

ESTRYPUB00190
23/05/2018

ESTRY
pp 00190-00250

PUBLIC
HEARING

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INDEPENDENT COMMISSION AGAINST CORRUPTION

STEPHEN RUSHTON SC
COMMISSIONER

PUBLIC HEARING

OPERATION ESTRY

Reference: Operation E17/0345

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON WEDNESDAY 23 MAY, 2018

AT 10.00AM

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THE COMMISSIONER: Are there any new appearances today?

MR EURELL: Yes. Good morning, Commissioner. My name is Eurell, E-u-r-e-l-l, I seek permission to appear for Mr Duncan.

THE COMMISSIONER: Thank you.

MR EURELL: My colleague Ms Fishburn had appeared yesterday and today. Sorry, yesterday and Monday and may be back at some point, but I
10 expect to be here for Mr Duncan's evidence today.

THE COMMISSIONER: All right. Well, authorisation is granted of course.

MR EURELL: Thank you, sir.

THE COMMISSIONER: Mr Duggan.

MR DUGGAN: Thank you, Commissioner. I should indicate before I
20 begin that there was some information that went up on the restricted website last night. Mr Duffy's record of interview with ICAC and also his compulsory examination, as I understand it, and I think I omitted to mention that yesterday, that that was going to happen.

THE COMMISSIONER: Right.

MR DUGGAN: But I'll just indicate that that information is up there.

THE COMMISSIONER: Well it might be a good idea in the future, I
30 suppose, that the various legal representatives just check the restricted website after the Commission has adjourned each day.

MR HARRIS: Commissioner, Harris. Could I just through you, Commissioner, Counsel Assisting, can we have the dates? I, I did check that website but obviously too early yesterday evening. The date of the record of interview and the compulsory examination, if possible.

THE COMMISSIONER: Certainly.

40 MR GREENHILL: 6 March is the compulsory examination.

MR HARRIS: 6 March this year.

MR GREENHILL: Yeah.

MR HARRIS: Thank you.

MR GREENHILL: One of the records of interview was on 2 August 2017.

THE COMMISSIONER: Thank you, Mr Greenhill.

MR HARRIS: Thank you.

MR GREENHILL: And the other one was at, on 20 July 2017.

THE COMMISSIONER: Thank you again.

10 MR HARRIS: I compliment senior counsel for its assistance there.

MR GREENHILL: All of that (not transcribable) which I saw at 11 o'clock last night.

THE COMMISSIONER: All right.

MR DUGGAN: Thank you, Commissioner. Mr Duffy, you gave some evidence yesterday about viewing the CCTV footage. Do you recall that?

20 MR DUFFY: That's correct.

MR DUGGAN: And the effect of your evidence was that you saw Mr O'Shea and Mr Peebles leave the day room at some point. Do you recall that evidence?

MR DUFFY: Yes.

THE COMMISSIONER: We might just swear the witness in again. I do apologise, I should've saw that myself. You take an oath, don't you?

30 MR DUFFY: I did.

THE COMMISSIONER: Yes. We'll just swear you in again.

MR GREENHILL: Mr Commissioner, can I just arise, the earphones which are absolutely essential for me to perform my task have collapsed. Can I get a, can I get another one, please?

THE COMMISSIONER: Certainly.

10 MR GREENHILL: So I can hear your words of wisdom, and Counsel Assisting.

THE COMMISSIONER: I'll just raise my voice then. The section 38 declaration I made yesterday continues to apply.---Yeah.

Do you understand that?---I do.

Thank you.

20 MR GREENHILL: Thank you, Mr Commissioner.

SECTION 38 DECLARATION MADE YESTERDAY BY THE COMMISSIONER CONTINUES TO APPLY

MR DUGGAN: Mr Duffy, you gave some evidence yesterday about the CCTV footage. Do you recall that?---Yes.

30 And the effect of your evidence was that at some point, Mr O'Shea and Mr Peebles could be seen leaving the day room on the footage.---Yes.

And you're not sure which one beckoned to which, but one waved the other towards the office.---Yeah.

Is that right?---Yes, that's right.

You didn't say anything about Mr Taylor. Do you recall seeing him on the CCTV footage?---I don't really, no.

40

Was he with, you don't recall him being with or leaving with Mr O'Shea or Mr Peebles?---I don't really remember that, no.

All right. Can I take you to Exhibit 45 at page 101, please? You see this is an incident report from Simon Graf?---Yeah.

Did you see that document in 2014?---No, I didn't. That document was shown to me at the compulsory hearing that I was at, at 6 March.

This year?---That's correct.

That was the first time you saw this document?---Yeah, the first time I saw, seen this report. Yes.

If you'd like a chance to read it, please do.---Yeah.

10 There's no mention of you in that incident report, is there?---No there's not.

And, in fact, there's no real mention of any use of force in that incident report, is there?---No. No. There's not.

There's a reference in line 2, to attending cell 208 to search the inmates and cell. Do you see that?---Yeah, that's correct. Yeah. Yeah. I see that.

There wasn't, that wasn't the reason for attending the cell, was it?---No, it wasn't.

20 You had a conversation with Mr Graf, I think you gave evidence yesterday, when you left Unit 5 and you were walking towards, you were going back to Unit 3 and you told him that Tex Walker had hit an inmate. Do you recall that evidence?---Yeah, I do.

And you also gave some evidence that Mr Graf had expressed some concerns to you about the reporting process?---At the time definitely he did, yes.

30 And he was there, wasn't he, when you said words to the effect, "Right, are we doing some reports?" And Mr Walker said - - -?---He was in the vicinity. I'm not sure whether he heard that or not.

All right.---But we were in, we were all walking together. I thought that he would have heard that but I can't say that he did or he didn't. I do know that he did agree with me that that's what needed to happen at the time, the reports needed to be done.

40 All right. And did he express to you that he was uncomfortable about the reporting process?---Right from the start, yes.

And did he explain why he was uncomfortable?---No, not really, but I – no, he didn't need to explain why.

Why do you say that he didn't need to explain why?---I wasn't the only one that didn't really think that the tactics these guys used were appropriate. Put it that way. It wasn't just me, it was a lot of staff. So it was no secret that, that, that I felt that way and other staff felt that way as well.

But specifically in relation to the reporting process, did he express to you that he was uncomfortable about the reporting process?---Not in as many words, no.

10 Have you ever had a discussion with him about the report that he provided on 19 February, 2014?---Not, not essentially. Look, it's no secret, I'm not going to keep it a secret, Mr Graf's one of my best mates, we see each other all the time, we work together all the time and this has been discussed regularly since the event. I've never kept any of it a secret. It's been an open subject to me to anybody that wanted to talk about it. So yeah, we would have had discussions in the last four years about what went on.

All right. And I took you a moment ago to the fact that you're not mentioned in Mr Graf's report.---No, I'm not.

And there's no mention of a use of force in that report.---No.

20 And there's a reference to a search and your understanding is that that was not the reason that you attended the cell?---That's right.

Have you discussed those matters with Mr Graf at any stage?---I never discussed exactly what was in their reports. I heard versions of what they'd put in their reports after the event but I was unaware of exact what was in those reports again until they were shown to me by ICAC.

What did Mr Graf tell you he put in his report?---He didn't really say that he -- basically that he'd removed the inmate from the cell, which is exactly what he did.

30 But your impression was certainly, as I understand it at the time, that he was uncomfortable about the reporting process.---Yes.

You accept that. And you're very good friends.---Yes.

40 And has Mr Graf explained to you why those three matters that I've asked you about, the fact you're not mentioned, there's no mention of the use of force, and there's a reference to the search, has he explained to you why he put those in his report?---He was told not to include me in the report, I know that. I can't tell you - - -

MR MADDEN: I didn't hear that, I'm sorry, Commissioner, I just couldn't hear that, what he said.

THE COMMISSIONER: He was told - - -

THE WITNESS: He was told not to put my name in the report.

MR MADDEN: Oh, thank you.

THE WITNESS: As far as I'm aware he's told me he did have my name in the report, obviously that came out yesterday anyway. I can't tell you exactly when he told me that, it was over some period of time between when it happened and obviously now.

MR DUGGAN: All right. So what did he tell you about that?---That he wished he had have left it there. That he wished he'd left my name there, but - - -

10

But more in relation to being directed I think you said to write or to leave out something in his report?---It was more that he was going to include me but was told not to. And, and it was very, it would have been in a, just a general conversation about - - -

THE COMMISSIONER: Did he tell you who had told him not to include your name?---Tex. Mr Walker, yeah.

MR DUGGAN: And did he mention – when was that conversation, do you recall?---I don't, I couldn't tell you.

20

And did he mention anyone else other than Mr Walker?---No.

And did he say anything else about the direction?---Not really, no.

Was the direction only in relation to whether you should be mentioned or did he, was he talking more generally?---It wasn't that, it wasn't that detailed of a conversation.

30 Did you respond at all?---I don't know what I said really, no.

You don't recall exactly when the conversation was, but - - -?---I don't. And look, honestly, it could have been since this stuff, the ICAC stuff started. It was after the departmental investigation.

40

Right. And it was certainly well after - - -?---Up until the departmental investigation I really spoke nothing about this to anybody. Let me rephrase that. I didn't go into detail about reports and such with anybody. The incident itself, yeah, I discussed that a lot. My report I actually showed heaps of staff.

THE COMMISSIONER: Why did you do that?---Because when I was being labelled as the give-up and the dobber I wanted people to know what I'd put in my report.

Who labelled you as a give-up and a dobber?---Oh, a few people were, were talking about it.

Well, think very carefully. You're on your oath, who told you or suggested - - -?---It was becoming, it was becoming a rumour around the gaol, and I actually confronted Mr Elliott and showed him specifically, sorry, Mr Duncan, and showed him my report. Actually that took place in the locker, in the locker room, because I was starting to get the impression that he felt I was trying to do something untoward.

Sorry, Mr Duggan. You go ahead.

10 MR DUGGAN: That's all right.

Did you respond to Mr Graf when he said that he'd been directed by Mr Walker to leave you out?---It was something that I kind of knew it had happened anyway, I knew that's why I was told not to write a report in the first place.

Didn't you say something like, why did you listen to him or - - -?---I don't remember any, any, anything of the details of that, no, I don't.

20 So he didn't tell you, to the best of your recollection, he didn't tell you why - - -?---No.

- - - Mr Walker directed him to do that?---No. Look, the other thing that, that would have been, that I would have thought at the time too, I mean, look, I'd seen that intel report and thought that what they were going to do was probably not report it as the correct thing that happened, but the other thing, as far as being involved in the IRM, quite often they try and have the, you know, not too many reports, but that would have been the only reason I would have thought that they, they wouldn't have wanted my report, other
30 than the fact that they thought I'd say something different.

All right. And the conversation that we're talking about, we're talking about it in isolation, so it makes little sense if Mr Graf says, oh, I left you out, because you were clearly there. You accept that, that at the moment we're talking about that conversation in isolation.---Right.

But why, why is it an issue, why would Mr Walker tell him to leave you out of the report?---Well, I'm pretty sure Mr Walker stated yesterday that, or the other day that he knew I would tell a different version of events.
40

And was that your understanding at the time?---Yeah, most definitely.

And did Mr Graf, did you have a discussion with Mr Graf about your understanding as to why you were left out?---No. And as I said, like, we didn't really discuss that until after, well after the event, that was after the departmental investigation into it.

All right. Did Mr, so Mr Graf didn't tell you why Mr Walker had told - - -
?---No.

- - - him to leave you out?---No.

Can I take you now to page 95, which is the IRM. Do you have access to an
IRM if you want to have a look at it?---Yeah, yeah.

On the OIMS system?---Yeah, yeah, I do.

10

Have you seen this, or did you see this IRM in 2014?---No. No, I didn't.

Didn't you have some interest in what might've been reported about this
event?---To be quite honest, no. A lot of people spend a lot of time looking
at these things and to me, we have a day to day job to do and once it's done
I'm really not that interested in the rest of it, once it's done. No. I had no
reason to look it, to look this up at the time, no.

20

You didn't have a reason didn't you, because you were told not to do a
report.---That's right.

And you were a bit concerned about whether the incident would be reported
truthfully. You accept that?---I was concerned that it would've been
reported at all.

Right. Well that's a reason to perhaps check the system?---I suppose you
could say that but it's not something I would do, no.

30

All right. So is the first time you saw this document when it was shown to
you in an investigation, or - - - ?---When I came here to ICAC, yeah.

All right.---Yeah.

Can I just take you to the summary? And you understand this is the IRM in
relation to the incident on 19 February?---Yeah.

40

And it says there, "User Walker, Terrence", under the summary. Do you
see that? About a third of the way down the page. Sorry, you've got it on
the screen.---User.

So, do you see the summary?---Yeah, yeah, yeah.

Under summary.---Yeah.

Now, you've been listening to some of the evidence during this hearing?
---Yeah. Yeah.

Try and put that out of your mind. Do you have any recollection as to whether you heard anything about whether Mr Walker made this entry?
---Whether I heard anything?

Yes. Was there any discussion about whether Mr Walker himself typed this up?---No, there wasn't any discussion. This is where I got, say it becomes a little bit hard. I'm finding it difficult now with all the information that I have now, the whole timeline is becoming quite a problem for me, but as far as I've got more, so much more information now than what I had. But from my recollection of the day, this was done at 1.30, about 1.30, 20 to 2.00. That's what time this, this thing was logged. At that time was the time we was, that we were upstairs at lunch waiting for Mr Walker to come back, and that's when he returned with that IR.

All right. And that's the IR that - - - ?---Yeah. That's, that's where this piece of evidence that I've, what you were talking about yesterday fitted into me when they were talking about who did this IRM.

Right.---So from what I can gather, this would've been done while I was upstairs with the other guys waiting for Mr Walker to return, and we were waiting to come, but that's why the reports hadn't been started.

All right. But you weren't there when this was typed up.---No. This was not typed up where I was present, no, but at this particular point in time on the day, we would've been in the IAT lunch room waiting for Mr Walker to return.

I understand.

30 THE COMMISSIONER: As I understand your evidence, he returned with that.---He returned, not with this, no.

Okay.---No. He returned with that IR that we talked about yesterday that said that the inmate would be subject to the search day.

MR DUGGAN: That's Mr McMurtrie's information report.---That's correct.

40 And just to go through the summary, the first line of it states that during an intel centre search, IAT were detailed by the MOS to search cell 208 in 5.1 Unit. Now, you were effectively attached to IAT at that point. Is that a correct - - - ?---Well, yeah. I was with them, yes.

Yes. And you didn't witness any - - - ?---No.

- - - detailing on that basis?---No, not at all.

And the directions to specifically look for buprenorphine, you say that to the best of your understanding, that came from Mr McMurtrie's IR?---After the event, yeah.

Yeah. And to your understanding, that's false.---Without a doubt. If you were there to do that, you would've been there with a camera before you even went into the cell.

10 All right. Have you ever had any discussions with anybody about whose idea that was to - - - ?---Again, that's something that's been a common topic at work since the event. Yeah. Once it became obvious that that's what had happened.

All right. Have you spoken to Mr Graf about that?---Not, not in any, yeah, probably in, you know, in the same sort of context as I said before.

20 And to the best of your recollection, what has he said about the IR containing the information about the targeted search?---That it was wrong. That that's not, that's not what they were there for.

When do you recall that conversation taking place?---Again, I, it's not something I, I wrote down. It was a while, it would've been a long time ago.

All right.---I mean, this, we're talking a four year period.

30 But are we talking 2014, or are we talking yesterday, or - - - ?---Up until the point of the internal investigation, I really didn't talk to Simon much about it.

All right. But he indicated to you in a conversation that the IR information about the targeted search was clearly wrong.---Yes.

Was that around the time of the investigation in 2015 or shortly after?---The internal investigation?

Yes.---Yeah. That, like I said, up until that point I really didn't discuss it that much with him, no.

40 All right. But that event, that investigation generated some discussion about this incident?---Most definitely, yeah.

Was there a discussion about why there was a need to have false information in this IRM?---No.

Was there a discussion about who was driving it?---Not that I recall as such, no.

Sorry, excuse me one minute. Now, I just asked you about the 2015 investigation.---Mmm.

Were you interviewed as part of that investigation?---No I wasn't.

And is it your understanding that you were not interviewed because - - - ?
---I was quite surprised I wasn't interviewed because I kind of was under the impression that that investigation was the result of the report that I'd submitted. I thought that that's why it was being investigated.

10

And it seems clear now that the reason you weren't being investigated is because you're not on the IRM and you're not in - - - ?---That's correct.

- - - Mr Graf, Mr Duncan or Mr Walker's reports.---That's right.

Now, this IRM refers to some still photos as part of standard centre procedure.---Yeah.

20

Do you see that in the comments column?---Yeah, I do.

And that suggests that some photos might've been taken.---Yeah. It does.

Were any photos taken to your understanding of - - - ?---No, not at all.

And you understand that Mr [REDACTED] the inmate, was injured.---I do now, yes, well I, yes, I do.

30

And it's usual procedure isn't it to take photographs of an inmate who's injured?---Most definitely.

And not just of a use of force but particularly when there's an injury.
---Yeah.

Are you aware of any reason why photographs weren't taken?---No.

Are you aware of any discussion about the fact that they weren't taken?
---No.

40

Or the fact that there's a reference here to photos existing in this IRM report when in fact no one seems to - - -?---Well, the rest of it's fabricated so why would that not be?

I understand that, but were you party to any discussion about that?---No, not at all, no.

All right.---I, basically after we left the unit I went back and ended up in another part of the gaol before lunch and had no more to do with them after, with the guys after this took place.

Is it correct to summarise it this way, that you've had some discussions with Mr Graf about this incident because you're good friends, but otherwise the others involved in the incident closed ranks and you were out?---Quite, yeah, basically, yeah. Obviously, yeah, he was probably in a situation where he didn't want to talk about it with me either. I don't know.

When you first saw Mr Graf's incident report, were you surprised by its contents?---Very much so.

10

And why were you surprised?---Because I don't believe that he would voluntarily be involved in something like this.

Is what you're saying to your understanding of Mr Graf it was out of character to put false things in an incident report?---Most definitely.

Just in relation to the comment here that, "No force was anticipated. Offender fell without any physical contact from officers," or the second sentence is - - -?---Mine's disappeared.

20

Sorry, have you got that there, on the right-hand side of the screen halfway down?---What am I reading?

Sorry, I've asked that question badly. So can you see the - - -?---I can see where you've got the cursor.

Yes. So it's - - -?---Oh, "No force anticipated," yep, yep, yep.

"No force anticipated."---Yeah.

30

And that's a question on the left-hand side of the page is "Reason use of force was not fully recorded or captured on CCTV." So you'd accept obviously that, "Offender fell without any physical contact from officers," well, that's clearly false?---That's right, false.

But the bit in relation to the excuse as to why - - -?---That is a standard answer on an IRM, if you don't, if you were there and you hadn't anticipated that that was going to happen then you don't necessarily have to have a camera, but realistically in any event that I would attend with IAT, if there was yelling, screaming and, and that sort of anger between staff or inmates or whatever, I would always film it.

40

In terms of the interaction with the inmate before you entered the cell, he was yelling, the inmate?---Yeah, he was yelling at, he was yelling at Mr O'Shea and Mr O'Shea was yelling back.

And so there would be some anticipation I expect that when you entered the cell the inmate might be non-compliant?---Yeah. Oh, yeah, there would have been on my part, yeah.

Well, there must have been, there must have been some expectation that there might need to be a use of force when you have an inmate yelling at the governor?---Well, that could, yes, to those that are, were doing it, yeah, I suppose there should have, there would have been, but as I said - - -

10 In your mind.---In my mind, yeah, but at the end of the day, it's the call of the senior that's doing it, it's, it's his role to decide what he's going to do.

THE COMMISSIONER: I think that you said before you went down to Unit 5 you were involved in searches in, was it Unit 3?---That's correct.

And was that with the IAT officers?---It was with the same guys, yeah.

All right. And were any of those searches filmed?---No.

20 All right. Were you able to observe whether any of the IAT officers actually had a camera on them?---I don't know whether they did or didn't.

Okay. Thank you .

MR DUGGAN: But you were in Unit 3 for a targeted search operation? ---Yeah.

And you'd been properly briefed beforehand I assume?---Yeah.

30 And IAT would have had a camera ready for that operation I assume? ---Oh, they, I'd assume they would, but you know, I mean there's days when they're, they're flat, you know, there's other, there is things that happen sometimes where they may not have one, but I would have assumed they would have had one.

THE COMMISSIONER: They certainly should have had one?---They should have had one, yeah.

40 MR DUGGAN: And it's not as though there's just one handheld camera in the correctional centre?---There's not, no, but sometimes what unfortunately does happen is a lot of the time they don't get charged, they don't, footage doesn't get cleared off them, so sometimes you might be limited to the amount that are actually available, but by rights there should be, we run usually two cameras on IAC.

All right. And - - - ?---When they're working.

It's not your understanding that someone pulled the Handycam out and said, "Oh, the battery's flat"?---No, no, no. That didn't happen.

Now can I leave the IRM please and take you to page 48. Now that's a document, an incident report from you in relation to 19 February 2014.

---That's correct.

And is that your signature at the bottom of the page?---Yes, it is.

10 And when did you put that signature on the report?---When I finished typing it. When I submitted it.

The date on the report is 7 December 2016. Do you see that?---Yeah.

Are you able to explain - - - ?---That's a print thing, that was when this copy was printed I'd say.

And do you have an electronic signature?---No.

20 Are you able to explain how your, this document would have your signature on it if it was printed in December 2016?---If that, this is the one that Matt Horan came to get. I printed this out at the gaol when Matt Horan came to see me before, not long before Paul contacted me.

And that was December 2016, was it?---That, yeah.

And did you sign it at that time?---I signed it at that time, yeah.

30 All right. And so when you say you printed it out, printed it out from your computer?---Yeah.

Had you kept it somewhere on your computer?---I've got all my reports on my computer at work.

All right. And so that's, this isn't kept in any, in the OIMS system or any other correctional services system?---Not that I'm aware of, no. I don't think so.

40 So you have a - - - ?---It's on my L drive, it's on my drive at work.

Which is your individual drive.---That's right, yeah.

And so you prepared the body of this on 19 February 2014?---I actually did this report on the following night.

On the following night.---Yeah. As I said yesterday, I spoke to Mr De Costa, I spoke to Mr Young.

And why did you prepare the report?---The purpose for me submitting this report was the fact that a use of force had taken place and I felt that Mr Walker striking an inmate in the face was excessive and I felt that that needed to be brought to management's attention for them to follow up. That was the sole purpose at the time of me submitting my report. I had no, I had no indication that it was going to go down the path that they've gone down. If I knew I'd be here, I think I said last time, this would've been three pages, not two thirds of a page. The main part that I wanted to cover in this report was the fact that I thought the striking of the inmate in the face by IAT was heavy handed and unnecessary. That was the only reason I wanted to, and of course to, to document the fact that there had been a use of force on an inmate.

THE COMMISSIONER: Well, you were there.---That's correct. And I felt at the time that, like I said, I spoke to some people who, sought some advice on it and at the time, that's what I needed to do.

MR DUGGAN: All right. And so I assume you didn't provide this to Mr Walker?---No.

Because he - - -?---No.

- - - told you he didn't want it.---Well, he wasn't even there the next day.

Right.---This was prepared, I wrote this report on the C watch on the 20th.

Of February?---Yeah.

And so you've typed it up on your computer?---Yes.

Did you give it to anyone?---I registered it with the dep's clerk.

So that's the deputy's clerk?---The deputy's clerk, yeah.

And who was that person in the centre?---That was Khili Jenkins.

Khili Jenkins?---Khili Jenkins.

And Khili is spelt K-h-i-l-i?---That's right, yeah.

And when you say you registered it with her, what - - -?---So she basically logs it on the, on the department's system that there's been a report submitted on that date by me. She doesn't read it, she doesn't even need to know the contents of it, she just registered it as a report that was submitted from me.

All right.

THE COMMISSIONER: Does the document itself go onto the system?
---No.

Right.---I don't – it's not something I do a lot but I was advised by Mr De Costa to do that, so that's what I did.

MR DUGGAN: And what was the purpose of asking Ms Jenkins to log your report?---So that there was a, it was approved and documented fact that I submitted a report about the incident.

10

And so where is Ms Jenkins located in the centre?---Oh, in the part of the gaol we call L Block. It's before you go into the – it's sort of between the gate and the main part of the gaol.

All right. And so she took a note of this report. What did you do with it next?---I had it in a sealed envelope and then I just submitted it to the general manager.

So that would be Mr O'Shea?---Yes.

20

And when you say you submitted it, did you, did you hand it to him, did you - - -?---No, no, it goes, just goes in an out tray.

There's, there's a - - -?---There's just a tray, yeah.

There's a tray there for any reports for the general manager, is there?
---Yeah, that's right.

30

Can I show you a document, please. We might just go to the first page of this document to orientate you and myself. Sorry, yes, so this is a document, Officer Report Form Register. Do you see that?---Ah hmm.

Have you seen this type of document before?---No.

Can I ask you to assume that this is the deputy's clerk, the deputy clerk's register to log the reports.---Right.

40

You can assume that.---Oh, this is off, yeah, this is the screen, I have seen the screen, yeah.

Yes. Is it an Excel document that you've seen?---I don't know, I just, I've seen it on the screen in the dep's clerk's office when they've been doing it before.

I understand. So if we can go to the 20 February, 2014 entry.---Mmm, oh, yeah.

Which is usefully highlighted in green.---Yeah, 21st.

So the 21st.---Yeah.

So does that accord with your recollections?---Yeah, that would be it, I'd imagine that would be it.

All right. So what's the number in the second column, do you recall?
---Sorry? What?

10 The 2-1-1-2-2. We might need to go back to the first page. So folio. I assume that's just a number for the deputy's clerk?---Yeah, I don't, no, I don't know.

And then "Duffy," that's obviously you.---Yeah.

And then do you see there, "██████████" Yep.

20 So that's obviously the inmate. And that's his MIN number I assume next to the right of that?---Probably, it probably is, yeah.

And GM, who would that be a reference to?---I imagine the general manager.

Yes, we might just check, so to whom GM. So that accords with your recollection that - - -?---Yes.

- - - on 21 February, 2014, you put your report into Mr O'Shea's tray and registered it with the deputy's clerk?---Yes.

30 Did Mr O'Shea come and see you shortly after that and say, I've read your report?---No.

Has he ever discussed that with you?---No.

And as you say, you'd assumed that in 2015 an investigation had kicked off generated by your report.---That's what I assumed, yeah.

40 Commissioner, I tender, I think I'll tender Khili Jenkin's statement which has that document that I've just taken Mr Duffy to as an annexure.

THE COMMISSIONER: Is that in the brief (not transcribable)?

MR DUGGAN: It is part of and it's on the restricted website.

THE COMMISSIONER: Is it? Okay. Well I'll mark that Exhibit 57.

**#EXH-057 – STATEMENT OF KHILI JENKINS DATED 31
JANUARY 2018**

MR DUGGAN: Thank you, Commissioner.

MR HARRIS: I'm sorry Commissioner, I couldn't hear. The exhibit number, was it?

10 THE COMMISSIONER: 57.

MR HARRIS: Thank you.

MR DUGGAN: So it's the statement of Khili Jenkin's, 31 January 2018.

THE COMMISSIONER: Thank you.

MR DUGGAN: Now, I think you might've given some evidence about this earlier but did you physically show your report to anyone?---After a period
20 of time, yeah.

And that was because you, there was some rumours circulating that you might've been a give-up. Is that - - - ?---Yeah. (not transcribable) yeah. And I, and there's some other officers I showed it to that I've known for a lot of years, just more so to say, you know, because it had been discussed, the event had been discussed so it was like, this, this is my report. I, I didn't find any need to keep it a secret.

30 You were really wanting the truth to be known.---Most definitely.

Did you show it to Mr Duncan at any point?---Yes.

When did you show it to him?---I showed it to Mr Duncan in the locker room at some period of time. He didn't really want to read it, but I asked him to read it to clarify what I had written. As I said, I didn't see the actual event as any more than an excessive mishandled use of force, is what I saw it as, at the time.

40 And in fact your incident report states that Officer Walker retaliated with a strike.---That's correct.

Which would suggest that it was done in self-defence.---It's one of those things, what was going on in his mind, what was going on in the inmate's mind, I don't know. From where I stood, the inmate lifted his hands. Was he going to strike him? Maybe, maybe he wasn't, I don't know.

A response to a provocation at least, if not self-defence.---That was his call but at the end of the day I think it was the wrong one.

What did Mr Duncan say when you showed him this report?---Not a lot, really.

So was the purpose of showing him really to - - - ?---Just to clarify what I had actually reported.

So that the rumours wouldn't get out of hand, he could have the facts.
---Yeah, yeah. Stories generate pretty, pretty quickly in the gaol.

10

Now you gave some evidence before, yesterday, about having some concerns about the reporting process and you spoke to Mr Turton.---Yeah.

What rank was he in 2014?---SAS, I think.

All right.---He might've been an AS, he was executive staff at that point.

All right.---I'm pretty sure he was an SAS at that point. Yeah.

20 And he was someone whom you respected?---Yeah. I, yeah, I've known Phil since I very first started at Parramatta.

All right. And you called him, did you, to tee up a meeting?---No. I just waited until I, until we were working in the same sort of area and I, I had a yarn to him about it.

Do you recall having a conversation with him in the tower?---That's right, yeah. We were on that day and he came up to the tower to talk about it, that's right.

30

So did you ask him to come and meet you in the tower?---I'd asked him to come and see me when he had a chance, yeah.

Okay. And you told him that you were struggling a bit with what to do with this [REDACTED] issue.---Yeah.

Did you tell him you'd done a report, do you recall that?---That may have even been the following, that may have even been the following day. It might've been on 21 before I wrote my report. As a matter of fact, yeah, it probably was because I was on the afternoon shift the next day, that's why I would've been in the Tower.

40

Right.

THE COMMISSIONER: Is that the control room, or - - - ?---No, it's above the control room.

Okay, thank you.---Yeah.

MR DUGGAN: So was this the case, you done your report - - - ?---No, I don't think I had done my report at that stage. I did it that night.

I understand.---Yeah. So like I said, that would've been when I was on the C watch the next day and he would've come to see me then.

All right. And you told Mr Turton that you were there in the cell?---Yeah. Yeah.

10

What did Mr Turton say to you, do you recall?---Same thing as Mr De Costa, yeah, "you've got to do the right thing, you've got to", you know, "you've got to report it." Which I knew, I guess it's more I was looking for some support because to turn around and say that one of your colleagues has done the wrong thing like that, it's a fairly big thing to do, even though it's the right thing to do.

So, did you tell Mr Turton one of your colleagues had done the wrong thing?---Yeah, yeah, I explained him the situation. Yeah.

20

And to the best of your recollection, what did you say?---Word for word I couldn't say.

What was the substance of it?---It would've been basically what I said in the report and basically what happened, that we'd gone in there and the inmate had, you know, been, been struck to the face and that I didn't think it was necessary, it was over the top. It would've been that sort of context, and what's, you know, and it would've been along the lines of, you know, what sort of backlash am I gonna get from everybody when I do, do the right thing.

30

Did you say anything about Mr Duncan being over the top when he came into the cell? Do you recall that?---I don't know. I don't, I don't know. Not, not that I specifically remember. No.

You don't remember saying anything about seeing Duncan driving his knees into the inmate or anything like that?---No.

Did you say anything to him to the best of your recollection about the IR? ---He told, I do know, Phil told me at one point that he was told not to have anything to do with the IR, oh, the IR or the IRM?

40

No, no, the IR. So, Mr McMurtrie's - - - ?---Yeah, well I probably did tell him about that. Yeah, at the time.

Do you recall what you said about Mr McMurtrie's IR to Mr Turton?---That I'd figured that the paperwork had been generated after the event, I would've told him that.

All right. And did, had you drawn some conclusion from that because it was generated after the event, as to whether it was true or false?---As to what, whether what was true or false?

The information in the IR, Mr McMurtrie's IR.---I had no doubt that the information was false.

10 And did you tell Mr Turton that in the tower?---Yeah, yeah, and I, yeah, I probably did. I certainly didn't think they were going to report the incident in the manner it should've been, it was obviously going to be some misrepresentation of what took place.

If not on this occasion, did you have a conversation with Mr Turton at some point about the fact you had done a report?---Yeah, I told him I'd, once I'd done it I told him I'd done it. Yeah.

20 And did you, did you have any discussion with him about how to register the report or how to bring it to anyone's attention?---No, I don't think so.

Did you tell him that you'd taken it to the deputy's clerk?---I may have done, yeah, I may have told him I'd done that. Yeah.

All right. Now I've been asking you about your report and about Mr McMurtrie's IR. What about the IRM? Did you have any discussion with Mr Turton about that?---Mr Turton had told me that he was told not to have, not to do the IRM.

30 Mr Turton was told not to do that?---He, I'm sure, yeah, he told me that he was, he was told he wasn't to do the IRM, that Mr Walker was to do it.

And who was he told that by? Did he say?---I do believe he told me Mr Peebles told him that.

All right. And was this in the same conversation or a different conversation? Do you recall?---I can't be a hundred per cent because again, Mr Turton is someone I talk to a fair bit.

40 All right. So you would've had more than one conversation with him about this issue at the time?---Yeah.

But the conversation you've just referred to was around February 2014. What expectation did you have, what did you think would happen when you lodged your report?---My intention for the report being lodged was that it would be investigated by management as an excessive use of force. That's, at the time of writing it, all I really thought had taken place.

Did you think someone senior might come and speak to you about it?

---I would have thought so.

Did you have concerns that nobody did?---I kind of, I was surprised that it took as long as it did but then like I said, once the other investigation started I figured that's what it was.

It was obviously playing on your mind in terms of wanting to get the truth out, because you've gone to the trouble of having the deputy's clerk - - -?
---That's right.

10

- - - lodge this report, which is not standard procedure, is it?---That's not really that big a deal, but the rest of it, just the fact of reporting it - - -

But it was, you wanted a record that you had lodged a report.---Yes, I did, yeah.

And that's why you went to the deputy's clerk and asked them to log it.
---That's what I was advised to, yes.

20

And I assume from that that you must have had some concern as to whether that report would see the light of day?---Yeah, that was suggested, yes.

That was suggested?---Yeah.

By whom?---By the people, by, by the people that told me to register it.

Oh, I understand. That you better log it otherwise it won't see the light of day. Is that - - -?---Oh, it could disappear.

30

Is there some way to make your job easier as an officer of Correctives to be able to log such a document like that centrally, would that assist? As in to someone outside the centre?---I don't really know.

But is that - - -?---I suppose so, if it was more like a, if it was more like an IRM sort of situation, but that starts to make day-to-day reporting more complex I suppose.

40

But is the difficulty that you faced that you were having to report up the chain to senior officers, for example, Mr Walker, and for example, the general manager, who had some role in the incident that day?---Yes.

That was a concern of yours, wasn't it?---Sorry, I don't quite get that.

So if you had to provide that report to someone who didn't work in Lithgow Correctional Centre, then you wouldn't have had such a concern about what would happen with that report?---Well, I suppose not.

I don't have any further questions for Mr Duffy at this point, Commissioner.

THE COMMISSIONER: Just one matter, Mr Duffy. We adjourned at 4 o'clock yesterday afternoon and we came back at 10.00. Did anyone, any Corrections staff contact you overnight?---No.

THE COMMISSIONER: Mr Madden, do you have any questions?

MR MADDEN: Oh, just a couple of very short ones.

10 On the day in question, 19 February, do you know that Mr Peebles was not the manager of security that day?---I've been told that. At the day, on the day I didn't know that, no.

All right. Do you now know that Mr Taylor was?---Yes.

Rightio. If I use the description, the foyer area of the unit in the vicinity of the cell, the cell that was searched, can you picture in your mind what area that would be, the foyer area of the - - -?---The foyer area?

20 Yes.

MR DUGGAN: I think it's been referred to as the day room.

THE WITNESS: Oh, okay.

MR MADDEN: All right. Say the day room then.---Right.

Rightio. You know the area I'm - - -?---I think I know it, yeah.

30 - - - I'm ineptly trying to describe to you?---Outside the cell.

Rightio.---Yeah.

The fact is that when you went into the cell, you don't know where Mr Peebles was, do you?---He was in the day room at the time when we went in.

40 Right.---So when we got there, him and Mr O'Shea were there, Mr O'Shea and Mr Taylor were at the cell door.

Mr Peebles left well before you went into the cell.---I believe he was there when we first got there as we were going into the cell, yeah.

Okay.---And the reason being is, like I said, I did watch the footage afterwards and you can clearly see him there and leave with Mr O'Shea whilst we're in the cell, about halfway.

Whilst you were in the cell.---Whilst we were in the cell.

Rightio. All right. And I didn't quite hear your evidence, I'm sorry, but you said something about, and I think this is what you said, about the IRM, you said you thought you were told by somebody, or you had a recollection that someone had told someone that Mr Taylor was to fill the IRM out. What, can you just explain? I couldn't quite hear you, I'm sorry.---I didn't say that at all.

Didn't you?---No.

10

Sorry. Rightio. You gave some evidence about someone told you that Mr Peebles had said that - - - ?---Mr Turton told me that he'd been told by Mr Peebles not to do the IRM, that Tex was to do it.

Right.---Yeah.

Okie doke. Right. Thank you, Commissioner.

20 THE COMMISSIONER: Thank you, Mr Madden. Mr Willis, do you have any questions?

MR WILLIS: I just have, I just have a couple.

THE COMMISSIONER: Thank you.

MR WILLIS: Mr Duffy, you've given evidence about viewing the CCTV. ---That's correct.

30 When did you look at that?---I looked at it I'm pretty sure, it may not have been that afternoon, it might have been the next afternoon. I'm not sure. It was within a short time, like, the couple of days over the, when I was doing my reports and such.

So this report of yours that I think is now an annexure to Exhibit 57, you've been shown that in your evidence. Do you follow which report I'm referring to?---My report, is that what you're saying?

40 Yes.---Yes, that's right. That report, do you know whether you had viewed the CCTV before you completed that report?---I don't know whether I had or hadn't.

Right. Do you know whether you had viewed the CCTV before you gave the, gave it to the deputy's clerk to be registered?---I probably had.

Right. Because that was a couple of days after, wasn't it?---That's correct.

You obviously thought that it was, I'm sorry, I withdraw that. Why did you watch the CCTV?---I initially watched it because there was something to do with the dog being close to the inmate.

Right. You made no comment about that or you didn't touch upon that subject in your report, did you?---There was no need for that to be put in the report.

10 Okay. You obviously thought that it was important that Mr O'Shea was in the vicinity when you entered the cell because you included that in your report.---Yeah.

And was that something that you specifically, specifically looked for in the CCTV to make note of that?---I didn't really need to look, it was clear as day in my head what had happened.

20 Yeah. In your report, as I understand your evidence, you say that you went into the cell and when you came out of the cell, you couldn't see Mr O'Shea in that day room area.---No, they'd left by the time we come out of the cell. That's right.

Did you think it was significant that Mr O'Shea had left the day room area and when he might've left that area?---I thought it was unusual because, as I said, initially I thought we were there to get him out so that Mr O'Shea could sort of finish yelling at him.

30 Well, my question to you was, did you think it was important to note at what stage Mr O'Shea left the day room area when you watched the CCTV?
---Not really because Mr O'Shea didn't have anything to do with the use of force. My report was submitted to basically let Mr O'Shea and Mr Peebles know that the use of force that had taken place was more excessive than it needed to be.

But you don't say that in your report, do you?---I don't need to say that in my report, sir.

Well, you don't say it in your report, do you?---I don't need to.

40 All right. Can you answer my question? You don't say it in your report, do you?---No, didn't say that in my report. I said that he struck the inmate in the face and that is a decision for the managers to make a call on whether it was excessive or not. That's not up to me.

You also don't say in your report anything about watching the CCTV and you noted when Mr O'Shea left the day room area, do you?---That, at that particular point of time, none of that was relevant because my report was an internal matter. I, if I had have expected, as I said at the start to be here, that

report would have been three pages, not two thirds of a page. I didn't really see the relevance of where the managers were in the day room at the point of time when I wrote my report because it was purely to convey what had taken place in the cell.

Yes. Thank you, Mr Duffy.

THE COMMISSIONER: Thank you, Mr Willis. Mr Dunne, do you have any questions?

10

MR DUNNE: No, Commissioner.

THE COMMISSIONER: Mr Greenhill?

MR GREENHILL: Thank you. Mr Duffy, you're a good friend of my client, Mr Graf, aren't you?---That's correct.

How long have you worked with him, in the Corrective Services system?

---Oh, I'd say it'd have to be nearly 10 years.

20

And has it been on a regular basis?---Yeah.

Daily or - - -?---Daily.

Daily basis. At the one institution?---Yes.

At Lithgow?---Yes.

And you've seen him perform his duties throughout that period of 10 years?

30

---We were on the IAT together, we worked on the same team together for that period of time.

Now, appreciating that you're a good friend of his, are you of the opinion that he's proved himself, other than in relation to this matter, to be a conscientious officer?---Mr Graf's one of the most highly respected officers and seniors that we had at the gaol up until the time that he left to go to another unit recently.

Now, you know that he submitted a false report?---Yes, I do.

40

Do you find that completely out of keeping with the character of that man that you know?---Yes, I do.

Are you of the opinion that he must have been subject to some pressure to make that report?---Without a doubt.

And how long have you known Mr Walker?---Since the eight years that he's been at Lithgow, yeah.

Have you noticed in recent time he's become an aggressive officer?---I always thought he was sort of fairly that way anyway. It got worse when he had his health problems.

And have you seen him being aggressive or angry with fellow officers?
---Yes.

10 Could you give is an example of what you've seen- - -?---Oh, he was just - -
-

- - - in that regard?---Often we'd be going somewhere and he'd yell at other staff to get out of his way, he regularly put staff down. He was just unpleasant to be around, especially around that time when he was going through that.

20 Roughly what period of time are we talking about?---Well, it was a few, three or four years when he was going through his marriage breakup and such and around this time too, but - - -

On the day, the 19th, that you went into the cell of the two inmates, what was his, what was his attitude like on that day?---Well, he was fine in the morning. I didn't, yeah, he'd been fine all morning. And as I said, it was, it wasn't really anything out of the ordinary as far as the use of, what happened except that it was, it was not done the way I would have done it. I don't think we should have gone in there at all, really. But, anyway.

30 But having gone in there, you saw that he was a bit heavy-handed, did you?
---He gets, he escalates very quickly. Yes.

What, you mean he resorts to bad temper?---That, yeah. Yes, he, his temper gets up.

And - - - ?---He becomes aggressive.

Is he a fear, does he cause fear in that situation?---I suppose he would to the people that he's directing it at.

40 Now, you've told the Commission how when Mr Walker came back to where you were, Mr Graf appeared uncomfortable with the situation.
---Yeah.

Correct?---Yes.

In fact, I think you told the compulsory hearing that he was very uncomfortable with what was going on.---Yes.

But yet he succumbed to the pressure. Do you find that strange?---I was surprised, I've got to say I was a bit surprised that they got over him, yeah.

Has he expressed his regrets to you for what - - - ?---Since then, yeah.

Since then. What's he said or done?---Just that he wish he hadn't have let them pressure him that much.

10 Now during the time that the investigation in this matter has been ongoing, have you worked with him?---For a little while, but he went to Dog Unit, so, he's gone to the Dog Unit, he doesn't work at the gaol anymore so since then, that was about two, three months ago.

Yes. Now, if you just bear with me, when you saw Mr Walker come back to where you and Mr Graf and the other officers were, according to my shorthand note, he said to you that he didn't need you to report because you were never there.---That was earlier in the day that he told me that.

20 Earlier in the day.---Yeah.

All right.---That was straight after the event that he told me that.

And you said something to the effect, "That's not fucken happening."?
---Yeah, that would've been something along the lines of what I would've said, yeah.

30 Right. Now, it wouldn't be, when the incident with the prisoner actually occurred in the cell, Mr Walker must've known that you were assisting him. Is that right?---Well, I would've, yeah, I, yeah, he would've known that I was assisting him.

All right. And it wouldn't be correct for him to express a belief that you weren't in there, would it?---No.

That would be a lie, wouldn't it?---Yes, most definitely.

And at no time has Mr Graf suggested to you what you should say in the witness box?---Most definitely not.

40 And you've been telling the truth here?---I have.

And during your compulsory examination?---All the time.

And to the interviews by the officers during record of interviews?---By everybody. Everybody I've spoken to.

Thank you, Commissioner.

THE COMMISSIONER: Thank you. Mr Harris?

MR HARRIS: Commissioner, thank you. All right. Mr Duffy, my name's Harris, I'm representing the interests of Mr Taylor. Yesterday afternoon when you gave your evidence you said to this effect, that in the day room, Mr Peebles, Mr O'Shea and Mr Taylor were present. Do you - - - ?---That's right.

10 Yeah, that's right. And you've since spent considerable time here looking at your incident report that's page 48 of Exhibit 45. You're welcome to ask for it to be on the screen, but would you agree that your incident report does not include the evidence you gave us yesterday, which is that Mr Taylor was present in that office?---I don't think I mentioned Mr Taylor in my report, no.

No. No. I can assure you, I looked and I'll be corrected but it's not there. You've also told us, you told us yesterday afternoon and I think again today, that there was yelling at the door of cell 208. This is before any of the IAT had gone in.---That's right.

And you said yesterday Mr Taylor was standing at the door.---That's right.

But that's not in your incident report either, is it? If you'll accept from me that - - -?---Yeah, I'll accept that it's not.

Yes. All right. You gave evidence yesterday afternoon, this is my note, I haven't got the transcript before me, "I think it was Mr Taylor who said to get the prisoner out of there," meaning out of cell 208.---Yeah.

30 And you said shortly after that in your evidence, "I think Mr Taylor opened the grille."---That's correct.

Could you be wrong about that recollection?---Look, I could be wrong about that. Maybe, maybe Mr Walker opened the grille, but at the time Mr Taylor was standing there as well.

But again, that's not in your incident report, is it?---No, no.

40 All right. In fact could I put it to you this way, your incident report contradicts your evidence yesterday, and that's in this specific regard, when you said yesterday, "I think it was Mr Taylor who said to get the prisoner out of there." And I'll persist if I may by referring to your incident report, and it's about halfway through it there.

THE COMMISSIONER: Mr Harris, we might just put it on the screen if that's okay.

MR HARRIS: Yes, I think it would help the witness and probably all of us. But what I'm saying is that your evidence yesterday to the effect that it was Mr Taylor who said to get the prisoner out of there, that evidence is in fact contradicted, if you care to look at the first big paragraph of your incident report, towards the end where it says, "In the office was general manager, Mr John O'Shea, and manager of security, Mr Brad Peebles. Mr O'Shea directed us to cell 208 and asked us to remove inmate [REDACTED] from the cell." Would you accept that is contradictory to what you said yesterday, that it was Mr Taylor?---Maybe I could clarify if you want me to.

10

Well, I think it would help, yes.---Okay. Like I did say, my reason for writing this report in the first place was purely to advise that the inmate had been struck by Mr Walker. The positioning and where management were at that particular point in time were of no real concern to me, it was more a generalisation that we were there.

20

Yes.---As I said, if I knew I was going to be here in four years' time, this page, sorry, this report would be three or four pages, it wouldn't be two-thirds of a page, sir. It was a generalisation to say that these guys were present. I didn't think that it was even relevant at the time that Mr Taylor was there. He'd made the radio call to have us there. I didn't think he was required in the report. That's the only reason he's not there. But as far as what you're asking and if you're trying to suggest to me that Mr Taylor wasn't there, he was most definitely there on the day, but I did not see the significance of putting him in my report.

30

No. But you'll agree, don't you, that your report effectively says it was not Mr Taylor who said to get the prisoner out of there, doesn't it, because it says someone else - - -?---Yeah, it, it, yeah, okay, yeah, sure, that's what it says there.

Yes. Thank you. And just in relation to that viewing of the CCTV, and I think in relation to Mr Willis, I think you said you probably had viewed the CCTV prior to registering your incident report with Khili Jenkins.---Yep, yeah.

40

But it would be clear, or I'm sorry, it would be reasonable to assume that you saw nothing in the CCTV that caused you to alter your incident report, did you?---No, no.

No.---Not at all.

All right. I think there was a question earlier this morning from Counsel Assisting when we got underway today to the effect that did you see Mr Taylor on the CCTV, and my note of your answer was, "I don't really remember that, no."---That's correct.

Mmm.---I don't really remember looking and seeing Mr Taylor on there, no.

All right. And the CCTV area I assume, it covers, and, and forgive me - - -
?---Unit 5 day room.

- - - Commissioner, it covers 5.1 and the office area, doesn't it?---Yeah.
Yeah. I'm sure if he was, he would've been on there but again I didn't
specifically notice, no.

10 No. And can I just ask again, could you be sure then as to the time Mr
Taylor did actually arrive in 5.1 Unit generally?---The time?

Yes. For example - - - ?---I'm not even 100 per cent sure of the time that the
incident took place.

20 No, I don't, I, yeah, I should, I'm not asking you about the time on the clock
but the time in relation to the sequence of events. Is it not possible that in
fact Mr Taylor arrived after the IAT had gone into the cell?---No. What
you're asking me is when I got there, Mr Taylor came down the day room
with Mr O'Shea, Mr Peebles and Mr Walker, and Mr Taylor was standing at
the door beside Mr O'Shea while the yelling was going on.

Commissioner, I thank you, and thank you Mr Duffy.

THE COMMISSIONER: Do you remember what Mr O'Shea was saying?
---Not really.

No, okay.---He just, he just yelled a lot. Yeah.

30 Okay. Mr Eurell.

MR EURELL: Thank you, Commissioner. Sir, I represent the interests of
Mr Elliott Duncan.

THE COMMISSIONER: Yes.

MR EURELL: Can you just confirm some background for me, if you will?
The incident occurred on 19 February 2014?---That's correct.

40 You say you drafted or commenced drafting your report on 20 February
2014?---That's right.

You believe you registered it on 21 February 2014.---Yes, that's what the
register says.

And the report that is actually at page 48 of the brief, the one that we've
been shown has a date of 7 December, 2016?---Yeah, that's right. It's a
print that was printed later.

Right.---That's a print that was printed off by Matt Horan, one of the departmental investigators.

So how does it come about that the date changes, can you just explain that?

---It changes on the date you print it.

Right. So it auto-populates or something, does it?---It must do, yeah.

10 Right. It's not a Word document that you've saved to a computer?---No. I don't know.

Do you know what I mean by that?---It's just, sorry?

Do you know what I mean by that question?---Not really, no, it's just a - - -

You know Microsoft Word?---Yeah. Basically.

20 A program that you type reports and stuff on.---I don't know if it's a Word document or a PDF, I'm not sure what it is.

Okay. The next time, is it the case that the next time that you recorded anything about the event of 19 February was when you were interviewed on 20 July 2017?---I don't understand what you're asking.

Were you interviewed departmentally on 20 July 2017?---Not by the department I wasn't.

30 No?---Yeah, by Mr Horan at the gaol, he came to see me to get that report. Yes.

And sorry, it might be that I just don't understand the procedure. You questioned whether or not that's a departmental interview, how did you understand it?---Yeah, it, I suppose. Yeah.

It was an internal interview, it was investigators from within Corrective? ---Yeah, yeah, he just said, it wasn't even an interview, he just came and turned up at the gaol and asked me if I had this report, which I was told I had to supply for him so I did.

40

So you didn't have any pre-warning?---No.

All right. I think you said you were then interviewed again on 2 August 2017?---Yeah, I think it was about then.

Okay. And then if I understand what's been said this morning, the next occasion that anything was said about these events was 6 March 2018 when

you attended this Commission as part of a private examination.---Yeah, that's right.

Other than the report that you authored on 21 February 2014, are there any other records that you've authored about those events of 19 February?---No.

I expect the answer to be no. If this is confusing - - - ?---Yeah.

10 - - - just, just follow. You've only written the one report at any point in time about these events.---Yes.

And I think you gave some evidence at the beginning of this morning that you've now, some four years - - - ?---That's right.

- - - after the event, got a lot more information than what you had previously?---That's right.

20 And do I take you to mean that now, as you sit there and give evidence to this Commission, there's a process of reconstruction involved? That is you are trying to piece together what has happened from fragments of your memory and other records that you've seen?---Yeah. I guess so.

And you would agree, wouldn't you, that your memory of certain conversations and words that were spoken back on the 19 February, 2014, suffers to some extent by the lapse of memory that naturally occurs to all of us with the passage of time?---Sure.

30 And you would agree that, is it fair to say, that you wouldn't be confident about which persons who were present in the cell on 19 February said what words?---Oh, no. I don't know. No, I wouldn't agree with that because there wasn't a lot said.

Did you not give some evidence just a short while ago, I think in answer to Mr Harris, that you couldn't remember what Mr O'Shea was saying? ---Yeah. He was yelling and just yelling general - - -

MR HARRIS: Yes. If it assists, I think it was a question from the Commissioner.

40 THE COMMISSIONER: Yes, it was.

THE WITNESS: Yeah. It was just yelling and just, and that, yeah.

MR EURELL: My apologies.

THE COMMISSIONER: Don't worry.

MR GREENHILL: His memory's let him down.

THE WITNESS: I can see where you're going. No. I don't specifically remember what Mr O'Shea was saying to the inmate at the time because there was a lot of noise outside the cell. As far as what went inside the cell, yeah, I have a fair idea of what was said because I'm pretty sure I know where you're going.

MR EURELL: But when you say you have a fair idea - - -?---I know what was said in the cell.

10

At the time that Mr Duncan entered the cell, you had Mr [REDACTED] in a category 4 leg lock, is that right?---I've never heard of that term in my life.

No?---No. I figure, like, a figure 4 is, maybe that's what you're talking about.

A figure 4?---Yeah. Okay, yeah.

20

What is a figure 4 leg lock?---Oh, it's just a, it's just a method of restraint that the department use.

Can you tell us about the method?---Well, you basically, you're behind the inmate and he's laying face down and you, you've got his legs in the shape of a 4. That's pretty much it.

So, you bend one over the other?---That's correct.

30

It's sort of a, is it, is it a form of pain compliance?---It can be if it needs to be, yeah.

So that if the inmate isn't following verbal directions, in that position – the figure four leg lock – if you need to, you can apply a degree of force to bring the prisoner under control?---That's correct.

And can we take it, from the fact that you were doing that in the cell, that Mr [REDACTED] was not complying?---At that point in time, yeah, that's correct. He wasn't complying at the time.

40

And that is the time that Mr Duncan came in, is that right?---That's right.

And he tripped as he entered the cell?---Correct. I believe that's what happened, yes.

And up until the time that he had come in, were you and/or Mr Walker saying things to Mr [REDACTED] such as, "Stop struggling"?---That's right.

Or, "Comply"?---Yes.

So, even if a person was standing outside the cell and couldn't see what was happening, they would be able to hear, from what you and Mr Walker were saying, that there was a prisoner who wasn't following your instructions?
---Yeah, generally I would say, yeah.

10 And at the time the Mr Duncan entered the cell, is it fair to say that what was being said by yourself and Mr Walker would have indicated to anybody that was listening that there was a problem?---That we were still trying, we were trying to restrain the inmate, yeah.

So, Mr Duncan came in and he tripped, I think, and ended up being able to place some weight on Mr [REDACTED] He fell over on top, he fell off of the lot of us.

20 And then, had he not tripped, is it the case in any event that a not uncommon measure for trying to bring a struggling prisoner who's not following verbal commands under control, to place body weight, for example, on top of them?---Yeah, yeah.

And is that what is referred to by Correctives as a form of fatigue control, as opposed to pain control?---I've not heard of that.

The purpose being to, the prisoner ultimately will fatigue and simply not have the - - -?---I've never heard it referred to like that but - - -

30 Is that a purpose of it?---Like I said, I've never really had anyone make reference to that sort of thing. Yeah, if you put body weight on someone, it's going stop them wrestling. Pretty much.

And it's the case, isn't it, that – as you described in your report – that that was the extent of Mr Duncan's assistance to you and Mr Walker?---That's correct. That's correct.

Right. Thank you, Sir. Thank you, Commissioner.

THE COMMISSIONER: We might just take the morning adjournment.

40 **SHORT ADJOURNMENT**

THE COMMISSIONER: Now where were we? I might just ask, apart from Corrective Services, who else would like to ask some questions? I think Mr Dunne has already indicated he doesn't. Okay. Mr Brasch?

MR BRASCH: Yes, just a few. Thank you, Commissioner. Sir, I appear for the Commission of Corrective Services. I just want to ask you a few

questions. You mentioned the printing out of your incident report and provided it to a Mr Horan, Horan.---That's correct.

And that was in December 2016.---Yes.

And you're also aware that there had been a departmental investigation some time earlier in about 2015?---Yeah, that's correct.

10 And so the circumstances were that Mr Horan asked you for that report, or your incident report, after you understood that the internal, or departmental investigation had occurred in 2015. That's correct?---That's right.

And that was the first time that you've in fact been – I withdraw that. Mr Horan approached you in a somewhat informal sense in that he just asked, he asked for the report.---Yes.

That's right.---Yes.

20 And you readily gave that to him?---I was happy to supply that report, yeah.

And that was the first time that you'd been actually asked for that report from internal investigators, departmental investigators, or the like.---That's right. Yeah.

Yes. Nothing further. Thank you, Commissioner.

THE COMMISSIONER: Mr Duggan.

30 MR DUGGAN: Just a couple of quick questions, Commissioner, if I may. Mr Duffy, you gave some evidence before the morning break about the CCTV, and the issue of when Mr O'Shea and Mr Peebles left the room, and you used the word "halfway". Do you recall saying that?---Yes.

What did you mean by "halfway"? Did you mean distance, or something to do with the CCTV or what was the reference?---Sorry, that was in reference to when we, the time we were, that we were inside the cell. So, we've gone in and somewhere between, probably about halfway between when we went in and came out, they left the day room.

40 All right. Thank you. And you were asked some questions in relation to your incident report and the fact that Mr O'Shea directed you to the cell and asked you to remove the inmate. Is it possible that more than one person directed you to remove the inmate from the cell?---To be quite honest, with reference to my report and Mr O'Shea's name being there as far as directing us or, it was more so that Mr O'Shea was present and I was under the impression that we were just getting him out for Mr O'Shea to talk to him. It wasn't actually a direction as such, I just assumed under his, I mean, he was the general manager at the time, he was talking to the inmate and I just

assumed he wanted him out. So there wasn't actually a direction as such, even though I may have worded it that way. It was more so that we were, I was under the impression we were removing him from the cell for Mr O'Shea to speak to him. Like I said, that part of the report was more generalised, it was the point of what took place that I was trying to convey in the report.

10 But is it possible that someone else also indicated to you, whether it was a formal direction or not, that he needed to be removed from the cell?---Yes. Yes. Definitely, it could've been.

I have no further questions of this witness.

THE COMMISSIONER: Is there any reason why Mr Duffy shouldn't be excused from his summons?

MR DUGGAN: No, Commissioner.

20 THE COMMISSIONER: Mr Duffy, thanks for your evidence and I'm going to excuse you from your summons and you're now free to go.---Okay. Thank you very much.

THE WITNESS EXCUSED

[12.09pm]

MR DUGGAN: The next witness is Mr Duncan, Mr Elliott Duncan, Commissioner.

30 THE COMMISSIONER: Mr Duncan, can you come forward, please. Take a seat. Mr Eurell, you appear for Mr Duncan?

MR EURELL: I do, Commissioner.

THE COMMISSIONER: Is there anything you seek from me?

MR EURELL: Just the standard order under section 33, please.

40 THE COMMISSIONER: Section 38.

MR EURELL: Sorry, 38, yes.

THE COMMISSIONER: Might the witness be sworn.

THE COMMISSIONER: Now, Mr Duncan, I may be repeating matters that your barrister's already said to you, but I want to explain to you your rights and obligations as a witness.---Okay.

10 As a witness you must answer all questions truthfully and you must produce any item described in your summons or required by me to be produced during the course of your evidence. Now, usually, or not usually, sometimes witnesses avail themselves of a right to object to answering a question or producing an item. It doesn't get round the fact that you still have to answer, but it gives you the protection that it can't be used against you in any civil proceedings or, subject to one exception, in criminal proceedings. However, your counsel has asked that I make a declaration under section 38 of the Independent Commission Against Corruption Act which will have the same effect, you don't have to keep objecting to answering questions, the declaration will give you the protection that the Act says it gives you.

20

Now, I mentioned that there are some exceptions to that protection. The first exception is the protection does not prevent your evidence from being used against you in a prosecution for an offence against the ICAC Act, and most importantly, giving false or misleading evidence. The penalties for giving false or misleading evidence to this Commission are quite severe, it can result in imprisonment for up to five years. Do you understand that? ---Yes, sir.

30

So it's very important you tell the truth.---Yep.

The second exception which applies to New South Wales public officials, and you are one because you're an officer, as I understand it, of Corrective Services?---Former.

40

Former. Then you don't have to worry. I was going to say that had you been a New South Wales public official then evidence against you could be used in disciplinary proceedings, but as you're no longer there, that's not an issue. So I remind you that it's your obligation to tell the truth and if you do, the declaration that I'm about to make will give you the protection that I've described.

Pursuant to section 38 of the Independent Commission Against Corruption Act, I declare that all answers given by this witness and all documents and things produced by this witness during the course of the witness's evidence at this public inquiry are to be regarded as having been given or produced on objection and there is no need for the witness to make objection in respect of any particular answer given or document or thing produced.

10 **PURSUANT TO SECTION 38 OF THE INDEPENDENT
COMMISSION AGAINST CORRUPTION ACT, I DECLARE THAT
ALL ANSWERS GIVEN BY THIS WITNESS AND ALL
DOCUMENTS AND THINGS PRODUCED BY THIS WITNESS
DURING THE COURSE OF THE WITNESS'S EVIDENCE AT THIS
PUBLIC INQUIRY ARE TO BE REGARDED AS HAVING BEEN
GIVEN OR PRODUCED ON OBJECTION AND THERE IS NO
NEED FOR THE WITNESS TO MAKE OBJECTION IN RESPECT
OF ANY PARTICULAR ANSWER GIVEN OR DOCUMENT OR
THING PRODUCED.**

THE COMMISSIONER: Thank you, Mr Duggan.

MR DUGGAN: Thank you, Commissioner.

Before I ask any questions can I tender a couple of documents, please.

20 THE COMMISSIONER: Certainly.

MR DUGGAN: The first one is a formal investigation report by John Glasheen dated March 2015 in relation to Mr Duncan, and I think it's got a coversheet which is a director's report of Mr Hovey.

30 THE COMMISSIONER: All right. The formal investigation report dated March 2015 of Principal Investigator John P Glasheen, G-l-a-s-h-e-e-n, and a covering memo or a memo of 20 March, 2015 by Michael Hovey, the director of Corrective Services New South Wales Investigation, will be Exhibit 58.

**#EXH-058 – DIRECTOR'S REPORT BY MICHAEL HOVEY DATED
20 MARCH 2015 & FORMAL INVESTIGATION REPORT BY JOHN
GLASHEEN RE: ELLIOTT DUNCAN DATED MARCH 2015**

40 THE COMMISSIONER: And you've also tendered a letter to Mr Duncan from Assistant Commissioner Kevin Corcoran, C-o-r-c-o-r-a-n, of 22 December, 2015. That will be marked as Exhibit 59.

**#EXH-059 – LETTER FROM KEVIN CORCORAN TO ELLIOTT
DUNCAN RE: ISS CASE NO 14-0227 DATED 22 DECEMBER 2015**

MR DUGGAN: Thank you, Commissioner. Mr Duncan, I don't need to ask you any questions about those documents specifically, but you recall being the subject of an investigation by the Investigations Branch in 2015?
---Yes.

And the outcome of that investigation was that you were fined?---Correct.
\$1000?---No. \$500.

10 Oh, \$500. My apologies. Did you pay that fine?---Yes.

Can I take you back to 2014? What rank were you in 2014?---First class correctional officer.

And when did you finish with Corrective Services?---4 June, last year. 3 or 4 June last year.

And you now work in the private sector, is that right?---Yeah, yep.

20 And so you were rostered on for the A watch on 19 February, 2014?---Yes.

And do you recall being up in Unit 3 on a targeted search operation or - - -?
---Not really but I, I mean I recall it now. I know I was there like, my recollection of it's not very good. But yeah, I don't dispute that that's where I was.

Do you recall receiving a radio call at any point on that day?---No.

30 Presumably you recall attending Unit 5.1 at some stage?---Yes.

So, is it fair to say that perhaps the, the uneventful things that happened on that day don't particularly stick in your mind but you recall attending the cell?---Yeah. Correct.

Do you recall being in the day room before you entered the cell?---Yes.

And just in terms of your earliest memory of the event, who do you recall being in the day room before you entered the cell?---I recall Mr Walker, Mr Graf, Mr Duffy and myself and I, I do think Mr O'Shea was there.

40

Do you recall Cameron Watson being there?---No, I don't. I've since learnt that he most certainly was but up until, you know, up until the, the private hearing, I, no, I didn't recall that.

All right. Do you remember, did you say Michael Watson from SOG?---I don't remember either Watsons, Michael or Cameron, being there.

Do you remember the dog? The German shepherd?---No. Like, I don't deny that they were but I, I don't remember it. it doesn't stick in my head.

You recall Mr O'Shea being there?---Very vaguely.

Is there a particular reason why you recall Mr O'Shea being there?---No. No.

10 But he was in the day room before you went into the cell, is that your recollection?---I believe so.

What about Mr Peebles? Do you remember Mr Peebles being there at all? ---I don't.

Mr Taylor?---No, I don't.

Do you remember any discussion you had with Mr Walker before you went into the cell?---No. I don't believe that I even did, but, but I don't know.

20 You don't believe you went into the cell?---No, no, no. I don't believe I had a conversation with Terry.

Did you have a conversation with anyone else or you were just waiting to work out what you needed to do?---Yeah. I believe I probably, the reason I say waiting you know, I was the fourth one into the cell. Like, I wasn't really, in my memory, I wasn't really expecting much to go on.

30 So, is there a protocol with the IAT about who goes first, who the point man is into a cell?---No. There's not. Generally speaking I, history would suggest I was usually the first one in. Usually, in my memory.

Is that because of your size?---Could be. Just, I don't know, bravado of a young man maybe, I don't know.

And how tall are you?---I'm only 180 centimetres, give or take.

40 It's all relative. How much do you weigh, Mr Duncan, or did you weigh in 2014?---I don't know exactly how much I weighed in 2014 but I'm about 120 kilos now and I would've been roughly probably the same then.

All right. What is the best way, would that be five kilos with the gear on you?---No, it's heavier. My memory suggests it weighs about 12 kilos, 10 to 12.

All right. So without being disrespectful, you as a package would be around 132 kilos with the vest on.---Correct.

All right. Now you said that you were the fourth man in. Do you recall the door being open of the cell?---Yeah. I, you're probably going to ask me who opened the door, I have no recollection of that. Obviously I know the door was open but I couldn't tell you by who.

Do you remember when you got there whether the solid door was open or closed?---No. No. I don't remember.

10 Do you remember any interaction, discussion, conversation through the grille with the inmate, or inmates?---Yeah. I believe Terry Walker may have been having a conversation with him, I think.

So you have some memory of, not a strong memory but some memory of - - - ?---No. The thing with all of this investigation, I don't know if I've created that memory since or what not but I think he could've been talking to him at the time.

20 THE COMMISSIONER: Was Mr O'Shea shouting?---I don't recall him shouting. I'm not saying he wasn't, but I don't recall it.

MR DUGGAN: Is it fair to say that you don't remember some of the more significant, sorry, the less significant details?---It's very fair to say that.

And aside of Mr O'Shea yelling at an inmate, that would've been fairly ordinary to your understanding?---Yeah. Yeah. He was, as I said before in the private, he's a pretty colourful character. Yeah.

30 Do you remember him being colourful with this particular inmate?---No, not necessarily, no.

But you remember him being in the day room?---Yeah, I'm pretty sure he was at the day room.

Do you remember - - -

40 MR EURELL: Sorry Commissioner, I'm sorry to interrupt Counsel Assisting. My client seems to have reflected on a private examination. I wonder if he might just be reminded that so far as I've read, I don't think any orders have been made for - - -

THE COMMISSIONER: It might be better if you come forward, and would it inconvenience you if you sat a little bit closer?

MR EURELL: No, not at all.

THE COMMISSIONER: Come forward. The sound in here isn't perfect unfortunately.

MR EURELL: Yes.

THE COMMISSIONER: Sorry, what - - -

MR EURELL: Mr Duncan's just reflected on a private examination, and I'm not sure that any order has been made.

10 THE COMMISSIONER: I think you're right in fact, in relation to, it was indicated yesterday, I know you weren't here, that it was my intention to vary the section 112 orders to the extent that counsel, including Counsel Assisting, wanted to refer to them and I omitted to make that order or vary that order this morning, but I do so. So to the extent that you or any other counsel wish to refer to any compulsory examination or other document over which a section 112 order applies, you can take it that the order is varied.

20 **VARIATION OF SUPPRESSION ORDER: SECTION 112 ORDER
VARIED IN REFERENCE TO MATERIAL FROM THE
COMPULSORY EXAMINATION**

MR EURELL: Thank you.

MR MADDEN: Commissioner, can I just ask, is the private transcripts on the restricted portal that this witness is - - -

MR DUGGAN: Not for this witness, Commissioner.

30 THE COMMISSIONER: Is it intended that it will be?

MR DUGGAN: Yes.

MR MADDEN: Well, I just wonder when we're going to get it.

40 THE COMMISSIONER: You'll get it in time, Mr Madden, to make sure that you're not prejudiced so that if you're not in a position to ask questions of this witness today, we'll get the witness back after you've had an opportunity to read it overnight and you can ask your questions then.

MR MADDEN: Thank you.

MR EURELL: Whilst there's a pause, so that I don't further interrupt Counsel Assisting, I haven't read the investigation report that's been tendered and I don't know whether it's in the brief of evidence and I've just missed it, or if it's, the Exhibit is 56 or 57 or 58. Have I missed them?

MR DUGGAN: No, they're not in the brief. I don't intend to ask any questions in relation to them. It was more a question of disclosure so that everybody I see ware of that.

THE COMMISSIONER: Certainly. Yeah.

MR EURELL: Thank you.

10 MR DUGGAN: Mr Duncan, I think I was asking you about the moment before the door was opened.---Yep.

You don't recall, sorry, I think I was asking you about the inmate. Do you recall the way in which the inmate was communicating, whether he was - - - ?---No.

- - - saying anything?---No, I don't.

Do you remember whether he was being aggressive or calm or - - - ?
---No, I don't recall.

20

Right. Were you close to the door when it was opened or were you a little bit further back in the day room?---No, by my memory I was to the left of the door in front of a concrete wall. So near, near the door but to the left of it.

All right. So facing the cell and to the left of it as you face it?---Yes.

So the end, not the office end but the compound end?---Yeah, correct.

30 All right. And so do you remember who first went into the cell?---Terry.

Were you able to see him from where you were?---Yeah, I would have been able to see the, the side and back end of him, yeah.

All right. Did you see him strike Mr [REDACTED] No.

Are you sure about that?---Yes.

40 What did you see inside the cell when he went in?---I didn't.

I though you said that you could see part of him at least?---I could see the back end of him as, but you're talking in the cell.

Yes.---I didn't see in the cell, I thought you meant as he walked in.

Oh, I see. So you saw him disappear into the cell?---Yeah.

But you couldn't see inside the cell. Is that your evidence?---Yes.

At that point.---Yeah, at that point, yeah.

And then who was the second man in, do you recall?---Well, I thought it was Wes Duffy.

That's your recollection now?---Yeah, yep.

And who was the third man in, do you recall?---Simon Graf.

10

And you I think said at the beginning that you were the fourth man in?
---Yeah.

And so when you entered the cell you could then see what was going on in the cell. What could you see?---No, mate, they're very narrow. I had Simon in front of me. I remember seeing the cellmate, [REDACTED] [REDACTED] he was on the top bunk on, so as we walked in he's on our left and Simon and I have grabbed him, took him outside.

20

Right. So you couldn't really see past whoever was in front of you, but you could see to your left, you could see the inmate because your vision wasn't blocked. Is that - - -?---Yeah. As you walk in, the, the bed is directly on your left.

Right. And you saw [REDACTED] [REDACTED] I think you said in the top bunk?---Yeah.

And what did you do if anything with [REDACTED] [REDACTED] Oh, Simon and I just grabbed him and took him outside.

30

All right. Could you hear anything going on towards the back of the cell?
---No, nothing sticks in my memory.

Was this all pretty calm and collected or was there some - - -?---Look, I have no memory of it, but I wouldn't imagine it was all calm and collected, no.

All right. But that may not be out of the ordinary in your job.---No.

40

So there might have been a bit of noise coming from the back of the cell?
---Yeah.

But you were focussed on Mr [REDACTED] Is that your evidence?---Yeah, yep.

So you took Mr [REDACTED] off the bunk with Mr Graf?---Yes.

Did you restrain him at that point?---I don't believe so. Not, not with cuffs or anything, I don't believe so, no.

He's not particularly large, Mr [REDACTED] is that your recollection?---No, I hadn't seen him before and no, he's, no, he's tiny.

And did he, was he compliant in coming down off the bunk, do you recall?
---I think we just grabbed him, mate, I don't think he had the chance to be non-compliant or compliant, to be honest.

Right. So can I put it this way. You picked him up and - - -?---I think we just picked him up and took him outside.

10

All right. Did he, did he go flying out of the cell or did he, did he walk out by himself or how did he exit the cell, do you recall?---I don't remember him, like, I know just from things I've read that apparently he came close to the dog or something, but I don't remember him flying out of the cell. I just remember him going to, to the position where I was standing prior to entering the cell, so on the left-hand side of the cell, closest to the - - -

The compound door?---The compound. Him going back to the same spot on the ground.

20

All right. And did you place him on the ground then or restrain him in some way, do you recall, or - - -?---I don't know. I don't know if I restrained him or not. I know he was placed on the ground, I don't know if Simon, I think Simon may have placed him in handcuffs, I'm not entirely sure.

And is it your recollection that there were a few people standing out in the day room at the time?---No, I have no memory of it, who was around. Like I said earlier, I don't remember a dog and two officers being there, so - - -

30

You don't have a recollection of it being empty, I assume?---No, I don't even remember it being empty either. No. That's correct.

But do you think Mr Graf might've restrained Mr [REDACTED] Yeah. Mr Graf, I'm pretty sure, stayed with Mr [REDACTED]

All right. And then you, did you go back into the cell, or where did you go after that?---Yeah, no, I went back into the cell.

40

And why did you go back into the cell?---My memory of it is I stuck my head, because I had a concrete wall in front of me where the inmate [REDACTED] is, and I stuck my head back into the cell and I could see a struggle at the back of the cell.

All right. Are you able to describe that struggle, what you could see?
---No. No. I just remember seeing Terry, Duffy and the inmate at the back of the cell. My memory, I think I've read that Duffy said they were already on the ground. My memory is that they were all standing at the back of the cell and, yeah, I came in and it's common protocol that we want to get the

threat on the ground, so the inmate is the threat or, you know, we want to get them on the ground, so - - -

And so you say Mr [REDACTED] was standing. Did he have his back to the back of the cell, or, do you recall?---I don't, I don't recall.

But do you recall, I think you said he was at the back of the cell. Is that right?---I remember it being toward the back of the cell, yeah.

10 And was he, what were the, what were Duffy and Walker doing at that point from what you could see?---When I say a struggle, I just meant for me, like, it was grabbing hold of him, like, that was about it. I didn't see any striking or I didn't see either, I didn't see no officers strike him, I just saw, like, having hold of him and, like the, I would describe that as a tussle.

So you're indicating, you're clenching your fists as though you're grabbing something, so - - - ?---Yeah, sorry, yeah.

20 So they had hold of him, did they?---Yeah. Yeah. Yeah. He could've had hold of them or one of them, like, I, I'm not entirely sure.

But there was a bit of a wrestle going on in the back of the cell.---Yeah. Yep.

And so you would've entered the cell pretty quickly to assist?---Yeah. Yeah.

30 And what happened next?---Well, Mr Duffy stated I trip on the way in. I, I'm not stating I didn't, I don't remember tripping but I remember going in and I would've just tackled everyone to the ground.

All right. When you say "would have", and I'm not interested in what Mr Duffy says - - - ?---Yeah.

- - - but what do you remember in terms of - - - ?---I just remember going in and running and seeing the tussle and then I just remember us all being on the ground together. In what order, I can't recall.

40 And did you bring the group down, if I can bring it that way?---Yeah, I would have. Yeah. Like, yeah, it was, it would've been my input that caused that.

And when you say input, what physically did you do to bring the group down?---I would've grabbed who was ever in front of me, sorry, just like a bear hug really and momentum, and gone to the floor.

All right. So you've used your body weight and your force to force the group down onto the ground.---Yeah.

So you would've been on top of the group?---Well you would think so but I mean I have been in cases where I've fallen off to the side, so yeah, I don't know where I fell in this, in relation to this incident.

There's not a lot of room at the back of that cell, is there?---No.

10 And there are two reasonably large correctional officers wrestling with [REDACTED] at the time in that area, in that small area.---Well your words are reasonably large, yeah. Yeah.

They're, Duffy and Walker are wrestling with - - - ?---Yes.

- - - Mr [REDACTED] Standing wrestling, grappling.

Yes. In a not particularly large area.---Yeah.

And you've come in on top and brought the group down.---Yeah.

20 And the point is to remove the threat, if I can remove your language?
---Yeah. If, it's easier to control an inmate when he's on the ground.

And can't move?---Well, he's got more limited movement. Yet I, I understand it's a confined area but once he's on the ground, he's got even less room to move.

30 What I'm really trying to suggest is that when you brought the group down, you and the group landed on top of him. Is that what happened?---I don't know.

You don't recall?---We all fell on top of like, we were all, there was bodies on top of bodies. I don't know who was where in the pile of it.

You don't recall whether he was at the bottom or not?---No.

If your intention was to bring him down, it was likely that that's where he ended up at some point, at the bottom of that - - -?---Not necessarily.

40 Well, did you need to further restrain him?---I would have done. I don't recall.

You don't recall whether Duffy or Walker were on the bottom saying, "I need to get up. I can't get up"?---I don't recall.

Do you recall Mr [REDACTED] saying, "I can't breathe," or, "I've got asthma"?
---No, I don't.

Is it possible he said that?---Oh, it's possible.

It's also possible you might not have heard it. There was a bit going on, I assume.---Oh, absolutely.

So, you had in mind removing the threat. Was it removed when you came in and brought the group down or was there further struggling?---I, I don't recall. I don't know. I don't remember there being much more of a struggle. He was restrained I would imagine, at some point.

10 But you don't recall him being restrained?---No.

Do you recall Mr Duffy having handcuffs on the day?---No. I don't recall either way.

You would have been issued with handcuffs.---Yeah, I would have had cuffs.

Did you take Mr [REDACTED] out of the cell?---I don't recall. I don't know.

20 Is this a common occurrence, this sort of use of force in a cell?---Oh, there's one very similar that stuck, strikes in my memory if I'm to be honest. And when I came, wasn't expecting to go in, I came in and we just pushed everyone into a corner and then I remember more of that one. I sometimes worry if I'm getting the two interrelated.

But can I put it this way, three Corrective officers or two IAT and one IAT trained officer and one inmate ending up on the floor of a cell scuffling, that's not an everyday event, is it?---No.

30 Now, do you recall, and I might have asked you this already, do you recall how he was removed from the cell?---No, I don't.

Do you recall whether, at what point you exited the cell?---No, I don't.

You don't have any recollection of whether you went out first?
---Unfortunately I don't.

40 Is there any reason why you might have a problematic memory in relation to this not insignificant event?---Not specific to this event but there's, there's plenty of evidence as to why I've got a problematic, problematic memory.

And what is that?---Bloody head injuries.

Oh, I see. Are you suggesting that you've received a lot - - -?---My short term memory is woeful.

But are you suggesting you've received a lot of head knocks and that's why your memory - - -?---Oh, it's a concern of mine, yeah. I haven't got

anything to support that like, from a doctor but it is a, a legitimate concern of mine.

But you've never, you've never been diagnosed with having any - - -?---No.

And it's not as though this event is some black hole in your memory. You do remember - - -?---I remember bits and pieces. Like, yeah.

10 So, at some point [REDACTED] is removed from the cell?---Yep.

Do you recall if he handcuffed?---No, I don't.

Do you recall whether he walked out of the cell or whether he had to be assisted?---I don't.

Were you concerned that he might have suffered some injury in the scuffle?---No.

20 Were you concerned that, why were you not concerned about that?
---Because I don't recall seeing anything. If I'd seen any injuries in him or him complaining about any injuries - - -

He wasn't an enormous man, Mr [REDACTED] was he?---Not by my memory, no.

No. And there's a scuffle at the back of the cell and you've brought, you've brought the group down. It's certainly possible at that point he might have suffered an injury?---Oh, anything's possible. Absolutely.

30 But you didn't consider to check for his welfare at any point?---Well, to my knowledge, he wasn't expressing any concern for his, like, he wasn't making any, I don't remember him making any signs that he was injured.

Did he have the chance to express any concern?---Well, of course he would have had the chance.

Well, why of course?---Well, he can talk.

Well, could he?---Well, yeah, he wasn't gagged.

40 Was he saying something to you?---No.

Do you recall him talking?---No, I don't.

Were you concerned about Mr Walker at any point?---I don't remember being concerned about Mr Walker.

Did you enter the cell because you were concerned he was in a struggle at the back of the cell?---Well yeah, I guess so. I don't remember being

concerned, I just remember seeing a struggle and going in. You don't have all that much time to think about your emotions at the time.

No. But did you consider, did you go in because you needed to go in to assist?---Yeah. I felt, obviously I felt I needed to go in and assist.

And did you see if Mr Walker was okay, if anything had happened to him?
---Look, I'm sure I did but I don't recall, I don't recall that.

10 You're good mates with him, aren't you?---Absolutely.

You wouldn't ask if he was okay?---Mate, I, I, I'm getting the impression you think I'm trying to run you around. I'm not.

THE COMMISSIONER: Just answer the questions, please.---I would've asked, I don't remember asking.

MR DUGGAN: What about Mr Graf? Did you, sorry, Mr Duffy? Did you ask if he was okay?---I would have if I thought he was injured, absolutely. I
20 don't recall doing it.

In your time as an IAT officer and a Correctives officer, have you been instructed to give an inmate therapy, or cell therapy?---Yes.

And who have you been instructed to do that by?---Oh, I'd say, no, various people.

It's a not uncommon event, is that - - - ?---No, it's not.

30 And what did - - - ?---Sorry?

No, that's all right. Please finish your answer.---No, no, no, no, no.

What do you understand "therapy" to mean to an inmate?---My understanding of that is just to show a presence, more than anything. Like, put them in their place, like, you know, it, it doesn't, it certainly doesn't mean go in and bloody belt someone, like you'd go in there and you tell them, "Mate, you need to pull your head in." You might even make a mess of their cell, like, stuff like that.
40

THE COMMISSIONER: You were here when Mr Walker gave evidence, were you?---No.

All right. He suggested one aspect of it might be to go in and, in effect, trash their cell.---Yeah. I, look, I've done that. Yeah.

And when you were asked to do that, can we assume that it was a direction from a superior officer?---Yeah.

Yes.---Yeah.

It's not the sort of thing you'd do on your own?---No, you don't. People at my rank and even Terry's rank don't, "Mate, listen, go and give this bloke therapy, he's done this", or - - -

Right. Thank you.

10 MR DUGGAN: Thank you, Commissioner. Do you recall whether you received that instruction at Lithgow while you were there?---No I don't.

If you received that instruction, would it usually come from the head of the IAT or would it usually come from higher up?---To the ground staff, so, to the, you know, one of the two strippers it could be delivered by the senior, but that instruction would've been given to him by someone else.

20 All right. Did you sometimes head up the IAT?---Yeah, I acted as senior of IAT, yeah.

Yes. Did you ever receive an instruction when you were the senior of IAT to give someone a bit of therapy or sort them out?---Not that I can recall.

Do you remember on this day on 19 February, receiving an instruction to sort an inmate out or anything to that effect?---No, I don't.

30 THE COMMISSIONER: What's your recollection of the reason why you were there?---I, I don't have a recollection of it, sir, I mean obviously I've, I know the reasons now but up until that prior hearing I didn't, I don't remember the reason, like, I remember being asked "did you hear a radio call?" and stuff like that. I don't remember all of that.

So you've got no recollection of why you're sent to the cell at all?---No.

Very well.---I've got to come here and convince you I'm not bloody lying and I don't remember anything. It's not a great place to be in.

40 MR DUGGAN: Mr Duncan, when at some point you came out of the cell - - - ?---Mmm hmm.

- - - do you recall whether Mr [REDACTED] was still with Mr Graf when you came out of the cell?---No, no I don't. I presume that he would be but I don't know.

Do you recall where Mr [REDACTED] ended up?---No, I don't, but I mean from the last time I was here I know where he ended up.

So you don't have a recollection about him ending up in a cell across the way?---No.

But that's certainly possible?---Up until, well, up until I was here last time I would have thought he would have gone to a camera'd cell, but he went to a cell across the way so, so I've since been told.

Do you have any recollection of putting him in the cell that he ended up in?
---No, I don't.

10

Or being in that cell with him?---No.

Now, you may not have a recollection of being in Unit 3 before visiting Unit 5, but do you recall going back to, or do you recall what you did after this incident?---No.

Whether you went back to Unit 3?---I don't recall.

20 And as I said a moment ago, this is not an insignificant day at the office for you.---Well, an incident took place but - - -

Well, I think you mentioned this incident and perhaps one other that stuck out in terms of this sort of event in your mind.---Yeah. The other, well, my intention of that was the other one sticks in my memory far clearer than this one.

I'm not asking you about some other event.---No, I understand that.

30 And you would accept that – I'll go back a step. You obviously trained and did the IRT training course?---Yep.

Part of that training course is cell removal and how to deal with emergency response situations and the like?---Correct.

Another important part of the training program is how to report matters?
---Yes.

And education in policies and procedures at Corrective Services?---Yep.

40 And you would have had a good understanding at the time and now that you had to report any use of force?---Yes.

And by that you would have understood you had to prepare an incident report or a witness report as to what happened on the day?---Yes.

And one of the reasons for that – no, I'll withdraw that. And this incident that you've described in the cell, it's clearly a use of force?---Yeah.

By you and by others?---Correct.

And I don't mean that in a derogatory or pejorative way, but it was clearly use of force?---Yes.

So you would have had an immediate understanding after the incident that you were required to do a report?---Yes.

10 And that other witnesses to the event would have been required to do reports as well?---Yep.

Do you recall a discussion shortly after the incident in relation to whether reports were necessary?---Can you please repeat that question, sorry?

Certainly. Shortly after this happened - - -?---Yep.

I'll ask it a different way. Shortly after this happened you would have been wondering when you'd have to do a report?---Oh, yeah, yeah.

20 Because part of the training would have taught you that you have to do the reports pretty quickly.---Yes.

And so you would have turned your mind to that issue I assume?---Yep.

Was there discussion about doing reports?---Mate, of course there would have been. I don't recall any discussion though.

Well, I want to suggest to you that Mr Duffy raised the topic of doing his report.---Yeah.

30 Were you present when - - -?---I don't, I don't recall it.

Were you here this morning when he gave that evidence?---Yeah, yep. Oh, I don't know if I was here from the very start of it, but yeah.

Do you have any recollection of Mr Duffy raising the topic of reports and when they might be done?---No. My first recollection of Mr Duffy is like he said, in the change room showing me his report.

40 Well, I want to suggest to you that Mr Duffy raised the need to do a report and Mr Walker told him, using colourful language, that there wouldn't be any reports.---Are you asking if I recall that?

Yes.---No, I don't.

That would be a pretty significant event, wouldn't it, if a senior correctional officer is - - -?---Yeah, absolutely it would have been.

- - - is telling a witness to use of force that - - -?---Yeah, absolutely.

And you have no recollection of it?---No I don't.

But you're not suggesting that it didn't happen?---No I'm not.

Do you have any recollection of discussions, and I may have asked you this already, but any discussions with Mr Walker about the need to do a report?

---I don't recall any discussions. There certainly would've been.

10

I asked you earlier whether you inquired as to the inmate's wellbeing. At some point that morning you would've found out that he was injured?

---Yeah. As I stated last time I was here, I had, I have no memory of him being injured and I didn't even know until I got interviewed by Glasheen and what not in 2015 that he went to hospital. I'm not saying he, like, I don't recall knowing at the time.

The fact that he went to hospital would've been a problem I suggest, because that meant that this use of force - - - ?---Absolutely.

20

- - - had to be reported, there had to be some documentary trail of what happened.---Yeah. Yeah.

And you recall that at the time, that being a problem?---No. Well, I know it would've been a problem, but I don't recall it.

Is it possible that that was considered by you a problem, that this inmate had gone to hospital and therefore there needed to be a documentary report?

---Mate, I repeat, I don't recall him going to hospital.

30

Do you have any recollection of needing to come up with a cover story for the fact that an inmate was injured during this use of force?---I don't, but what I will say is that people at my rank don't come up with the idea to come up with a cover story.

I haven't suggested that.---I'm just saying.

Is there a reason why you're proffering that evidence?---Well obviously I'm involved in a cover up, an alleged cover up.

40

THE COMMISSIONER: I beg your pardon, an alleged cover up?---Yeah.

You don't think there was a cover up?---Obviously there was.

Yes.---But I'm saying I, I'm not the one pulling those strings. I don't recall, I would've been told what to write in a report, I don't recall who told me what to write but there's a reason my report would've reflected what it reflected.

MR DUGGAN: It didn't reflect the truth of what happened in that cell, did it?---No it did not.

No. So, reports, IAT reports are usually written in the IAT office?
---Usually.

10 And that would be from a computer in that office above Unit 5?---Yeah, either, yeah. It, yeah, and there's another office adjacent to it and, because we only had two, two computers, often someone would go next door and write one there.

So the regular Corrective Services office was adjacent to the IAT. Is that right?---No, above. So, the adjoining office was by, there was lots of computers in there and they were mostly non-custodial staff, you know, like psychologists and welfare workers and stuff like that.

20 All right. But as an IAT, someone rostered on for IAT that day you could use either the computers in the IAT room or this other office?---Yeah, yeah.

And do you recall any discussion in that office about the preparation of reports?---I don't recall, mate.

Do you recall preparing your report?---I don't.

You've prepared a report that you've accepted didn't contain a truthful recollection of events, but you have no recollection of even preparing that report. Is that your serious evidence?---That's my serious evidence.

30 Are you able to explain why you would not remember what would otherwise be a very significant event?---Well all I can come up with is, mate, it was over four years ago.

Do you often prepare reports which are not a truthful recollection of an incident?---No.

THE COMMISSIONER: Well this one was utterly false, wasn't it?---Yeah. Yeah. Well, sir, not utterly false but yeah, absolutely.

40 And you're saying to me that you can't remember it?---I can't remember writing it, no, or the discussion that took place around it.

MR DUGGAN: You take, or when you were an officer at Corrective Services you took your obligation as an officer seriously?---Oh, yeah. I would have.

"Oh, yeah" or "yes"?---Yes.

And those obligations included, you would have understood, being honest in your reporting function?---Yep.

And the fact that you had prepared a report which was clearly dishonest must have caused you some stress, do you accept that? I'm not asking you whether you remember it. It must have caused you some stress, do you accept?---I beg your pardon, sir?

10 I'm not asking whether you remember at this stage, but I'm just saying - - -?
---Are you asking if I remember it causing me stress?

No, no, no. I'm just saying do you accept that that event must have caused you some stress?---Yeah. Yep.

And that because it must have caused you some stress, it's something that you would remember because it's such a significant event?---You would think so, yes.

20 Are there other parts of your life that you just, significant events you've just forgotten?---There's parts that I'd like to forget.

That's not what I'm asking you. Can you answer the - - -?---Yeah, there are parts that I've forgotten.

Significant events like, preparing a dishonest report and filing it?---More signature events in my personal life, yes. To me, certainly not to undermine the severity of this.

30 THE COMMISSIONER: How did you get your head injuries?---A lot of motorbike accidents. I'm on bloody camera at Lithgow falling off a motorbike and knocking myself out. I've knocked myself out several times on motorbikes?

Were you hospitalised?---I beg your pardon, sir?

40 Were you hospitalised?---I was taken to hospital that morning. The worse one I've suffered was when I was 17, I was knocked out for about a half an hour but I didn't know that until the next day, and my mate told me how long it took me to get back to his house, and once I found out I went straight to the hospital.

And no doubt they did scans and the likes of that?---Yeah, I've had, well I'd just started, I was boxing as a child and I had, I've had MRI scans done, CAT scans done. I, when I started wearing glasses, I, I, I was getting really bad headaches. Instead of thinking I needed glasses, I went and got a, a CAT scan done just because of the head knocks.

And did the MRI or any of the CAT scans show any abnormalities?---Yeah. The CAT scan showed an abnormality. This is when I was a kid. I was 15 and that's when I had to get the MRI scan and it showed what the abnormality was. I don't remember what it was. But it wasn't of great concern obviously.

And did it suggest that it would likely cause you to have memory problems. ---No one's ever said that to me, sir.

10 Yes, Mr Duggan.

MR DUGGAN: Thank you, Commissioner. Do you have any recollection of Mr Walker telling you what to put in this report, in your incident report? ---I don't. However, what I wrote is what I would have been told to write.

You may not have a recollections in relation to this specific incident, but had you previously been told what to put in a witness or incident report? ---No. No. I don't, I don't believe so.

20 What makes you say that you would have been told on this occasion? ---Because I would have written what happened. I didn't see an assault. Obviously one's come out, I mean I saw Terry's evidence. What I saw, I didn't see that and what I did, what I considered to have done was by the book, why would I not report that?

THE COMMISSIONER: Well, there was no doubt that there was a use of force, was there?---No.

30 MR DUGGAN: Mr Walker aside, did any other senior officer speak to you about what should go into your report to your recollection?---No.

Is it possible that it was someone other than Mr Walker that would have told you what to write in this report?---Look, it's possible but I don't think so.

Have you had discussions with Mr Walker about that?---At that point in time?

At any point in time?---I've spoken to him, well I read his evidence actually and I know what he's said.

40 But you're mates with him?---Yeah.

You've been mates with him throughout the period since 2014?---Yep.

There was in investigation in 2015 in relation to this incident?---Yep.

You would have had discussions with him at that time?---Yeah.

Do you recall what was said in those discussions about - - -?---No, but I don't recall exactly when, what was said, but I know he has said that he was directed by Peebles.

To do what?---What to write.

In what document?---In the report.

10 Are you talking about his witness report or the IRM?---No, I'm not talking about the IRM, I'm talking about the - - -

The witness statements or incident reports?---Yeah.

And is there any suggestion that that was communicated directly to you?
---By Peebles?

Yes.---No. No, I have no recollection of him ever saying that.

20 Commissioner, just before we break, can I indicate that the compulsory examinations and record of interview of Messrs Graf and Duncan will be put up on the restricted website over lunch.

THE COMMISSIONER: All right. And as I indicated, Mr Madden, if there's a problem we may have to adjourn a little early so people, there may be people who don't really need to see what's been said. I suspect Mr Madden will and I suspect Mr Willis will.

MR GREENHILL: And Greenhill, Your Honour.

30 THE COMMISSIONER: Oh, Mr Greenhill, of course. So let's just see how we go. If it's on the website I'd encourage those who can do so to have a look at it.

MR MADDEN: I won't be able, won't be able to look at it until 2 o'clock. I've got a computer here but I can't, I've got no printer here.

THE COMMISSIONER: No, that's okay, that's okay. I can understand the difficulty and I don't want to compound it, but we'll just see how we go.

40 Can I just ask you this, Mr Duncan. I get the impression that within certain parts of Corrective Services they're very tight-knit?---Yes.

And they look after each other?---Yeah.

And there's a degree of trust between certain officers?---Yes.

And it sometimes goes as far as protecting them if they've done something wrong?---Yes.

And then there are others within Corrective Services that aren't part of that tight-knit group?---Correct.

And they are ones that you wouldn't trust - - -?---Correct.

- - - to watch your back.---Yes.

Yes. Okay. Yes. Thank you.

10

MR DUGGAN: Thank you, Commissioner.

LUNCHEON ADJOURNMENT

[1.03pm]