LECC
Law Enforcement
Conduct Commission

OPERATION SOMNUS

A report pursuant to section 132 of the *Law Enforcement Conduct Commission Act 2016* concerning officers who fabricated and tampered with evidence with intent to mislead a judicial tribunal

December 2025

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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



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17 December 2025

The Hon Ben Franklin, MLC
President
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The Hon Greg Piper, MP
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Dear Mr President and Mr Speaker

Operation Somnus

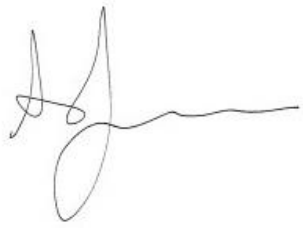
In accordance with s 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act), the Commission provides you with a copy of its Report:

> Operation Somnus
>
> A report pursuant to section 132 of the *Law Enforcement Conduct Commission Act 2016* concerning officers who fabricated and tampered with evidence with intent to mislead a judicial tribunal

I presided at the private examinations held in aid of the investigation.

In accordance with s 142(2) of the LECC Act, I recommend that this report be made public immediately.

Yours sincerely



Anina Johnson
Commissioner

Executive Summary

In July 2021, CIV1 attended a regional police station to ask about obtaining a police report relating to a motor vehicle accident. The exchange with officers became heated. CIV1 was arrested in the foyer of the Regional Police Station 1 and charged with offences of offensive language, failure to comply with a move on direction and resist officer in execution of duty.

Two years later, the matter went to court. The defence introduced a synchronised video consisting of audio from CIV1's phone overlayed onto CCTV footage from Regional Police Station 1. The footage completely contradicted the version of events provided by police in their statements. CIV1's charges were dismissed. The Magistrate stated he held 'grave concerns' about the behaviour of the NSW Police Force officers involved, including potential corroboration or collusion of officers in creating a false narrative of events in support of the offences charged and a 'compelling inference' that police had tampered with evidence.

Following the adverse comments made by the Magistrate, the Police Prosecutor completed a Failed Prosecution Report, initiating an internal investigation by the NSW Police Force into the conduct of 2 of the officers involved, Officers SOM1 and SOM2.

The NSW Police Force investigated allegations that the officers had fabricated or tampered with evidence. No sustained findings were made in relation to these allegations. The only sustained finding was against Officer SOM2 for copying quotes from Officer SOM1's statement.

In January 2024, the Commission commenced a review of the investigation conducted by the NSW Police Force. The Commission was concerned that several officers had engaged in serious misconduct, including criminal offences. In April 2024 the Commission commenced its own investigation.

The Commission privately examined 4 of the officers involved in the incident relating to CIV1's arrest, interviewed a fifth involved officer and obtained statements from 2 civilian witnesses. The Commission also reviewed a significant amount of evidence, most notably including the transcripts of evidence given by police in the criminal proceedings, the statements provided by police, mobile phone recordings from CIV1's mobile phone and synchronised footage of the incident which consisted of audio from CIV1's mobile phone overlayed onto the CCTV footage.

The Commission also privately examined the Police Prosecutor and the police officer that conducted the internal police investigation.

The Commission made 7 factual findings, including:

1. The arrest of CIV1 on 12 July 2021 was unlawful.

2. Officer SOM1 choked CIV1 in the corridor of the police station whilst in the process of escorting him to the dock.

3. Officer SOM1 took CIV1's mobile phone and deleted the recording of the incident. He then purposely omitted 6 seconds of CCTV footage during the search of CIV1 from the brief of evidence to conceal evidence that he had deleted the mobile phone recording.

4. Officer SOM1 fabricated statements in the Facts Sheet in support of the offences CIV1 was charged with.

5. Officers SOM1 and SOM2 fabricated evidence in their statements with an intent to mislead a judicial tribunal, providing an entirely false narrative of events relating to CIV1's arrest.

6. Officers SOM1 and SOM2 gave false evidence in the Local Court under oath in the matter of CIV1 in relation to matters material to the proceedings.

7. The internal police investigation into the conduct of Officers SOM1 and SOM2 was deficient.

The Commission found that the conduct of Officers SOM1 and SOM2 amounted to serious misconduct and has recommended the Commissioner of Police consider taking action to dismiss the officers pursuant to s 181D of the *Police Act 1990* (Police Act).

The Commission will refer briefs of evidence to the Director of Public Prosecutions (DPP) to seek her advice with respect to the prosecution of Officers SOM1 and SOM2 for the following criminal offences:

- perjury pursuant to s 327(1) of the *Crimes Act 1900* (Crimes Act); and

- fabricate false evidence pursuant to s 317(b) of the Crimes Act.

In addition, advice will be obtained from the DPP in respect to the prosecution of Officer SOM1 in relation to the following criminal offences:

- tamper with evidence pursuant to s 317(a) of the Crimes Act; and
- common assault pursuant to s 61 of the Crimes Act.

The Commission has also recommended that Officer SOM3, who conducted the internal police investigation, should be subject to non-reviewable action under s 173 of the Police Act.

The investigation raised significant concerns about some current practices within the NSW Police Force around the preparation of statements, review of criminal briefs and the use of privacy squares on CCTV within police stations. Accordingly, the Commission has also made the following general recommendations:

1. The template police statement should include a second paragraph to prompt officers to list the extrinsic material that they have considered as part of preparing their statement.

2. The Commission's *Review of NSW Police Force responses to failed prosecutions* report included the following recommendations:

   Recommendation 1: The NSW Police Force put in place systems and procedures to ensure that officers responsible for the quality review of briefs of evidence have the necessary skills, time and resources to:

   a) review all evidence, including BWV, CCTV, witness and victim statements and DNA evidence to confirm the evidence satisfies the elements of the offence

   b) ensure that the investigator has thoroughly investigated the matter

   c) ensure that the investigator has time to complete any outstanding requisitions

   d) confirm that the investigator has completed the brief and has sent it to the police prosecutor within the recommended timeframes.

Recommendation 7: The NSW Police Force conducts a yearly review of the reasons why the courts award costs against the NSW Police Force and develops strategies to reduce the conduct that leads to courts awarding costs to the defence.

The Commission reiterates these recommendations in this matter.

3. Privacy squares covering the corridor of the relevant police station be removed from the CCTV and an alternative option be considered to protect the privacy of officers using the bathroom.

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1. Introduction

1.1. On the morning of 12 July 2021, CIV1 attended Regional Police Station 1 to obtain a police report relating to a motor vehicle accident he was involved in approximately 7 months before.

1.2. Approximately 30 minutes later, following several interactions with various police officers, CIV1 was arrested in the foyer of Regional Police Station 1. CIV1 was subsequently charged with the following offences:

1. Use offensive language in/near public place/school.[1]
2. Refuse/fail to comply with a direction under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).[2]
3. Resist officer in execution of duty.[3]

1.3. CIV1 entered a plea of not guilty to the above charges. The matter was part heard across 3 days in the Local Court in April and December 2022.

1.4. During the cross-examination of the Officer in Charge of the investigation, Officer SOM1, the defence introduced footage retrieved from CIV1's mobile phone of his interaction with police and subsequent arrest on 12 July 2021. The defence also introduced a synchronised video consisting of audio from CIV1's phone overlayed onto CCTV footage from Regional Police Station 1. The footage completely contradicted the version of events provided by police.

1.5. On 29 August 2023, the Police Prosecutor, Prosecutor SOM8 withdrew all charges against CIV1 and the charges were dismissed by the Magistrate.

1.6. On the same date, CIV1's legal representative made an application for costs. In his judgment on the costs application, the Magistrate stated that he held 'grave concerns' about the behaviour of the NSW Police Force officers involved and their apparent misconduct. This included corroboration or collusion by officers to create a false narrative of events in support of the offences charged and a

[1] *Summary Offences Act 1988*, s 4A(1).
[2] LEPRA, s 199(1).
[3] *Crimes Act 1900* (Crimes Act), s 58.

'compelling inference' that police had deleted footage from CIV1's phone. The Magistrate made a costs order in favour of CIV1 in the sum of $136,704.76.

1.7. On 1 September 2023, Prosecutor SOM8 completed a Failed Prosecution Report following the adverse comments made by the Magistrate in the Local Court.

1.8. As a result of information contained in the Failed Prosecution Report, the NSW Police Force commenced an investigation into the allegations of tamper with evidence and adverse comment against 2 of the officers involved, Officer SOM1 and Officer SOM2.

1.9. The NSW Police Force completed its Investigation Report on 11 December 2023,[4] with no sustained findings made against the 2 officers for the allegations triaged. However, a sustained finding was made against Officer SOM2 in relation to an allegation arising for copying parts of Officer SOM1's statement into his own statement.

1.10. On 25 January 2024, the Commission commenced a review of the police investigation under its powers to oversight police investigations: Part 7 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act). The review found evidence to support a view that several officers had engaged in serious misconduct, including criminal offences.

1.11. Accordingly, on 11 April 2024, the Commission decided to commence an investigation under Part 6 of the LECC Act into the conduct of Officer SOM1, Officer SOM2 and other NSW Police Force officers to determine if they had engaged in serious misconduct in relation to the arrest and prosecution of CIV1.

1.12. The scope of the Commission's investigation was later expanded to include an investigation into whether Officer SOM3 or any other NSW Police Force officer failed to properly and/or adequately investigate the misconduct matter relating to CIV1.

[4] Exhibit WQK07.

2. The consequences of police officers falsifying and colluding on their statements

2.1. All police statements start with the following declaration:

> This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false, or do not believe to be true.

2.2. The statements of police officers are the foundation for many criminal cases. The importance of police officers' statements containing only information that the officer knows and believes to be true is fundamental to the proper workings of the criminal justice system.

2.3. It is generally accepted that it is only possible for a witness to say that their statement is accurate if the statement records information the witness knows from their own observations or experience. Where the statement records something that the witness did not observe or experience, that qualification should be recorded in the witness statement.

Findings of the Wood Royal Commission

2.4. In his final report of the Royal Commission into the NSW Police Service, the Hon Justice James Wood included numerous examples amongst police of using 'verbals', which were described as 'false evidence given by police that a suspect had confessed or made inculpatory remarks at the time of arrest or during an interview.'[5]

2.5. Justice Wood also discussed the topic of 'scrumdowns' in which police would meet together to 'refresh' each other's memories. This practice included one officer generating a statement for another which contained information of which the first officer had no knowledge. It also included junior officers being informed

[5] *Royal Commission into the New South Wales Police Service* (Wood Royal Commission), Final Report (1997) vol 1 defined at xiii.

by senior officers of the version of events that would be given in their statements with the expectation that this would be reflected in their evidence.[6]

2.6. Justice Wood identified both verbals and scrumdowns as a form of process corruption, which stemmed in part from:[7]

- the pressures upon police to solve crime and lock up criminals
- frustration with the justice system and the perceived need to even the odds
- the belief by police that they are doing what is expected by them in securing convictions

2.7. Justice Wood pointed out that:[8]

> This is the kind of corruption whereby police powers are abused, evidence is fabricated or tampered with. It is often directed at those members of the community who are least likely or least able to complain and is justified by police on the basis of procuring the conviction of persons suspected of criminal or antisocial conduct, or in order to exercise control over sections of the community.

2.8. However, Justice Wood concluded that being involved in this kind of process corruption:[9]

- leaves an officer potentially compromised for all time
- teaches other officers about the ease with which a deception and cover-up can be maintained
- leads to lack of confidence on the part of the community in the criminal justice system or
- is seen as an easy alternative to skilled detective work.

2.9. The Wood Royal Commission concluded that process corruption, such as verballing persons of interest or collaborating on the production of statements

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[6] Wood Royal Commission, Final Report (1997) vol 1 [4.10-4.12] (with case studies in the pages that follow [4.12-4.45]).
[7] Wood Royal Commission, Final Report (1997) vol 1 [4.7].
[8] Wood Royal Commission, Final Report (1997) vol 1 [2.3].
[9] Wood Royal Commission, Final Report (1997) vol 1 [4.9].

of evidence without disclosing that fact, 'constitutes a gross distortion of police powers, and is destructive of the good reputation of the [Force]'.[10]

2.10. The Wood Royal Commission recommended[11] that there should be a positive and sustained program to bring home to all police that:

- the Service [now Force] does not expect convictions to be obtained other than as the result of due process
- police are as much bound by the law as all other citizens and that it is their duty to uphold the law rather than circumvent it
- an officer who engages in process corruption is:
    - not entitled to retain the Commissioner's confidence
    - potentially compromised for all time and liable to prosecution for perjury or conspiracy to pervert the course of justice and civil damages
    - of no value to the [Service] operationally because of the likelihood of his or her evidence being challenged in every case.

Recommendations made by the Police Integrity Commission in 2013

2.11. Despite these recommendations, police collusion on statements remained an issue for the NSW Police Force.

2.12. In the Police Integrity Commission's (PIC) Operation Barmouth,[12] a number of police gave statements that a person in custody had broken free from their grasp and punched one of the officers on the nose. CCTV footage from the police station was initially unplayable but was played after the intervention of the Specialist Technical Information Branch. The CCTV footage showed that there was no punch. The PIC concluded that the officer who said he was punched knew that he had not been punched. The other officers who gave evidence that they

[10] Wood Royal Commission, Final Report (1997) vol 2 [7.18].
[11] Wood Royal Commission, Final Report (1997) vol 2 [7.17].
[12] *Police Integrity Commission (NSW), Report to Parliament: Operation Barmouth* (Report, September 2013) https://www.parliament.nsw.gov.au/tp/files/58091/Operation%20Barmouth%20-%20Report%20to%20Parliament.pdf

had seen the punch had no actual recollection of the punch being thrown and had copied that information from the statement of the officer allegedly punched.

2.13. Evidence was given at a public hearing of the PIC that it was common practice in the NSW Police Force for a police officer to have access to another officer's statement before making their own statement.

2.14. The PIC said:[13]

> If a police officer in making a statement confers with another police officer or accesses another police officer's notes or statement or accesses any other extrinsic material, the police officer should not include in the police officer's statement any matter of which the police officer does not, at the time of making the statement, have an actual recollection of having done or observed. The police officer should disclose in the officer's statement any sources other than the officer's own unaided recollection which the officer has used in the making of the statement.

2.15. The PIC also commented on the importance of CCTV inside police stations for the protection of those arrested and the police officers who work there:[14]

> A member of the public is particularly vulnerable inside a police station. If any dispute arises between a member of the public and police officers as to what happened inside a police station, there is likely to be a police version of what happened which will be presented in the evidence of a number of police officers, whereas the member of the public is unlikely to be able to call on any witness to support his or her version of what happened. Accordingly, CCTV within police stations is an important protection for members of the public.
>
> CCTV in police stations can also be an important protection for police officers, protecting police officers against false accusations of misconduct by them inside a police station.

2.16. Those comments remain apposite 10 years later.

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[13] *Police Integrity Commission (NSW), Report to Parliament: Operation Barmouth* (Report, September 2013) xvi.
[14] *Police Integrity Commission (NSW), Report to Parliament: Operation Barmouth* (Report, September 2013) xvii.

Judicial criticism of cutting and pasting statements

2.17. The practice of sharing statements between officers, relying on police facts or agreeing on the nature of the evidence to be given in a matter has been criticised by the courts. Sharing information in this way is only permissible if the use of the extrinsic material is documented. This is because 'in relying upon another officer's statement as to the details of conversations there is a real danger of it being accepted as correct even though the personal recollection of the writer of the statement may be unclear or slightly different.': see for example *Houda v The State of New South Wales* [2005] NSWSC 1053, Cooper AJ at [247]. An officer's failure to document their reliance on another officer's statement can result in the prosecution of the officer(s) involved for perjury, pervert the course of justice or misconduct in public office, see for example: *R v Michael Jason Cox; R v Sharon Patricia Lucas* [2011] NSWDC 58, Lakatos SC DCJ; *R v Cottrell* [2010] NSWDC 213.

2.18. The courts have also noted that where there is 'a high degree of similarity in content, detail, terminology and sequence' between the statements of different witnesses, this gives rise to the suspicion of collusion. At the very least, it devalues the evidence of those witnesses as it is not possible for the Court to be satisfied of their genuine personal recollection of events: see *In the matter of Colorado Products (in prov liq)* [2014] NSWSC 789 Black J at [16], citing *Seamez v McLaughlin* [1999] NSWSC 9 at [40] per Sperling J.[15]

Destructive of the good name of the Force

2.19. Trust is hard to earn and easy to lose. The nature of policing is that where one officer fails to act with integrity, it can jeopardise public confidence in the conduct of police more generally.

2.20. The opening paragraph of Victoria's Independent Broad-based Anti-corruption Commission's Report in Operation Gloucester highlights the importance of ensuring that a witness statement contains only their own version of events:[16]

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[15] For a fuller discussion of these issues see Benjamin Pierce, 'Cut and Paste Credibility Evidence', *Criminal CPD* (Seminar Paper, November 2014) <https://criminalcpd.net.au/evidence/>.
[16] *Independent Broad-based Anti-Corruption Commission (Vic), Operation Gloucester: An investigation into improper evidentiary and disclosure practices in relation to the Victoria Police investigation of the murders of Sergeant Gary Silk and Senior Constable Rodney Miller* (Report, 2020) 9.

> The administration of justice requires that a statement made by a witness to police investigators is an accurate and full record of the witness's account and that the statement, if relevant, is disclosed in a criminal prosecution. A failure to comply with either of these requirements is likely to jeopardise that legal process. Without someone coming forward to say that these requirements have not been followed, non-compliance or related improper practices are unlikely to be detected.

2.21. The Commission continues to receive allegations that police statements are inaccurate. Without corroborative evidence, it is very difficult for defendants to prove that a police statement is false or misleading.[17]

2.22. As discussed below, the deception perpetrated in this case only came to light because CIV1 had recorded the conduct of police on his phone, and that recording was able to be retrieved after it 'disappeared'. But for that, it could be expected that CIV1 would have been convicted of the offences with which he was charged.

2.23. The comments and recommendations of the Wood Royal Commission are as apt today as they were in 1997. As Justice Wood said, making an untrue witness statement can end the career of the individual police officer and expose that officer to potential prosecution. Collusion between officers is a form of process corruption which constitutes a gross distortion of police powers and is destructive of the good name of the NSW Police Force.

3. The Commission's statutory functions

3.1. This Report is made pursuant to Part 11 of the LECC Act. Section 132(1) provides that the Commission may prepare reports 'in relation to any matter that has been or is the subject of investigation under Part 6'.

3.2. The other relevant provisions of the LECC Act are set out in Appendix 1 to this Report.

[17] See also *Rainbow v R* [2024] NSWDC 632 where the evidence given by one police officer was entirely inconsistent with the evidence of his colleague's body worn video. The second officer was not available to give evidence in the Local Court and his body worn video does not appear to have been a part of the Local Court brief.

3.3. The Commission does not sit as a criminal or civil court. It does not determine the rights of any person. However, the Commission may make findings which are adverse to persons and their reputation. The standard of proof to be applied by the Commission making findings of fact is the civil standard of proof, proof on the balance of probabilities, being qualified having regard to the gravity of the questions to be determined. The test is whether the facts have been proved to the reasonable satisfaction of the Commission.[18]

3.4. An important function of the Commission is to determine whether any police officer has engaged in 'serious misconduct' as defined in s 10 of the LECC Act. In addition, the Commission may make findings, express opinions, and make recommendations under s 133 of the LECC Act. Those provisions will be considered later in this Report.

3.5. The Commission has decided that this Report should be tabled in Parliament under s 132 of the LECC Act, but that pseudonyms should be used to protect the identity of those involved in these events. In adopting this approach, the Commission had regard to the Guidelines on the use of pseudonyms and non-publication orders in Commission reports published by the Commission in November 2023.

3.6. The Commission has made orders protecting the identity of the people involved in this Report. Those orders are set out in Appendix 2 to this Report.

4. The Commission's investigation

Private examinations

4.1. In conducting its investigation, the Commission used various investigative techniques, including the use of private examinations. The Commission appointed Slade Howell as Counsel Assisting the Commission in this investigation.

[18] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Rejfek v McElroy* (1965) 112 CLR 517, 521; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171-2.

4.2. In its first tranche of private examinations, the Commission summoned 7 former and currently serving NSW Police Force officers to attend private examinations before the Commission, pursuant to s 69 of the LECC Act.

4.3. These persons were all serving NSW Police Force officers as of 12 July 2021 and were involved in varying capacities in the incident and subsequent arrest of CIV1 at Regional Police Station 1. Whilst they were not all stationed at Regional Police Station 1, they all worked within the same Police District. Given Regional Police Station 1 is a larger police station, it was not unusual for officers stationed at neighbouring police stations to be rostered on at Regional Police Station 1 or asked to attend if that station is short-staffed.[19]

4.4. On the morning of 12 July 2021, additional officers from surrounding stations were at Regional Police Station 1 to assist in a community event.

4.5. The 7 officers summoned to give evidence included:

1. Officer SOM1 who was the arresting officer and Officer in Charge of the prosecution against CIV1. He was a Sergeant and the most senior officer on duty that day.[20] At the time, he had been a police officer for over 21 years, 7 of those stationed at Regional Police Station 1.

2. Officer SOM2 who was a Senior Constable and had been a police officer for over 7.5 years at the time of CIV1's arrest.[21] He was stationed at Regional Police Station 2 but had been working in the Police District for approximately 4.5 years.[22] He was at Regional Police Station 1 that morning to participate in the community event.[23]

3. Officer SOM7 who was a Senior Constable and a plain clothes detective. At the time of CIV1's arrest, he had been a police officer for almost 30 years.[24] He had been stationed at Regional Police Station 1 since May 2020.

4. Officer SOM4 who was a Probationary Constable and had only been in the NSW Police Force for less than 3 months.[25] He was stationed at Regional Police Station 3.[26] However, on the day CIV1 attended Regional Police

[19] Private examination of SOM9 at T9; Private examination of SOM4 at T7.
[20] Exhibit WQK06 at 3.
[21] Private examination SOM2 at T5.
[22] Private examination of SOM2 at T5; T18.
[23] Private examination of SOM2 at T11-12.
[24] Exhibit WQK06 at 70.
[25] Private examination of SOM4 at T6; T18.
[26] Private examination of SOM4 at T7.

Station 1, Officer SOM4 had been called to attend Regional Police Station 1 due to staffing issues.[27] He has since resigned from the NSW Police Force and is now a police officer in a different state.

5. Officer SOM5 who was a Senior Constable and had been a police officer for almost 11 years on the day of CIV1's arrest. At the time he was stationed at Regional Highway Patrol, however he was on restricted duties at Regional Police Station 1. He has since disengaged from the NSW Police Force.

6. Officer SOM9 who was a Constable and had been a police officer for almost 5 years. At that time, he was stationed at Regional Town 2 within the Police District and had been there for approximately one year.[28] On the day of CIV1's arrest, he was at Regional Police Station 1 getting ready to participate in the community event.

7. Officer SOM6 who was a Senior Constable and had been a police officer for almost 10 years.[29] Since joining the NSW Police Force, Officer SOM6 has been based in the Police District working at various police stations. On the morning of 12 July 2021, Officer SOM6 attended Regional Police Station 1 in relation to an unrelated matter.

4.6. Of the 7 officers identified above, 3 were excused from attending the Commission to give evidence on medical grounds. This included Officers SOM1, SOM5 and SOM7.

4.7. Despite being excused from giving evidence in a private examination, former Officer SOM5 participated in a recorded interview with Commission investigators.

4.8. The second tranche of witnesses that gave evidence before the Commission in private examinations were not police officers directly involved in the arrest of CIV1 on 12 July 2021. They were called to give evidence about their subsequent involvement with the case. They were:

1. Officer SOM3 who was the investigator that conducted the internal police investigation into the conduct of Officers SOM1 and SOM2 in relation to the arrest of CIV1; and

2. Prosecutor SOM8 who was the prosecutor in the matter of CIV1.

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[27] Private examination of SOM4 at T7.
[28] Private examination of SOM9 at T6.
[29] Private examination of SOM6 at T5.

4.9. CIV1 was approached by Commission investigators to participate in an interview, however, he declined that offer.

5. The events of 12 July 2021

5.1. On the morning of 12 July 2021, CIV1 attended Regional Police Station 1 seeking information relating to a motor vehicle incident in which he was previously involved. CCTV footage obtained from Regional Police Station 1 captures CIV1 entering the police station on 3 separate occasions in the space of 24 minutes.[30] CIV1 also made several calls to the station in this time.

5.2. On the third and final entry into the station, CIV1 was arrested and placed into custody where he remained until he was released the following day.

5.3. The Commission's investigation explored how a routine request for information culminated in the arrest of CIV1 in the foyer of Regional Police Station 1.

The first entry

5.4. At 9:33 am on 12 July 2021, CIV1 walked into Regional Police Station 1, entering through the main entrance into the foyer. CCTV footage of the foyer of the police station shows CIV1 approach the station counter and converse with the officer behind the station counter.[31] That officer is Officer SOM4. Officer SOM4 gave evidence that CIV1 was making enquiries about a case in which he was involved and wanted to know how the matter was progressing.[32]

5.5. Around this time, CCTV footage shows a man dressed in a red hoodie enter through the main entrance into the foyer. He was attending the station to report for bail. He stood behind CIV1, waiting for his turn to speak to police at the counter. Commission investigators were able to identify this witness, who participated in a recorded interview and provided a statement.[33] He has no relationship to CIV1.

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[30] On one occasion, CIV1 exited the station only momentarily before quickly returning. For the purposes of this Report, this is counted as a single entry.
[31] Exhibit LGP1C.
[32] Private examination of SOM4 at T13.
[33] Exhibit PZN1C; Exhibit PZN2C.

5.6. Officer SOM4 took a piece of paper and a pen and wrote down some items. Officer SOM4 stated that this was for the purpose of looking up CIV1's incident to see if he could provide some advice to CIV1 on what was happening with his matter.[34]

5.7. At this point, Officer SOM4 described CIV1 as being 'quite frustrated'.[35] Whilst he did not recall exact words, he recalled CIV1 saying he had been 'fucked around' by police in relation to the case about which he was enquiring.[36]

5.8. Officer SOM4 then left the counter to start making enquiries in the police system for CIV1.[37] Officer SOM4 gave evidence that there were a number of events relating to CIV1 on the police system, so he was going through the most recent events trying to locate the relevant matter.[38]

5.9. CCTV footage shows CIV1 continuing to speak and gesticulate in the direction of Officer SOM4 (who was no longer in view). Officer SOM4 could not recall the exact words that were spoken by CIV1 but recalled him swearing and being frustrated whilst he was looking for the relevant records.[39] He specifically recalled CIV1 calling him a 'tired looking cunt'.[40] Whilst he could not recall exactly at what point in time CIV1 said this to him, he agreed with Counsel Assisting that it was probably around the time he was looking up CIV1's records on the police database.[41]

5.10. The bystander in the red hoodie described CIV1 as being fairly calm to begin with but said then he started speaking with 'a bit of tone'.[42] He said police then began to speak with CIV1 in a similar tone.

5.11. In the CCTV footage, Officer SOM7 can be seen entering the foyer from an internal door in the police station. Officer SOM4 followed closely behind where CIV1 was. In his evidence, Officer SOM4 stated that he followed Officer SOM7 as

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[34] Private examination of SOM4 at T13.
[35] Private examination of SOM4 at T13.
[36] Private examination of SOM4 at T13.
[37] Private examination of SOM4 at T14.
[38] Private examination of SOM4 at T14-15.
[39] Private examination of SOM4 at T8, T14.
[40] Private examination of SOM4 at T8, T18-19.
[41] Private examination of SOM4 at T18.
[42] Exhibit PZN2C.

'back-up' as he suspected CIV1 could become aggressive.[43] Officer SOM7 walked towards CIV1, pointing towards the front door of the station, gesturing for him to leave. Officer SOM7 can be seen to say something briefly to CIV1 before he ushered him out the door. CIV1 left and Officer SOM7 shut the door behind him.

5.12. In his written statement provided for the prosecution of CIV1, Officer SOM7 said that at this point he issued CIV1 with a move on direction.[44]

5.13. Whilst unable to recall the exact words used, the bystander recalled that police may have asked CIV1 to 'move on and get out of there', and that he would be in trouble if he came back.[45]

5.14. Moments after CIV1 left the station, he re-entered. CIV1 was holding up his phone and appeared to be recording. CIV1 walked towards Officer SOM7, who was attempting to exit the foyer through the internal door, whilst filming him. Officer SOM7 did not look behind him and quickly exited the foyer. Officer SOM4 pushed CIV1 to prevent him from moving further into the station and ushered him back out the front door. Officer SOM4 stood just outside the station, holding the door open for a few moments. Officer SOM4 then returned inside the station.

Was a move on direction given to CIV1?

5.15. CIV1 was arrested for failing to comply with a move on direction. Given the Commission's concerns about the fabrication of evidence in this investigation, it is appropriate to consider whether this formal direction was in fact given to CIV1.

5.16. Under s 197 of LEPRA, there are specific requirements that a police officer must satisfy themselves of before giving a direction to a person in a public place. Firstly, they must believe on reasonable grounds that the person's behaviour or presence in the public place:[46]

(a) is obstructing another person or persons or traffic, or

(b) constitutes harassment or intimidation of another person or persons, or

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[43] Private examination of SOM4 at T15.
[44] Exhibit PZN3C at [6].
[45] Exhibit PZN2C at 2.
[46] LEPRA, s 197(1).

(c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness, or

(d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or

(e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.

5.17. Secondly, the direction given by the police officer must be reasonable in the circumstances for the purpose of:[47]

(a) reducing or eliminating the obstruction, harassment, intimidation or fear, or

(b) stopping the supply, or soliciting to supply, of the prohibited drug, or

(c) stopping the obtaining, procuring or purchasing of the prohibited drug.

5.18. Once satisfied of the above, in accordance with s 202(1) of LEPRA, a police officer must provide the following to the person subject to the move on direction:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power.

5.19. Whilst s 204A(1) LEPRA provides that a failure by a police officer to provide their name and place of duty does not render the exercise of the power unlawful, that exception does not apply to the exercise of a power that consists of a direction to a single person. Therefore, for the move on direction to be lawful, it must be in the terms set out in s 202(1).

5.20. In his written statement provided for the prosecution of CIV1, Officer SOM7 stated that he said the following words to CIV1:[48]

[47] LEPRA, s 197(2).
[48] Exhibit PZN3C.

I'm Detective [SOM7] and I'm giving you a move on direction to leave the police station. If you don't you maybe committing an offence. Do you understand that?

5.21. If Officer SOM7's statement is accepted as the truth of what he said to CIV1, it appears Officer SOM7 did not follow s 202(1)(b) and (c) of LEPRA as he did not provide his place of duty or the reason for issuing the move on direction. This is important because police have relied on CIV1's apparent failure to comply with this move on direction to justify his arrest.

5.22. There is also evidence that Officer SOM1 was not told of the alleged move on direction until after CIV1 had been arrested. During the prosecution of CIV1 in the Local Court, Officer SOM1 was asked how he knew CIV1 was given a move on direction.[49] He said he had heard after the fact that CIV1 had been told to leave the station and then within minutes after CIV1's first entry into the station, one of the officers clarified that CIV1 had been issued with a move on direction. However, in his statement, Officer SOM7 makes no record of telling Officer SOM1 that a move on direction had been given. During CIV1's hearing in the Local Court, Officer SOM7 said that he passed information relating to the move on direction to Officer SOM1 for the purpose of charging CIV1.[50] Whilst the timing of this conversation was not qualified, the language used by Officer SOM7 suggests this was done post-arrest. This casts doubt on the evidence Officer SOM1 gave in the Local Court that he was told that a move on direction had been given to CIV1 prior to his arrest, and adds to the suspicion that the move on direction was fabricated by Officer SOM1 after the fact.

Second entry to the station

5.23. At approximately 9:49 am CCTV captures CIV1 re-entering Regional Police Station 1.[51] Again, there is no audio captured of this entry.

5.24. On this occasion, CIV1 is only in the foyer of the station for approximately one minute.

[49] Exhibit XSD07 at 63.
[50] Exhibit XSD07 at 75.
[51] Exhibit LGP2C.

5.25. In his statement, Officer SOM1 states that upon entering the station CIV1 immediately yelled, 'I come here to get help and all you fat cunts do is lie and say you don't have anything.'[52]

5.26. CCTV shows that CIV1 approached the front desk and was speaking in the direction of the front counter area (officers are out of view). According to Officer SOM1, Officers SOM4 and SOM5 were already speaking with CIV1 before Officer SOM1 walked out into the counter area and started engaging with CIV1.

5.27. In his statement, Officer SOM1 provides a detailed account of this interaction, which allegedly involved CIV1 yelling over the top of police, demanding police provide him with the report he had requested, and swearing at police with a range of different insults, including referring to Officer SOM1 as a 'dog cunt.'[53] Officer SOM1 allegedly advised CIV1 that his behaviour and language would not be tolerated, asked him to stop swearing and yelling at police, and specifically said to him, 'you've been told to move on and if you stay you will be committing an offence, so leave now or you will be arrested.'[54]

5.28. Officer SOM4 was questioned on whether he recalled Officer SOM1 telling CIV1 he would be arrested if he did not move on:[55]

> Q: Just in relation to that footage - and I know I've asked you about your recollection but I'll ask you a little bit more - do you recall in that footage that you have just seen, or during that period of time, Sergeant [SOM1] telling [CIV1] that he would be arrested if he didn't move on?
>
> A: I can't say for certain but I believe he did. But I can't remember when or how.
>
> Q: So you recall that that was told to [CIV1] but you are not certain at what point in time?
>
> A: Correct .

5.29. CCTV footage shows Officer SOM4 enter the foyer and speak briefly with CIV1. He then opened the front door and waited whilst CIV1 continued his conversation

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[52] Exhibit XSD04 at [19].
[53] Exhibit XSD04 at [20]-[21].
[54] Exhibit XSD04 at [20].
[55] Private examination of SOM4 at T22.

with Officer SOM1. Officer SOM4 and CIV1 spoke briefly again before CIV1 exited the station unaided.

5.30. When asked about why he entered the foyer, Officer SOM4 responded:[56]

> A: Probably because he has contravened or failed to move – he's come back from that move-on direction. I don't remember the conversation or what I said to him but I believe it would be in relation to that.

5.31. Officer SOM4 recalled that at this point he was speaking to CIV1 about the prior move on direction:[57]

> Q: And your recollection is that you're speaking to him about his failure to comply with the move-on; is that fair to say?
>
> A: Yes, I didn't arrest - I hadn't arrested anyone yet at that point so I was just – didn't really – I think it was just as to why he came back and that kind of thing.

5.32. According to Officer SOM1,[58] after he was told by Officer SOM4 to leave, CIV1 yelled a range of swear words and insults including 'fuck, cunt, mother fucker, dog cunts, cocksuckers'. Given the gross inaccuracies identified in Officer SOM1's statement during the third entry when compared to the audio recording from CIV1's phone, Officer SOM1's statement carries little credibility. The Commission does not accept the version of events provided by Officer SOM1 in relation to this second entry by CIV1.

Phone calls to the station

5.33. Officer SOM4 gave evidence that CIV1 called Regional Police Station 1 three times after exiting the police station on the first occasion,[59] and that he answered each of them.[60] Later in his evidence he qualified that he could not recall the specific number of calls that he answered, but stated it was 'a few'.[61] In his statement, he recorded that CIV1 made 'several' phone calls to the station.[62]

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[56] Private examination of SOM4 at T20.
[57] Private examination of SOM4 at T21.
[58] Exhibit XSD04 at [21].
[59] Private examination of SOM4 at T8-9.
[60] Private examination of SOM4 at T9, T49-50.
[61] Private examination of SOM4 at T49.
[62] Exhibit LGP8C.

5.34. Officer SOM4 recalled that the calls were short in duration due to the 'nature' in which CIV1 was talking.[63] When asked to qualify what he meant by this and asked what words were used by CIV1, Officer SOM4 responded:[64]

> A: Yes, I think he's used the word "corrupt" and just swore a lot and just was frustrated with the situation and just was very elevated and loud. I couldn't – he was talking at me. I couldn't even reply because he just continued to - I couldn't actually have a conversation with him.

5.35. In his statement, Officer SOM5 also stated that he answered 2 calls from a caller believed to be CIV1 that day.[65] On the first call, the caller allegedly yelled words to the effect of, 'do your job, you dumb cunts' before ending the call. In the second, the caller allegedly said words to the effect of, '6 months. Do your job'.[66]

5.36. In the narrative of the COPS event drafted by Officer SOM1, the phone calls were described as constituting 'relentless, abusive and aggressive verbal assaults.' When asked whether he agreed with this description, Officer SOM4 responded, 'yeah, I'd say so.'[67] When questioned further about whether this accorded with his recollection of the phone calls from CIV1, Officer SOM4 replied:[68]

> A: Yes, he was very loud and swearing and taking personal attacks of police and that kind of thing.

5.37. Phone records obtained by the Commission show there were only 3 calls made to the station that day within the relevant time period, and all calls were made between CIV1's second and third entry to the station. The combined evidence of Officers SOM4 and SOM5 of at least 5 calls being made to the station is at odds with the phone records and suggests that one or both of the officers have made records of phone calls made by CIV1 that they have characterised as abusive that did not occur. Unfortunately, the phone calls were not recorded so the content of the calls cannot be verified.

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[63] Private examination of SOM4 at T9.
[64] Private examination of SOM4 at T10.
[65] Exhibit PZN4C at [7].
[66] Exhibit PZN4C at [7].
[67] Private examination of SOM4 at T50.
[68] Private examination of SOM4 at T50.

Third entry to the station

5.38. CCTV captured CIV1 returning to Regional Police Station 1 at approximately 9:57 am. CIV1 is holding up his phone recording of this interaction with police.

5.39. Unlike CIV1's previous interactions with police that day, the Commission is in possession of the audio from this interaction as recorded on CIV1's phone. In the Local Court during the prosecution of CIV1, CIV1's legal representative introduced several pieces of mobile phone footage into evidence, including raw mobile phone video recorded footage (clear audio, with some limited visual) from this third interaction and a synchronised video consisting of audio from CIV1's phone overlayed onto the CCTV footage from Regional Police Station 1.

5.40. Upon entering the station, Officer SOM2 said to CIV1, 'Mate if you wanna come in here and be a pest you can leave again.'[69] The following conversation then takes place between CIV1 and Officer SOM2:

CIV1:	Well, if I keep ringin' youse hung up on me, I've got no choice I gotta - - -
SOM2:	You're hangin' up on us.
CIV1:	- - -try and sort this out. Hey?
SOM2:	You're hangin' up on us.
CIV1:	Well all right. Well I'm just trying to sort this out. I put in a police report or somethin', I got ran over by a car, my finger broke and my car ran off the road and there's no report, ro-, report anywhere.
SOM2:	As the officer told you before- - -
CIV1:	No the officer t-told me before, he doesn't know nothin'. He can't find anything on the system, I've asked 3 police officers- - -
SOM1:	Mate [indecipherable].
CIV1:	- - - and nobody can find any of it.
SOM2:	We're not giving you a police report, simple as that.

[69] Exhibit LGP3C.

CIV1: W-why not?

SOM2: Because- - -

CIV1: ‘Cause youse don't have it. You didn’t do your job.

SOM2: Because of the Privacy Act mate [indecipherable]

CIV1: No, because youse didn't do the job that day. You don’t have, there is no police report on the system, that’s what my problem is.

SOM2: Go through your solicitor.

CIV1: I am, and they told me that I should have a, a-a whole report on the whole incident.

SOM2: No.

CIV1: Nah.

SOM2: That's not how it works mate. We don't give you- - - [indecipherable]

CIV1: It doe-, so, so I can crash into you, write your car off, and run away scared, and tell youse that I ran away scared and that's okay?

Unidentified

Male: No.

SOM2: I don't know the story mate but we don’t give police reports.

CIV1: Oh youse don't care about the story. But how can someone get away with that out at [Regional Town 3]? And run away with my $70,000 car and youse just don't give a fuck.

SOM2: Contact your solicitor.

CIV1: Why?

SOM2: And they can apply for it.

CIV1: When youse are the police, youse are supposed to do this job.

SOM2: And they can apply through it.

CIV1: Oh so it's alright for you to raise your voice at me?

SOM2: Yes, it is.

CIV1: Why?

SOM2: ‘Cause it's my fuckin’ station.

CIV1: Oh it's your fuckin’ station, so it's okay for you to swear too?

SOM2: Yes.

CIV1: And it's okay for him to not wear a mask? It's okay for youse all to break the rules but it's not okay for someone to ask for help? Honestly, what the fuck is your purpose?

SOM2: Mate, if you're recording this you need to inform us you’re recording this [indecipherable]

CIV1: No, I don't. I'm allowed to record anything in the public mate, go and speak to your solicitor.

SOM2: Mate, we're not answering anymore questions.

CIV1: No, you haven’t asked, answered none of my questions.

SOM2: Mm.

CIV1: You haven't done anything, there’s no police report on my incident, and I, I know that and that's why youse all tryin’ to cover for everyone. It's been 6 months and youse have done nothin’ man. And I'm s’posed to still go past this bloke every day, drive past this shit bloke every day of my life, knowing that he's crashed my $70,000 car off the road, now I’m driving in a $2,000 car. And y- - -

5.41. At this point Officer SOM1, who was also standing behind the station counter, interjected with the following accusation, ‘You crashed your $70,000 car while you were drunk. That was you’. The conversation between Officer SOM1 and CIV1 then proceeded as follows:

CIV1: I wasn't drunk man. Where’s - - -

SOM1: You were drunk.

CIV1: - - -that, where's the breath analysis to that?

SOM1: You were drunk [indecipherable].

CIV1: I was not drunk, I had one beer with my neighbour.

SOM1: There is a report.

CIV1: Yeah. Where is it?

SOM1: [indecipherable]

CIV1: Nah, I was not drunk.

SOM1: You were drunk.

CIV1: He didn't even breathalyse me.

SOM1: You crashed your own car.

CIV1: No, I didn't. No, I didn't.

SOM1: [indecipherable] doing stuff illegally. You were charged.

CIV1: You're making up your own assumptions.

SOM1: He was charged with runnin' you over, the end of story is now. Come back and [indecipherable] *raises voice at CIV1*

CIV1: Oh so you think that you know, *yelling* you think you know what happened?

SOM1: And [indecipherable]

CIV1: *Yelling* You do not know what happened. You do not have an idea.

5.42. Officers SOM1, SOM2 and SOM4 then rushed into the foyer where CIV1 was standing. CIV1 yelled, 'What the fuck man. I'm trying to get help.' Officer SOM1 took hold of CIV1's left arm and Officer SOM2 grabbed CIV1's right arm. Officer SOM1 told CIV1 he was under arrest but did not provide a reason for the arrest. Officers SOM1 and SOM2 escorted CIV1 through the internal police door, leading to the charge room.

5.43. The statements of police, particularly those of Officers SOM1 and SOM2 provide a vastly different version of events to those recorded on CIV1's phone overlayed on the CCTV footage. This will be explored later in the Report.

Was the arrest lawful?

5.44. Under s 99 of LEPRA, a police officer has the power to arrest a person without a warrant in specific circumstances. There are 2 elements to this power that police must satisfy for the power to be considered lawful.

5.45. The first is that the police officer must suspect on reasonable grounds that the person is committing or has committed an offence. That suspicion must be held

by the police officer that effects the arrest. According to the evidence given by Officer SOM1 in his statement, the offences he suspected were being or had been committed by CIV1 were:

1. failure to comply with a move on direction[70] and

2. use offensive language in or near, or within hearing from, a public place or school.[71]

5.46. Dealing firstly with the offence of failure to comply with a move on direction, a person is not guilty of this offence unless it is established that the person persisted, after the direction concerned was given, to engage in the relevant conduct.[72] This requires a lawful direction to have been given in the first place.

5.47. As discussed earlier in this Report, on his own evidence the direction issued by Officer SOM7 to CIV1 did not comply with the legal requirements for a move on direction during CIV1's first entry to the police station.

5.48. A person who fails to comply with a move on direction commits an offence: s 199 LEPRA. However, a person is not guilty of an offence unless it is established that the person persisted in the conduct after the direction was given: s 199(2) LEPRA.

5.49. In relation to the second offence of offensive language, on the third occasion CIV1 entered the police station, the audio from the mobile phone recording revealed that the only language capable of being considered 'offensive' that CIV1 used was 'fuck' and 'fucking'. On the occasion he said 'fucking', it was in direct response to Officer SOM2 using the word 'fucking' and he was simply challenging Officer SOM2 on why it was okay for him to swear, but CIV1 was not allowed. He used the word 'fuck' on 2 occasions as follows:

> Oh, youse don't care about the story. But how can someone get away with that out at [Regional Town 3] and run away with my $70,000 car and youse just don't give a fuck.

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[70] LEPRA, s 199.
[71] *Summary Offences Act 1988* (NSW) s 4A.
[72] LEPRA, s 199(2).

> And it's okay for him to not wear a mask? It's okay for youse all to break the rules but it's not okay for someone to ask for help? Honestly, what the fuck is your purpose?

5.50. In determining whether language is considered 'offensive' for the purposes of s 4A of the Summary Offences Act, the Court will apply an objective test. In the case of *Conners v Craigie* (1994) 76 A Crim R 502, Dunford J upheld the objective test set out by McInerney J in the judgment under appeal, which read as follows:

> The test to be applied on whether the language was "offensive" is an objective one as to whether the language complained of was calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person (*Worcester v Smith* (1951) VLR 316; *Ball v McIntyre* (supra) and *Spence v Loquch* (unreported, Sully J, 12 November 1991)). It has been said that a so-called reasonable person is reasonably tolerant and understanding and reasonably contemporary in his reactions *Ball v McIntyre* and *Spence v Loquch*).

5.51. The courts have held that a reasonable person must not be 'thin-skinned': *Re Marland* [1963] 1 DCR 224. The courts have also considered the location to be a relevant factor in applying the reasonable person test: *Commissioner of Police v Anderson* [1996] NSWCA 116, an appeal from a Police Tribunal hearing where a police officer had allegedly used offensive language that may have been heard in the foyer of a police station.[73]

5.52. In *Rowlands v R* [2021] NSWDC 723, P Taylor SC DCJ, having reviewed the relevant case law concluded at [42]:

> Terms such as "*fuck*" and its derivatives in their various forms often serve merely to emphasise the purpose or the proposition that is being said in conjunction with the term. Nowadays those terms are understood often to merely indicate an emphasis or exaggeration of a proposition rather than having some other offensive meaning. If that is the case, they do not reach the high levels of offence required to make out the charge and are unlikely to cause offence, outrage and significant emotional reaction to a reasonably tolerant bystander, who must be regarded as a robust, contemporary and not especially sensitive person.

[73] per Meagher JA at [9].

5.53. CIV1's use of the words 'fuck' and 'fucking' on 12 July 2021 were not directed at police to wound their feelings, arouse anger or resentment or disgust or outrage. Rather, it is evident they were said by CIV1 in anger to emphasise his feelings that he was not being treated reasonably or fairly by police. CIV1 was upset that police were being unhelpful in a situation that has clearly had a significant impact on him. However, the use of these words in the foyer of a police station does not amount to offensive language.

5.54. In the Facts Sheet prepared by Officer SOM1 and in the statements prepared by Officers SOM1 and SOM2, they allege the language used by CIV1 on the third entry was far more offensive than the word 'fuck'. The Statement of Facts states that CIV1 was still 'hyped up, yelling and screaming the same derogatory language.'[74] In the Facts Sheet, Officer SOM1 recorded that CIV1 used expressions such as 'useless cunts', 'dog cunts' and 'fat cunts' towards police.[75] It is clear from the audio recorded by CIV1 that none of these expressions were used by CIV1 on his third entry, and the only offensive language used by CIV1 was 'fuck' and 'fucking'.

5.55. In his evidence, Officer SOM2 maintained that he had heard CIV1 use offensive language towards police and in particular the words 'dog cunts', although it was not on the recording of the third entry to the police station. However, he later conceded that he was not able to say if that language had been used during CIV1's first and second entries to the station, when he was later in custody or in a prior interaction he had had with CIV1.[76]

5.56. The statements of Officers SOM1 and SOM2, and the Statement of Facts prepared by Officer SOM1 are entirely inaccurate in their description of the offensiveness of the language used by CIV1 on the third entry. The Commission cannot give any weight to the suggestion in the Statement of Facts that the same derogatory language was also used by CIV1 in his earlier entries into the station.

[74] Exhibit LGP7C at 3.
[75] Exhibit LGP7C at 3.
[76] Private examination of SOM4 at T99-101

5.57. Having formed a reasonable suspicion that an offence is being or has been committed, a police officer can place a person under arrest if satisfied it is *reasonably necessary* to do so for one of the reasons set out in s 99(1)(b) of LEPRA. The only possible reason applicable in this situation is 'to stop the person committing or repeating the offence or committing another offence'.[77]

5.58. The courts have interpreted the term 'reasonably necessary' to mean more than convenient, but less than essential or indispensable.[78] Further, it has been held that this section requires the police officer to consider proportionate responses to the offending behaviour, including alternatives to arrest.[79]

5.59. Given that CIV1 was not using offensive language during the third entry to the station, the arrest cannot have been made to stop him using offensive language. Officer SOM1 was therefore required to have been satisfied that the arrest was reasonably necessary to stop CIV1 from failing to comply with the move on direction. In other words, if Officer SOM1 did not arrest him, CIV1 would remain in the police station in contravention of the prior direction to move on. This response must have been *proportionate* to his failure to comply with the move on direction and other alternatives to arrest must have factored into Officer SOM1's decision making.

5.60. For the following reasons, the Commission does not accept that Officer SOM1 was satisfied that it was *reasonably necessary* to arrest CIV1:

1. Neither Officers SOM1 nor SOM2, the 2 officers who interacted with CIV1 immediately prior to his arrest, told CIV1 to leave or warned him that if he did not leave in compliance with the move on direction, he would be arrested. These are reasonable alternatives to arrest that should have been considered. Both officers lied about this in their statements, claiming Officer SOM2 reminded CIV1 about the prior move on direction when he re-entered the station and Officer SOM1 warned My CIV1 prior to his arrest that if he did not comply with the move on direction, further action would be taken. These fabrications suggest an attempt to justify the arrest after the fact.

[77] *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s 99(1)(b)(i).
[78] *Jankovic v Director of Public Prosecutions (DPP)* [2020] NSWCA 31.
[79] *Jankovic v Director of Public Prosecutions (DPP)* [2020] NSWCA 31.

2. The reason CIV1 kept returning to the police station was to obtain a copy of the report from his motor vehicle accident. This was made clear by CIV1 throughout his interactions with police from the start. During his third entry, he said the reason he had returned to the station was to obtain a copy of the report, because he was not getting any help from the officers over the phone. The Commission has records of 3 phone calls made by CIV1 to the station prior to entering the station for the third time. Officer SOM2 provided a false version of his interaction with CIV1 prior to his arrest, in which he portrays himself as being tolerant and helpful. Instead, the mobile phone recording shows that Officer SOM2 was dismissive of CIV1 and unwilling to genuinely assist him. Officer SOM2 conceded during his evidence that his version of this interaction was misleading.[80] A reasonable alternative to arrest would have been to genuinely assist CIV1 by providing him with what he was seeking or making a genuine attempt to advise him on how he could obtain a copy of the report. In Officer SOM1's evidence in the Local Court, he accepted that, according to the Police Handbook, the driver or owner of a vehicle involved in an accident is entitled to particulars of the police record relating to the accident.[81] Further, he agreed that CIV1 was entitled to that information if it was available.[82]

3. CCTV footage shows that CIV1 moved towards the front door of the foyer and appeared to be almost out of the door when Officer SOM1 started arguing with CIV1 and provoked him by falsely accusing him of being drunk when he crashed his car. A reasonable alternative to arrest at this point would have been to allow CIV1 to leave on his own accord.

5.61. In the circumstances, the arrest was not proportionate to CIV1's offending behaviour (if an offence was even committed).

5.62. During his private examination, Officer SOM2 acknowledged that as he was writing up his statement, he was conscious of the fact that the arrest was done

[80] Private examination of SOM2 at T57.
[81] Exhibit XSD07 at 28.
[82] Exhibit XSD07 at 29.

without any effort to comply with what he knew to be the requirements for the arrest to be lawful.[83]

5.63. An arrest without a warrant will be unlawful if it is not effected in good faith and for the purpose contemplated by the statute. A police officer is not acting in good faith if his acts are done only in pretended execution of the law.[84] Officer SOM1's interaction with CIV1 leading up to the moment of his arrest strongly suggests he was not acting in good faith when he arrested CIV1. This is supported by the false evidence he provided in his statement to justify the lawfulness of the arrest, which is discussed in the transcript.

5.64. In considering all of the above circumstances, the Commission finds that CIV1's arrest was unlawful.

What happened in the corridor of the station?

5.65. In the Facts Sheet under the heading 'RESIST ARREST'[85] and in the statements of Officers SOM1,[86] SOM2[87] and SOM4,[88] it is alleged that CIV1 'violently' wrestled with police in the corridor that leads to the charge room. He is alleged to have screamed at police, 'Fuck you dog cunts I've come here for help'.[89]

5.66. A sequence of events is then described, involving the officers losing control of CIV1, CIV1 falling to the ground, Officer SOM1 losing balance and falling onto CIV1.[90] It is alleged that in response to this heavy contact, CIV1 screams, 'Ya fucking dog cunts no need to kick me ya cunts. You fuckers are fucked I'll sue you cunts when I'm done you cunts won't have a job.'[91]

5.67. The language alleged to have been used by CIV1 at this point is entirely inconsistent with the audio recording from CIV1's phone set out at 5.40 and

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[83] Private examination of SOM2 at T64.
[84] *Pirani v Hardy* (NSWSC, Smart J, 9 September 1994, unreported) applying *Drymalik v Feldman* [1966] SASR 227, 231; *Trobridge v Hardy* (1955) 94 CLR 147, 157.
[85] Exhibit LGP7C.
[86] Exhibit SVB12C at [33].
[87] Exhibit SVB11C at [14].
[88] Exhibit LGP8C at [26].
[89] Exhibit LGP7C at 4.
[90] Exhibit LGP7C at 4.
[91] Exhibit LGP7C at 4.

following. The physical interaction alleged by police is, in part, contradicted by the footage retrieved from CIV1's mobile phone.

5.68. The CCTV footage of this interaction is partly obscured as there is a permanent white square fixed to the top corner of the camera that faces the corridor. This white square is referred to by police as a privacy square. Evidence given by Officers SOM4 and SOM9 indicates that this privacy square protects the privacy of male officers using the bathroom which is located through a door off the corridor.[92]

5.69. On the *voir dire* in the Local Court, CIV1 gave evidence that there was a 'scuffle' in the corridor, during which officers punched and kicked him.[93] Even more concerningly, CIV1 also alleged that Officer SOM1 put him in a choke hold.[94]

5.70. For most of this interaction CIV1 is still holding his phone in his hand, recording.[95] Upon entering the corridor, the phone footage is limited, however the audio is captured. Noises consistent with a scuffle can be heard on the recording and then:

CIV1: Oh fuck [indecipherable] Oh kicks.

SOM1: Stop resisting. Stop resisting, you resisting?

5.71. At this point, the phone recording captured a fleeting visual of CIV1 and Officer SOM1.[96] When the recording is paused at 3 minutes and 33 seconds, Officer SOM1's head is positioned immediately behind CIV1's head, which is tilted backwards, and CIV1's eyes appear to be rolling back in his head. A gargling noise can be heard and then:[97]

SOM1: Have you finished resisting? Have ya? Have ya?

CIV1: *Strained voice* Yeah mate. *Breathes heavily*

SOM1: Good.

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[92] Private examination of SOM9 at T25-26; Private examination of SOM4 at T29-32.
[93] Exhibit SVB3C at 4, 11.
[94] Exhibit SVB3C at 6-7.
[95] Exhibit JQH7C.
[96] Exhibit JQH7C at 3:33.
[97] Exhibit LGP3C.

5.72. On the *voir dire*, CIV1 explained the visual he was able to record, 'I felt like I was going to pass out, so I thought I'd try and get a good shot of who had me'.[98] He further stated, 'I was in that chokehold for a long time and when he asked me if I'd done resisting I couldn't even get anything out until he loosened grip a bit and I said – I just tried to say "Yes" so he'd just drop me'.[99]

5.73. On the mobile phone recording, Officer SOM1 can then be heard to say, 'Give me that. Give me that phone'.[100] The CCTV footage shows CIV1's phone fall to the ground.[101]

5.74. On the *voir dire*, CIV1 described his phone falling to the ground as follows:[102]

> That was when I'd turned my phone around the officer yesterday, he seen his face in my phone and he yelled out, "Phone, phone" a couple of times and then they all just jumped on my arm and my phone come out of my hand on the floor.

Evidence of officers

5.75. Officer SOM4 gave evidence that he saw Officer SOM1 take CIV1 to the ground.[103] He said Officer SOM1 then appeared to lose balance and land on top of CIV1. From there, he recalled CIV1 'resisted a little bit, in terms of locking up his arms and that kind of thing, preventing control of him'.[104]

5.76. When pressed by Counsel Assisting on whether he had a strong recollection of those events, Officer SOM4 explained that whilst he does remember the incident, his vision was obscured because he was behind the other officers.[105]

5.77. Again, when he was asked whether he saw what Officer SOM1 was doing at the point he said, 'stop resisting', Officer SOM4 said CIV1 was on the ground and 'they were trying to grab his arms or to that effect'. However, his vision was

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[98] Exhibit SVB3C at 6.
[99] Exhibit SVB3C at 6.
[100] Exhibit LGP3C.
[101] Exhibit JQH2C.
[102] Exhibit SVB3C at 10.
[103] Private examination of SOM4 at T33.
[104] Private examination of SOM4 at T33.
[105] Private examination of SOM4 at T33.

obscured because he was behind the others, who he described as 'pretty big dudes'.[106]

5.78. Officer SOM4 did not know why Officer SOM1 took CIV1 to the ground. He speculated that Officer SOM1 could have tried to restrict CIV1's movement and the possibility of assault. Alternatively, Officer SOM1 simply tripped.[107]

5.79. Officer SOM9 gave evidence that he was ironing a shirt in the muster room when he heard a commotion in the front foyer area and made his way down to assist.[108] By the time Officer SOM9 entered the foyer, CIV1 and the other officers were already in the corridor.[109] CCTV footage shows Officer SOM9 walking quickly through the foyer to enter the corridor.[110] When shown the CCTV footage he agreed with Counsel Assisting that he would have been in the corridor at the time the 'scuffle' occurred, however he did not have any independent recollection of this.

5.80. Officer SOM9 had no recollection of CIV1 being put in a choke hold.[111] When shown the raw mobile phone footage from the corridor, Officer SOM9 agreed with Counsel Assisting that the footage was consistent with CIV1 being choked.[112]

5.81. Officer SOM6 gave evidence that when CIV1 and the officers came through the internal door, he was in the corridor and stepped aside into the Sergeant's office to let them through. Whilst he did not witness CIV1 and the officers initially walking into the corridor, he was an eyewitness to the events that occurred in the corridor as Officer SOM1 and CIV1 fell to the ground and the events that followed.[113] He gave evidence that Officer SOM1 and CIV1 fell to the ground, with Officer SOM1 falling on top of CIV1.[114] He did not know how they fell over.[115] Officer SOM6 recalled grabbing CIV1's other arm to help him up.[116]

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[106] Private examination of SOM4 at T35.
[107] Private examination of SOM4 at T33-35.
[108] Private examination of SOM9 at T10, T20.
[109] Private examination of SOM9 at T24; Tab 88.
[110] Exhibit JQH1C.
[111] Private examination of SOM9 at T33, T44.
[112] Private examination of SOM9 at T43.
[113] Private examination of SOM6 at T43.
[114] Private examination of SOM6 at T43.
[115] Private examination of SOM6 at T44.
[116] Private examination of SOM6 at T43.

5.82. Officer SOM6 said he could not recall where Officer SOM1 was holding CIV1 after they had fallen over.[117]

5.83. After being shown the raw mobile phone footage and the compiled footage, Officer SOM6 accepted it was possible he was holding CIV1's arm at the point in time that Officer SOM1 had hold of CIV1 by the neck.[118] Officer SOM6 reluctantly agreed with Counsel Assisting that Officer SOM1 was restricting CIV1's airways. However, he maintained at several points in his evidence that he had no recollection of Officer SOM1 choking CIV1.[119]

5.84. Like the other officers that gave evidence, Officer SOM2 denied seeing Officer SOM1 choke CIV1.[120] Officer SOM2 agreed that he was in the immediate proximity of CIV1 and Officer SOM1 in the corridor at that time and conceded that if the choke did occur, it would have happened in front of him as he was situated behind Officer SOM1, making his way through the door.[121]

5.85. Whilst Officer SOM1 did not give evidence before the Commission, in his statement he did not include any reference to a choke hold or to him grabbing CIV1 around the neck, throat or upper body area.[122] The only mention of Officer SOM1 applying force is when he purportedly 'crashed heavily' into CIV1 after losing his balance as a result of CIV1 'thrashing around' and striking Officer SOM1 with his elbow.[123] Officer SOM1 described that his right shin collided with CIV1's ribs on the right side of his body.[124]

5.86. Following the fall, Officer SOM1 stated that none of the officers had hold of CIV1, so he and Officer SOM6 took hold of him.[125] Officer SOM1 did not indicate which part of CIV1's body he took hold of.

5.87. Under cross-examination in the Local Court, Officer SOM1 said that he could not recall CIV1 being put in a choke hold by him or any of his colleagues.[126] After the

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[117] Private examination of SOM6 at T44.
[118] Private examination of SOM6 at T47.
[119] Private examination of SOM6 at T47-48.
[120] Private examination of SOM2 at T95-96.
[121] Private examination of SOM2 at T95-96.
[122] Exhibit SVB12C.
[123] Exhibit SVB12C at [34].
[124] Exhibit SVB12C at [34].
[125] Exhibit SVB12C at [35].
[126] Exhibit XSD07 at 13.

mobile phone footage was played to Officer SOM1 in the Local Court, he disagreed with the suggestion that he choked or was attempting to choke CIV1.[127]

5.88. When considering the totality of the evidence captured by the mobile phone footage as described above, the Commission is satisfied that Officer SOM1 did choke CIV1. Whilst all officers giving evidence before the Commission initially denied seeing this occur, the choke hold was conceded by multiple witnesses after being shown the mobile phone footage.

Was this an unreasonable use of force?

5.89. If the arrest was unlawful, as the Commission concluded earlier, it is unnecessary to consider whether the force used by Officer SOM1 was reasonably necessary to arrest CIV1 or prevent him from escaping,[128] as Officer SOM1 had no authority to use any force against CIV1.

5.90. If the Commission is wrong in its conclusion and the arrest of CIV1 was lawful, Officer SOM1 and other police are still only entitled to use 'such force as is reasonably necessary to make the arrest': s 231 LEPRA. If the use of force does not meet these statutory limitations, it is an assault: s 61 Crimes Act.

5.91. The question of what is reasonable use of force in effecting an arrest under s 230 LEPRA was considered by Ierace J in *Director of Public Prosecutions (NSW) v Greenhalgh* [2022] NSWSC 980 at [186]:

> [T]he term "reasonably necessary" in s 230 is to be understood as incorporating the common law test. I find that the objective test is as stated in *R v Turner* and quoted with approval by Heydon JA in *Woodley v Boyd*, which is to this effect when appropriately modified for the purposes of s 230: whether a reasonable person in the position of the police officer would not consider the use of force by the police officer to be disproportionate to the risk or danger sought to be prevented.

5.92. The passage referred to by Ierace J was from *Woodley v Boyd* [2001] NSWCA 35, in which Heydon JA, Davies and Foster AJJA agreeing, stated, at [37]:

> According to some writers, at common law, which applies in New South Wales, a person effecting an arrest may use whatever force is "reasonable"

[127] Exhibit XSD07 at 39.
[128] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 231.

in the circumstances (Archbold: *Criminal Pleading Evidence and Practice 2000* at [19]-[39]) or "reasonably necessary" (*Wiltshire v Barrett* [1966] 1 QB 312 at 326 and 331). "Thus if the arrestee offered resistance, the arrestor could increase his force in proportion to the force of that resistance": R W Harding, *The Law of Arrest in Australia* (eds Duncan Chappell and Paul Wilson) *The Australian Criminal Justice System* (2nd ed, Butterworths, 1977) p 254. A more elaborate test has been propounded in the context of whether the killing of a felon in the course of committing a felony is a justifiable homicide, or manslaughter, or murder. It was put thus by the Full Court in *R v Turner* [1962] VR 30 at 36:

> "When a felony is committed in the presence of a member of the public, he may use reasonable force to apprehend the offender or for the prevention of the felony. What is reasonable depends upon two factors. He is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (i.e. the commission of a felony or the escape of the felon)."

5.93. It is also important to remember the comments of Connor J in *McIntosh v Webster* (1980) 43 FLR 112 at 123, where his Honour said:

> [Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.

5.94. As noted above, the CCTV footage shows CIV1 being grabbed by Officer SOM1 on one side and Officer SOM2 on the other in the foyer of the police station. Officer SOM4 held open the door to the corridor. Officer SOM1 said, 'You're under arrest'. As they moved to the corridor, the CCTV footage is obscured by the privacy square. The audio includes a thump followed by a groan from an unknown person. CIV1's voice is heard saying, 'kicks kicks.' Officer SOM1 said, 'Stop resisting'. Officer SOM1 said, 'Have you finished resisting?' several times in a clear voice. CIV1 (barely audible and in a squeezed tone) says, 'Yep'. There is then a deep inhale of breath. During this time (2.25- 2.41) CIV1's feet can be seen, but the rest of the vision is obscured by the privacy square. When the 3 people come into view on the CCTV, CIV1 is being marched down a narrow corridor with his arms pinned behind his back by Officers SOM1 and SOM2. Three other officers are following.

5.95. As noted above, the visual footage from CIV1's phone was largely obscured. What is clear is that at the point that Officer SOM1 said, 'Have you finished resisting?' for a second time when he is standing behind CIV1.

5.96. The consistent evidence of CIV1 and all officers was that there was a scuffle in the corridor. It appears that at some point, Officer SOM1 and CIV1 ended up on the floor. The Commission is satisfied that Officer SOM1 kicked CIV1, on the basis that this was CIV1's evidence and that he is recorded as saying, 'kicks kicks' on the audio recording.

5.97. CIV1 was outnumbered, with officers ahead and behind him. His chances of escape were almost nil. However, in a narrow corridor with limited manoeuvrability, the risk that the officers were reasonably entitled to mitigate was that CIV1 might strike out at them. The Commission accepts that the officers would want to quickly gain control of the situation. However, Officer SOM1 spoke in a loud and consistent voice throughout. At no point was there any audio to suggest that he lost any control of the situation. At the point at which CIV1 was being choked by Officer SOM1, both men were standing and within seconds, CIV1 was marched down the corridor with each of his arms pinned by 2 officers. The Commission considers that the situation was readily controlled without any need for a dangerous choke hold.

5.98. The Commission considers that there is sufficient evidence to refer Officer SOM1 to the Director of Public Prosecutions (DPP) to consider a charge of assault relating to the choke hold used while allegedly arresting CIV1.

5.99. It is possible that some of the officers who gave evidence witnessed the choke hold but then denied seeing it to protect another officer. However, the Commission accepts there would have been visibility issues due to fast pace of events in the corridor, the narrowness of the corridor and the number and size of the people within the corridor. Accordingly, the Commission makes no adverse comment in relation to the other officers that may have potentially witnessed the assault on CIV1.

Offensive comments made by Officer SOM1

5.100. Immediately after CIV1 was choked and his phone fell to the ground, he said to the officers, 'Oh great you guys are legends ay?'. Officer SOM1 then called CIV1 a

'fuckwit' to which CIV1 responded, 'I'm a fuckwit? Fuck, I'm just trying to get help with my car man'.[129]

5.101. CIV1 was then escorted by officers to a holding cell where his property was seized and Officer SOM1 began to search him.

5.102. CIV1 did not refuse to go into the cell.[130] He was compliant with Officer SOM1's instructions when he asked for his keys and asked him to turn around. Officer SOM1 was forceful in his tone, announcing that CIV1 was being searched and directed him to take everything off. Whilst CIV1 was taking his clothes and accessories off, Officer SOM1 said to him, 'Act like a cunt, you're treated like one'.[131] CIV1 responded, 'I'm not tryin' to act like a cunt'. Officer SOM1 then yelled, 'You are a fuckin' cunt. Deadset cunt'.[132]

5.103. The language used by Officer SOM1 is offensive, unnecessary and unprofessional.

5.104. All NSW Police Force officers are required to comply with the Code of Conduct and Ethics which are set out in the Standards of Professional Conduct handbook. The Commission is satisfied to the requisite standard that Officer SOM1 has breached point 4 of the Code of Conduct and Ethics which provides that an employee of the NSW Police Force must:[133]

> 4. treat everyone with respect, courtesy and fairness.

5.105. These comments by Officer SOM1 are not included in any of the officers' statements, the COPS report or the Facts Sheet.

5.106. Of the examinations that were held, Officer SOM2 is the only officer that admitted hearing Officer SOM1 say the above offensive comments to CIV1,[134] despite a number of the other officers being in the same vicinity. He conceded that he omitted to include this in his statement.[135]

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[129] Exhibit LGP3C.
[130] Exhibit LGP3C.
[131] Exhibit LGP3C.
[132] Exhibit LGP3C.
[133] NSW Police Force Code of Conduct and Ethics.
[134] Private examination of SOM2 at T104; Private examination of SOM9 at T44.
[135] Private examination of SOM2 at T104.

5.107. Officer SOM9 agreed with Counsel Assisting that they were not usual words for an officer to use when speaking to a person under arrest.[136] Officer SOM9 gave evidence that in the context of his short involvement with CIV1 that morning, it was not a comment he would say nor would think was appropriate.[137] He ultimately agreed with Counsel Assisting that it was not consistent with treating everyone with respect, courtesy and fairness.[138]

5.108. Officer SOM6 agreed with Counsel Assisting that the language used by Officer SOM1 was abusive (a word that had been used by Officer SOM6 in his statement to describe CIV1).[139]

5.109. Officer SOM4 gave evidence that in Regional Town 1, given it is a country town, people would generally swear when speaking to one another.[140] However, he qualified that it would depend on the context and the person you are speaking to. The Commission accepts that in certain communities swearing may regarded as acceptable. However, the nature and context of Officer SOM1's offensive comments to CIV1 go far beyond what is acceptable conduct for a police officer.

CIV1's mobile phone recording

5.110. Immediately after a visual of the choke hold which was captured on CIV1's mobile phone,[141] Officer SOM1 can be heard saying, 'Give me that. Give me the phone'.[142]

5.111. CCTV footage of the corridor captures the phone falling to the floor and Officer SOM9 picking up the phone shortly thereafter.[143] Officer SOM9 gave evidence that he had no independent recollection of picking up the phone, however he identified himself on the CCTV when it was played during his examination.[144]

5.112. Officer SOM9 placed the phone on what is known as a 'property square' on the counter in the charge room. The property square is a designated square area

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[136] Private examination of SOM9 at T45.
[137] Private examination of SOM9 at T45-46.
[138] Private examination of SOM9 at T46.
[139] Private examination of SOM6 at T50-51.
[140] Private examination of SOM4 at T68.
[141] Exhibit JQH7C.
[142] Exhibit LGP3C.
[143] Exhibit JQH2C.
[144] Private examination of SOM9 at T28, T31.

where a prisoner's personal items are placed after being collected from them.[145] All personal items are then recorded on a property docket for the purpose of keeping a record of all items the person came into custody with.[146]

5.113. Officer SOM2 admitted during his examination that he stopped the phone recording.[147] CCTV footage captures him doing this whilst the phone is still on the charge counter about 20 seconds after it is placed there by Officer SOM9.[148] Officer SOM2 gave evidence that he announced to his fellow officers that the phone had been recording.[149] Officer SOM6 corroborated that this occurred.[150] Officer SOM4 denied having any knowledge of the recording, however he admitted he was aware CIV1 was filming at the start of his interaction with police.[151]

5.114. However, CIV1's evidence at his trial was that the recording was not on his phone when he was released from custody.[152] According to CIV1, when he got home he gave his phone to his neighbour who is 'pretty good with technology' and when the neighbour returned the phone, the footage was there.[153]

5.115. CIV1's neighbour participated in a recorded interview with Commission investigators and provided a statement.[154] The neighbour explained that on a day in 2021, believed to be the day of CIV1's arrest, she heard CIV1 on his verandah 'swearing and carrying on' and he said words to the effect of, 'I had the friggen video'.[155] The neighbour went next door to assist CIV1. She witnessed CIV1 go through his mobile phone, but he was unable to find the video.

5.116. The neighbour assisted CIV1 to navigate through his Google account until they found the relevant video in the recently deleted folder. The neighbour was able to restore the video to CIV1's phone. The neighbour watched the video. In the

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[145] Private examination of SOM2 at T110.
[146] Private examination of SOM2 at T111.
[147] Private examination of SOM2 at T104.
[148] Exhibit JQH3C.
[149] Private examination of SOM2 at T116.
[150] Private examination of SOM6 at T22.
[151] Private examination of SOM4 at T38, T40-41.
[152] Exhibit SVB3C at 8.
[153] Exhibit SVB3C at 8.
[154] Exhibit PZN5C.
[155] Exhibit PZN5C at 2.

video, she heard CIV1 arguing with police and then saw that he was manhandled and placed in a choke hold. She recalled CIV1 say in the video, 'I'm not resisting'.

5.117. Mobile phone footage was introduced into evidence at CIV1's trial when it was played by the defence during the cross-examination of Officer SOM1. The Commission accepts that this was the recording retrieved by CIV1's neighbour, which was then tendered by CIV1's defence team in the Local Court, and then used by the Commission throughout its investigation.

5.118. Despite the officers being aware of the recording, there is no reference to the recording in any of the officers' statements (including Officer SOM2 who is recorded openly questioning CIV1 on whether he is recording when he enters the station on the third occasion). The recording was not seized as an exhibit.[156] Officer SOM1, as the Officer in Charge of the investigation, produced a number of exhibits to the Court in his statement.[157] Officer SOM1's statement does not refer to the mobile phone footage or produce the footage as an exhibit. Indeed, the content all of the officers' statements, but particularly those of Officers SOM1 and SOM2, are at complete odds with the mobile phone recording. The Commission considers it highly unlikely that any of the officers would have produced such statements if they considered it possible that there was a recording on CIV1's phone which would contradict their statements.

5.119. The Commission is satisfied there is sufficient evidence to establish an attempt was made to delete the relevant footage from CIV1's phone. This raises the question of who attempted to delete that footage.

The missing 6 seconds of CCTV footage

5.120. Officer SOM1 produced 9 CCTV video files from Regional Police Station 1 to the Court as evidence in the prosecution of CIV1.[158] These are referred to in his statement.[159]

5.121. CCTV footage of the charge room which captures CIV1 being escorted into the holding cell, his property being collected and a search being conducted, was

[156] Exhibit SVB12C.
[157] Exhibit SVB12C.
[158] Exhibit SVB12C.
[159] Exhibit SVB12C.

provided in 2 separate videos. There is a gap between those 2 videos of 6 seconds. Those 6 seconds of footage were not produced to the Court. What goes missing in those 6 seconds of CCTV footage is significant.

5.122. At the point in time when the CCTV footage of the charge room cuts out,[160] Officer SOM1 was leading a search of CIV1 in the dock, with the dock door open, and was collecting CIV1's property. He threw CIV1's ring onto the property square. At the same time, Officer SOM2 stops the mobile phone recording. The phone is also located on the property square. Four other officers were standing by the dock door observing or assisting with the collection of property. At the conclusion of the first video, CIV1's mobile phone and ring are clearly visible on the property square.

5.123. When the second video commences 6 seconds later,[161] 2 things are missing - Officer SOM1 and the mobile phone. Officer SOM1, who was previously mid-search, is no longer in view. On the property square, the ring remains, however CIV1's mobile phone has disappeared. Officer SOM1 does not return to continue to the search.

5.124. The 4 remaining officers continued to collect CIV1's property and search CIV1.

5.125. In his evidence, Officer SOM2 agreed with Counsel Assisting that there would be no legitimate reason for Officer SOM1 to walk out of the room in the middle of leading the search of a person he just arrested in the dock.[162] He further agreed that the action of Officer SOM1 leaving the search at this stage is completely irregular and extraordinary.[163] Officer SOM9 also agreed that it was unusual.[164]

5.126. Officer SOM2 denied seeing Officer SOM1 move the mobile phone, but having reviewed the CCTV footage, agreed that Officer SOM1 appears to have moved the phone.[165] Officers SOM6 and SOM9 denied having any knowledge of where Officer SOM1 or the mobile phone went.[166]

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[160] Exhibit JQH3C.
[161] Exhibit JQH4C.
[162] Private examination of SOM2 at T112.
[163] Private examination of SOM2 at T112-113.
[164] Private examination of SOM9 at T49.
[165] Private examination of SOM2 at T113.
[166] Private examination of SOM6 at T65; Private examination of SOM9 at T37-38, T48.

5.127. Under cross-examination in the Local Court, Officer SOM1 denied having any recollection of moving or taking the phone.[167]

5.128. Officer SOM1 agreed that he collated the relevant video footage on that day.[168] The Commission notes that there is a CCTV camera positioned directly above the property square in Regional Police Station 1.[169] The footage from that CCTV camera was not included in the package collated by Officer SOM1.

5.129. Officer SOM1's explanation given under cross-examination in the Local Court for the gap in the footage was as follows:[170]

> Q: Well, you say there can be gaps in the video that - - -
>
> A: Yes.
>
> Q: - - - you collated? Let's be clear. From your experience of 22 years, how would those gaps occur?
>
> A: There was a gap from the front foyer that's not recording this part because the videos are all recording simultaneously, but when they're downloaded, the program cuts, edits and removes the part to the nearest whatever, I'm not a video expert, however, there's only 30 - 29 seconds of that one, or 38 of the other one I believe I saw, so as it's cut into the pieces and filed into the computer, you simply extract that file and put it on there. Like, I don't know how seven seconds or whatever you say it is is not there.

5.130. Officer SOM1 further stated he believes the missing 6 second gap is a coincidence.[171]

5.131. When Officer SOM1 was later asked to explain by way of Directive Memorandum why the CCTV footage was not provided in its entirety,[172] he said that despite multiple attempts at downloading more than 6 hours of footage, on each occasion due to the large size and length of the files, the program would crash and corrupt the footage. Due to these issues, he said he reviewed all the footage

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[167] Exhibit XSD07 at 18.
[168] Exhibit XSD07 at 24.
[169] Exhibit SVB14C.
[170] Exhibit XSD07 at 24.
[171] Exhibit XSD07 at 25.
[172] Exhibit PZN7C at 3-4.

and only took the CCTV footage that was relevant to the charges.[173] In this response, unlike in his evidence in the Local Court, he did not suggest that any program cut, edited or removed the CCTV footage of its own accord. The explanation he provided in response to the Directive Memorandum does not explain how 6 seconds of footage could be cut at a random point from a continuous video file extracted from the one camera, unless it was deliberately removed.

5.132. In his evidence to the Commission, Officer SOM2 agreed with Counsel Assisting that it would be a remarkable coincidence for the CCTV to have glitched at the same point in time that these 2 critical events occur.[174]

5.133. Given all the circumstances, there is an overwhelming and irresistible inference that Officer SOM1 took CIV1's mobile phone, erased the recording and purposely tampered with the CCTV footage to ensure those 6 seconds of footage of him taking the phone were not provided to the Court.

Offence of tampering with evidence

5.134. Section 317 of the Crimes Act provides that it is an offence:

> 317 Tampering etc with evidence
>
> A person who, with intent to mislead any judicial tribunal in any judicial proceeding —
>
> (a) suppresses, conceals, destroys, alters or falsifies anything knowing that it is or may be required as evidence in any judicial proceeding, or
>
> (b) fabricates false evidence (other than by perjury or suborning perjury), or
>
> (c) knowingly makes use of fabricated false evidence,
>
> is liable to imprisonment for 10 years.

5.135. Officer SOM1 was aware that CIV1's phone contained a recording of some or all of the events in the police station on 12 July 2021. He was aware that Officer SOM2 stopped the recording. The phone was not seized as an exhibit and the

[173] Exhibit PZN7C at 4.
[174] Private Examination of SVB at T110.

recording was not produced as an exhibit, despite being obviously relevant evidence. The recording was not on CIV1's phone when he left custody. Officers SOM1, SOM2 and others then prepared sworn statements for court, which were entirely inconsistent with the objective evidence of the phone recording. Without adequate explanation, Officer SOM1 stopped searching CIV1 and disappeared from the charge room at the time that the phone disappeared from the custody square on the custody counter. He did not return. There are 6 seconds of footage missing from the CCTV recording which would have shown how both Officer SOM1 and the phone vanish at the same time.

5.136. The Commission is satisfied there is sufficient evidence to refer Officer SOM1 to the DPP to consider 2 charges under s 317(a) of the Crimes Act of intentionally misleading a judicial tribunal in judicial proceedings by destroying and/or altering:

a) Attempting to destroy the phone footage
b) Altering the CCTV recording of the custody room by 6 seconds

The Facts Sheet

5.137. In evidence given in the Local Court for the prosecution of CIV1, Officer SOM1 agreed that that he was responsible for the creation of the police event and the narrative in the police Facts Sheet.[175] He referred to these records as 'contemporaneous' records he made about the incident on the police computer. Records obtained from Officer SOM1's hard drive confirmed that he drafted the narrative for the Facts Sheet on the same day as CIV1's arrest.

5.138. A comparison of the Facts Sheet and the audio obtained from CIV1's mobile phone from the third entry into the station identified significant inconsistencies and false statements, particularly in relation to the offensive language purportedly used by CIV1. When looked at in totality, it shows a concerning misrepresentation of what in fact took place between police and CIV1 inside the police station.

[175] Exhibit XSD07 at 5.

5.139. Annexure A compares the key inconsistencies identified in the Facts Sheet with the mobile phone recording at the relevant point in time.

5.140. Significantly, every false or misleading piece of information Officer SOM1 included in the Facts Sheet supported the 3 offences police alleged CIV1 committed on 12 July 2021, particularly the offence of offensive language. Contrary to the Facts Sheet, a review of the audio from CIV1's phone showed that CIV1 did not direct any offensive language at police at any point during the third entry.

5.141. Officer SOM1's evidence was that he prepared the Facts Sheet on 12 July 2021. This is corroborated by data from his computer. The inconsistencies cannot be explained by poor memory of events. Rather, the Commission is satisfied that Officer SOM1 intentionally fabricated evidence in the Facts Sheet to mislead the reader as to what had occurred inside the station. This included the Custody Manager who authorised the charges and granted CIV1 conditional bail, and any judicial officer called on to determine whether CIV1 should be convicted of the offences with which he was charged.

5.142. The Facts Sheet formed part of the brief of evidence in the prosecution of CIV1 and if it were not for the introduction of the mobile phone footage by the defence, the version of events provided in the Facts Sheet may very well have been accepted by the Magistrate as the true version of events. CIV1 was at risk of a custodial sentence.

5.143. As noted at 5.134 above, s 317(b) of the Crimes Act makes it an offence to fabricate false evidence with the intention of misleading a judicial tribunal in any judicial proceeding. The meaning of 'fabricate false evidence' was considered in *Director of Public Prosecutions v Aydogan* [2006] NSWSC 558; (2006) 67 NSWLR 727 at [25]–[26], where Latham J held that an offence against s 317(b) may be committed:

- by conduct that pre-empts the institution of proceedings; and
- even if the false document or record or accusation does not find its way into evidence.

5.144. The Commission considers that the comparison undertaken in Annexure D between the Statement of Facts prepared by Officer SOM1 and the objective

evidence from the phone recording is sufficient evidence to warrant referring Officer SOM1's conduct to the DPP to consider one charge under s 317(b) of the Crimes Act of intentionally misleading a judicial tribunal in judicial proceedings by intentionally fabricating false evidence, namely a false Statement of Facts.

6. Police witness statements

6.1. On 13 July 2021, the day after CIV1's arrest, Officer SOM1 completed a signed statement for the prosecution of CIV1.[176] That statement, which will be scrutinised later in this Report, is almost entirely inconsistent with the mobile phone footage recorded by CIV1 and provides a grossly inaccurate version of events that occurred on the morning of 12 July 2021.

6.2. Approximately 2 weeks later, on 28 July 2021, Officer SOM1 sent an email to Officers SOM2, SOM6, SOM4 and SOM5 requesting witness statements.[177]

6.3. The email read as follows:

> Men
>
> Surprise surprise… [CIV1] the bloke that carried on like a prize pork chop pleaded not guilty and somehow managed to get a short notice brief…. That's where you lot come in….
>
> I need statements from each of you:
>
> [SOM2] and [SOM6] – helped arrest
>
> [SOM4] and [SOM5] – [CIV1] carrying on, phone calls, and move on direction. Add as much first person conversation as you can remember.
>
> [Charge Number] relates
>
> [Event Number] relates
>
> Have a look at the Event, there is 9 x CCTV files that show the incident
>
> Also attached is a copy of my statement and the facts
>
> I need the statement by **6th of Aug 2021**

[176] Exhibit XSD08.
[177] Exhibit LGP6C.

Thanks men!!!

6.4. Officer SOM1 attached a copy of his statement and a copy of the Facts Sheet. As mentioned earlier in this Report, the Facts Sheet had also been prepared by Officer SOM1 and was similar in content to his statement.

6.5. Officer SOM7 was not included in the email and completed his signed statement on the same day that Officer SOM1 sent the above email.[178] A review of the roster for that time period indicates Officers SOM7 and SOM1 were rostered on together at Regional Police Station 1 that same day. Whilst Officer SOM7 did not give evidence to the Commission, it can be reasonably assumed Officer SOM1 spoke to Officer SOM7 in person about providing a statement. It is unknown what material Officer SOM1 provided Officer SOM7, or what instructions were given.

6.6. Officer SOM9, who gave evidence before the Commission, did not complete a witness statement and was not asked to provide one.[179]

6.7. Between 4 and 13 August 2021, all 4 recipients of the email completed their signed statements. The officers, to varying degrees, corroborated the version of events provided by Officer SOM1 in his statement. None of the officers made any reference in their statement to having relied on Officer SOM1's statement.

6.8. The NSW Police Force Handbook provides the following guidance to police officers in preparing a statement for court:[180]

> When you are asked to prepare a statement for court, the information contained in your statement is expected to be your own independent account of the evidence you can give.
>
> The expectation that a police officer's statement is their own account of the events is no different to the expectation of statements obtained from any witness. You may encounter significant difficulties in court if you have accessed your partner's statement before writing your own. It may be suggested that you have no independent recollection of events and are only repeating your partner's statement. The weight given to your evidence will be minimal if the court accepts that you are simply repeating someone else's evidence.

[178] Exhibit PZN3C.
[179] Examination of JQH at T21.
[180] Exhibit SVB10C.

Your statement must be in your own words and you must not copy another officer's statement.

You should prepare your statement from your own notes or from the notes you adopted in another officer's notebook or other secondary material such as Facts Sheet, CCTV, BWV, COPS events, statements etc. You must reference all material you have relied upon to refresh your memory for the purposes of completing your statement.

Evidence given by the officers about preparation of their statements

Officer SOM4

6.9. Officer SOM4 gave evidence that this was the first statement he had ever completed.[181] At the time he prepared his statement, he said he was unaware of what was allowed and what was not.[182] He was unaware of the instructions on how to complete a statement available to officers in the Police Handbook.[183] He did not seek guidance from anyone in completing his statement.[184]

6.10. Officer SOM4 admitted that he opened Officer SOM1's statement but said he did not read it.[185] He gave evidence that he did not realise at the time that you could not use someone else's statement when preparing your own.[186] He did however give evidence that he relied on the Facts Sheet to prepare his statement.[187] This included, on at least one occasion, the inclusion of direct speech, that was inconsistent with the phone recording.[188]

6.11. Officer SOM4 maintained that he was not pressured to put anything into his statement, however he recalled Officer SOM1 telling him to make sure his statement was 'detailed'.[189]

6.12. Despite the evidence given by Officer SOM4, the Commission is satisfied that in addition to the Facts Sheet, he also relied on Officer SOM1's statement to

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[181] Private Examination of LGP at T52.
[182] Private Examination of LGP at T53.
[183] Private Examination of LGP at T53.
[184] Private Examination of LGP at T54.
[185] Private Examination of LGP at T53.
[186] Private Examination of LGP at T53.
[187] Private Examination of LGP at T53-54, T60.
[188] Private Examination of LGP at T60.
[189] Private Examination of LGP at T57-58.

prepare his own statement. A comparative analysis undertaken by the Commission between Officer SOM4's statement, the Facts Sheet and Officer SOM1's statement demonstrates this. A copy of the analysis is at Annexure B. The most obvious example of this is where Officer SOM4 recorded in his statement that immediately after the arrest of CIV1, CIV1 called police 'corrupt cunts'.[190] This is language that CIV1 did not use at any point during the third entry. This phrase is only found in Officer SOM1's statement,[191] and is not included in the Facts Sheet. The Facts Sheet does not record that CIV1 used any offensive language immediately after his arrest. Further, Officer SOM4 did not attribute the term 'corrupt cunts' to CIV1 in the event narrative he created on the day of CIV1's arrest. It is evident the inclusion of this offensive phrase could have only been drawn from Officer SOM1's statement.

6.13. Ultimately, the Commission is satisfied that Officer SOM4 included information in his statement that he did not independently recall and did not identify in his statement that he had used the Statement of Facts on another officer's statement to prepare his own statement.

6.14. This is a breach of the NSW Police Force Code of Conduct and Ethics, specifically that an employee of the NSW Police Force must:

1. behave honestly in a way that upholds the values and the good reputation of the NSW Police Force whether on or off duty
2. act with care and diligence when on duty
3. know and comply with all policies, procedures and guidelines that relate to their duties.

6.15. Whilst Officer SOM4 gave evidence that he was not pressured by Officer SOM1 or any other officer to put anything into his statement, the Commission accepts that as a junior inexperienced officer who was told to ensure his statement was 'detailed', it is clear he was influenced by the email sent by Officer SOM1 as a superior officer to use the resources that were sent to him in the preparation of his statement, which included the statement of Officer SOM1.

[190] Exhibit LGP8C at [25].
[191] Exhibit XSD04 at [31].

6.16. The Commission acknowledges that Officer SOM4 was inexperienced and influenced by a senior officer. For this reason, the Commission does not recommend any criminal charges against Officer SOM4. However, the fact remains that his witness statement corroborated a false narrative of events. But for the phone recording, the prosecution of CIV1 may well have been successful.

Officer SOM6

6.17. Unlike Officer SOM4, Officer SOM6 was aware that in this situation, a senior officer attaching a copy of their own statement was concerning.[192] When asked why, Officer SOM6 explained:[193]

> A: We don't really look at other people's statements.
>
> Q: Why?
>
> A: You don't copy other people, because you perceive things different to what I perceive things. You might hear something different to what that person hears. It's - everyone sees things from a different perspective. It could be where you're standing and where you're not standing, what's in the road, what's happening over there when they're dealing with something over there. You don't want to be putting in things that you don't know about.

6.18. Officer SOM6 said he did not look at Officer SOM1's statement and did not access any of the other material referred to by Officer SOM1 in his email,[194] except for the Facts Sheet which he 'possibly' accessed. When asked why he did not access any of the sources provided in preparing his statement, Officer SOM6 explained that because of 'work' and 'time' he prepared his statement purely from his own recollection.[195]

6.19. Officer SOM6 told the Commission it was not normal to receive a copy of another officer's statement when asked to prepare your own.[196] This was the first instance where he had received a statement from Officer SOM1 in asking him to prepare a statement.[197]

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[192] Private Examination of WSR at T59.
[193] Private Examination of WSR at T59.
[194] Private Examination of WSR at T58.
[195] Private Examination of WSR at T58.
[196] Private Examination of WSR at T59.
[197] Private Examination of WSR at T59.

6.20. Officer SOM6 did not raise his concern with Officer SOM1, he merely paid no regard to it.[198]

6.21. When questioned about whether he spoke about the statement to Officer SOM2, who was working at the same police station, Officer SOM6 told the Commission they only spoke briefly about the fact they had both received the email and did not discuss the content of their statements.[199]

Officer SOM2

6.22. Before preparing his statement, Officer SOM2 told the Commission he accessed Officer SOM1's statement.[200] He could not specifically recall whether he accessed the Facts Sheet, the event or the CCTV video files that were referred to in Officer SOM1's email, however he acknowledged it would have been consistent with what he would usually have regard to.[201]

6.23. Officer SOM2 admitted that at the time he completed his statement, he had little independent recollection of the incident.[202]

6.24. Officer SOM2 denied having any discussion with Officer SOM1 about preparing a statement, either prior to or after receiving the email.[203]

6.25. Unlike the other officers, Officer SOM2 conceded that on numerous instances in his statement, he either copied verbatim from Officer SOM1's statement, including direct quotes attributed to CIV1, or he copied and varied some of the words when reproducing it in his own statement.[204] As a result, Officer SOM2's statement corroborates Officer SOM1's version of events, a version which the Commission now understands to be almost entirely fabricated.

6.26. At a minimum, this is a breach of the NSW Police Force Handbook and a breach of the NSW Police Force Code of Conduct and Ethics.

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[198] Private Examination of WSR at T60.
[199] Private Examination of WSR at T60.
[200] Private Examination of SVB at T14.
[201] Private Examination of SVB at T15-17.
[202] Private Examination of SVB at T14.
[203] Private Examination of SVB at T13.
[204] Private Examination of SVB at T53-54, 74, 77, 78, 84.

6.27. Officer SOM2 maintained that Officer SOM1 never expressly asked him to corroborate his version of events. However, he conceded that as Officer SOM1 was the Officer in Charge and a superior officer, he 'backed him in'.[205] Officer SOM2 could not explain why he did it.[206] When asked by Counsel Assisting whether he felt like he had a choice, Officer SOM2 responded, 'We've always got a choice.'[207]

6.28. Officer SOM2 told the Commission that whilst it was not common or recommended to attach a statement to an email requesting officers prepare a statement, it was not the first time he had received this type of communication from an Officer in Charge.[208] It was however the first time he had received this type of communication from Officer SOM1.[209]

6.29. Officer SOM2 did not recall raising this issue with Officer SOM1 or anyone else.[210]

Officer SOM3

6.30. Officer SOM3, who conducted the internal investigation into this matter, also gave evidence in relation to the practice of attaching a copy of an officer's own statement when requesting the statements of others. He agreed with Counsel Assisting that it should not be done, however he told the Commission that it was not unheard of.[211] When asked why it should not be done, Officer SOM3 accurately stated that it would influence the way the officer writes their statement.[212]

7. Officer SOM2's witness statement and evidence in the Local Court

7.1. The significant inconsistencies between Officer SOM2's statement, his evidence in the Local Court and the objective evidence of the audio recording warrants further examination. Officer SOM2 completed his witness statement on 5 August

[205] Private Examination of SVB at T102-103.
[206] Private Examination of SVB at T103.
[207] Private Examination of SVB at T103.
[208] Private Examination of SVB at T18.
[209] Private Examination of SVB at T18.
[210] Private Examination of SVB at T18-19.
[211] Private examination of SOM3 at T54-55.
[212] Private examination of SOM3 at T55.

2021. He included, as required, a jurat at the commencement of his statement which reads as follows:[213]

> This statement by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false, or do not believe to be true.

Officer SOM2's witness statement

7.2. In his evidence before the Commission, Officer SOM2 acknowledged that he was familiar with the meaning of the jurat and understood that it meant he could be criminally prosecuted for perjury if he knowingly made a false statement.[214]

7.3. During Officer SOM2's private examination, he was taken to 19 different parts of his witness statement and accepted they were significantly inconsistent with what really occurred during CIV1's third entry into Regional Police Station 1 on 12 July 2021, as captured in the recording on CIV1's mobile phone.

7.4. These inconsistencies are presented in Annexure B which shows a comparison between the content of Officer SOM2's statement with the mobile phone recording at the relevant point in time.

7.5. Officer SOM2 conceded that parts of his statement were fabricated, other parts, including words attributed to CIV1, were copied from Officer SOM1's statement and other significant events and things that were said were deliberately omitted from his statement.

7.6. The totality of the inaccuracies in Officer SOM2's statement means that his statement completely misrepresents the events that occurred on the morning of 12 July 2021 at Regional Police Station 1.

7.7. Officer SOM2 agreed that he gave deliberately false evidence in his statement to support the prosecution of CIV1.[215] This amounts to an intention to mislead the judicial tribunal presiding over the prosecution of CIV1. There are many examples

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[213] Exhibit SVB11C at [1].
[214] Private examination of SOM2 at T7-8.
[215] Private examination of SOM2 at T102.

of this throughout Officer SOM2's statement. The following list highlights the main examples:

- Specific words and phrases he falsely attributed to CIV1 which have the cumulative effect of providing support for the offensive language charge. For example, referring to police as 'nothing but corrupt cunts'[216] and 'dog cunts'[217] and saying to police, 'You're all fat useless cunts, do your fucking job'[218] and, 'You cocksuckers have to do what I tell you. You cunts are my slaves!'[219]

- The inclusion of references to a prior move on direction, including by Officer SOM2 himself when CIV1 re-entered the police station and then again by Officer SOM1, who he purported to give CIV1 a warning prior to his arrest that if he did not comply with the move on direction, further action would be taken. This provides support for the arrest in relation to the offence of fail to comply with a move on direction being lawful and reasonable. These fabrications also place doubt on whether a move on direction was ever given to CIV1 or whether the existence of the move on direction was entirely fabricated to justify CIV1's arrest after the fact.

- The sequence of events which immediately preceded CIV1's arrest, including the misrepresentation of the interactions CIV1 had with both Officers SOM2 and SOM1, had the effect of representing CIV1 as a completely unreasonable and abusive individual and the officers as being tolerant, calm and reasonable in their approach to CIV1. This misrepresented the fact that the officers spoke to CIV1 in a way that was likely to inflame the situation and cause a reaction by CIV1.

- Officer SOM2 falsely said that Officer SOM1 told CIV1 the reason for his arrest at the time of arrest, and that Officer SOM1 repeated this reason to CIV1 once in custody. This provides support that Officer SOM1 complied with his statutory obligations under LEPRA.[220] Officer SOM2 accepted that when he was writing up his statement afterwards, he was conscious of the fact that the arrest was done without any effort to comply with what he knew to be the requirements for the arrest to be lawful.[221]

7.8. During his examination, Officer SOM2 made an attempt to justify how his statement came to be so inaccurate by alleging that some of the words and behaviour he attributed to CIV1 in his statement were words and behaviour he

[216] Exhibit SVB1C at [12].
[217] Exhibit SVB1C at [14].
[218] Exhibit SVB1C at [8].
[219] Exhibit SVB1C at [8].
[220] LEPRA, ss 201-2.
[221] Private examination of SOM2 at T64.

observed from CIV1 either before the recording commenced, or after the recording had ceased, when CIV1 was in custody.[222] Despite Officer SOM2's first interaction with CIV1 commencing at the same time as the recording, Officer SOM2 stated he could overhear CIV1 in the foyer on the earlier occasions. Similarly, despite leaving the custody area shortly after the recording ended, Officer SOM2 stated it is easy to hear into the custody area from other parts of the police station.

7.9. Officer SOM2 then acknowledged that it was possible he had become confused with other interactions he had with CIV1, noting he had dealt with him on several other occasions.[223] When challenged on whether he heard CIV1 say those words on 12 July 2021, as opposed to on another day, Officer SOM2 conceded he could not be sure.[224]

7.10. Officer SOM2 ultimately agreed with Counsel Assisting that if he had just been innocently mistaken about when these things were said, every mistake he made, by chance, happened to improve the prosecution case against CIV1 for each of the charges.[225] He agreed that would be a remarkable coincidence.[226]

7.11. Officer SOM2 agreed that his attempt at explaining how he got it so wrong is a contrivance.[227] The Commission understands this as Officer SOM2 admitting that his attempt at justifying some of the inaccuracies in his statement was insincere.

7.12. As noted at 5.134, s 317(b) Crimes Act makes it an offence to fabricate false evidence with the intention of misleading a judicial tribunal in any judicial proceeding. Officer SOM2's evidence before the Commission was given under objection. That evidence is not admissible in any criminal proceedings against him: ss 57, 74, 75 LECC Act. In assessing whether a referral to the DPP should be made, Officer SOM2's evidence to the Commission must be disregarded. The table at Annexure B documents the glaring inconsistencies between Officer SOM2's statement and the objective evidence in the audio recording made by CIV1. It also documents the striking consistency between Officer SOM1's

[222] Private examination of SOM2 at T98-101.
[223] Private examination of SOM2 at T99-100.
[224] Private examination of SOM2 at T100-101.
[225] Private examination of SOM2 at T101.
[226] Private examination of SOM2 at T101.
[227] Private examination of SOM2 at T101-102.

statement (which is also inconsistent with CIV1's audio recording) and the statement of Officer SOM2. The analysis in Annexure B leads to an irresistible inference that Officer SOM2 has copied Officer SOM1's statement, rather than relying on his own true recollection of events. The Commission considers that there is sufficient evidence to refer Officer SOM2's conduct to the DPP to consider one charge under s 317(b) of the Crimes Act of intentionally misleading a judicial tribunal in judicial proceedings by intentionally fabricating false evidence, namely his statement made on 5 August 2021.

7.13. Furthermore, the Commission is of the opinion that the false evidence given by Officer SOM2 in his statement is a breach of the NSW Police Force Code of Conduct and Ethics.

Officer SOM2's evidence in the Local Court

7.14. Officer SOM2 gave evidence in the Local Court in the prosecution of CIV1 on 15 December 2022. He gave evidence in chief and was also cross-examined by the legal representative for CIV1.

7.15. During Officer SOM2's private examination before the Commission, he was taken to the transcript from the evidence he gave in the Local Court in relation to 4 different topics and accepted that the evidence he gave was, at its best, inconsistent with the recording, and at its worst, entirely untruthful.

7.16. Annexure C provides an extract of the evidence Officer SOM2 gave in the Local Court in relation to those 4 topics and a summary of the evidence Officer SOM2 gave to the Commission in relation to that evidence.

7.17. Officer SOM2 agreed that he maintained false aspects of his account, both when examined in chief by the prosecutor and when challenged by CIV1's legal representation in Court on 15 December 2022.[228]

7.18. The 4 topics that Officer SOM2 gave false evidence on in the Local Court all bolstered the prosecution's case against CIV1 and were material to the proceedings.

[228] Private examination of SOM2 at T102.

7.19. First, the inclusion of a reference to the prior move on direction provides support for a finding that the arrest was lawful by inferring that:

a) a move on direction was previously issued

b) CIV1 was reminded of the prior move on direction and therefore

c) the subsequent arrest of CIV1 for failing to comply with a move on direction was lawful and reasonable.

7.20. Secondly, the false evidence Officer SOM2 gave in relation to offensive language allegedly used by CIV1 provides *prima facie* support for the offensive language charge.

7.21. Thirdly, evidence that Officer SOM1 provided a reason for arrest at the time CIV1 was arrested is an effort to show the arrest was in compliance with LEPRA.

7.22. Finally, by failing to disclose the full extent of his reliance on Officer SOM1's statement in the preparation of his own, Officer SOM2's statement was given greater weight by the Court, improving the prospects of CIV1's prosecution being successful.

7.23. Officer SOM2 agreed that his conduct was serious, shocking and constituted misconduct of a high order.[229]

7.24. Section 327 of the Crimes Act establishes the offence of perjury:

327 Offence of perjury

(1) Any person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years.

(2) A statement can be considered to have been made in connection with a judicial proceeding whether or not a judicial proceeding has commenced, or ever commences, in connection with it.

[229] Private examination of SOM2 at T102.

(3) The determination of whether a statement is material to a judicial proceeding that has not commenced is to be made on the basis of any judicial proceeding likely to arise in connection with the statement.

(4) The question of whether any matter is material to a proceeding is a question of law.

7.25. The elements of the offence are that:

1. the accused in judicial proceedings made a false statement
2. on oath
3. concerning any matter which was material to the proceeding
4. knowing the statement to be false or not believing it to be true.

7.26. There is also a common law requirement for corroboration of evidence of the falsity of the statement. It can be satisfied in one of 4 ways:[230]

1. evidence of two witnesses attesting to the falsity of the accused's statement
2. by one witness with corroboration
3. by the *production of a record which was known to the accused*
4. by *documentary evidence from the accused or an admission from the accused.*

7.27. As noted earlier, Officer SOM2's evidence before the Commission must be disregarded when considering whether his conduct might amount to the offence of perjury.

7.28. The content of Officer SOM2's evidence was established by the Local Court transcript. The question of whether the statement was false requires evidence which proves the falsity of the statement. CIV1's evidence (in the terms given on the *voir dire* in the Local Court) corroborated by the phone recording establishes that Officer SOM2's testimony in the Local Court was untrue. Officers SOM4, SOM9 and SOM6 could be called to provide corroborative evidence, consistent

[230] See *Mehajer v R* [2022] NSWCCA 240 per Bell CJ, Gleeson JA and Yehia J at [35]–[37] and cases cited therein.

with their evidence to the Commission, that the audio from the phone recording represents an accurate account of what occurred during the third entry. The second element is established by the transcript of evidence in the Local Court. The evidence that Officer SOM2 gave was material to the proceeding, in that it went directly to the matters that were the subject of the charges that CIV1 was facing (see summary at paragraphs 7.18 – 7.20).

7.29. The fourth element requires evidence (without relying on his evidence before the Commission) that Officer SOM2 knew that the evidence he gave in the Local Court was untrue. Officer SOM2 prepared his statement on 5 August 2021, 6 weeks after CIV1's arrest. For the reasons outlined above, his statement contains false evidence. Officer SOM2 gave evidence in the Local Court that he knew that CIV1's phone was recording because he switched off that recording.[231] At the time of preparing his statement there is an irresistible inference that he must have believed that this recording had been deleted, or he would not have prepared a statement so grossly inconsistent with the recording. At the time of preparing this statement, he would therefore have known that his statement was false. When he gave that same evidence to the Local Court in December 2022, he did so in the same terms as the statement which he must have known was false at the time it was prepared. He was given an opportunity in the Local Court to provide a different version of events (which he did in part, by acknowledging that he had used Officer SOM1's statement to prepare his own). He gave evidence in cross-examination that none of his statement was false and that it was all true. He specifically gave evidence that he recalled certain words being said which were not objectively said.[232] There is a *prima facie* case that in giving this evidence, Officer SOM2 knew that it was not true.

7.30. The Commission considers that there is sufficient evidence to refer Officer SOM2's conduct to the DPP to consider one charge of perjury under s 327 of the Crimes Act.

[231] Exhibit SVB3C pp 41- 42.
[232] Exhibit XSD08 pp 44-45.

8. Officer SOM1's witness statement and evidence in the Local Court

8.1. Officer SOM1 did not give evidence before the Commission as part of this investigation as he was excused from attending the Commission on medical grounds. Accordingly, the analysis of the evidence against Officer SOM1 does not include any evidence he provided directly to the Commission. However, he did give evidence under oath in the Local Court in the prosecution of CIV1. The Commission has the transcript of this evidence and has used this evidence in its analysis.

8.2. Officer SOM1 gave evidence in the Local Court over 2 days. At the beginning of his evidence, as is usual practice, he swore that the evidence he was going to give to the Court was the truth.[233] He gave evidence in chief and under cross-examination by the defence. The mobile phone footage retrieved from CIV1's phone was introduced by the defence part way through the cross-examination of Officer SOM1.

8.3. Towards the end of the cross-examination of Officer SOM1, the Magistrate adjourned proceedings to afford Officer SOM1 an opportunity to obtain legal advice in relation to s 128 of the *Evidence Act 1995* (Cth) (Evidence Act) which allows for a witness to object to giving evidence on the grounds they may incriminate themselves. Where it appears to the Court that a witness may have grounds for making an application or objection under s 128 of the Evidence Act, the Court may grant the witness a certificate, which then prevents that evidence being used against the witness in other court proceedings: s 128(7) Evidence Act.[234]

8.4. Following the adjournment and a number of questions asked by defence counsel, Officer SOM1 made an objection pursuant to s 128.[235] The Magistrate issued Officer SOM1 with a s 128 certificate, finding there was reasonable grounds for his objection and determining it was in the interests of justice that he be required to answer the question.[236] It is highly unusual for a police witness to be issued a

[233] Exhibit PZN6C at 3.
[234] Evidence Act, s 132; *R v Parkes* [2003] NSWCCA 12 at [94]–[99].
[235] Exhibit XSD07 at 44.
[236] Exhibit XSD07 at 46.

s 128 certificate and demonstrates that the Magistrate was concerned Officer SOM1 was at risk of committing a criminal offence.

8.5. Officer SOM1 completed his witness statement for the prosecution of CIV1 on 13 July 2021, the day after CIV1's arrest at Regional Police Station 1. In his evidence in the Local Court, he agreed with the defence counsel that the reason he prepared his statement the day after the incident was so that it was fresh in his mind.[237] He did not make any notes relating to the incident in his notebook because he had already made contemporaneous notes on the police computer, including the police event narrative, the charge and his statement.[238]

8.6. Officer SOM1 included, as required, a jurat at the commencement of his statement:[239]

8.7. The Commission undertook a comparative analysis between Officer SOM1's statement and the evidence he gave in the Local Court against the mobile phone footage retrieved from CIV1's phone. The Commission identified 15 significant inconsistencies between his statement and the mobile phone recording, which the Commission accepts as objective evidence of what occurred.

8.8. Officer SOM1 also gave evidence in the Local Court in support of his statement which was entirely inconsistent with the mobile phone recording. These inconsistencies are presented in Annexure D below in chronological order, separated by specific events.

8.9. The comparison evidenced in Annexure D demonstrates that the contents of the statement prepared by Officer SOM1 and the evidence he gave in the Local Court are entirely inconsistent with the objective mobile phone recording from CIV1's phone. The sheer volume of false or misleading evidence within Officer SOM1's statement, particularly when considering his statement was prepared contemporaneously, is evidence of deliberate falsification of his evidence.

[237] Exhibit XSD07 at 4-5.
[238] Exhibit XSD07 at 6.
[239] Exhibit XSD04 at [1].

8.10. As part of the internal police investigation into the conduct of Officers SOM1 and SOM2 in this matter, Officer SOM1 was served with a Directive Memorandum requiring him to answer questions relevant to the investigation.

8.11. Officer SOM1 goes on to suggest the footage provided by the defence was untested and 'manipulated' by the defence, therefore he believed it was tainted evidence.[240] He says the matter was ultimately withdrawn prior to fully testing the synchronised footage and suggests it had not yet been accepted by the Court. His response here is at a minimum misleading, and arguably untruthful. Whilst an objection was initially raised by the prosecution in relation to the providence of the synchronised footage during the part-heard hearing, it was ultimately admitted into evidence without further objection.[241] As the Officer in Charge of the investigation, Officer SOM1 would have been aware of this. Further, following the part-heard hearing Officer SOM1 was involved in sending the footage off to be tested. Prior to Officer SOM1 responding to the Directive Memorandum, he had been informed that the footage was determined to be authentic. He neglected to mention this in his response. Officer SOM1's attempt to characterise the footage supplied by the defence as inaccurate in explaining the conflict between the footage and his statement is dishonest.

8.12. Officer SOM1 then stated that if the evidence from the phone was accepted, he made a mistake in the sequence of events and may have inadvertently and unintentionally placed conversations and events out of order.[242] Officer SOM1 said he was under a lot of stress at that time which may explain this mistake. The Commission does not accept this explanation on the basis that this was Officer SOM1's main interaction with CIV1 on the day, the fabrications are linked to specific events (for example the interaction that immediately preceded CIV1's arrest, CIV1's arrest, transporting CIV1 through the corridor and searching CIV1 in the dock) and the fabrications and omissions all support the prosecution of CIV1.

8.13. All 15 of the inconsistencies identified in Annexure D are material to the prosecution of CIV1 and demonstrate an intent to mislead the Court. Some examples of this include:

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[240] Exhibit PZN7C at 3.
[241] Exhibit XSD08 at 18.
[242] Exhibit PZN7C at 3.

1. The language attributed to CIV1 which is objectively false supports the charge of offensive language.

2. The inclusion of references to Officer SOM1 reminding CIV1 to comply with the move on direction and warning him that he will be arrested if he does not comply provides justification for his arrest under s 99 of LEPRA.

3. The misrepresentation of his interaction with CIV1 immediately prior to his arrest concealed Officer SOM1's provocative comments and unfairly portrayed CIV1 as being entirely unreasonable and abusive. Several misrepresentations throughout his statement unfairly portray CIV1 in this way.

4. The inclusion of announcing the reason for CIV1's arrest at the time of arrest supports the lawfulness of the arrest.

5. The failure to include the apparent choke hold that Officer SOM1 puts CIV1 in conceals the use of force used by Officer SOM1 and strengthens the charge of resist arrest.

8.14. For the reasons provided below, the only reasonable conclusion that can be drawn is that Officer SOM1 deliberately fabricated his statement and lied to the Local Court to secure the successful conviction of CIV1:

1. Officer SOM1 was the first officer to complete his statement in the prosecution of CIV1, therefore he did not copy any part of his statement from anyone else.

2. Officer SOM1 completed his statement only one day after the incident in question. In addition, many of the inconsistencies identified in his statement mirror the content from the Facts Sheet which Officer SOM1 prepared on the same day as CIV1's arrest. In his own evidence, he accepted that his statement was a contemporaneous record of the incident and his recollection of the events from that morning were fresh in his memory.

3. The inclusion of fabricated words and actions in his statement are linked to significant events that occurred during CIV1's third entry and are not replicated at any other point in time, such as the interaction immediately preceding the arrest of CIV1, the arrest of CIV1, escorting CIV1 into his cell and searching CIV1 once in his cell. He simply could not have confused the language CIV1 used during these specific events with any other interaction he had with CIV1 on this day. Therefore, any suggestion that he could have placed words and actions out of order is unreliable.

4. The gross inaccuracies in Officer SOM1's statement in relation to CIV1's third entry to the station mean that little weight can be given to Officer SOM1's evidence of what occurred during the first 2 entries. Whilst there is no

recording to contradict the accounts of police in relation to the language CIV1 purportedly used during his earlier entries, Officer SOM1's evidence has the hallmarks of fabrication. He records in his statement that during CIV1's second entry into the station, CIV1:[243]

> …screamed more abuse yelling things like 'fuck, cunt, mother fucker, dog cunts, cocksuckers.'

Officer SOM1 then attributes this same offensive language to CIV1 during the third entry. This language was not used by CIV1 on the third entry. There is an available inference that the offensive language Officer SOM1 alleges he overheard CIV1 use during his earlier entries into the station was also not used. Instead that language was falsely included to persuade a court that CIV1 continued the same course of conduct over a period of time, ultimately culminating in his arrest.

5. The extent of the inconsistencies and falsehoods at every point in his statement.

6. The fact that every single fabrication or omission supported the prosecution of CIV1. For example, he included offensive and abusive language that he attributed to CIV1 that was not actually said, yet omitted to include offensive language he used himself towards CIV1, such as 'you're a fuckwit', 'act like a cunt, you're treated like one', 'you are a fuckin' cunt' and 'dead set cunt'.

8.15. In completing his statement and giving evidence in the Local Court, Officer SOM1 must have known that his false assertions would mislead the Court.

8.16. As noted at 5.134 above, s 317(b) Crimes Act makes it an offence to fabricate false evidence with the intention of misleading a judicial tribunal in any judicial proceeding. The comparison undertaken in Annexure D between Officer SOM1's statement and the objective evidence of the phone recording shows the extensive inaccuracies in the statement. As noted at 8.13 above the inaccuracies in the statement were material to a successful prosecution of CIV1. The statement was made the day after CIV1's arrest so that the actual conduct of CIV1 must have been fresh in his mind. The evidence in the statement must have been designed to mislead a judicial tribunal. The Commission is satisfied that there is sufficient evidence to warrant referring Officer SOM1's conduct to the DPP to consider one charge under s 317(b) of the Crimes Act of intentionally

[243] Exhibit XSD04 at [21].

misleading a judicial tribunal in judicial proceedings by intentionally fabricating false evidence, namely a false Statement of Facts.

8.17. The Commission also considers that there is sufficient evidence to refer Officer SOM1's conduct in giving evidence before the Local Court to the DPP to consider one charge under s 327 of the Crimes Act of perjury. The elements of the offence were set out at 7.25 and 7.26.

8.18. The content of Officer SOM1's evidence is established by the Local Court transcript. The falsity of his evidence can be established by CIV1's own evidence (in the terms given on the *voir dire* in the Local Court) corroborated by the phone recording. Officer SOM2's evidence before the Commission that his statement (which was a copy of Officer SOM1's) can be used in proceedings against Officer SOM1. So too can the evidence of Officers SOM4, SOM9 and SOM6. The second element is established by the transcript of evidence in the Local Court. The evidence that Officer SOM1 gave was material to the proceedings, for the reasons outlined earlier. The fourth element requires evidence that Officer SOM1 knew that the evidence he gave in the Local Court was untrue. Officer SOM1 does not admit this fact at any point. However, the circumstantial evidence is strong. There is a strong inference that he deleted the recording on CIV1's phone. On the same day, he drafted a Facts Sheet containing multiple falsehoods. The following day, he completed his statement, again with multiple falsehoods. At the time that he created these documents he must have known that they were false. It follows that when Officer SOM1 gave evidence in the Local Court, he was aware that the evidence that he was giving was false. The Commission considers that there is sufficient evidence to refer Officer SOM1's conduct to the DPP to consider one charge of perjury under s 327 of the Crimes Act.

8.19. The Commission is of the opinion that the false evidence given by Officer SOM1 in his statement and Facts Sheet and on oath in the Local Court is also a breach of the NSW Police Force Code of Conduct and Ethics.

9. Statements given by the other officers

9.1. The Commission considered the statements provided by the other officers in relation to this incident, including Officers SOM4, SOM6 and SOM5.[244] The Commission focused particularly on any inconsistencies between their statements in relation to CIV1's third entry to the station and the mobile phone recording.

9.2. Of the 3 statements, the Commission was most concerned with the statement made by Officer SOM4.

Officer SOM4

9.3. Like the other officers, Officer SOM4 included a jurat at the commencement of his statement. In his statement, Officer SOM4 inaccurately described the interaction between Officer SOM1 and CIV1 that immediately preceded CIV1's arrest,[245] incorrectly stated that Officer SOM1 told CIV1 to leave or he would be arrested,[246] incorrectly stated that Officer SOM1 provided a reason for his arrest,[247] and falsely attributed offensive language to CIV1.[248]

9.4. In addition to the observable errors in his statement when compared to the mobile phone recording, Officer SOM4 also included a description in his statement of what had occurred in the corridor despite telling the Commission he did not see what happened as his vision was obscured. When questioned on why he included this information if he did not see it, he explained that at that point he lacked the knowledge of what should be included in a statement and had essentially taken it from the Facts Sheet.[249]

9.5. The cumulative effect of the false statements included in Officer SOM4's statement portrayed Officer SOM1 as reasonable and his actions lawful, whilst unfairly portraying CIV1 as abusive. Whilst the extent of the false evidence

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[244] Whilst other officers provided a statement in relation to this incident, the officers identified are the only other officers that provided accounts from CIV1's third entry into the station. Whilst SOM9 was involved during this part of the incident, he was not asked to provide a statement.
[245] Exhibit LGP8C at [21]-[23].
[246] Exhibit LGP8C at [23].
[247] Exhibit LGP8C at [24].
[248] Exhibit LGP8C at [25].
[249] Private Examination of LGP at T60-61.

provided in his statement was significantly less than that of Officers SOM2 and SOM1, his statement effectively corroborated parts of their statements, supporting the prosecution of CIV1.

9.6. In his evidence, Officer SOM4 attributed some of the false information to human error as he had made his statement some time after the incident. In relation to other fabrications, he explained that given the passage of time, he had relied on the Facts Sheet.[250] Neither explanation excuses Officer SOM4's decision to include information in his statement that he did not independently recall.

9.7. As discussed earlier in this report, Officer SOM4 was a very junior officer at the time of CIV1's arrest.

9.8. Despite his inexperience, Officer SOM4 should have been aware of the importance of making a truthful and accurate statement. Nonetheless, the Commission accepts that this occurred very early in his career and his conduct was significantly influenced by a senior officer. Had Officer SOM4 still been employed with the NSW Police Force, the Commission would have recommended additional training for him. As Officer SOM4 is now engaged by another Police Force, the Commission considered referring a copy of this report to that force: s 163 LECC Act. However, the Commission decided that it was not necessary to take this step.

9.9. Whilst the statements prepared by the other 2 officers had some inconsistencies when compared to the mobile phone recording, they were minimal when compared to the statements provided by Officers SOM1, SOM2 and SOM4.

Officers SOM6, SOM5 and SOM7

9.10. Officer SOM6 gave evidence that he prepared his statement based wholly on his recollection and did not refer to any of the material that was provided to him such as Officer SOM1's statement, the Facts Sheet, the event or the CCTV footage.[251] When some of the inconsistencies in his statement were pointed out to him by Counsel Assisting, he conceded only after watching the synchronised footage that he was wrong. However, he maintained that was his belief at the

[250] Private examination of SOM4 at T60-61.
[251] Private examination of SOM6 at T58.

time.[252] He agreed with Counsel Assisting that every part of his statement that he got wrong was adverse to CIV1, not to any of his colleagues.[253] Whilst the Commission is of the belief that Officer SOM6's statement was unfairly skewed towards representing police in a positive light, it accepts this reflects human error and does not make any adverse comment in relation to Officer SOM6.

9.11. The inconsistencies identified in Officer SOM5's statement were of a minor nature and the Commission makes no adverse comment in relation to him.

9.12. The Commission also considered the statement by Officer SOM7.[254] However, as he was not involved during CIV1's third entry into the station or during his arrest, he did not include any information in his statement that can be compared to the mobile phone recording. Officer SOM7's statement asserts that he had given CIV1 a move on direction. The Commission is satisfied that Officer SOM7 told CIV1 to leave, and there is no objective evidence to dispute Officer SOM7's statement. Accordingly, the Commission makes no adverse comment in relation to Officer SOM7.

10. Conduct of the Police Prosecutor

10.1. The Commission examined Prosecutor SOM8. She had carriage of the Local Court prosecution of CIV1. The following issues were explored:

1. Whether Prosecutor SOM8 noticed issues with the prosecution brief, such as the similarities between the statements of Officers SOM2 and SOM1, the missing 6 seconds of CCTV footage and the absence of any mobile phone footage, prior to the Local Court hearing commencing.

2. Why the prosecution was not withdrawn once the credibility of the police evidence became apparent.

3. Why Officer SOM2 was called as a witness knowing it was likely he would perjure himself in court by maintaining the evidence that he had given in his statement.

[252] Private examination of SOM6 at T38-T41, T49-T52.
[253] Private examination of SOM6 at T52.
[254] Exhibit PZN3C.

10.2. A prosecutor's role is to assist the Court to arrive at the truth. Prosecutors have obligations to the Court, including that they must:[255]

1. act independently and impartially without regard to individual or sectional interests or public or media pressure
2. act fairly in relation to the accused

...

7. act with integrity and care.

These issues raised concerns that Prosecutor SOM8 may have breached her prosecutorial obligations and ethics.

10.3. Prosecutor SOM8 gave evidence in a frank way, with appropriate concessions. She was careful in her explanation of the challenges that she had faced during the trial, and the efforts she had made to meet those challenges as they unfolded. The Commission notes Prosecutor SOM8 also properly raised the adverse comments made by the Magistrate at the conclusion of the trial as a misconduct matter.

10.4. In relation to the first concern, Prosecutor SOM8 gave evidence that she had reviewed the brief of evidence in advance of the hearing.[256] She had limited independent recollection of reviewing the brief and did not recall noticing anything unusual about the statements or the 6 second gap in the CCTV footage.[257] She had not noticed CIV1 holding his mobile phone up during the interaction on the CCTV footage, only appreciating the significance of that fact once the phone footage was introduced into evidence by the defence.[258]

10.5. The Commission accepts that Prosecutor SOM8 did not notice any of the key issues with the brief of evidence in advance of the hearing. The Commission accepts that some of these issues, such as the similarities between the statements, may have been difficult to identify without knowledge of the mobile phone footage and with the time constraints faced by a prosecutor. The

[255] Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (March 2021).

[256] Private examination of SOM8 at T7-T11.
[257] Private examination of SOM8 at T17 and T28.
[258] Private examination of SOM8 at T28-29.

Commission is satisfied Prosecutor SOM8 did not deliberately ignore these issues when reviewing the brief of evidence.

10.6. In relation to the second concern, the Commission notes that under the NSW Police Force's Withdrawal Standard Operating Procedures, Prosecutor SOM8 did not have authority to withdraw the matter herself. Prosecutor SOM8 gave evidence that during the hearing, she became very concerned about how the matter was unfolding, including the possibility that Officer SOM1 had fabricated his evidence. She described the hearing as 'a train wreck'.[259]

10.7. Prosecutor SOM8 spoke with 3 different superior officers to ask if the prosecution should be continued and to seek their advice. On the first occasion, she could only reach her manager, who was an Inspector, but not directly responsible for prosecutions. She was told by the Inspector not to withdraw the prosecution.[260] At the lunch adjournment she had a 3-way conversation with both her supervising Sergeant and the Crime Manager (also an Inspector). She explained her concerns about the inconsistency between Officer SOM1's evidence and the video. Again, their direction was to proceed.[261] Prosecutor SOM8's evidence about her attempt to obtain instructions to withdraw the prosecution is corroborated by comments she made to the Local Court, as recorded on the transcript.[262] Prosecutor SOM8 was sufficiently concerned about how events were unfolding that she also asked another senior prosecutor who was at the Local Court to sit in court with her to provide some independent advice and support.[263]

10.8. The Commission is satisfied that Prosecutor SOM8 took reasonable steps to advise those with the authority to withdraw the matter about the issues that arose during the hearing.

10.9. In relation to the Commission's third concern about calling Officer SOM2 to give evidence when it seemed likely that his evidence was untrue, Prosecutor SOM8

[259] Private examination of SOM8 at T36.
[260] Private examination of SOM8 at T 37, T40.
[261] Private examination of SOM8 at T44.
[262] Private examination of SOM8 at T43-45.
[263] Private examination of SOM8 at T69.

gave evidence that she had specifically raised this issue with her superiors.[264] Again, Prosecutor SOM8 was told to proceed.[265]

10.10. Officer SOM2 gave evidence that Prosecutor SOM8 told him to be honest on the stand about whether he had copied anyone's statement.[266] In light of being advised to proceed, this suggests Prosecutor SOM8 was doing what she could to ensure Officer SOM2 did not perjure himself in court. Ultimately, as a witness sworn to tell the truth, it was Officer SOM2's responsibility to provide truthful evidence to the Court. Prosecutor SOM8 could not control Officer SOM2's answers to her questions.

10.11. The Commission is satisfied that Prosecutor SOM8 took reasonable steps to seek advice from her superiors about whether Officer SOM2 should still be called to give evidence in light of the fresh evidence which was inconsistent with the police evidence.

10.12. The Commission is satisfied that Prosecutor SOM8 did not engage in any serious misconduct.

11. NSW Police Force internal investigation

11.1. As a result of the failed prosecution report completed by Prosecutor SOM8, the NSW Police Force launched an internal investigation into the conduct of Officers SOM1 and SOM2.

11.2. Officer SOM3 was assigned the investigation and conducted a non-criminal investigation into the following allegations against both Officers SOM1 and SOM2.

> Issue 1: Adverse comments made by judicial officer – conflict between the statements of police and the audio-visual footage of the incident.
>
> Issue 2: Tamper with evidence – deletion of footage from CIV1's mobile phone.

11.3. On 6 December 2023, Officer SOM3 completed the Investigator's Report, recommending not sustained findings against both officers in relation to the 2

[264] Private examination of SOM8 at T61.
[265] Private examination of SOM8 at T61.
[266] Private examination of SOM2 at T52.

allegations. Officer SOM3 recommended a sustained finding against Officer SOM2 in relation to a matter arising for copying quotes from Officer SOM1's statement into his own statement.

11.4. These findings were endorsed by a quality reviewer and the Commander.

11.5. A review of the internal police investigation by the Commission was the catalyst for the Commission's investigation on the basis that the review officer did not agree with the findings made by the NSW Police Force.

11.6. During the Commission's investigation it became apparent that the internal investigation conducted by the NSW Police Force was deficient. Accordingly, it was decided that Officer SOM3 would be called to give evidence at a private examination in respect of his investigation and the findings he ultimately made. The Commission suspected Officer SOM3 may have acted dishonestly to cover up the misconduct of his colleagues.

Evidence given by police investigator

11.7. At the time of giving evidence, Officer SOM3 had attained the rank of Inspector and had been a member of the NSW Police Force for approximately 24 years. He has been attached to the Police District since June 2016.

11.8. Officer SOM3 was approached by the Command in September 2023 to conduct an investigation into the allegations set out in the failed prosecution report submitted by Prosecutor SOM8.[267] This was not the first internal investigation he had conducted.[268] He was aware of his role as an investigator of an internal investigation, as well as his responsibilities and obligations.[269]

11.9. As part of his investigation, Officer SOM3 gave evidence that he reviewed the following material:

1. CCTV footage of the incident from inside the police station overlayed with the audio from CIV1's mobile phone[270]

[267] Private examination of SOM3 at T5.
[268] Private examination of SOM3 at T10.
[269] Private examination of SOM3 at T7-9.
[270] Private examination of SOM3 at T11-12.

2. investigative documents including the terms of reference, Mara B and 'other relevant documents', triage document[271]

3. transcripts from the hearing in the Local Court in matter of CIV1 held on 14 and 15 December 2022[272]

4. court transcript of the costs application[273]

5. police statements, including the statements prepared by Officers SOM2 and SOM1[274]

6. the event narrative[275]

7. the 9 CCTV files that formed part of the brief of evidence[276]

8. the brief of evidence.[277]

11.10. Officer SOM3 took a number of other investigative steps during the course of his investigation, including:

- contacting CIV1's solicitor to make enquiries in relation to the allegation that one or more police officers had deleted the audio recording from CIV1's phone (CIV1's solicitor did not assist)[278]

- approaching CIV1 to make enquiries about his dealings with the phone after he left the police station (CIV1 refused to assist)[279] and

- issuing Directive Memorandums, which legally require officers to respond to set questions,[280] to Officers SOM2 and SOM1.[281]

11.11. Part of an investigator's role is to gather all relevant evidence.[282] In conducting the investigation, Officer SOM3 did not obtain or review the following evidence:

1. The court transcript from the first day of the hearing in the Local Court held on 22 April 2022.[283] He acknowledged that he noticed when reviewing the

[271] Private examination of SOM3 at T11.
[272] Private examination of SOM3 at T14.
[273] Private examination of SOM3 at T13
[274] Private examination of SOM3 at T18.
[275] Private examination of SOM3 at T19.
[276] Private examination of SOM3 at T19.
[277] Private examination of SOM3 at T19.
[278] Private examination of SOM3 at T14.
[279] Private examination of SOM3 at T14.
[280] *Police Regulation 2015* (NSW) reg 8.
[281] Private examination of SOM3 at T18.
[282] Exhibit WQK01.
[283] Private examination of SOM3 at T15.

transcript from 14 December 2022 that the hearing had re-commenced, however, he did not request the transcript.[284] As a result, he did not have the evidence Officer SOM1 gave in chief, which includes evidence contradicted by the mobile phone footage.

2. The raw mobile phone footage from CIV1's phone.[285] When he read the Local Court transcript, Officer SOM3 stated that he confused the playing of the raw mobile phone footage with the synchronised footage.[286] He accepted that he must not have read the transcript carefully. Once this footage was played to Officer SOM3 during his private examination, he agreed the footage was highly relevant evidence and consistent with the allegation Officer SOM1 choked CIV1.[287]

3. CIV1's phone.[288] This is relevant to the allegation police tampered with evidence as it may have shown whether the footage was deleted and recovered.

Dealing with the allegation police lied

11.12. As noted earlier, in the final report, Officer SOM3 recommended not sustained findings against Officers SOM1 and SOM2 in relation to the comments made by the Magistrate, that there was a compelling inference police lied in their statements.

11.13. During his investigation, Officer SOM3 did not conduct an analysis of the inconsistencies between the mobile phone recording and Officer SOM1's statement.[289] In his evidence to the Commission, Officer SOM3 said he was willing to accept Officer SOM1's explanation for the inconsistencies between his statement and the footage, that he mistook the order and sequence of events. This acceptance was based on the statements provided by other officers and the evidence given at court.[290]

11.14. Counsel Assisting took Officer SOM3 through some of the inconsistencies between the mobile phone recording and Officer SOM1's statement. Following this mini-analysis, Officer SOM3 accepted the account given by Officer SOM1

[284] Private examination of SOM3 at T15.
[285] Private examination of SOM3 at T25-26.
[286] Private examination of SOM3 at T25.
[287] Private examination of SOM3 at T26-27.
[288] Private examination of SOM3 at T65.
[289] Private examination of SOM3 at T27.
[290] Private examination of SOM3 at T30.

was completely different to the events recorded on CIV1's mobile phone.[291] Further, he accepted there was a compelling inference that the version of events provided by Officer SOM1 in his statement was a fabrication by Officer SOM1.[292]

11.15. When it was put to Officer SOM3 that on the balance of probabilities, Officer SOM1 deliberately lied about the sequence of events that led to CIV1's arrest, Officer SOM3 agreed that Officer SOM1 had done so.[293]

11.16. Officer SOM3 was asked about the Directive Memorandum he issued to Officer SOM1 as part of his investigation. He agreed that his role was to analyse Officer SOM1's response to his questions and form an assessment about whether, on the balance of probabilities, he accepted it or not.[294]

11.17. In his Directive Memorandum, Officer SOM1 was asked:[295]

> Q. There is a conflict between statements of police including yours with regard to the audiovisual footage of the incident. Can you provide an explanation for this?

11.18. Officer SOM1 responded, 'The conflict to my knowledge relates to when CIV1 was given the arrest reason/details'. Officer SOM3 acknowledged in his evidence that this was incorrect as the conflict extended far beyond one discrete aspect of CIV1's arrest.[296]

11.19. Officer SOM1 also referred to the mobile phone footage being 'untested defence manipulated and supplied footage'.[297] Before the Commission, Officer SOM3 accepted that this was not an accurate description, given that the Magistrate in the Local Court had accepted the synchronised footage as evidence.[298]

11.20. Having been led through an analysis of the footage and comparison of it to Officer SOM1's statement by Counsel Assisting, Officer SOM3 agreed that Officer SOM1's alternative explanation that he 'may have inadvertently and

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[291] Private examination of SOM3 at T30-41.
[292] Private examination of SOM3 at T40-41.
[293] Private examination of SOM3 at T41.
[294] Private examination of SOM3 at T43.
[295] Exhibit PZN7C at 3.
[296] Private examination of SOM3 at T42-43.
[297] Exhibit PZN7C at 3.
[298] Private examination of SOM3 at T43-46.

unintentionally placed conversations and events out of order they occurred in' was a fanciful explanation.[299]

11.21. In making a not sustained finding against Officer SOM1, Officer SOM3 said he accepted the veracity of Officer SOM1's explanation, that Officer SOM1 may have gotten the order and sequence of events out of place.[300]

11.22. Officer SOM3 said that in assessing the veracity of this allegation against Officer SOM1, Officer SOM3 took into account his own prior knowledge of CIV1. In relation to his prior knowledge of CIV1, he said:[301]

> I don't - I haven't had direct dealings with him, but I've heard and been present in the police station when he's called and abused staff for whatever reason. So I was aware of his capabilities of talking like that, and my view was that the moment he began to record, he was mindful of his behaviour. That's my view.

11.23. Further, Officer SOM3 admitted his prior knowledge of CIV1's conduct played a part in his assessment of who was telling the truth.[302] This reasoning was not recorded in his report.

11.24. When challenged on the fact that his knowledge of CIV1's prior conduct was irrelevant because he had objective evidence of what had occurred, Officer SOM3 maintained his belief that CIV1 had altered his behaviour knowing he was recording.[303]

11.25. Despite this, Officer SOM3 accepted that, if not for the recording, it was likely CIV1 would have been convicted of the criminal charges brought against him.[304]

11.26. When it was put to him that as an investigator Officer SOM1's explanation for the material inconsistencies was insufficient, Officer SOM3 said that, on reflection, he agreed.[305]

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[299] Private examination of SOM3 at T47.
[300] Private examination of SOM3 at T46-48.
[301] Private examination of SOM3 at T49.
[302] Private examination of SOM3 at T49.
[303] Private examination of SOM3 at T50.
[304] Private examination of SOM3 at T51.
[305] Private examination of SOM3 at T51.

11.27. Officer SOM3 said that he had undertaken a similar process when investigating the inconsistency between Officer SOM2's statement and the mobile phone footage and arrived at a similar finding that Officer SOM2 was simply mistaken.[306] Officer SOM3 again accepted that there was a genuine mix up of the order and sequence of events.[307]

Dealing with the issue arising – copying another officer's statement

11.28. Officer SOM3 noted that Officer SOM2 had admitted in his directive memorandum response to using Officer SOM1's statement to complete his own statement, which he prepared almost a month later.[308] Officer SOM3 agreed that this led to an issue which he did address in his report.[309] When asked what he thought of Officer SOM1's role in sending his statement to Officer SOM2 (and others) when requesting a statement, he said whilst it was not best practice, it was not 'unheard of'.[310]

11.29. Officer SOM3 did not obtain a copy of the email referred to earlier in this Report sent by Officer SOM1 to Officer SOM2 and other officers requesting statements, in which he attached a copy of his own statement.[311] He agreed that on reflection, given he was going to make an adverse comment about Officer SOM2's reliance on Officer SOM1's statement, it would have been relevant to request that email to see whether a related adverse comment was deserving in respect of Officer SOM1's sharing of his statement.[312]

11.30. Officer SOM3 conceded that on reflection, despite not making any adverse comment in relation to Officer SOM1 sharing his statement, it was obvious that Officer SOM1 also behaved in an unprofessional manner.[313]

Dealing with the tampering of evidence allegation

11.31. The second aspect of the investigation related to the allegation that police had deleted the mobile phone footage from CIV1's phone and deliberately concealed

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[306] Private examination of SOM3 at T51-52.
[307] Private examination of SOM3 at T53.
[308] Private examination of SOM3 at T53.
[309] Private examination of SOM3 at T54.
[310] Private examination of SOM3 at T54-55.
[311] Private examination of SOM3 at T57.
[312] Private examination of SOM3 at T57.
[313] Private examination of SOM3 at T57.

6 seconds of CCTV footage which may have shown police taking possession of CIV1's mobile phone and deleting the footage. In his Investigation Report, Officer SOM3 found this issue not sustained.

11.32. Officer SOM3 explained that in drawing this conclusion, he placed considerable weight on the fact that there was no direct proof the footage had been deleted from CIV1's phone.[314] He said CIV1's evidence in the Local Court was uncertain, with CIV1 not even understanding how the footage re-appeared on his phone.[315] He was then unsuccessful in making further enquiries with CIV1 and his solicitor to identify the neighbour who CIV1 said helped him retrieve the footage.[316]

11.33. Officer SOM3 made this finding despite the surrounding circumstances and evidence which led the Magistrate to conclude there was a 'compelling inference' that the footage had been deleted by police. He understood that from the Magistrate's view, having seen and heard the evidence, even though definitive proof was lacking, police had deleted the footage from CIV1's phone.[317]

11.34. Officer SOM3 accepted that in his Investigation Report there is little reference to the combination of circumstances which give rise to an available inference that police deleted the footage.[318]

11.35. It was put to Officer SOM3 that police had a motive to delete the recording, given the footage potentially established an unlawful arrest and assault by police. He agreed.[319]

11.36. Officer SOM3 gave evidence that his past dealings with Officers SOM1 and SOM2 did not factor into his assessment of the allegations against them.[320] At the time he completed his investigation, he had been Officer SOM1's direct supervisor for almost 3 years, and Officer SOM2's supervisor for approximately 7 years.[321] However, he had known Officer SOM1 for a long time, over 13 years, as

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[314] Private examination of SOM3 at T66, 68.
[315] Private examination of SOM3 at T66.
[316] Private examination of SOM3 at T68.
[317] Private examination of SOM3 at T69-70.
[318] Private examination of SOM3 at T70.
[319] Private examination of SOM3 at T70-71.
[320] Private examination of SOM3 at T72.
[321] Private examination of SOM3 at T72.

they had previously been stationed at the same Command, but in neighbouring police stations.[322] He described the nature of their relationship as 'work colleagues'.[323] He said he had limited dealings with both officers outside of work.[324]

Findings in relation to the internal police investigation

11.37. One of the key roles of an investigator is to conduct a fair-minded and objective analysis of the evidence and reach valid conclusions about the veracity of the allegations.[325]

11.38. For the following reasons, the Commission finds that Officer SOM3 failed to properly engage with the alleged misconduct. He did not conduct a fair-minded analysis of the evidence or reach evidence-based conclusions about the veracity of the allegations:

1. He failed to objectively compare the evidence given by Officers SOM1 and SOM2 in their statements with the mobile phone footage. Instead, he accepted at face value the explanations given by Officers SOM1 and SOM2. In his evidence, Officer SOM3 conceded that an analysis between the footage and the statements of the 2 officers showed they had fabricated a version of events.

2. He did give not proper consideration to the possibility that police had tampered with the footage on CIV1's phone. He placed too much weight on the fact there was no definitive proof the footage had been deleted (despite not making any attempt to seize CIV1's phone) without considering the compelling circumstances which showed, on the balance of probabilities, that police had deleted the recording. An objective analysis of the available evidence, should have considered:

    a. the missing 6 seconds of CCTV footage in which both the mobile phone and Officer SOM1 disappear

    b. the sworn evidence of CIV1 in the Local Court that he was unable to find the recording on his phone

    c. that Officers SOM1 and SOM2 knew CIV1 was recording, giving rise to an inescapable inference that those officers would not have made

[322] Private examination of SOM3 at T72-73.
[323] Private examination of SOM3 at T73.
[324] Private examination of SOM3 at T75.
[325] Exhibit WQK01.

statements at odds with the recording if they considered there was any possibility of the recording surfacing to contradict their evidence.

3. Investigators are obliged to declare any conflicts of interest and consider any risks of conflicts they may have. Officer SOM3 failed to declare that in forming his conclusions about the veracity of the allegations, he relied on his knowledge of CIV1's past conduct. Despite not knowing CIV1 personally, his knowledge of CIV1 clearly impacted his ability to conduct an impartial investigation and should have been declared as a conflict of interest.

4. Officer SOM3 maintained some partiality towards Officer SOM1 in failing to investigate whether Officer SOM1 was at fault in sharing his statement with Officer SOM2 (and others). Officer SOM3 conceded this in his evidence to the Commission.

11.39. As discussed in Appendix 1, the Commission is only entitled to make findings where an officer's conduct reaches the threshold of serious misconduct. Serious misconduct is conduct that could result in the prosecution of an officer for a serious offence, or which could lead to serious disciplinary action including terminating their employment, demotion or a reduction in rank, classification or grade.

11.40. Officer SOM3's conduct fell short of the standards expected of an experienced investigator. However, it was not criminal conduct. Nor is it of sufficient gravity to warrant his termination or a demotion or reduction in rank.

11.41. The Commission recommends that Officer SOM3 should be given some advice and guidance on the conduct of a thorough and objective internal police investigation.

12. Affected persons

12.1. When tabling a report under s 132 of the LECC Act, the Commission must consider whether it should take further steps or recommendations as a result of its findings against any 'affected person', that is, any person who has been the subject of substantial allegations during the course of the investigation: s 133(3) LECC Act.

12.2. The Commission is of the opinion that Officers SOM1, SOM2, SOM4 and SOM3 are affected persons. A copy of this Report in draft has been sent to those officers and they have been given an opportunity to make submissions.

13. Submissions Received

13.1. The Commission received advice that Officers SOM1 and SOM2 did not wish to make any submissions in response to the draft s 132 report.

Submissions from Officer SOM3

13.2. Officer SOM3 accepts that he could have undertaken a more thorough investigation. He goes on to say that an investigation of the conduct of Officers SOM1 and SOM2 would have been better handled by Professional Standards Command, rather than an internal investigation such as the one tasked to him. He notes that at the time that he was conducting this investigation, he was also engaged in operational shifts as Inspector, and lacked the resources he needed to conduct an investigation of this kind.

13.3. Officer SOM3 submits that the Commission should also reconsider its view that he should have obtained the phone of CIV1 as part of his investigation. Officer SOM3 says that this could only have been done as part of a criminal investigation or with CIV1's cooperation. The Commission accepts that CIV1 was clearly unwilling to cooperate with police, so that obtaining the phone voluntarily was unrealistic.

13.4. The inference from Officer SOM3's submission is that from the position of time and resources, he was ill equipped to conduct a criminal investigation that could have included the seizure of CIV1's phone and any other evidence. An evidence based (criminal) investigation of the conduct of Officers SOM1, SOM2 and SOM4 may have been time consuming, but it was not complex. It simply involved a comparative exercise (of the kind undertaken by the Commission) comparing the statements (and sworn evidence) of each officer with the objective evidence as recorded by CIV1 on his phone. Had this been done, the inconsistencies would have been obvious. That investigation needed to be undertaken without Officer SOM3's assessment being clouded by preconceived ideas about the authenticity of the phone recording, CIV1 and his conduct.

13.5. The Commission accepts that a criminal investigation would have been necessary in order to seize CIV1's phone, but Officer SOM3 did not bring that level of scrutiny to this investigation. The Commission remains of the view that Officer

SOM3's conduct fell short of the standards expected of an experienced investigator.

13.6. Officer SOM3 did not say in his evidence that he had raised concerns with his superiors about the resources needed to undertake this investigation. Nor is there any evidence that he attempted (through his Commander or otherwise) to refer the matter to the Professional Standards Command for their review or assistance.

13.7. In terms of receiving further training, Officer SOM3 said that he has conducted numerous investigations of this kind without criticism. He has made concessions in his evidence as to the shortcoming of his investigation and submits that these concessions bear upon the utility of further education. He says that the process of giving evidence before this Commission and the manner in which he conceded his shortcoming reveals relevant insight and understanding such that the Commission should be satisfied that he will undertake further investigations to the requisite standard.

13.8. The Commission expects that the process of giving evidence has been a pointed reminder to Officer SOM3 of the importance of properly identifying any conflicts of interest and carrying out internal investigations with diligence and an open mind. Nonetheless, the Commission still considers that it would be appropriate for Officer SOM3 to be provided with formal advice and guidance from an experienced and more senior officer, perhaps from the Professional Standards Command, on the key elements of an internal investigation.

13.9. Officer SOM3 also suggests that the Commission could make the following recommendations:

a. Where a matter results in an adverse costs order, and the relevant costs report has been prepared by the Prosecutor, if there is a suspicion of criminal offending (of the kind referable to Officer SOM1 and SOM2) there should not be a requirement for an internal investigation of the kind tasked to Officer SOM3.

b. There is little utility of an investigation of this kind where the matters are appropriately addressed by a referral to and investigation by this Commission. Given the matter was already subject of judicial

consideration (albeit in the context of criminal charges against CIV1), Officer SOM3's investigation was unlikely to add anything of relevance even if it had been conducted as thoroughly as expected. Matters of this seriousness should be subject to a policy within NSW Police Force (particularly applying to Police Prosecutors) of consideration of a referral to this Commission immediately after judicial criticism, particularly so if there is a costs order based upon the potentially criminal conduct of the police.

13.10. The Commission is (or should be) notified of adverse judicial comments.[326] Most allegations of misconduct are then referred back to the NSW Police Force to deal with. That arrangement reflects the statutory scheme under s 46(b) LECC Act which provides that primary responsibility for investigating and preventing officer misconduct lies with the NSW Police Force. Nonetheless, Officer SOM3's concerns will be raised with the Professional Standards Command as part of this Report.

Submissions of Officer SOM4

13.11. The Commission also furnished the draft report to the legal representative of Officer SOM4 to allow submissions to be made on whether the Report should be furnished to his current employer. In that draft report, the Commission foreshadowed referring a copy of this Report to the police force in the jurisdiction where Officer SOM4 now works: s 163 LECC Act.

13.12. Officer SOM4 submitted that at the time of the incident, he was a Probationary Constable with 3 months experience, he now has 4-and-a-half years' experience. His initial training was conducted during the COVID-19 pandemic which he submitted was detrimental to his learning. He submitted that he received further training after the incident and after joining another state's police force.

13.13. Officer SOM4 provided a sworn statement to this effect and that he has no sustained complaints against him since arriving in that jurisdiction, and now

[326] See discussion in the Law Enforcement Conduct Commission Report Review of NSW Police Force responses to failed prosecutions that include adverse comments made by judicial officers October 2025 available at https://www.lecc.nsw.gov.au/publications/publications/review-of-nsw-police-force-responses-to-failed-prosecutions-that-include-adverse-comments-made-by-judicial-officers-final.pdf.

appreciates the importance of the way statements are written. For these reasons, he submits that referring the Commission's Report to the jurisdiction where he is currently employed is unnecessary.

13.14. Officer SOM4 relied on his inexperience when giving evidence before the Commission about why he had included information in his statement about events that he had not witnessed. He did not volunteer that he now knew better, but nor was he directly asked questions on that point.

13.15. As he has now provided sworn evidence to that effect, the Commission accepts his submission and will not take further action in relation to Officer SOM4's conduct.

14. Findings and recommendations in relation to individual officers

14.1. In summary, the Commission makes the following findings and recommendations.

Factual findings

14.2. For the reasons outlined above, the Commission is satisfied to the requisite standard of the following:

1. The arrest of CIV1 on 12 July 2021 was unlawful. As discussed throughout this Report, there is significant doubt as to whether a move on direction was given to CIV1. Whilst the evidence is not strong enough to make a finding in this regard, the evidence does support a finding that police did not have the requisite power to arrest CIV1 pursuant to s 99 of LEPRA.

2. Officer SOM1 choked CIV1 in the corridor of the police station whilst in the process of escorting him to the dock.

3. On an analysis of the circumstantial evidence, there is an irresistible inference that Officer SOM1 took CIV1's mobile phone and deleted the recording of the incident. He then purposely omitted 6 seconds of CCTV footage during the search of CIV1 from the brief of evidence to conceal evidence he deleted the mobile phone recording. These were deliberate

actions to mislead the Court, namely, to cover up his own conduct and support the charges brought against CIV1.

4. Officer SOM1 fabricated evidence in the Facts Sheet in support of the 3 offences CIV1 was charged with.

5. Officers SOM1 and SOM2 fabricated evidence in their statements, providing an entirely false narrative of events relating to CIV1's arrest. Again, this was a deliberate act to mislead the Court, namely, to cover up the conduct of police and support the charges brought against CIV1.

6. Officers SOM1 and SOM2 gave false evidence in the Local Court under oath in the matter of CIV1 in relation to matters material to the proceedings.

7. The internal police investigation into the conduct of Officers SOM1 and SOM2 was deficient. Officer SOM3 failed to comply with his role as an investigator to conduct a fair-minded analysis of the evidence and reach valid conclusions about the veracity of the allegations. Whilst Officer SOM3 showed some partiality towards Officer SOM1 and the position of police in general during his investigation, the Commission ultimately does not make any findings that he maliciously foiled the investigation for the purpose of protecting his colleagues.

Findings against individual officers

14.3. The Commission makes the following findings against the officers whose conduct was considered in this investigation.

Officer SOM4

14.4. The Commission finds that Officer SOM4 included information in his statement which he did not independently recall and copied another officer's statement in contravention of the NSW Police Force Handbook.

14.5. This is a breach of the NSW Police Force Code of Conduct. It is expected that Officer SOM4 would now possess the experience and training required to complete his job competently but the evidence does not support a finding of serious misconduct.

14.6. Prior to, and unrelated to the Commission's investigation, Officer SOM4 left the NSW Police Force and has joined the police force in a different jurisdiction.

Officers SOM5, SOM6 and SOM7

14.7. The evidence does not support a finding of serious misconduct in relation to these officers.

Officer SOM2

14.8. The Commission finds that Officer SOM2 gave intentionally false evidence in his statement in the matter of CIV1 and in his Local Court evidence during the prosecution of CIV1.

14.9. For the reasons discussed earlier, the Commission considers there is sufficient evidence to refer Officer SOM2 to the DPP to consider:

- one charge of intentionally misleading a judicial tribunal in judicial proceedings by intentionally fabricating false evidence contrary to s 317(b) of the Crimes Act.
- one charge of perjury contrary to s 327 of the Crimes Act.

14.10. Officer SOM2's conduct in intentionally falsifying evidence in order to obtain a successful prosecution is plainly serious misconduct. It is conduct that compromises his own integrity as a witness of truth for all time. As Justice Wood said in 1997, an officer for whom it is likely that their evidence will be challenged in future cases has no value to the Police Force. In light of the circumstances of this investigation it is likely that Officer SOM2's evidence will be challenged in future cases. He cannot retain the Commissioner of Police's confidence. The Commission recommends that the Commissioner of Police take action to dismiss Officer SOM2 under s 181D of the Police Act.

Officer SOM1

14.11. Despite not giving evidence to the Commission, the Commission is satisfied that Officer SOM1 engaged in the following conduct in relation to the arrest and subsequent prosecution of CIV1:

1. He unlawfully arrested CIV1
2. He choked CIV1 in the corridor of the police station, restricting his airways

3. He made offensive comments towards CIV1 that fall well below the standard expected of a police officer

4. He intentionally deleted the mobile phone recording of the incident from CIV1's phone and intentionally concealed 6 seconds of CCTV footage from the Court which showed him committing this act

5. He fabricated evidence in the Facts Sheet relating to the arrest of CIV1

6. He gave false evidence in his statement in the matter of CIV1

7. He shared a copy of his statement when requesting a statement from other officers in breach of the NSW Police Force Handbook

8. He gave false evidence in the Local Court during the prosecution of CIV1.

14.12. For the reasons discussed earlier, the Commission considers there is sufficient evidence to refer Officer SOM1 to the DPP to consider:

- one charge of assault contrary to s 61 Crimes Act (choke hold)
- 2 charges under s 317(a) of the Crimes Act of intentionally misleading a judicial tribunal in judicial proceedings by destroying and/or altering evidence (deleting the phone recording and the CCTV footage)
- 2 charges of intentionally misleading a judicial tribunal in judicial proceedings by intentionally fabricating false evidence contrary to s 317(b) of the Crimes Act (preparing the Statement of Facts and the making of the statement)
- one charge of perjury contrary to s 327 of the Crimes Act (Local Court evidence).

14.13. The totality of Officer SOM1's conduct represents a betrayal of the values of the NSW Police Force, set out in s 7 Police Act which are:

> Each member of the NSW Police Force is to act in a manner which —
>
> (a) places integrity above all,
>
> (b) upholds the rule of law,
>
> (c) preserves the rights and freedoms of individuals,
>
> (d) seeks to improve the quality of life by community involvement in policing,
>
> (e) strives for citizen and police personal satisfaction,

(f) capitalises on the wealth of human resources,

(g) makes efficient and economical use of public resources, and

(h) ensures that authority is exercised responsibly.

14.14. Officer SOM1's conduct caused the wrongful arrest of CIV1. Had CIV1 not been able to record the interaction and then retrieve the deleted recording, it could have led to his wrongful imprisonment. Officer SOM1 has misled other senior officers in the NSW Police Force including a probationary constable. Officer SOM1 should lose his career as a police officer and may face criminal charges. More broadly, Officer SOM1 has tarnished the reputation and the community's trust in their Police Force.

14.15. There is no doubt that Officer SOM1's conduct is serious misconduct. He has no value to the NSW Police Force as his evidence is forever tarnished. The Commission recommends that the Commissioner of Police dismiss Officer SOM1 pursuant to s 181D of the Police Act.

Officer SOM3

14.16. The Commission finds Officer SOM3 failed to comply with the NSW Police Force guidelines for investigators of non-criminal evidence-based investigations by not:[327]

1. gathering all relevant evidence
2. analysing and reaching valid conclusions about the veracity of the allegation(s); and
3. considering a conflict of interest in relation to his prior knowledge of CIV1's behaviour and declaring it appropriately.

14.17. For the reasons outlined at 11.39-11.40 this conduct does not justify a finding of serious misconduct under s 10 of the LECC Act, and therefore the Commission does not make a finding of serious misconduct in relation to Officer SOM3.

[327] Exhibit WQK01.

14.18. However, the Commission recommends that Officer SOM3 should be given advice and guidance on the conduct of a thorough and objective internal police investigation.

Prosecutor SOM8

14.19. The evidence does not support a finding of serious misconduct in relation to Prosecutor SOM8. The Commission is satisfied Prosecutor SOM8 took the appropriate steps to manage the issues which arose during the prosecution of CIV1.

15. General recommendations

Preparation of police statements

15.1. Given the longstanding concerns about police colluding on the preparation of their statements, the Commission has considered whether any changes to police practice should be made to mitigate the risk of police making statements that attest to matters not within their knowledge.

15.2. In today's policing environment BVW, CCTV footage, COPS entries, Statements of Facts and other extrinsic material are all readily available and might be used to refresh an officer's memory when they go to prepare their statement.

15.3. The Commission recommends that the template police statement should be amended to include a standard second paragraph to prompt officers to list the extrinsic material that they have considered as part of preparing their statement. The Commission considered including statements of other police officers as part of this standard list but considers it preferable not to do so in case it is seen as endorsing the practice.

15.4. The Commission recommends to the Commissioner of Police that the template for a police statement should include a standard second paragraph which says:

> In preparing this statement I have had regard to [delete any items not considered]:
>
> 1. My notebook entry pages
> 2. Event entry no
> 3. Statement of Facts in relation to [x] dated [y]

4. Body Worn video of officer [A] between [date] and [time]
5. CCTV footage [list]
6. [list any other extrinsic material considered in the preparation of this statement].

Reinvigorating the role of Brief Manager

15.5. The similarity between the statements of Officers SOM1, SOM2 and SOM4 should have been a red flag to the police prosecutor that their statements had not been independently prepared and that there was an element of copying and pasting between the officers.

15.6. Prosecutor SOM8 gave evidence that the pressures facing a police prosecutor did not allow time for a detailed analysis of the statements to identify this kind of issue. Even if a police prosecutor did have time to identify this issue, by the time that a brief reaches the police prosecutor, the accused has already been significantly disadvantaged. The accused will have been criminally charged, had the stress and expense of preparing for court and may have been remanded in custody or required to comply with the restrictions of bail.

15.7. It is preferable that issues with a prosecution brief are identified early. In the past, this has been the role of the Brief Manager. Prosecutor SOM8's evidence was that the NSW Police Force no longer uses Brief Managers. Had a Brief Manager been used, that person should have read through the brief and hopefully identified the similarity between the witness statements. Ideally, a Brief Manager would also have identified that a key portion of the CCTV footage was missing and been aware that editing CCTV in this way was unusual and suspicious.

15.8. The importance of the role of a Brief Manager has been discussed by the Commission in its report on *Review of NSW Police Force responses to failed prosecutions* that include adverse comments made by judicial officers tabled on 17 October 2025. That report confirmed the evidence of SOM8 that the NSW Police Force no longer uses Brief Managers. This is despite the fact that the Brief Preparation Guide 2017, which was current at the time of this Report, includes a 10 step checklist for Brief Managers to quality review the brief.

15.9. Step 4 in that checklist requires the Brief Manager to read the brief to determine whether there is admissible evidence. Step 6 requires the Brief Manager to consider if the evidence has been obtained illegally or improperly. Step 7 calls on the Brief Manager to consider whether the investigation is complete and whether the investigation was conducted ethically.

15.10. The Commission's Review of NSW Police Force responses to failed prosecutions (October 2025) recommended that:

> **Recommendation 1:** The NSW Police Force put in place systems and procedures to ensure that officers responsible for the quality review of briefs of evidence have the necessary skills, time and resources to:
>
> a) review all evidence, including BWV, CCTV, witness and victim statements and DNA evidence to confirm the evidence satisfies the elements of the offence
>
> b) ensure that the investigator has thoroughly investigated the matter
>
> c) ensure that the investigator has time to complete any outstanding requisitions
>
> d) confirm that the investigator has completed the brief and has sent it to the police prosecutor within the recommended timeframes.

15.11. The Commission reiterates that recommendation in this matter, and notes that the NSW Police Force have responded saying:

> The Police Handbook currently contains instructions for Officers in Charge, Supervisors and Commanders.
>
> The Police Prosecutions Command advise that gaps have been identified in the current system. Action is being taken to enhance the brief dashboard to make it more visible to commands to identify the stages of brief preparation and submission and to take timely, appropriate action where necessary.

15.12. When undertaking that review, the Commission suggests that the Police Prosecutions Command consider the issues raised in this investigation.

15.13. The Commission's *Review of NSW Police Force responses to failed prosecutions* report also covers the issue of the cost to the NSW Police Force where prosecutions fail because of challenges to the evidence.

15.14. The NSW Police Force do not report separately on the amount payable in court costs as a result of failed prosecutions. However, the Commission reported that in 23 out of 92 matters considered in its Review, a judicial officer had awarded costs against the NSW Police Force totalling $310,833.328

15.15. A failed prosecution also exposes the NSW Police Force to the risk of liability for a civil claim. In the 2023-2024 financial year, the NSW Police Force paid $10.106 million in damages and costs for claims commenced in that financial year. The total amount paid out in that financial year for claims commenced at any time was $36.358 million.[329]

15.16. In its Review of NSW Police Force responses to failed prosecutions report, the Commission recommended:

> **Recommendation 7:** The NSW Police Force conducts a yearly review of the reasons why the courts award costs against the NSW Police Force and develops strategies to reduce the conduct that leads to courts awarding costs to the defence.

15.17. The Commission reiterates that recommendation here and notes the NSW Police Force response:

> The Police Prosecutions and Licensing Enforcement Command support the recommendation to conduct a yearly review of failed prosecutions where costs are awarded. However, have advised a broader review of all matters where courts award costs against the NSW Police Force would be dependent on additional funding being allocated for IT improvements.

CCTV and the use of privacy squares

15.18. As this investigation illustrates, people taken into custody are particularly vulnerable, as any interactions with police occur away from the public gaze. The corollary is that police are also vulnerable to false allegations made by people taken into custody. Clear CCTV footage offers protection for both police and the community. The CCTV that covered the police station where these events occurred included a number of privacy squares. These are white boxes which are artificially imposed over the CCTV cameras, and obscure part of the view of those cameras. They are meant to offer privacy from being recorded and small

[328] Part 4.6 Review of NSW Police Force responses to failed prosecutions
[329] NSW Police Force, Annual Report 2023-2024 (Report, 2024) 135.

squares covered the toilets in the cells. There was a large square that covered the corridor between the front office and the station's cells. It was intended to cover the doorway to the male staff bathroom.

15.19. The privacy square intended to cover the male staff bathroom door also obscured the footage of a reasonable portion of the corridor. The area obscured by the square was where CIV1 was marched down the corridor and where the Commission found that CIV1 was choked by Officer SOM1. There was therefore no CCTV of that part of CIV1's arrest.

15.20. The evidence before the Commission was that the privacy square only protected male staff from being recorded entering the bathroom and washing their hands. The protection of staff privacy in this instance is outweighed by the importance of having CCTV record the whole view of the corridor.

15.21. The Commission recommends that:

> Privacy squares covering the corridor of the Regional Police Station 1 be removed from the CCTV and an alternative option be considered to protect the privacy of officers using the bathroom.

15.22. It is unclear whether this is a broader problem in police stations. The Commission suggests that the NSW Police Force consider whether a broader review of the location of privacy squares on police station CCTV is warranted.

Annexure A: Significant inconsistencies between the Facts Sheet and CIV1's mobile phone recording.

Timing	Facts Sheet	Mobile phone recording[330]
Pre-arrest	About 9.58am the Accused returned to [Regional Police Station 1] for a third time. The Accused was still 'hyped' up, yelling and screaming the same derogatory language.[331] [In the preceding paragraphs of the Facts Sheet, it was recorded that CIV1 had used the following expressions towards police: - 'useless cunts' - 'dog cunts' - 'fat cunts']	CIV1 did not use any of these expressions at the time he entered the station, or at any other time during the third entry. CIV1 did not use language which could be described as 'derogatory' at any time during the third entry.
	The Accused told what Police believed was the answer to the Accused'[s] questions however the Accused just screamed louder and yelled over the top of police more profanities and abuse.[332]	CIV1 did not direct any profanities or abuse at police at any time during the third entry.
	At this point the Accused was given one final chance to leave the station or he would be arrested. The Accused screamed extremely loud "arrest for what ya dumb cunts, you fuckers are paid to serve me so serve me cunts."[333]	No member of the NSW Police Force told CIV1 to leave the station or he would be arrested. Further, CIV1 did not respond to Police with the language as quoted in the Facts Sheet because CIV1 never responded to a direction to leave or be arrested. My CIV1 did not use the offensive language as quoted in the Facts Sheet at any time during the third entry.

[330] Exhibit SVB4C.
[331] Exhibit LGP7C at 3.
[332] Exhibit LGP7C at 3-4.
[333] Exhibit LGP7C at 4.

At the point of arrest	The Accused was arrested in the foyer of the Police Station. He was told that he was under arrest for offensive language and fail to move on. Police physically took hold of the Accused to prevent him from running as he was half out the front door.[334]	Police did not provide a reason for arrest to CIV1 at any point during the third entry. Additionally, CCTV footage of the station foyer identified that CIV1 was not apprehended 'half out the front door' but was instead apprehended in the foyer.
In the corridor	After entering the corridor, the Accused began to violently wrestle with Police thrashing his body with force. He was screaming loudly "fuck you dog cunts I've come here for help."[335]	CIV1 did not say to police 'fuck you dog cunts' inside the station corridor, or at any other time during the third entry.
	The impact was between the Accused right side rib (centre body) and lower leg (shin) of Officer SOM1. The Accused screamed "ya fucking dog cunts no need to kick me ya cunts. You fuckers are fucked I'll sue you cunts when I'm done you cunts wont [sic] have a job."[336]	CIV1 did not refer to police as 'cunts', 'dog cunts' or fuckers inside the station corridor, or at any other time during the third entry. Additionally, CIV1 did not tell police he would sue them and take their jobs inside the station corridor or at any other time during the third entry.
In custody	He was pushed into the dock as he refused to go in screaming "ya fuckers kicked me, ya cunt you kick like a woman."[337]	CIV1 did not use the language as quoted while in the custody dock, or at any other time during the third entry. Additionally, the available audio and CCTV footage from inside the custody area at Regional Police Station 1 does not support the accusation that CIV1 refused to enter the custody dock.

[334] Exhibit LGP7C at 4.
[335] Exhibit LGP7C at 4.
[336] Exhibit LGP7C at 4.
[337] Exhibit LGP7C at 4.

Annexure B: Significant inconsistencies conceded by Officer SOM2 between his witness statement and CIV1's mobile phone recording.

Timing	Officer SOM2's statement	Mobile phone recording[338]	Officer SOM2's evidence to LECC
Pre-arrest	A short time later, the accused walked back into the Police Station. I was in the station area this time and I said: I said – Weren't you given a direction not to come back here?[339]	Officer SOM2's first words to CIV1 upon him re-entering the station were: 'Mate if you're gonna come in here and be a pest you can just leave again.'	Officer SOM2 conceded that the first words he purported to say to CIV1 upon re-entering the station were incorrect and do not indicate any awareness of a prior move on direction.[340]
	The accused said – They keep *fucking* hanging up on me![341]	CIV1: 'Well if I keep ringin' youse hung up on me, I've got no choice mate I gotta ... try and sort this out, hey'	Officer SOM2 conceded that CIV1 did not use the word 'fucking' in his response initially.[342]
	I said – That's because you keep abusing them.[343]	Officer SOM2: 'You're hangin' up on us'.	
	Omitted from his statement.	CIV1: 'Oh so it's alright for you to raise your voice at me?' Officer SOM2: 'Yes, it is'.	Officer SOM2 conceded that despite attributing the word 'fucking' to CIV1 later in his statement, he omitted any reference to using the same word himself.[344]

[338] Exhibit SVB4C.
[339] Exhibit SVB1C at [7].
[340] Private examination of SOM2 at T25.
[341] Exhibit SVB1C at [7].
[342] Private examination of SOM2 at T28.
[343] Exhibit SVB1C at [7].
[344] Private examination of SOM2 at T32-33, 58.

		CIV1: 'Why?' Officer SOM2: ''Cause it's my fuckin' station'. CIV1: 'Oh it's your fuckin' station, so it's okay for you to swear too?' Officer SOM2: 'Yes'. CIV1: 'And it's okay for him not to wear a mask? It's okay for youse all to break the rules but it's not okay for someone to ask for help? Honestly, what the fuck is your purpose?'	Officer SOM2 agreed that he was saying to CIV1 that the standard that applies to himself is different to the standard that applies to CIV1.[345] Further, Officer SOM2 conceded that the way he spoke to CIV1 could have the potential to inflame the person he was speaking to.[346]
	No mention of CIV1 recording the interaction in his statement.	Officer SOM2: 'Mate, if you're recording this you need to inform us you're recording this'. CIV1: 'No, I don't. I'm allowed to record anything in the public mate, go and speak to your solicitor'.	Officer SOM2 conceded that he did not say anything in his statement, at any point, about CIV1 recording the interaction.[347]

[345] Private examination of SOM2 at T32-33.
[346] Private examination of SOM2 at T33.
[347] Private examination of SOM2 at T59-60.

	The accused then went on shouting at me with a tirade of abuse.[348]	CIV1 did not shout at Officer SOM2 with a 'tirade of abuse'.[349] Instead, CIV1 was asking for information and challenging Officer SOM2 on why he could not provide it.	Officer SOM2 conceded that at this stage CIV1 did not shout at him with a 'tirade of abuse', however he qualified that CIV1 did so towards the end of the recording.[350] Counsel Assisting challenged Officer SOM2 on this, as whilst CIV1 is yelling later in the recording, he was not using any abusive language, and given the context, his frustration is understandable.[351]Officer SOM2 eventually conceded this.[352]
	I do not recall exactly what was said, however I do recall words to the effect of "You're all fat useless cunts, do your fucking job."[353]	Nothing like this was said by CIV1 during the recording. When Officer SOM2 told him to contact a solicitor, CIV1 responded, 'Why? When youse are the police, youse are supposed to do this job'.	Officer SOM2 conceded that CIV1 did not say anything remotely like this during this interaction.[354] Officer SOM2 accepted that he copied this from Officer SOM1's statement.[355]

[348] Exhibit SVB1C at [8].
[349] Private examination of SOM2 at T29-30.
[350] Private examination of SOM2 at T30.
[351] Private examination of SOM2 at T31-32.
[352] Private examination of SOM2 at T38.
[353] Exhibit SVB1C at [8].
[354] Private examination of SOM2 at T41.
[355] Private examination of SOM2 at T51-53.

	The accused said – Give me my fucking paperwork![356]	Nothing like this was said by CIV1 during the recording.	
	The accused said – You cocksuckers have to do what I tell you. You cunts are my slaves![357]	Nothing like this was said by CIV1.	Officer SOM2 conceded that he copied this directly from Officer SOM1's statement despite having no recollection of those words.[358]
	I said – No, I don't and I won't [in response to CIV1 purportedly saying to Officer SOM2 he has to do what he tells him]. If you want this information you can apply for it through the freedom of information site like everyone else. I will give you the event number, but that's all I can give you'.[359]	Officer SOM2: 'We're not giving you a police report, simple as that'. CIV1: 'W-why not?' Officer SOM2: 'Because'. CIV1: ''Cause youse don't have it. You didn't do your job'. Officer SOM2: 'Because of the Privacy Act mate. (undecipherable)' CIV1: 'No, because youse didn't do the job that day, you	Officer SOM2 conceded that he did not say anything like this, with the qualification that he did tell CIV1 he could have the event number (this is disputed by the Commission).[360] Officer SOM2 agreed that it reads as being a tolerant and detailed response to CIV1's enquiries which was not the case.[361] Officer SOM2 agreed this is completely misleading, even if he did tell CIV1 he could have the event number.[362]

[356] Exhibit SVB1C at [8]; Private examination of SOM2 at T41.
[357] Exhibit SVB1C at [8].; Private examination of SOM2 at T41.
[358] Private examination of SOM2 at T42-43.
[359] Exhibit SVB1C at [8].
[360] Private examination of SOM2 at T56-57.
[361] Private examination of SOM2 at T56-57.
[362] Private examination of SOM2 at T57.

		don't have, there is no police report on the system, that's what my problem is'. Officer SOM2: 'Go through your solicitor'.	
	At this point Officer SOM1 came to the station area and engaged with the Accused. Officer SOM1 needed to raise his voice at the accused as the accused would not listen and kept yelling over top of everyone else. I do not recall the exact words used by Officer SOM1; however the accused was being told to leave the station and to comply with his move on direction or further action would be taken.[363]	Accusations made by Officer SOM1 towards CIV1: 'You crashed your $70,000 car while you were drunk. That was you'. 'You were drunk'. (said twice) 'You crashed your own car…' '(undecipherable), doing stuff illegally. You were charged,' In response, CIV1 retorted (yelling) 'Oh so you think that you think you know, you think that you know what happened? You do not know what happened.	A series of accusations that were made by Officer SOM1 towards CIV1 are not reflected in Officer SOM2's statement at all.[364] This context which culminated in CIV1's arrest is not reflected in Officer SOM2's statement. He conceded this.[365] Officer SOM2 conceded that his representation reads as though CIV1, in one direction, is behaving in a way that was completely abusive and unreasonable, not that it involved a back and forth between Officer SOM1 and CIV1 about his past motor vehicle accident.[366]

[363] Exhibit SVB1C at [9].
[364] Exhibit SVB1C.
[365] Private examination of SOM2 at T54.
[366] Private examination of SOM2 at T58, 60.

		You do not have an idea'. When understood in context, CIV1 denied wrongdoing and challenged Officer SOM1 about what he had just accused him of.	
	I do not recall the exact words used by Officer SOM1; however the accused was being told to leave the station and to comply with his move on direction or further action would be taken.[367]	Officer SOM1 did not make any reference to a move on direction, nor did he tell CIV1 to leave at any point in their interaction.	Officer SOM2 conceded that Officer SOM1 made no reference to a move on direction, nor did he invite or instruct CIV1 to leave the station.[368] Officer SOM2 agreed that CIV1 seemed to be on his way out of the station voluntarily.[369] Officer SOM2 agreed that he made this up to strengthen the case against CIV1, and make the subsequent arrest look more reasonable.[370]
	The accused was not listening to the instruction of Officer SOM1[371]		Officer SOM2 conceded that CIV1 could not have been not listening to Officer SOM1's instruction because he in fact, gave no instruction to CIV1.[372]

[367] Exhibit SVB1C at [9].
[368] Private examination of SOM2 at T61-62.
[369] Private examination of SOM2 at T61.
[370] Private examination of SOM2 at T63.
[371] Exhibit SVB1C at [10].
[372] Private examination of SOM2 at T65-66.

	and continued to yell abuse at all officers in the station area.[373]	The only thing that CIV1 can be recorded yelling is, 'Oh so you think that you think you know, you think that you know what happened? You do not know what happened. You do not have an idea'. This is in direct response to Officer SOM1's accusations to him about his prior motor vehicle accident.	Officer SOM2 agreed that he did not 'continue' to yell.[374] However, he disagreed that that the sentence CIV1 yelled towards Officer SOM1 was not abusive.[375]
At the point of arrest	Officer SOM1 said – You're under arrest for offensive language and failing to comply with a move on direction.[376]	At the point of arrest, Officer SOM1 said: 'You're under arrest, c'mon. You're under arrest'. He did not provide a reason for arrest in the interaction prior, or in the moments after the arrest that are recorded.	Officer SOM2 agreed that Officer SOM1 did not provide a reason for arrest at the time of arrest as purported in his statement.[377] Officer SOM2 had no independent recollection of Officer SOM1 saying those words when he drafted his statement and believes he extracted this quote from Officer SOM1's statement.[378] Officer SOM2 agreed that this fabrication was

[373] Exhibit SVB1C at [10].
[374] Private examination of SOM2 at T68.
[375] Private examination of SOM2 at T68.
[376] Exhibit SVB1C at [11].
[377] Private examination of SOM2 at T69-70.
[378] Private examination of SOM2 at T72-73, 81-82.

			self-serving in that it implies that Officer SOM1 complied with the statutory obligations in ss 201 and 202 of LEPRA when in fact he had not.[379] Further, he agreed that this was another example of providing support for the prosecution of CIV1.[380]
	The accused continued yelling call[ing] us "nothing but corrupt cunts."[381]	CIV1 did not say "nothing but corrupt cunts" or anything remotely close to this.	Officer SOM2 admitted to copying these words from Officer SOM1's statement.[382] Officer SOM2 agreed that CIV1 did not say those words at the point of arrest, and that this part of his statement is wrong.[383] Officer SOM2 agreed this was another example of him attributing what might be *prima facie* evidence of offensive language to CIV1.[384]
In the corridor	The accused started to yell and accused us of kicking him and continued to call us "dog cunts" and threatening to sue us for our jobs.[385]	At this point, CIV1 did not make any threats to police or call police any offensive names.	This part of Officer SOM2's statement is included immediately after he recounts Officer SOM1 and CIV1 falling on to one another in the corridor.

[379] Private examination of SOM2 at T81-82.
[380] Private examination of SOM2 at T82.
[381] Exhibit SVB1C at [12].
[382] Private examination of SOM2 at T73.
[383] Private examination of SOM2 at T75.
[384] Private examination of SOM2 at T75.
[385] Exhibit SVB1C at [14].

			Officer SOM2 agreed that CIV1 did not call police 'dog cunts' or anything of the sort. He further agreed that he did not make threats about suing police for their jobs.[386] Officer SOM2 agreed that the inclusion of these statements was part of an overall effort to describe CIV1 as being an utterly unreasonable individual.[387]
In custody	This has been completely omitted from Officer SOM2's statement.	Whilst CIV1 is taking his jacket off in compliance with Officer SOM1's instructions, Officer SOM1 said to CIV1: "Act like a cunt, you're treated like one." CIV1: "I'm not trying to act like a cunt." Officer SOM1: "You are a fuckin' cunt. CIV1: "I'm just tryin' make a point man."	Officer SOM2 conceded that he heard Officer SOM1 say this to CIV1 and agreed that he did not include this in his statement.[388]

[386] Private examination of SOM2 at T97.
[387] Private examination of SOM2 at T97.
[388] Private examination of SOM2 at T104.

		Officer SOM1: "Deadset cunt."	
	Officer SOM1 again informed the accused why he was in custody and the accused continued with his belligerent behaviour.[389]	Whilst CIV1 was being searched in the dock, Officer SOM2 stopped the mobile phone recording. Officer SOM1 did not tell CIV1 why he was under arrest.	Officer SOM2 conceded that he omitted this sequence of events from his statement, falsely included Officer SOM1 informing CIV1 the reason he was under arrest and did not make any reference to the recording anywhere in his statement.[390]

[389] Exhibit SVB1C at [16].
[390] Private examination of SOM2 at T105.

Annexure C: Officer SOM2's evidence in the Local Court

Topic	Officer SOM2's evidence in the Local Court	Officer SOM2's evidence to the Commission
Awareness of prior move on direction	Evidence in Chief: **Q.** I'm going to take you back a bit. When the accused walked into the station what did you say to him?[391] **A.** My words, I believe, were, "Weren't you given a move on from here?" or, "Weren't you told not to come back here?" something to those - that effect.	Officer SOM2 conceded that he did not say these words to CIV1 when he walked back into the station.[392]
Offensive language attributed to CIV1	Cross examination: **Q.** What did he say to you?[393] [after CIV1 walked into the station] **A.** It was just the same yelling, abusing, the same sort of stuff that he was saying all day. **Q.** What was that? **A.** Basically just calling us, "Useless cunts," that we work for him, he owns us, all that sort of stuff. [And then later in his evidence -] **Q.** You then say in paragraph 8, "The accused then went on shouting at me with a tirade of abuse. I do not recall exactly what was said. However, I do recall words to the effect of, "You're all fat, useless cunts. Do your fucking job".[394] **A.** That's correct. **Q.** You swear that's true?	Officer SOM2 accepted that CIV1 did not say anything to this effect to him during their interaction.[395]

[391] Exhibit SVB3C at 28.
[392] Private examination of SOM2 at T48-49.
[393] Exhibit SVB3C at 28.
[394] Exhibit SVB3C at 45.
[395] Private examination of SOM2 at T49-52.

	A. Yes. I do recall words to those effect. Yes.	
	Cross examination: **Q.** Then the accused said these words, "You cocksuckers have to do what I tell you. You cunts are my slaves". That's your recollection there as you put in your statement, correct?[396] **A.** Correct. **Q.** So, we understand from that he used the word, "Cocksuckers" in that context? **A.** Yes. **Q.** He used the word, "Cunts" in that context, correct? **A.** Correct. **Q.** And, the word, "My slaves" or two words, "My slaves" in that context? **A.** Yes.	Officer SOM2 agreed that these were not words that he recalled CIV1 say at all.[397]
	Cross examination: **Q.** Paragraph 12, you went on to say, "The accused continued yelling and calling us, "Nothing but corrupt cunts". You've used the word, "Continued".[398] **A.** I'm sorry, what do you mean I've used the word - "Continued to yell". Yes. Yeah. **Q.** So, should we understand from that he kept repeating those words?	Officer SOM2 agreed that in the recording CIV1 does not refer to 'corrupt cunts' at all.[400] Officer SOM2 gave evidence that he recalled those words being repeated a number of times, but not on the recording.[401]

[396] Exhibit SVB3C at 47-48.
[397] Private examination of SOM2 at T44-45.
[398] Exhibit SVB3C at 49.
[400] Private examination of SOM2 at T75.
[401] Private examination of SOM2 at T76.

	A. He said that more than once. Yes. **Q.** How many times? **A.** I don't recall how many times. **Q.** Was it several? Was it 10? Was it 20? Was it three? **A.** Several.[399] **Q.** Several? **A.** Yeah. **Q.** Between, say, three to 10 times? **A.** Yeah. Between three and 10 times.	
Reason for arrest	<u>Cross examination:</u> **Q.** At paragraph 11 you say that, "[Officer SOM1] walked out into the foyer, and I followed. [Officer SOM1] took hold of the accused's left arm, and I town 1took hold of his right arm and [Officer SOM1] said, 'You're under arrest for offensive language and failing to comply with a move-on direction'". Do you see that?[402] **A.** Yes. **Q.** There's no doubt that was said? **A.** Yes. **Q.** No doubt in your mind? **A.** No doubt in my mind. No. **Q.** I'm suggesting to you that your evidence here today is fabricated evidence in relation to what was said by the defendant at certain times. **A.** And I've told you I disagree.	Officer SOM2 agreed that the reason for arrest was objectively not said.[403] He further conceded he had significant doubt in his mind that those were the specific words spoken by Officer SOM1 and his response that there was no doubt in his mind was untruthful.[404]

[399] Exhibit SVB3C at 50.
[402] Exhibit SVB3C at 49.
[403] Private examination of SOM2 at T70-71.
[404] Private examination of SOM2 at T71-72.

Reliance on Officer SOM1's statement	Evidence in Chief: **Q.** How could you remember what happened?[405] **A.** I had seen a copy of [Officer SOM1]'s statement to refresh my memory of the timeline of events. Cross examination: **Q.** Certainly. I'm putting to you that when you read [Officer SOM1]'s statement and his version of what took place did that accord with your recollection of what took place in relation to things said, words said, and physical acts done? **A.** It helped in relation to the timeline of events, for my recollection of the timeline. **Q.** More specifically, did it help you with what was said as recollected by [Officer SOM1]? **A.** To be honest I can't answer that because I done the statement so long ago. I don't remember. **Q.** What was your purpose in reading it in the first place? **A.** Like I said, to get the timeline of events. **Q.** Only the timeline of events? Nothing about the narrative? **A.** No.	Officer SOM2 accepted that the effect of his response was misleading as it suggests he only relied on Officer SOM1's statement for the limited purpose of establishing the timeline of events, when this in fact untrue.[406] Officer SOM2 agreed that the main reason he read the statement was to assist in his recollection of what happened and what Officer SOM1 said had happened so he could reflect this in his own statement.[407] Officer SOM2 agreed that it was wrong and improper for him not to have disclosed the extent to which he relied on Officer SOM1's statement.[408]

[405] Exhibit SVB3C at 42.
[406] Private examination of SOM2 at T84-85.
[407] Private examination of SOM2 at T88-89.
[408] Private examination of SOM2 at T90.

Annexure D: Significant inconsistencies between Officer SOM1's statement/evidence given in the Local Court and CIV1's mobile phone recording.

Timing	Officer SOM1's statement	Mobile phone recording[409]	Evidence given in the Local Court
Pre-arrest	About 9.58am the Accused stormed into the Police Station for a third time. I heard the Accused yell something like "you cock suckers have to do what I tell you, you cunts are my slaves....."[410]	CIV1 did not say this or anything to this effect.	Evidence in Chief **Q.** Are the contents of your statement true and correct?[411] **A.** Yes. [His statement, including this paragraph, was read word for word onto the record.[412]] Cross examination **Q.** Are you saying that the accused stormed into the police station and the first words he uttered were, "You cocksuckers have to do what I tell you, you cunts are my slaves". You've got a clear recollection of that?[413] **A.** Yes. ... **Q.** Sergeant, in your 22 years of police service, did you believe the defendant was being very brave with his opening statement of, "You cocksuckers have to do what I tell you, you

[409] Exhibit SVB4C.
[410] Exhibit XSD04 at [25].
[411] Exhibit PZN6C at 12.
[412] Exhibit PZN6C at 16.
[413] Exhibit XSD07 at 7.

			cunts are my slaves"? Did you think he was being very brave or- -[414] **A.** No. **Q.** - -foolhardy, you choose the word? **A.** Stupid.
	I immediately looked at the CCTV and could see that another male was already talking with other Police Officers. The Accused simply interrupted and yelled over the top of this man.[415]	A member of the public appears to be speaking to police when CIV1 re-enters the police station. However, it is Officer SOM2 who spoke to CIV1 first with, 'Mate, if you're gonna come in here and be a pest you can leave again.' CIV1 did not interrupt anyone	<u>Evidence in Chief</u> Although the transcript does not reflect the exact words written in his statement, Officer SOM1 is reading directly from his statement.[416] <u>Cross examination</u> **Q.** Stupid, all right, and you recall that the defendant, and you could see from - I apologise, you could see from the CCTV that another male was already talking with other police officers and the defendant simply interrupted him, and yelled over the top?[417] **A.** Yes. **Q.** Is that when he yelled those words I take it? **A.** Yes. **Q.** He yelled those words in front of a civilian? **A.** Yes.
	I yelled to get the Accused attention, "get	This conversation did not take place.	<u>Evidence in Chief</u>

[414] Exhibit XSD07 at 7-8.
[415] Exhibit XSD04 at [25].
[416] Exhibit PZN6C at 16.
[417] Exhibit XSD07 at 8.

	out and comply with the move on, stop swearing and come back another day." The Accused said, "fuck of cock sucker you do what I tell you." I yelled "get out now otherwise you'll be arrested for not leaving and offensive language."[418] ... "I yelled loudly at the Accused "if I come out there your getting arrested....."[419]	Officer SOM1 did not mention the move on direction, tell him to leave or give him a warning at any stage during their conversation. CIV1 did not say the words as alleged by Officer SOM1 at any time. Officer SOM1 completely misrepresented the nature of his conversation with CIV1, which started with Officer SOM1 accusing CIV1 of being drunk when he crashed his car.	His statement, including this paragraph, was read word for word onto the record.[420] <u>Cross examination</u> **Q.** In paragraph 29 you say this, you yelled at the accused to get his attention, is that correct?[421] **A.** Correct. ... **Q.** Yes, so what I want to get from you, your opening statement to him were those words, "Get out and comply with the move on. Stop swearing", apart from what you said before [that he first said to him 'someone will be with you shortly'], is that correct? **A.** Yes. **Q.** Instead of getting out, according to you the accused said, "Fuck off cocksucker, you do what I tell you"? **A.** Correct. **Q.** You were in full uniform? **A**. Yes.

[418] Exhibit XSD04 at [29].
[419] Exhibit XSD04 at [29].
[420] Exhibit PZN6C at 17.
[421] Exhibit XSD07 at 8-9.

			Q. Again, did you think he was being very brave or just stupid? **A.** Very stupid. **Q.** You then said, "Get out now, otherwise you'll be arrested for not leaving and offensive language", what did you mean by that? **A.** This was his third occasion that he'd been into the police station and there were civilians using the police station, and there was no need for him to be carrying on like that when we were - there was no less than three people that tried to assist him. So if he couldn't stop his behaviour from being like that, then the only alternative I had was to arrest him and stop his behaviour. ... **Q.** You then loudly said to the accused, "If I come out there, you're getting arrested", that was in a loud tone of voice I take it?[422] **A.** Yes
	The Accused took a step towards the door opened it, stood in the doorway and screamed "fucking corrupt cunts	This was not said by CIV1 at any time.	<u>Evidence in Chief</u> His statement, including this paragraph, was read word for word onto the record.[424]

[422] Exhibit XSD07 at 9.
[424] Exhibit PZN6C at 17.

	I'm getting the ombudsman and you fucking cock suckers will all be sacked."[423]		<u>Cross examination</u> **Q.** Instead of taking your advice, he said, "Fucking corrupt cunts, I'm getting ombuds on you, fucking cocksuckers will all be sacked", and I take it you have a distinct recollection of that being said?[425] **A.** Something to those words were recorded in my statement, so yes. **Q.** Well, that was fresher in your mind then- - **A.** Yes. **Q.** - -than it is now, so accept what you said then was true. That was your best recollection at the time when you made your statement? **A.** Yes.
	The Accused screamed over the top of me before I could finish stating "you fat corrupt cunt [can't] arrest me I've done fuck all except try and get help."[426]	CIV1: 'What the fuck man. I'm trying to get help.'[427]	<u>Evidence in Chief</u> His statement, including this paragraph, was read word for word onto the record.[428] <u>Cross examination</u> **Q.** Before you finished, "The accused screamed over the top of me before I could finish stating, 'You fat corrupt cunt, arrest me, I've done fuck

[423] Exhibit XSD04 at [29].
[425] Exhibit XSD07 at 9.
[426] Exhibit XSD04 at [29].
[427] Exhibit LGP3C.
[428] Exhibit PZN6C at 17.

			all except try and get help"'?[429] **His Honour:** "can't arrest me". **Defence Counsel**: Sorry? **His Honour**: Can't arrest rather than- - **Defence Counsel:** Sorry, I apologise, your Honour. **Q.** You're a fat -cunt, "can't arrest me, I've done fuck all except try and get help", is that right? **A.** Yes.
At the point of arrest	I said "[you're] under arrest for offensive language and fail to comply with a move on direction."[430]	Officer SOM1 did not provide a reason for arrest. He said, 'You're under arrest, c'mon. You're under arrest.'	Evidence in Chief His statement, including this paragraph, was read (almost) word for word onto the record.[431] Cross examination **Q.** More to the point, you did say, "You're under arrest for offensive language and fail to comply with a move on direction", you recall that being said?[432] **A.** Yes. **Q.** Because that was the reason for the arrest, was it not? **A.** Yes.

[429] Exhibit XSD07 at 9.
[430] Exhibit XSD04 at [31].
[431] Exhibit PZN6C at 17. He left out the word 'direction'.
[432] Exhibit XSD07 at 11-12.

	The Accused was yelling profanities and saying that we were nothing but "corrupt cunts".[433]	CIV1 did not refer to police as 'corrupt cunts' at any point during the recording.	<u>Evidence in Chief</u> His statement, including this paragraph, was read word for word onto the record.[434] <u>Cross examination</u> **Q.** If you go to paragraph 31, by this time you'd walked around the foyer and took a hold of the accused by the left arm and Senior Constable SOM2 had his right arm and then you said, "You're under arrest for offensive language and fail to comply with a move on direction".[435] "The accused was yelling profanities and saying we were nothing but corrupt cunts." There's no doubt that sticks out in your mind, is that correct? **A.** Yes. **Q.** As being said? **A.** Yes. **Q.** By the defendant? **A.** Yes. ... **Q.** You were as good as your word, you did arrest him and he used those words?[436] **A.** Yes.

[433] Exhibit XSD04 at [31].
[434] Exhibit PZN6C at 17.
[435] Exhibit XSD07 at 11.
[436] Exhibit XSD07 at 12.

			Q. You were met with the words, "You're nothing but corrupt cunts"? **A.** Similar.
In the corridor	He was screaming loudly "fuck you dog cunts I've come here for help" and "you cock suckers are fucked, I'll be taking this public."[437]	CIV1 did not say anything at this point in the interaction (upon immediately entering the corridor prior to the fall to the ground). He did not refer to police as 'dog cunts' or 'cock suckers' at any point during the recording.	Evidence in Chief His statement, including this paragraph, was read (almost) word for word onto the record.[438] Cross examination **Q.** Do you say he was yelling out in the corridor, "Fuck you dog cunts, I've come here for help and you cocksuckers are fucked, I'll be taking this public"?[439] That's what he said in the corridor, is that correct? **A.** Yes.
	Officer SOM1 describes a sequence of events that allegedly occurred in the corridor which involve CIV1d resisting police which ultimately caused Officer SOM1 to lose his balance and crash into CIV1.[440] There is no reference to Officer SOM1 putting CIV1 in a choke hold or otherwise engaging in any action that would	The mobile phone recording strongly suggests Officer SOM1 put CIV1 in a choke hold.	Evidence in Chief His statement, including this paragraph, was read onto the record, with no reference to a choke hold.[441] Cross examination **Q.** Explain to the Court, if you can, and you can go to your statement if you wish, what do you say he actually did as soon as he got into the corridor?[442]

[437] Exhibit XSD04 at [33].
[438] Exhibit PZN6C at 17. Instead of "you cocksuckers are fucked" he read, "you cocksuckers are corrupt".
[439] Exhibit XSD07 at 13.
[440] Exhibit XSD04 at [33].
[441] Exhibit PZN6C at 17-18.
[442] Exhibit XSD07 at 13.

	cause a restriction of CIV1's airways.		**A.** He tried to pull away from me. He pushed and thrashed and, in my opinion, he tried to break my grip. [Officer SOM2] had already let him go so there was only my grip holding. Because of the narrow corridor, then the thrashing about, we both ended up on the floor. **Q.** See, that's not quite true, is it? **A.** It's true in my recollection. **Q.** Either you or one of your police colleagues grabbed hold of him in a choke hold? **A.** I don't recall that. **Q.** Is it a matter of not recalling it or it wasn't done? **A.** I don't recall him being in a choke hold. **Q.** Do we take from that answer that did not occur in your presence? **A.** Not to my knowledge.
	The Accused screamed "ya fucking dog cunts no need to kick me ya cunts. You fuckers are fucked I'll sue you cunts when I'm done you cunts won't have a job."[443]	CIV1 actually said, 'Oh fuck. Oh kicks' whilst in the corridor. After CIV1 was released from what appeared to be a choke hold, he	<u>Evidence in Chief</u> His statement, including this paragraph, was read (almost) word for word onto the record.[444] <u>Cross examination</u>

[443] Exhibit XSD04 at [34].
[444] Exhibit PZN6C at 18. Instead of 'no need to *kick* me ya cunts', he said, 'now you've *hit* me, you cunts.' The word 'done' was also not transcribable on the transcript.

		said, “Oh great you guys are legends ay?’ It was officer SOM1 that then referred to CIV1 as a ‘fuckwit’ to which CIV1 responded, ‘I’m a fuckwit? Fuck, I’m just tryin’ to get help with my car man.’	**Q.** He continued to scream and said, "You're fucking dog cunts, no need to kick me you cunts, you fuckers are fucked, I'll sue you cunts. When I'm done you cunts won't have a job"?[445] **A.** Yes. **Q.** I didn't add them up but he's used the word cunt a number of occasions, did he not? **A.** Yes.
	The Accused was repeating his threats to 'sue' and 'take our jobs.'[446]	CIV1 did not refer to suing the police or taking their jobs at any point during the recording.	<u>Evidence in Chief</u> His statement, including this paragraph, was read word for word onto the record.[447] <u>Cross examination</u> **Q.** He kept on saying things such as, threatened to sue you and take your jobs, or take our jobs as you've got there, is that right?[448] **A.** Yes. **Q.** These sort of profanities continued? **A.** Yes.
	He was screaming "fucking cock suckers" and other similar phrases.[449]	This was not said by CIV1 at any point in the recording.	<u>Evidence in Chief</u> His statement, including this paragraph, was read word for word onto the record.[450]

[445] Exhibit XSD07 at 13-14.
[446] Exhibit XSD04 at [35].
[447] Exhibit PZN6C at 18.
[448] Exhibit XSD07 at 14.
[449] Exhibit XSD04 at [36].
[450] Exhibit PZN6C at 18.

In custody	The Accused was physically escorted into the charge room and pushed into the dock as he was refusing to go in. He screamed "ya fuckers kicked me, ya cunt you kick like a woman."[451]	CCTV footage shows CIV1 being pushed into the dock by Officer SOM1, however he appears to be compliant and was not refusing to go into the dock. The audio confirmed CIV1 did not say these words, or any words to this effect.	<u>Evidence in Chief</u> His statement, including this paragraph, was read (almost) word for word onto the record.[452] <u>Cross examination</u> Q. He was pushed into the dock as he's refusing to go and he screamed, "You fuckers kicked me, you cunt, you kick like a woman". You distinctly remember him saying those words?[453] **A.** Yes.
	Once in the dock I let go of him and was yelling at him to surrender his property. The Accused continued to yell over the top of me and not comply.[454]	CIV1 was not yelling over Officer SOM1 and was fully compliant with Officer SOM1's instructions.	<u>Evidence in Chief</u> His statement, including this paragraph, was read (almost) word for word onto the record.[455]
	The whole time Accused was continuing to insult and abuse me and the other Police.[456]	CIV1 did not say anything abusive or insulting to police during this time. Officer SOM1 was the only person who	<u>Evidence in Chief</u> His statement, including this sentence, was read word for word onto the record.[457]

[451] Exhibit XSD04 at [37].
[452] Exhibit PZN6C at 18. Where he said in his statement, 'He screamed "ya fuckers kicked me, ya cunt you kick like a woman", much of this was not transcribable on the court transcript. 'He screamed "... (not transcribable)... you can't kick me like a ... (not transcribable).' Whilst not accurately captured on the court transcript, it is presumed officer SOM1 was reading directly from his statement in court.
[453] Exhibit XSD07at 14.
[454] Exhibit XSD04 at [39].
[455] Exhibit PZN6C at 18. Parts of this paragraph were not transcribable on the court transcript. According to the court transcript, he also said 'reply' rather than 'comply'. Whilst not accurately captured on the court transcript, it is presumed officer SOM1 was reading directly from his statement in court.
[456] Exhibit XSD04 at [39].
[457] Exhibit PZN6C at 18.

	[The abusive language used by Officer SOM1 towards CIV1 was not included in his statement.]	used abusive language. Officer SOM1: 'Act like a cunt, you're treated like one.' CIV1: 'I'm not tryin' to act like a cunt.' Officer SOM1: 'You are a fuckin' cunt.' CIV1: 'I'm just tryin' to make a point man.' Officer SOM1: 'Dead set cunt.'	He did not mention the abusive language he used towards [CIV1]. <u>Cross examination</u> **Q.** The whole time the accused was continuing to insult and abuse me and other police, is that right?[458] **A.** Yes. Further in his evidence… **Q.** Do you recall these words, "Act like a cunt and you'll be treated like one"?[459] **A.** No. **Q.** You didn't use those words? **A.** I don't recall. **Q.** Well, are they words you normally use, sergeant? **A.** Occasionally. **Q.** When dealing with a prisoner? **A.** No. **Q.** In what circumstances would you use the words, acting like a cunt you're treated like one, even occasionally, in what circumstances? **A.** If you're referring to the word itself, I have used that word, yes.

[458] Exhibit XSD07 at 14.
[459] Exhibit XSD07 at 17.

			Q. Right, but in this context have you ever said it to a prisoner after he's been arrested? **A.** Not that I can recall. **Q.** You then went on to say after you said, "Act like a cunt and you'll be treated like one", you then said, "You're a fucking cunt", do you recall saying that to the defendant? **A.** No, I don't.

Appendix 1 – The Commission's Statutory Functions

1. The *Law Enforcement Conduct Commission Act 2016 (*the LECC Act) lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.

2. Section 10 of the LECC Act defines 'serious misconduct':

> (1) For the purposes of this Act, **serious misconduct** means any one of the following:
>
> (a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,
>
> (b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,
>
> (c) corrupt conduct of a police officer, administrative employee, or Crime Commission officer.
>
> (2) In this section:
>
> **serious disciplinary action** against an officer or employee means terminating the employment, demoting, or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.
>
> **serious offence** means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

3. ‘Officer maladministration’ and ‘agency maladministration’ are both defined in s 11 of the LECC Act. ‘Officer maladministration’ is defined in s 11(2) in these terms:

> (2) **Officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee, or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):
>
> (a) is unreasonable, unjust, oppressive, or improperly discriminatory in its effect, or
>
> (b) arises, wholly or in part, from improper motives, or
>
> (c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
>
> (d) arises, wholly or in part, from a mistake of law or fact, or
>
> (e) is conduct of a kind for which reasons should have (but have not) been given.

4. The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

5. The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).

6. Section 29 provides the authority for the Commission to make findings and express opinions:

> (1) The Commission may:
>
> (a) make findings, and
>
> (b) form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission

investigations, as to whether officer misconduct or officer maladministration or agency maladministration:

(i) has or may have occurred, or

(ii) is or may be occurring, or

(iii) is or may be about to occur, or

(iv) is likely to occur, and

(c) form opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and

(d) make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and

(e) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter or opinions or the results of any such investigations.

(2) Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.

(3) The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

(4) An opinion or finding that a person has engaged, is engaging or is about to engage in:

(a) officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or

(b) specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

(5) Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the *Police Act 1990*.

(6) The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.

(7) The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.

7. This report is made pursuant to Part 11 of the LECC Act. Section 132(1) provides that the Commission may prepare reports 'in relation to any matter that has been or is the subject of investigation under Part 6'.

8. Section 133 (Content of reports to Parliament) provides that:

(1) The Commission is authorised to include in a report under section 132:

(a) statements as to any of the findings, opinions and recommendations of the Commission, and

(b) statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.

(2) The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary infringement,

(c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer,

(e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.

Note. See section 29 (4) in relation to the Commission's opinion.

(3) An "**affected person**" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.

(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

9. In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.[460] Accordingly findings can form the basis of opinions and recommendations, even if they do not reach the standard of beyond reasonable doubt.

Considerations under s 133(2) of the LECC Act

10. Section 133(1) authorises the Commission to include in a s 132 report statements as to any findings, opinions and recommendations of the Commission together with statements of the Commission's reasons for any findings, opinions and recommendations.

11. As noted earlier in this Report (at paragraph 2.3), an important function for the Commission is to determine whether any police officer has engaged in 'serious misconduct' as defined in s 10 of the LECC Act. Relevantly, s 10 defines 'serious misconduct' as conduct of a police officer that could result in prosecution of the officer for a serious offence or serious disciplinary action against the officer for a disciplinary infringement. 'Serious disciplinary action' is defined as action against any officer by terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or reducing the remuneration payable to the officer.

[460] *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

12. For practical purposes, 'serious disciplinary action' for a police officer involves action to terminate the officer's employment under s 181D of the *Police Act 1990* or reviewable action under s 173 of the *Police Act 1990*. If the conduct could result only in non-reviewable action as defined in s 173(1) and Schedule 1 of the *Police Act 1990*, then the conduct would not constitute 'serious misconduct'.

13. Section 133(2) requires the Commission to include in a report, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given (relevantly) to the following:

    (a) obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence;
    (b) the taking of action against the person for a specified disciplinary infringement;
    (c) the taking of action including the making of an order under s 181D of the *Police Act 1990* against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the police officer; and
    (d) the taking of reviewable action within the meaning of s 173 of the *Police Act 1990* against the person as a police officer.

14. Some observations should be made about the various steps contained in s 133(2).

15. Firstly, it is mandatory that the Commission give consideration to such measures in s 133(2) as may be relevant to the particular affected person.

16. Secondly, in considering whether to obtain advice of the DPP under s 133(2)(a), it is necessary for the Commission to disregard evidence given under objection by the person being considered for referral. The evidence of that person is not admissible in any criminal proceedings against that person: ss 57, 74, 75 LECC Act. Evidence given under objection should not be provided to the DPP in the event of a s 133(2)(a) referral. However, the evidence given under objection by one person may be considered by the Commission in determining whether another person should be referred to the DPP for advice as to prosecution under s 133(2)(a).

17. Thirdly, in considering whether a s 133(2)(b) recommendation ought to be made, regard should be had to the definition of 'disciplinary infringement' in s 4(1) LECC Act:

> 4. **disciplinary infringement** includes any misconduct, irregularity, neglect of duty, breach of discipline or substantial breach of a code of conduct or other matter that constitutes or may constitute grounds for disciplinary action under any law.

18. The term 'disciplinary infringement' is used in ss 9 and 10 of the LECC Act. The Commissioner of Police may issue instructions to members of the NSW Police Force with respect to the management and control of the NSW Police Force. Instructions to members of the NSW Police Force under s 8(4) of the *Police Act 1990* may include instructions and guidelines with respect to the exercise of police officers of functions conferred under LEPRA. The terms 'misconduct', 'neglect of duty' and 'breach of discipline' in the definition of 'disciplinary infringement' are capable of picking up alleged breaches of Commissioner's Instructions issued under the *Police Act 1990*.

19. Fourthly, the various steps in s 133(2) are not mutually exclusive. They are not expressed as alternatives although, as noted earlier, not all will be capable of application in a particular case. Clearly, s 133(2)(e) has no application in the case of a police officer.

20. Fifthly, the Commission is not bound to select one or other of the steps contained in s 133(2)(c) and (d). They are not expressed as alternatives. In some cases, a s 133(2)(c) recommendation for action under s 181D of the *Police Act 1990* may be the clear course of action to be recommended. In other cases, action under s 173 of the *Police Act 1990* may seem the clearly appropriate course to be recommended. There will undoubtedly be cases where factors may bear upon the exercise of judgment by the Commissioner of Police in the choice between s 181D or s 173 action, and those factors may not be fully known to the Commission. Reviewable action under s 173 of the *Police Act 1990* involves more serious disciplinary action falling short of dismissal from the NSW Police Force.

21. It is open to the Commission under s 133(2) to state that consideration be given to the taking of action under s 181D or s 173 with an opinion being expressed that one of these steps is supported more strongly than the other. The Commission's reasons given under s 133(1)(b) will explain the thought processes which have led to the s 133(2) steps being addressed in this way.

Appendix 2 – Use of Names of Witnesses or Pseudonyms in this Report

1. The Commission has made a determination to protect the identities of all persons involved. Accordingly, all persons/places will be referred to by codenames in this report.

2. There is to be no publication of the name or image of any of the codenamed persons/places in relation to the evidence given in the Operation Somnus investigation or included in this report without further order of the Commission.

3. In accordance with the statutory requirements, a copy of this report will be provided to the complainant, the Commissioner of Police and the Minister for Police and Counterterrorism. There is to be no publication of the actual name of any person referred to in this report in relation to the conduct discussed in this report, without order of the Commission.

LECC
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Conduct Commission