

Review of a WA Police Force investigation into use of force in respect of a child

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CHAPTER ONE

Overview

- [1] In February 2018, a 13 year old child in State care was charged by the WA Police Force for damaging a Department for Child Protection and Family Support (DCPFS) office, and for twice assaulting a police officer.
- [2] When the charges against the child were heard in court, the magistrate dismissed the assault charges and raised serious concerns that a police officer had acted 'with aggression and violence' towards the child. The magistrate also questioned the veracity of the evidence presented in court to support the charges.
- [3] The WA Police Force reported the matter to the Commission and conducted a criminal investigation into both the use of force against the child and the preparation and presentation of the involved officers' evidence. As the matter involved an alleged use of force against a person at risk, the Commission monitored the investigation.
- [4] The criminal investigation considered whether the child had been assaulted and whether the involved officers had attempted to pervert the course of justice. The investigating officer decided there was insufficient evidence to support any criminal charges.
- [5] The investigation thereafter proceeded as a disciplinary matter. This resulted in a number of disciplinary findings against the police officers, including that unnecessary force was used and that a number of officers neglected their duties. The officers were sanctioned.
- [6] The Commission reviewed the WA Police Force's investigation. In the Commission's opinion, the WA Police Force used contradictory reasoning to justify not criminally charging the officer with assault, on the one hand, and sanctioning the officer for use of unnecessary force on the other hand.
- [7] The finding that there was insufficient evidence that the officers attempted to pervert the course of justice was reasonably open in the circumstances, in particular because of the magistrate's conclusion that the officers involved were not deliberately dishonest and more likely thought the behaviour shown towards the child in the CCTV footage was so common and run of the mill as to be acceptable.

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CHAPTER TWO

The incident

- [8] On 14 February 2018, four police officers from a regional Community Engagement Team attended the local DCPFS office in response to a report that a 13 year old child in State care was 'smashing up the reception area'.
- [9] The officers attending included Senior Constable (S/C) Able, who held the role of Youth Crime Intervention Officer; S/C Bravo,¹ who held the role of Family Violence Coordinator; a Senior Aboriginal Police Liaison Officer; and a Community Relations Officer.
- [10] S/C Able had close to 20 years' experience as a police officer. His role involved engaging with youths, building relationships and ultimately diverting them from crime. His self-described approach to those duties was 'firm but fair'.
- [11] The officers' interaction with the child was captured on CCTV footage.² After entering the DCPFS office and directing the child to sit down, the footage shows S/C Able repeatedly pushing the child in the chest and gesturing in a threatening manner in front of the child's face. The other officers did not intervene.
- [12] When the child stood and attempted to walk away, he was stopped by S/C Able, prompting the child to swing out his right arm and strike S/C Able's shoulder.
- [13] The child was handcuffed and escorted to the nearby police station. CCTV footage from the station shows that, while in custody, the child spat at S/C Able's face. The child was charged with criminal damage for his actions in the DCPFS office, and two counts of assault public officer, for striking and spitting at S/C Able. He pleaded guilty to criminal damage but not guilty to the assault charges.
- [14] S/C Bravo initiated the charges and became the investigating officer. The supervisor endorsed the charges. The brief of evidence prepared by S/C Bravo was provided to the local prosecuting team.
- [15] The prosecutors identified significant concerns with the actions of the attending officers, in particular S/C Able's interaction with the child. They also identified inconsistencies between the CCTV footage of the incident

¹ As the police officers were not charged, the Commission has anonymised their names.

² The CCTV footage is annexed to this report.

and the attending officers' statements. They sought a review of the matter with a view to having the assault charges discontinued.

- [16] The file was provided to an inspector at the district office for review. Despite the prosecutors' concerns, the inspector decided the prosecution of the child should continue.

The trial

- [17] The matter proceeded to trial on 13 July 2018. The magistrate acquitted the child of the assault charges and heavily criticised the actions of the police officers and their evidence at trial. Concerns were raised that:
- a) the arrest of the child was unlawful;
 - b) the force used by S/C Able against the child was harmful;
 - c) S/C Able was not performing a function of his office at the time of the alleged assault by the child;
 - d) the prosecution did not negate self-defence or provocation; and
 - e) the prosecution did not prove capacity.³
- [18] The magistrate questioned the honesty of S/C Able and S/C Bravo's evidence and expressed concerns that the officers present and the reviewing inspector had failed to recognise that the force used against the child was unreasonable, and had allowed the prosecution to proceed. Ultimately, the magistrate found that S/C Able and S/C Bravo were not credible witnesses.
- [19] These comments caused a complaint to be made by the Aboriginal Legal Service (ALS) on behalf of the child to the WA Police Force.
- [20] The Internal Affairs Unit commenced an investigation into both the use of force by S/C Able and the honesty and accuracy of the evidence provided by S/C Able and S/C Bravo to the court.

Report to the Commission

- [21] The Commission was notified both by ALS on behalf of the child and the WA Police Force.

³ The *Criminal Code* s 29 states that 'a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission'.

- [22] The Commission undertook a comprehensive assessment and referred 10 allegations involving five police officers back to the WA Police Force for action. These allegations included that:
- a) S/C Able used excessive force against the child;
 - b) S/C Able failed to inform the child that he was under arrest as soon as practicable after detaining him;
 - c) S/C Able failed to inform the child of his rights pursuant to the *Criminal Investigation Act 2006*;
 - d) S/C Able and S/C Bravo submitted false statements;
 - e) other officers present at the scene neglected their duty when they failed to intervene in S/C Able using excessive force; and
 - f) the inspector who reviewed the brief of evidence failed to report the use of excessive force.
- [23] Because the allegations included excessive force used against a vulnerable person by a police officer (two of the Commission's strategic themes), the Commission monitored and later reviewed the WA Police Force's actions.⁴

⁴ *Corruption, Crime and Misconduct Act 2003* ss 40-41.

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CHAPTER THREE

The WA Police Force investigation

- [24] The WA Police Force's investigation covered the incident in the DCPFS office through to the preparation and presentation of evidence at trial.
- [25] The investigator considered relevant evidence including concerns raised by both ALS on behalf of the child and the trial magistrate.
- [26] CCTV footage from the DCPFS office was examined. This depicts the child being disruptive and damaging the furnishings of the DCPFS reception area. DCPFS staff had left the area pending arrival of the WA Police Force.
- [27] The footage shows the police officers entering the area and S/C Able pushing the child at least eight times in an attempt to keep him seated. S/C Able also points his finger at the child and clenches his fist in the child's face, as well as removing the child's hat and tossing it onto the seat. The other officers watch, but do not intervene.
- [28] Eventually, S/C Able sits beside the child and holds him by the shoulder. The child pulls away and attempts to stand but his shirt is held by S/C Able. The child turns and swings his right arm, striking S/C Able to the shoulder. S/C Able stands and restrains him while S/C Bravo applies handcuffs.
- [29] The officers escorted the child to the nearby police station. CCTV footage shows the child being placed in a holding cell and spoken to by S/C Able, before the child spits in S/C Able's face. The other officers watch from close by.
- [30] The investigator also considered other material. There was no record of the child being provided an opportunity to participate in an interview. He was not provided his rights pursuant to the Criminal Investigation Act until after he was in custody and had spat at S/C Able. He was held for five hours before a responsible adult arrived.
- [31] The investigator obtained S/C Able and S/C Bravo's police notebooks. Each had made more than five pages of notes about the incident. Both sets of notes, which they were later unable to recall, were inconsistent with their statements prepared for court.
- [32] The investigator considered the Statement of Material Facts and evidence matrices prepared by S/C Bravo for the prosecution. The investigator noted that the Statement of Material Facts contained incorrect and misleading statements, including that the child was 14 years

old, and that he 'continually attempted to get up and walk away from S/C Able and each time he was directed back to his seat'.

- [33] Deficiencies in the evidence matrices were also noted, including the omission of the need to prove capacity, despite the charges being laid against a 13 year old child.
- [34] The investigator interviewed relevant witnesses, including officers responsible for supervision at the police station and the prosecutors who reviewed the brief of evidence.
- [35] The investigator considered the statements prepared by S/C Able and S/C Bravo for the trial. These were reviewed by the inspector who decided the charges should continue. S/C Able's initial statement did not refer to the force used against the child so the inspector afforded him the opportunity to provide an addendum statement and an explanatory memorandum. In these, S/C Able provided a lengthy justification for the force used. Part of this justification included that S/C Able felt the child was being threatening and he was not going to tolerate the child's intimidating behaviour.⁵
- [36] S/C Able and S/C Bravo declined to participate in an interview under the Criminal Investigation Act. Each was then directed to participate in a managerial interview with the investigator. Admissions made under the compulsion of a managerial interview are not admissible in criminal proceedings. S/C Able admitted that describing the child as 'intimidating' was a bad choice of words.

The outcome of the criminal investigation

- [37] The investigator considered whether criminal charges should be laid against S/C Able for assaulting the child pursuant to the *Criminal Code* s 313 and whether S/C Able and S/C Bravo should be charged with attempting to pervert the course of justice pursuant to the *Criminal Code* s 143.
- [38] The investigator concluded that there was insufficient evidence to prefer criminal charges against the officers for all matters.
- [39] In relation to the force used against the child, the investigator concluded that there was reason to arrest the child for criminal damage, and by detaining the child, the officers effectively arrested him, despite not telling him so. Once arrested, force could be used to prevent the child from escaping.

⁵ Memorandum by S/C Able, Review of Brief, 4 July 2018.

- [40] The investigator noted that 'although the repeated pushing [by S/C Able] ... was not in line with WA Police Force training and was considered provocative, it was low impact and done for a short period of time'.⁶
- [41] The investigator decided that a prima facie case had not been established and there was insufficient evidence to prefer a criminal charge for assault.
- [42] The investigator also considered whether S/C Able and S/C Bravo attempted to pervert the course of justice by giving insufficient evidence to the court, which tended to downplay the force used by S/C Able. The investigator concluded there were significant inconsistencies between their statements, the CCTV footage and the notes taken in their police notebooks.
- [43] However, the investigator gave weight to S/C Able's consistent denials of dishonesty as put to him by defence counsel at trial. Despite noting that S/C Bravo appeared to have done little to no further investigation after charging the child, the deficiencies of both officers were attributed to lack of preparation and incompetence, rather than a deliberate attempt to mislead the court.

The outcome in relation to disciplinary action

- [44] Although the investigator did not consider the conduct reached the threshold of criminal conduct, the investigator considered their conduct could amount to a breach of the *Police Force Regulations 1979*. A number of allegations were sustained.
- [45] Despite finding during the criminal investigation that the child was effectively under arrest and the force used against him was minimal, the investigator reasoned to the contrary in reaching disciplinary findings. It was found that the pushing of the child was not reasonably necessary to exercise a power, or overcome the resistance offered by him. It was found that S/C Able had exacerbated the situation by waving a fist and a finger in the child's face and removing his hat.
- [46] It was noted that the child was not told he was under arrest, cautioned or provided with his rights pursuant to the Criminal Investigation Act. There was no requirement to detain him for identification purposes, and the child was legally entitled to leave the scene.
- [47] On this reasoning, the WA Police Force determined that the actions of S/C Able were unprofessional, unnecessary and appeared oppressive and bullying. The WA Police Force concluded that S/C Able used unnecessary force pursuant to the Police Force Regulations reg 609 and he was fined.

⁶ WA Police Force, Investigation Final Report, 27 May 2019, p 61.

[48] A number of other breaches of discipline were also sustained against various officers. These included that:

- a) S/C Able and S/C Bravo did not afford the child his rights pursuant to the Criminal Investigation Act as soon as practicable;⁷
- b) S/C Able failed to correctly record and manage CCTV footage that he seized from the DCPFS office;⁸
- c) S/C Able and S/C Bravo negligently made misleading and inaccurate statements;⁹
- d) S/C Bravo failed to conduct an adequate and proper investigation;¹⁰
- e) the inspector who reviewed the prosecution brief failed to adequately review the available evidence and to recognise the issues around the actions of the police officers;¹¹ and
- f) a supervising officer failed to perform and carry out his duties in a proper manner by:
 - i) failing to give the child the opportunity to participate in an interview with a responsible adult present; and
 - ii) endorsing three substandard evidence matrices which were significantly lacking in detail.¹²

[49] The supervising officer and inspector received Managerial Notices. S/C Able and S/C Bravo were fined. S/C Able was ordered to undertake further training.

⁷ Breach of the *Police Force Regulations 1979* reg 402(e).

⁸ Ibid reg 605(1)(b).

⁹ Ibid reg 606(b).

¹⁰ Ibid reg 605(1)(b).

¹¹ Ibid.

¹² Ibid.

CHAPTER FOUR

The Commission's review

- [50] The Commission reviewed the WA Police Force's investigation to ensure the investigation was conducted adequately and the findings (on the evidence) were reasonably open.
- [51] A Commission review is not an investigation. It focuses on the quality of the investigation and whether conclusions reached following an investigation were reasonably open.
- [52] Other than in exceptional circumstances, the Commission will not comment on the adequacy of any penalty imposed. Penalty is in the discretion of the Commissioner of Police or delegate and in the exercise of discretion, persons may reasonably reach different conclusions.
- [53] The WA Police Force and the Commission respectfully disagree as to whether the investigation failed by applying contradictory reasoning in the criminal and disciplinary investigations.
- [54] In the Commission's opinion, the investigation did fail and criminal proceedings for assault should have been instituted. But it notes the firm contrary view expressed by the WA Police Force in its response to the draft report.

Use of force

- [55] An assault is defined as 'a person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent'.¹³
- [56] A police officer using force when making an arrest will not have committed an assault if the force used was reasonably necessary to overcome any resistance to the arrest.¹⁴
- [57] The investigator found that a prima facie case of assault by S/C Able was not established on the basis that:
 - a) he had reason to arrest the child for criminal damage;
 - b) the child was detained and effectively under arrest, despite not being told so; and

¹³ *Criminal Code* s 222.

¹⁴ *Ibid* s 231.

- c) once arrested, S/C Able could use reasonable force to stop the child from escaping.

[58] This reasoning is inconsistent compared with the same investigator's comments in the disciplinary investigation that the child was in fact free to leave the scene, as he had not been told he was under arrest, cautioned or read his Criminal Investigation Act rights, and there was no need to arrest him for identification purposes.

[59] In the disciplinary investigation, the investigator also found that the repeated pushing of the child by S/C Able would still be considered unnecessary even if the child had been arrested. The investigator noted that:

... reasonable force to arrest [the child], under these circumstances, would be to hold onto [him] and clearly advise him he was being arrested on suspicion of damage, and he was not free to leave; it was then open to the arresting officers to consider the use of handcuffs.¹⁵

[60] In finding that the force was unnecessary, the WA Police Force's investigator effectively found that the protections afforded to S/C Able pursuant to the *Criminal Code* s 231, which allows for the use of reasonable force when effecting an arrest, did not apply.

[61] In response to a draft copy of this report, the WA Police Force disputed that the conclusion that the use of force was 'unnecessary' pursuant to the Police Force Regulations was the same as a conclusion that excessive force had been used.

[62] In the Commission's respectful opinion, the distinction between excessive force in the *Criminal Code* and unnecessary force under the Police Force Regulations, is a distinction without a difference.

[63] If force is unnecessary, it is excessive in the circumstances.

[64] The *Criminal Code* s 260 is clear that the use of more force than is justified by law under the circumstances is excessive and unlawful.

[65] In further justifying the lack of criminal charges, the WA Police Force's investigation noted that S/C Able's use of force on the child was 'low impact and done for a short period of time'.¹⁶ This justification does not negate the elements of the offence of assault.

[66] The decision may be contrasted with the decision, albeit by different officers, to charge the child with assault for the use of force that was also

¹⁵ WA Police Force, Investigation Final Report, 27 May 2019, p 66.

¹⁶ Ibid 61.

of low impact for a short period of time. The Commission accepts that the incident of spitting is in a different category. The Commission notes that police prosecutors raised concerns about the charges, to no avail.

- [67] In response to this report, the WA Police Force noted that the investigations into S/C Able and the child's conduct were 'independently conducted in different circumstances, by different officers of different levels of training, competency and skill'.¹⁷
- [68] The WA Police Force's response also noted that when considering the reasonableness of a police officer's conduct, a realistic assessment of their conduct should consider the speed and pressure under which police officers must make decisions and that arrests are frequently made in circumstances of excitement and turmoil.¹⁸
- [69] The WA Police Force also noted that S/C Able received a significant penalty for his conduct pursuant to the *Police Act 1892* s 23, which may be comparable to that imposed by a criminal court.
- [70] The Commission accepts this response in the preceding two paragraphs. However, while the Commission recognises that S/C Able has been sanctioned, it was his initial engagement with the child that heightened the situation and led to circumstances in which force was unnecessarily used against a 13 year old child. The Commission remains of the view that criminal proceedings for assault should have been instituted and the matter resolved in court.

Preparation of evidence and prosecution

- [71] The investigation also concluded that the inconsistencies and inaccuracies in S/C Able and S/C Bravo's evidence resulted from a lack of preparation and incompetence, as opposed to the officers being dishonest, lying or attempting to mislead the court.
- [72] The Commission, when previously presented with the issue of police officers giving inadequate evidence in court, noted that 'lack of proper preparation ... does not justify their failure to clearly present the facts. A police officer, indeed any witness, has an obligation to tell the unvarnished truth'.¹⁹
- [73] Of course, even honest witnesses can become confused, and, at times, give unreliable evidence. However, in this case, it is of concern that each

¹⁷ Letter from the WA Police Force to the Commission, 6 April 2020.

¹⁸ *Scarlett Rhodes v State of Victoria* [2017] VCC 1493.

¹⁹ Corruption and Crime Commission, *Review of an arrest incident by Western Australian Police at Hamilton Hill*, 1 November 2018.

of the misleading or inaccurate statements of the police officers tended to omit or downplay the use of force by S/C Able.

[74] The Commission also notes that in considering whether to prefer criminal charges against the officers, the WA Police Force gave weight to S/C Able's denials of his dishonesty in court, as well as mitigating factors including the personal circumstances of some of the police officers.

[75] It is difficult to judge the credibility of a witness simply by reading the trial transcript and giving weight to denials. The presiding magistrate had a considerable advantage in assessing the credibility of S/Cs Able and Bravo, and it is appropriate to give weight to their findings.

[76] To the extent that they deal with the same issues, a judicial officer's judgment, unless displaced on appeal, is binding on the parties.

[77] In relation to the credibility of S/Cs Able and Bravo, the magistrate found:

The CCTV proves each of these statements made by these police officers to be incorrect and an incomplete account of what actually occurred.

Having viewed the CCTV a number of times, it is incomprehensible how any right thinking member of the community could ignore, fail to see or simply forget the violence being perpetrated against a child either by them or directly in front of them. It is particularly inconceivable when those people are police officers. Perhaps even more so when those police officers are then in the roles of Youth Crime Intervention Officer and Family Violence Co-ordinator.

It seems to me there can only be two explanations for the evidence of Senior Constables Able and Bravo. Either they are lying or the behaviour demonstrated by Senior Constable Able on the CCTV is so common and run of the mill that police officers simply accept it as reasonable and within their functions as police officers. Both are concerning prospects.

Unfortunately, given the lack of reaction of any police officer present on that day and the fact this matter made it to court despite having been reviewed by an Inspector, the latter seems to be the most likely explanation.

Further supporting that conclusion is the fact that it is significant in this case that the accused was never placed under arrest or given his rights under the Criminal Investigation Act 2006. It seems to me that if Senior Constables Able and Bravo were lying and covering for each other it would have been in their interests to lie about this fact as well. The fact they did not, is probably the only positive thing that can be said about their evidence; I note though, any lie would require 4 police officers to be involved in the cover up and I did not hear the evidence of [the] Senior Aboriginal Police Liaison Officer or Community Relations Officer.

[78] In view of the magistrate's finding, the conclusion by the investigating officer that there was insufficient evidence to support charges of attempting to pervert the course of justice was reasonably open.

Other matters referred to the WA Police Force

- [79] The decision to proceed by way of managerial intervention and impose sanctions on the officers in relation to the other matters referred by the Commission was reasonably open.

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CHAPTER FIVE

Conclusion

- [80] The Commission's review of this matter is complete. The WA Police Force undertook appropriate investigatory actions and the officers were sanctioned through a disciplinary process. The Commission and the WA Police Force disagree as to whether the evidence disclosed a prima facie case of assault.
- [81] The Commission has a general misconduct function in respect to the WA Police Force. In the past few years, the Commission has gained confidence in WA Police Force investigations and dispositions when conducted by the Internal Affairs Unit.
- [82] For that reason, the Commission has undertaken fewer investigations but has increased its monitoring and review of police investigations.
- [83] In the Commission's respectful opinion, the finding that there was insufficient evidence to prefer a criminal charge against S/C Able for assault was supported by flawed reasoning that was inconsistent with conclusions reached in the subsequent disciplinary investigation.
- [84] In response to a draft copy of this report, the WA Police Force stressed that a prima facie case of assault by S/C Able had not been established, on the basis that S/C Able believed he was exercising a function of his office, and the child was effectively under arrest when force was used against him.
- [85] However, the response did not address the discrepancy between this reasoning and the conclusion of their disciplinary investigation, other than to note that the two investigations 'are conducted independently of each other and are benchmarked with different standards of proof and rules of evidence'.²⁰
- [86] The WA Police Force did note that had S/C Able told the child he was under arrest, the outcome of the charges against the child might have been different. However, the trial magistrate made it clear that '[S/C Able's] actions against [the child] would have been unlawful even if [the child] was under arrest'.
- [87] The 13 year old child was clearly misbehaving in the DCPFS reception area. It was appropriate for the WA Police Force to attend and deal with him.

²⁰ Letter from the WA Police Force to the Commission, 6 April 2020.

- [88] Although misbehaving, he remained a vulnerable person. S/C Able's response to the child may have been firm but it was not fair and contributed significantly to the escalation of the event.
- [89] Noting that the WA Police Force and the Commission diverge on the issue of whether the facts disclosed a prima facie case of assault, the WA Police Force has otherwise dealt with the matter appropriately and reached conclusions that are open.
- [90] The anonymised CCTV footage at the DCPFS office can be viewed on the Commission's website at <https://www.ccc.wa.gov.au>.