threat and gain control of a subject where there is a real and imminent risk of **serious** injury to any person.*

(underlined emphasis added)

- [107] Subsequently, also in December 2010, the Commissioner of Police issued a statement to clarify the intention of the interim change. The following are extracts from that statement.

*... All officers should be aware of FR–1.2.14 [entitled] Carriage of Accoutrements and Firearms – Generally [which states:]*

*... [m]embers who carry firearms in the performance of their duties **must** also carry all tactical force options i.e. handcuffs, extendable baton and where available OC [S]pray and Taser.*

*The [interim change] ... requires that you have a reasonable belief that you or another person may sustain a serious injury. Most other States of Australia have this as their threshold and it causes minimum problems ... a serious injury threat is something that has the potential to require an officer or another person to seek actual medical attention.*

*... I understand that these judgements are never clear cut and they could come under intense scrutiny and there is no prescriptive way of making a judgement in circumstances where you face a violent or threatening offender ...*

- [108] As recognised by the Commissioner of Police, the interim change requires a threshold for the use of a Taser weapon by WAPOL officers that is consistent with the thresholds applied in most other States of Australia, which is in fact a higher threshold, as recommended by the Commission in its October 2010 report.
- [109] The Commission notes that WAPOL states in its section 86 representations that the higher threshold for Taser weapon use required by the interim change of December 2010 has been permanently “incorporated into ... FR-1.6.1 Use of Taser and reinforced in all Use of Force training since 1 January 2011”. Pursuant to Regulation 307, *Police*

*Force Regulations 1979*, which “... as a means of keeping the Force and cadets better informed on matters relating to the Force the Commissioner may from time to time cause an official gazette known as the *Police Gazette* to be published”, the change to the threshold for Taser weapon use was promulgated in the 9 December 2010 edition of the *Police Gazette Western Australia*, p.1060.

- [110] Earlier in this report at [50]-[55] the Commission has referred to the *Court Security and Custodial Services Act 1999* (WA) and in particular section 26. An issue arises whether, by section 26(2), a WAPOL officer, when an authorised person in relation to persons in custody, may use reasonable force to ensure compliance with their lawful orders. However, in the case of a WAPOL officer, the power to issue an order must be found elsewhere, as is indeed the case in various legislation, including the *Criminal Investigation Act 2006* (WA), section 14(2) and section 15 of the *Prisons Act 1981* (WA) or under various provisions of the *Court Security and Custodial Services Act 1999* (WA). Whether a WAPOL officer is empowered to issue a particular order to a person in custody, and the nature and reasonableness of the force used to ensure compliance with that order, will, of course, depend upon the circumstances of the particular case.
- [111] The “objective” reasonableness of an application of force by a WAPOL officer is also subject to the instructions of the Commissioner of Police that are contained in the *Police Manual*. The compliance with the *Police Manual* by a WAPOL officer is an independent obligation (of a WAPOL officer) and a WAPOL officer must comply with the *Police Manual* **and** the overriding standard of reasonableness.
- [112] It must be remembered, of course, that the power to use force to ensure compliance with a lawful order under section 26(2) of the *Court Security and Custodial Services Act 1999* (WA), whether by a DCS officer or WAPOL officer, does not, of itself, imply the power to use a Taser weapon. Depending upon the circumstances, compliance may reasonably be ensured by the use of force other than that of a Taser weapon. In that regard, as stated above, “reasonableness” remains an overriding standard in relation to any use of force – whether by the use of a Taser weapon or otherwise.
- [113] As a WAPOL officer’s power to use a Taser weapon is prescribed and limited by the *Police Manual*, which prohibits an officer from using a Taser weapon “as a compliance tool”, section 26(2) of the *Court Security and Custodial Services Act 1999* (WA) does not, therefore, empower or authorise a WAPOL officer to use a Taser weapon for the purposes of compliance.

### **3.3 Use of Taser Weapons on Mr Spratt by WAPOL Officers**

- [114] While the use of Taser weapons on Mr Spratt by WAPOL officers occurred essentially on Sunday 31 August 2008 at the PWH, it should be noted that Taser weapons were also deployed, or their use was threatened, on other occasions on Saturday 30 August 2008 and Saturday 6 September 2008. These occasions were:

- threatened use on 30 August 2008 by Senior Constable Mayger in an effort to apprehend Mr Spratt on the Graham Farmer Freeway at approximately 4:00 p.m.;
- deployment of a Taser weapon in “Probe” Mode on two occasions and several times in “Drive-Stun” Mode on 6 September 2008 by Constable Taylor in an effort to apprehend Mr Spratt in Bayswater; and
- deployment of a Taser weapon in “Drive-Stun” Mode on 6 September 2008 by Senior Constable Skelton in an effort to restrain Mr Spratt at the PWH.

### 3.3.1 30 August 2008

#### 3.3.1.1 Senior Constable Mayger

- [115] The incidents which occurred on 30 August 2008 in relation to threatened use of a Taser weapon by Senior Constable Mayger have been set out in Chapter Two at [74]-[75].
- [116] As required by FR-1.6.1, *Police Manual* 2008, Senior Constable Mayger submitted a Use of Force Report to her supervisor in relation to the incident on the Graham Farmer Freeway on 30 August 2008, as she had drawn (and aimed) a Taser weapon.
- It was noted in the Use of Force Report, dated 30 August 2008, that no injuries were sustained by either Mr Spratt or WAPOL officers involved in the incident.
  - The supervisor concluded that the “force options used by officers concerned were reasonable and appropriate in the circumstances ... and Senior Constable Mayger and Constable Drake displayed appropriate judgement during ... [the] incident”.

[117]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force,<sup>59</sup> including the threatened use of the Taser weapon, by Senior Constable Rebecca Mayger in the circumstances in relation to Mr Spratt on 30 August 2008 was reasonable and in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

<sup>59</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

### 3.3.2 31 August 2008

#### 3.3.2.1 Senior Constable Tomlin

[118] The incidents which occurred on 31 August 2008 in relation to deployment of a Taser weapon in “Drive-Stun” Mode by Senior Constable Tomlin have been set out in Chapter Two at [79]-[81].

[119] The Commission has established, through examination of the CCTV footage and through a review of Taser Data Port download records, that Senior Constable Tomlin deployed a Taser weapon on four separate occasions in “Drive-Stun” Mode during the period that Mr Spratt was in the PWH on 31 August 2008. Of those four deployments, the first deployment has been given the greatest scrutiny by the Commission because:

- at that point, while Mr Spratt was certainly uncooperative, he was not showing any overt signs of violence or aggression;
- the use of the Taser weapon appeared to be for the purpose of compliance, which was contrary to FR-1.6.4, *Police Manual* 2008, that is, **“the Taser shall only be used to prevent an injury to any person and shall not be used as a compliance tool”**; and
- resulted in an escalating series of events which may not have otherwise occurred.

(original emphasis)

#### **Initial Deployment**

[120] Senior Constable Tomlin gave evidence during a public examination that on arrival at the PWH “he [Mr Spratt] wasn’t violent”, which is consistent with CCTV evidence.<sup>60</sup>

- Mr Spratt was released from his handcuffs and asked to move to a room to be strip searched. Mr Spratt initially complied with the request but then locked his arms onto the armrests of a seat.
- Several attempts were made to release Mr Spratt’s grip on the armrests, including an attempt by Senior Constable Tomlin, but these attempts were unsuccessful.

[121] Senior Constable Tomlin was questioned by Counsel Assisting regarding the purpose of his direction to Mr Spratt, just prior to deployment of a Taser weapon in “Drive-Stun” Mode.

*So when you said, “Give us your hand or you’re going to get fucking tasered,” that was in effect saying, “Give us your hand or you’re going to receive pain”? ... when I said those words, to me it was trying to get across*

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<sup>60</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 13 December 2010, p.204.

*a demand to Mr Spratt, who I believed was under the influence of drugs or alcohol. It was more of a - the words aren't right and it was unprofessional, but at the time in the dynamic circumstances, to me it was more of a - there was no misunderstanding of the order. It was a better order than "stop resisting".*

The examination continued.

**THE COMMISSIONER:** *I don't think you have actually answered the question that counsel asked you.*

**COUNSEL ASSISTING:** *Yes. The question I asked was, "Because you knew that the only effect that you could produce from your Taser was to cause pain to Mr Spratt, by saying, "Give us your hand or you're going to get fucking tasered," you were in effect saying, "Give us your hand or you are going to receive pain"?---Okay. Yes.*

*And I think you said in response to the question when I asked it the first time that those words were unprofessional. Did you say that?---That's right.*

*In what respect do you say that they are unprofessional?---That what I said was unprofessional, the language.*

....

*Saying, "Give us your hand or you're going to get tasered," when you have got it in the drive stun mode is ...*

*... telling the person that they are to comply with your instruction or you will apply force to them for the purpose of pain?---That's correct.*

*That is precisely the circumstance in which you are trained not to use a Taser?---That's correct or to gain control, not for compliance.*

*But the instruction that you have given is entirely a compliance instruction, Give us your hand or you're going to get fucking tasered"?---From the instruction, yes.*

*That is entirely inconsistent with the training that you are given in relation to the use of Tasers?---That's correct. You can't use it for compliance.*

*You were aware of that?---Yes.*<sup>61</sup>

(emphasis added)

- [122] It is evident from the above that Senior Constable Tomlin accepted that he used a Taser weapon in "Drive-Stun" Mode for the purpose of compliance, contrary to FR-1.6.4, *Police Manual* 2008. Nonetheless Senior Constable Tomlin maintained in his evidence that, notwithstanding what appears from his instruction to Mr Spratt (that is, use of the Taser weapon for compliance), his use of a Taser weapon was not simply for compliance but

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<sup>61</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, pp.219-220.

to prevent injury, although he was frank in his acknowledgment that his own recollection of events did not accord with what was depicted on the CCTV footage.

*And also when you actually deployed the Taser, it was carrying out what you had said you were going to do. It was because he didn't release his arm that you employed the Taser?---I can only go from my recollection of the day. I can understand from the video, and I've been found guilty of misconduct with that Taser application, and I accept that, but - I'm not trying to justify myself. I'm just trying to explain what my mindset was at at that time, and I still clearly can remember him screaming out and then me, in that order, applying the Taser. I understand it looks different on video and I'm surprised it looks different on video. That's where I believe the situation has changed from - if that didn't happen, yeah, it's compliance, I totally agree with you, but I still, the sequence of events to me is still, he cried out in pain after he was injured, or going to be injured, and that's when I have used the Taser, but I totally understand where you are coming from.<sup>62</sup>*

(emphasis added)

- [123] Inspector Craig Lockhart was Acting Superintendent of the West Metropolitan District Office in September 2008, and in this capacity submitted the Complaint Advice Notice that resulted in the commencement of an investigation by the Office of Metropolitan Regional Coordinator, and subsequently IAU on 23 September 2008, into the multiple deployments of Taser weapons on Mr Spratt at the PWH on 31 August 2008. During a public examination in April 2011 Inspector Lockhart gave the following evidence in relation to those multiple deployments of Taser weapons.

*... what were your concerns ... I think it was the number of times that the Taser had been deployed, and when I looked at the environment in which it was deployed in I would have considered the watch-house to be a fairly sterile environment for the handling of prisoners with so many staff being available and I questioned the necessity for why it had been deployed even in the first place.*

...

*Then you have had an opportunity to view the [CCTV] footage. What did you make of the footage?---Like the rest of the people that have viewed the footage, I was quite alarmed.*

*Why was that?---Well, number one, I didn't see any need for it. I really didn't hear any verbal communication or direction being given to Mr Spratt by any officer other than, you know, a predetermination that he was going to be tasered by the constable for the lockup.*

**THE ACTING COMMISSIONER:** *When you say you didn't see any need for it, you're referring to the tasing?---Sorry, sir?*

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<sup>62</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, p.247.

*You started by answering the question, which was "What did you make of the video?" and you said, "I didn't see any need for it." Do you mean any need for the Taser?*

*---Sorry, yes. I'll qualify that. Any need for the use of the Taser, yeah.*

*Why was that?---You know, at any given time at the East Perth lockup, you know, there's a couple of sergeants working, there's probably up to 10 or a dozen uniformed officers working, and we're talking about one lone man here in the lockup. He was the only prisoner in the arrest room, or the charge room, prior to being put in the lockup. There was no oral communication skills that were deployed to try and get him to comply. It was - the only thing that I heard was, "Okay, come with me," like he knew what he was supposed to be doing, then turned on his heels and went and sat down after he preliminarily went with the officers for a search, then I think Constable Tomlin came out from behind the counter of the lockup. I think he uttered something like, "Not this shit again," or something like that. To me, that was predetermination.*<sup>63</sup>

*In your opinion, was that to use the Taser for compliance?---Yeah, for compliance. That's correct.*<sup>64</sup>

(emphasis added)

- [124] It is evident from the above that Inspector Lockhart had concerns about the need to deploy a Taser weapon on Mr Spratt as the PWH was a "sterile environment" with "many staff ... available". Inspector Lockhart also had concerns about the lack of "communication or direction" and a "predetermination" that a Taser weapon was going to be deployed on Mr Spratt for the purposes of compliance.
- [125] The views expressed by Inspector Lockhart reflect the views which the Commission has reached.
- [126] As mentioned previously, WAPOL commenced an internal investigation on 23 September 2008 of the incidents which occurred at the PWH on 31 August 2008 in relation to Mr Spratt. The investigation was undertaken by IAU and was substantially complete by December 2008. Below is an extract from the concluding section of the report of that investigation relating to the initial deployment of a Taser weapon on Mr Spratt by Senior Constable Tomlin.

*Investigators believe the initial deployment of the [T]aser on [Mr] Spratt could have been avoided had other force options been exhausted. The first deployment has provoked the resultant altercation forcing [Senior Constable] Strahan to take his action and placing police officers and [Mr] Spratt at risk of injury.*

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<sup>63</sup> Although Inspector Craig Lockhart gave evidence during the Public Examination in April 2011 that Senior Constable Troy Gregory Tomlin "walked out there with a Taser in his hand and he knew straightaway what he was going to do with it", this is not supported by CCTV footage. It is evident from CCTV footage that Senior Constable Tomlin did not draw a Taser weapon until he had reached Mr Kevin John Spratt.

<sup>64</sup> Transcript of Proceedings, Public Examination of Inspector Craig Lockhart on 18 April 2011, pp.470-473.

[127] The Commission agrees with and accepts the above conclusion, contained in the report of the WAPOL internal investigation, in relation to the first deployment of a Taser weapon by Senior Constable Tomlin. In the Commission's view the initial deployment was unreasonable, unjustified and constitutes excessive use of force. The use of a Taser weapon was for the purposes of persuading Mr Spratt to comply with the directions given by Senior Constable Tomlin. At the time of the initial deployment of the Taser weapon Mr Spratt was not aggressive and was not struggling. Neither he nor the WAPOL officers in attendance were at risk of injury.

[128]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force<sup>65</sup> by the initial deployment of a Taser weapon in "Drive-Stun" Mode by Senior Constable Troy Gregory Tomlin in the circumstances in relation to Mr Spratt on 31 August 2008 was use of undue and excessive force for the purpose of compliance contrary to Force Option requirements contained in the *Police Manual* 2008 and constitutes misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the initial deployment of a Taser weapon, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Tomlin for offences relating to Mr Kevin John Spratt on 31 August 2008.

The Commission notes that Senior Constable Tomlin was charged with using undue and unnecessary force against Mr Spratt at the PWH pursuant to Regulation 609(b), *Police Force Regulations* 1979, and that on 26 November 2009 he was found guilty after a disciplinary hearing (as he had pleaded not guilty) and fined \$1,200.

### **Subsequent Deployments**

[129] In relation to the three subsequent uses of a Taser weapon by Senior Constable Tomlin in "Drive-Stun" Mode on Mr Spratt it is evident from the CCTV footage that little assistance was given to Senior Constable Tomlin to restrain Mr Spratt following the initial deployment of the Taser weapon. The Commission accepts Senior Constable Tomlin's evidence that he expected other officers to render assistance following the initial deployment of the Taser weapon (which was not forthcoming) and that Mr

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<sup>65</sup> The expression "use of force" contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.



Spratt would have been able to be subdued (which he was not), had that assistance been provided.

- [130] At the 14 December 2010 public examination Senior Constable Tomlin, after viewing the CCTV footage, gave evidence as follows.

*Certainly there were four [deployments of a Taser weapon in "Drive-Stun" Mode] by you in total?---That's right.*

*They were all prior to the point at which Sergeant Strahan fired his Taser in probe mode?---I think so.*

*A couple of things about the part that we have just watched, there appears to be ... a decent period of time on which, after you have applied the Taser and Mr Spratt has gone to the ground, where he is simply lying on the ground - - -?---Yes, that's correct.*

*- - - and you have grabbed his arm. What were you expecting to happen at that point?---I was expecting other people to get in and help. I was trying to put the Taser away at that stage, because I thought there was no more threat of injury and Mr Spratt wasn't doing anything at that stage. I was trying to get the Taser away so I could gain better control but - I think I even yell out, "Grab a leg," or something.*

*Because it seems that there was a significant opportunity lost there - - -?---I agree with you.*

*- - - when Mr Spratt was prone on the ground, you had one arm and other officers are simply standing there?---Yeah, I agree with you.*

*Which, given that he had just been applied with a Taser, you would expect that he would start to react violently to the use of or the pain that he has had inflicted?---I actually expected him to act like that. With the other times that I've used the Taser in the drive stun mode it's basically, "Okay. I've had enough," and you gain control of people. So that's what I expected but I didn't expect him to get back up again, but I did expect a bit of a hand.*

*But there was certainly enough time there - - -?---Yeah.*

*- - - if the officers had moved in as he had gone prone, that you would have expected that he would be able to be subdued?---Yeah, I agree with you.<sup>66</sup>*

*(emphasis added)*

- [131] It is evident from the CCTV footage that immediately after the initial deployment of a Taser weapon by Senior Constable Tomlin on Mr Spratt in the "Drive-Stun" Mode (at approximately 12:09:33 p.m.) Mr Spratt fell to the floor and was spread-eagled (face down). Senior Constable Bakovic seized Mr Spratt's right arm and Senior Constable Tomlin seized Mr Spratt's left arm, while at the same time attempting to re-

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<sup>66</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, pp.251-252.

holster his Taser Weapon. Senior Constable Tomlin also placed his right foot into Mr Spratt's lower back, but did not appear to use much force or weight.

- [132] Mr Spratt then appeared to push-up from the floor with his upper body while both his arms were being held. For the first time Mr Spratt then started struggling, although not violently.
- [133] Four officers, Senior Constable Tomlin, Senior Constable Strahan, Senior Constable Bakovic and Probationary Constable Toogood, attempted to restrain Mr Spratt. Senior Constable Tomlin then deployed a Taser weapon on Mr Spratt for a second time in the "Drive-Stun" Mode (at approximately 12:09:49 p.m.). The Taser weapon was deployed onto Mr Spratt's back. Mr Spratt reacts, apparently in pain, by increasing his resistance.
- [134] The above mentioned officers attempt to restrain Mr Spratt, an attempt which is observed by Acting Sergeant Moore. Senior Constable Tomlin deployed the Taser weapon on two more occasions in the "Drive-Stun" Mode at approximately 12:09:51 p.m. and 12:09:53 p.m. Therefore, in the space of four seconds, from approximately 12:09:49 p.m. to 12:09:53 p.m., Senior Constable Tomlin deployed a Taser weapon on Mr Spratt on three occasions in "Drive-Stun" Mode. On each occasion Mr Spratt reacted to the pain caused by the deployment, and struggled more forcibly.
- [135] In the Commission's view on each occasion that Senior Constable Tomlin deployed a Taser weapon (to the upper part of the body) the reaction by Mr Spratt was foreseeable. The cause of Mr Spratt's increase in physical resistance was the deployment of the Taser weapon in "Drive-Stun" Mode. The repeated use of the Taser weapon by Senior Constable Tomlin, therefore, caused an escalation of Mr Spratt's physical resistance and led to the physical confrontation that occurred between Mr Spratt and WAPOL officers.
- [136] Further, in the Commission's view there was ample opportunity to restrain Mr Spratt after the initial deployment of the Taser weapon by Senior Constable Tomlin without the need for further deployments. The repeated deployments of the Taser weapon, rather than assisting WAPOL officers to restrain Mr Spratt and maintain control, seemed to provoke Mr Spratt, thereby causing an escalation of his physical resistance. The repeated deployments were, in the opinion of the Commission, the direct cause of the escalating confrontation between Mr Spratt and the WAPOL officers.
- [137] Finally, in the Commission's view the subsequent deployment of the Taser weapon in the "Drive-Stun" Mode on three further occasions by Senior Constable Tomlin as shown on the CCTV footage was unreasonable, unjustified and constitutes excessive use of force.

[138]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force<sup>67</sup> by the subsequent deployment of a Taser weapon on three occasions in “Drive-Stun” Mode by Senior Constable Troy Gregory Tomlin in the circumstances in relation to Mr Spratt on 31 August 2008 was unreasonable and unjustified, was on each occasion contrary to Force Option requirements contained in the *Police Manual* 2008, constitutes excessive use of force and misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the subsequent deployment of a Taser weapon on three occasions in “Drive-Stun” Mode, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Tomlin for offences relating to Mr Kevin John Spratt on 31 August 2008.

Further, it is the opinion of the Commission that the subsequent deployment of a Taser weapon by Senior Constable Tomlin on three occasions occurred in circumstances that were unlikely to have arisen but for the initial deployment of a Taser weapon at approximately 12:09:33 p.m., and that each separate deployment served as a provocation to Mr Spratt and caused him to react as he did, leading to the confrontation between Mr Spratt and the WAPOL officers.

### **3.3.2.2 Senior Constable Strahan**

[139] The incidents which occurred on 31 August 2008 in relation to deployment of a Taser weapon in “Probe” Mode and “Drive-Stun” Mode by Senior Constable Strahan have been set out in Chapter Two at [76]-[81].

[140] Taser Data Port download records reviewed by the Commission indicate that the Taser weapon used by Senior Constable Strahan on 31 August 2008, in relation to the incidents under consideration, was deployed on 10 occasions. Senior Constable Strahan gave evidence during a public examination conducted by the Commission on 13 December 2010 that:

*Each of the deployments of the Taser after the first deployment ... was in the drive stun mode?---Yes.*

*And I think you deployed it again once you got into the padded cell itself?---My recollection was three times.<sup>68</sup>*

<sup>67</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

<sup>68</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.156.

- [141] As with the subsequent deployments of a Taser weapon by Senior Constable Tomlin, the deployments of a Taser weapon by Senior Constable Strahan at the PWH on 31 August 2008 all occurred once the struggle with Mr Spratt had commenced. In relation to these deployments, Senior Constable Strahan stated:

*... based on my training, and the use I believed that they were - it was the correct time and place to use it, and it did stop officers being injured, it stopped Mr Spratt being injured, so ... I viewed that it was probably the right thing to do ...*<sup>69</sup>

(emphasis added)

- [142] Sergeant Thwaites stated during the 14 December 2010 public examination that Taser weapons “had no effect on him [Mr Spratt] at all, none whatsoever” and described Mr Spratt as having an “extraordinary amount of strength” and was just “super, super strong”.<sup>70</sup>

### **Initial Deployment**

- [143] In the Commission’s assessment the initial deployment by Senior Constable Strahan was unreasonable and unjustified. Senior Constable Strahan gave evidence as follows —

*It's that point that you've taken the opening and you've applied - and that's you applying the Taser in probe mode?---That's correct.*

*What was your intention in doing that?---He was not being restrained. He appeared to be coming towards me and I didn't want him grabbing hold of me because I'd seen what he was capable of doing. That snapping of the teeth was something that was in the forefront of my mind and the fact that the pin-pricks and with the pupils, I didn't know if he was an intravenous drug user. I wasn't happy about going into hand-to-hand with him. You just don't know what he's got, whether he's got hepatitis or any other blood-borne, you know - - -*

*Now, from your training, when you've applied the Taser in probe mode for the purposes of achieving neuromuscular incapacitation - - -?---Yes.*

*- - - what is the training as to what happens then, by officers who are around?---They're meant to - you hang back in reserve, ready to reapply the Taser if need be, and the other officers are meant to come through and subdue the prisoner or subject.*

*Did that happen on this occasion?---Sadly, no, but in fairness, a lot of those officers, or some of those officers had only been out of the academy a week, were virtually civilians.*<sup>71</sup>

(emphasis added)

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<sup>69</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.173.

<sup>70</sup> Transcript of Proceedings, Public Examination of Sergeant Gary Christopher Thwaites on 14 December 2010, p.321.

<sup>71</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.153.

- [144] It is evident from CCTV footage that Senior Constable Strahan initially deployed a Taser weapon at approximately 12:09:57 p.m. in “Probe” Mode, four seconds after Senior Constable Tomlin had deployed a Taser weapon on Mr Spratt in “Drive-Stun” Mode for the fourth time in quick succession (that is, during a period of approximately 20 seconds), as set out at [131]-[134] above.
- [145] Immediately before the initial deployment of a Taser weapon by Senior Constable Strahan Mr Spratt had been wriggling and writhing around on the floor and had rolled onto his back, as Senior Constable Tomlin, Senior Constable Bakovic and Probationary Constable Toogood were attempting to restrain him. The WAPOL officers were unable to do so and stepped back as Mr Spratt leapt up and then fell to his knees, and approached Senior Constable Strahan.
- [146] Senior Constable Strahan’s initial deployment of a Taser weapon was in “Probe” Mode, and was deployed for the full five-second cycle. The deployment resulted in one probe hitting Mr Spratt just “below the rib cage on the right side of the body” and the other “a bit lower down on the left ... on the abdomen”, but, as given in evidence by Senior Constable Strahan during a public examination, Mr Spratt “flicks out” one probe.<sup>72</sup>
- [147] The Commission rejects Senior Constable Strahan’s evidence that the Initial deployment of a Taser weapon on Mr Spratt was justified. In the Commission’s view, although Mr Spratt was increasingly struggling, the attempts to physically restrain him were half-hearted. There were adequate opportunities to restrain Mr Spratt without needing to deploy a Taser weapon. Although the Commission accepts that Mr Spratt was coming towards Senior Constable Strahan, Mr Spratt did so on his knees and in the Commission’s view he was attempting to evade further deployment of Taser weapons. He was not approaching Senior Constable Strahan in a way which threatened injury to Senior Constable Strahan.

[148]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force<sup>73</sup> by the initial deployment of a Taser weapon in “Probe” Mode by Senior Constable Aaron Grant Strahan in the circumstances in relation to Mr Spratt on 31 August 2008 was use of undue and excessive force for the purpose of compliance, without warning, contrary to Force Option requirements contained in the *Police Manual 2008* and constitutes misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the initial deployment of a Taser weapon,

<sup>72</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.155.

<sup>73</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual 2008* FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Strahan for offences relating to Mr Kevin John Spratt on 31 August 2008.

The Commission notes that Senior Constable Strahan was charged with using undue and unnecessary force against Mr Spratt at the PWH pursuant to Regulation 609(b), *Police Force Regulations 1979*, and that on 26 November 2009 he was found guilty after a disciplinary hearing (as he had pleaded not guilty) and fined \$750.

### Subsequent Deployments

#### Deployments Two — Five Captured by CCTV

- [149] Senior Constable Strahan deployed a Taser weapon again on a further nine occasions, although it is unclear how many of these deployments came into contact with Mr Spratt. In response to Counsel Assisting in relation to use of a Taser weapon Senior Constable Strahan stated:

*... the entries ... all reflect deployments of the Taser by you in the incident involving Mr Spratt?---Well, activations. I don't know how many of those times it actually - - -*

*Were effective?---Well, even occurred. You can have a muscle response that you pull the trigger when you're exerting yourself, and there was - - -*<sup>74</sup>

In effect, Senior Constable Strahan stated that a muscle response could result in “deployment” of a Taser weapon that would be recorded as an activation in a Taser Data Port download record where the “deployment” was neither deliberate nor effective.

- [150] Senior Constable Strahan maintained in his evidence that, in his view, all deployments (or applications) of a Taser weapon were justified and that he did not believe that he used excessive force. Commendably, however, Senior Constable Strahan, accepted that the WAPOL disciplinary proceedings found otherwise in relation to later deployments of a Taser weapon, and stated that he accepted those findings.

*... I - there's no way that I was going to go to stunning strikes; and Mr Spratt didn't get injured with this at all, other than the probe deployment. I thought it was of safety to the officers concerned, to Mr Spratt; and I thought it was effective.*

*So you continue to be of the view that there was no respect in which your application of force on that occasion was excessive?---No, I didn't believe that it was excessive.*

*You don't accept that, even in hindsight from the result of the management plan that was put in place and then the disciplinary proceedings?---I've*

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<sup>74</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.157.

accepted the findings of the disciplinary officer [in relation to three uses of a Taser weapon]. *In hindsight, things may have - you know, if we had a bit of a chance to try things differently I would have loved to have tried it. I don't like being here, I don't want to be here but I'm here now. I did what I thought on the day - no officers got injured. Mr Spratt wasn't injured. It looks terrible. I can't be any more honest than that.*<sup>75</sup>

(emphasis added)

[151] In relation to the later deployments of a Taser weapon by Senior Constable Strahan, the CCTV footage shows that he applied a Taser weapon on Mr Spratt on two occasions after a direction had been given by Sergeant Thwaites for Mr Spratt to be taken to the padded cell. Senior Constable Strahan was questioned about these deployments during the 13 December 2010 public examination and stated that:

- although a number of officers had hold of Mr Spratt, they did not have control of him, as he was “quite vigorous in his struggling”, but “they probably did have grip on him”;
- “Senior Constable Tomlin had called out that he [Mr Spratt] had hold of his Taser [weapon] which was in the holster ... all I kept thinking was we were having this trouble with him at this point, what was he going to be like if a Taser got loose and he got hold of it. So I've tasered him – I think it was his right forearm and then I've come over the top and tasered him in the forearm again when he didn't release”;
- he considered that use of the Taser weapon “was the best force option that we had available ... at the time” (as “mere presence ... didn't work, verbal or tactical communication ... wasn't working, empty-hand control ... was pointless, it wasn't going to work ... that left firearm, capsicum spray or baton ... [and firearms and batons are] not allowed ... in the lockup. Pepper spray ... [cannot be used] in certain circumstances and that's one of them. So really that only left ... the Taser [weapon] ... unless we went to really heavy-handed sort of stuff ... [such as] choke-holds”); and
- did not remember hearing someone calling out “stop, stop” as there “was really quite a din going on there, and it's a confined space”.<sup>76</sup>

[152] When questioned further about the findings of the WAPOL disciplinary proceedings, that is, what he understood to be the reason why it was concluded that some deployments of a Taser weapon were justified and some were not, Senior Constable Strahan stated:

- he understood that it was inappropriate as there were “enough numbers to – to use the weight of numbers”.

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<sup>75</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.162.

<sup>76</sup> *Ibid*, pp.160-161 and p.178.

The examination continued.

- “You mean there weren’t enough people committing to take control- -?---Yes, enough of the junior officers to get involved and it was only the senior staff that were getting involved and there wasn’t enough of those ... [i]t was just unfortunate that the junior staff were on in the numbers that they were”.<sup>77</sup>

- [153] It is evident from the CCTV footage that after Senior Constable Strahan initially deployed the Taser weapon (in “Probe” Mode at approximately 12:09:57 p.m.) Mr Spratt fell back, from a kneeling position, to the floor onto his left side. WAPOL officers approached Mr Spratt while he was lying on his left side and attempted to restrain him. However, Mr Spratt started to struggle again and at approximately 12:10:08 p.m. Senior Constable Strahan said to Mr Spratt “do you want to go again” and then deployed the Taser weapon for the second time at approximately 12:10:09 p.m., but in “Drive-Stun” Mode. Mr Spratt attempted to stand. The Taser weapon had been deployed to the upper part of Mr Spratt’s body.
- [154] At approximately 12:10:29 p.m., while Mr Spratt was half-sitting and half-leaning on a seat and while WAPOL officers were attempting to restrain him, Senior Constable Strahan again deployed a Taser weapon in “Drive-Stun” Mode. This was the third deployment of a Taser weapon on Mr Spratt by Senior Constable Strahan.
- [155] Between approximately 12:10:41 p.m.-12:10:48 p.m. Senior Constable Strahan deployed the Taser Weapon in “Drive-Stun” Mode on two further occasions. During this time it appears to the Commission, from the CCTV footage, that although Mr Spratt is continuing to struggle, a number of WAPOL officers have managed to restrain Mr Spratt.<sup>78</sup> Sergeant Thwaites is heard shouting “stop, stop”. Mr Spratt is then carried along the corridor and out of view of the CCTV camera. He can be heard screaming.
- [156] The effect of the deployment of the Taser weapon by Senior Constable Strahan was to cause Mr Spratt to struggle increasingly, as occurred subsequent to the deployments of a Taser weapon by Senior Constable Tomlin. In the Commission’s view Mr Spratt’s movements and reactions are an attempt to avoid further deployments of a Taser weapon on him rather than to cause violence to the WAPOL officers. Mr Spratt can be seen on the CCTV footage rolling around and calling out. Mr Spratt reacts to the pain caused by the deployment and appears not to respond to requests by WAPOL officers.
- [157] The Commission rejects Senior Constable Strahan’s evidence that the subsequent four deployments of a Taser weapon in “Drive-Stun” Mode on Mr Spratt were justified. In the Commission’s assessment those

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<sup>77</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.174.

<sup>78</sup> The Commission has established, through examination of relevant CCTV footage, that four WAPOL officers restrained Mr Kevin John Spratt.



deployments were unreasonable and unjustified. Although Senior Constable Strahan's comments regarding the lack of assistance from other officers on duty at the PWH (during the relevant period) are valid and the Commission accepts that, for various reasons, these officers did not provide adequate assistance to Senior Constable Strahan, and previously to Senior Constable Tomlin, when they should, and could, have done so, the Commission does not accept that the lack of assistance justified the repeated use of a Taser weapon on Mr Spratt, more particularly because the repeated use of a Taser weapon inflamed the situation.

- [158] Although the Commission recognises that had other officers on duty at the PWH rendered appropriate assistance to restrain Mr Spratt at critical times the circumstances leading to the deployment of a Taser weapon by Senior Constable Strahan may not have arisen, in the Commission's view those circumstances do not justify Senior Constable Strahan's deployment of a Taser weapon in either the initial "Probe" Mode or in the subsequent four "Drive-Stun" Modes. In particular, the Commission is critical that the deployment by Senior Constable Strahan of a Taser weapon on two occasions in the "Drive-Stun" Mode between 12:10:41 p.m. and 12:10:48 p.m. when it appears to the Commission that the WAPOL officers had restrained Mr Spratt, was unnecessary.

[159]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force<sup>79</sup> by the subsequent deployment of a Taser weapon in "Drive-Stun" Mode on four occasions by Senior Constable Aaron Grant Strahan in the circumstances in relation to Mr Spratt on 31 August 2008 were unreasonable and unjustified, was on each occasion contrary to Force Option requirements contained in the *Police Manual* 2008, constitutes excessive use of force and misconduct under sections 4(d)(iii) and (vi) of the CCC Act.

Pursuant to section 43(1)(a) of the CCC Act the Commission recommends, in relation to the subsequent deployment of a Taser weapon in "Drive-Stun" Mode on four occasions, that the Director of Public Prosecutions for Western Australia give consideration to the prosecution of Senior Constable Strahan for offences relating to Mr Kevin John Spratt on 31 August 2008.

Further, it is the opinion of the Commission that the subsequent deployments of a Taser weapon by Senior Constable Strahan in "Drive-Stun" Mode on four separate occasions served as a provocation to Mr Spratt and caused him to react as he did, leading to the confrontation between Mr Spratt and the WAPOL officers.

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<sup>79</sup> The expression "use of force" contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

- [160] Although the conduct of Senior Constable Tomlin and Senior Constable Strahan does not fall within the meaning of “serious misconduct” as defined by section 3 of the CCC Act, that is, meaning misconduct of a kind described in section 4(a), (b) or (c) of the CCC Act, in the opinion of the Commission the misconduct was serious and represents a serious departure from, and falls significantly short of, the standard of conduct the public is entitled to expect from WAPOL officers. Any reasonable person viewing the CCTV footage of the use of Taser weapons on Mr Spratt by WAPOL officers at the PWH on 31 August 2008 is left with a feeling of considerable disquiet, if not outrage (refer Footnote <sup>x</sup>, Executive Summary, of this report).

### **Multiple Deployments Not Captured by CCTV**

- [161] While there is no CCTV footage of the deployment of a Taser Weapon on Mr Spratt in the padded cell at the PWH on 31 August 2008 by Senior Constable Strahan (as, for privacy reasons, the cell is monitored in real time via CCTV cameras),<sup>80</sup> the Commission investigation has established, through a review of Taser Data Port download records, that Senior Constable Strahan’s Taser weapon was deployed a further five times in “Drive-Stun” Mode while he was in the padded cell with Mr Spratt and other officers.<sup>81</sup> However, evidence given by Senior Constable Strahan during a public examination (refer [140]) states that his “recollection was” that it was only “three times”.
- [162] In relation to Mr Spratt’s behaviour after being taken to the padded cell Sergeant Thwaites gave the following evidence.

*... We attempted to remove his clothing. He began to thrash around and he was quite violent. There was a point where I can clearly recall one officer had his hand on the back of his head or the neck region of Mr Spratt, and his other hand was on the ground supporting him. Mr Spratt was sort gnashing towards his hand and fingers and so forth in an attempt to bite him. Mr Spratt attempted to grab a Taser again, and now I'm not sure if it was Troy's or Grant's Taser because it was all happening so quickly but he certainly made an attempt to do so. He was tasered as a result. He continued to struggle and thrash around violently ...<sup>82</sup>.*

- [163] Nonetheless the Commission is troubled by the fact that Senior Constable Strahan deployed a Taser weapon on at least three further occasions in “Drive-Stun” Mode on Mr Spratt in the padded cell, particularly in light of the Commission’s findings in relation to the earlier five deployments of a Taser weapon by Senior Constable Strahan. However, due to the absence of any CCTV footage of events in the padded cell (of which the

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<sup>80</sup> Prisoners detained in the padded cell at the Perth Watch House often have their clothing removed for safety reasons.

<sup>81</sup> The Taser X-26 has a Data Port which enables complete and accurate documentation of the date, time and duration of each deployment of a Taser weapon to be downloaded. FR-1.6.12 outlines the responsibilities of officers in relation to Taser Data Port downloads.

<sup>82</sup> Transcript of Proceedings, Public Examination of Sergeant Gary Christopher Thwaites on 14 December 2010, p.302.

Commission is not critical) and any independent corroborating evidence in circumstances where Mr Spratt is unable to recall in any detail what occurred, the Commission is unable to form any proper view as to whether the deployment of a Taser weapon on at least three occasions on Mr Spratt in the padded cell was reasonable or unjustified. The Commission, therefore, expresses no views and makes no findings regarding the deployment of Taser weapons on Mr Spratt by Senior Constable Strahan in the padded cell on 31 August 2008.

[164]

#### **Commission Opinion as to Misconduct**

In relation to the deployment of a Taser weapon by Senior Constable Aaron Grant Strahan on at least three occasions in “Drive-Stun” Mode on Mr Spratt on 31 August 2008 in the padded cell at the PWH the Commission, due to absence of CCTV footage (of which the Commission is not critical) and any corroborating evidence, expresses no opinion as to whether the use was reasonable or unjustified.

### **3.3.3 6 September 2008**

#### **3.3.3.1 Constable Taylor**

[165] The incidents which occurred on 6 September 2008 in relation to the deployment of a Taser weapon in “Probe” Mode on two occasions and several times in “Drive-Stun” Mode by Constable Taylor have been set out in Chapter Two at [82]-[83] as has Constable Taylor’s evidence given during a public examination on 15 December 2010.

[166] As required by FR–1.6.1, *Police Manual* 2008, Constable Taylor submitted a Use of Force Report to his supervisor in relation to the incidents in Bayswater on 6 September 2008, as he had deployed a Taser weapon.

- The supervisor concluded that Constable Taylor “[h]as complied with agency policy regarding the use of force ...”.

[167]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of force<sup>83</sup> by the use of a Taser weapon by Constable Alan Mark Taylor in the circumstances in relation to Mr Spratt on 6 September 2008 was reasonable and in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

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<sup>83</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR–1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

### 3.3.3.2 Senior Constable Skelton

- [168] The incidents which occurred on 6 September 2008 in relation to deployment of a Taser weapon in “Drive-Stun” Mode by Senior Constable Skelton have been set out in Chapter Two at [85]-[86].
- [169] Taser Data Port download records reviewed by the Commission indicate that the Taser weapon used by Senior Constable Skelton on 6 September 2008 in relation to the incidents under consideration was deployed on eight occasions, in “Drive-Stun” Mode”, in three minutes.
- [170] Senior Constable Skelton gave evidence during a public examination conducted by the Commission on 16 December 2010 that he only applied the Taser weapon in “Drive-Stun” Mode on Mr Spratt on two occasions, and that the applications of a Taser weapon on Mr Spratt “charged him up like the energizer bunny”.<sup>84</sup>
- Taser Data Port download records do not distinguish between activations that are applied to a subject and those that are not applied to a subject.
  - The evidence of other officers given during Commission examinations is not decisive and is useful only in confirming that a Taser weapon was used on Mr Spratt in the padded cell at the PWH on 6 September 2008 by an officer at some time, but found to be largely ineffective.
  - There is no Closed-Circuit Television (CCTV) footage of what occurred in the padded cell on 6 September 2008 (that is, there is no recorded footage as, for privacy reasons, the cell is monitored in real time via CCTV cameras).<sup>85</sup>
  - Although Senior Constable Skelton gave evidence that he submitted a Use of Force Report in relation to the incident to his supervisor, Sergeant Bell,<sup>86</sup> WAPOL have been unable to locate it. However, Sergeant Bell gave evidence that he could not recall receiving a Use of Force Report from Senior Constable Skelton.<sup>87</sup>
- [171] Although there is a lack of independent corroborating evidence in relation to the number of times Senior Constable Skelton deployed a Taser weapon on Mr Spratt in “Drive-Stun” Mode at the PWH on 6 September 2008, exacerbated by there being no Use of Force Report in relation to those deployments, the Commission accepts that it is probable that Senior Constable Skelton only deployed a Taser weapon on Mr Spratt in

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<sup>84</sup> Transcript of Proceedings, Public Examination of Senior Constable Darren Lee Skelton on 16 December 2010, pp.547-548.

<sup>85</sup> Prisoners detained in the padded cell at the Perth Watch House often have their clothing removed for safety reasons.

<sup>86</sup> Transcript of Proceedings, Public Examination of Senior Constable Darren Lee Skelton on 16 December 2010, pp.555-556.

<sup>87</sup> Transcript of Proceedings, Public Examination of Sergeant Wesley John Bell on 16 December 2010, p.592.

“Drive-Stun” Mode on two occasions (and not on eight occasions, as indicated by the Taser Data Port download records), and that these deployments were largely ineffective. In making this finding the Commission is mindful of the evidence that Taser Data Port download records do not distinguish between activations that are applied to a subject and those that are not applied to a subject, but could be the result of cycling without making any direct contact with a subject.

- [172] In relation to whether or not Senior Constable Skelton submitted a Use of Force Report to his supervisor, Sergeant Bell, the Commission accepts the evidence of Sergeant Bell and rejects the evidence of Senior Constable Skelton. In the Commission’s view, had Senior Constable Skelton submitted a Use of Force Report, it would have been located by WAPOL and Sergeant Bell would have recalled receiving it. The Commission finds that it is probable that a Use of Force Report was not prepared or submitted by Senior Constable Skelton.

[173]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission and in the absence of independent evidence to suggest otherwise, the use of force<sup>88</sup> by the deployment of a Taser weapon in “Drive-Stun” Mode by Senior Constable Darren Lee Skelton on two occasions in the circumstances in relation to Mr Spratt on 6 September 2008 was reasonable, given the reported behaviour of Mr Spratt, his previous history and the potential for Mr Spratt and WAPOL officers to incur injury, and was in accordance with Force Option requirements contained in the *Police Manual* 2008 and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

- [174] The above opinion is not altered by the probability that Senior Constable Skelton did not prepare or submit a Use of Force Report to his supervisor as required by FR–1.6.1. However, as Senior Constable Skelton is no longer a public officer, having ceased employment with WAPOL on 30 September 2011,<sup>89</sup> the Commission makes no recommendation for action by WAPOL in relation to Senior Constable Skelton’s failure to submit a Use of Force Report to his supervisor as required by FR–1.6.1. If Senior Constable Skelton had not ceased employment with WAPOL, the Commission would have recommended, pursuant to section 43(1)(a) of the CCC Act, that WAPOL give consideration to taking disciplinary action against him.

<sup>88</sup> The expression “use of force” contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR–1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.

<sup>89</sup> Western Australia Police section 86 representations, p.8.

### 3.3.4 Recommendation

[175] By FR–1.6.1 a Use of Force Report is required to be submitted to the Officer-in-Charge, manager or supervisor when a Taser weapon is deployed operationally. Accordingly, the Commission makes the following recommendation, as in the opinion of the Commission the failure by Senior Constable Skelton to submit a Use of Force Report may be indicative of a systemic deficiency, recognising these events occurred over three years ago and WAPOL has amended its procedures and practices since the tabling of the Commission report on the use of Taser weapons by WAPOL in the Parliament on 4 October 2010 (as is noted in [177]–[178] below).

[176]

#### **Recommendation 1**

That WAPOL review the process for submission of Use of Force Reports and establish procedures to ensure that: Use of Force Reports are submitted in the prescribed manner and in accordance with FR–1.6.1, *Police Manual*, requirements; and a record of submission is maintained by the Officer-in-Charge, manager or supervisor.

It is further recommended that the Officer-in-Charge, manager or supervisor undertakes a cross-check of the details contained in each Use of Force Report and the associated Taser Data Port download record as part of the assessment of the Use of Force Report and the circumstances during which the Taser weapon was used.

[177] The Commission notes that reporting requirements as detailed in FR–1.1.1, *Police Manual*, have been amended since 2008 to include a requirement that the Use of Force Report be submitted via email. The amendment states that the “Use of Force Report is to be emailed, via your OIC/Manager/Supervisor, to “the Risk Assessment Unit ..., District Office ... and District Training Office ... station mail boxes as soon as practicable, and prior to the completion of duty on the day of the incident”.<sup>90</sup>

- The amendment, in effect, establishes a uniform requirement in relation to the submission of a Use of Force Report. Sergeant Bell on 16 December 2010, during a public examination, in relation to the submission of a Use of Force Report stated that:

*... There's a use of force document that the officer submits; a hard copy it used to be. I think it's now electronically. I think part of that process is as an OIC you would review that information that officer has provided.*<sup>91</sup>

<sup>90</sup> Western Australia Police *Police Manual* 2008 and 2010, FR–1.1.1.

<sup>91</sup> Transcript of Proceedings, Public Examination of Sergeant Wesley John Bell on 16 December 2010, p.580.

- Prior to the amendment there were various requirements in relation to the submission of Use of Force Reports.
- The amendment better enables the Officer-in-Charge, manager or supervisor to maintain a record of submission as outlined in Recommendation 1 above.

[178] The Commission also notes that WAPOL states in its section 86 representations that “current practices meet standards proposed” by Recommendation 1. Since January 2011 FR–1.1.1 has been amended to include the requirement that where the Use of Force Report relates to the use of Taser weapon it is to be reviewed by the Officer-in-Charge, manager or supervisor to ensure that “an evidentiary Taser Data Port Download is conducted within 72 hours”. Further it is stated by WAPOL that:

- a multi-faceted review of Use of Force Report occurs through its transmission to the relevant District Office, the Operational Safety Tactics and Training Unit and the Risk Assessment Unit;
- an electronic record of the submission of each Use of Force Report is maintained, and each Use of Force Report is electronically stored in the WAPOL Professional Standards Information Management System (IAPro) by the Risk Assessment Unit for review or investigation at any time (ultimately, upon implementation of “Blue Team”, it will be possible for Use of Force Reports to be entered directly into IAPro); and
- the Corporate Use of Force Committee, an oversight body, was established in January 2011.

### **3.4 Preparation of Use of Force Report by Senior Constable Strahan**

[179] As required by FR–1.6.1, *Police Manual* 2008, Senior Constable Strahan submitted a Use of Force Report to his supervisor in relation to the incidents that occurred at the PWH on 31 August 2008, as he had deployed a Taser weapon, which included details about the use of force by Senior Constable Tomlin and other WAPOL officers.

[180] The Commission investigation found that some entries in the Use of Force report prepared by Senior Constable Strahan were inconsistent with the CCTV footage in relation to the number of officers required to break Mr Spratt’s grip on the armrests of a seat and the actions of Mr Spratt immediately after a Taser weapon was deployed on him in “Drive-Stun” Mode by Senior Constable Tomlin, that is, Mr Spratt rose to his knees but did not stand as stipulated in the Use of Force Report. Senior Constable Strahan was questioned about these inconsistencies during a public examination on 13 December 2010, after viewing the CCTV footage. Senior Constable Strahan stated:

*I didn't have the benefit of viewing videotape, and ... it was pretty stressful for - for Mr Spratt but it was also fairly stressful for - for myself, and I won't*

*... speak for the others, I'm sure that they were the same. My - my recollection was, as it happened, and it's, like with the event of the Tasers, it's sort of jumbled up. I remember applying each of them but not in what order they were, and also when I got into the padded cell, it was like my vision had gone from here around to there, it was just ...<sup>92</sup>*

(emphasis added)

[181] The Commission accepts Senior Constable Strahan's evidence, and in the Commission's assessment he prepared the Use of Force Report in good faith, based on his recollection of events at the time, that is, 2:12 p.m. (time of report), as:

- it was prepared without viewing the CCTV footage;
- the circumstances were stressful to him; and
- his memory of events was unclear due to the stressful circumstances in which the incidents occurred.

Senior Constable Strahan acknowledged that, after viewing the CCTV footage, that the Use of Force Report prepared by him was not entirely accurate.

[182]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of Senior Constable Aaron Grant Strahan in relation to the preparation of a Use of Force Report, and the inconsistencies contained therein, about the use of force<sup>93</sup> by the deployment of Taser weapons on Mr Spratt on 31 August 2008 does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

### **3.5 Inconsistencies in Evidence by Senior Constable Tomlin and Senior Constable Strahan**

[183] Both Senior Constable Tomlin and Senior Constable Strahan gave evidence during public examinations in December 2010 that Mr Spratt had referred to himself as "God" or "the devil" whilst he was at the PWH. These comments are not evident from the CCTV footage, were not mentioned in the Use of Force Report prepared by Senior Constable Strahan on 31 August 2008 nor in an amended Use of Force Report dated

<sup>92</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.165.

<sup>93</sup> The expression "use of force" contained in this report means the use of force as explained in the Western Australia *Police Manual* 2008 FR-1.1 Use of Force – Generally, referred to at [102], Chapter Three, of this report.



20 May 2009, and were not referred to during interviews conducted by IAU officers soon after the incidents occurred on 31 August 2008. However, both Senior Constable Tomlin and Senior Constable Strahan did make mention of it during WAPOL disciplinary proceedings.

- [184] When questioned about this apparent inconsistency Senior Constable Tomlin responded:

*... but during the internal [IAU] interview I'd done a 12-hour day shift at the lockup and this interview was conducted late at night. I'd just been told I was stood down. I was trying to get everything out. Because I haven't said - brought this out in my interview doesn't mean I admit - omitted it or thought of it at a later stage to bring it up. I just forgot.<sup>94</sup>*

(emphasis added)

- [185] When Senior Constable Strahan was questioned why he had not mentioned the use of the words “God” and “devil” by Mr Spratt during the interview by IAU officers he responded that the “internal investigation process is a fairly intimidating process ... I didn’t know whether we were going to keep ... [our] jobs ... I was in a fair bit of shock at the time ... I was fairly upset, because this is something I’ve been doing in excess of 20 years ...”.<sup>95</sup>
- [186] In further evidence during the December 2010 public examination, Senior Constable Strahan stated the he regretted not having mentioned that he heard Mr Spratt say the words “I am God, I am the devil” at any time up until the disciplinary proceeding, but maintained that it was his recollection of what had occurred, although not necessarily at the time that he was removing Mr Spratt’s handcuffs (as had been given in evidence by him during the disciplinary proceeding). Senior Constable Strahan also stated that he could not recall having any conversation with Senior Constable Tomlin about Mr Spratt referring to himself as “God” or “the devil” whilst at the PWH on 31 August 2008.<sup>96</sup>
- [187] In the Commission’s assessment neither Senior Constable Tomlin nor Senior Constable Strahan deliberately withheld information about Mr Spratt’s references to “God” and the “devil” during interviews by IAU officers. Further, it is the Commission’s assessment that Senior Constable Strahan did not deliberately omit that information from the Use of Force Reports prepared by him and that he did not conspire with Senior Constable Tomlin prior to disciplinary proceedings in relation to words used by Mr Spratt while referring to himself at the PWH.

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<sup>94</sup> Transcript of Proceedings, Public Examination of Senior Constable Troy Gregory Tomlin on 14 December 2010, p.230.

<sup>95</sup> Transcript of Proceedings, Public Examination of Senior Constable Aaron Grant Strahan on 13 December 2010, p.140.

<sup>96</sup> *Ibid*, pp.138-143.

[188]

### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of Senior Constable Aaron Grant Strahan and of Senior Constable Troy Gregory Tomlin in relation to reporting Mr Spratt's references to "God" and the "devil" on 31 August 2008 whilst at the PWH does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **3.6 Supervision at the Perth Watch House (PWH) on 31 August 2008 (Sergeant Thwaites and Acting Sergeant Moore)**

[189] Sergeant Thwaites was the Sergeant-in-Charge at the PWH on 31 August 2008 and gave evidence during a public examination conducted by the Commission on 14 December 2010. During the examination Sergeant Thwaites explained that he undertook various actions, in his capacity as supervisor, during the time that the incidents involving Mr Spratt occurred. These actions are summarised below.

- Sergeant Thwaites upon being advised that a potentially violent person was being brought to PWH instructed officers to be ready and to be in the sallyport to meet the secure police vehicle in which Mr Spratt was being conveyed to the PWH from Bayswater in order to discourage undesirable behaviour through a strong police presence ("mere presence").
- Mr Spratt did not show any signs of aggression upon arrival at the PWH. After Sergeant Thwaites was satisfied that officers had Mr Spratt under control he left the Reception Area and returned to his office.
- Sergeant Thwaites went back to the Reception Area a short time later when he heard the sound of a Taser weapon being activated and the call by an officer to "remove the barb" or words to that effect.<sup>97</sup> Sergeant Thwaites assessed the situation and immediately instructed officers to move Mr Spratt to the padded cell, and remained to supervise officers until Mr Spratt was under control, had had his clothing removed and was secured in the padded cell.

[190] As stated earlier in this chapter a number of the officers on duty at the PWH on 31 August 2008 during the time that the incidents involving Mr Spratt occurred were junior officers and relatively new to the role of police officer. With the exception of Sergeant Thwaites, Acting Sergeant Moore, Senior Constable Tomlin, Senior Constable Strahan and Senior Constable

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<sup>97</sup> Transcript of Proceedings, Public Examination of Sergeant Gary Christopher Thwaites on 14 December 2010, p.298.

Bakovic the officers on duty were junior officers (with ranks of 1/C Constable, Constable and Probationary Constable), who were reluctant to provide assistance to restrain Mr Spratt. Had this assistance been provided at critical times the circumstances leading to multiple deployments of Taser weapons on Mr Spratt may not have arisen.

[191] Notwithstanding the actions undertaken by Sergeant Thwaites as outlined above, in the opinion of the Commission, Sergeant Thwaites, as the Sergeant-in-Charge, should have been more proactive and given specific instructions to the junior officers to provide the required support to restrain Mr Spratt.

[192] Acting Sergeant Moore was on duty at the PWH on 31 August 2008 and gave evidence during a private examination on 25 August 2011. The following is an extract from that examination in relation to Acting Sergeant Moore's role at the PWH on 31 August 2008, which was a non-operational role due to "a medical condition" and "was actually spare" (surplus to requirements).

*What was your role?---I was an acting sergeant and I was actually - well, I was actually spare. I normally used to do the reserve - used to work on the reserve desk but being my last day, we were actually training somebody else up to do that job. So I just moved around and helped as I could.*

*So, sorry, the reserve desk? Could you just explain what's involved in duties relating to the reserve desk?*

*---That's all the paperwork to do with the prisoners ...*

*So you said that was your last day on 31 August?---Yes, that's correct; yes.*

*So that was in 2008, so you had previously completed approximately two years prior to that at the watch-house?---That's right, yes.*

*And you were on the reserve desk?---In January 2008 I had a medical condition and so from January 2008 till then, yeah, I was non-operational, so I worked the reserve desk.*

*When you say non-operational, can you just explain what that means?---It means I cannot take part in full operational duties of a police officer.<sup>98</sup>*

[193] The Commission notes that in the section 86 representations submitted by Ms Lyn Zinenko, Principal Lawyer for WA Police Union of Workers, on behalf of Acting Sergeant Moore it is stated that "[a]t the time of the incident ... [he] was under strict instructions ... to avoid any sort of physical confrontation [due to a medical condition] ... and was non-operational at the time ... [h]e did as much as he could within the confines of his medical condition". Nonetheless, in the opinion of the Commission, he was on duty at the time that the incident occurred on 31 August 2008 as an Acting Sergeant and, therefore, a supervisor, just as Sergeant Thwaites was a

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<sup>98</sup> Transcript of Proceedings, Private Examination of Acting Sergeant Ronald Allen Moore on 25 August 2011, p.8.

Sergeant (and supervisor) on duty. Acting Sergeant Moore, therefore, retained supervisory responsibility and was under a duty to supervise the WAPOL officers to ensure that they acted properly and reasonably. It is also the opinion of the Commission that Acting Sergeant Moore could have provided support and guidance to the WAPOL officers “within the confines of his medical condition”, for example, by issuing instructions.

[194] Acting Sergeant Moore was questioned as to whether he had taken any action to stop the use of Taser weapons on Mr Spratt. He stated that he did not intervene as he considered that the use of Taser weapons was justified, but acknowledged that this was contradictory to statements made during his interview with IAU investigators on 24 September 2008. When questioned about the contradiction Acting Sergeant Moore explained, in essence, that since 2008 he had had more time to consider the circumstances surrounding the use of Taser weapons on Mr Spratt at the PWH on 31 August 2008 and now believed that the use of Taser weapons had been justified.<sup>99</sup>

[195] In response to questions from Counsel Assisting about the inaction of other officers Acting Sergeant Moore stated that there “probably wasn’t” any reason why they could not have assisted Senior Constable Tomlin to restrain Mr Spratt other than “inexperience”. His evidence was as follows.

*Okay. Was there any reason why they couldn't have assisted Tomlin in physically restraining or grabbing Spratt, given that you were obviously unable to, given your non-operational status?---No, there probably wasn't. Maybe inexperience. I don't know. I think most of - quite a few of them were probationers, I think. As I said, I had - that was the first day I'd actually ever worked with most of them so I didn't know what they were capable of or what they'd been trained to do as such. What their experience was, I should say.<sup>100</sup>*

[196] In the opinion of the Commission Acting Sergeant Moore should have been more proactive and given specific instructions to the junior officers to provide the required support during those times that Sergeant Thwaites, the Sergeant-in-Charge, was absent from the Reception Area. This opinion is supported by the evidence given by Inspector Lockhart during a public examination on 18 April 2011.

*... I saw a supervisor in the lockup stand there and then put his hands in pockets and walk away without giving any clear instructions to any of the officers, you know, to take charge of the prisoner and at least put him back into handcuffs and then, if they had to, put him into a padded cell if he was so violent, you know? Put him into a padded cell and just give him time to settle. I think they eventually did that but, boy, they took some time to getting around to that.<sup>101</sup>*

(emphasis added)

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<sup>99</sup> Transcript of Proceedings, Private Examination of Acting Sergeant Ronald Allen Moore on 25 August 2011, pp30-46.

<sup>100</sup> *Ibid*, p.47.

<sup>101</sup> Transcript of Proceedings, Public Examination of Inspector Craig Lockhart on 18 April 2011, p.473.

[197] Further, the Commission does not accept Acting Sergeant Moore's explanation that he did not take any action to stop the use of Taser weapons on Mr Spratt because he thought that it was justified, as this was not his view at the time that the incidents occurred, as expressed to IAU investigators. In the Commission's view the CCTV footage, which Acting Sergeant Moore had re-viewed "about a week" prior to attending the 25 August 2011 private examination,<sup>102</sup> and as has been earlier found, shows that the deployment of Taser weapons on Mr Spratt was unjustified as is consistent with Acting Sergeant Moore's initial contemporaneous view, which is the more reliable view.

[198]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the standard of supervision provided by Sergeant Gary Christopher Thwaites and Acting Sergeant Ronald Allen Moore at the PWH during the time that incidents involving Mr Spratt occurred on 31 August 2008 does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

However, the Commission is mindful of the fact that a number of officers on duty at the PWH during the relevant time were junior officers and relatively new to the role of police officer, and in the assessment of the Commission the lack of physical assistance provided by these officers at critical times contributed to the circumstances leading to multiple deployments of Taser weapons on Mr Spratt. Given this, in the opinion of the Commission, Sergeant Thwaites, as the Sergeant-in-Charge, and Acting Sergeant Moore during those times that Sergeant Thwaites was absent from the Reception Area, should have been more proactive and given specific instructions to the junior officers to provide the required support to restrain Mr Spratt.

It is acknowledged by the Commission that since 30 August 2008 changes have been made by WAPOL to transition the custodial care of detainees at the PWH to Level 2 Custody Officers and Band 1 Auxiliary Officers instead of Constables.

[199] It is noted by the Commission that Sergeant Thwaites and Acting Sergeant Moore were charged with failing to perform and carry out their duties as supervising sergeants during the processing of Mr Spratt (pursuant to Regulation 605(1) *Police Force Regulations 1979*), but were found not guilty following a disciplinary hearing.

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<sup>102</sup> Transcript of Proceedings, Private Examination of Acting Sergeant Ronald Allen Moore on 25 August 2011, p.18.

### 3.7 Other Officers at PWH on 31 August 2008

[200] The evidence given to the Commission by Acting Sergeant Moore, and the evidence given by Senior Constable Bakovic, Probationary Constable Toogood, Constable Naylor and 1/C Constable Woods during examinations in December 2010 was consistent in relation to Mr Spratt's demeanour upon arrival at the PWH, that is, he was not aggressive but "docile".<sup>103</sup> The evidence (extracts of which are provided below) was also relatively consistent in relation to subsequent incidents involving Mr Spratt and in the Commission's assessment any discrepancies were minor and a combination of varying perceptions and memory of events that had occurred almost three years previously.

[201] 1/C Constable Woods gave evidence about his reluctance to assist once Mr Spratt's behaviour became problematic.

**COUNSEL ASSISTING:** *So you are reluctant to get involved, it would seem, but concerned about what's going on. Can you explain what you were thinking at that particular time?---Well, in my eyes there was enough officers there to deal with it.*

*Sure?---And also with Tasers going off I wasn't prepared to step in there when there's enough officers there.*<sup>104</sup>

[202] Constable Naylor gave evidence about Mr Spratt's demeanour.

*What were your observations of Mr Spratt when he was sitting in the admission area?---His demeanour for the day was very up and down, very unpredictable - - -*

...

*Can you explain what you mean by up and down?---Well, one minute he would be calm and collected and then the next minute he was talking about the devil, getting quite agitated and aggressive ... and then someone would ask him a question ... and then he'd answer them and he'll be nice and calm again, and then again he would be - - -*

*Okay?---So they were - his demeanour was up and down, very unpredictable.*

...

*... I didn't mean like aggressive at anyone. I mean, agitated and aggressive in himself; like, one minute he'd be calm and then the next he'd be talking about the devil coming to take him away and - - -*

*So perhaps agitated more than aggressive?---Yeah.*<sup>105</sup>

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<sup>103</sup> Transcript of Proceedings, Public Examination of 1/C Constable Leigh Michael Woods on 14 December 2010, p.331.

<sup>104</sup> *Ibid*, p.334.

<sup>105</sup> Transcript of Proceedings, Public Examination of Constable Kate Marie Naylor on 14 December 2010, pp.345-347.

- [203] Probationary Constable Toogood also gave evidence about Mr Spratt's demeanour, which appeared aggressive.

*... it was more his demeanour that appeared aggressive.*

*Is that because he was rigid in the chair with his arms locked down?---Yes, but you could also see the rest of his muscles begin to tense up and his nostrils began to flare and his eyes widened.<sup>106</sup>*

- [204] Senior Constable Bakovic gave further evidence about Mr Spratt's demeanour.

*Once he was on the ground and you had hold of him, can you just describe how easy or difficult it was to handle him?---Yeah, in my nine years of policing he was definitely the most violent and aggressive detainee that I've ever come across. For a man of his size, and I'm six foot two and I'm slightly heavier than Mr Spratt I'd say but, yeah, he was unbelievable.<sup>107</sup>*

### **3.8 Statement of Material Facts (SMF) and Major Incident Briefing Note**

- [205] At approximately 11:05 a.m. on Sunday 31 August WAPOL officers were called to King William Street in Bayswater in response to reports that a man (later identified as Mr Spratt) was acting suspiciously near private residences. 1/C Constable Fowler and Senior Constable Strahan attended in response to the call. The incidents which occurred subsequently on that day in relation to Mr Spratt have been set out in Chapter Two at [76]-[81].

- [206] 1/C Constable Fowler was in attendance at the PWH when Mr Spratt arrived in a secure police vehicle at approximately 12:00 p.m. (Noon), as he and Senior Constable Strahan had travelled to the PWH from Bayswater in another police vehicle. 1/C Constable Fowler left the Reception Area of the PWH several minutes later at 12.02 p.m. (and did not return until 12.04:52 p.m.), after having replaced Mr Spratt's handcuffs with handcuffs that were attached to the seat on which Mr Spratt was sitting.

#### **3.8.1 Statement of Material Facts**

- [207] 1/C Constable Fowler prepared the Statement of Material Facts (SMF) which contained false information about the incidents which occurred at the PWH on 31 August 2008 resulting in an additional charge of Obstruct a Public Officer. 1/C Constable Fowler was questioned about including

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<sup>106</sup> Transcript of Proceedings, Public Examination of Probationary Constable Geoffrey Nicholas Toogood on 14 December 2010, p.365.

<sup>107</sup> Transcript of Proceedings, Public Examination of Senior Constable Emanuel Bakovic on 15 December 2010, p.386.

false information in the SMF during a public examination on 15 December 2010. He stated that he:

- relied on information provided by other officers as he was not present to observe the circumstances which gave rise to the additional Obstruct a Public Officer charge;
- did not have any reason to believe that the information provided by other officers was inaccurate;
- had not seen the CCTV footage prior to preparing the SMF; and
- first viewed the CCTV footage on 25 September 2008 during an interview by IAU officers, at which time he realised that the SMF was “inaccurate”.<sup>108</sup>

[208] The CCTV footage was viewed by 1/C Constable Fowler during the public examination and he agreed that the SMF presented “a misleading picture of what occurred at the time that Mr Spratt was first tasered”.<sup>109</sup> The relevant section of the SMF relating to the additional charge of Obstruct a Public Officer reads:

*Upon arrival at the Perth watch-house the accused was initially calm and cooperative with police and was walked into the main area without incident where he was given several drinks of water.*

...

*His handcuffs were removed from the seat and he was requested to accompany police for a strip-search. The accused began to resist by holding onto the seat and by bracing his arms. Police tried to move him from the seat when he began resisting against police. He again became violent and aggressive towards police who were attempting to restrain him by kicking and flailing his arms towards police as they approached him.*

...

*The Taser was deployed to prevent any injury to the police or the accused however it initially had little effect with the accused continuing to violently resist against police trying to restrain him. The accused was taken to the padded cell where he continued his violent aggressive behaviour ...*<sup>110</sup>

(emphasis added)

[209] The SMF is false in relation to the circumstances in which a Taser weapon was first deployed on Mr Spratt, as he was not aggressive (which is evident from the CCTV footage).

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<sup>108</sup> Transcript of Proceedings, Public Examination of 1/C Constable Brett Andrew Fowler on 15 December 2010, pp.412-414, 416 and 432.

<sup>109</sup> *Ibid*, p.418.

<sup>110</sup> *Ibid*, p.417.



[210] 1/C Constable Fowler gave evidence during the 15 December 2010 public examination that he remembered “asking the ... two investigators [during the IAU interview on 25 September 2008] ... if I ... needed to go and either amend the statement of material facts or do something with it. I remember being told to leave it, given the internals process had started ...”.<sup>111</sup>

- The Commission notes that Mr Spratt did not plead guilty to the additional charge of Obstruct a Public Officer until 1 December 2008. Therefore, there had been ample time to amend the SMF prior to that time or to seek to withdraw the charge either before 1 December 2008 or 30 January 2009 (the date upon which the conviction of Mr Spratt on the charge was recorded).
- The Commission also notes that neither of the IAU investigators who interviewed 1/C Constable Fowler on 25 September 2008, nor the WA Police Union representative present during the interview, have any recollection of 1/C Constable Fowler’s comments about the inaccuracy of the SMF and the need to amend it. However, the Commission considers that this does not necessarily mean that the comments were not made by 1/C Constable Fowler.

[211] The Commission has no evidence to suggest that 1/C Constable Fowler knew that the information contained in the SMF relating to the incidents which occurred at the PWH on 31 August 2008 resulting in an additional charge of Obstruct a Public Officer was false at the time that he prepared the SMF, although the Commission has determined that the SMF was inaccurate in relation to those incidents and surrounding circumstances.

[212]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of 1/C Constable Brett Andrew Fowler in relation to preparation of the SMF does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

This opinion is not altered by the fact that the SMF resulted in the conviction of Mr Spratt on a charge of Obstruct a Public Officer recorded on 30 January 2009, but set aside on 24 February 2011 by the Supreme Court of Western Australia, in Spratt -v- Fowler [2011] WASC 52, and substituted by a verdict of “Not Guilty” on the grounds Mr Spratt’s plea of guilty was induced by false allegations made by the prosecution, and there was no proper basis for the obstruction charge, resulting in a miscarriage of justice.

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<sup>111</sup> Transcript of Proceedings, Public Examination of 1/C Constable Brett Andrew Fowler on 15 December 2010, p.432.

### 3.8.2 Major Incident Briefing Note

[213] The Major Incident Briefing Note (“the Briefing Note”) prepared by 1/C Constable Fowler in relation to incidents involving Mr Spratt at the PWH on 31 August 2008,<sup>112</sup> as with the SMF, contained inaccurate or false information about the behaviour of Mr Spratt at the time that his handcuffs were removed in preparation for a strip search, resulting in the initial use of a Taser Weapon on Mr Spratt.

[214] 1/C Constable Fowler conceded during a public examination on 15 December 2010 that the information contained in the Briefing Note: did not accurately reflect the circumstances which resulted in the initial deployment of a Taser Weapon on Mr Spratt; and was based on information provided by other WAPOL officers, which he did not know was incorrect at the time.<sup>113</sup>

- 1/C Constable Fowler’s explanation in this case is consistent with the explanation given in relation to the SMF, as outlined above.

[215]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the conduct of 1/C Constable Brett Andrew Fowler in relation to preparation of the Major Incident Briefing Note does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## 3.9 Investigation by the Internal Affairs Unit (IAU)

[216] As part of its investigation the Commission examined the conduct of the internal investigation conducted by WAPOL relating to the multiple deployments of Taser weapons on Mr Spratt on 31 August 2008. As part of its investigation the Commission examined relevant documents and materials provided by WAPOL and a number of witnesses during a public examination on 18 April 2011 in relation to the origin, conduct and outcome of the WAPOL internal investigation conducted by IAU.

### 3.9.1 Criticisms of IAU Investigation

[217] In the opinion of the Commission, based on available evidence, the investigation undertaken by IAU is open to criticism in two respects.

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<sup>112</sup> The Major Incident Briefing Note (“the Briefing Note”) was prepared by 1/C Constable Fowler on 31 August 2008, being completed by 3:10 p.m. (with the “Time of Incident” recorded on the Briefing Note as 11:35 a.m.).

<sup>113</sup> Transcript of Proceedings, Public Examination of 1/C Constable Brett Andrew Fowler on 15 December 2010, p.421.

### 3.9.1.1 Criticism No. 1

- [218] The first criticism relates to the failure to follow up or reveal the inconsistency between the SMF and the CCTV footage (as considered earlier in this chapter of the report) available at the time of the IAU investigation. In this regard Inspector Lockhart gave evidence during a public examination on the 18 April 2011 that he had “met with [IAU] investigators ... [subsequent to submitting the Complaint Advice Notice] and mentioned it was generally the disparities ... [between] the different reports and the [CCTV] footage that caused ... [him] to take the next step [that is, submit the Complaint Advice Notice]”.<sup>114</sup>
- [219] Further, 1/C Constable Fowler also gave evidence in this regard during a public examination on 15 December 2010 of having advised IAU investigators about the inconsistency during an interview on 25 September 2008 and asking them if he “needed to go and either amend the statement of material facts or do something with it”, and that he was advised “to leave it, given the internals process had started”.<sup>115</sup> However, the Commission has not been able to determine to whom that advice may have been provided.
- [220] The fact that it has not been possible for the Commission to identify precisely what, or with whom, 1/C Constable Fowler communicated in relation to the inconsistency between the SMF and the CCTV footage, in the opinion of the Commission, could be indicative of a systemic deficiency in relation to internal investigations of this kind, that is, systemic in the sense that there does not appear to have been any particular requirement to review the charges against Mr Spratt in light of the IAU investigation, and highlights the importance of record keeping (whether those records be written or otherwise).
- [221] This is a matter that ought to have been properly and systemically addressed, particularly given that the IAU investigation was running in parallel with matters relating to the laying of criminal charges against Mr Spratt. As noted earlier in this chapter of the report, Mr Spratt did not plead guilty to the additional charge of Obstruct a Public Officer, which arose from the false information contained in the SMF in relation to the circumstances surrounding the initial deployment of a Taser weapon by Senior Constable Tomlin on 31 August 2008, until 1 December 2008. In the Commission’s assessment there was ample time to amend the SMF prior to that time, or to seek to withdraw the charge either before 1 December 2008 or 30 January 2009 (the date upon which the conviction of Mr Spratt on the charge was recorded), had IAU reviewed the charges against Mr Spratt in light of its investigation which commenced in September 2008 and was substantially complete by December 2008.

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<sup>114</sup> Transcript of Proceedings, Public Examination of Inspector Craig Lockhart on 18 April 2011, p.472.

<sup>115</sup> Transcript of Proceedings, Public Examination of 1/C Constable Brett Andrew Fowler on 15 December 2010, p.417.

[222] Given that Mr Spratt's interaction with the police on 31 August 2008 had come to the attention of a number of senior WAPOL officers,<sup>116</sup> and who had concerns about it, in the opinion of the Commission, the criminal charges against him ought to have been the subject of specific scrutiny. They were not and a miscarriage of justice, as considered in detail in Chapter 5 of this report, followed.

[223] In relation to this aspect of the IAU investigation, Inspector Steven Stingemore, the officer who supervised the investigation, gave the following evidence at a public examination on 18 April 2011.

*... Was it brought to your attention by anyone that Constable Fowler had raised the issue that the statement of material facts that he had prepared was inconsistent with what's shown on the CCTV footage?---It was never raised with me.*

*Is that a matter which you would expect in the course of an internal investigation such as this, where there have been offences committed or alleged against the person involved, that the internal affairs process should be ensuring that the material upon which the offences themselves are being put forward is accurate? ... in some instances yes, and some instances no ... depending on the nature of the investigation we were doing.*

*In this particular case the charge of obstructing public officers ... was directly relevant to the deployment of the Taser that was the subject of the internal affairs investigation?---Yep.*

*So in those circumstances would you expect that the discrepancy between the facts upon which Mr Spratt was charged and what in fact occurred ought to have been identified and dealt with by internal affairs?---Yes, what you are saying is correct ...*

*...*

*So did it arise ... that there may be some inaccuracy in the material upon which he'd been charged and sentenced?---We never examined that component of it, bearing in mind there was a large number of charges ... This particular element was never examined as to the accuracy of it ...*

*Yes. Do you agree, given that you've had an opportunity to consider that in more detail, that that was an omission in relation to the way this was dealt with, that each of those charges wasn't reviewed and assessed against the material which was revealed in the course of the internal affairs unit investigation?---I don't believe it was an omission because bearing in mind the volume of the charges we had. We were examining the use of force by the officers. As I said, other than that one sentence, the rest of the*

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<sup>116</sup> On 1 September 2008 the Acting Superintendent Craig Lockhart, West Metropolitan District Office, reviewed the Use of Force Report submitted by Senior Constable Strahan and relevant CCTV footage. Subsequently, Acting Superintendent Lockhart submitted a Complaint Advice Notice, resulting in the commencement of an investigation by the Office of Metropolitan Regional Coordinator. On 23 September 2008, at the direction of Deputy Commissioner Dawson, the Internal Affairs Unit (IAU) assumed responsibility for the investigation. Assistant Commissioner Corruption Prevention and Investigation, Mrs Barbara Etter, was given regular updates on the progress of the investigation by IAU, as was Superintendent Graham Moon as Acting Assistant Commissioner Corruption Prevention and Investigation (in the absence of Mrs Etter).

*statement of material facts is probably correct but it's more of a passive resistance rather than an aggressive resistance, and we were examining the use of force in relation to that.*

*But you certainly are aware now, I take it, that that particular conviction has been quashed by the Supreme Court having regard to the fact that it proceeded upon facts which were not correct?---That is correct.*

*That of itself - does that suggest to you that there is room for improvement in relation to the way in which charges which are brought in the context of an internal affairs investigation such as this are monitored and reviewed so as to ensure that they are fully accurate?---Yes, I agree with that and we've certainly already taken steps in that regard. As you may be aware, the commissioner of police has already ordered a review of all these matters as a result of that matter, which we are currently progressing.<sup>117</sup>*

- [224] That the criticism of the IAU investigation in this regard is, in the opinion of the Commission, well founded does not mean that the omission was deliberate or occasioned by misconduct. Something more would be required before such an opinion could be sustained, for example, pursuant to section 4 of the CCC Act “involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person, and constitutes or could constitute ... a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the *Public Sector Management Act 1994* ...”. That is not the case in this instance.

### **3.9.1.2 Criticism No. 2**

- [225] The second criticism of the investigation undertaken by IAU relates to the decision-making process that determined whether or not officers should be charged with disciplinary offences and/or criminal offences. Such matters are, of course, matters of discretion in relation to which differing views might legitimately and reasonably be reached as to the appropriateness of a particular course of action. Absent “misconduct”, it is not for the Commission to determine whether the course of action undertaken was preferable or not. However, in the opinion of the Commission, the decision-making process was somewhat disjointed.
- [226] In that regard, there was certainly advice received from the Aboriginal Legal Service of Western Australia (Inc.) (“the ALS”) by email dated 25 February 2009 (as considered in Chapter Five of this report) to the effect that Mr Spratt had “decided to allow the police department to take their own action against the officers involved in the incident”.<sup>118</sup> The email confirmed verbal advice provided to WAPOL the previous day. The

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<sup>117</sup> Transcript of Proceedings, Public Examination of Inspector Seven Stingemore on 18 April 2011, pp.502-504.

<sup>118</sup> Email to WAPOL of 25 February 2009, 9:03 a.m., from Paralegal, Criminal Law Unit, for Director of Legal Services, Aboriginal Legal Services of Western Australia (Inc.) [CCC 0005].

Commissioner of Police, quite properly in the opinion of the Commission, stated that this was a principal reason for preferring disciplinary charges over criminal charges in relation to incidents involving Mr Spratt on 31 August 2008. The Commissioner of Police was asked questions by Counsel Assisting about this during a public examination on 19 April 2011.

*And in this particular case what were the principal factors which caused you to reach the decision that the matter should proceed by way of disciplinary charges rather than by way of criminal charges?---The main reason was the advice from the ALS that Mr Spratt did not want to proceed as a victim in a court of law. We still have a very robust judicial process which ultimately could lead to the dismissal of a police officer or a demotion so the outcome could be very strong indeed for individual police officers. I don't see that as downplaying the process, it's just an alternative judicial process which doesn't necessarily need to include the victim.*<sup>119</sup>

[227] It remains the case, however, that the Commissioner of Police was unaware that Mr Spratt had earlier, during an interview with WAPOL officers on 27 January 2009, expressed a different view as to whether the officers should be charged in a manner that would require him to "go to court". Below is an extract from the transcript of that interview.

**WAPOL OFFICER:** *But we'll take this as your complaint today. So you're complaint is that having viewed the video, you want to make a complaint about the way police treated you.*

**K SPRATT:** *Yeah.*

**WAPOL OFFICER:** *Okay. What we normally ask people Kevin at this stage is what you would expect the outcome to be. What are you looking for? Do you want the policemen spoken to, do you want them charged, what is it you expect to happen.*

**K SPRATT:** *Can they get charged for it?*

**WAPOL OFFICER:** *Maybe, it's not up to us, it's up to the lawyers to decide that.*

**K SPRATT:** *Oh yeah. Uhm.*

**WAPOL OFFICER:** *You'd be required to go to court obviously, give evidence, as we would. So are you comfortable with that Kevin?*

**K SPRATT:** *Yeah.*

(emphasis added)

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<sup>119</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 19 April 2011, p.662.

- [228] The Commissioner of Police gave evidence at the 19 April 2011 public examination that he was not aware that Mr Spratt had earlier expressed a different view.

**COUNSEL ASSISTING:** ... the date ... [of the interview was] 27 January 2009, so this was prior to the communications with the ALS, and that takes me ... to the ... question ... whether you were aware of any different view having been expressed by Mr Spratt than that communicated by the ALS ... ---No, and I have to say that my experience of working with the ALS is they are very earnest and very focussed on representing Aboriginal people. I guess when they came back and they said, "Well, he doesn't want to take this matter any further" I was surprised, but give that they work with them all the time and they have always been very focussed about taking actions against police. I took their communication through ... [the Assistant Commissioner, Corruption Prevention] at face value.<sup>120</sup>

- [229] In the Commission's assessment whether the decision would have been different had the Commissioner of Police been in possession of all the background material is beside the point; indeed the decision may well have been the same. This is not the issue. In the opinion of the Commission, the issue is that the importance of the matter was one which required, at the very least, clear documentation of the reasons for the decision and advice to Mr Spratt about that decision, the outcomes of it and the reasons for those outcomes; if for no other reason than to avoid any misunderstanding about the planned course of action.

### **3.9.2 Office of the Director of Public Prosecutions for Western Australia**

- [230] As mentioned previously, the IAU investigation commenced on 23 September 2008 and was substantially complete by December 2008. During a public examination on 18 April 2011 Inspector Stingemore gave evidence to the effect that he reviewed the IAU investigation report in December 2008 and recommended that a legal opinion be sought as to whether or not criminal charges should be considered in relation to the use of Taser weapons on Mr Spratt by Senior Constable Tomlin and Senior Constable Strahan on 31 August 2008, in addition to the recommended disciplinary charges, as he had concerns about whether or not the use of force had been reasonable in the circumstances.<sup>121</sup>
- [231] Accordingly, the investigation file was referred to Mr John Francis O'Sullivan, the "Commissioner's Counsel", a Senior Assistant State Solicitor from the State Solicitor's Office seconded to WAPOL, for consideration and provision of a legal opinion. During a public examination on 18 April 2011 Mr O'Sullivan gave evidence to the effect that he reviewed the CCTV footage in October 2008 and found discrepancies between supporting documentation, such as the Briefing

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<sup>120</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 19 April 2011, p.661.

<sup>121</sup> Transcript of Proceedings, Public Examination of Inspector Seven Stingemore on 18 April 2011, p.483.

Note and Use of Force Report, and the CCTV footage of incidents at the PWH on 31 August 2008 in relation to Mr Spratt, and thought that he had “raised ... [the discrepancy] as an issue” with IAU officers (not recalled by IAU officers). He also stated in evidence that, based on the viewing of the CCTV footage, he had determined “it was [not] really in dispute that there seemed to be excessive force”.<sup>122</sup>

- [232] Mr O’Sullivan sought advice from the Director of Public Prosecutions for Western Australia (DPP) “around January 2009”,<sup>123</sup> and after Ms Linda Petrusa, Senior State Prosecutor, reviewed the IAU investigation file and the CCTV footage determined that there was a *prima facie* case of assault with reasonable prospects of conviction. Accordingly, Ms Petrusa advised Mr O’Sullivan by email on 16 January 2009.<sup>124</sup>
- [233] As outlined above, the Commissioner of Police after being advised that Mr Spratt had “decided to allow the police department to take their own action against officers involved in the incident” (in an email from ALS of 25 February 2009, which confirmed legal advice provided the previous day) directed that disciplinary action should be taken against Senior Constable Tomlin, Senior Constable Strahan and Sergeant Thwaites, and subsequently expanded to include Acting Sergeant Moore, in relation to incidents involving Mr Spratt on 31 August 2008, in line with recommendations contained in the IAU investigation report. Proceedings under section 23 of the *Police Act 1892* commenced and a disciplinary hearing was listed for August 2009.
- [234] The Commissioner of Police is not obliged to follow advice provided by the DPP.
- [235] Mr O’Sullivan advised Ms Petrusa of the decision to commence disciplinary action, and during the 18 April 2011 public examination in relation to that stated:

*Why was ... [contact made with the Office of the DPP]?---Well, first of all having taken it upon myself to seek their view and then have the matter resolved so quickly after Mr Spratt had expressed an opinion, I thought I wanted to in a sense (a) as a courtesy inform them what had transpired and (b) I thought myself, "Well, if it is, for whatever reason, that they've come to a completely contrary view, I'd like to know if that was so" in a sense to see whether they were okay with it. I mean, obviously it would present a difficulty if they were in an entirely different mindset. I have to say given my previous discussions, although - and this is I guess my impression - Mr Spratt's view was determinative, it seemed from what my understanding at least was that*

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<sup>122</sup> Transcript of Proceedings, Public Examination of Mr John Francis O’Sullivan, the “Commissioner’s Counsel”, on 18 April 2011, pp.540-543.

<sup>123</sup> Letter to Senior Investigator, Corruption and Crime Commission of Western Australia, of 25 February 2011 from Director Corporate Services, Director of Public Prosecutions for Western Australia [CCC 1149].

<sup>124</sup> Email to Mr John Francis O’Sullivan, the “Commissioner’s Counsel”, of 16 January 2009, 6:05 p.m., (resent on 19 January 2009, 9:04 a.m.) from Ms Linda Petrusa, Senior State Prosecutor, Office of Director of Public Prosecutions for Western Australia [CCC 1149].



the DPP were likely to come to the view that it should be dealt with internally if in fact Mr Spratt expressed an informed view to that effect.

...

*What did you tell Linda Petrusa at that time?---I would have explained to her, "The commissioner's made a decision that's going to be dealt with in this way."*

*What was her response?---Going from the email that I sent of around that date, which is probably the best guide I had, she didn't seem troubled by it. ... she didn't express a view to me that suggested - or say anything to me that suggested that she thought there was a major problem with the decision...*<sup>125</sup>

(emphasis added)

- [236] Ms Petrusa also gave evidence during the 18 April 2011 public examination and in relation to being advised by Mr O'Sullivan that a decision had been made to commence disciplinary action she stated:

*... our advice was sought, we gave some preliminary direction, if you like, about what else needed to be done and they never came back to us, so presumably they were content to follow the course that they'd chosen.*<sup>126</sup>

- [237] The matter was referred back to the DPP by the Commissioner of Police, subsequent to the release of Commission report entitled *The Use of Taser® Weapons by Western Australia Police* in October 2010, for further advice as to whether or not charges should be preferred against any officer involved in the incidents at the PWH on 31 August 2008.<sup>127</sup> This matter is currently in abeyance, pending the outcome of the Commission investigation.

- [238]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission, although the failure of IAU investigators to determine, reveal and/or follow-up on the inconsistency between the Statement of Material Facts and other supporting documentation, and the CCTV footage was unsatisfactory, it does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act, but could be indicative of a systemic deficiency in relation to record keeping (whether they be written or otherwise) and the way in which internal investigations are conducted.

<sup>125</sup> Transcript of Proceedings, Public Examination of Mr John Francis O'Sullivan, the "Commissioner's Counsel", on 18 April 2011, pp.564-565.

<sup>126</sup> Transcript of Proceedings, Public Examination of Ms Linda Petrusa, Senior State Prosecutor, Director of Public Prosecutions, on 18 April 2011, p.589.

<sup>127</sup> Western Australia Police states in its section 86 representations that: "I [the Commissioner of Police] wrote to the DPP ... on 11 October 2010 seeking advice on whether a *prima facie* case existed with reasonable prospects of a successful prosecution against the police officers involved who had already been dealt with under the *Police Force Regulations 1979* for conduct arising from the PWH investigation".

### 3.9.3 Recommendations

[239] The Commission makes the following recommendations in relation to IAU investigations and the process by which it is determined that officers should be charged with disciplinary and/or criminal offences.

[240]

#### **Recommendation 2**

That WAPOL review processes and procedures in relation to investigations undertaken by IAU to ensure that all relevant documentation, such as Major Incident Briefing Notes, Use of Force Reports and any other reports, Crime and Occurrence Books and Statements of Material Facts (where applicable), and any other relevant evidence, such as CCTV footage, are reviewed and cross-checked to ensure consistency and where inconsistencies are determined any matters related to the outcome of investigations be reviewed in light of the identified inconsistencies. This includes charges which are brought in the context of an IAU investigation, which should be monitored and reviewed to ensure that the facts upon which the charges are based are accurate.

#### **Recommendation 3**

That WAPOL review the process by which it is determined that officers should be charged with disciplinary offences and/or criminal offences to ensure that:

- all relevant material is taken into account during the decision-making process;
- reasons for the decision are clearly documented; and
- the complainant is advised in writing of the outcome of the decision-making process to avoid any misunderstanding about the planned course of action.

[241] The Commission notes that WAPOL states in its section 86 representations in relation to Recommendation 2 that “[r]obust investigation and review processes do currently exist and were independently progressed two years ago ... the maintenance of accurate and complete records of all aspects of the investigation, inclusive of critical decision logs and evidence matrices [are required] to ensure all aspects are reviewed for consistency and completeness”. The Commission acknowledges that recent Systems-Based Evaluation of systems and processes used by IAU to manage misconduct and reviewable police action confirm that IAU investigation practices and management have

significantly improved since the last Systems-Based Evaluation conducted by the Commission during 2008-2009.

- [242] The Commission notes that WAPOL states in its section 86 representations in relation to Recommendation 3 that the “organisational dictate”, that decisions to prefer criminal charges against a WAPOL officer could not be made in isolation of legal advice, which existed in 2008 is no longer required in ordinary circumstances, that is. “[t]here is no need to seek legal opinion for matters where *prima facie* evidence clearly supports a criminal/statutory offence ...”. WAPOL further states in its section 86 representations that “since August 2008 events will attest to the willingness of IAU and WAPOL generally to commence criminal prosecutions ... [t]here are currently eight current or former WAPOL officers facing criminal prosecutions arising from IAU investigations”.

### 3.10 Changes Introduced by WAPOL

- [243] In addition to the interim change issued by the Commissioner of Police to the *Police Manual* in December 2010 which established a higher threshold for the use of a Taser weapon by WAPOL officers (which became permanent after being promulgated in the 9 December 2010 edition of the *Police Gazette Western Australia*, p.1060 (refer [109])), as considered earlier in this chapter, changes have also been made by WAPOL in relation to custodial management at the PWH since the incidents involving Mr Spratt in 2008. These changes include those outlined below.<sup>128</sup>

- At the PWH a transition has occurred from Constables providing custodial care to detainees, to having Level 2 Custody Officers and Band 1 Auxiliary Officers performing that function, with supervision of those officers being provided by Sergeants, Level 4 Custody Officers and Band 3 Auxiliary Officers.
- Only PWH personnel are permitted to carry a Taser weapon in the PWH.
- In order to enhance the level of custodial care provided to detainees in the PWH the times during which nursing services are available has been extended to include each night and on Sundays during day shift hours. There is also a provision for an on-call nurse to attend the PWH, if required.
- A revised procedure, developed in collaboration with DCS. has been implemented to govern cell extractions by ESG at the PWH.<sup>129</sup>

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<sup>128</sup> Letter to the Corruption and Crime Commission of 4 July 2011 from Mr Wayne Gregson, APM, Assistant Commissioner, Judicial Services, Western Australia Police.

<sup>129</sup> The procedure is detailed in the Department of Corrective Services, Emergency Support Group, *Superintendents Management Instruction No. 1 Cell Extraction Request from Western Australia Police*, reviewed 21 June 2011 [CCC 1434].

- [244] The Commission has been advised that WAPOL continues to evaluate work practices and reporting systems at the PWH in order to enhance efficiency and accountability.<sup>130</sup>

### **3.10.1 Recommendation**

- [245] The Commission makes the following recommendation in relation to evaluation of work practices and reporting systems at the PWH by WAPOL.

[246]

#### **Recommendation 4**

It is recommended that WAPOL continues to evaluate work practices and reporting systems at the PWH in order to enhance efficiency and accountability, and it is the intention of the Commission to monitor and review the action undertaken by WAPOL in this regard, including the action outlined in a letter to the Commission of 4 July 2011 (refer Footnote 128) relating to custodial care, issue of Taser weapons, nursing services and cell extractions by ESG.

- [247] The Commission notes that WAPOL states in its section 86 representations in relation to Recommendation 4 that “[t]he review of reporting processes as outlined in a letter to the Commission ... [of] 4 July 2011 is ongoing and has been expanded to capture recording and reporting of custody episodes ... [agency-wide]”.

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<sup>130</sup> Letter to the Corruption and Crime Commission of 4 July 2011 from Mr Wayne Gregson, APM, Assistant Commissioner, Judicial Services, Western Australia Police.

## **CHAPTER FOUR**

### **DEPARTMENT OF CORRECTIVE SERVICES (DCS)**

#### **4.1 Introduction**

[248] As mentioned in Chapter One, this is a report on the investigation by the Commission of alleged public sector misconduct in relation to the use of Taser weapons by officers of WAPOL and DCS. This chapter examines alleged public sector misconduct by officers of DCS in relation to:

- the use of Taser weapons on Mr Spratt on 6 September 2008, and the treatment of Mr Spratt on 6 September and 7 September 2008;
- the use of Taser weapons on, and treatment of, Prisoner X on 2 August 2010; and
- associated matters.

#### **4.2 DCS Policy in Relation to Use of Force and Use of Taser Weapons in Comparison with WAPOL Policy**

[249] During 2008 DCS had the following policies in place governing the Use of Force and use of Taser weapons:

- *Prisons Policy Directive 5 — Use of Force* (PD5); and
- *Superintendent's Official Instruction A19 — Deployment of Taser* ("Instruction A19").

[250] The terms "use of force" and "planned use of force" are defined as follows in PD5.

##### **Use of Force**

*... means the application of any manual restraint or other device [Taser weapon etc] ... imposed (forced) on a prisoner, other than where required under an escort routine or management regime ...*

##### **Planned Use of Force**

*... means the application of force where time has permitted an evaluation of risk and a determination of actions.*

[251] PD5 outlines the basic principles, subject to the *Prisons Act 1981* (WA), involving the use of force which an officer believes on reasonable grounds to be necessary, which includes the use of Taser weapons (only by the ESG ... trained and qualified ... [to do so]). These are:<sup>131</sup>

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<sup>131</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.3 [CCC 0770].

- 2.1 *the degree of force used shall be the minimum required to control the situation or behaviour;*
- 2.2 *force is only used as a means of control and never as a method of punishment;*
- 2.3 *alternatives to the use of force should be considered and used by officers where practicable;*
- 2.4 *the use of force should be discontinued as soon as practicable after control has been established ...*

[252] PD5 also outlines what actions **may** be taken by an officer prior to the use of force, as outlined below.

- 1.1 *A decision on whether the use of force is required will depend on the circumstances at the time. When it is considered reasonable to do so, an officer may, prior to the use of force against the prisoner:*
  - 1.1.1 *issue orders or instructions to the prisoner(s) concerned and allow sufficient time for them to comply with the orders or instructions;*
  - 1.1.2 *use negotiation and conflict resolution techniques;*
  - 1.1.3 *issue a warning that force and/or restraint may be used; and*
  - 1.1.4 *ensure that the appropriate authority relative to the degree of force and restraint to be used is obtained.<sup>132</sup>*

(emphasis added)

[253] Instruction A19 details the standards and procedures required for the deployment of a Taser weapon, for example, in relation to application, cell extraction, assessment for competence, deployment approval, storage and issue and return. Specifically, in relation to a cell extraction where use of a Taser weapon is planned, the following is stated in Instruction A19.

...

*One nominated officer commences mediation with the prisoner. Conflict resolution techniques should be used to reduce the level of emotional conflict. The mediation officer should attempt to resolve the situation to the extent that physical force is not required to effect the removal.*

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<sup>132</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.6 [CCC 0770].

***... Negotiations are to continue throughout ... [the] preparation period.***

*The Section Leader will ... negotiate with the prisoner/s in a final attempt to resolve the situation without the need for physical force. During the negotiation, the Section Leader must make it clear to the prisoner that the prisoner's behaviour dictates the type of response by the officers. Special emphasis should be placed on reinforcing the fact that a prisoner will not be harmed if passive compliance by the prisoner/s is achieved ...*

(original emphasis)

- [254] In relation to WAPOL, as outlined in Chapter Three of this report, the *Police Manual 2008* included Force Options applicable to the use of Taser weapons, and in particular FR-1.6.4 which states in part —

*The use of the Taser should be reasonable and appropriate in the circumstances and members will be accountable for any excessive use of force.*

***THE TASER SHALL ONLY BE USED TO PREVENT INJURY TO ANY PERSON AND SHALL NOT BE USED AS A COMPLIANCE TOOL.***

(original emphasis)

- [255] It is evident from the above, that FR-1.6.4 prohibits WAPOL officers from using a Taser weapon as a compliance tool and is only to be used to prevent injury to any person. However, DCS officers are permitted to use a Taser weapon for such purposes, as explained below.
- [256] The basic principles outlined in PD5 involving the use of force, as stated above, are subject to the *Prisons Act 1981* (WA) and are, in particular, to be understood in light of section 14 of that Act which provides —

*Powers and duties of prison officers*

14(1) *Every prison officer —*

- (a) *has a responsibility to maintain the security of the prison where he is ordered to serve; and*
- (b) *is liable to answer for the escape of a prisoner placed in his charge or for whom when on duty he has a responsibility; and*
- (c) *shall obey all lawful orders given to him by the superintendent or other officer under whose control or supervision he is placed and the orders and directions of the chief executive officer; and*
- (d) *may issue to a prisoner such orders as are necessary for the purposes of the Act, including the security, good order, or*

*management of a prison, and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with.*

- [257] It is, essentially, the interaction of section 14 of the *Prisons Act 1981* (WA) with PD5 from which the notion that “compliance” use of a Taser weapon is permitted, that is, section 14(1)(d) of the *Prisons Act 1981* (WA) allows a DCS officer to “use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with”, and that force may, depending on the circumstances, include the use of a Taser weapon. In this regard, a Taser weapon may justifiably be used by a DCS officer in circumstances in which the same or similar use by a WAPOL officer would be contrary to applicable Force Options in the *Police Manual*.
- [258] Nevertheless, it should be stressed that this does not have the consequence that a DCS officer may use any force he or she considers should be used to ensure that his or her lawful orders are complied with. The officer must “objectively” have reasonable grounds to believe that the particular use of force is necessary. In the absence of such “reasonable grounds” the application of force would not be justified (by section 14 of the *Prisons Act 1981* (WA)) and, assuming no other legal justification (such as self defence) was available, such an application of force would be unlawful. The overriding consideration is that the use of force must, in all the circumstances, when viewed objectively, be reasonable for the purposes of controlling a situation or the behaviour of a prisoner to ensure a prisoner complies with lawful orders or directions.
- [259] As should be apparent, however, the “policy” of DCS does not suggest otherwise. Indeed, it recognises that the “degree of force used shall be the **minimum** required to control the situation or behaviour”.<sup>133</sup> PD5 and Instruction A19 highlight the importance of the use of negotiation and conflict resolution techniques, which are to continue throughout the period of preparation for a cell extraction.
- [260] The Commission has earlier in this report (refer [50]-[55]) considered the provision of the *Court Security and Custodial Services Act 1999* (WA), including section 26 which relates to the use of reasonable force by authorised persons.
- [261] Part 4 of the *Court Security and Custodial Services Act 1999* (WA) provides “[h]ow authorised persons take charge of, and move, persons in the custody of law enforcement officers”. Section 70 defines an “authorised person” as “a person who is authorised to exercise a power set out in clause 1 of Schedule 2”.
- [262] At the time of the cell extraction by ESG officers on 6 September 2008 at the PWH Mr Spratt had been refused bail and remanded in custody by a Magistrate (refer [86]). He was, therefore, “on remand” and a

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<sup>133</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.3 [CCC 0770].



“prisoner” as defined by section 3 of the *Prisons Act 1981* (WA). Alternatively he was a “person in custody” as defined in section 3 of the *Court Security and Custodial Services Act 1999* (WA) as being a person “who is in custody under a law of the State”.

[263] That “remand” prisoners are included within the scope of the *Prisons Act 1981* (WA) is made clear by section 16(4) of that Act, which states.

(4) *A prisoner on remand shall be treated in the same manner as other prisoners except in so far as regulations provide otherwise.*

[264] It is also the case that a “prisoner”, such as Mr Spratt, is at all times “deemed” to be in the custody of the Chief Executive Officer under the *Prisons Act 1981* (WA). This is made clear by sections 16(1)-16(3) of the *Prisons Act 1981* (WA) which state:

(1) *Every prisoner is deemed for so long as he continues to be a prisoner to be in the custody of the chief executive officer.*

(2) *Except as otherwise provided by this Act and subject to ...section (3), a prisoner shall not be confined or kept in any place other than a prison.*

(3) *...section (2) is a directory provision only and a breach of that ...section does not affect any issue relating to the lawfulness of the custody of a person at any time.*

[265] It is, therefore, important to recognise that, while both the *Prisons Act 1981* (WA) and the *Court Security and Custodial Services Act 1999* (WA) contemplate circumstances in which a “prisoner” will be physically outside of a prison, including under the physical control of a person other than a DCS officer, it always remains the case that the prisoner is in the “custody” of the Chief Executive Officer under the *Prisons Act 1981* (WA).

[266] For example, in relation to “lock-ups”, Regulation 85 of the *Prisons Regulations 1982* provides:

(1) *If a prisoner is confined in a place prescribed as a lock-up for the purposes of the “Court Security and Custodial Services Act 1999 [(WA)]”, the CEO as defined in that Act is responsible for the management and routine of the prisoner while the prisoner is confined in that place.*

(2) *If a prisoner is confined in any other lock-up, the Commissioner of Police is responsible for the management and routine of the prisoner while the prisoner is confined in the lock-up.*

[267] It is apparent from the above that, while the management and routine of the prisoner is conferred upon some other person, the person having “custody” of the prisoner does not change.

- [268] Similar observations could be made in relation to section 13 of the *Court Security and Custodial Services Act 1999* (WA) which confers responsibility for “security, control, safety, care and welfare” of persons in custody in a lock-up upon the Chief Executive Officer under that Act.
- [269] The fact that a “prisoner” such as Mr Spratt remains in the “custody of the Chief Executive Officer” of the *Prisons Act 1981* (WA), informs the broad purposes of that Act and, in turn powers such as those set out in section 14(1)(d).
- [270] Accordingly “the purposes of this Act” (that is, the *Prisons Act 1981* (WA)). in the Commission’s view, broadly includes the maintenance of the custody deemed by section 16 of that Act. There is relevantly no restriction on the power of a DCS officer under the *Prisons Act 1981* (WA) in relation to giving lawful orders that arises from the particular location at which the prisoner is in custody. In that regard the words “including the security, good order, or management of a prison” in section 14(1)(d) of the *Prisons Act 1981* (WA) are not, in the Commission’s view, words of limitation. That is, section 14(1)(d) enables a DCS officer to issue orders necessary for the maintenance of the custody of the prisoner, both inside and outside a prison.
- [271] Accordingly, assuming that a DCS officer is lawfully upon premises where a prisoner is in custody, and otherwise acting in the course of his or her duties, the power to issue lawful orders and to enforce their compliance under section 14 of the *Prisons Act 1981* (WA) will apply. No further lawful authority is, in the Commission’s view, necessary.
- [272] As the Commission has earlier observed (refer [51]), the *Court Security and Custodial Services Act 1999* (WA) proceeds upon the basis that the power of those officers will generally be found in other legislation, for example, the *Prisons Act 1981* (WA) in the case of a DCS officer.
- [273] One instance in which the *Court Security and Custodial Services Act 1999* (WA) potentially enlarges powers arises under section 71, section 72 and section 76 where persons are requested to take charge of persons in custody. Sections 71 and 72 are relevant for present purposes. Sections 70-72 provide:

## **70. Terms used**

*In this Division —*

**authorised person** means a person who is authorised to exercise a power set out in clause 1 of Schedule 2;

**person in custody** does not include a person apprehended under the “*Mental Health Act* [1996]”.

## **71. Law enforcement officers may request authorised persons to take charge of persons in custody at certain custodial places**

*A law enforcement officer who has the custody of a person may request an authorised person to take charge of the person in custody at any of the following custodial places —*

- (a) *a lock-up or court custody centre (but if the authorised person is a contract worker, the lock-up or court custody centre must be one that is managed under the relevant contract); or*
- (b) *a hospital or other place that is attended by the person in custody for medical treatment.*

**72. Law enforcement officers may request authorised persons to move persons in custody between custodial places**

*A law enforcement officer who has the custody of a person may request an authorised person to move the person in custody between custodial places and to take charge of the person in custody while he or she is moved or is being prepared to be moved.*

[274] Clause 1 of Schedule 2 of the *Court Security and Custodial Services Act 1999* (WA) in turn provides:

**1. Power to take charge of, and move, persons in the custody of law enforcement officers**

*The power to take charge of, and move, a person in the custody of a law enforcement officer in accordance with a request under section 71, 72 or 76.*

[275] An “authorised person” (such as a DCS officer under the *Prisons Act 1981* (WA)), when acting pursuant to a request under section 71 or section 72 of the *Court Security and Custodial Services Act 1999* (WA), would be exercising a Schedule power. In those circumstances, section 26 of the *Court Security and Custodial Services Act 1999* (WA) would apply

[276] Section 26(1), therefore, provides an additional basis upon which a DCS officer responding to a request under section 71 or section 72 could use reasonable force for the purposes of carrying out the request. Such a power would exist in addition to the power under section 14 of the *Prisons Act 1981* (WA) to use force to ensure that his or her lawful orders are complied with.

[277] Section 26(2) also confirms that a person authorised to issue an order to a person in custody may use reasonable force to ensure that that order is complied with. Again, however, as is generally the case under the *Court Security and Custodial Services Act 1999* (WA), it is necessary for the authority to give such orders to be found elsewhere. In the case of a DCS officer, of course, the power to issue orders to a prisoner is found in section 14(1)(d) the *Prisons Act 1981* (WA).

[278] Accordingly, while section 26(2) does provide an additional justification for the use of force, in the case of a DCS officer acting pursuant to Schedule powers under the *Court Security and Custodial Services Act 1999* (WA), it remains the case that the primary source of his or her powers, and in

particular the power to give orders, arises under section 14 of the *Prisons Act 1981* (WA).

[279] In any event, it will be apparent that, insofar as enforcing compliance with orders is concerned, the scope and restrictions upon the DCS officers' powers under the *Prisons Act 1981* (WA) and the *Court Security and Custodial Services Act 1999* (WA) are relevantly the same, namely:

- both authorise the use of reasonable force necessary to ensure that the order is complied with; and
- the use of force must be objectively "reasonable".

[280] There is, therefore, a connection between the provisions of the *Court Security and Custodial Services Act 1999* (WA) and the *Prisons Act 1981* (WA). Section 26 of the *Court Security and Custodial Services Act 1999* (WA), which empowers an authorised person to "use such reasonable force as is "necessary to ensure that an order is complied with", is in similar terms to the power provided in section 14(1)(d) of the *Prisons Act 1981* (WA). Accordingly the observations set out above at [257]-[259] regarding the interaction between section 14 of the *Prisons Act 1981* (WA) and PD5 and Instruction A19 apply to persons authorised to use reasonable force pursuant to section 26 of the *Court Security and Custodial Services Act 1999* (WA).

[281] Accordingly, in conducting the cell extraction the ESG officers were empowered to use such reasonable force as was necessary to ensure their orders were complied with.

#### **4.3 Use of Taser Weapons on Mr Spratt by Emergency Support Group (ESG) Officers on 6 September 2008**

[282] The incidents which occurred on 6 September 2008 in relation to the use of Taser weapons on Mr Spratt during a cell extraction at the PWH by ESG officers have been set out in Chapter Two at [86]-[89].

[283] Sergeant Rowe was on duty at the PWH on 6 September 2008 and in relation to the decision to request the assistance of ESG gave the following evidence.

*When Sergeant Bell went off to receive medical attention, I take it you took over as officer in charge of the shift?---That's correct.*

*And he said he returned at some point and a decision had been made that the ESG group from the Department of Corrective Services would be involved in doing the cell extraction?---That's correct.*

...

*... Can you just tell the Commission how that came about ...?---The effort obviously to get him into the padded cell, the two occasions he has then assaulted an officer that has gone into the padded cell ... I think I made a point of it wouldn't be a good idea to take him up to the court for the safety of the court, and obviously the magistrate, and he was then dealt with in his absence, to the level of which he was yelling, screaming, punching the cell,*

kicking the cell, could be heard throughout the watch-house ... I didn't want any of my staff injured again. I'd already had a couple of officers injured. I didn't want to fight him again ... I suggested [that the] ... ESG [be] used ... I then got a call from the ESG supervisor to say they had been authorised to do the extraction and they would be there in about an hour. They then turned up. I gave them a bit of a briefing. When they came through the door into the reception, he was still yelling and screaming. This of course is four hours after the event, roughly, and they couldn't believe he was still going. They thought they would turn up and he would be now quiet and sitting in the corner.<sup>134</sup>

(emphasis added)

- [284] The cell extraction was undertaken by six ESG officers, and an additional officer operated a Video Camera to record the cell extraction. The Video Camera was activated at approximately 2:15 p.m. in the Foyer of PWH adjacent to the corridor leading to the padded cell in which Mr Spratt was being held. Approximately 13 minutes and 22 seconds later Mr Spratt was further restrained by chains<sup>135</sup> (having been restrained by handcuffs and hobbles to his ankles during the extraction), taken to the PWH sallyport and secured in a DCS escort vehicle.
- [285] The Video footage of the cell extraction was reviewed by the Commission as part of its investigation. The Video footage does not include:
- the briefing of the cell extraction team by Senior Officer B at the PWH; or
  - the negotiation process and cell appraisal undertaken prior to ESG officers entering the cell in which Mr Spratt was located; or
  - continuing negotiations and use of conflict resolution techniques in an attempt to reduce the level of emotional conflict and to resolve the situation without the need for physical force.

The above omissions are in contravention of PD5 and Instruction A19.<sup>136</sup>

- [286] Further, the Video footage, due to the congested nature of the corridor leading to the padded cell in which Mr Spratt was being held, is, in certain respects, unhelpful. In particular, it does not depict precisely what Mr Spratt was doing during the attempts to put him in restraints after he had been pulled clear of the padded cell by ESG officers. In that regard, the only evidence is that of Senior Officer A and Senior Officer B who gave evidence during public examinations held in December 2010 that Mr Spratt was attempting to bite them and was struggling.

<sup>134</sup> Transcript of Proceedings, Public Examination of Sergeant Nicholas Rowe on 16 December 2010, pp.619-620.

<sup>135</sup> Mr Spratt was further restrained by chains or by a “connecting chain”, that is, a chain designed to secure ankles to wrists, and then wrists to the waist.

<sup>136</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.7 [CCC 0770] and *Superintendent's Official Instruction A19 — Deployment of Taser*, p.4 [CCC 0784].

**Table 2: Overview of Deployment of Taser Weapons  
During Cell Extraction  
(Taser Data Port Download Record and Video Footage)**

No.	Taser Weapon Start Time, <sup>137</sup> Approximate Video Record Time and Duration of Deployment (in Seconds)			Mode	Officer
1/2.	14:18:15	2:06 Minutes	8	"Probe" and "Drive-Stun" Mode	Senior Officer B
3.	14:18:32	2:26 Minutes	5	"Drive-Stun" Mode	Senior Officer B
4.	14:19:03	2:57 Minutes	5	"Drive-Stun" Mode	Senior Officer B
5.	14:19:21	2:05 Minutes	5	"Probe Mode"	Senior Officer A
6.	14:19:28	2:12 Minutes	5	"Drive-Stun" Mode	Senior Officer A
7.	14:19:42	2:26 Minutes	5	"Drive-Stun" Mode	Senior Officer A
8.	14:20:35	3:20 Minutes	5	"Drive-Stun" Mode	Senior Officer A
9.	14:21:05	3:48 Minutes	5	"Drive-Stun" Mode	Senior Officer A
10.	14:21:23	4:07 Minutes	5	"Drive-Stun" Mode	Senior Officer A
11.	14:21:35	4:19 Minutes	5	"Drive-Stun" Mode	Senior Officer A

**Table 3: Overview of Remarks by ESG Officers and Mr Spratt  
During Cell Extraction**

Approximate Video Record Time	Remarks/Event	Person
1:30 Minutes	Padded Cell Door Opened.	—
1:32-1:52 Minutes	"Turn around and lay down, mate ... if you don't lay down, I'm going to Taser you ... if you turn around and lay down, I won't Taser you ... I'm not going to ask you again ..."	Senior Officer A
1:55 Minutes	"I love yous all".	Mr Spratt
1:58 Minutes	"Turn around and lay down".	Senior Officer A
2:17 Minutes	"Lay still, lay still and we will not do it again ... don't move".	Senior Officer A
2:42 Minutes	"Move your hands to the top of your head".	Senior Officer A
2:55 Minutes	"Put your hands out straight".	Senior Officer A
2:57 Minutes	"Put them out straight or I will Taser you again".	Senior Officer A
3:13 Minutes	Growling Sound.	Mr Spratt
3:13 Minutes	"Put your hands out or I will Taser you again".	Senior Officer A
3:16 Minutes	"This is your last chance".	Senior Officer A
3:23 Minutes	"Now put your arm out straight and don't move".	Senior Officer A
3:40 Minutes	"Hit him again. He's a biter and a spitter".	Unknown Officer.
3:54 Minutes	"Put your arm up or I will Taser you again".	Senior Officer A
4:32 Minutes	"Cuffs are on, cuffs are on".	Senior Officer A
4:35 Minutes	Part of The Lord's Prayer is recited.	Mr Spratt
5:00 Minutes	"Stay nice and still mate".	Senior Officer A
5:14 Minutes	"Right chains are on".	Senior Officer A
6:45-6:46 Minutes	"What's happened ... just stabbed me [in the foot] with a plug [probe]".	Senior Officer A
7:18 Minutes	"Let's remove ... [the] probes".	Senior Officer A

<sup>137</sup> Taser Data Port download record.

[287] In total there were 11 deployments of Taser weapons on Mr Spratt at the PWH on 6 September 2008 during the cell extraction by ESG officers. The cell extraction was undertaken by six ESG officers, and an additional officer operated a Video Camera to record the cell extraction. Senior Officer B was responsible for four deployments and Senior Officer A for seven deployments. All deployments of the Taser weapons were recorded by the Video Camera operator (although only the sound of the first two deployments can be heard, as they occurred while Mr Spratt was still in the padded cell and not the corridor) and, according to Taser Data Port download records, occurred between 14:18:15 and 14:21:40. Two deployments were in "Probe Mode" (one by Senior Officer B at 14:18:15 and one by Senior Officer A at 14:19:21) and nine deployments were in the "Drive-Stun" Mode (three by Senior Officer B and six by Senior Officer A, at times indicated in Table 2 above). In all, Taser weapons were deployed for a total of 53 seconds of shock over a period of 205 seconds, with a Taser weapon deployed on average every 18.36 seconds. Senior Officer B was responsible for four deployments during a 53-second period, with a total of 18 seconds of shock, and Officer A was responsible for seven deployments during a 139-second period with a total of 35 seconds of shock. There was a 13-second gap between the last deployment by Senior Officer B and the first deployment by Senior Officer A.

[288] The following extract is from the 17 December 2010 public examination transcript, where Senior Officer A responds to questions asked by Counsel Assisting after viewing Video footage.

**COUNSEL ASSISTING:** *Yes?---You hear the sounds Mr Spratt's making loudly, the growling sound? He again is - is uncontrollably biting. His teeth and his face is just biting at anything. At one stage here - and it's hard to say which part - but at one stage he had end of my boot and was biting on the end of my boot for a second or so just in his out-of-control aggression.*<sup>138</sup>

[289] Senior Officer A later stated:

**SENIOR OFFICER A:** *Okay, stop there. We have now got one arm clear. I'm putting a cuff on. As I said, the officer on the bottom of the screen, he's trying to get the other arm. He pulls back a few times as Mr Spratt goes to bite him. I then deploy the Taser again as you saw, which was my aim of incapacitating him again to give the officer the time to pull the arm out and put the cuff on.*

*Was that deployment of the Taser to your observation having the incapacitating effect?---I believe it was having a certain amount of effect. The only problem I was facing, and looking at that now, is that in the short burst of five seconds, there wasn't enough time for the officers to get hold of the arm, pull it out and get a restraint on, because every time we would start to get it out, he would - the incapacitation would stop and he would pull them back under and start biting again. In hindsight, I probably should have deployed the Taser for a longer period ... At no stage did he, while we*

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<sup>138</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 17 December 2010, p.732.

*were getting those restraints on now, stop resisting and stop struggling and stop biting, attempting to bite us.*<sup>139</sup>

- [290] Similarly, Senior Officer B had earlier in the public examination of 17 December 2010 after viewing Video footage stated:

*The second deployment was a deployment for a five-second cycle and that indicates that it ended at 4.18.32. It would have commenced at 4.18.27, so it's a little over 10 seconds after the first deployment, and then the next deployment is about 25 minutes, 25 seconds on again. Do you remember the second and third deployments that you made of the Taser?---I can only by the vision that's on the video. I was - obviously, direction from Senior Officer Officer A, because I'm trying to take his attention away from his biting staff, refusing to put his hands out so they can control his hands and the restraints on effectively. He's attempting to bite, spitting at staff, so I'm not sure whether - one of the probes could have come out, both probes could have come out. The ensuing struggle with the individual is there, the wires could have been broken as well, but I'm attempting at all times with probe mode to get a full NMI. I'm not sure that it occurred. I don't know.*<sup>140</sup>

- [291] That Mr Spratt was actively struggling with ESG officers, is, to some extent, corroborated by his own evidence during a public examination on 13 December 2010. Below is an extract from the transcript of that examination.

*Now, do you recall being moved from one cell to another on that day?---No, I don't recall that, no.*

*Do you recall a Taser being used on that day at the police watch-house?---I can - I can remember a incident where - where I pulled a Taser - Taser dart and I stuck it into a - someone's boot.*

*Right, so you can remember an incident with you pulling a Taser dart and putting it into somebody's boot?---Yes, that's what I remember.*<sup>141</sup>

(emphasis added)

- [292] That incident occurred during the cell extraction by ESG officers on 6 September 2008, and the officer whose boot was stabbed with a probe was Senior Officer A.

#### **Senior Officer B (After viewing Video footage.)**

*... and then I ... found out that in the process of the application of the interconnecting chain, he'd pulled a probe out and stabbed the senior officer, it went straight through his boot.*

**COUNSEL ASSISTING:** *Right. I think a little later ... in the foyer here there's a reference to - it sounds like Senior Officer A saying, "In the foot"?--Yes.*

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<sup>139</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 17 December 2010, p.741.

<sup>140</sup> Transcript of Proceedings, Public Examination of Senior Officer B on 17 December 2010, pp.688-689.

<sup>141</sup> Transcript of Proceedings, Public Examination of Mr Kevin John Spratt on 13 December 2010, p.100.



... somebody said ... [Officer A (name suppressed)] ... and then he said, "On the foot" ...<sup>142</sup>

**Senior Officer A (After viewing Video footage.)**

... They have now told me that they've got the adjoining chain secure on the leg chains that they have around his ankles. The next part of the footage that you will see is where we try and bring that chain up to the hands now, so we have got to roll Mr Spratt to his side and now bring his hands, which are above his head now down to his mid section to join them up to the chain.

**SENIOR OFFICER A:** Stop there. Again, Mr Spratt is making some growling [sic: growling] noises.

**COUNSEL ASSISTING:** It almost sounds like he's mimicking the sound of the Taser?---You have beat me to it. I was just about to say it's almost now like he's mimicking the sound of the Taser?---You beat me to it ... At that point he removes the probe that's in his wrist. His hands are cuffed. We bring him down. He removes the probe that's in his wrist, turns around and stabs me in the foot with it.<sup>143</sup>

(emphasis added)

The Commission investigation has determined that the comment made by Senior Officer A in relation to being stabbed in the foot with a probe by Mr Spratt occurred approximately 2 minutes and 27 seconds after the final deployment of a Taser weapon in "Drive-Stun" Mode" by Senior Officer A at about 2:21 p.m.

- [293] In the Commission's assessment, based on available evidence, including Video footage, the accounts given by Senior Officer A and Senior Officer B as to the attempts by Mr Spratt to bite and otherwise injure ESG officers during the cell extraction can, until the deployment at 14:20:35, at 3:20 minutes Video Record Time (refer Table 2), be accepted. Therefore, in the Commission's opinion the individual applications of Taser weapons during the cell extraction up until 14:20:35, while severe, were not excessive and were justified. Such use, in the opinion of the Commission, is in accord with Principle 2.1 of PD5 which permits the use of a Taser weapon "to control the situation or behaviour" and section 14(1)(d) of the *Prisons Act 1981* (WA) which allows a DCS officer to "use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with".
- [294] In the Commission's view, until 14:20:35, Mr Spratt failed to comply with the lawful orders and directions of the ESG officers and was violently resisting their efforts to control him. However, by 14:20:35 Mr Spratt was spread-eagled on the floor (face down) in a narrow corridor with six ESG

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<sup>142</sup> Transcript of Proceedings, Public Examination of Senior Officer B on 17 December 2010, p.752.

<sup>143</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 17 December 2010, p.741.

officers, with body protection and face masks, forcibly restraining him and holding him down. Mr Spratt's prostrate body is obscured by the ESG officers and it is impossible to clearly see what, if anything, he is doing. While it seems he may be attempting to struggle there is only a limited ability for him to do so because he is being restrained by the ESG officers and because of the narrow confines of the corridor. His right arm can be clearly seen being held out in front of him. His left arm is not visible but from the position of three ESG officers it seems they are trying to pull Mr Spratt's left arm out in front of him for the purposes of handcuffing his hands together. Importantly, after someone is heard saying "cuffs are on, cuffs are on" (refer Table 3) Taser weapons are not deployed again.

- [295] Mr Spratt was extracted from the padded cell and restrained by six ESG officers in the confines of the narrow corridor. Mr Spratt may have tried to struggle with them, but for practical purposes he was unable to do so because he was overwhelmed; his limbs were restrained, his head was restrained and an ESG officer was kneeling on his back.
- [296] While the Commission accepts it is reasonable to use overwhelming force quickly and efficiently to avoid injuries to both prisoners and officers, the Commission is concerned that it may not have been reasonable to continue to use a Taser weapon after 14:20:35. Although it might logically and reasonably involve using a Taser weapon to bring a prisoner under control quickly and efficiently, such overwhelming force, including the repeated use of Taser weapons, cannot, on any reasonable basis, extend to more force than is required to do so.
- [297] However, in the Commissioner's opinion the evidence is insufficient to enable it to form an opinion as to whether the use of a Taser Weapon by Senior Officer A on Mr Spratt on four occasions between 14:20:35 and 14:21:35 is either unjustified or reasonable. The Commission, therefore, makes no finding regarding the use of the Taser weapon on four occasions from 14:20:35.
- [298] Nevertheless, an issue does remain with respect to the use of force by the ESG officers in relation to its instigation. In the Commission's assessment, a very real issue arises as to whether any, or any adequate attempts, to negotiate with Mr Spratt were made at all. The Commission is concerned whether any, or any sufficient, regard was given to the procedures for ongoing negotiations and the use of conflict resolution techniques as outlined in PD5 and Instruction A19.
- [299] Based on Video footage, the initial contact with Mr Spratt by Senior Officer A, when the door of the padded cell in which Mr Spratt was being held at the PWH was opened, was one of confrontation, and this initial contact is probably a factor that contributed to the events that followed and the way in which Mr Spratt reacted. If ESG officers had been less confrontational or had attempted to mollify Mr Spratt, when there was an opportunity to do so prior to opening the cell door, those events may not have occurred. Mr Spratt may not have reacted as he did and the outcome may have been different. In considering this possibility the

Commission is mindful of the evidence given by Senior Officer A during December 2010 and April 2011 public examinations, Senior Officer B during a public examination in December 2010 and that of Sergeant Nicholas Rowe during a public examination in April 2011. Sergeant Rowe was on duty at the PWH on 6 September 2008 at the time the cell extraction occurred.

- [300] The following are relevant extracts from 2010 and 2011 public examination transcripts in relation to attempts to negotiate with Mr Spratt prior to opening the cell door.

**Senior Officer A (17 December 2010)**

*And what happened once you got there?---We moved forward to the, I think it's the holding cell area, and we were met by a number of police. One police officer, I can't, I don't know his name, he then began to tell us what had happened earlier on in the day. At that stage, our team, except for Senior Officer B and myself, were beginning to lay our equipment out and get ready, and we were doing the brief with the police - OIC of the lockup.*

...

*After the briefing that you had with the officer from the lockup and the other officers had their gear together, what did you next do?---Prior to myself starting to put my own protective equipment on, I went forward to the cell door with Senior Officer B and a police officer, I don't know his name, and did an appreciation of the area and the cell and what we were getting ourselves into. In doing that, I realised the viewing hatch had been permanently sealed up, which greatly reduced our effectiveness to be able to communicate with him. The walls obviously were very thick, because I could hear Mr Spratt screaming quite loudly, but it was coming through quite muffled. I was trying to watch him on the camera, but the camera wasn't the best, and at that stage I called out to Spratt and introduced myself, and the more I spoke, the louder he growled. I attempted to get his attention two, maybe three times, and then I said to Senior Officer B, "I can't communicate with him can't negotiate with him. Can't see him." The walls were really thick. I said, "Let's go forward, brief the team, and then when we enter the cell, if I feel it's safe enough, I'll try and negotiate with him then. If it's not safe enough, or he tries to come towards me, then we will deploy our force."*

...

*Now, you had the appointed role as the negotiator for the team?---Correct.*

*That meant that you were the first person to - or you were in the front of the group as you went to the cell when the cell door was opened?---In two parts. Initially, when I tried to negotiate with him, the team was still kitting up, so I'm trying to instigate negotiations with him through a door and ascertain whether he's going to comply with the orders. Once we're on the door and the door was opening, ordinarily you may not do any negotiations at that stage. However, I felt that I hadn't properly been able to engage him through the wall so if safe I'll try and engage him once I was actually looking at him and was able to try and communicate with him.*

...

*... Prior to going in and trying negotiating through the wall and not being able to look at him, I used the words, "Spratt, this is Senior Officer A from ESG. I need you to listen to my orders." That's as far as I got. He kept yelling over the top ...*<sup>144</sup>

#### **Senior Officer A (11 April 2011)**

*... You say that it formed no part of the plan on this occasion that you were going to open the door and immediately take control without trying to negotiate and explain who were you?---No, from my memory I said to Senior Officer B and to the rest of the team that I would give him the opportunity when the doors open to try and talk to him, as opposed to, I guess for want of a better word, an element of surprise where once the door opens we commit whole-heartedly to the use of force.*

*But you agree that that opportunity did not include even simply explaining who you were and where you were from?---Once the door's open?*

*Yes?---No, I didn't, I didn't feel that that was - that was needed at that time. You may not like that but I'm quite comfortable with that. I felt that the moment that door opened there was a person in there who had displayed violence, we had to deal with him, so my - my words and orders to him had to be very simple. I wasn't going to enter into long conversations with him. My whole priority was to try and get him to lay down and comply without force being used on him.*<sup>145</sup>

#### **Senior Officer B (17 December 2010)**

*... but I'm sure that we went there to check the cell out, to check out where he was. I don't remember exactly what was said to Spratt, whether he, you know, calmed down or whatever it was, but we must've gone - because we had to check out what was going on, whether I could actually talk through the door, whether we could communicate through the door.*

*But that point where we see the door opened by the officer on the video ... was the first time that you were in fact able to speak to Mr Spratt?---Clearly it was the first time we could see him and we could communicate with him, yeah.*<sup>146</sup>

#### **Sergeant Rowe (11 April 2011)**

*In relation to that, are you able to say whether at that point when you went to the cell door, was there communication between - I think you said there were two officers from the ESG there?---I can't remember if there was one or two.*

*One or two, but communication from one or other of the ESG officers to Mr Spratt while he was in the cell?---No. Definitely not. As I said, without the exact words, the feeling was that they wouldn't let him know until they went in. They wouldn't give pre-warning that they were there.*

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<sup>144</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 17 December 2010, pp.714-716 and 720.

<sup>145</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 11 April 2011, p.58.

<sup>146</sup> Transcript of Proceedings, Public Examination of Senior Officer B on 17 December 2010, p.685.

*So you definitely don't recall there being an attempt to speak with him through the door of the cell?---No.*

*What about an introduction as to who they were?---On the footage that we see, where they do the cell extraction, that's the introduction. That's the only time they communicated ...<sup>147</sup>*

- [301] It is evident from the above that the evidence given by Senior Officer A, which was not disputed by Senior Officer B (as he could not “remember exactly what was said to [Mr] Spratt”), is to the effect that attempts were made to communicate and/or negotiate with Mr Spratt prior to opening the cell door and at the time that the cell door was opened, and that there was no intention to conduct a “surprise” extraction. However, Sergeant Rowe gave evidence that attempts to communicate or negotiate with Mr Spratt did not occur.
- [302] It should be noted, however, that Senior Officer A’s evidence in relation to attempts to communicate and/or negotiate is supported by the Incident Description Reports prepared by him (other than his claim that he used the words, “Spratt, this is Senior Officer A from ESG. I need you to listen to my orders”) and Senior Officer B subsequent to the cell extraction. The following extracts are from the Incident Description Reports prepared by Senior Officer A and Senior Officer B.

#### **Senior Officer A**

*... Once at the Cell Door I was unable to view the prisoner or communicate effectively with him, as the viewing window has been permanently blacked out. On discussion with SO B the decision was made to open the cell and communicate with Spratt on opening. When the door was opened I was able to sight Prisoner Spratt who was sitting on the ground approximately 1 metre from the door in the corner. I immediately ordered Prisoner Spratt to lie on the ground. I repeated this several times of which Prisoner Spratt refused to comply. At one stage he began to lie down, I encouraged him to do this then he sat back up and tried to stand. At this point my orders were not complied with and I tasered him ...<sup>148</sup>*

#### **Senior Officer B**

*... Due to their [sic] being no viewing hatch and only a CCTV the cell had to be opened for negotiations to continue. The cell was breached and Senior Officer A tried to negotiate with prisoner Spratt KJ to comply with his orders, Spratt was warned on three or more occasions that refusal to comply with his orders he would be tasered. Spratt refused to comply ...<sup>149</sup>*

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<sup>147</sup> Transcript of Proceedings, Public Examination of Sergeant Nicholas Rowe on 11 April 2011, p.36.

<sup>148</sup> Department of Corrective Services, Incident Description Report, Senior Officer A, Incident I1124528, 6 September 2008 [CCC 0762].

<sup>149</sup> Department of Corrective Services, Incident Description Report, Senior Officer B, Incident I1124528, 6 September 2008 [CCC 0759].

[303] Senior Officer A's evidence, contrary to the evidence given by Sergeant Rowe, namely that he introduced himself to, and attempted to communicate with, Mr Spratt prior to entering the cell was not (as he accepted when questioned during the 11 April 2011 public examination) recorded by the Video Camera in accordance with the requirements of PD5 (refer [285]).<sup>150</sup> The following extract is from the transcript of that public examination.

*It's clear that that negotiation, as you have described it, trying to negotiate through the wall, was not video-taped, was it?---I believe it wasn't, no.*

*Was there any attempt to arrange for that to be video-taped?---No. If I recall when we first got there - and you've to remember now I'm trying to recall. When we first got there Senior Officer C started the video camera - and I believe he had an initial problem with the battery and changed it, and I believe that happened once or twice during the rest of the cell extraction but my main priority and concern at that time isn't that the video operator is following me everywhere. I've still got a role to do.*

*But you are conscious of the fact that the negotiations that precede the use of force should be under policy direction 5, as far as practicable, be recorded as well?---Correct.*

*On this occasion the negotiations that you are referring to there were not recorded on video?---That I was referring to?*

*Yes?---No, they weren't recorded on video.*

[304] In the opinion of the Commission, the failure to follow the requirements of PD5 by not video recording the briefing, the cell appraisal or the communication and/or negotiation process prior to and during the cell extraction is a matter for systemic improvement to be addressed by DCS but is not an issue of "misconduct".

[305] However, the Commission remains concerned that sufficient regard was not given to the procedures, outlined in PD5 and Instruction A19, for ongoing negotiations and use of conflict resolution techniques during the cell extraction of Mr Spratt. However, as there is conflicting evidence, which the Commission is unable to resolve, as to whether Senior Officer A did or did not attempt to communicate and/or negotiate with Mr Spratt prior to opening the cell door at the PWH on 6 September 2008, as outlined above, the Commission makes no finding in relation to this matter. It is also important to note that PD5 states that "... an officer may, prior to the use of force against the prisoner ... issue orders or instructions to the prisoner(s) concerned and allow sufficient time for them to comply with the orders or instructions ... use negotiation and conflict resolution techniques ... issue a warning that force ... may be used".<sup>151</sup> Clearly, although recommended, it is not a requirement for officers to do so.

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<sup>150</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.7 [CCC 0770] and *Superintendent's Official Instruction A19 — Deployment of Taser*, p.4 [CCC 0784].

<sup>151</sup> Department of Corrective Services, *Prisons Policy Directive 5 — Use of Force*, p.6 [CCC 0770].

[306]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of Taser weapons on seven occasions between 14:18:15 and 14:19:42 on Mr Spratt during a cell extraction on 6 September 2008 at the PWH by ESG officers did not amount to the use of excessive force and that the Taser weapons were used “to control the situation or behaviour” (PD5) on “reasonable grounds ... to ensure that ... lawful orders are complied with” (section 14(1)(d) of the *Prisons Act 1981* (WA)), and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

In relation to use of a Taser weapon by Senior Officer A on Mr Spratt on four occasions between 14:20:35 and 14:21:35 the Commission, due to insufficient evidence, expresses no opinion as to whether the use was unjustified or reasonable.

Further, although the Commission remains concerned as to whether sufficient consideration was given to the use of negotiation and conflict resolution techniques outlined in *Prisons Policy Directive 5 — Use of Force* (PD5) and *Superintendent’s Official Instruction A19 — Deployment of Taser* and, in particular, whether or not Senior Officer A attempted to communicate and/or negotiate with Mr Spratt prior to opening the cell door at the PWH on 6 September 2008, a failure to do so would not be in contravention of PD5 and does not, therefore, constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

#### **4.4 Use of Taser Weapons on Prisoner X by ESG Officers on 2 August 2010**

[307] The incidents which occurred on 2 August 2010 in relation to the use of Taser weapons on Prisoner X during a cell extraction at Hakea Prison by ESG officers have been set out in Chapter Two at [94]-[96].

[308] At the time of the incidents in August 2010 there were a total of 199 Incident Reports on the Total Offender Management Solution (TOMS), a restricted-access DCS database which contains details about prisoners in Western Australia, about Prisoner X, and as at May 2010 Prisoner X had a total of 59 prison-related charges and had 33 active alerts on TOMS. Prisoner X was reported as a prisoner with a disregard for prison rules and regulations, with a propensity for non-compliance with orders and instructions. Prisoner X was classified as a High Security Escort prisoner, which meant that whenever Prisoner X left the confines of Hakea Prison he was to be escorted by ESG officers.

[309] In the opinion of the Commission the principal concern that emerges from the cell extraction of Prisoner X on 2 August 2010 are the inconsistencies between what is contained in the Incident Description Reports prepared by Senior Officer A and Senior Officer B subsequent to the cell extraction and the evidence that they gave during public examinations on 11 and 12 April 2011. The following extract is from the transcripts of those examinations.

**Senior Officer A (11 April 2011)**

*Do I understand from that answer that the decision to deploy the Taser was made prior to the cell door being opened because of the way in which he, that is, Prisoner X, had conducted himself before the door was opened; that is, taking into account everything that had happened prior to the cell door being opened, a decision was made that the Taser would be deployed when it was opened?---The decision was made to deploy the Taser because of the distances we were going to have to work in. It's extreme close quarters that we were working in. The fact that we know he's got those weapons, so yes, you're right. It may not look good and you may not agree with it, but for staff moving into a distance with a person who is armed and dangerous, then at that point, yes, we carry out the use of force.*

*Can I summarise it this way: the decision is taken to deploy the Taser - the deployment of the Taser is not in response to any actual movement or aggression from him when the door is open but has been pre-planned because the distances you talk about means that you wouldn't have any time to assess that?---In this particular instance?*

*Yes?---Yes. Not only assess it but the fact that we're moving into that space at those distances I would not take the risk. I would not put my staff at risk to enter into that and then to stop and see if he's going to comply, because as we found out in the past, and I think only six months ago, a prisoner has taken two steps with his back turned to staff and in those three steps has turned around and stabbed a staff member in the neck. It doesn't matter whether they're facing you or they're turning away. In actual fact a lot of these attacks have happened when they turn their back from you and then do spin around and attack, so the position of his body and what he's doing at that time was totally irrelevant. We were committed to the use of force then for our safety and his.*

*And your focus, as you've said, was on finding the target that you can apply the Taser to?---Correct.*

*And not on whether he has moved forward in an attacking motion with somebody or used any weapons that he might have had?---Not in that environment, no. If it was a larger room, a room this size, then yes, it would be totally different.*

*I'm only talking about the decision-making process in this particular example?---The decision at that distance was to use a Taser.<sup>152</sup>*

(emphasis added)

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<sup>152</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 11 April 2011, p.72.



**Senior Officer B (12 April 2011)**

*Yes. Do I understand that because of that information, because the information you had was that he was standing up with the mattress, that it would be necessary to apply the force of the Taser when you went through the door?---I'm thinking that straightaway, yes.*

*It wasn't the case that, if you like, he was going to get another chance once the door was opened?---We don't have that opportunity. Staff safety is paramount. I can't afford for that distance with someone with an edged weapon who can turn around and stab one of the staff members, the people entering, so our safety is paramount. He'd made the decision that he wasn't going to be compliant with instructions that Senior Officer A had given. He'd been given sufficient - there had been extensive negotiations by the Hakea unit 1 staff to gain his compliance, and upon us entering he still was noncompliant and had armed himself with an edged weapon and a barricade in front of himself. So he was not being compliant, and we don't have that distance to cover effectively, probably a metre to two metres, as soon as that door was opened. He could be on us and he could have inflicted some serious injuries.*

*Yes, and understand I'm not suggesting otherwise, but the question is directed to the fact that from what you knew before the door was opened, that the only option, the only plan, was that in effect it had reached the point of no return once that door was opened, that the planned use of force was going to have to take place?---Yes, pretty much - yeah.<sup>153</sup>*

(emphasis added)

- [310] In the Commission's assessment the information provided to ESG officers prior to the decision to undertake a planned cell extraction was ample to suggest that Prisoner X was a danger to officers and that the characteristics (including a confined cell area of approximately two metres by three metres) and condition of the cell at Hakea Prison from which he was to be extracted were such that the decision that there would be insufficient time to make a further assessment once the cell door was opened (breached) was reasonable, as was the decision to use Taser weapons immediately the cell door was opened. An inspection of the cell by Commission officers on 9 June 2011 confirmed the confined nature of the space within which ESG officers were operating at the time of Prisoner X's cell extraction.
- [311] As stated above, in the opinion of the Commission, the real issue in the case of the cell extraction of Prisoner X is that the Incident Description Reports prepared subsequent to the cell extraction by Senior Officer A and Senior Officer B, particularly that of Senior Officer A, do not seek to explain the use of Taser weapons in the way explained during the public examination on 11 April 2011. The Incident Description Report of Senior Officer A, for example, suggests that, at the time ESG officers entered the cell, Prisoner X was actively "rushing towards" those officers.

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<sup>153</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 12 April 2011, p.116.

*Once Officer [suppressed] was ready with the quick cut saw I updated the information of our method of entry to the team including the Hakea staff involved. The team positioned themselves [sic] and Officer [suppressed] proceeded to cut the door tongue. Once the door tongue was cut the door was opened and the team entered the cell. [Prisoner X (name suppressed)] rushed towards Officer [suppressed] who was the first Officer through the door. The items that [Prisoner X (name suppressed)] through [sic] were the remains of the restraint bed consisting of metal, this hit the shield Officer [suppressed] was holding. At this point I was able to get a clear line of sight and deployed the Taser. The Taser hit [Prisoner X (name suppressed)] however due to the range of deployment a small neuro-muscular incapacitation was gained, to ensure better neuro-muscular incapacitation Officer B deployed his Taser. Once the Taser's took effect [Prisoner X (name suppressed)] fell to the ground and obeyed my orders to comply. At this point restraints were applied to [Prisoner X (name suppressed)] and he was removed to the cell next door.*

- [312] In the Commission's assessment it is clear from Video footage of the cell extraction of Prisoner X on 2 August 2010 that he was not "rushing towards" ESG officers at the time that they entered the cell. Even allowing for misperceptions that are likely to occur when brief and intense incidents are recalled, such as the cell extraction of Prisoner X, in the view of the Commission Senior Officer A did not adequately explain the inclusion of inaccurate details and descriptions in his Incident Description Report. He explained as follows —

*At the point - when I wrote my report, I'm writing my report based on what I can recall that's happened in real time in fractions of seconds.*

*...*

*... So when I go and write my report, I see something coming towards me. I can only presume, Prisoner [X (name suppressed)] being the only person in the room, that's him coming towards me. I've since now seen in the video footage that what initially came towards us after the barricade was knocked down, was a mattress - a stretcher-sized mattress with the metal trim around the bottom of it.*

*But Senior Officer A, you did not say in your report that you saw something come towards you?---No, I saw - - -*

*You said - - -?---Yes - - -*

*- - - "Prisoner X rushed towards Prison Officer E who was the first officer - - -?---Yes.*

*...*

*... The last bit of information I had prior to going in that cell was he had a mattress in front of him with a shade [sic: shard] of glass in his hand. Now, if someone says to me he's got a mattress in front of him, and I'm looking*

*down here to belt, and as I come around I see that mattress come towards to me, what do you think I'm going to say, he was running away or he was coming towards me?*

...

*... I acknowledge, that looking at the video footage it wasn't in fact Prisoner X's body. It was the motion of him throwing that mattress away.*

...

*... Okay? So if I've got a mattress in front of me one and a half metres away from you, and as you come around a person and you're looking at his mid-section, that mattress comes towards you, at the time you write your report what are you going to say? He came towards me.*

*Yes?---And that's what I've said in there.*

*You haven't though. You've said Prisoner X rushed towards Prison Officer E who was the first officer through the door? ...*<sup>154</sup>

- [313] In the opinion of the Commission that part of the Incident Description Report prepared by Senior Officer A relating to the actions of Prisoner X at the time that ESG officers entered the cell was not prepared with sufficient care and that the descriptions of the reaction of Prisoner X at that time was exaggerated and incorrectly reported. However, the Commission considers that this is a matter for systemic improvement to be addressed by DCS but is not an issue of “misconduct”.

[314]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the use of Taser weapons on Prisoner X during a cell extraction on 2 August 2010 at Hakea Prison by ESG officers did not amount to the use of excessive force and that the Taser weapons were used “to control the situation or behaviour” (PD5) on “reasonable grounds ... to ensure that ... lawful orders are complied with” (section 14(1)(d) of the *Prisons Act 1981* (WA)), and does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

#### **4.4.1 Recommendation**

- [315] The Commission makes the following recommendation in relation to recording, reporting and review of, and preparation for, incidents involving the use of Taser weapons.

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<sup>154</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 11 April 2011, pp.86-94.

[316]

### **Recommendation 5**

That DCS review the shortcomings outlined in this report regarding video recording and reporting of incidents involving the use of force by ESG officers, and undertake appropriate action to address those shortcomings to ensure compliance with the requirements of *Prisons Policy Directive 5 — Use of Force* (PD5) in relation to the use of force and *Superintendent's Official Instruction A19 — Deployment of Taser* ("Instruction A19") in relation to the deployment of a Taser weapon by ESG and other authorised officers. The specific shortcomings set out in this report relate to the:

- failure to include in the video recording of the cell extraction of Mr Spratt on 6 September 2008 the "briefing of the cell extraction team and the operation of the cell extraction (including the mediation process)" as required by PD5 and Instruction A19; and
- inconsistencies between Incident Description Reports and Video footage in relation to the cell extractions of both Mr Spratt on 6 September 2008 and Prisoner X on 2 August 2010.

Further, in the view of the Commission the above specific shortcomings may be indicative of the need for broader systemic improvements that need to be addressed by DCS to ensure compliance with the requirements of PD5 and Instruction A19, particularly in relation to reporting and review of Incident Description Reports and Video footage, and recording of incidents and preparation for incidents involving the use of force by ESG and other authorised officers. The Commission is concerned that, if proper care and attention is not given to the preparation for deployment of Taser weapons and the subsequent accurate reporting of incidents involving the use of Taser weapons, the need to comply with relevant processes and procedures will in time be ignored.

It is recommended that DCS undertake appropriate action, including a systemic review of current applicable processes and procedures, to ensure compliance with the requirements of PD5 and Instruction A19.

[317] The Commission notes that DCS states in its section 86 representations in relation to Recommendation 5 that DCS note and accept "the recommendation of the Commission". However, DCS "wishes to reiterate that in the period of time since ... 2006 and the commencement of the Commission's investigation in 2010 ... Taser weapons have been deployed and discharged on only six (6) occasions ... [i]n addition, as the

Commission observed (refer [318]), Notice No. 48/2010 ... [was] issued [on 1 December 2010]". Notice No. 48/2010 outlines the protocols for "maintaining the integrity of Video footage and Taser-Cam recordings". The Commission is currently reviewing the approved use of force by the DCS ESG in relation to cell extractions, including the use of Taser weapons (and the basis upon which it is determined by DCS that a Taser weapon has/has not been deployed), in order to determine whether applicable DCS policies and procedures are adequate to prevent, manage and appropriately respond to incidences of misconduct. The Commission will report on the review in due course.

#### 4.5 DCS Review of Incidents Involving the Use of Force

[318] Since the incidents that occurred on 6 September 2008 and 2 August 2010 in relation to Mr Spratt and Prisoner X respectively, DCS have made changes to the process for the review and video recording of incidents involving the use of Taser weapons, and for subsequently securing Video footage of those incidents. The changes made by DCS to the process for the review and video recording of incidents involving the use of Taser weapons, and for subsequently securing Video footage of those incidents are detailed in the Assistant Commissioner Custodial Operations Notice No. 48/2010, entitled *Taser Deployments – Protocols*, issued on 1 December 2010.<sup>155</sup> These changes are —

- *In any future deployment, the "Taser-Cam" attachment must be used. (This is in addition to the mandatory Video recording of a planned use of force.)*
- *Following an incident where [a] Taser has been deployed the Video/DVD is to be immediately seized and secured in a DCS Evidence bag. The "Taser-Cams" are to be immediately downloaded onto a suitable medium and also secured into the Evidence bag. No other copies of the Video/DVD or "Taser-Cam" content are to be made unless authorised by the Assistant Commissioner Custodial Operations.*
- *Both the Video[/DVD] and the "Taser-cam" [content] are to be provided to the Director Security Services immediately following the resolution of the incident.*
- *The Director Security Services is to personally view the Video[/DVD] and "Taser-Cam" footage of all Taser deployments within 24 hours (ie next business day) of the incident.*
- *The Standards and Review Branch are [sic: is] to complete a review of all Taser deployment and usages within one week of the incident occurring.*

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<sup>155</sup> Assistant Commissioner Custodial Operations Notice No. 48/2010, *Taser Deployments – Protocols* of 1 December 2010 [CCC 0177].

[319] As evidence available to the Commission, resulting from a forensic examination undertaken by the Australian Federal Police, suggests that the Video footage of the cell extraction of Mr Spratt on 6 September 2008 at the PWH may have been “replayed and reviewed at some time before the recording of [that section of the footage which commences with arrival at Casuarina Prison]”,<sup>156</sup> it is open to question the integrity of that Video footage. The Commission considers that the changes made by DCS to ensure the integrity of Video footage of incidents involving the use of Taser weapons to be appropriate.

[320] In the opinion of the Commission a significant matter which emerged from its investigation is the need for a wholly independent review of incidents involving the use of a Taser weapon. It is apparent from the evidence of Superintendent James Anatoli Schilo during a public examination on 15 April 2011 that prior to the incidents involving Mr Spratt and Prisoner X use of force review reports remained, in effect, internal to the ESG and Operations. The extract below is from the transcript of that examination.

*So the events in question happened on Saturday 6 September and this report [Superintendent Emergency Support Group Report] was completed on Wednesday 10. Where does the report go?---It's sent to the superintendent operations for their review as well.*

*What is the purpose of the preparation of the report and it being sent to the superintendent of operations?---It's part of the process and also it advises head office executive, adult custodial executive, of the situation and that the review has taken place, so it's the circumstances of the use of force.*

*The preparation of a document such as this, is it provided to anybody else within the organisation other than the superintendent operations?---Outside the ESG you mean?*

*Yes?---Not to my knowledge, no.*<sup>157</sup>

[321] The requirement, resulting from Notice No. 48/2010 that the “Standards and Review Branch are [sic: is] to complete a review of all Taser deployment and usages” provides for independent assessment as part of the review process and, in the opinion of the Commission, is clearly necessary not only to provide for independent assessment but also for the review of incidents involving the use of force to be transparent.

[322] A final comment in relation to Notice No. 48/2010 relates to the timeline for review by the Standards and Review Branch and the consequent manner in which a review is likely to occur. Notice No. 48/2010 requires the “Standards and Review Branch ... to complete a review ... within one week of the incident occurring”. In the opinion of the Commission, the prescribed timeline of “within one week” would in normal circumstances be sufficient to undertake a review of the Incident Description Reports and

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<sup>156</sup> Australian Federal Police Forensic Analysis of 17 April 2011 [CCC 0880].

<sup>157</sup> Transcript of Proceedings, Public Examination of Superintendent James Anatoli Schilo on 15 April 2011, p.426.

Video footage. However, in the Commission's opinion there must be some flexibility in relation to the period in which the review must be concluded to ensure that in all circumstances the review is effective and efficient. If complicating factors prevent the review from occurring in accord with the prescribed timeline of "within one week", an extension should be permitted to ensure that the review process allows the reviewer to critically evaluate any written reports and Video footage and, if necessary, interview individual officers in relation to the use of force incidents.

#### 4.5.1 Recommendation

[323] Accordingly, the Commission makes the following recommendation in relation to the timeline for review, by the Standards and Review Branch, of incidents involving the use of Taser weapons.

[324]

##### **Recommendation 6**

That DCS reconsider the timeline for review, by the Standards and Review Branch, of incidents involving the use of Taser weapons where circumstances prevent the review from occurring "within one week of the incident" as presently prescribed by Notice No. 48/2010. DCS should, however, in all circumstances, ensure that the review process allows the reviewer to critically evaluate any written reports and Video footage and, if necessary, interview individual officers in relation to the use of force incidents, and prepare a review report.

Nonetheless, the review process should be both effective and efficient, including being completed without delay in order to ensure that the review is contemporaneous.

#### 4.6 DCS Training

[325] As part of its investigation the Commission sought documents relevant to DCS training and workplace assessments in relation to the use of force, including Taser weapons. As mentioned previously in this chapter, Instruction A19 details the standards and procedures required for the deployment of a Taser weapon, for example, in relation to application, cell extraction, assessment for competence, deployment approval, storage and issue and return, and stipulates that:

*[o]nly ESG Officers who have received training and have been assessed as competent in the use of the TASER will be directed to deploy the device in a "use of force" incident.*<sup>158</sup>

(original emphasis)

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<sup>158</sup> Superintendent's Official Instruction A19 — Deployment of Taser, p.1 [CCC 0784].

- [326] Once assessed as competent ESG officers are required to undertake requalification training and to be assessed as competent in the Taser Tactical (Requalification) Training Program, which includes a restraints and cell extraction requalification. The requalification is an ongoing requirement.

#### **4.6.1 Recommendation**

- [327] The Commission makes the following recommendation in relation to the DCS *Prisons Policy Directive 5 — Use of Force*.

##### **Recommendation 7**

That DCS give consideration to amending *Prisons Policy Directive 5 — Use of Force* to make it mandatory for officers to issue orders or instructions to the prisoner(s) concerned, allowing sufficient time for them to comply with the orders or instructions, use negotiation and conflict resolution techniques and issue a warning to the prisoner(s) that force may be used prior to the use of force against the prisoner(s).

- [328] The Commission investigation has shown that a number of DCS ESG officers have been attached to the ESG for a considerable period of time and there appears to be little opportunity for junior officers to achieve more senior positions or to contribute in any meaningful way to the development of training regimes and procedures. Specialist groups with irregular replacement of staff have the potential to develop stagnant and, in some cases, unhealthy cultures. The development of a sustainable process for rotating staff attached to specialist groups can be seen as a way of:

- creating opportunities for professional development;
- ensuring regular critical analysis of policy and procedures;
- ensuring that staff do not become so specialised that integration back into the normal prison environment is difficult; and
- reducing the opportunities for unhealthy cultures to develop within the group.

Staff turnover should, of course, be managed so that a sufficient number of staff with high level skills are retained at all times in order to provide adequate and necessary training for incoming members.

#### **4.6.2 Recommendation**

- [329] Accordingly, the Commission makes the following recommendation in relation to a tenure period for ESG officers.

##### **Recommendation 8**

It is recommended that DCS review the period of time that officers can be attached to the ESG and give consideration to the introduction of a tenure period for officers attached to the ESG.



## CHAPTER FIVE ASSOCIATED MATTERS

### 5.1 Timeline of Events (“the Timeline”) or Flow Chart

#### 5.1.1 Background

- [330] On 4 October 2010 the Commission tabled a report, and accompanying summary, in the Parliament entitled *The Use of Taser® Weapons by Western Australia Police*. The report contained a number of case studies involving the use of Taser weapons by WAPOL officers, one of which, Case Study Five, focused on the multiple use of Taser weapons on Mr Spratt (unidentified in the report) on 31 August 2008.
- [331] Subsequent to the release of the Commission report and WAPOL Fact Sheet or News Release there was extensive State and national, and indeed international, media coverage and public debate about the multiple use of Taser weapons on Mr Spratt as outlined in Case Study Five and depicted by the DVD which was attached to the report. Mr Spratt was identified by the media on 5 October 2010 as being the person who was the subject of Case Study Five.
- [332] On Monday 18 October 2010 the Commissioner of Police released a Timeline of Events (“the Timeline”) or Flow Chart to the media.<sup>159</sup> The Timeline was a chronicle of the interactions between Mr Spratt and WAPOL officers during the period 10 July and 31 August 2008 and resulted in heated public debate. *The West Australian* newspaper of 19 October 2010 attributed the following comments about the Timeline to a Member of Parliament:
- a “dirt sheet”; alleging that “they [WAPOL] have from day one sought to respond to the torture in the police lockup by publicly vilifying Mr Spratt”.

#### 5.1.2 Purpose of the Timeline

- [333] In response to a Notice to Produce a Statement of Information, pursuant to section 94 of the CCC Act, relating to the preparation of the Timeline the Commissioner of Police advised that the Timeline was released to the media:

*[i]n the interests of fairness and to provide a degree of balance to the national and international media interest generated by the East Perth Watch House footage, WA Police determined that it was important that the public had a full appreciation of Mr Spratt's actions earlier on the day of his arrest and what the officers involved understood about his past interactions with police.*

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<sup>159</sup> *Timeline of Events*, Kevin John Spratt, compiled by the WA Police Internal Affairs Unit, 18 October 2010 [CCC 1153].

*While the WA Police accepts that it will legitimately be the subject of criticism where its officers have acted inappropriately, it is entitled to take steps to ensure that the criticism is fair and balanced.*

(emphasis added)

- [334] The Commissioner of Police also advised that the Timeline was limited to Mr Spratt's most recent, and relevant, antecedents (between 10 July and 31 August 2008) and the extent of warnings on WAPOL computer systems relating to Mr Spratt was not disclosed on the Timeline.
- [335] During a public examination on 19 April 2011 the Commissioner of Police responded to questions by Counsel Assisting in relation to release of the Timeline, and said that the decision to release it was not taken "lightly" and stated that "there was a lot of misinformation in the public domain ... some of it deliberate, some of it not deliberate" and it "was necessary ... for me to preserve public confidence in the West Australia Police ... and it was then necessary to try and find a way of explaining fully the police interaction and what the police did ...", but it was not intended to be "an excuse for what happened to Mr Spratt ... I don't resile from that position ... [it] was wrong".<sup>160</sup>
- [336] The Commissioner of Police also stated that the Timeline had been "in existence long before" its release to the media on 18 October 2010 and that it had been prepared for internal use as an IAU "investigative tool ... to map out the process of an inquiry".<sup>161</sup>
- [337] This assertion was put to the IAU Intelligence Analyst who prepared the Timeline and was confirmed by him in his evidence.<sup>162</sup>
- [338] During an earlier public examination on 18 April 2011 Inspector Stingemore from IAU stated that it was his understanding that the Timeline had been prepared to "provide background ... [for] the WA police executive team" and he was not aware that it was intended for public release.<sup>163</sup>

### **5.1.3 Accuracy of the Timeline**

- [339] Public allegations were made that the Timeline contained several ambiguities or inaccuracies. On 17 February 2011 it was referred to in the Parliament, by a Member of the Legislative Assembly, as a "litany of lies". The alleged ambiguities or inaccuracies related to:
- charges of assaulting a public officer (two counts) and obstructing a public officer (two counts) emanating from incidents which occurred in

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<sup>160</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 19 April 2011, p.680.

<sup>161</sup> *Ibid*, p.670.

<sup>162</sup> Transcript of Proceedings, Public Examination of IAU Intelligence Analyst on 19 April 2011, p.622.

<sup>163</sup> Transcript of Proceedings, Public Examination of Inspector Seven Stingemore on 18 April 2011, p.506.

Bayswater and at the PWH on 31 August 2008 being referred to twice on the Timeline (once in relation to incidents in Bayswater and again in relation to incidents at the PWH), giving the impression that Mr Spratt had been charged with assaulting a public officer (four counts) and obstructing a public officer (four counts), when in fact assaulting a public officer (2 counts) and obstructing a public officer (1 count) related to incidents in Bayswater, with only the further single count of obstructing a public officer being related to incidents at the PWH;

- the entry which included the words that “[o]nce at PWH Spratt resisted violently, staff unable to subdue him”; and
- the entry which included reference to an email from an ALS Solicitor.

[340] During the 19 April 2011 public examination the Commissioner of Police in relation to the:

- first ambiguity or inaccuracy explained that “[i]t’s not meant to imply that he was charged with four of each of those charges ... all it does is it replicates it and so as you walk through the chart [the Timeline] ... you refer to that matter as you go from step to step”;
- second ambiguity or inaccuracy agreed that it “is ambiguous” but “purports to represent what happened on 31/8/2008”; and
- final ambiguity or inaccuracy explained that the “information [contained in an email from an ALS Solicitor of 25 February 2009 advising that Mr Spratt did not wish to pursue criminal charges against WAPOL officers] was conveyed to us under an ALS letterhead and purported to be on behalf of their senior counsel”.<sup>164</sup>

[341] The Commission investigation established that the email of 25 February 2009 was not sent on behalf of the Director of Legal Services, ALS, but had been sent by a paralegal who had not consulted with senior personnel prior to sending it. However, in the Commission’s assessment it was reasonable in the circumstances for the Commissioner of Police to accept that the email of 25 February 2009 was sent on behalf of the Director of Legal Services, ALS, and to, therefore, accept and interpret the contents of the email as being that Mr Spratt did not wish to make a formal complaint and the ALS was satisfied with that course of action.

[342] Inspector Stingemore stated that the Timeline had been edited to correct grammatical errors but the substantive content, obtained from source documents, remained unchanged. Inspector Stingemore acknowledged that any errors in source documents would have been carried through to the actual Timeline, as the IAU Intelligence Analyst responsible for preparation of the Timeline would have operated on the basis that the information contained in source documents was correct, unless he came

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<sup>164</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O’Callaghan, APM, Commissioner of Police, on 19 April 2011, pp.672-673.

to believe otherwise.<sup>165</sup> The IAU Intelligence Analyst, in response to a question from Counsel Assisting relating to this matter, stated:

*When you're conducting a task such as this, in preparing a chronology of events, to what extent are you required to go beneath the records themselves to determine the accuracy or otherwise of particular entries that are in the system?---Well, unless it's otherwise indicated to me or I myself develop some unease with the information that's contained therein, I would tend to rely on the information contained within the databases [source documents].*

*So in terms of your task of putting together the chronology, it's a matter of assembling the information which is there rather than investigating the information itself?---That's correct.*<sup>166</sup>

(emphasis added)

- [343] In the Commission's assessment it was reasonable for the IAU Intelligence Analyst to rely on the accuracy of source documents and to not investigate the accuracy of those documents when preparing the Timeline, unless he suspected otherwise. One of the source documents relied upon was the SMF completed by 1/C Constable Fowler, which contained false information in relation to the circumstances in which a Taser weapon was first deployed on Mr Spratt on 31 August 2008 (refer Chapter Three of this report). The IAU Intelligence Analyst did not suspect that the SMF contained false information and, therefore, saw no need to view the CCTV footage when preparing the Timeline. It is also important to note that when the IAU Intelligence Analyst prepared the Timeline it was only intended for internal use as an IAU "investigative tool ... to map out the process of an inquiry".<sup>167</sup>

#### **5.1.4 Release of the Timeline**

- [344] The *Police Manual* 2010 contains an administration policy, AD-40, relating to media and news services. Section AD-40.1 of that policy stipulates that "... a member shall not reveal information which ... may adversely affect current or future operation, investigation and/or prosecutions ..." and section AD-40.3 enables a duly authorised person to release information that "... expresses a personal opinion ... divulges any Police records (either criminal, traffic or warrants) ...".
- [345] Although the Commissioner of Police was authorised, pursuant to AD-40.3, to release the criminal history of Mr Spratt, it could be argued that the release of the Timeline was in breach of AD-40.1. However, as the Commission investigation of alleged public sector misconduct in relation to the use of Taser weapons on Mr Spratt had not commenced by

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<sup>165</sup> Transcript of Proceedings, Public Examination of Inspector Seven Stingemore on 18 April 2011, pp.510-511.

<sup>166</sup> Transcript of Proceedings, Public Examination of IAU Intelligence Analyst on 19 April 2011, p.624.

<sup>167</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 19 April 2011, p.670.

18 October 2010 (date of release of the Timeline), nor was there a current WAPOL operation, in the opinion of the Commission the argument cannot be reasonably sustained.

[346] The Commission accepts the evidence given by the Commissioner of Police that he released the Timeline to “preserve public confidence in the West Australia Police” as “there was a lot of misinformation in the public domain”, it was not intended to be “an excuse for what happened to Mr Spratt” and the decision to release it was not taken “lightly”. However, in the Commission’s assessment:

- the Timeline did contain inaccuracies or factual errors which should have been addressed and corrected prior to its release, the most obvious and concerning of which was reference to Mr Spratt’s violent resistance which both the Commissioner of Police and Inspector Stingemore should have known to be erroneous as they were familiar with the CCTV footage by October 2010 which clearly showed that Mr Spratt did not resist violently, and only forcibly resisted after a Taser weapon was first deployed on him; and
- it was not essential to commence the Timeline from 10 July 2008, as the focus was on the use of Taser weapons on Mr Spratt which did not occur until late August, but it is acknowledged that there was intense media and public interest in relation to Mr Spratt’s involvement with police during the period 28 July and 6 September 2008, and that, therefore, reference to incidents which occurred on 10 July 2008 provided context for later incidents.

[347]

#### **Commission Opinion as to Misconduct**

In the opinion of the Commission the release of the Timeline of Events on 18 October 2010 by the Commissioner of Police, Dr Karl Joseph O’Callaghan, APM, was in line with provisions of administration policy AD-40 of the *Police Manual* 2010 relating to media and news services and, although the Timeline contained errors, does not constitute either serious misconduct as defined by section 3 of the CCC Act or misconduct as defined by section 4 of the CCC Act.

## **5.2 Identification of Mr Spratt by the Media**

[348] The Commission report entitled *The Use of Taser<sup>®</sup> Weapons by Western Australia Police* tabled in the Parliament on 4 October 2010 did not in any way identify Mr Spratt, with facial images on that part of the accompanying Digital Video Disc (DVD) relating to Case Study Five<sup>168</sup> pixilated to ensure

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<sup>168</sup> Case Study Five focused on the multiple use of Taser weapons on Mr Spratt by Western Australia Police Officers at the Perth Watch House on 31 August 2008.

the anonymity of Mr Spratt. Although Mr Spratt initially claimed that his “identity [was] clearly visible to all” who viewed the DVD as it was not pixilated,<sup>169</sup> this claim was withdrawn on 12 April 2011.<sup>170</sup> However, the claim that Mr Spratt’s name had been “leaked” to the media was not withdrawn.

[349] Consequently, the question remains as to how Mr Spratt was identified by the media.

[350] In response to a Notice to Produce a Statement of Information, pursuant to section 94 of the CCC Act, relating to the identification of Mr Spratt by the media the Commissioner of Police advised that in:

*... the article published in “[T]he West Australian” on 6 October 2010, Mr Spratt is quoted as saying he “only realised he was the man in the brutal footage ... after being contacted by Channel Seven News yesterday” ... [but that he] ... has no knowledge of how Channel Seven (or any other media outlet) obtained the name of the detainee depicted in the East Perth Watch House footage.*

[351] The Commissioner of Police responded to questions by Counsel Assisting in relation to the identification of Mr Spratt by the media.

*Do I understand from that that to your knowledge no member of the WA Police was the source of Mr Spratt’s identity being known or found out by news media?---That’s correct.*

*And does that continue to be the case? ---*

*Yes, it does.*<sup>171</sup>

### **5.2.1 Conclusion**

[352] In conclusion, the investigation by the Commission could not determine who was responsible for “leaking” Mr Spratt’s name to the media, and it is the opinion of the Commission to use coercive powers, in this instance, in order to compel a journalist to reveal his/her confidential source would be inappropriate.

## **5.3 Injuries Incurred by Mr Spratt**

[353] The incidents which occurred on 6 September 2008 in Bayswater and at the PWH and Casuarina Prison, and on 7 September 2008 at Casuarina Prison and Royal Perth Hospital in relation to Mr Spratt have been set out in Chapter Two at [82]-[93].

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<sup>169</sup> Letter to “Executive Officer”, Crime and Corruption Commission [sic], of 18 October 2010 from Mr Kevin John Spratt [CCC 0175].

<sup>170</sup> Letter to Acting Commissioner Herron of 12 April 2011 from Mr Steven Penglis, Partner, Freehills [CCC 0176].

<sup>171</sup> Transcript of Proceedings, Public Examination of Dr Karl Joseph O’Callaghan, APM, Commissioner of Police, on 19 April 2011, pp.667.

- [354] Injuries incurred by Mr Spratt were ultimately diagnosed at Royal Perth Hospital on 7 September 2008, namely: a large left pneumothorax with associated collapse of the lung; fractures of the anterior end of the left sixth and possibly other ribs; and anterior dislocation of the shoulder.<sup>172</sup>
- [355] In the opinion of the Commission it is not possible to be precise about what event or person or persons caused these injuries or to suggest that a particular “blow” or use of force did so. However, there are a number of observations that can be made in relation to the injuries incurred by Mr Spratt.
- [356] First, there is no doubt that Mr Spratt sustained injuries. As aforementioned, they were diagnosed at Royal Perth Hospital on 7 September 2008 and confirmed by Medical Imaging (X-Ray).<sup>173</sup>
- [357] Secondly, it is highly unlikely that the injuries could have been sustained after Mr Spratt was in the care of nursing staff at Casuarina Prison on 6 September 2008. No event of any significance, capable of causing those injuries, occurred between that time and Mr Spratt’s transfer to Royal Perth Hospital.
- Indeed, CCTV footage of Mr Spratt’s arrival at the Infirmary within the Casuarina Prison Health Centre shows that, and the evidence of Registered Nurse Ms F at a public examination on 12 April 2011 was to the effect that, he complained of, amongst other things, an injury to his arm, which Ms F suspected was a broken arm.<sup>174</sup>
- [358] Thirdly, while possible, it is unlikely that Mr Spratt sustained the injuries on 6 September 2008 prior to the cell extraction by the DCS ESG, that is, while he was in the custody of WAPOL. Certainly, there were physical interactions between Mr Spratt and WAPOL officers on 6 September (including the incident in which an attempt was made to move him from the padded cell to another cell). Nevertheless, the evidence does not suggest that he was in particular pain or requiring medical attention while at the PWH prior to the cell extraction. Nor is there any evidence that the force of the physical interaction with WAPOL officers was consistent with the level of force necessary to cause the injuries suffered by Mr Spratt.
- [359] With regard to Mr Spratt’s medical condition whilst at the PWH on 6 September 2009 prior to the cell extraction by DCS ECG, Sergeant Nicholas Rowe, who was on duty at the PWH during the relevant period on 6 September, gave the following evidence.

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<sup>172</sup> Royal Perth Hospital, Medical Imaging (X-ray) Report, 7 September 2008, Mr Kevin John Spratt [CCC 1172].

<sup>173</sup> *Ibid.*

<sup>174</sup> Transcript of Proceedings, Public Examination of Ms F on 12 April 2011, p.162. Ms F was in attendance at the time of Mr Spratt’s arrival at the Infirmary.

Right. The occurrence book itself is a separate document which is maintained in relation to prisoners who are in the watch-house?---That's correct.

... [there are] a series of entries [made as a result of routine checks] from 10.30 down to 1400 where there are various recordings of what Mr Spratt is doing at the particular times ...

...

I take it during all of that period ... you remained the officer in charge of the shift?---Sergeant Bell was there for some period of that time so - but I would say between the two of us we take responsibility, but when Sergeant Bell went to get medical help, I'm not sure of the exact timing for that, but I would have, yeah, been in charge. When he was injured he would have gone off to clean himself and I would have effectively taken over if there was any issues.

During the entire time that you were either in charge or the second in charge at that shift, did you observe any injuries on Mr Spratt?---Only from the original - when he was put into the cell and he had - either lips or nose was bleeding from the incident with Constable Turner. After that initial when he was put into the cell we actually had no physical contact with him, so no, it was only the blood, which he did have some blood on him from his lip or nose which - that was it, that was the only injury observed.

In terms of the subsequent checks that were made after that which were all presumably made after 10.30 because 10.19 is when that incident [attempt to move Mr Spratt from the padded cell to another cell] occurred, was there any observation made of him in the observations that he had suffered any other injury to his body other than the bleeding that you have identified at his lip?---No.

Was there any complaint made by him that he had suffered or he was suffering significant pain to any part of his body?---No, I mean, not to my knowledge, I didn't hear it, it wasn't recorded, and given his behaviour on the day, both from my recollection, reading on the running sheet, he was punching the wall, being aggressive, yelling and screaming for some considerable time, so sort of gave us an idea that he was fine and fit and still ready to fight, as it were, hence the action that we took.

Was there any indication reported to you or that you observed that he was complaining of an injury to either his arms or his shoulders?---No.

If that kind of injury was observed or if a person was complaining of injury to their arm or their shoulder, what would be the practice to be taken in relation to how that's recorded and how that is responded to?---If there's a complaint of an injury or seeking medical assistance, that would get recorded on the running sheet. A supervisor, be it the cell supervisor or the shift OIC, would assess the situation and also make an assessment. Given if you have a violent prisoner in a cell that has an injury you would then assess what attention or medical attention you would give them, be it you would call a doctor, which we have, to the watch-house, or you convey them in a police vehicle or you call an ambulance, so that assessment would be made, regardless medical attention if it was needed would be given.



Was anything of that nature [medical attention] requested or observed to be needed in relation to Mr Spratt while he was in the cell at the Perth watch-house on that morning - - -?---No.

- - - and into the afternoon?

Sorry, you - - -?---No. No.

(emphasis added)<sup>175</sup>

- [360] All evidence available to the Commission in relation to incidents which occurred at the PWH on 6 September 2008 was examined by the Commission during its investigation, and none suggest that any significant injuries were incurred by Mr Spratt during his time at the PWH on that day.
- [361] Fourthly, the medical evidence that was given to the Commission, while not conclusively establishing that the DCS ESG cell extraction was the cause of Mr Spratt's injuries, was certainly consistent with it being a cause. That is, the evidence supports the conclusion that the use of force, or control tactics employed during the cell extraction were capable of causing the injuries sustained by Mr Spratt.
- [362] This assessment by the Commission was supported by Dr K during evidence given at a public examination on 13 April 2011.<sup>176</sup>

*And dislocation of the shoulder, if you could just briefly explain how that comes about and what it involves?---Well, dislocation of the shoulder is essentially a situation where the humerus, which connects to the shoulder, gets displaced from its socket. The injury usually comes about from some type of force, usually from falling down or from a sudden movement. Essentially that would be it, I think.*

*What degree of force - what is the mechanism by which force causes the shoulder to dislocate?---It would be a sudden movement of the upper arm to be forceful enough to dislocate that bone from the socket.*

*How much force is required in order to do that?---It should be quite excessive, an extensive amount of force.*

*There's also a reference to the chest pneumothorax. What is a chest pneumothorax?---A pneumothorax is when air is present in the chest wall, specifically between the pleural spaces of the chest. There are different types of pneumothorax. You can have a primary pneumothorax where it could happen where the air gets into the chest wall for no apparent reason. You could have secondary causes of pneumothorax where it happens because of a particular condition or disease state.*

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<sup>175</sup> Transcript of Proceedings, Public Examination of Sergeant Nicholas Rowe on 11 April 2011, pp.30-31.

<sup>176</sup> Dr K was the on-call doctor contacted by Registered Nurses from the Casuarina Prison Infirmary on 6 and 7 September 2008 in relation to Mr Spratt's medical condition.

*The particular features that are described here provide more detail in relation to the details that appear on the emergency summary which you were provided with. Would you agree with that?---Yes.*

*In the particular case here in relation to the chest, the "AP", what's that a reference to?---Anterior, posterior. So it's a description of how the x-ray was taken.*

*Then it says, "A large left pneumothorax is present with associated collapse of the lung"?---Yes.*

*Can you just describe - you have given evidence that a pneumothorax may be present for a number of reasons. This is indicating it's present with associated collapse of the lung. Can you assist us with understanding the process that that's describing and what brings that about?---Well, a large left pneumothorax basically means that there is a large amount of air that has displaced where the lung would normally reside in the chest, and so therefore the lung has collapsed or has gotten smaller because of this airspace within the chest wall.*

*Do I take it that ordinarily within the chest, the lung fills the chest cavity?---That's correct.*

*...*

*A large pneumothorax means a lot of air has got between where the lung is and the chest cavity?---That's correct.*

*And there's an associated collapse of the lung which means that the lung has, in proportion to the amount of air that's in that chest cavity, been displaced?---That's right.*

*Then it says, "Fractures of the anterior and of the sixth and possibly other ribs are present, and lateral chest wall surgical emphysema." What are the references to the "fractures of the anterior end of the left sixth and possibly other ribs are present" describing, and what does that indicate in relation to the presence of a large pneumothorax and collapse of the lung?---Well, the fractures obviously are broken ribs that the report indicates, broken rib in the left sixth and possibly other ribs, so it could be more than one rib. In relation to the pneumothorax, it could be related. He could have sustained an injury to his chest wall that impacted his - that broke his ribs and may have caused the pneumothorax.*

*You referred to an impact, so I take it that's a traumatic injury?---Yes.*

*...*

*A comminuted fracture is one where the damage to the bone causes fragments of it to break off from the rest of the bone?---That's right.*

*Generally what kinds of causes give rise to a comminuted fracture?---It could be the same causes as a simple fracture, so a fall, a blow to the shoulder, essentially trauma really.*

*Yes. Is there anything you can say as to the extent of force or the extent of the blow which would be necessary to produce a comminuted fracture*

*particularly in circumstances where there has been an anterior dislocation of the shoulder as well?---I'm just wondering, is it possible that perhaps [because] of the dislocation he could have pieces of bone being pulled off [sic: off] because of the dislocation, compared to versus a fall or a blow to the shoulder.*

*So that the force that has given rise to the dislocation, the force to the back, I think you described, with an anterior dislocation - - -?---Yeah.*

*- - - could be the same force giving rise to the bone fragments breaking off?---Right. Just to clarify, the dislocation to the shoulder could happen from not just the blow to the back but it could happen from even swinging one's arm or - extensively or excessively, and may be such an impact that it could actually dislocate his shoulder. So it can happen in different circumstances.*

*In circumstances if a person is in restraints, and you have described earlier in one of the reports being in level one restraints, that kind of injury that's described there, if a person was in restraints with their arms being down around in the way I'm holding it now, around the mid-section - - -?---Yes.*

*- - - would it be possible - or how easy would it be to cause injuries such as that, for example, by pushing oneself against - - -?---It's possible.*

*It's possible?---Yes.*

*How forceful would you have to do that in order to produce that?---Pretty forceful, I would think.<sup>177</sup>*

- [363] Dr Jillian Lee<sup>178</sup> also gave evidence during the public examination on 13 April 2011, which was to similar effect to evidence given by Dr K in relation to the potential causes of injuries incurred by Mr Spratt. Dr Lee also gave evidence that it would be unlikely that a patient would have these injuries and not exhibit pain for a number of hours. She explained —

*... Do I take it that other than obviously the catheter that you observed once you got there, there wasn't an obvious source of air going into the pleural cavity. The more likelihood in this case was air was coming from the lung?--Yes.*

*Is that why you have said it's associated with the rib fractures?---Yes.*

*How, in effect, does that happen? How does the rib fracture create the pneumothorax?---If rib fractures occur and they are a bit displaced, the ends of it are very jagged; you know, splintered bone is very, very sharp, and that can sometimes breach the lining of the chest cavity, and then you've got this sharp bit sticking into where the lung is. Then as you breathe your lung moves as it expands and collapses and so you have this nice sharp thing sticking out and the lung is going to move up and down on it, and the lungs are fairly fragile to getting damaged, and so it's easy to*

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<sup>177</sup> Transcript of Proceedings, Public Examination of Dr K on 13 April 2011, pp.243-249.

<sup>178</sup> Dr Jillian Lee was a Medical Registrar, Cardiothoracics Department, Royal Perth Hospital (RPH), who examined Mr Spratt at RPH.

*cause a tear in them, which is usually what happens when you have a fractured rib causing a pneumothorax.*

*So the fractured rib creates sharpened areas of bone which in turn causes the lung tissue itself to be damaged?---Yes.*

*In effect to open it to the lung cavity and allow air to get out?---Exactly.*

*The presence of the pneumothorax and at least two rib fractures that you were able to observe led to the conclusion that that was the cause in this particular case?---Yes.*

*In relation to the observations that you were able to make, including the general observations as to the patient's other vital signs, is it possible to make any accurate assessment of how long the patient had that particular injury for?---Not based on the information I had. It's a pretty painful thing to have fractured ribs and a collapsed lung, so he's not likely to have been walking around with it for a long time without seeking medical attention, even if he hated hospitals or something. He would still be in a lot of pain.*

*And in this patient as well you can see there, which is perhaps not directly your concern as a cardiothoracic registrar, but in addition this patient had a dislocated shoulder and a comminuted fracture of the head of the humerus. Both of those conditions would be painful?---Yes, definitely.*

*So in terms of timing, determining when they are likely to have arisen, you would expect that there would be signs of pain coinciding with when the injuries had occurred?---Yes, definitely.*

*It's unlikely, for example, that the patient had these injuries and was not exhibiting significant pain for hours at a time?---No, and with the shoulder he probably wouldn't have been able to move his arm very much, so he would have been well aware that there was an injury there.*

*In terms of the fractured rib associated with or causing a pneumothorax such as this, what kinds of trauma can give rise to those particular injuries?---It varies depending on the patient. I mean, little old ladies who have really weakened bones, they can easily cause a fractured rib from quite minor trauma, sort of falling over onto the floor or having a particularly severe coughing fit will sometimes be enough, but in a young person of his age you would need a reasonable amount of force, you know, things like car accidents, being in a sporting incident, footballers and that kind of thing, a reasonable amount of force.*

*Would that similarly be the case in a person of this age in relation to the injuries that are described to the shoulder and the humerus?---Yes. Unless he was someone who had had an unstable shoulder with previous dislocations, it does take a fair bit of force to dislocate someone's shoulder.<sup>179</sup>*

- [364] This evidence given by Dr Lee in relation to timing further supports the conclusion that Mr Spratt had not incurred the serious injuries, outlined earlier in this section of the report, while he was at the PWH in the custody of WAPOL.

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<sup>179</sup> Transcript of Proceedings, Public Examination of Dr Jillian Lee on 13 April 2011, pp.274-276.

- [365] Similarly, in the opinion of the Commission, it is unlikely that, given the nature of the injuries, the injuries could have been incurred during the journey from the PWH to Casuarina Prison on 6 September 2008 when he was being conveyed in a DCS escort vehicle.
- [366] While there was some evidence from Senior Officer B,<sup>180</sup> given during a public examination on 12 April 2011, to the effect that Mr Spratt was “throwing himself around the van”, it is clear that Senior Officer B did not observe those events or consider that anything that was occurring in the back of the van was likely to cause Mr Spratt significant harm. He gave evidence as follows —

*I just have one more thing I want to ask you about, Senior Officer B, and that is, yesterday you gave some evidence in relation to the trip back involving Mr Spratt now - I'm sorry to jump around a little - the trip back in the vehicle when you said you were in the front seat and it was reported to you that Spratt was, to use your words I think throwing himself around in the back of the van?---Yes.*

*I'm not sure if I asked you yesterday: do you remember - I think you said there were two or three people in the back?---I'm not sure - - -*

*Do you remember who any of the officers were who were in the vehicle with you?---No, I don't. I do remember the driver, obviously, Mr Curtis, and myself but I didn't put it in my report. It was in the back of the vehicle, so no, I don't recall.*

*Is it required as part of your procedures that the prisoner be viewed at all times in the back of the van?---We do view them at all times, yes, so I have had to - if we've got to get out and make a movement, someone will keep the auxiliary power on and some will stay in the back and watch while, say, we're doing a changeover of weapons, so we do view the prisoners at all times.*

*If a prisoner is behaving in the back of the van in a manner which might harm themselves - and I take it the prisoners are only transported in these vans one at a time, that is, one per - - -?---It depends on the circumstances.*

*But on this particular occasion when there's one prisoner in the back of the van, are there procedures in relation to the circumstances in which you should stop the van and deal with what the prisoner is doing?---Definitely. If the prisoner, say, had a ligature of some sort, was trying it around his neck or manipulating his cuffs or restraints at some point where he's causing himself serious harm, then, yes, I would stop the van and then we would reconfigure the restraints somehow or I might put him in the front of the vehicle with us and have him sit either side of us to prevent injury. There's a range of options and scenarios I could use for that.*

*In relation to what was being reported to you concerning Mr Spratt's transfer from the Perth watch-house to Casuarina Prison was the behaviour being reported to you, in the back of the van, such that you thought he was*

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<sup>180</sup> Senior Officer B was one of the DCS ESG Officers who assisted with the cell extraction at PWH and the transfer of Mr Spratt from the PWH to Casuarina Prison on 6 September 2008.

*at risk of harming himself?---No, not at all. Obviously by the vision you can see I have put an interconnecting chain on as well. That to me was to prevent any further escalation of maybe manipulating the restraints or getting a ligature of some sort and causing some harm to himself, so I was quietly confident that he could not harm himself to the point where that would occur. I mean, he could be tossing himself or throwing, as I said, himself around the back of the van, but he's not going to cause himself significant injuries, I believe, at that time for 30 minutes travelling to Casuarina.*<sup>181</sup>

- [367] Senior Officer A<sup>182</sup> gave evidence during a public examination on 17 December 2010 that there was no activity by Mr Spratt in the back of the DCS escort vehicle (van) capable of causing an injury. He said —

**THE COMMISSIONER:** *You were in the back of the van with him, were you?---No, we have monitors in the cabins that - - -*

*I see. In any event, I guess my question really is were you actually able to see what he was doing on the way back?---The whole time, on the monitors. We're viewing him, and that's part of our procedures.*

*Yes?---The moment we put them in the back, we start the vehicle and somebody looks at them on the camera, and they do so until we remove them.*

**QUINLAN, MR:** *Did you observe on the way back him doing anything with parts of his body that could have caused injuries to his upper body?---No.*

*No? So you didn't see him throwing himself about inside the back of the van?---No.*

*Nothing of that nature occurred?---No.*<sup>183</sup>

- [368] This evidence was later clarified by Senior Officer A in evidence given at a public examination on 11 April 2011.

*Do you remember whether or not you were viewing him, that is, Mr Spratt, on this occasion or was it being reported to you?---As I said, I can't recall exactly where I was sitting in the vehicle. If I was sitting in the front the staff in the back would be telling me and I would always anyway, regardless of whether it was Mr Spratt, be looking over myself. The first thing you do when you start the vehicle up is ask, "Have you got a good picture?" and if for whatever reason we haven't, then we try to get it working because on occasion they haven't been working. Occasionally we've had to make a phone call on the run to TSU to tell them that they're not working. They will talk us through getting them going, so again I'm really not certain where I was sitting. I'm confident though that there would have been somebody looking at him all the time. Who that is in the team I'm not really sure, and*

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<sup>181</sup> Transcript of Proceedings, Public Examination of Senior Officer B on 12 April 2011, pp.123-124.

<sup>182</sup> Senior Officer A was one of the DCS ESG Officers who assisted with the cell extraction at PWH and the transfer of Mr Spratt from the PWH to Casuarina Prison on 6 September 2008.

<sup>183</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 17 December 2010, p.760.

*did that change along the way, the cameras getting moved? Yeah, quite possible, with the monitors getting moved.*

*You now can't recall precisely whether or not it was you observing it or somebody else observing and reporting to you?---I wouldn't have been observing it the whole way, no, not being the senior officer.<sup>184</sup>*

- [369] The above accounts by Senior Officer B and Senior Officer A, in the opinion of the Commission, clearly support the inference that Mr Spratt's injuries were not incurred *en route* to Casuarina Prison from the PWH on 6 September 2008.

### **5.3.1 Conclusion**

- [370] In conclusion, by necessary inference, including inferences based upon exclusion of periods of time during which injuries may have been incurred by Mr Spratt, the inferences in favour of the broad conclusions set out in this report in relation to those injuries ultimately diagnosed at Royal Perth Hospital on 7 September 2008, in the opinion of the Commission, are strong. In summary, these broad conclusions are that those injuries were probably caused:

- on 6 September 2008;
- while in the custody of the DCS ESG officers; and
- between the time that the cell door was opened at the PWH and prior to his being placed in the DCS escort vehicle which took Mr Spratt from the PWH to Casuarina Prison, that is, that the injuries are likely to have arisen during the cell extraction by DCS ESG officers at the PWH on 6 September 2008.

However, precisely when, during the course of the cell extraction, by whom and precisely how that might have occurred it is not possible to determine.

## **5.4 Quality of Nursing and Medical Care Provided to Mr Spratt in the Infirmary at Casuarina Prison**

- [371] Matters relating to the nursing and medical care provided to Mr Spratt in the Infirmary located within the Casuarina Prison Health Centre on 6 and 7 September 2008 have been set out in Chapter Two at [89]-[93].
- [372] With the benefit of hindsight, particularly in light of the injuries from which Mr Spratt was suffering, that is, those ultimately diagnosed at Royal Perth Hospital on 7 September 2008, in the opinion of the Commission it would certainly have been better if Mr Spratt had been examined by a medical practitioner on 6 September 2008 rather than on the morning of 7 September, as in fact occurred. It would also have been better if Mr Spratt

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<sup>184</sup> Transcript of Proceedings, Public Examination of Senior Officer A on 11 April 2011, p.60.

had undergone a Medical Imaging (X-ray) procedure on 6 September 2008, rather than on the afternoon of 7 September, as in fact occurred at Royal Perth Hospital.

[373] However, in the opinion of the Commission the nursing and medical care provided to Mr Spratt in the Casuarina Infirmary cannot properly, in the circumstances, be the subject of criticism. Taking into account the, apparently, developing nature of Mr Spratt's symptoms (which had worsened by early morning on 7 September 2008), his nursing and medical care was reasonable, but perhaps not optimal (given that it would have been better if Mr Spratt had been examined by a medical practitioner and had undergone a Medical imaging procedure on the day of arrival at Casuarina Prison). Indeed, the available CCTV footage of Mr Spratt's arrival at Casuarina Prison provides evidence that the nursing staff were both caring and genuinely concerned for Mr Spratt's well-being.

[374] Nonetheless, there appears to have been an apparent lack of understanding about the extent to which X-ray and radiography services could be accessed by nursing and medical staff at Casuarina Infirmary on weekends. Ms F a Registered Nurse who was in attendance at the time of Mr Spratt's arrival at the Infirmary noted that "Kevin ... will need an Xray to rule # out ... Area Manager advised of same ... Clinical Nurse also advised of same ... unable to have/get Xray done today [Saturday]".<sup>185</sup> Evidence given by Dr K during a public examination on 13 April 2011 provides further evidence of this lack of understanding.

**COUNSEL ASSISTING:** *I just do now have one matter arising ... Dr K ... I don't know whether you're aware of this so I want to show you a document that suggests, at least, that to some extent there were arrangements made with the radiographer on occasion for the radiographer to come in on weekends to perform x-rays by way of a radiography service, and we have here an invoice, for example, from the radiographer who had a locum ... at the time. Did you know a radiographer who performed locum services ...?--Not that I'm aware of, no.*

*This [document] indicates, at least, that there had been radiography services provided for Casuarina Prison on 9 August 2008, a month before this date, and 13 September 2008, the week after, on Saturdays. Were you aware of the potential for those services to be engaged on a Saturday?---No, I was not aware.*

*That wasn't something which was brought to your attention as an option that might be available as part of any consultation process that you might be going through with the nurses?---No, I was not aware of that.*<sup>186</sup>

[375] Certainly, the evidence available to the Commission and as shown to Dr K during the public examination on 13 April 2011 suggests that Radiography

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<sup>185</sup> Department of Corrective Services, Health Services, Casualty Report and Progress Notes, Mr Kevin John Spratt [CCC 0893].

<sup>186</sup> Transcript of Proceedings, Public Examination of Dr K on 13 April 2011, pp.258-259.



Services would have been available upon request and had, in fact, been accessed in the months surrounding 6 September 2008.<sup>187</sup>

- [376] Clearly it is imperative that nursing and medical staff in any institution are aware of the availability of a particular service (or avenue for investigation) that would assist in determining the cause(s) of a patient's complaint(s). In this case there needed to be an understanding by nursing and medical staff at Casuarina Prison Infirmary that Radiography Services were available on a Saturday or Sunday, if required. However, in the opinion of the Commission this is a matter for systemic improvement to be addressed by DCS and is not matter of "misconduct".

#### **5.4.1 Recommendation**

- [377] Accordingly, the Commission makes the following recommendation in relation to the operation of the Infirmary within the Casuarina Prison Health Centre.

[378]

#### **Recommendation 9**

That DCS review internal processes and procedures relating to the operation of the Infirmary within the Casuarina Prison Health Centre, and infirmaries within other prisons, with respect to the assessment of a patient's medical condition and the provision and availability of services or avenues for investigation that would assist with the timely and accurate determination of the cause(s) of a patient's complaints, thereby facilitating the provision of appropriate and adequate nursing and medical care.

## **5.5 Conviction of Mr Spratt Set Aside on 24 February 2011**

### **5.5.1 Background**

- [379] As a result of incidents which occurred on 31 August 2008 as set out in this report, Mr Spratt was charged with the following offences:

- (1) one count of Assault a Public Officer (1/C Constable Brett Andrew Fowler), section 318(1)(d) of *The Criminal Code* (Charge No. 52505 of 2008);
- (2) one count of Assault a Public Officer (Senior Constable Aaron Grant Strahan), section 318(1)(d) of *The Criminal Code* (Charge No. 52506 of 2008);

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<sup>187</sup> Email of 11 February 2011 to the Corruption and Crime Commission from Medical Radiographer providing Radiography Services to Casuarina Prison [CCC 0817] and Tax Invoice from that Medical Radiographer for Radiography Services rendered on Saturday 9 August 2008 and Saturday 13 September 2008 at Casuarina Prison [CCC 1144].

- (3) one count of Obstruct a Public Officer, section 172(2) of *The Criminal Code*, arising out of conduct occurring at Bayswater (Charge No. 52507 of 2008); and
- (4) one count of Obstruct a Public Officer, section 172(2) of *The Criminal Code*, arising out of conduct occurring at the PWH (Charge No. 52508 of 2008).

[380] On 1 December 2008 Mr Spratt appeared in the Perth Magistrates Court on a number of charges. One of those charges was Obstruct a Public Officer (Charge No. 52508 of 2008), which was based on the presentation of the SMF as prepared by 1/C Constable Fowler.<sup>188</sup> Mr Spratt pleaded guilty to that charge and on 30 January 2009 a conviction of Obstruct a Public Officer was recorded. Mr Spratt was represented by the ALS.

### 5.5.2 Conviction of Mr Spratt

[381] At the time Mr Spratt pleaded guilty to the charge of Obstruct a Public Officer (Charge 52508 of 2008) he had no recollection of the incident. Mr Spratt gave evidence during a private examination on 9 December 2010 that he had no recollection of any of the events which had given rise to the offences with which he had been charged, that is, events which occurred on 30 and 31 August 2008 and 6 September 2008.

*... the day I went to - my lawyer - my lawyer come out and seen me before my court date and he like - we talked about all my charges and all that and he asked if I could remember any of my charges and I couldn't remember none of them.*

*Yes?---And he - and he just asked me what was I prepared to do and I said I was going to plead guilty to all of them. And the actual day when I went to court, all I just said was just, "Guilty, guilty, guilty," to all the charges.*

...

*Right?---To all of them. And when I went there for sentencing and I just like pleaded guilty again to all the charges.*<sup>189</sup>

[382] Mr Spratt gave similar evidence during a public examination on 13 December 2010.

*Just tell us how it came about that you pleaded guilty to the charges that you pleaded guilty to ... I had no recollection of them, so I knew I couldn't fight them so I just pleaded guilty.*<sup>190</sup>

[383] As a consequence of pleading guilty to the charge of Obstruct a Public Officer (Charge 52508 of 2008) Mr Spratt was sentenced to imprisonment for two months, to be served concurrently with other terms of

<sup>188</sup> The preparation of the Statement of Material Facts by 1/C Constable Fowler has been considered in detail in Chapter Three of this report and in an earlier section of this chapter of the report.

<sup>189</sup> Transcript of Proceedings, Private Examination on 9 December 2010 of Mr Kevin John Spratt, pp.14-15.

<sup>190</sup> Transcript of Proceedings, Public Examination on 13 December 2010 of Mr Kevin Spratt, p.103.

imprisonment imposed for other offences, totalling imprisonment for 18 months. The period of incarceration was backdated to 6 September 2008. Mr Spratt was released from prison on the 22 April 2010.

### 5.5.3 Conviction of Mr Spratt Set Aside

[384] On 24 February 2011 Mr Spratt appeared in the Supreme Court of Western Australia, before the Hon. Justice Hall, in relation to an application to have the charge of Obstruct a Public Officer (Charge 52508 of 2008) overturned. He was represented by Freehills, Perth. The appeal was allowed. The judgment is reported as case citation Spratt -v- Fowler [2011] WASC 52. Justice Hall found that the basis for the conviction was false and that Mr Spratt could not in law have been convicted of the offence on the basis of the facts.

[385] At [2] he said —

*... on 31 August 2008 Mr Spratt was arrested and taken to the watch house in East Perth. He was intoxicated at the time. He recalls staggering around on arrival at the watch house but otherwise has very little memory of what occurred ...*

At [3] he said —

*Mr Spratt's memory of the events was no better when he appeared in the Magistrates Court on 30 January 2009.<sup>191</sup> On that day he pleaded guilty to all of the charges, including the obstruction at the watch house. He says in his affidavit that he pleaded guilty to that charge because he accepted that what was alleged must be correct ...*

At [4] he said —

*Those alleged facts were not correct ...*

At [5] he said —

*... It is plain that he pleaded guilty on a false basis; that is, that he accepted the truth of what was alleged, not having available any recollection or evidence to suggest that it was wrong.*

At [6] he said —

*The inconsistency between the allegations and the CCTV footage was publicly exposed in December of last year. That enabled Mr Spratt to appreciate the false basis of the conviction. He was then able, with the benefit of legal advice, to bring this appeal and that accounts for the delay.*

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<sup>191</sup> Mr Kevin John Spratt pleaded guilty to all charges on 1 December 2008, The conviction on Charge No. 52508 of 2008, i.e., Obstruct a Public Officer arising out of conduct occurring at the Perth Watch House on 31 August 2008, was recorded on 30 January 2009.

At [9] he said —

*... it is clear that Mr Spratt's plea of guilty was induced by the false allegations made by the prosecution. On the real facts, as now known, he could not lawfully have been convicted of the offence. In those circumstances, I am satisfied that there has been a miscarriage of justice.*

At [10] he said —

*The orders of the court are that ... leave to appeal is granted on the ground that there has been a miscarriage of justice; the ground of appeal is allowed; the conviction is quashed and a verdict of not guilty is substituted.*

#### **5.5.4 Conclusion**

[386] As considered earlier in this report (refer Footnote 188), 1/C Constable Fowler prepared the SMF which contained false information about the incidents which occurred at the PWH on 31 August 2008 resulting in the additional charge of Obstruct a Public Officer recorded on 30 January 2009, but set aside on 24 February 2011 by Justice Hall, as the basis for the conviction was false. However, the Commission has no evidence to suggest that 1/C Constable Fowler knew that the information was false at the time that he prepared the SMF, although the Commission has determined that the SMF was inaccurate in relation to those incidents and surrounding circumstances.

[387] Nonetheless, the Commission notes that Mr Spratt did not plead guilty to the additional charge of Obstruct a Public Officer until 1 December 2008. If the evidence given by 1/C Constable Fowler during a public examination on 15 December 2010 is accepted (that is, that he realised on 25 September 2008 that the SMF was “inaccurate” and asked IAU investigators if he “needed to go and either amend ... [it] or do something with it”), there would have been ample time to amend the SMF, or indeed withdraw the charge, either prior to 1 December 2008 or 30 January 2009 (the date upon which the additional charge of Obstruct a Public Officer was recorded), and thereby prevent a miscarriage of justice.

### **5.6 Recent Events**

[388] Since the conduct of the private and public examinations in 2010 and 2011 Mr Spratt has been charged with a number of offences in relation to incidents which occurred during the evening of 25 August 2011 in Thornlie pursuant to sections 74A(2)(a), 317A(c), 338B(a) and 444(1)(b) of *The Criminal Code*, and sections 60(1), 53(1)(b) and 55(1) of the *Road Traffic Act 1974*. These include:

- Disorderly Behaviour in Public;
- Assault with Intent to Prevent Arrest of a Person;

- Threaten to Kill;
- Criminal Damage (x4);
- Reckless Driving;
- Fail to Stop when Called Upon; and
- Driver Fail to Stop (Property) (x2).

In addition, Mr Spratt has been charged with Breach of Bail Undertaking pursuant to section 51(1) of the *Bail Act 1982*, as he failed to appear at the Perth Magistrates Court at 10:00 a.m. on 25 August 2011.

[389] The Commission has been advised that the “charges against” Mr Spratt “were substantially downgraded”. These downgraded charges were detailed in an Amended Statement of Material Facts as outlined below.<sup>192</sup>

- Criminal Damage, Charge No. 42447/11, at 9:15 p.m. on 25 August 2011, Spencer Village Shopping Centre, Thornlie, Western Australia.
- Disorderly Behaviour in Public, Charge No. 40402/11, at 9:20 p.m. on 25 August 2011, Caltex Service Station, Thornlie, Western Australia.
- Threat to Endanger (amended from Threat to Kill), Charge No. 40397/11, on 25 August 2011, Caltex Service Station, Thornlie, Western Australia.
- Reckless Driving, Charge No. 04393/11, Fail to Stop when Called Upon, Charge No. 40394/11, and Driver Fail to Stop (Property), Charge No. 40395/11 and 40396/11, on 25 August 2011, Thornlie, Western Australia.
- Criminal Damage, Charge No. 40399/11, Charge No. 40400/11 and Charge No. 40401/11, on 25 August 2011, Caltex Service Station, Thornlie, Western Australia.

[390] In addition to the above, Mr Spratt has also been charged with Assault a Public Officer on 31 August 2011, Hakea Prison, Canning Vale, Western Australia. Mr Spratt pleaded guilty to that charge and was given the mandatory minimum sentence of six months (to be served concurrently).

[391] On Mr Spratt’s plea he was sentenced on 2 March 2012 to imprisonment for a total period of 12 months with parole, backdated to 25 August 2011. There were no orders made for compensation.

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<sup>192</sup> Letter to Acting Commissioner Herron of 6 March 2012 from Mr Steven Penglis, Partner, Freehills, with attached Amended Statement of Material Facts and Statement of Material Facts relating to an incident which occurred on 31 August 2011 [A623052].



## **APPENDICES**





**APPENDIX 1**

**Witnesses Called to Give Evidence  
During Private and Public Examinations (2010 and 2011)**



## **1. Witness Called to Give Evidence During Private Examinations**

[392] The following witnesses were called to give evidence under oath or by affirmation during private examinations conducted by the Commission in 2010 and 2011 (excepting 15 December 2010 and 22 March 2011), pursuant to section 141 of the CCC Act.

### **Non-Public Officer**

- Mr Kevin John Spratt (9 December 2010).

### **Public Officers — During the Period Relevant to the Investigation**

- Mr John Francis O’Sullivan (21 December 2010).
- Acting Sergeant Ronald Allen Moore (25 August 2011).

## **2. Witness Called to Give Evidence During Public Examinations**

[393] The following witnesses were called to give evidence under oath or by affirmation during public examinations conducted by the Commission in 2010 and 2011, pursuant to section 141 of the CCC Act.

### **Non-Public Officer**

- Mr Kevin John Spratt (13 December 2010).

### **Public Officers — During the Period Relevant to the Investigation**

- Mr Christopher Damian Markham, Expert Witness (9 December 2010).
- Sergeant Aaron Grant Strahan (13 December 2010).
- Constable Nadia Anna Okis (13 December 2010).
- Senior Constable Troy Gregory Tomlin (13-14 December 2010).
- Sergeant Gary Christopher Thwaites (14 December 2010).
- 1/C Constable Leigh Michael Woods (14 December 2010).
- Constable Kate Marie Naylor (14 December 2010).
- Probationary Constable Geoffrey Nicholas Toogood (14 December 2010).
- Senior Constable Emanuel Bakovic (15 December 2010).
- 1/C Constable Brett Andrew Fowler (15 December 2010).
- 1/C Constable Alan Mark Taylor (15 December 2010).
- Senior Constable Carol Patricia Eaton (15 December 2010).

- Constable Dean Leslie Turner (16 December 2010).
- Constable Jennifer Katherine Grigg (16 December 2010).
- Senior Constable Darren Lee Skelton (16 December 2010).
- Sergeant Wesley John Bell (16 December 2010)
- Sergeant Nicholas Rowe (16 December 2010).
- Senior Sergeant Stephen John Hackwell (17 December 2010).
- Sergeant Nicholas Rowe (11 April 2011).
- Senior Officer Terrence Joseph Zappelli (12 April 2011).
- Dr Jillian Lee (13 April 2011).
- A/Superintendent Raymond Edge (13 April 2011).
- Superintendent James Anatoli Schilo (15 April 2011).
- Inspector Craig Lockhart (18 April 2011).
- Inspector Stephen Bobby Frederick Stingemore (18 April 2011).
- Superintendent Kim Douglas Porter (18 April 2011).
- Mr John Francis O’Sullivan, Senior Assistant State Solicitor, State Solicitor’s Office, on secondment to Western Australia Police (18 April 2011).
- Ms Linda Petrusa, Senior State Prosecutor, Office of Director of Public Prosecutions for Western Australia (18 April 2011).
- Superintendent Graham William Moon (19 April 2011).
- 1/C Constable David Markey (19 April 2011).
- Mr Ian David Johnson, Commissioner, Department of Corrective Services (19 April 2011).
- Dr Karl Joseph O’Callaghan, APM, Commissioner of Police (19 April 2011).

[394] In addition to the above, there were 11 witnesses (ESG officers and others) whose names have been suppressed either in accordance with Suppression Orders issued by then Commissioner Roberts-Smith or Acting Commissioner Herron during the course of the 2010 and 2011 public examinations respectively, pursuant to section 151(3) of the CCC Act (refer [66]), or who have assisted the Commission during its investigation and the Commission has concluded that it is not necessary to name them in this report.

[395] Further to this, in his remarks at the start of the December 2010 public examinations then Commissioner Roberts-Smith stated the following in relation to witnesses called for examination before the Commission.

*In relation to the conduct of public examinations by the Commission, it is, I think, necessary to state the obvious. Witnesses may be called for examination before the Commission for all sorts of reasons. Many witnesses are called whose own conduct is not in question. They may be called because they can assist the Commission by giving information about events, circumstances, systems, procedures or the activities of other persons.*<sup>193</sup>

(emphasis added)

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<sup>193</sup> Transcript of Proceedings, Public Examination, Opening Remarks by Commissioner Roberts-Smith, RFD, QC, on 9 December 2010, p.9.



## **APPENDIX 2**

### **Notifications of Adverse Matters Under Section 86 of the *Corruption and Crime Commission Act 2003 (WA)***





## Notifications of Adverse Matters

No.	Recipient of Section 86 Notification	Date Notification Received	Date of Representations	From
<b>Public Officers During the Period Relevant to the Investigation</b>				
1.	Mr Ronald Allen Moore (Extension to due date for submission of representations granted on 20 January 2012.)	19 January 2012	11 March 2012 (Received by the Commission on 12 March 2012.)	Ms Lyn Zinenko Principal Lawyer Western Australia Police Union of Workers
2.	Senior Officer A	1 February 2012	No Response.	—
3.	Senior Officer B	1 February 2012	No Response.	—
4.	Mr Darren Lee Skelton	17 January 2012	No Response.	—
5.	Mr Aaron Grant Strahan	19 January 2012	17 February 2012	Ms Karen Vernon Barrister Francis Burt Chambers
6.	Mr Gary Christopher Thwaites	18 January 2012	20 January 2012	Mr Gary Christopher Thwaites
7.	Mr Tony Gregory Tomlin	17 January 2012	17 February 2012	Ms Karen Vernon Barrister Francis Burt Chambers
<b>Non-Public Officer</b>				
8.	Mr Kevin John Spratt	23 January 2012 (A copy of the Section 86 Notification was provided to Mr Steven Penglis, Partner, Freehills, on 3 February 2012.)	10 February 2012 and 6 March 2012	Mr Steven Penglis Partner, Freehills QV.1 Building
<b>Bodies</b>				
9.	Department of Corrective Services Mr Ian David Johnson, APM Commissioner	2 February 2012	17 February 2012	Mr Ian David Johnson, APM
10.	Western Australia Police Dr Karl Joseph O'Callaghan, APM Commissioner of Police	17 January 2012	15 February 2012 (Received by the Commission on 16 February 2012.)	Dr Karl Joseph O'Callaghan, APM Commissioner



## **APPENDIX 3**

### **Chronology of Events: August and September 2008, and August 2010**



## Chronology of Events: August and September 2008, and August 2010

Date	Approximate Time (as Applicable)	Event
<b>Mr Kevin John Spratt</b>		
<b>30 August 2008 (Saturday)</b>	4:00 p.m.	WAPOL officers attended the Graham Farmer Freeway in response to reports that a man (later identified as Mr Spratt) was running into and out of traffic.
	—	Taser weapon drawn and aimed, but not deployed. Mr Spratt arrested, handcuffed and conveyed to the Perth Police Station (Curtin House) where he was formally charged with disorderly conduct and obstructing a public officer.
	5:04 p.m.	Mr Spratt released on bail.
<b>31 August 2008 (Sunday)</b>	11:05 a.m.	WAPOL officers called to King William Street in Bayswater in response to reports that a man (later identified as Mr Spratt) was acting suspiciously near private residences.
	11:30 a.m.	Mr Spratt was observed running across Guildford Road and colliding with a stationary vehicle, and then continuing to run. Mr Spratt was apprehended. A Taser weapon was drawn but not deployed.
	11:37 a.m.	A secure police vehicle was requested to convey Mr Spratt to the PWH on charges of obstructing a public officer (x1) and assaulting public officers (x2).
	12:00 p.m.	Mr Spratt arrived at the PWH in the secure police vehicle.
	12:09:33 p.m. – 12:10:48 p.m.	Nine deployments of Taser weapons (one in "Probe" Mode and eight in "Drive-Stun" Mode). Subsequently Mr Spratt was conveyed to the padded cell where three deployments of a Taser weapon occurred in "Drive-Stun" Mode (refer [161], Chapter Three, of this report).
	7:45 a.m.	Mr Spratt released on bail.
<b>6 September 2008 (Saturday)</b>	4:57 a.m.	WAPOL officers called to a disturbance in Guildford Road, Bayswater, and subsequently located Mr Spratt (who had been earlier identified as a possible intruder). A Taser weapon was deployed in "Probe" Mode, several times in "Drive-Stun" Mode and then again in "Probe" Mode.
	6:30 a.m.	Mr Spratt arrived at the PWH, being conveyed in a secure police vehicle. Mr Spratt was processed through the custody system without incident and detained in custody in a padded cell. Mr Spratt was charged with attempted burglary, obstructing a public officer, escaping lawful custody and assaulting public officers.
	10:20 a.m.	As Mr Spratt was being moved from the padded cell to another cell, he became aggressive and sustained a minor injury to his nose and/or mouth. Bleeding occurred as a result of the injury. Mr Spratt spat blood at officers and violently resisted restraint. Mr Spratt was moved back to the padded cell. A Taser weapon was deployed twice in "Drive-Stun" Mode, after which Mr Spratt became calm.
	10:30 a.m.	A WAPOL officer enters the padded cell to speak with Mr Spratt. Mr Spratt became aggressive and kicked the officer in the leg.

Date	Approximate Time (as Applicable)	Event
7 September 2008 (Sunday)	10:40 a.m.	The WAPOL officer returned to the padded cell to again speak with Mr Spratt and opened the door to the padded cell. Mr Spratt "sprayed blood and saliva from his mouth" into the officer's face, and "got blood in and around the eye area and ... spittle on ... [the] mouth". <sup>194</sup> The officer withdrew from the padded cell and sought medical treatment. A request was made to the DCS ESG to extract Mr Spratt from the padded cell and convey him to Casuarina Prison.
	2:00 p.m.	DCS ESG officers attended the PWH to extract Mr Spratt from the padded cell and convey him to Casuarina Prison. The cell extraction was undertaken by six ESG officers, two of whom deployed Taser weapons on eleven occasions during the process.
	2:28:22 p.m.	Mr Spratt was taken to the PWH sallyport and secured in a DCS escort vehicle.
	2:40 p.m.	Mr Spratt was transferred to the custody of ESG.
	3:30 p.m.	Mr Spratt arrived at Casuarina Prison and was admitted to the Infirmary within the Casuarina Health Centre.
	4:00 p.m.	An assessment of Mr Spratt's medical condition was undertaken by a Registered Nurse and observations about his mental state were made by the Mental Health Nurse.
	4:22 p.m.	An E-Consult was sent by the Registered Nurse to the on-call doctor (who replied at 4:27 p.m.).
	6:20 a.m.	It was noted by another Registered Nurse in the Infirmary that Mr Spratt had complained of severe pain in one arm, but had not complained of pain throughout the night.
	9:00 a.m.	It was noted by a third Registered Nurse that Mr Spratt's arm was swollen and bruised, and that he was unable to move his shoulder ("pain score of 10/10"). An E-Consult was sent by the Registered Nurse to the on-call doctor (who replied at 9:20 a.m.). Registered Nurse replied at 9:28 a.m.
	Before 11:00 a.m.	On-call doctor arrived at the Infirmary. Diagnosed deformity of the right proximal humerus and bronchitis.
12 September 2008 (Friday)	1:34 p.m.	Mr Spratt arrived at Royal Perth Hospital, having been escorted by the ESG. Admitted to the Emergency Department and was treated for a dislocated shoulder and pneumothorax injuries (in association with rib fractures).
	—	Mr Spratt was discharged from Royal Perth Hospital and returned to Casuarina Prison.
<b>Prisoner X</b>		
2 August 2010 (Monday)	9:50 a.m.	Prisoner X was escorted by the ESG to the Perth Magistrates Court where he became non-compliant. Prisoner X was subsequently escorted back to Hakea Prison by the ESG.
	4:00 p.m.	ESG assistance to extract Prisoner X from the secure cell in Unit 1 was requested. Taser weapons were deployed by ESG officers.

<sup>194</sup> Transcript of Proceedings, Public Examination of Sergeant Wesley John Bell on 16 December 2010, pp. 583-586.