

OPERATION KADENWOOD

**REPORT PURSUANT TO SECTION 132 OF THE *LAW
ENFORCEMENT CONDUCT COMMISSION ACT 2016***

March 2021

LECC

Law Enforcement
Conduct Commission

Office of Commissioner for Integrity

53155/217

26 March 2021

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission hereby furnishes to you a Report in relation to its investigation in Operation Kadenwood.

Pursuant to section 142(2) of the Act, I recommend that this Report be made public immediately.

Yours sincerely



The Hon Lea Drake
Commissioner for Integrity

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1. Introduction

- 1.1 On 2 April 2020 the Law Enforcement Conduct Commission ('the Commission') decided to conduct an investigation pursuant to s44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* (NSW) ('the LECC Act') into whether Officer KAD1, a Senior Constable, or any other NSW Police Officer, or other person associated with him, is or has been involved in criminal activity or serious misconduct.
- 1.2 The Commission in particular investigated an allegation that during an arrest of Civilian KAD2 on 23 October 2019, Officer KAD1 used excessive force in restraining her.
- 1.3 On 23 October 2019 Officer KAD3, a Constable, and Officer KAD4, also a Constable, were conducting patrols in a Sydney suburb when they observed Civilian KAD2 walking on the street at approximately 9:00 p.m.
- 1.4 Both officers observed Civilian KAD2 to be unsteady on her feet whilst in possession of a handbag and a suitcase. Officer KAD3 and Officer KAD4 exited their vehicle to speak to Civilian KAD2 because of her condition and because the area was one which was known to police for drug related activities.
- 1.5 During this conversation Civilian KAD2 provided her name and, when asked why she was in the area, she stated that she was visiting a friend and looking to "score" later. Civilian KAD2 was incoherent and dishevelled.
- 1.6 As the conversation progressed, Civilian KAD2 became aggressive and walked up to Officer KAD3, who performed a check drill on her which caused her to fall down. Both officers went to assist Civilian KAD2. She began shouting and swearing at them and attempted to strike Officer KAD4 in the face area.
- 1.7 After she stood up, with the help of the officers, Civilian KAD2 fell down again and began hitting her head on the ground. As she was doing this

she continued to verbally abuse the officers. The officers placed handcuffs on Civilian KAD2 to protect her from self-harm and also for their own protection.

- 1.8 The two officers called for an ambulance due to their concerns for Civilian KAD2's health. A call was also made for a female police officer to attend so that a search of Civilian KAD2 could be conducted. As a result, Officer KAD5, a Senior Constable and Officer KAD6, also a Senior Constable, arrived at the scene. Subsequently, Officer KAD1 and another officer also attended the scene.
- 1.9 Whilst ambulance officers were attending to Civilian KAD2 police searched her bag and suitcase and found various items suspected to be stolen including clothing with security tags attached.
- 1.10 Civilian KAD2 was placed under arrest and issued with a caution. They then moved her to a police vehicle. She stood facing and leaning against the side of the vehicle.
- 1.11 Officer KAD5 stood behind Civilian KAD2 and conducted a search. She ran her hands over Civilian KAD2's dress. Civilian KAD2 then voluntarily lifted her dress. Police asked her to pull it down.
- 1.12 After the search, Civilian KAD2 turned around to face Officer KAD5 and lifted her right leg up and out towards Officer KAD5. Her leg was fended off by Officer KAD5 using her left hand.
- 1.13 Officer KAD1 then stepped in towards Civilian KAD2, reached out with his left arm, and grabbed Civilian KAD2 by the neck, forcing her back against the police vehicle. It is this action of Officer KAD1 which was considered to determine whether or not it was an unreasonable use of force.
- 1.14 The Commission obtained relevant footage from the body worn cameras of Officer KAD3 and Officer KAD4, in addition to other information, in the course of its investigation. Only the footage from the body worn camera of Officer KAD3 captured the relevant conduct. A

pixelated version of the footage has been uploaded to the Commission's website with this Report.

- 1.15 The Commission gave consideration to the relevant provisions of the LECC Act and determined that private examinations should take place.
- 1.16 On 1 and 2 December 2020 Officer KAD3, Officer KAD4, Officer KAD5 and Officer KAD1 gave evidence in separate private examinations before the Commission.
- 1.17 The general scope and purpose of the examinations was as follows:

To investigate allegations of excessive force used by Officer [KAD1] and to investigate whether any NSW Police Officer or other person associated with him is or has been involved in criminal activity or serious misconduct in relation to those allegations.

- 1.18 For the reasons set out later in this Report the Commission finds that Officer KAD1 engaged in serious misconduct.
- 1.19 The Commission has made a determination to protect the identities of all persons involved. Accordingly, all persons will be referred to by codenames in the publication of this Report. There is to be no publication of the name or image of any of the codenamed persons in relation to the evidence given in Operation Kadenwood or included in this Report without further order of the Commission.

2. The Commission's Statutory Functions

- 2.1 The LECC Act lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.
- 2.2 Section 10 of the LECC Act defines "serious misconduct":

(1) For the purposes of this Act, serious misconduct means any one of the following:

- (a) *conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,*
- (b) *a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,*
- (c) *corrupt conduct of a police officer, administrative employee or Crime Commission officer.*

(2) *In this section:*

serious disciplinary action against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.

serious offence means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

2.3 “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 11(2) in these terms:

(2) *Officer maladministration means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- (a) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (b) *arises, wholly or in part, from improper motives, or*
- (c) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (d) *arises, wholly or in part, from a mistake of law or fact, or*
- (e) *is conduct of a kind for which reasons should have (but have not) been given.*

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

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

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

(1) *The Commission may:*

- (a) *make findings, and*
- (b) *form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:*
 - (i) *has or may have occurred, or*
 - (ii) *is or may be occurring, or*

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

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

(b) *specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration),*

and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

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

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

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

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

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

- (1) *The Commission is authorised to include in a report under section 132:*
 - (a) *statements as to any of the findings, opinions and recommendations of the Commission, and*
 - (b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*
- (2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*
 - (a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*
 - (b) *the taking of action against the person for a specified disciplinary infringement,*
 - (c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*
 - (d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*
 - (e) *the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

Note. See section 29 (4) in relation to the Commission's opinion.

(3) An "affected person" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.

(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

2.9 In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.¹ Accordingly findings can form the basis of opinions and recommendations, even if they do not reach the standard of beyond reasonable doubt.

3. The Commission's Private Examinations

3.1 The Commission summoned relevant witnesses during the investigation for them to give evidence in private examinations at the Commission. Below are summaries of the evidence of all witnesses who were summoned.

Officer KAD3

3.2 Officer KAD3 gave evidence on 1 December 2020 in a private examination at the Commission and was legally represented. The following is a summary of his evidence:

- i. He joined the NSW Police Force ('NSWPF') in August 2018 and has been based at his current police station since that time.²

¹ *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

² Private examination KBC at T5.

- ii. He joined the NSWPF because his uncles and grandfathers served in the army, and he had always wanted to serve. It was his way of giving back.³
- iii. He spent his first 18 months in General Duties and he is now working in plain clothes.⁴
- iv. General Duties involved an array of different jobs, ranging from investigating the breaking into of houses, to mental health and suicides.⁵
- v. General Duties also involved arresting people using physical force.⁶
- vi. He understood that only reasonable force was permitted when arresting someone and that use of reasonable force was to gain control of a situation.⁷
- vii. He agreed that there are various factors which go towards determining whether force is reasonable, including the level of resistance encountered, the threat presented, a person's age, size, gender, whether they are armed or unarmed, and whether they are skilled in physical combat.⁸
- viii. He was aware that the police handbook contained information on use of force but he had not read it.⁹
- ix. He was aware that use of force was required to be recorded, and this duty to record applied to any officer who sees the use of force, not just the officer who applies the force.¹⁰

³ Private examination KBC at T30-31.

⁴ Private examination KBC at T6.

⁵ Private examination KBC at T6.

⁶ Private examination KBC at T6.

⁷ Private examination KBC at T6.

⁸ Private examination KBC at T6-7.

⁹ Private examination KBC at T7.

¹⁰ Private examination KBC at T7-8.

- x. He was aware of the general operation of sections 230 and 231 of the *Law Enforcement (Powers and Responsibilities) Act 2002* regarding the use of force.¹¹
- xi. He was aware that unreasonable use of force could constitute assault and misconduct. He was also aware of the duty on police to report misconduct.¹²
- xii. He would report misconduct by informing a supervisor.¹³
- xiii. It was purely an officer's discretion as to when a body worn camera was switched on and off.¹⁴
- xiv. He knew Civilian KAD2 from her arrest in October 2019. Prior to that he had only heard stories about her and her tendency to be involved in street crime. However he was not aware of any tendency to be violent.¹⁵
- xv. He recalled that, on the night of Civilian KAD2's arrest, he and Officer KAD4 were patrolling the streets in a police vehicle when he saw her come out of a well-known drug location.¹⁶
- xvi. He approached Civilian KAD2 and she swore at them. He pushed her backwards after she attempted to swipe at Officer KAD4 and while on the ground, she pretended to be unconscious. As a result of this an ambulance was called.¹⁷
- xvii. He also called for a female police officer as he believed that Civilian KAD2 was in possession of drugs or stolen goods. Officer KAD5 subsequently arrived at the scene.¹⁸

¹¹ Private examination KBC at T8.

¹² Private examination KBC at T9.

¹³ Private examination KBC at T11.

¹⁴ Private examination KBC at T11-12.

¹⁵ Private examination KBC at T13.

¹⁶ Private examination KBC at T14.

¹⁷ Private examination KBC at T14-15.

¹⁸ Private examination KBC at T14.

- xviii. Police identified about \$2,000 or \$3,000 worth of stolen goods and accordingly placed Civilian KAD2 under arrest.¹⁹
- xix. Civilian KAD2 was handcuffed for her safety because she was head-butting the ground. After she settled down, she was walked over to the police vehicle where Officer KAD5 conducted a general pat down search of Civilian KAD2.²⁰
- xx. During the search, Civilian KAD2 lifted her leg up towards Officer KAD5 and then Officer KAD1 “...has come along and grabbed her and pushed up her by the neck against the cage truck”.²¹
- xxi. He thought that Civilian KAD2 was “...going to go and kick” Officer KAD5.²²
- xxii. In response, he moved towards Civilian KAD2 but by that stage Officer KAD1 had already pushed her back towards the police vehicle.²³
- xxiii. Officer KAD1 “...put his hand around her neck and shoved her against the car” and he may have said “stop it” or some swear words.²⁴
- xxiv. He would not describe Officer KAD1’s grip on Civilian KAD2 as a tight one.²⁵
- xxv. He disagreed with the proposition that Officer KAD1 had grabbed Civilian KAD2’s neck. He stated that Officer KAD1 had “...pushed towards the car”.²⁶

¹⁹ Private examination KBC at T15.

²⁰ Private examination KBC at T14-15.

²¹ Private examination KBC at T15.

²² Private examination KBC at T16.

²³ Private examination KBC at T16.

²⁴ Private examination KBC at T16.

²⁵ Private examination KBC at T16.

²⁶ Private examination KBC at T16.

- xxvi. He did not consider that to be an unreasonable use of force because Civilian KAD2 was violent that night, had already tried to hit Officer KAD4 and was affected by drugs.²⁷
- xxvii. Pushing someone back by the neck was not in accordance with training provided by the NSWPF.²⁸
- xxviii. An approved check drill is a push to the shoulders with two hands, and an approved strike zone is anywhere except the head, and it also excludes the neck.²⁹
- xxix. When asked if Officer KAD1 could have used an approved check drill instead, he stated that would be done in a perfect world, but it happened quickly and Officer KAD1 acted in the way he did.³⁰
- xxx. He did not describe the kick by Civilian KAD2 or the push to the neck by Officer KAD1 in the COPS Event because he did not see an issue with it and it was recorded on his body worn camera.³¹
- xxxi. He agreed that Civilian KAD2's kick was not very effective and that "*...it was a pretty bad attempt*".³²
- xxxii. He was unsure as to why or when Officer KAD1 had arrived at the scene.³³
- xxxiii. When asked whether there was a better alternative course of conduct open to Officer KAD1, he responded that he personally would have done things differently.³⁴

²⁷ Private examination KBC at T17.

²⁸ Private examination KBC at T17.

²⁹ Private examination KBC at T17-18.

³⁰ Private examination KBC at T18.

³¹ Private examination KBC at T19.

³² Private examination KBC at T22-23.

³³ Private examination KBC at T23.

³⁴ Private examination KBC at T23.

- xxxiv. He stated in relation to Officer KAD1's actions that "...he's reacted poorly, but I don't think it was over the top".³⁵
- xxxv. He also stated that "yes, I think [Officer KAD1] has made a very poor decision where he's got her throat, but in saying that, I don't think it was an overdue use of force".³⁶
- xxxvi. When asked why he thought it was a poor decision, he stated because he would not have done that and "...it's a reaction thing and he probably hasn't made the best use of police tactics, but sometimes you just don't have time to do that".³⁷
- xxxvii. He could not explain why he turned the body worn camera off shortly after Officer KAD1 was seen with his hand on Civilian KAD2's neck, and denied that he turned away from them so as not to capture any evidence of it.³⁸
- xxxviii. He did not report Officer KAD1's conduct because he did not think it was an overdue use of force.³⁹
- xxxix. He discussed Officer KAD1's conduct with Officer KAD4 in the car on the way back, where he stated "...shit decision, mate". Officer KAD4 agreed with him.⁴⁰

Officer KAD4

3.3 Officer KAD4 gave evidence on 1 December 2020 in a private examination at the Commission and was legally represented. The following is a summary of his evidence:

- i. He joined the NSWPF in December 2016 and has been based at his current police station since that time.⁴¹

³⁵ Private examination KBC at T24-25.

³⁶ Private examination KBC at T25.

³⁷ Private examination KBC at T26.

³⁸ Private examination KBC at T28.

³⁹ Private examination KBC at T28.

⁴⁰ Private examination KBC at T29.

⁴¹ Private examination KBD at T5.

- ii. He is in General Duties which can involve arresting people by using physical force.⁴²
- iii. He agreed that only reasonable force is permitted, and that factors such as size, gender, age, level of resistance, whether the person is armed or unarmed, and the number of police officers can determine whether force is reasonable.⁴³
- iv. He was aware of the duty to record instances where force is used and he would usually do this in COPS entries.⁴⁴
- v. He understood that unreasonable use of force could be an assault and misconduct and he also understood that there was a duty for police to report misconduct.⁴⁵
- vi. He would report excessive force by speaking to a senior officer on shift.⁴⁶
- vii. He recalled that on the night of Civilian KAD2's arrest, he was working with Officer KAD3 in a car crew. He saw Civilian KAD2 walking on the street, which was very well-known for drugs and property offences.⁴⁷
- viii. Civilian KAD2 had two airport carry-on bags and appeared somewhat disorientated and, as a result, a decision was made to speak to her.⁴⁸
- ix. During the conversation with Civilian KAD2 he left and went to the police vehicle to retrieve a torch. Upon returning, he noticed that the conversation between Officer KAD3 and Civilian KAD2 had escalated. Civilian KAD2 walked towards Officer KAD3 and

⁴² Private examination KBD at T5.

⁴³ Private examination KBD at T5-6.

⁴⁴ Private examination KBD at T6.

⁴⁵ Private examination KBD at T6.

⁴⁶ Private examination KBD at T6.

⁴⁷ Private examination KBD at T7.

⁴⁸ Private examination KBD at T7-8.

Officer KAD3 performed a check-drill, causing her to fall into the bushes outside one of the unit blocks.⁴⁹

- x. Civilian KAD2 started screaming and smacking her head on the ground and “...*had thrown a few swings*” at him. She was handcuffed as a result of this.⁵⁰
- xi. They called for an ambulance and female police officers to attend so that a search could be conducted.⁵¹
- xii. As a result of the search, thousands of dollars’ worth of stolen clothes were found in addition to prescription medication that did not belong to her.⁵²
- xiii. He could not recall whether a request for another caged vehicle was made, but he remembered seeing Officer KAD1 and another officer arrive at the scene.⁵³
- xiv. While Civilian KAD2 was handcuffed and facing the police vehicle, she may have said something “...*or had kind of possibly kicked back towards police*” and then Officer KAD1 grabbed her and pulled her against the police vehicle. At this time he was standing “*a couple of metres back*” from what had occurred.⁵⁴
- xv. He could not recall where Officer KAD1 grabbed Civilian KAD2, except that it was “*definitely the upper portion of her body*”. He considered it as a strong grab, but not excessive or unreasonable.⁵⁵
- xvi. He was with Officer KAD3 when the COPS Event was written. They discussed what had happened and he had a chance to review it.⁵⁶

⁴⁹ Private examination KBD at T8.

⁵⁰ Private examination KBD at T8 and T11.

⁵¹ Private examination KBD at T8.

⁵² Private examination KBD at T8-9.

⁵³ Private examination KBD at T9.

⁵⁴ Private examination KBD at T9-10.

⁵⁵ Private examination KBD at T11.

⁵⁶ Private examination KBD at T12.

- xvii. He could not explain why Officer KAD3 was not mentioned in the COPS Event and he deemed it as not relevant to the charge, but conceded that “...it should have been maybe mentioned in another narrative”.⁵⁷
- xviii. He considered Civilian KAD2’s kick as “unpredictable”. He agreed that her leg had moved in a slow manner.⁵⁸
- xix. He considered that Officer KAD3 using his arm to hold Civilian KAD2 back was a reasonable response.⁵⁹
- xx. When asked whether he thought Officer KAD1’s actions were reasonable, he stated “...my opinion is I wouldn’t do that”. He explained that this was based on the circumstances, including size, gender and the fact that Civilian KAD2 was handcuffed. He also stated “...generally speaking I wouldn’t grab anyone around the throat”.⁶⁰
- xxi. His opinion was that Officer KAD1’s actions were “...reasonable in the circumstances on the basis that she was unpredictable, she did try to assault two officers who were much larger than her”.⁶¹
- xxii. He also elaborated by stating “...my honest opinion is I, like I said, I wouldn’t do something like that. However, based on the circumstances, I don’t think it was totally unreasonable. Perhaps a little heavy handed, yes.”⁶²
- xxiii. He did not report the conduct but recalled talking with Officer KAD3 afterwards about how it had escalated very quickly.⁶³

⁵⁷ Private examination KBD at T12-13.

⁵⁸ Private examination KBD at T14-15.

⁵⁹ Private examination KBD at T15.

⁶⁰ Private examination KBD at T16-17.

⁶¹ Private examination KBD at T18.

⁶² Private examination KBD at T18.

⁶³ Private examination KBD at T19.

Officer KAD5

3.4 Officer KAD5 gave evidence on 2 December 2020 in a private examination at the Commission and was legally represented. The following is a summary of her evidence:

- i She joined the NSWPF in 2011 and has been based at her current police station since that time.⁶⁴
- ii She is in General Duties and attached to the high visibility policing unit.⁶⁵
- iii She was aware of Civilian KAD2 as “...*she’s a regular crook that I know*”.⁶⁶
- iv On the night of Civilian KAD2’s arrest, she was called over police radio to attend as a female officer was needed to search Civilian KAD2.⁶⁷
- v When Civilian KAD2 made a kicking movement towards her, she did not feel an imminent threat of harm as “...*it just happened so quick*”.⁶⁸
- vi She agreed that she could be seen in the video batting away Civilian KAD2’s leg with her left hand.⁶⁹
- vii She did not consider Officer KAD1’s conduct to be an unreasonable use of force because Civilian KAD2 had tried to kick her.⁷⁰
- viii She agreed with the proposition that Civilian KAD2’s attempted kick was useless and she was just flailing her leg around.⁷¹

⁶⁴ Private examination KBF at T5.

⁶⁵ Private examination KBF at T5.

⁶⁶ Private examination KBF at T5-6.

⁶⁷ Private examination KBF at T6.

⁶⁸ Private examination KBF at T7.

⁶⁹ Private examination KBF at T7.

⁷⁰ Private examination KBF at T7-8.

⁷¹ Private examination KBF at T8.

- ix She stated that if she had been in Officer KAD1's position, she would not have grabbed Civilian KAD2's throat, and instead would have check-drilled her.⁷²
- x When asked if she thought it was an excessive use of force at the time, she stated "*...it may have been*".⁷³
- xi She did not report the conduct, but she had a telephone conversation with Officer KAD1's brother about it the following day.⁷⁴
- xii She agreed that in different circumstances Officer KAD1's conduct could have exacerbated the situation.⁷⁵
- xiii She stated that perhaps at the time of the incident she thought it was excessive, but her view changed after realising that Civilian KAD2 had lashed out at her.⁷⁶

Officer KAD1

3.5 Officer KAD1 gave evidence on 2 December 2020 in a private examination at the Commission and was legally represented. The following is a summary of his evidence:

- i He joined the NSWPF in August 2010 and has been based in his current local area command since that time.⁷⁷ He performs general duties which includes arresting people.
- ii He understands that any force used must be reasonable.⁷⁸

⁷² Private examination KBF at T9-10.

⁷³ Private examination KBF at T9.

⁷⁴ Private examination KBF at T9-10.

⁷⁵ Private examination KBF at T10-11.

⁷⁶ Private examination KBF at T11.

⁷⁷ Private examination KBH at T5.

⁷⁸ Private examination KBH at T5.

- iii When asked how he would determine what was a reasonable use of force he responded “...to prevent the continuation of an offence, like to stop, to get, to achieve an outcome”.⁷⁹
- iv He agreed that factors such as age, gender, size, resistance, physical and mental state, combat skills, and the number of police officers at the scene would help determine whether something was reasonable.⁸⁰
- v He was aware that use of force was required to be recorded on the COPS system.⁸¹
- vi On the night of Civilian KAD2's arrest, he had been patrolling with another officer when he heard another car crew was dealing with something in another area. He went there to see if they required any assistance.⁸²
- vii When he arrived, Officer KAD3, Officer KAD4, and Officer KAD5 were already present. He monitored and stood back to assist in case they needed help because they were junior officers.⁸³
- viii Police officers were talking to Civilian KAD2, there was an ambulance there and there were bags on the ground. At one point Civilian KAD2 kicked out at police and he then “...grabbed hold of her and pushed her towards the cage – into the side of the cage truck”.⁸⁴
- ix He believed he grabbed her with his left hand “around the chest, throat and chin region”.⁸⁵
- x He did this because Civilian KAD2 had kicked at police and he wanted to prevent an injury to police or himself.⁸⁶

⁷⁹ Private examination KBH at T5-6.

⁸⁰ Private examination KBH at T6.

⁸¹ Private examination KBH at T6.

⁸² Private examination KBH at T7.

⁸³ Private examination KBH at T7.

⁸⁴ Private examination KBH at T8.

⁸⁵ Private examination KBH at T8.

⁸⁶ Private examination KBH at T9.

- xi He agreed that Civilian KAD2 was incoherent, unarmed, handcuffed and appeared to be affected by drugs or alcohol. Further, he agreed that there were five or six officers at the scene.⁸⁷
- xii After viewing the body worn video he conceded that Officer KAD5 did not appear to be worried about Civilian KAD2's kick.⁸⁸
- xiii He recalled grabbing and holding Civilian KAD2 but he could not recall whether it was a tight grip.⁸⁹
- xiv He agreed that the force he applied had pushed Civilian KAD2 back against the police vehicle.⁹⁰
- xv He considered that the force he used was reasonable because it prevented any more action by her towards police.⁹¹
- xvi He did not learn this action of grabbing a person's neck in police training, from supervisors, or from anywhere else.⁹²
- xvii He has not grabbed anyone else by the neck before.⁹³
- xviii No one expressed any concern to him about his conduct except his brother, also a police officer, who sent him a text message about it on the day after the incident.⁹⁴
- xix The text message was "*...something about grabbing people by the throat, I'm an idiot, or something.*"⁹⁵

⁸⁷ Private examination KBH at T10.

⁸⁸ Private examination KBH at T11-12.

⁸⁹ Private examination KBH at T12.

⁹⁰ Private examination KBH at T13-14.

⁹¹ Private examination KBH at T14.

⁹² Private examination KBH at T14.

⁹³ Private examination KBH at T14.

⁹⁴ Private examination KBH at T14-15.

⁹⁵ Private examination KBH at T15.

- xx He did not reply to the text message because he was of the view that his brother did not know what he was talking about since he was not present at the scene.⁹⁶
- xxi He agreed that he could have used a check drill or done nothing at all.⁹⁷
- xxii He considered that when a police officer has to react to a perception of danger, that evaluation is done in split seconds, and that considerations to be borne in mind are what the officer has seen and heard up until that point.⁹⁸
- xxiii He agreed that Civilian KAD2 said “*I’m a kick boxer*” in the video, but he could not recall whether he heard this on the night, although it was possible.⁹⁹
- xxiv When asked if he recalled how close the police officers were to Civilian KAD2 on the night, he stated “*at times close, yeah*”. His evidence was that the furthest they may have been from Civilian KAD2 was a metre or two away.¹⁰⁰
- xxv He could tell from the video that Officer KAD3 said to Civilian KAD2 “*just stand still, just relax*”.¹⁰¹
- xxvi He stated that persons who are affected by drugs and alcohol are unpredictable and can become violent very quickly, presenting a danger to police officers in proximity.¹⁰²
- xxvii Civilian KAD2 was not told to turn around to face police.¹⁰³

⁹⁶ Private examination KBH at T16.

⁹⁷ Private examination KBH at T19.

⁹⁸ Private examination KBH at T21.

⁹⁹ Private examination KBH at T22.

¹⁰⁰ Private examination KBH at T24.

¹⁰¹ Private examination KBH at T26.

¹⁰² Private examination KBH at T26-27.

¹⁰³ Private examination KBH at T28.

- xxviii He gave evidence that Civilian KAD2 moved her left leg forward after her right leg had retracted¹⁰⁴. He had his thumb and index finger towards the front part of Civilian KAD2's neck and his palm on the upper part of her breast plate.¹⁰⁵
- xxix He agreed that Civilian KAD2 was heard laughing at this point in time in the video.¹⁰⁶
- xxx He stated that he reacted in split seconds¹⁰⁷ and he did not use any other physical force on Civilian KAD2 that night.¹⁰⁸
- xxxi In response to his legal representative's questions he responded that his understanding of the law of self-defence was that a person is entitled to defend both themselves and others.¹⁰⁹ He agreed with the proposition put to him by counsel that he had had a reasonable basis to believe either his own safety or the safety of others was in imminent danger from Civilian KAD2.¹¹⁰
- xxxii In hindsight he gave evidence that he would not react the same way.¹¹¹ However, he considered that his use of force was reasonable in the circumstances.¹¹²

4. Analysis of Evidence

- 4.1 The evidence obtained from witnesses in private examinations provided the context in which the arrest of Civilian KAD2 occurred. The video footage from the body worn camera of Officer KAD3 was central to the investigation of whether Officer KAD1 used unreasonable force during the arrest of Civilian KAD2.

¹⁰⁴ Private examination KBH at T30.

¹⁰⁵ Private examination KBH at T31.

¹⁰⁶ Private examination KBH at T32.

¹⁰⁷ Private examination KBH at T32.

¹⁰⁸ Private examination KBH at T34.

¹⁰⁹ Private examination KBH at T34.

¹¹⁰ Private examination KBH at T34.

¹¹¹ Private examination KBH at T34.

¹¹² Private examination KBH at T34-35.

- 4.2 The Commission accepts that on the night of 23 October 2019 Civilian KAD2 was under the influence of drugs or alcohol. This was evident from the video, which showed Civilian KAD2 as being incoherent, confused and unstable on her feet. This was supported by the evidence of Officer KAD3 and Officer KAD4.¹¹³
- 4.3 Officer KAD3 and Officer KAD4 were the first officers to approach Civilian KAD2. Subsequently, four other officers arrived, including officers KAD5, KAD6, KAD1 and another unidentified officer. Two ambulance officers were also at the scene.
- 4.4 The beginning of Officer KAD3's body worn video showed himself and Officer KAD4 attending to Civilian KAD2 who was on the ground and not moving. She appeared to have her eyes open but her state of consciousness was questionable. Within minutes she became more active and accused the officers of sexually assaulting her, which was either an indication of how confused she was at the time or more likely, an accusation made for another motive.
- 4.5 She was soon handcuffed and the Commission accepts that this was done for her own safety. She was able to sit up, and began crying and pleading for the officers to help her.
- 4.6 Whilst Civilian KAD2 was being attended to by ambulance officers Officer KAD5, Officer KAD3 and Officer KAD4 conducted a search of her belongings and found various items of clothing which they suspected were stolen. These items were found to still have security tags attached with foil wrapped around them probably for the purpose of preventing detection by electronic scanners in stores. Other items such as medication and identification documents not in her name were also found.
- 4.7 During the search, Civilian KAD2 was laying on the ground when she asked "*what are you doing?*" and Officer KAD5 replied "*...just going*

¹¹³ Private examinations KBC at T14 and KBD at T7.

through your bag". Civilian KAD2 then asked "*why?*". This was possibly an indication that she did not fully understand what was going on.

- 4.8 A male police officer was heard asking Civilian KAD2 "*...did you buy this stuff today mate?*" and she replied with an inaudible response. The male officer was then heard saying "*...you're a bit incoherent at the moment mate, but pretty much...there's no point in cautioning is there?*"
- 4.9 Civilian KAD2 started crying again and when Officer KAD3 tried to get her attention she asked "*...can you kill me?*" Officer KAD3 then told her she was under arrest for having stolen goods and her response was "*...what the fuck?*" He then proceeded to issue her with a caution.
- 4.10 The officers helped Civilian KAD2 to her feet and she continued crying. She also stated "*I'm a kick boxer (ind), I (ind) you*". Officer KAD3 responded with "*alright*". Civilian KAD2 made a critical remark about Officer KAD5's appearance and another female police officer was heard saying "*...that's a bit harsh*".
- 4.11 Civilian KAD2 was walked over to the police vehicle where she was made to face the window. She made a reference to "*Tommy Hilfiger*", then Officer KAD5 asked "*...you steal that too?*" and Civilian KAD2 replied "*yep*".
- 4.12 Civilian KAD2 lifted her dress up. She was asked to pull it down. Officer KAD5 then helped her pull the dress down.
- 4.13 Civilian KAD2 claimed the police were jealous of her body, then stated "*I'm an old body sculptor*". When a male officer asked "*what?*" she repeated her answer and turned clockwise to face Officer KAD5.
- 4.14 Civilian KAD2 then lifted her right leg up towards Officer KAD5, who fended her leg away with her left hand. A male and female police officer can be heard saying "*don't*". Officer KAD1 then stepped in and grabbed Civilian KAD2 by the neck with his left hand, pushing her back against the police vehicle.

- 4.15 This was not a manoeuvre Officer KAD1 learnt in the NSWPF.¹¹⁴ It was an ill-advised excessive reaction given that Civilian KAD2 was already handcuffed, surrounded by police officers and the target of her supposed kick, Officer KAD5, barely reacted to it. Officer KAD1's grab to Civilian KAD2's neck caused sufficient concern amongst the other police officers for them to talk about it afterwards in a critical fashion.¹¹⁵
- 4.16 The Commission accepts that Civilian KAD2 was located in an area well-known for drug related activities, she appeared to be affected by drugs, displayed mood swings, was unpredictable and that she had made some ineffectual and pathetic attempts to intimidate police.
- 4.17 The Commission has taken into account the fact that Civilian KAD2 was affected by drugs or alcohol, was incoherent, unsteady on her feet, handcuffed and surrounded by a number of officers who were attending to the event particularly appropriately. None of those officers were threatened by the pathetic leg swing of Civilian KAD2 demonstrating her kickboxing skills. None of the officers needed Officer KAD1's assistance.
- 4.18 These factors provide the context in which Officer KAD1 made his decision to restrain Civilian KAD2, using an inappropriate method and excessive force.
- 4.19 Citizens in the condition that Civilian KAD2 was in on this occasion deserve the same care, attention and attendance to duty as sober, law-abiding citizens. She was vulnerable. She was no threat. Officers KAD4, KAD3 and KAD5 gave her the care, attention and application of their lawful duty in as caring and compassionate manner as was possible in difficult circumstances.
- 4.20 The evidence of the other officers in attendance was that they would not have behaved in a similar manner to Officer KAD1, although they were reluctant to criticise his decision to intervene.

¹¹⁴ Private examination KBH at T14.

¹¹⁵ Private examinations KBC at T29 and KBD at T19.

- 4.21 The Commission rejects any suggestion that Officer KAD1 performed a check drill towards the top of Civilian KAD2's chest and did not grasp her throat.
- 4.22 The Commission rejects any suggestion that Officer KAD1 acted in self-defence or in defence of others when he put his hands around Civilian KAD2's throat.
- 4.23 The Commission rejects any suggestion that Officer KAD1 was obliged by anything he saw or heard to make a split second decision to interfere and restrain Civilian KAD2.

5. Submissions

- 5.1 The legal representatives for all NSWPF officers examined were provided with a draft version of this Report and invited to make submissions. Only the legal representative for Officer KAD1 provided submissions. He submitted that:
- Officer KAD1 was denied procedural fairness because he was not provided with a copy of the video footage, the transcripts of the evidence of the other witnesses, the opportunity to test the evidence of the other witnesses and because Civilian KAD2 was not examined by the Commission;
 - The evidence of all police officers supported the conclusion that Officer KAD1 acted in defence of Officer KAD5 and therefore the conduct of Officer KAD1 was not excessive force or unlawful;
 - The body worn video footage does not support a finding of serious misconduct; and
 - Excessive force is not an offence known to law, and therefore is not serious misconduct under the LECC Act.
- 5.2 The Commission responds to the above submissions as follows.

5.3 Officer KAD1 was not denied procedural fairness by not having access to the body worn video footage. The body worn video footage was shown to Officer KAD1 and his legal representative at the hearing and his legal representative was given an opportunity to put any matter arising from that body worn video footage to his client. Had the legal representative needed an adjournment to consider any matter during the course of hearing he could have asked. He did not. Subsequent to the hearing and the provision of the draft report Officer KAD1's legal representative asked to be provided with a copy of the body worn video. That application was refused. It is not the practice of the Commission to provide copies of body worn video. At the hearing Officer KAD1's legal representative was informed that he could view the body worn video footage at the Commission premises if a request was made. Following his request post-hearing the Commission wrote to him as follows:

"...we can't provide a copy of the footage, but you are more than welcome to view it at our premises. I understand you are currently in a trial, so we can accommodate you in terms of a time that is suitable for you."

5.4 No request was made.

5.5 A summary of the evidence of other police witnesses was contained in the draft report which was provided to all of the legal representatives.

5.6 The legal representative of Officer KAD1 referred to sections 65 and 68 of the LECC Act.

5.7 Sections 65 and 68(1) of the LECC Act are discretionary in nature and do not provide witnesses or their legal representatives with an entitlement to require the appearance of and the opportunity to cross-examine witnesses.

- 5.8 The Commission also has a discretion as to which witnesses to summons for private examinations.¹¹⁶ The decision to not call Civilian KAD2 was a matter for the Commission in the exercise of its discretion. Civilian KAD2 was very obviously seriously affected by drugs and/or alcohol on the relevant occasion. The Commission determined that no benefit could arise from the evidence of Civilian KAD2. That decision was an available exercise of discretion for the Commission which did not result in any failure of procedural fairness.
- 5.9 Officers KAD3, KAD4, KAD5 and KAD1 all stated that the force used on Civilian KAD2 was reasonable. However, other aspects of the evidence of these officers did not appear to be consistent with this view. For example, Officer KAD3 stated “*I personally would have done things differently*”¹¹⁷ and “*yes, I think [Officer KAD1] has made a very poor decision where he’s got her throat, but in saying that, I don’t think it was an overdue use of force*”.¹¹⁸ Officer KAD4 stated “*generally speaking I wouldn’t grab anyone around the throat*”.¹¹⁹ Officer KAD5 went as far as to concede that “*it may have been*” excessive force at the time.¹²⁰
- 5.10 Although the opinions of serving operational police officers present at the scene are proper matters for the Commission to take into account, the question of whether the force used by Officer KAD1 on Civilian KAD2 was excessive is ultimately one for the Commission to determine.
- 5.11 Officer KAD1’s legal representative submitted that there were limitations on the use of the body worn video footage which was central to the investigation. These limitations were that the video was only a partial record of the events and the audio was difficult to hear. It was submitted that the only conclusive findings which could be made based solely on the video were that Civilian KAD2 had been placed under arrest, she was heard making threats towards police, she is seen making gesticulations with her legs that are consistent with kicking, or

¹¹⁶ *Law Enforcement Conduct Commission Act 2016*, section 69.

¹¹⁷ Private examination KBC at T23.

¹¹⁸ Private examination KBC at T25.

¹¹⁹ Private examination KBD at T17.

¹²⁰ Private examination KBF at T9.

attempting to kick the police, and that two police officers take immediate and momentary physical action to prevent further violence by Civilian KAD2.

- 5.12 The Commission has concluded that the body worn video footage reveals more than what is submitted by the legal representative of Officer KAD1. Civilian KAD2 did make threats towards police officers. The earlier conduct which caused Officer KAD3 to push her had ceased well before Officer KAD1's intervention. When Officer KAD1 intervened the Commission is satisfied that it was obvious that she was in no condition to carry out any threat and posed no threat serious or otherwise to the officers present.
- 5.13 The Commission is further satisfied that none of the other officers perceived Civilian KAD2 to be any threat.
- 5.14 None of them were junior and none of them needed assistance.
- 5.15 As to the stumbling movement of her right leg, Officer KAD3 agreed that *"..it was pretty bad attempt"*.¹²¹ Officer KAD4 agreed that Civilian KAD2 had moved her leg in a slow manner.¹²² Officer KAD5 agreed that Civilian KAD2 was just flailing her leg around.¹²³
- 5.16 The body worn video footage demonstrated that Officer KAD1 grabbed hold of Civilian KAD2's neck with one hand, using sufficient force to cause her to be pushed back up against the police vehicle, and to affect the sounds coming out of her mouth. The Commission is satisfied that Officer KAD1 could not have held a belief on reasonable grounds that his action in placing his hand around the throat of Civilian KAD2 was necessary to protect Officer KAD5.
- 5.17 The legal representative for Officer KAD1 submitted that excessive force is not an offence known to law, and is therefore not serious misconduct under the LECC Act. This submission appears to be based on an

¹²¹ Private examination KBC at T22-23.

¹²² Private examination KBD at T15.

¹²³ Private examination KBF at T8.

incomplete reading of section 10 of the LECC Act, which relevantly provides:

(1) *For the purposes of this Act, serious misconduct means any one of the following:*

(a) *conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,*

(b) *...*

(2) *In this section:*

serious disciplinary action against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.

5.18 Section 4 of the LECC Act defines “disciplinary infringement” to include “*any misconduct, irregularity, neglect of duty, breach of discipline or substantial breach of a code of conduct or other matter that constitutes or may constitute grounds for disciplinary action under any law*”.

5.19 The Commission is satisfied that Officer KAD1’s conduct was conduct which could result in serious disciplinary action for a disciplinary infringement.

6. Findings

6.1 Having considered all of the above, the Commission finds that the conduct of Officer KAD1, in striking and restraining Civilian KAD2 by forcibly placing his hand around her throat on the night of 23 October 2019, was an unreasonable use of force although at the lower end of the spectrum of serious misconduct.

7. Affected Persons

- 7.1 In Part 2 of this report the Commission set out the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to “*affected persons*”.
- 7.2 The Commission is of the opinion that Officer KAD1 is an affected person within the meaning of subsection 133(2) of the LECC Act, being a person against whom, in the Commission’s opinion, a substantial allegation has been made in the course of the investigation.

8. Recommendations

- 8.1 The Commission recommends that the Commissioner of Police should give consideration to the taking of non-reviewable action against Officer KAD1 pursuant to s 173 of the *Police Act 1990*.

Operation Kadenwood
Report pursuant to s 132
Law Enforcement Conduct Commission Act 2016
March 2021

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