WESTERN AUSTRALIA

CCC | Corruption and Crime Commission

Review of police response to an incident in High Street Mall Fremantle on 3 September 2017

7 February 2019

ISBN: 978-0-6483047-3-9

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CHAPTER ONE

Introduction and overview

[1] On 3 September 2017, Mr John Wells[1] and another patron were ejected from the National Hotel in Fremantle by a crowd controller.

[2] Coincidently, Constable Simon Waller and Police Auxiliary Officer (PAO) Evie Lewis were walking past the entrance to the hotel when this occurred. Constable Waller initiated police back-up via his radio.

[3] The responding officers were Constable Olivia Cooke, Sergeant (Sgt) Nathan Trenberth and First Class Constable (1/C) Julian Donohoe. Constable Cooke left about one minute later.

[4] Sgt Trenberth was the most experienced officer with approximately 21 years of policing in the WA Police Force. He was also the Operation Commander for 'Fremantle Nightsafe' on the night. 1/C Donohoe had 11 years of policing experience, while Constable Waller had 11 days remaining as a probationary constable.

[5] Under the *Police Act 1892*, PAO Lewis was not considered a member of the Police Force of WA.[2] Police auxiliary officers are not trained to the same level as police officers. However, 'a police auxiliary officer has all of the powers, duties and obligations that a police officer or a member of the Police Force has under any written law other than this Act'.[3]

[6] The officers were yet to establish whether an offence had occurred when they approached Mr Wells to seek his identifying particulars. By police accounts, he refused to comply and was arrested. Mr Wells has little memory of the incident.

[7] When Mr Wells attempted to light a cigarette, one of the officers attempted to take the cigarette away and a struggle ensued. Mr Wells was taken to the ground. Officers used empty hand tactics to subdue Mr Wells including multiple strikes to the head by Sgt Trenberth. A CCTV camera located in the High Street Mall captured the incident and forms part of this report. After he was handcuffed, 1/C Donohoe twisted Mr Wells' finger back to the point of dislocation.

[1] Names of civilians and some police officers have been anonymised.
[2] *Police Act 1892* s 38I(1).
[3] *Police Act 1892* s 38H(1)(a).

[8] Mr Wells was charged with three counts of assaulting a public officer, obstructing public officers and failing to comply with the request to give personal details.

[9] The matter was listed for trial in the Fremantle Magistrates Court in June 2018. However, the charges were discontinued by the Fremantle Prosecuting Branch of the WA Police Force after issues over the conduct of the police officers involved were identified. The matter was reported to the Internal Affairs Unit (IAU) who took carriage of the investigation.

[10] The complainant, Mr Wells, expressed no interest in pursuing a criminal complaint against any of the officers. IAU indicated that where a complainant does not wish to make a formal complaint, prosecution will not be supported unless the circumstances are exceptional. As a result, IAU conducted a disciplinary investigation. Sgt Trenberth and 1/C Donohoe were stood down from duty.

[11] Sgt Trenberth resigned before IAU completed its investigation.

[12] Although 1/C Donohoe has been referred to the Independent Review Panel for consideration of Loss of Confidence proceedings, IAU are currently considering criminal prosecution. At the time of this report there are no charges pending.

[13] IAU are continuing to examine the supervision issues evident from this incident, including those relating to the use of force reporting, the review process and the preparation and management of the prosecution brief.

[14] The Commission has a responsibility to ensure that allegations of serious misconduct are dealt with in an appropriate way. It will exercise its power in a number of ways including investigation, monitoring and review.

[15] The Commission conducted an investigation and reviewed IAU's investigation of the incident.

[16] Based on the CCTV footage, the Commission considers that both Sgt Trenberth and 1/C Donohoe used excessive force against Mr Wells. Moreover, knowing of the finger twisting incident, Sgt Trenberth was remiss in not ensuring it was included in a Use of Force Report.

[17] 1/C Donohoe's action in twisting the finger of a restrained person to the point of dislocation was unreasonable and excessive. The Commission forms an opinion of misconduct.

[18] The Commission considers that Sgt Trenberth's use of force constitutes reviewable police action which is misconduct.

[19] An opinion that misconduct has occurred is not, and is not to be taken as, an opinion that a particular person is guilty of or has committed a criminal offence or a disciplinary offence.[4]

[4] *Corruption, Crime and Misconduct Act 2003* (CCM Act) s 217A(3).

CHAPTER TWO

Commission investigation and review

[20] Despite a requirement that notification must be made as soon as reasonably practical, the Commission did not receive formal notification of the incident from the WA Police Force until 31 May 2018, eight months after the incident.

[21] Four allegations were identified by the Commission, namely that Sgt Trenberth, 1/C Donohoe, Constable Waller and PAO Lewis each used excessive force against Mr Wells in Fremantle on 3 September 2017.

[22] The allegations against Sgt Trenberth, Constable Waller and PAO Lewis were referred back to the WA Police Force for action, with Commission oversight through active monitoring and review. The Commission undertook an investigation into the conduct of 1/C Donohoe.

[23] IAU's investigation of the incident was well progressed prior to the Commission's involvement and officers Trenberth and Donohoe were stood down on 5 June 2018.

[24] On 1 August 2018, the Commission revised its decision and commenced an investigation of the entire matter. As a consequence, the Commission identified that the force used by Sgt Trenberth and 1/C Donohoe was potentially excessive and may meet the threshold for misconduct.

[25] The Commission also identified areas of concern in relation to the conduct of PAO Lewis and Constable Waller. The Commission has a function to prevent and educate on police misconduct.[5] While the conduct of PAO Lewis and Constable Waller is not considered misconduct, their actions could form the basis for WA Police Force managerial action.

[26] During the course of the investigation, the Commission remained in regular contact with IAU. The investigation by IAU included statements taken from a number of officers and witnesses; examination of the CCTV footage of the High Street Mall incident; examination of the CCTV footage and audio at the police station lockup; and review of internal documents, all of which were made available to the Commission. The Commission considers the IAU investigation to this stage has been appropriate and thorough.

[5] CCM Act s 21AA.

[27] The Commission interviewed Mr Wells, who confirmed that he did not wish to pursue a criminal complaint. He gave reasons for his decision.

[28] The attitude of a complainant is a matter to be taken into account when the Commission is considering an investigation but is not decisive.

[29] Decisions made by the Commission as to whether to investigate or report on a matter are analogous to decisions made by prosecutors. Decisions are made in the public interest. That interest involves many factors. The attitude of a 'complainant' is obviously a relevant factor and in some cases may be decisive.

[30] In respect of this incident, the Commission considers the public interest in exposing misconduct and the opportunity for other police officers to learn from the incident transcends the private interests of Mr Wells.

[31] The account in this report is taken from, among other things, witness statements obtained from the officers, IAU interviews, contemporaneous documents and CCTV footage.

[32] The anonymised CCTV footage can be viewed on the Commission's website at https://www.ccc.wa.gov.au

[33] It speaks for itself.

CHAPTER THREE

An incident in High Street Mall, Fremantle

[34] Just past midnight on 3 September 2017, Constable Waller was escorting PAO Lewis to a local convenience store to buy food for a stray dog that had been handed into the Fremantle Police Station.

[35] On their return, they walked past the entrance to the National Hotel located two doors down from the police station. Constable Waller glanced inside the main doorway before stopping. Within seconds Mr Wells and another male patron were ejected from the hotel's interior by a crowd controller. There is evidence that both Mr Wells and the other patron were intoxicated.

[36] Whilst Constable Waller was calling for assistance over his police radio, PAO Lewis intervened between Mr Wells and the other patron, even though they were still grappling each other. PAO Lewis alleges that she shouted at the other patron to release Mr Wells before stepping between them.

[37] PAO Lewis:

> *… I identified myself as a Police Auxiliary Officer, and asked him if he could tell me his name so that I could pass it on to the investigating officers if he made an assault complaint.*
>
> *The accused continued to stare at me for a few seconds, then shook his head …*[6]

[38] During this discussion, PAO Lewis took hold of Mr Wells' left arm, while pointing in the direction of the High Street Mall. Mr Wells eventually walked off in that direction.

[39] Constable Cooke, who was performing office duties at the police station, responded to Constable Waller's call for assistance. Simultaneously Sgt Trenberth and 1/C Donohoe arrived in a police vehicle.

[40] Constable Cooke returned to the police station when advised by Constable Waller that everything was under control.

[41] PAO Lewis had a brief discussion with Sgt Trenberth before pointing out Mr Wells who was standing outside the convenience store, adjacent to the hotel. As they approached Mr Wells, he took a seat on a bench nearby. Mr Wells appeared to be favouring his left eye.

[6] Witness statement by PAO Lewis [19]-[20].

[42] A short time later they were joined by 1/C Donohoe. Constable Waller remained at the hotel talking to the crowd controller, witnesses and the second patron.

[43] Sgt Trenberth maintained that when he asked Mr Wells what had happened, he complained about being in a fight and became quite aggressive.[7] Sgt Trenberth further stated Mr Wells 'remained aggressive and was vengeful so I reasonably suspected he would commit an offence …'[8]

[44] Similarly, PAO Lewis stated 'the accused was staring quite intently at Sgt Trenberth, while arching his shoulders, so I was concerned that he wanted to fight …'[9]

[45] However, CCTV footage belies the stated level of aggression. There is no evidence that Mr Wells was arching his shoulders as claimed by PAO Lewis. Although Sgt Trenberth is largely obscured by the High Street Mall sign, 1/C Donohoe stands with his back to Mr Wells. At the same time, PAO Lewis actively engaged in conversation with Mr Wells. The absence of aggression is further evidenced when 1/C Donohoe left the group approximately one minute later to re-join Constable Waller at the National Hotel.

[46] Sgt Trenberth's intention was to arrest Mr Wells, obtain his personal details for consideration of a Disorderly Conduct Infringement, give him a Move on Order and hopefully release him unconditionally.[10]

[47] PAO Lewis stated that when Sgt Trenberth asked Mr Wells for his name, Mr Wells asked why, to which Sgt Trenberth quoted the *Criminal Investigation (Identifying People) Act 2002* s 16; and told Mr Wells that he suspected him of being involved in the offence of disorderly behaviour by fighting.[11]

[48] PAO Lewis: 'I remember this, because I had never heard anyone refer to fighting as being disorderly behaviour, and I was surprised that Sergeant Trenberth's reply was so concise, even though the accused was being belligerent …'[12]

[49] Sgt Trenberth maintained that he asked Mr Wells for his name and address over a period of approximately five minutes. Mr Wells refused

[7] Witness statement by Sgt Trenberth [9].
[8] Ibid [12].
[9] Witness statement by PAO Lewis [31].
[10] Witness statement by Sgt Trenberth [31].
[11] Witness statement by PAO Lewis [34]-[36].
[12] Ibid [37].

and was subsequently placed under arrest, cautioned and given his rights.[13]

[50] Sgt Trenberth: '[Wells] continued to be aggressive and he seemed to turn his aggression from whoever he had had a fight with back on to me and PAO [Lewis], and then on to First Class Constable Donohoe who had joined us …'[14]

[51] Sgt Trenberth's version of events indicates that 1/C Donohoe arrived **after** Mr Wells was arrested.

[52] PAO Lewis remembers 1/C Donohoe walking over at some point and also attempting to explain the process to Mr Wells.[15] However, 1/C Donohoe's version of events does not include any reference to this conversation as averred by PAO Lewis.

[53] 1/C Donohoe:

> *Sergeant Trenberth continued to explain to the accused that he was required to provide his personal details and that if he did not, that he would be arrested …*[16]
>
> *I observed that the accused was clenching his fist and looking from one to another of the three of us standing to his front …*[17]
>
> *I was of the opinion that the accused was either going to try and attack one of us or attempt to flee …*[18]
>
> *… after some time, Sergeant Trenberth informed the accused that he was under arrest for refusing to provide his name …*[19]

[54] CCTV footage does not support Sgt Trenberth's insistence that Mr Wells was displaying continued aggressive behaviour towards the officers, nor 1/C Donohoe's claim that Mr Wells was clenching his fist.

[55] Sgt Trenberth alleges that he repeatedly asked Mr Wells to remove the items from his pockets. Mr Wells appears to be amenable towards the officers when he removes a phone wallet containing his identification which is then examined by Sgt Trenberth.

[56] Sgt Trenberth: 'I could see some identification like a drivers licence in it but it was behind a plastic liner which was really cloudy. I couldn't see his ID through the liner …'[20]

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[13] Witness statement by Sgt Trenberth [29]-[30].
[14] Ibid [33].
[15] Witness statement by PAO Lewis [42].
[16] Witness statement by 1/C Donohoe [23].
[17] Ibid [24].
[18] Ibid [25].
[19] Ibid [26].
[20] Witness statement by Sgt Trenberth [37].

[57] While this was occurring, Mr Wells attempted to light a cigarette which PAO Lewis tried to snatch away. 1/C Donohoe intervened by grabbing Mr Wells' hand. His intention was to handcuff Mr Wells for safety reasons.[21] Mr Wells resisted and a struggle followed between Mr Wells and the three officers, in addition to the crowd controller, who had arrived to assist.

[58] CCTV footage also captures what happened next. Although the High Street Mall sign partially obscures the struggle, there is evidence that Mr Wells' legs were flailing around. All three officers allege they were kicked by Mr Wells. There is no evidence the crowd controller was injured.

[59] Sgt Trenberth:

> *[Wells] then deliberately kicked out violently at me a number of times. His first kick was sort of a push and glanced my side. His second was a proper kick and hit my bicep. His third kick hit just above my groin and I tried to catch his leg. His fourth kick hit my left side. His fifth kick came up under and stuck [sic] my chin …*[22]
>
> *I saw PAO [Lewis] get kicked hard to her head …*[23]

[60] PAO Lewis:

> *I remember walking around in an arc in front of them to see where I could assist …*[24]
>
> *I heard Sergeant Trenberth say "Don't do that, don't kick" and then feeling an impact on the right side of my head above my ear. Everything went quiet, I felt dazed and saw little white dots at the top of my sight. I was clutching onto something very tightly with two hands so [sic] stop from falling forward, I believe it was one of the accused's legs. I remember someone calling my name, but I was confused about what was happening …*[25]

[61] 1/C Donohoe also claimed that he was kicked in the abdomen; witnessed Mr Wells kick PAO Lewis to the head and repeatedly kick Sgt Trenberth.[26]

[62] While Mr Wells was on his back, Sgt Trenberth repeatedly punched him to the head. While this was occurring, Constable Waller arrived to provide assistance.

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[21] Witness statement by 1/C Donohoe [34].
[22] Witness statement by Sgt Trenberth [49]-[54].
[23] Ibid [55].
[24] Witness statement by PAO Lewis [58].
[25] Ibid [59]-[62].
[26] Witness statement by 1/C Donohoe [39]-[41].

[63] Sgt Trenberth:

> *I threw a few punches at [Wells]. I think I hit him twice. The punches weren't hard but just numerous jabs to distract and cease his attack on us. It had the desired effect with him momentarily stop kicking and to cover up …*[27]

[64] CCTV footage shows that Sgt Trenberth punched Mr Wells at least seven times to the head area.

[65] When Sgt Trenberth disengaged, Constable Waller restrained Mr Wells by placing his right forearm across Mr Wells' left lower jaw. PAO Lewis and the crowd controller continued to assist with restraining Mr Wells' legs.

[66] When Mr Wells ceased to resist, he was placed on his front. While this was occurring, 1/C Donohoe: 'I delivered a number of distraction strikes using my knees to the accused's thigh and buttocks while yelling at him to stop resisting and to place his arms at his back …'[28]

[67] CCTV footage does not support this claim. Mr Wells was lying on his right side and compliant when 1/C Donohoe used his right knee to strike Mr Wells in the back at least three times on the left side of his body.

[68] While Mr Wells was handcuffed and compliant, 1/C Donohoe looked in the direction of the CCTV camera before grabbing Mr Wells' right index finger and twisting it. This action resulted in Mr Wells' finger being dislocated.

[69] 1/C Donohoe:

> *As I was doing this [cuffing Mr [Wells]], the accused scratched my right middle finger with one of his fingernails …*[29]
>
> *I took hold of his finger and twisted it to discourage him from further attempts to injure officers …*[30]

[70] A police officer is entitled to use such force as may be reasonably necessary to overcome any force used in resisting arrest.[31] The use of more force than is justified by law under the circumstances is unlawful.[32]

[71] Based on the CCTV footage, the Commission considers that Sgt Trenberth and 1/C Donohoe may have used excessive force in restraining Mr Wells.

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[27] Witness statement by Sgt Trenberth [57]-[59].
[28] Witness statement by 1/C Donohoe [45].
[29] Ibid [48].
[30] Ibid [49].
[31] *Criminal Code* s 231(1).
[32] *Criminal Code* s 260.

[72] The force used in twisting Mr Wells' finger does not appear to be associated with the arrest. Mr Wells had been arrested and was handcuffed.

[73] Constable Waller is seen to look down at Mr Wells' handcuffed hands several times after this apparent deliberate act. There is evidence that he was aware that Mr Wells' index finger was dislocated: 'I looked towards the accused's hands and looked to me that one of his index fingers was dislocated …'[33]

[74] Sgt Trenberth could not recall when he became aware of Mr Wells' dislocated finger.[34]

[75] While Sgt Trenberth and Constable Waller were escorting Mr Wells from the High Street Mall back to the police station, PAO Lewis walked alongside and engaged in conversation with Mr Wells. There is evidence that PAO Lewis was also aware Mr Wells' finger had been dislocated: 'the male told me to look at his hand, which I did, and I saw that one of his fingers was at an unnatural angle …'[35]

[76] Despite having a strong headache and feeling disorientated, PAO Lewis later provided a detailed witness account of the incident.

[77] PAO Lewis attended a doctor the next day. The consultation notes read:

> *Works for WA Police as police auxillary [sic].*
>
> *Closed head injury 36 hours ago whilst apprehending suspect. Kick to right side of head.*
>
> *No LOC but did feel dazed.*
>
> *Current symptoms*
>
> - *headache*
>
> - *fuzzy headedness*
>
> - *lethargy*
>
> *No vomiting. No nasal or otic [sic] discharge.*
>
> *No localising neurological symptoms*
>
> *?balance effect*
>
> *No history of previous significant head injuries*

[33] Witness statement by Constable Waller [52].
[34] Witness statement by Sgt Trenberth [65].
[35] Witness statement by PAO Lewis [65].

O/E:

Alert and orientated

PERL

No scalp tenderness

Neck NAD

No haemotympanum

Cranial nerves intact

Upper limb neuro

- *normal tone / power / reflexes*

- *normal sensation*

Lower limb neuro

- *normal tone / power / reflexes*

Romberg negative

Ax: Concussion post head injury

[78] The doctor issued a medical certificate to PAO Lewis for sick leave from 4 to 8 September 2017.

CHAPTER FOUR

Fremantle Police Station lockup

[79] The interaction between Mr Wells and the officers in the lockup area was recorded by video and audio.

[80] When Mr Wells was escorted into the lockup area he complained to Sgt Trenberth, Constable Waller and PAO Lewis about being beaten and kicked.

[81] PAO Lewis responded "You're the one that kicked me in the head and you kicked another police officer in the head, so we've kicked the shit out of you …"[36]

[82] Once Mr Wells was placed in an observation cell, Sgt Trenberth informed him that he was under arrest for failing to give his details and for assaulting a police officer.[37] He was also cautioned and informed of his rights. Sgt Trenberth claimed that Mr Wells continued to make threats.[38]

[83] Mr Wells repeatedly informed the officers that their careers would be over.[39] However, in the Commission's opinion, these comments could not reasonably be regarded as threats as averred by Sgt Trenberth and PAO Lewis.

[84] Although PAO Lewis initiated the call for Mr Wells' medical treatment,[40] her stated level of concern in relation to Mr Wells' injury is called into question: "well once you make - stop making threats, we'll see what we can do about it …"[41]

[85] Mr Wells was suffering significant discomfort from his injured finger and was entitled to medical treatment.

[86] Mr Wells' handcuffs were removed just prior to the paramedics arriving. The paramedics assessed Mr Wells as requiring hospital treatment pending his release from custody.

[87] The Commission has concerns about the length of time Mr Wells remained in handcuffs (approximately one hour and 10 minutes). There was no evidence that Mr Wells posed a risk to officers or himself.

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[36] Fremantle Police Station Lockup transcript, p 1.
[37] Ibid 2.
[38] Witness statement by Sgt Trenberth [68].
[39] Fremantle Police Station Lockup transcript, pp 7-8.
[40] Witness statement by PAO Lewis [69].
[41] Fremantle Police Station Lockup transcript, p 11.

[88] Sgt Trenberth left the lockup area approximately 17 minutes after Mr Wells was placed into custody. He returned approximately 15 minutes later and addressed Constable Waller and PAO Lewis. Although Sgt Trenberth is not visible, audio confirms that Mr Wells acknowledged his presence.

[89] Sgt Trenberth: "We've just been down and looked at the CCTV … The CCTV looks like a problem … Sometime you should shoot over and look at the CCTV …"[42]

[90] There is evidence that Sgt Trenberth and 1/C Donohoe attended the City of Fremantle camera room that night where they viewed the CCTV footage.[43]

[91] Constable Waller remained in the lockup area entering Mr Wells' information into the custody system. PAO Lewis was often absent attending to the stray dog that had been handed in earlier that night.

[92] During the course of the evening, PAO Lewis engaged in unprofessional conduct towards Mr Wells. In response to Mr Wells claiming the officers were 'gone' (careers over), PAO Lewis responded "I look forward to it … we're all gone? … what do you mean by "Gone"? Would you like to elaborate on that? … We're always happy for you - to listen to you … If you feel like you need to elaborate …"[44]

[93] When Mr Wells was escorted from the premises via the rear entry to the waiting paramedics, PAO Lewis: "Come on Mr [Wells], if you would like to go to hospital, your chariot awaits …"[45]

[94] In the Commission's view, PAO Lewis' overall conduct and demeanour towards Mr Wells was unprofessional. However, it falls short of misconduct.

[95] Mr Wells was subject to normal custody processes before being formally charged with one count of obstructing public officers, three counts of assaulting a public officer and one count of failing to comply with a lawful order. He was released unconditionally on bail to appear in the Fremantle Magistrates Court on 29 September 2017.

[42] Ibid 35.
[43] Witness statement by 1/C Donohoe [57].
[44] Fremantle Police Station Lockup transcript, pp 9-10.
[45] Ibid 80.

Subsequent police actions

[96] 1/C Donohoe later completed an Incident Report in which he noted that Mr Wells was arrested for failing to provide his personal particulars; and that he expressed a desire to continue fighting. When Mr Wells took out a cigarette, a decision was made to secure him in handcuffs based on his 'demeanour, clenched fist and prior claims'.[46]

[97] 1/C Donohoe's Incident Report also described Mr Wells' assault of the attending officers, specifically that he 'punched SGT TRENBERTH with a clenched fist to the jaw, struck APO [LEWIS] in the head with his foot and PC DONOHOE in the chest and stomach with his knee and foot'.[47]

[98] At 2.17 am on 3 September 2017, Constable Alexandra Fraser took a photograph of 1/C Donohoe's fingers.

[99] At 5.00 pm on 3 September 2017, 1/C Donohoe obtained a copy of the CCTV footage of the incident from the City of Fremantle camera room.

[100] At 11.25 pm on 3 September 2017, 1/C Donohoe completed a Use of Force Report, in which he incorrectly recorded Mr Wells' name and address. In relation to his own actions, 1/C Donohoe stated:

> *… the accused pulled his arms into his chest and grabbed hold of my arm. I delivered a number of distraction strikes using me [sic] knee into the region of his thigh and buttocks …*
>
> *… after these strikes the accused allowed us to handcuff him before he scratched my finger with his nails. I took hold of his finger and twisted it to discourage him from further attempts to injure officers …*[48]

[101] 1/C Donohoe's Use of Force Report revealed that he only received a grazing injury to his right hand. It is unclear why he did not record the injuries to his chest or stomach (as described in his Incident Report), given they formed part of Mr Wells' criminal charges (Assault Public Officer).

[102] The chain of command history shows that on 4 September 2017, Sgt Samuel Barnes, Team Supervisor at Fremantle Police Station, reviewed and rejected the Use of Force Report. Aside from noting Mr Wells' inaccurate personal details, Sgt Barnes stated 'further clarification required in relation to grabbing the subject's finger as this may be scrutinised due to the injury caused …'[49]

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[46] Fremantle Police Station Incident Report 030917 0005 12336.
[47] Ibid.
[48] WA Police Use of Force Report, p 1.
[49] Ibid 10.

[103] There is no evidence that 1/C Donohoe provided this clarification. As a consequence, the Use of Force Report was never forwarded to the Use of Force Co-ordination Unit for review.[50] The Use of Force report remains unresolved and without final oversight.

[104] The Commission acknowledges that IAU are yet to investigate Sgt Barnes' supervision of 1/C Donohoe's Use of Force Report.

Prosecution brief

[105] Constable Cooke was the officer responsible for preparing the prosecution brief for the charges against Mr Wells. Amongst other things, her preparation would have included a review of the CCTV footage of the incident.

[106] The prosecution brief was reviewed and approved by two senior officers, namely Sgt Phoebe Marshall, the Brief Quality Manager, and Sgt Barnes.

[107] On 27 October 2017, Mr Wells appeared before Fremantle Magistrates Court with legal representation. Mr Wells pleaded not guilty to all five charges. His lawyer claimed to have seen the CCTV footage of the incident and considered it damaging for the prosecution. The matter was set for mention on 15 January 2018.

[108] The prosecution brief was subsequently referred to the Fremantle Prosecutions Branch in May 2018 for trial on 13 June 2018. Noting the absence of the CCTV footage, the Prosecutor contacted Constable Cooke seeking a copy. There is evidence that Constable Cooke raised her concerns with the Prosecutor when she provided the CCTV footage.[51]

[109] Similarly, the Prosecutor raised concerns with the Prosecuting Regional Coordinator: 'I find the footage disturbing, with excessive force being used by two officers …'[52]

[110] Aside from Mr Wells' lawyer confirming that he would vigorously defend the matter and be lodging a police complaint, the Prosecutor also advised the Prosecuting Regional Coordinator that if the CCTV footage was played in court, the WA Police Force would come under adverse criticism.[53]

[111] Within days the prosecution against Mr Wells was discontinued and the matter reported to IAU.

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[50] IAU Running Sheet, p 32.
[51] Email from Sgt Hobbs to a Senior Sgt on 31 May 2018.
[52] Ibid.
[53] Ibid.

[112] The grounds for discontinuance were communicated to Sgt Trenberth, at his insistence 'it is not in the public interest to continue with the Prosecution given the high possibility of acquittal, with officer's credibility being questioned and the criticism which could be levelled at the WA Police …'[54]

[113] The Commission notes that the WA Police Force should comply with the Statement of Prosecution Policy and Guidelines.

[114] The question of an officer's credibility and the criticism which could be levelled at the WA Police Force do not appear to be valid considerations for discontinuance.

[115] In his written response to a draft of this report, Sgt Trenberth:

> *I have spent the majority of my career policing pubs, clubs and entertainment districts. That's day in and day out dealing with people who have consumed too much alcohol. I think I have a bit of experience in it, like more than you have. Yet you are judging me alone, you have absolutely no expertise or experience and you are hardly a peer of mine. A local Magistrate would know more about dealing with drunks than you yet I wasn't given the opportunity to have this matter judged by one, even though I tried unsuccessfully to make that happen.*
>
> *…*
>
> *There is gross misconduct in not pursuing the prosecution, it was a neglect of duty by [the Prosecutor] to refuse to prosecute. The WAPOL prosecution policy did not support the charges being withdrawn. Why are you investigating me over an alleged excessive force where you can't even prove excessive but not looking at [the Prosecutor] and the whole prosecution process? They want to sack me over this non-criminal matter but won't sack anyone else in the chain of command for breaching prosecution policy. So the back benchers can make significant errors and not be subjected to the same level of scrutiny as those on the front line?*

[116] His response was forwarded to IAU for comment who responded:

> *1/C Constable [Cooke] was the assigned investigating officer for the prosecution of [Wells] that ran its course until shortly before trial on 13 June 2018. In late May 2018 [Cooke] delivered the trial brief to the Fremantle Prosecuting where [the Prosecutor] was the allocated senior prosecutor.*
>
> *[The Prosecutor] communicated with [Cooke] via email, advising the brief 'looked in order'. He asked some clarifying questions about the detail of the alleged assault on [PAO Lewis], and also requested the CCTV footage be delivered to him. [The Prosecutor's] tone indicates a preparedness to continue the prosecution at that point.*
>
> *[Cooke] delivered the CCTV footage to [the Prosecutor], advising him at the time that she had concerns about police actions during the arrest of [Wells]. [The*

[54] Email from Sgt Hobbs to Sgt Trenberth on 24 May 2018.

Prosecutor] reviewed that footage and as a result made the decision to discontinue all charges against [Wells] for the following reasons:

1. *The physical nature of the arrest started with [Lewis] trying to grab the cigarette from [Wells].*

2. *Submissions raised by [Wells'] lawyer questioned the lawfulness of the arrest, given the accused produced his phone wallet containing identification.*

3. *The level of force used by Trenberth may or may not be found to be justified.*

4. *The unjustified use of force by Donohoe once the accused had been handcuffed.*

5. *Given the police officer's actions it was his opinion a conviction would be unlikely.*

Trenberth queried the discontinuance of the charges by email, and [the Prosecutor] responded with the above points. Trenberth then requested the matter be reviewed by another Senior Prosecutor.

[The Prosecutor] arranged for [the] Senior Fremantle Prosecuting Sergeant review his decision. [He] concurred with [the Prosecutor's] view and submitted a Prosecution Discontinuance Notice. [The Prosecutor] also requested a Senior Sergeant of the Prosecution Divisional Office review the case. [That officer] also concurred with the decision to discontinue, before submitting a Police Complaint Report to initiate an investigation into the actions of officers during the arrest of [Wells].

… An Evidence Assessment Meeting was held at IAU on 18 August 2018 with the senior management team. A consensus was reached that the decision to discontinue the charges against [Wells] was correct.

There is no evidence [the Prosecutor] or any other Police Officer acted improperly in the process of discontinuing the charges against [Wells].

[117] The Prosecutor's decision was confirmed at all levels and was not, in any event, his alone. In the Commission's opinion, the decision to discontinue the charges was an appropriate exercise of the Prosecutor's discretion. Sgt Trenberth's allegations about the Prosecutor lack substance.

CHAPTER FIVE

The Internal Affairs Unit investigation

[118] The allegations that Sgt Trenberth and 1/C Donohoe used excessive force against Mr Wells prompted IAU to commence an internal investigation. The subject officers were stood down on 6 June 2018.

[119] Two days later, IAU met with Mr Wells. Mr Wells confirmed he was heavily intoxicated when he was evicted from the National Hotel. Although he had little recollection of the incident, he remembers the officers asking him who he was.[55] IAU did not explore Mr Wells' response to this critical question.

[120] Mr Wells also acknowledged that his intoxication and behaviour may have played a role in the events that transpired. He questioned the accuracy of the Statement of Material Facts, namely his scratching of 1/C Donohoe's finger. Mr Wells stated he was a habitual nail biter and could not have scratched 1/C Donohoe as alleged.

[121] Mr Wells told IAU investigators that when he went to have a cigarette, there was a bit of a disagreement and he was grabbed and taken to the ground. He recalled being punched and his finger being injured.

[122] Mr Wells denied kicking PAO Lewis in the head. He maintained that he would never hit a woman like that. He questioned the severity of PAO Lewis' injury: "if you look at inside the police station, she was quite happily giving me shit, so she couldn't have been that bloody bad …"[56]

[123] Evidence from the lockup and PAO Lewis' behaviour offers some support to Mr Wells' assertions. On the other hand, the medical evidence supports some contact with PAO Lewis' head.

[124] Aside from the dislocated finger, Mr Wells also advised IAU investigators that he sustained a couple of broken ribs on his left side during the scuffle. The former injury was treated by the ambulance officers on the night. However, he did not seek further medical attention for the dislocated finger or the broken ribs. The injuries that Mr Wells allegedly sustained have not been confirmed by any medical practitioner.

[125] Mr Wells told the IAU investigators he was satisfied they were conducting an investigation. He did not want to pursue any criminal action against the police officers involved in the incident.

---

[55] IAU interview with Mr Wells on 8 June 2018, p 4.
[56] Ibid 5.

[126] As a consequence, IAU undertook a managerial investigation into the allegations that Sgt Trenberth and 1/C Donohoe used excessive force against Mr Wells on 3 September 2017.

Commission review

[127] The Commission's review of the CCTV footage, witness statements and IAU interviews exposed additional areas of concern in relation to officer conduct and the supervision and management of staff.

[128] Sgt Trenberth told IAU investigators that he initially intended to issue Mr Wells with a Move on Order. However, when he failed to provide his personal details, he arrested him.[57]

[129] When Mr Wells removed his mobile phone wallet, it was as a result of being asked to remove everything from his pockets for security purposes and not because he was asked to produce identification.

[130] Sgt Trenberth confirmed he was looking at Mr Wells' identification when PAO Lewis attempted to snatch the cigarette from Mr Wells.

[131] The Commission is unable to determine whether Mr Wells ultimately complied with Sgt Trenberth's request for identification due to the absence of audio and Mr Wells' poor recollection of the events. But whether asked for or not, Sgt Trenberth did have identifying particulars in his hand, albeit 'cloudy'.

[132] Sgt Trenberth maintained there was nothing precluding PAO Lewis from issuing instructions to Mr Wells outside of the confines of the police station. Similarly, he had no issue with PAO Lewis attempting to snatch the cigarette from Mr Wells because he was an arrested person who was in possession of a security risk item.

[133] Contrary to Sgt Trenberth's view, IAU considered that PAO Lewis had no authority in her capacity as a police auxiliary officer to be dealing with a street policing incident. The Commission agrees.

[134] Sgt Trenberth claimed the decision to go 'hands on' with Mr Wells was not made by him but by 1/C Donohoe when he decided to apply the handcuffs. When Mr Wells grabbed 1/C Donohoe, the situation got out of control.

[135] The distraction punches that he applied to Mr Wells were intended to stop him from kicking. He considered his use of force to be lawful and in

[57] IAU interview with Sgt Trenberth, p 9.

line with training in empty hand techniques: "when he stopped kicking I stopped punching …"[58]

[136] The Commission is very conscious that it should not second guess decisions made by police officers who may be confronted with a dynamic and potentially or actively violent situation.

[137] Decisions made instantaneously in the heat of the moment may turn out to be wrong. That does not mean they reach the threshold of misconduct.

[138] Police officers are entitled to use reasonable force but, like every other citizen, cannot use excessive force.

[139] Whether injury occurs is an indicator not a determinant of the level of force.

[140] The Commission sought assistance from the Police Capability Advisor - Use of Force at the Police Academy. The Commission considers the Advisor is an expert in the subject. The WA Police Force Use of Force policy states:

> ***Purpose Statement - Use of Force – Generally***
>
> ***Any Use of Force MUST be reasonably necessary in the circumstances and members will be individually accountable for such force.***
>
> *Members must be cognisant that the use of tactical options in certain circumstances may cause serious injury and must ensure their use of force is reasonably necessary in the circumstances to reduce a threat and gain control of a subject.*
>
> ***Operational Safety Principles – Excessive Force***
>
> *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.*
>
> *Members must ensure that they do not use excessive force and, in particular, do not:*
>
> - *Use force where none is needed.*
> - *Use more force than is needed.*
> - *Use force or a greater level of force after the necessity for it has ended.*
>
> *...*
>
> ***FR-01.04.1 Use of Empty Hand Tactics***
>
> *Empty Hand Tactics means any self-defence or control technique executed without the use of a weapon. Such techniques include but are not restricted to blocks,*

[58] Ibid 41.

strikes, punches, kicks, compliance holds, restraints or similar operational defensive tactics. Empty Hand Tactics can be utilised by members for the following uses:

- *To prevent bodily injury to any person*
- *As a technique to effect arrest*
- *To prevent escape from arrest*
- *To prevent damage to property*

When selecting Empty Hand Tactics as an appropriate tactical option, members should ensure their decision is made in accordance with the Western Australia Police Force (WA Police Force) Situational Tactical Options Model (STOM).

When using Empty Hand Tactics as an appropriate tactical option, members must ensure their use of Empty Hand Tactics is in accordance with relevant legislation, WA Police Force policy and guidelines.

Any Use of Force MUST be reasonably necessary in the circumstances and members will be individually accountable for such force.

FR-01.04.2 Use of Head or Neck Holds

In appropriate circumstances members can elect to use Empty Hand Tactics as a tactical option to reduce a threat and/or gain control of a subject. Empty Hand Tactics include, but are not restricted to, techniques as listed in FR-1.4.1 Use of Empty Hand Tactics.

Head or neck holds should only be used to reduce a threat and gain control of a subject where the member reasonably believes ***there is an imminent risk of grievous bodily harm or death to any person*** *(****emphasis added****).*

When using Empty Hand Tactics as an appropriate tactical option, members must ensure their use of Empty Hand Tactics is in accordance with relevant legislation and the guidelines of the Western Australia Police Force (WA Police Force).

Any Use of Force MUST be reasonably necessary in the circumstances and members will be individually accountable for such force.

[141] There appears to be no continuation training in empty hand tactics. The Capability Advisor:

The agency does not provide any ongoing or continuation training in respect to Empty Hand Tactics techniques. In other words there is no 'refresher' or requalification in Empty Hand Tactics techniques as a component of the agency's annual In –Service Critical Skills training program.

Therefore a member who undertook their Initial Critical Skills training as part of their OSTT Foundation Training at the Police Academy ten years ago will not have had any update on the Empty Hand Tactics techniques currently being taught and as such will have to rely on what they can remember from their original training or those techniques that they have tried and tested and found to work in the operational environment.

[142] The Commission makes no recommendation but raises the issue for consideration.

[143] The Capability Advisor sets out the use of empty hand tactics:

> *Generally, the use of Empty Hand Tactics in any circumstances would be premised on the behaviour and demeanour of the subject and the level of resistance they offer when they are arrested, ensuring the Use of Force is lawful and providing the attending members with sufficient justification to select and utilise these tactical options as being appropriate and reasonably necessary in the circumstances to reduce the threat and gain control of the subject.*
>
> *In consideration of the policy in respect to the use of Empty Hand Tactics techniques and when members are justified to use these techniques, please note, the member can utilise any defensive tactic technique which they determine is reasonably necessary in the circumstances. They are not restricted to using only those techniques in which they have been instructed or trained by the WA Police Force.*
>
> *…*
>
> *In terms of addressing your specific query regarding the Use of Force 'to the head or neck and where the application of force to these areas and the circumstances, if any, in which force to these areas is considered necessary or defensible', irrespective of the name of the techniques, where a member elects to strike a subject to the head or face area the questions that must be asked are:*
>
> - *Why was the member not able to tactically disengage and establish some reactionary gap*
> - *Why were other tactical options precluded*
> - *What was the perceived threat*
> - *Why did the member select the subjects head or face as an appropriate target area for the delivery of a strike*
> - *Was the strike to the head or face delivered with a closed fist*
> - *Was this a single strike and with which hand*
> - *Were there multiple strikes and with which hand/s*
> - *Was the strike to the head or face an instinctive reaction in the circumstances – was this an act of self defence*
> - *In the event of multiple strikes being delivered to the subject's head or face was this an excessive Use of Force*
>
> *Any such action would need to be justified in consideration of the circumstances and whether the Use of Force was lawful and reasonably necessary in the circumstances. In consideration of the questions identified above, was a single strike or 'punch' to the head proportionate to the threat and therefore could be considered reasonable force in the circumstances. What other tactical options*

were considered and available, why were these precluded and what if any injuries did the subject sustain as a result of the strike to the head or face.

…

Entry Diversion and Tactical Disengagement Techniques:

An Entry Diversion Technique is a physical or verbal tactic employed by a Police Officer to momentarily re direct the perceived primary focus of an "attacking or aggressive" subject. This is done to allow the officer to effectively apply an approved control or restraint technique. It should be noted that disarming/distracting dialogue can also be used in appropriate situations.

Entry Diversion Techniques may include:

- *Verbal Commands*
- *Manipulation of Pressure Point*
- *Hammer Fist*
- *Elbow Strike*
- *Rear Elbow Strike*
- *Stomp*
- *Knee Strike*

Entry Diversion Techniques should be delivered to specified target areas, depending on the level of perceived threat/resistance encountered.

Low Threat Areas may include:

- *Joints*
- *Major Muscle Groups*
- *Fleshy parts of an individual*
- *Hands and Feet*

High Threat Areas may include:

- *Eyes, Nose*
- *Throat*
- *Groin*

In all circumstances the force applied when utilising 'Entry Diversion Techniques' must be reasonable and not excessive and in accordance with relevant legislation and WA Police Force Use of Force policy.

Entry Diversion Techniques are useful in situations where it is obvious to the member that their own physical stature and ability restricts them realistically performing specific restraint and control techniques. This also leads into the

importance of training the Tactical Disengagement Option. It is critical that members understand these techniques thus enabling them to utilise other available and perhaps more appropriate tactical options.

Notwithstanding the above, in any Use of Force Incident, where the conflict situation has escalated to the extent that a member has selected and used tactical option/s to reduce a threat and control of a subject, the use of Empty Hand Tactics techniques will be required to restrain and control the subject for the purpose of applying handcuffs.

Use of Force Reports

[144] Sgt Trenberth reviewed and approved the Incident Report compiled by 1/C Donohoe on the night. He stated that Mr Wells did not punch him in the jaw with a "clenched fist" as described by 1/C Donohoe in his Incident Report.[59]

[145] The decision to keep Mr Wells handcuffed for over an hour while secured in a cell was not his. He considered it to be the correct decision because in his view Mr Wells had already been violent.

[146] The lockup CCTV footage shows that Mr Wells was physically compliant the entire time he was restrained and secured in the cell. This raises questions about the quality of supervision and its impact on Mr Wells' health and welfare while in custody. The Commission notes that IAU will be examining this matter further.

[147] Sgt Trenberth did not witness 1/C Donohoe injure Mr Wells' finger. When he became aware of it, he directed 1/C Donohoe to submit a Use of Force Report.

[148] He did not submit a Police Conduct Report because 1/C Donohoe gave him a reasonable explanation. He also didn't believe that it was up to him to judge a matter that was reviewable by the "chain of command".[60]

[149] Sgt Trenberth maintained the matter should have gone to prosecution and believed his actions were lawful. He stated "I think the fact that it's not a criminal investigation backs that up and this is only disciplinary so I haven't used an excessive amount of force otherwise I'd be facing an assault charge …"[61]

[150] It was apparent during interview that Sgt Trenberth was often argumentative and unwilling to examine his own actions during the incident or consider alternative actions he could have taken. A similar

[59] IAU interview with Sgt Trenberth, p 59.
[60] Ibid 51.
[61] Ibid 61.

comment might be made about his response to this draft report, some of which is reproduced in Chapter Six.

[151] 1/C Donohoe told IAU investigators that when he made the decision to handcuff Mr Wells, it was because of his demeanour and the potential injury to attending officers. After reviewing the CCTV footage he conceded that he had misread the threat and there was no evidence of Mr Wells clenching his fists as outlined in his witness statement.

[152] 1/C Donohoe did not consider Sgt Trenberth's punches to be an excessive use of force given the number of kicks Sgt Trenberth had received from Mr Wells.[62]

[153] 1/C Donohoe expressed surprise when it became evident from reviewing the CCTV footage that Mr Wells did not grab his arm or scratch his right finger as evinced in his witness statement. After being shown a photograph of Mr Wells' chewed fingernails, he acknowledged it was unlikely that he could have been scratched by Mr Wells.

[154] He conceded that when he twisted Mr Wells' finger, it was not a justified use of force and considered it a "most regrettable act".[63]

[155] 1/C Donohoe stated "It's not what we're trained to do, I know that. It was unnecessary I believe, and even if he had have scratched me I still think it was unreasonable …"[64]

[156] He could not recall why he looked up because he knew the CCTV camera was there and stated "if I'd been thinking clearly I'd have known the camera was there and I would not have done it regardless …"[65]

[157] The Commission considers the alleged dislocation of Mr Wells' finger was deliberate. It was unrelated to any action to restrain Mr Wells and appears to be a gratuitous use of force against a person already restrained.

[158] 1/C Donohoe also advised IAU investigators that when he wrote his witness statement, it was "under a degree of bias, you know, my memory was being sympathetic to my actions".[66]

[159] He made no attempt to cover his tracks when he completed and forwarded his Use of Force Report to Sgt Barnes for review. Sgt Barnes contacted him some time later to discuss what he had written about

[62] IAU interview with 1/C Donohoe, p 29.
[63] Ibid 34.
[64] Ibid 35.
[65] Ibid 36.
[66] Ibid 42.

Mr Wells' finger and whether it could be worded differently in the report. 1/C Donohoe made no changes to the report following this conversation.

[160] 1/C Donohoe conceded that if the matter had gone to prosecution, they would have lost.

[161] PAO Lewis told IAU investigators that when she viewed the CCTV footage in October 2017 she did not recall seeing anything adverse in relation to the actions of Sgt Trenberth or 1/C Donohoe.[67]

[162] She involved herself in the incident because she wanted to "de-escalate the situation" and talk Mr Wells down.[68] She conceded that as a PAO, she had no power on the street and should not have involved herself in the incident.

[163] PAO Lewis could not recall how she became aware that Mr Wells had kicked her in the head. The lockup audio confirms that PAO Lewis was acutely aware of what happened when she stated "You're the one that kicked me in the head and you kicked another police officer in the head, so we've kicked the shit out of you …"[69]

[164] PAO Lewis claimed that one of the first things she did after she left Mr Wells in the lockup was to start writing her witness statement without reviewing the CCTV footage or speaking with the other officers involved in the incident. Yet her witness statement tells a different story: 'Once the accused had been processed and released from Police custody, I went to my computer and sat down. Suddenly I felt sluggish, sick and began feeling disorientated …'[70]

[165] In her response to the draft report, PAO Lewis:

> *I maintain that I did not discuss my statement with anyone prior to drafting it, and I did not look at the CCTV footage. I explain why in my interview. The suggestion appears to be in this paragraph that I either went to the computer while Mr 'Wells' was in the lock up, or after he left, but that it could not have been both. I cannot now recall exactly when I first went to my computer, or whether I went several times. If there is any inconsistency, it was not because I was trying to hide anything, it was because I genuinely cannot remember.*
>
> *I know that at some point in the evening I created a word document and typed some notes. The document's data shows that this document was 'created' at 2.30am. These notes formed the basis of my statement. Therefore, in the interview I have referred to these notes as my statement.*[71]

[67] IAU interview with PAO Lewis, p 13.
[68] IAU interview with PAO Lewis, p 33.
[69] Fremantle Police Station Lockup transcript, p 1.
[70] Witness statement by PAO Lewis [79]-[80].
[71] Section 86 response of PAO Lewis, 21 January 2019.

[166] The Commission has some doubt as to the degree of candour displayed by PAO Lewis during her interview with IAU investigators, particularly with regard to her knowledge of the actions of other officers and her own actions in the lockup.

[167] Constable Waller told IAU investigators that he had no knowledge of what transpired between Mr Wells, Sgt Trenberth, PAO Lewis or 1/C Donohoe, prior to him assisting with the restraint of Mr Wells.[72]

[168] He did not witness Sgt Trenberth punch Mr Wells until after he watched the CCTV footage. Yet the CCTV footage shows that Constable Waller responded to the incident while Sgt Trenberth was still punching Mr Wells.

[169] Based on the CCTV footage, it is unlikely that Constable Waller was unaware of Sgt Trenberth's actions as he is seen to observe them. For that reason, it is the view of the Commission that Constable Waller has not been completely candid in his account.

[170] Constable Waller had no recollection of 1/C Donohoe twisting Mr Wells' finger. Instead, he thought that Mr Wells' finger had been caught in his vest during the struggle. The CCTV footage shows that immediately after 1/C Donohoe twists Mr Wells' finger, Constable Waller looks down at Mr Wells' hands. He then looks down at Mr Wells' hands a further seven times, suggesting he was fully aware of what had occurred.

[171] Although IAU investigators gave Constable Waller every opportunity to reconsider his response in relation to when he became aware of Mr Wells' finger being dislocated "I don't recall seeing his finger busted …"[73]

[172] Constable Cooke told IAU investigators that Sgt Trenberth was her line manager and assigned her the prosecution case file because she was not involved in the incident.[74]

[173] She only became aware of the circumstances of Mr Wells' dislocated finger when she watched the CCTV footage a few days later. She was shocked at what she saw.

[174] Constable Cooke: "I know I definitely spoke to Nathan [Sgt Trenberth] about it. I didn't like what I saw; it didn't look good. But I also saw enough for [Wells] to be charged with the offences he was charged with …"[75]

[72] IAU interview with Constable Waller, p 13.
[73] Ibid 17.
[74] IAU interview with Constable Cooke, p 8.
[75] Ibid 10.

[175] Constable Cooke could not recall Sgt Trenberth's exact response.

[176] Although Constable Cooke considered Sgt Trenberth's actions to be heavy handed, she was more concerned about the conduct of 1/C Donohoe.

[177] Constable Cooke said that following Mr Wells' receipt of the summons and Statement of Material Facts, she was approached by Mr Wells' lawyer asking to view the CCTV footage. Mr Wells' lawyer told her that it looked bad and he would be speaking to the police prosecutor. Constable Cooke stated she "probably" relayed the lawyer's comments to Sgt Trenberth, however she didn't speak to any other senior officers about it.[76]

[178] It is the Commission's view that the comments of Mr Wells' lawyer should have been communicated to a more senior officer. The fact that Constable Cooke did not is a significant error in judgment.

[179] Constable Cooke stated that she had a conversation with Sgt Barnes about the prosecution brief before he approved it: "I definitely remember speaking to him saying it didn't look good, but I don't think I showed him the footage at all …"[77]

[180] Constable Cooke was aware the prosecution brief would have been disseminated to a number of people including the Brief Quality Manager, Sgt Marshall. However, she could not confirm if any of those people had viewed the CCTV footage.

[181] The Commission notes that Sgt Marshall has taken voluntary severance unrelated to this matter.

[182] Constable Cooke believed there was enough evidence to support the charges against Mr Wells. After some discussion with IAU investigators, Constable Cooke conceded that she did not question the inconsistencies that existed between the CCTV footage and the witness statements submitted by the officers involved.

[183] Constable Cooke stated "the next person I showed the footage to was Sergeant Hobbs at prosecuting …"[78]

[184] Aside from Sgt Hobbs, Constable Cooke did not raise her concerns about 1/C Donohoe with anyone else because she had already broached them with a couple of supervisors. Upon reflection, Constable Cooke acknowledged that she had a responsibility to formally report misconduct.

[76] Ibid 13.
[77] Ibid 13.
[78] Ibid 15.

CHAPTER SIX

Responses

[185] At the conclusion of an investigation, the Commission reaches tentative conclusions in a draft report.

[186] Before finalising its report, the Commission gives a person reasonable opportunity to make representations on any matter adverse to that person.[79]

[187] Responses are considered and the Commission may modify or change the draft report if the responses are accepted.

[188] PAO Lewis responded with respect to the incident in the mall:

> *At the outset, I would like the Commission to know that I accept, and agree, that my behaviour both on the street and in the lockup was unacceptable. I should not have become involved on the street. I felt that I was already involved once the incident unfolded directly in front of me at the Hotel. I was suddenly confronted with violence, which looked like it may continue. While the CCTV footage, viewed away from the incident, may suggest that there were no further threats, that is not what I felt on the night, having just seen the patron being ejected. At no time was I told by the attending officers that I should not be involved. I assumed that, given the situation, they felt I was needed.*
>
> *I had not been involved in any incidents on the street before this. During my auxiliary training I did not accompany other officers to incidents, and I was not taken onto the street. Therefore the only experiences I had had of violence were when a suspect in the lock up becomes violent, usually in an attempt to harm themselves. In those situations talking and de-escalation is usually all that is required, and the situation is contained within the lock up. This was an entirely new situation for me and I was taken by surprise and I let the adrenalin get the better of me.*[80]

[189] As to her attitude in the lockup:

> *I genuinely do not recall the majority of what occurred in the lock up, but I have been told by IAU and my lawyer what I said at various times. The words I used at the lock up were, I agree, unacceptable. I was upset at the outset because I felt unwell, and I was upset by the threats coming from Mr Wells about my career, given that I had barely started it at that stage. I was not given any guidance at any point by my superiors. I should have been more aware of taking responsibility for what I was doing, and I should have asked to leave the lock up given the way I was feeling.*[81]

[79] CCM Act s 86.
[80] Section 86 response of PAO Lewis, 21 January 2019.
[81] Section 86 response of PAO Lewis, 21 January 2019.

[190] Relevant portions of Sgt Trenberth's response are as follows. Names have been anonymised:

Hello John,

I feel this is going to be a complete waste of my energy to respond to your S 86 report.

As with the IA[U] investigator you have done a half arsed job. Baseless allegations with no corresponding alternative offered. Where's your opinion on what I should've done? How should I have secured an offender who was actively kicking me and had kicked [PAO Lewis] in the head without causing any injury to him? I offered [him] to recreate the incident where I could be the offender and he could show me how he could secure me without injury but true to form he wouldn't. I offer the same to you but I'm guessing you won't do it either. Why? Because you can't?

Distracting techniques like I used are part of Police training. Did you know that?

The arrest of the offender was completely lawful, PAO [Lewis'] involvement was with an arrested person. She was acting lawfully. That's what their job is, as custody officers they assist with arrested persons.

…

Yet … you say based on the CCTV footage I 'may' have used excessive force. Where is it excessive? Where are the injuries? Where's the complaint from the offender I punched? Again where's the alternative recommendation by you that after being kicked five times you could have secured him without injury like I did? So you can be better educated on such matters without relying on an armchair opinion from a glass tower I offer you the following: I'll happily provide myself at anytime to be secured by absolutely anyone you can bring. Have some confidence in your opinion that the force was excessive. There is only ONE conclusion that can be drawn if you don't, and that it can't be done without injury like I did it.

I go to the gym all the time, at that stage I was a lean 102kgs. I was standing over the offender punching downwards. If I punched him using excessive force seven, eleven or any number of times then there would be injuries, in fact these injuries would be significant. How do I know? I've seen a lot of fights in my career and I've watched some UFC. Those guys wear gloves and still do more damage. Ask around and maybe get yourself educated. If its excessive as you're alleging then where are the injuries to prove your assumption?

'Argumentative and unwilling to examine my own actions during the incident or consider alternative actions'. The alternative actions put forward by [the] IAU [investigator] were mischievous and deceiving. Things like 'let him smoke' are just ridiculous and against policy for an arrested person. I challenged him to come up with alternative actions as an officer 'with experience' but he said that wasn't his role. I can also imagine ridiculous alternatives that may work in a utopian environment but have no bearing in the real world.

(The Commission notes that the investigator reiterated a number of times during the interview that the IAU were in a fact finding stage. In the Commission's view, the questions asked in the interview were appropriate.)

You are doing exactly the same in offering an opinion on my actions but no recommendation on an alternative.

The fact you have failed to include material facts is also mischievous. I was kicked five times and received an injury to my ribs that took three months to heal. [PAO Lewis] was kicked to the head and received a concussion which she was treated for and had a significant amount of time off work. This all occurred prior to my actions in overcoming his resistance. You also deliberately leave out the fact he had no injuries. You deliberately leave out the fact that I was acting in accordance with Police training …

Your Conclusion:

Possible excessive force; where's the injuries delivered by me? Where's the action I took that was not in accordance with Police training. Where is your summation of alternative techniques I could've taken without causing injury to the offender? I was kicked five times causing me injury, [PAO Lewis] was kicked once to the head causing her a significant injury.

…

I made no deliberate attempt to inflict pain. The CCTV footage is clear that I used force to stop him kicking me, to overcome the resistance and once his resistance was overcome I stopped immediately. This can be seen very clearly from the CCTV.

Your report is full of subjective, unqualified opinion, inaccuracies, false assurances and leaves out many material facts. Submitting this report to parliament in its current form is skewed significantly, you are selectively using evidence to fit your narrative rather than let the evidence do the talking. A politician should be able to trust the accuracy of your report.

Use of force is disturbing. I hated this part of the job and fortunately most times I could talk my way through nearly all situations. I was hoping to do that this time hence the reason I requested the offenders details for over more than five minutes so I could deal with him without an arrest. The use of force then used was only to overcome him kicking me, which I did. He received no injury from my actions. It looks disturbing as all use of force does, but he was overcome without injury to him, but injury to us.

Accounts were significantly at variance, what so there was no collusion, no use of the CCTV to back up statements?

…

Excessive how? Take my challenge, overcome my resistance using less force than me and don't cause me any injuries. I on the other hand can be as violent as the offender. Without this test your unqualified inexperienced opinion is just that, unqualified inexperienced opinion.

…

You, John McKechnie, have similarly shown a disregard for the evidence yet have chosen to adopt a favourable narrative which you've used the evidence to fit.

I could go on and pick each point apart, like comments made in the lock up which have been skewed to match your narrative but to me it seems like a complete waste of time. I have no confidence that this reply will even make your desk as I've previously sent correspondence to the Commissioner that was circumvented and responded to by IA[U].

I have no confidence in your 'investigation' and have lost any confidence in you that you can accurately form an independent opinion of any great substance on matters like this.

I again invite you or IA[U] the opportunity to demonstrate an alternative technique to overcome my resistance. At the end of the day this is the whole crux of your allegations that I used excessive force and without it being tested it is just your subjective opinionated rubbish that you are judging me on.

CHAPTER SEVEN

Conclusion

[191] This was a serious incident involving possible excessive use of force.

[192] IAU decided not to pursue criminal proceedings after Mr Wells indicated he was not prepared to lodge a complaint. He maintained that position when interviewed by the Commission.

[193] The attitude of the possible victim is always a material consideration. However, the public interest in having matters properly determined by a court should also be given weight. The Commission notes the IAU investigation is not yet complete.

[194] The deliberate infliction of pain on another person by a police officer is a matter of significant public interest.

[195] That said, the Commission is not a charging authority. It does however report to Parliament and may form opinions of misconduct.

[196] There are several disturbing features of this incident apart from the finger twisting.

[197] The officers' accounts, at times, were significantly at variance with the CCTV footage.

[198] The involvement of PAO Lewis in the incident was wrong. Her subsequent behaviour at the Fremantle Police Station lockup reflects poorly on her and on the WA Police Force. To her credit, she has acknowledged aspects of her behaviour were wrong.

[199] The force used to overcome Mr Wells, in the Commission's opinion, was excessive. Mr Wells was intoxicated and no doubt difficult, but the triggering event for the incident was the snatching away of his cigarette by PAO Lewis. Until then he had shown no overt aggression.

[200] The Commission does not express any opinion on whether it constitutes an offence.

[201] Nor does the Commission express an opinion as to whether 1/C Donohoe's action in respect of the injury to Mr Wells' finger may constitute an offence.

[202] Only a court can determine guilt.

[203] The Commission in its oversight of police is empowered to form opinions on police misconduct and forms such an opinion in respect of Sgt Trenberth and 1/C Donohue in their use of force against Mr Wells.