



STATE CORONER'S COURT OF NEW SOUTH WALES

Inquest: Inquest into the death of Todd McKenzie

Hearing dates: 27-31 March 2023; 3-6 April 2023
(sitting at Taree Court House)

17-20 April 2023; 14-16 19-23 June 2023
(sitting at NSW Coroners Court, Lidcombe)

Date of findings: 5 April 2024

Place of findings: NSW Coroners Court, Lidcombe NSW

Findings of: **Magistrate Harriet Grahame, Deputy State Coroner**

Catchwords: CORONIAL LAW – Death in police operation – gunshot wounds by police officer – appropriateness of actions of NSW Police Force officers – use of “breach and hold” in a police operation involving a person suffering from an acute episode of schizophrenia – use of family and friends as third party intervenors in police operations – use of consultant psychiatrists in police operations involving a person suffering from a mental illness – recommendations – use of body worn video by tactical officers – review and audit of mental health training

File number: 2019/00239447

Representation: **Counsel Assisting:** Mr Jason Downing SC and Mr Michael Dalla-Pozza, Counsel Assisting, instructed by Mr Tom Holcombe and Mr James Prindiville (Crown Solicitor’s Office)

Counsel for Mr Mark McKenzie: Mr Peter Krisenthal and Mr Pearce McManus, instructed by Ms Marie Iskander (Legal Aid NSW)

Counsel for Ms June Wilkins, Mr Neil Wilkins and Ms Margarete Hill: Mr Self Rumbewas, instructed by Mr George Newhouse, Mr Duncan Fine, Ms Karina Hawtrey and Mr Jason Hesse (National Justice Project)

Counsel for Commissioner of Police, Negotiation Commander, Officer T9, Officer T1, Senior Constable Glen Harris and Senior Constable Jarrod Stewart: Mr Sebastian De Brennan, instructed by Ms Rebecca Atherton (Office of the General Counsel, NSW Police Force)

Counsel for Superintendent Paul Fuller: Mr Anthony Howell, instructed by Mr Dominic Longhurst (Police Association of NSW)

Counsel for Negotiation Team Leader, Officer T5 and Sergeant Matthew Horsington: Mr Darien Nagle, instructed by Mr Greg Willis

Non-publication orders:

A significant number of non-disclosure orders and non-publication orders have been made in this inquest. A copy of these orders can be found on the Registry file.

Findings:

Identity

The person who died was Todd McKenzie

Date of death

He died on 31 July 2019

Place of death

He died at Manning Hospital, Taree NSW

Cause of death

He died of gunshot wounds

Manner of death

Todd was shot by NSWPF officers at his home in Taree. At the time Todd was experiencing psychosis and had been seen waving a knife earlier that afternoon. After an unsuccessful negotiation, police took deliberate action, executing a "breach and hold technique" which involved smashing Todd's window and ramming in his front door. Todd ran towards police with a knife and after using several less than lethal weapon options, an officer from the TORS shot Todd three times. His injuries were not survivable.

Recommendations: To the Commissioner of the NSW Police Force

1. Tactical police should be required to wear body-worn video.
2. A review and audit of mental health training be undertaken within two years to ensure that adequate and regular mental health training is being provided to NSWPF officers of all ranks.
3. The Commissioner consider updating the NSW Police Force's "Standard Operating Procedure – Negotiation Unit, Counter-Terrorism and Special Tactics Command" to include an additional paragraph

A copy of the findings is to be provided to the Minister for Mental Health, Minister for Police and Negotiation Commander.

Table of Contents

Introduction	1
The role of the coroner and the scope of the inquest	2
The evidence.....	2
The context of Todd’s death.....	3
Fact finding and chronology	4
Background facts	4
Chronological narrative.....	8
Preliminary matters	28
Certain information provided by Mr Knight.....	28
Incorrect information conveyed via VKG broadcast.....	30
Hindsight bias	31
Mental health in the regions is in crises	33
Issues for consideration	35
Issue 1 – What was the nature of Todd’s psychiatric condition as at 30 and 31 July 2019?	35
Evidence.....	35
Submissions	37
Consideration	40
Issue 2 – Were adequate steps taken by police on 30 July 2019?.....	41
Evidence.....	41
Submissions	41
Consideration	43
Issue 3 – Was the initial response by police on 31 July 2019 adequate?.....	43
Limitations in information available	44
Insufficient emphasis on the fact that it was a mental health incident.....	46
Oversight over Senior Constable Larrain.....	54
Issue 4 – Were adequate resources allocated to the response?.....	61
Evidence.....	61
Submissions	61
Consideration	62
Issue 5 – Was the nature of the negotiation undertaken by Sen Cst Larraine appropriate? What, if any, impact did it have on the events that followed?	62
Evidence.....	62
Submissions	62
Consideration	66
Issue 6 – Were sufficient steps taken to obtain background information about Todd, from family members, friends, treating clinicians?.....	67
Evidence.....	67
Submissions	72
Consideration	75
Issue 7(a) – Would it have been appropriate, in the circumstances, for the negotiation team to obtain advice from an independent psychiatrist?	75
Evidence.....	75
Submissions	79
Consideration	92

Issue 7(b) – Would it have been appropriate, in the circumstances, for the negotiation team to consider seeking the assistance of a family member in trying to engage with Todd?	95
Evidence	95
Submissions	104
Consideration	127
Issue 8 – What is the PACER program and how does it currently operate?	130
Evidence	130
Submissions	132
Consideration	134
Issue 9 – Was the Deliberate Action an appropriate tactical option to take at the time it was executed, in light of the information known about Todd and other options available?	134
Submissions and consideration	136
a. Evidence of NSWPF officers	137
b. Evidence of persons outside the NSWPF	163
c. The risk of violent physical confrontation from a breach and hold	167
d. The risks that the less lethal options would be ineffective	174
e. The breach and hold was not an [REDACTED]	184
f. A breach and hold was not otherwise apt to peaceably subdue Todd.....	191
g. There were alternatives available to the breach and hold.....	197
h. Overall conclusion regarding Issue 9.....	208
Issue 10 – Was the Deliberate Action adequately planned, resourced and documented?	215
a. Certain deficiencies associated with the planning of the breach and hold	216
b. Insufficient involvement of the negotiations team in the development of the breach and hold	221
c. Insufficient planning regarding the execution of the breach and hold	228
d. Insufficient planning by negotiators as to how to engage Todd	232
e. Adequacy of the resources for and documentation of the Deliberate Action ..	236
f. Attribution of responsibility to the officers who have received letters of “sufficient interest”	237
Issue 11 – Was the decision to use lethal force justified in the circumstances?	245
Evidence	245
Submissions of Counsel Assisting	248
Submissions of interested parties	249
Consideration	249
The need for recommendations	249
Findings.....	273
Identity.....	273
The person who died was Todd McKenzie.....	273
Date of death.....	273
Place of death	273
Cause of death	273
Manner of death	273
Recommendations	273
Conclusion	274

Introduction

1. This inquest concerns the death of Todd McKenzie. Todd died of gunshot wounds at Manning Hospital at Taree, NSW at or about 10.10pm on 31 July 2019. He had been shot three times by an officer from the Tactical Response Group of the New South Wales Police Force, as they conducted an operation at Todd's home earlier that evening. Todd was only 40 years of age. During the police operation, which continued for about nine hours, Todd was mentally unwell and at times brandishing a knife.
2. Todd was well-loved and well supported by his family and community. He lived alone with his dog and budgie and had regular contact with his family. Todd had a wide range of interests. He was creative and musical. He loved surfing, drawing and playing the drums.
3. Todd was stable with his medication in the period before his death. While he lived with schizophrenia, over recent years Todd had developed his living skills, he handled his own finances, did his own shopping and attended medical appointments. With the help of family he had created a fairly peaceful and creative life and he appeared mostly content. He had not needed mental health inpatient treatment since February 2014.
4. Todd's family described him as loyal, loving and kind. He had a happy-go-lucky personality and would generously share anything he owned with those in need. He was close to his parents, and to his sister and her children.
5. Todd's sudden and violent death was shocking to all who knew him. I acknowledge that Todd's parents and their respective partners have waited a long time for these proceedings and that they have experienced both profound sadness and searing anger since his death. They attended this inquest every day and their heartbreaking grief was palpable in the courtroom. Throughout Todd's life they had done everything they could to keep him safe and despite his illness, help him build a meaningful and independent life. That Todd should die in these circumstances must feel incomprehensible. I respect their engagement with these proceedings, not just to understand the circumstances in which their beloved son was killed by police, but in an attempt to shine a light on what happened so that other families do not experience what they have. In a moving family statement at the end of proceedings, Todd's mother and stepfather expressed a hope that there might be better, kinder, and safer ways to deal with people like Todd who experience a mental health crisis. I share that hope.
6. As will become apparent, in my view the police operation which ended Todd's life was flawed in a number of significant respects. Insufficient regard was had for the particular

circumstances that presented on that day, as police commenced a strategy they believed almost always works. Early communication with Todd was inappropriate. The movement to Deliberate Action was premature and did not adequately factor in Todd's likely reaction. Insufficient consideration was given to obtaining the advice of a consultant psychiatrist or to properly consulting Todd's parents or considering their greater involvement. Once tactical police broke the window and rammed the door of Todd's home, disaster of some kind was, in my view, almost assured.

7. There is much to learn from a close examination of these events. Most obviously there is a need to ensure police receive better training in de-escalation techniques and mental health. There is also a need to re-think the space where policing overlaps with the need for mental health assistance and develop more nuanced approaches to providing care and assistance to those in mental health crisis.

The role of the coroner and the scope of the inquest

8. The role of the coroner is to make findings as to the identity of the deceased person and in relation to the place and date of their death. The coroner is also to address issues concerning the manner and cause of the person's death.¹ A coroner may make recommendations, arising from the evidence, in relation to matters that have the capacity to improve public health and safety in the future.²
9. When a person dies as a result of police operations, it is mandatory for an inquest to be held.³

The evidence

10. The Court took evidence over 21 hearing days. The Court also received extensive documentary material in 18 volumes. This material included witness statements, medical records, police records, policies and procedures and expert reports. The Court heard oral evidence from Todd's father, Mark McKenzie, experts and those involved in the police operation.
11. While I am unable to refer specifically to all the available material in detail in my reasons, it has been comprehensively reviewed and assessed.

¹ *Coroners Act 2009* (NSW) s 81.

² *Coroners Act 2009* (NSW) s 82.

³ *Coroners Act 2009* (NSW) ss 23(1)(c), 27(1)(b)

12. A list of issues was prepared before the proceedings commenced. These issues guided the inquest and focused on the police response to Todd's mental health crisis. I will deal with each of the issues after setting out a chronology of events.

The context of Todd's death

13. It is firstly necessary to place Todd's death in its wider social context prior to examining the particular circumstances of 31 July 2019. There is great public interest in examining the way in which officers of the NSW Police Force (**NSWPF**) approach their role in situations where mental health issues intersect with policing. Legitimate questions arise in relation to police officers' training, skills and ability to intervene where complex psychiatric disorders may affect a person's behaviour and potentially place the safety of themselves or others at risk. At least one officer in these proceedings suggested that inadequate health funding resulted in an inordinate burden falling upon them to manage situations that were in fact health related. While I accept that this is likely to be correct, current policies would always require a police led response when a knife is involved. For this reason, it was necessary to examine current police training and practice in relation to de-escalation techniques and negotiation strategies with an eye to what might be learnt by involving mental health practitioners at an early stage.
14. Unfortunately, Todd's death is not the only death of a mentally ill person killed by NSWPF after a knife or bladed weapon was produced or used.⁴ In a number of these cases and others involving the intersection of policing and mental illness, coroners have made general recommendations aimed at improving mental health training or commented on a lack of appropriate training. In my view it remains a live issue and one in urgent need of attention.
15. This is the second time this year that I have been compelled to say that in my view one of the most important issues facing NSWPF is finding practical ways to improve training in relation to de-escalation techniques.⁵ It is an issue to which I will return.

⁴ See for example: Inquest into the death of Courtney Topic (30 July 2018); Inquest into the death of Christopher McGrail (10 June 2020); Inquest into the deaths of Gabriella Thompson and Tafari Walton (30 April 2021); Inquest into the death of Ian Fackender (13 September 2022); and Inquest into the death of Stanley Leonard Russell (14 April 2023).

⁵ Inquest into the death of Brandon Rich (21 March 2024)

Fact finding and chronology

Background facts

16. Todd was born in Gosford on 10 May 1979 and was 40 at the time of his death. His parents, June Wilkins and Mark, moved the family to Wingham in 1991 and set up a farm. They separated when Todd was about 17 and divorced in 1998. Todd moved to live with his mother at Tinonee, near Taree. Todd has an older sister, Belinda.
17. Todd's great grandfather, Frank, was a World War One veteran and a significant influence on Todd as a child. Todd reportedly visited him regularly and attended the 75th ANZAC parade with him, aged 13. Todd appears to have inherited Frank's medals or coins.
18. Todd lived alone in his home at 3 Robertson Street, Taree from about 2005. It was owned by Compass Housing.

Mental Health

19. Todd suffered problems with his mental health from an early age. According to his sister Belinda, he was referred to a psychiatrist with suspected schizophrenia at the age of 6 (though there are no available records).⁶ Mark recalls Todd seeing a psychiatrist in North Sydney at about age 6 but does not believe any diagnosis was made.⁷ In any event, Todd attended a mainstream school, Taree High. He was popular, leaving mid-way through year 11.
20. From around the time of his parents' separation, Todd's mental health declined significantly. Police were called to the family home in June 1997 when he threatened to kill his mother with a knife. He was scheduled and admitted to James Fletcher Hospital for two months.⁸ He absconded twice during that admission.
21. From 1998, Todd received treatment in the community from a psychiatrist, Dr Richardson. He diagnosed Todd with chronic paranoid disorganised schizophrenia compounded by illicit drug use. At times, a different diagnosis of schizoaffective disorder was given. Dr Richardson saw Todd, both at Manning Base Hospital and in private practice, for an extended period until he left practice due to ill health in 2017.

⁶ Tab 10 (Statement of Belinda McKenzie) at [9].

⁷ Tab 11A-1 (Supplementary statement of Mark McKenzie) at [6].

⁸ Tab 334 (James Fletcher Hospital Medical Records) at pp. 630-764.

22. On 21 September 1999, Todd seems to have again behaved aggressively towards June and an AVO was imposed on 9 November 1999, which remained in force until 8 November 2000.⁹
23. There were subsequent involuntary admissions to James Fletcher Hospital in July 2000, August 2000, August 2001, May 2002, July 2005, and December 2005.¹⁰ Several of these involved threats being made against June or Belinda.
24. Exacerbation of Todd's illness seems, fairly clearly, to have been linked with use of drugs or non-compliance with medication. A number of Community Treatment Orders (CTOs) were imposed.
25. Todd had taken drugs from school age into his twenties, using cannabis, amphetamines, mushrooms, and LSD. He did not have a significant problem with alcohol. He continued to use cannabis regularly until the time of his death. There are also more recent reports of ice use. Todd had convictions for drug supply and/or use in 2003, 2008, and 2010.¹¹
26. In November 2007, Todd commenced being managed by the Taree Community Mental Health Team. His case worker was Greg Knight. Mr Knight remained involved with Todd until about 2014, when he retired. Shortly after, in February 2015, Todd had his last contact with that service.
27. Todd was reviewed in the community at the Mayo Clinic by psychiatrist Dr Koller from 2009, and then Dr Richardson from 2010.¹²
28. Todd was initially managed with an antipsychotic, Clopixol. This was changed to paliperidone, in the form of a depot injection Invega Sustenna, from January 2014. This appeared to have a stabilising effect and Todd developed some insight into his illness. Todd was discharged from a CTO in 2014.

⁹ Tab 274 (Charge file re Apprehended Violence Order for Todd McKenzie - H7642746, dated 9 November 1999) at pp. 556 and 569; Exhibit 3 (Compilation of COPS events relating to Todd McKenzie – COPS Event E6901597) at pp. 18-20.

¹⁰ Tab 334 (James Fletcher Hospital Medical Records).

¹¹ Tab 275 (Criminal History Report) at pp. 2979-82.

¹² Dr Richardson had seen Todd, both publicly and privately, at other locations going back to 1998. See Tab 308 (Mayo Specialist Centre Records); Tab 309 (Statement of Dr Michael Richardson (Psychiatrist)) at [5].

29. A recurrent feature of Todd's illness was that he was paranoid that other people were threatening him, entering his home, or interfering with his possessions. For example:¹³
- a. In June 2000, Todd reported to police that an unknown man had entered his flat and threatened to kill him;
 - b. In September 2000, Todd reported to police that 4 females were threatening him in his home;
 - c. In August 2010, Todd reported to police that someone had broken into his home and stolen his medication (he later acknowledged his mother may have taken it);
 - d. In July 2013, Todd made threats that "*we are going to shoot you*", although it was unclear to whom he was referring;
 - e. In December 2013, Todd accused a neighbour of stealing a topaz rock from his home;
 - f. In February 2014, Todd reported to police that someone had tried to break into his home and a few days later complained the neighbours were "up to no good";
 - g. In December 2018, Todd called police because he was concerned there was a detonator outside his home, which turned out to be a washing machine part;
 - h. In April 2019, Todd reported to police that a woman had smashed his coffee cup; and
 - i. In May 2019, Todd reported a neighbour dispute to police.
30. These delusions also brought Todd into conflict with his neighbours from time to time. In the weeks prior to his death, he accused his neighbours of allowing a dog into his home which defecated on his furniture. As with other delusions, there may well be a kernel of truth to Todd's belief; he owned an elderly dog, Violet.
31. There is evidence that when Todd felt threatened he would, at times, brandish knives to protect himself. However, it appears that prior to the events of 30 and 31 July 2019,

¹³ Tab 35 (Statement of Paramedic Kellee Coe); Tab 276 (Chronology/Timeline of Strike Force Besborough with events of interest for Todd McKenzie); Exhibit 3 (Compilation of COPS events relating to Todd McKenzie).

that had not caused particular concerns amongst neighbours or the Community Mental Health Team.¹⁴

32. It does not appear that self-harm was a prominent feature of Todd's illness. Belinda does not recall Todd ever threatening self-harm. Self-harm is mentioned rarely in the medical records (e.g., the admission in July 2000).
33. In 2017, Dr Richardson left practice due to ill-health and referred Todd to his colleague, Dr Brian Neale. At that point, Todd appeared stable and reportedly had "a lovely quiet acceptance of his psychotic disorder".¹⁵ Dr Neale saw Todd on just five occasions, initially on 5 May 2017, when he appeared well. They discussed the possibility of a 3-monthly depot injection, which Todd was keen to take up. At that time, Dr Neale also completed a form for obtaining a driver's licence.
34. At a review on 3 November 2017, Todd reported not feeling as calm and "a bit delusional".¹⁶ Dr Neale was not concerned.
35. On 3 April 2018, Dr Neale discussed with Todd a change to a 3-monthly depot injection of paliperidone, Invega Trinza and sent a letter to Todd's general practitioner (**GP**), Dr Singh, explaining what would be required for the change.¹⁷ Todd appeared well. Todd attended Dr Singh and had his first injection of Invega Trinza on 10 April 2018.¹⁸
36. Todd missed his next appointment with Dr Neale in September 2018, so the final time Dr Neale saw him was 8 March 2019.¹⁹ At that time, Todd raised the fact that he had "areas of concern" and felt he had "disorganised thoughts",²⁰ although he was vague about this. He also said he "wasn't as concerned about locking the doors and security in the house".²¹ He was more talkative than he had been previously. Dr Neale continued the same medication and wrote a letter to Todd's GP, confirming that he was content for Todd to have diazepam or Valium for sleep, which he had occasionally needed in the past. The records show Todd received his injections in April as prescribed.²²

¹⁴ Tab 8 (Statement of Detective Chief Inspector Wayne Walpole) at [72] and [81].

¹⁵ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [20].

¹⁶ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [39].

¹⁷ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [41]-[42].

¹⁸ Tab 298 (Access Health records at p. 371.

¹⁹ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [44]-[50].

²⁰ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [44].

²¹ Tab 312 (Second Statement of Dr Brian Neale (Psychiatrist)) at [46].

²² Tab 298 (Access Health records) at pp. 390-1.

37. In the weeks leading up to his death, there was no obvious indication that Todd's mental health was deteriorating.
38. On 10 July 2019, Todd met a woman and spent the night with her. His friends and family recall that he was happy about this, although this did not appear to develop into a relationship.
39. On 16 July 2019, Todd met Belinda and they went shopping. He was calm but talkative (as he had been with Dr Neale in March).
40. On 24 July 2019, Todd attended an appointment with GP, Dr Knowles. His regular GP, Dr Singh, was not available. On this occasion, Todd told Dr Knowles he had been feeling anxious. He asked for Valium, as he had in the past. Dr Knowles declined, saying that his anxiety could be due to the fact that he was near the end of a three-month cycle of paliperidone. He suggested Todd return in seven days if he still felt anxious.²³
41. It does not seem that Dr Knowles read the letter from Dr Neale from March 2019 or made any enquiries with Dr Neale to check if Valium was appropriate.
42. That same day, Todd received his Invega Trinza injection from Nurse Avery. He appeared calm and pleasant.²⁴

Chronological narrative

30 July 2019

43. On the morning of 30 July 2019, Todd was seen at Manning Mall by a friend, Mr Baker, who spoke with him briefly and reported nothing unusual.²⁵ This sighting is not confirmed by CCTV.
44. During the afternoon, Todd became very unwell and made threats to his neighbours. At about 4pm, he was in the street holding a large knife, threatening to kill neighbours, and alleging they had been into his home.

²³ Tab 299 (Statement of Dr Phillip Knowles (GP)) at [9].

²⁴ Tab 298 (Access Health records) at pp. 372 and 391; Tab 301 (Statement of Nurse Kerri Avery) at [13].

²⁵ Tab 182 (Second Statement of Michael Baker); Tab 194 (First Statement of Michael Baker) at [14]; Tab 279 (Statement of Detective Senior Constable Gibson).

45. At 4.25pm, neighbour Paul Smith called Taree police station, speaking to Sen Cst Schoenherr. She completed a Computer Aided Dispatch (**CAD**) message, broadcast at 4.28pm. The message states:
- “INF STATES THAT MALE RESIDENT OF A/A IS O/S NUMBER 3 TREATENING TO KILL PEOPLE. HIS WEARING JEANS AND A GREY TOP AND INF BELIEVES THAT HE MAY BE ARMED WITH A KNIFE.”²⁶
46. According to Sen Cst Schoenherr, the reference to “believes ... he may be armed” was because Mr Smith said he had not actually seen Todd with a knife, but assumed he had one, as he had on previous occasions.²⁷ However, in his statement, Mr Smith stated that he saw that Todd was brandishing a knife.²⁸ Other neighbours also report seeing a knife.²⁹ In respect of this evidence, Counsel Assisting submit that the finding that should be made is that Todd was waving a knife around outside his house on the afternoon of 30 July 2019. I accept that submission.
47. At this time, Sen Cst Harris and Sen Cst Larrain were on duty in Taree (in vehicle TE15). They were busy with another job at a residence on Iluka Circuit Taree, where a person had died. They left that house, becoming free at 4.54pm. They acknowledged the job a minute later.³⁰
48. They travelled to Robertson Street. While Sen Cst Larrain claimed at one point that he believed he was driving that day, based on the available records and the evidence of both Sen Cst Larrain and Sen Cst Harris, it appears that on 30 July 2019, Sen Cst Harris was the driver and Sen Cst Larrain was the passenger in TE15.³¹
49. Sen Csts Harris and Larrain patrolled along Robertson Street, Golf Avenue, and Stewart Street at low speed for 1 minute 8 seconds (between them acknowledging on the CAD system that they were on scene and acquitting the job). They did not see a man with a knife and no-one flagged them down.
50. Notwithstanding that information available on the CAD³² indicated that the person who had been seen with the knife (later confirmed to be Todd McKenzie) resided at

²⁶ Tab 12 (CAD Job 887868-30072019).

²⁷ Tab 16 (First Statement of Senior Constable Schoenherr) at [4].

²⁸ Tab 139 (Statement of Paul Smith (10 Robertson Street)) at [11].

²⁹ See Tab 145 (Statement of Harold Guy Sunderland (4 Robertson St)) at [12]; Tab 146 (Statement of Karen Cross (4 Robertson St)) at [13].

³⁰ Tab 12 (CAD Job 887868-30072019) at p. 2857.

³¹ Tab 12 (CAD Job 887868-30072019) at p. 2857; Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) p. 120 [A148]; T83.22 (28 March 2023).

³² Tab 12 (CAD Job 887868-30072019) at p. 2857.

3 Robertson Street, the officers did not stop to attend that address. Further, notwithstanding that the CAD information included the name and phone number of the informant (Paul Smith) who had called to report seeing Todd on the street with a knife and Mr Smith was mentioned by name on the VKG broadcast,³³ no call was made to Mr Smith by either Sen Cst Larrain or Sen Cst Harris.

51. As Sen Cst Harris was driving, it does not appear that he had seen the information on the terminal screen.³⁴ Sen Cst Larrain had, however, seen it.³⁵ He explained in his evidence that because of the demands of other jobs on the day, with no other police cars on duty in Taree, no attempts were made to telephone Mr Smith or knock on the door at 3 Robertson Street on 30 July 2019.³⁶

52. It is unclear what Todd did for the rest of that day.

31 July 2019

53. On the morning of 31 July 2019, there was an unconfirmed sighting of Todd in Manning Street, Taree. It appears likely that this is in error.

54. There is an unconfirmed report that Todd obtained drugs at some stage. Mr Knight says an unknown person or persons told him that Todd had bought ice on the day of his death or perhaps the day before.³⁷ Mr Knight further says that he was told Todd used the ice and then became mentally unwell, perhaps after some conflict with the unidentified drug dealer on 30 or 31 July 2019.³⁸ The matter of what weight is given to Mr Knight's unconfirmed report is considered below.

55. At 12.50pm, Todd attended the Taree West Bottle-O, where he purchased toilet paper and milk. There is CCTV footage of this and nothing in it suggests any overtly concerning behaviour. Todd then returned home.

56. Within a short period of his return, Todd became highly elevated. He took a large knife and went into the street, yelling at his neighbours, alleging that someone had been into his place when he was not home. This was a similar pattern as to previous episodes.

³³ Tab 15 (Certified Police Radio Transcript) at p. 2871 [4.28pm].

³⁴ T163.31 (28 March 2023).

³⁵ T83.46 (28 March 2023).

³⁶ T87.48 (28 March 2023).

³⁷ Tab 307 (Second Statement of Greg Knight - Taree Community Health); Exhibit 4 (Redacted statement of Gregory Knight dated 16 April 2023) at p. 3.

³⁸ Tab 306 (First Statement of Greg Knight - Taree Community Health) at p. 2922; Exhibit 4 (Redacted statement of Gregory Knight dated 16 April 2023) at p. 3.

57. Todd took the knife and cut away at a telegraph pole, saying the knife would not break, and knelt down and stabbed the knife into the ground. A number of neighbours heard and saw this. Shona Moy called 000 at about 1.10pm, saying:

“there’s a man out the front of my house with a big knife screaming at us ... Well, I think he’s hallucinating screaming at someone but he’s looking at us.”³⁹

58. Todd then approached neighbour Karen Cross’ home and scraped the knife against the door or doorbell. She was alarmed and also called 000, saying:

“Um, there’s a guy lives across the road and he’s a schizophrenic and he’s just been at my front door with a big bladed knife in his hand.”⁴⁰

59. Ms Cross was with Shandelle Smyth, Todd’s cousin, who also lives in Robertson Street. Ms Smyth called Todd’s mother, June, to tell her he was unwell. The incident was given priority 2 (urgent response) and broadcast via radio at 1.11pm. A second broadcast was made two minutes later, at 1.13pm which provided some history of Todd’s mental health background, as follows:

“And just cars on the way to Robertson Street, a Todd McKenzie, ah, warning, he’s been diagnosed as being schizophrenic, was admitted to Newcastle psych ward, but that was back in ‘97. Confirm number 3 at Robertson Street. Just repeating, number 3, the POI comes from. Also had intel, numerous intel, break and enter, drugs other, drugs cannabis, sexual other, public mischief etcetera. He’s known under the mental health act.”⁴¹

60. The reference in that broadcast to intelligence on Todd McKenzie indicating a history of sex offences was an error. As the Officer in Charge (**OIC**), DCI Walpole, indicated in his oral evidence, the information seems to emanate from Person of Interest (**POI**) profile documents generated by the Real-Time Intelligence Centre on 31 July 2019, one of which indicated a history of sexual offences. However, as DCI Walpole indicated in his oral evidence, there was no such history. The intelligence in fact related to young persons identified in the POI profile report for Todd who had associated with him at some point in October 2015.⁴²

³⁹ Tab 21 (Certified Transcript of Triple Zero Call by Shona Moy at 1:12pm).

⁴⁰ Tab 20 (Certified Transcript of Triple Zero Call by Karen Cross at 1:12pm).

⁴¹ Tab 26 (Certified Police Radio Transcript of Calls between 1:10pm and 10:05pm) at p. 2229. A further broadcast about the mental health history was made at 1.37pm: Tab 26 at pp. 2234-5.

⁴² T1057.35 - T1060.4 (18 April 2023); Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence) by Senior Constable Antoinette Daley) at pp. 2146-2150.

61. The first unit to acknowledge was TE15, Sen Csts Harris and Larrain, who had responded the previous day. They arrived at 1.18pm, immediately followed by Officer T2, Officer T6, and Sen Cst Stewart. Officers T2 and T6 responded in a general duties capacity, however, both happened to be Tactical Operations Regional Support (**TORS**) officers and later became involved in that capacity.

Police arrive and confront Todd

62. Sen Cst Larrain activated his Body Worn Video (**BWV**) on arrival and it captured images showing the approach. Sen Cst Harris activated his BWV at 1.22pm. These remained active until about 4pm, when tactical officers arrived.
63. On police arrival, Todd slammed his door shut. Sen Cst Larrain went to the front to speak to Todd, and then Sen Cst Stewart, Officer T6 and Officer T2 attended the rear. Sen Cst Stewart drew OC spray and also commenced his BWV. Almost immediately, Todd's responses were angry, confusing, and suggestive of him suffering from delusions.⁴³
64. At 1.25pm, Todd emerged from the rear door with a 30cm kitchen knife. Sen Cst Stewart drew his firearm and confronted Todd at close range. He told Todd to "drop the knife", to which Todd replied "Disarm" and "Try your luck with a gun". Sen Const Stewart also yelled to Todd to "Drop it now" and "Drop it now or you will be shot", with Todd responding "Shoot me cunt". Sen Const Stewart replied, "I don't want to shoot you. I don't want to shoot you."⁴⁴ Other officers were also present.
65. Sen Cst Harris, who had a Taser drawn, was approximately five metres from Todd,⁴⁵ however, he did not use his Taser. Todd quickly retreated inside.⁴⁶
66. Shortly after, Sen Cst Stewart said to his colleague, Officer T2, "oh fuck, mate, if he is coming at me shoot him, I don't want to fucking die".⁴⁷ This was overheard by a neighbour.⁴⁸ Sen Cst Stewart explained that when he said those words, he was concerned that Todd would come at him with the knife, which would present an immediate risk of serious harm or death, so as to justify other police present using their

⁴³ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at pp. 12-13.

⁴⁴ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at pp. 19-20; Tab 51 (Transcript of Body Worn Video Recording by Senior Constable Stewart) at p. 304.

⁴⁵ T172.2 (28 March 2023).

⁴⁶ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain (Involved Officer)) at p. 20. See also BWV of Sen Cst Larrain at 1.25pm.

⁴⁷ Tab 51 (Transcript of Body Worn Video Recording by Senior Constable Stewart) at p. 305.

⁴⁸ Tab 140 (First Statement of Ryan Potter (1 Robertson St)) at [17].

firearms.⁴⁹ Sen Cst Stewart left the immediate scene shortly afterwards to block the street, before ceasing duty at about 4.30pm.⁵⁰

Police gather resources

67. Immediately following this confrontation, the seriousness of the situation became clear. Consistent with the principle of [REDACTED] police at the scene took up positions around the property at the front and the rear and sought further support.
68. Police reported the threats made towards them over the radio and asked the Duty Officer, Superintendent Fuller,⁵¹ to attend. Ch Insp Fuller departed Taree Police Station at approximately 1.29pm with his colleague Ch Insp Power, as well as Sen Cst Reardon, and they seem to have arrived at 3 Robertson Street at approximately 1.35pm.⁵² Ch Insp Fuller took up the role of Forward Commander, with overall responsibility for the incident.
69. A number of other police units began arriving shortly afterwards.
70. A request was made for background checks on Todd at 1.37pm. These were first provided at 1.50pm,⁵³ followed by more intelligence at later times. A forward command post was set up in a bus outside 7 Robertson Street at 1.45pm. Ch Insp Fuller had a log and kept a running note, which records significant events and decisions.⁵⁴

Sen Cst Larrain's engagement/negotiation with Todd McKenzie

71. Following the 1.25pm confrontation with Sen Cst Stewart, Sen Cst Larrain took up a position near a window at the rear of the property. From there, he tried to engage with and (informally) negotiate with Todd for an extended period, effectively until negotiators formally commenced their role at about 5pm. Other officers, including Sgt Horsington and Sgt Broadley, also engaged with Todd over this time.
72. Sen Cst Larrain had no formal training in negotiation. He said in interview he "*fell into*" the role, and he felt comfortable doing it.⁵⁵ The evidence indicates that there was no discussion or planning around Sen Cst Larrain taking on that role. It seems that he

⁴⁹ T701.26 (5 April 2023).

⁵⁰ Tab 53 (First statement of Senior Constable Stewart) at [11].

⁵¹ As at 31 July 2019, Superintendent Fuller was a Chief Inspector. For convenience and with no disrespect intended, he will be referred to as Ch Insp Fuller or Mr Fuller in these findings.

⁵² T499.38 (3 April 2023).

⁵³ Tab 26 (Certified Police Radio Transcript of Calls between 1:10pm and 10:05pm) at p. 235; Tab 70 (Forward Command Log) at p. 399.

⁵⁴ Tab 70 (Forward Command Log); Tab 71A (Notes made by Chief Inspector Fuller).

⁵⁵ Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) at p. 155 [Q434].

assumed it and others present, including Sgt Horsington (Sen Cst Larrain's immediate supervising officer) took the view that it was reasonable for him to do so because he had some experience in country policing and was regarded as good at communicating with ordinary people.⁵⁶

73. Much of the exchange between Sen Cst Larrain and Todd is captured on Sen Cst Larrain's and Sen Cst Harris's BWVs, although not all of Todd's responses are clear and the image is often poor (as Sen Cst Larrain's BWV was moved to his thigh). There is a transcript available from each BWV.⁵⁷
74. Todd remained inside his home from this point forward. He continued to make threats towards police. He said he was going to defend his home. He made bizarre military references to ANZACS (noting his connection via his great grandfather), drinking "the rum and milk", Richmond RAAF, the SAS, the British army, and other matters. He suggested that police weapons would not work as they had been disarmed by counter-terrorism police. He said the officers' heads would explode and it would hurt. Much of what Todd said was patently delusional.
75. Some of the things Todd said and did may be interpreted to suggest an intention to self-harm, although his words were not unambiguous. For example: at 2.31pm, Todd said "just leave or fucking shoot me"; at 4.39pm, he was "ranting and raving about ashes to ashes, dust to dust"; and later he played the Last Post (using his lips).
76. Todd intermittently came to the window at the rear to engage with police but also went elsewhere in his house. He went to the front of the house, ate food, played the drums and other music, and phoned people, including his father. This presented a problem for police as they were not always able to observe him and they were concerned about what he was doing. For example, Sen Cst Larrain said he was worried about Todd making booby traps (albeit there was no specific basis for him to believe Todd would do so).⁵⁸
77. In the course of the informal negotiations, Sen Cst Larrain confronted Todd on a number of occasions, saying things which, objectively speaking, seemed designed to provoke a response in Todd. He challenged what Todd was saying about the ANZACS

⁵⁶ T172.11 (Sen Cst Harris, 28 March 2023); T694.38 (Sen Cst Stewart, 5 April 2023); T754.19, T756.25, T762.28 (5 April 2023); Tab 58 (Certified Transcript – Interview with Sergeant Horsington) at p. 44 [A289] (Sgt Horsington).

⁵⁷ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain); Tab 45 (Transcript of Body Worn Video Recording by Senior Constable Harris).

⁵⁸ Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) at pp. 183 [A646] and 188 [A677]; T97.9 (28 March 2023).

and his other delusions, suggested Todd was lying, and challenged him physically. For example, in the early afternoon, Sen Cst Larrain is captured on his BWV speaking to Todd as follows:

- a) 1.53pm: “Well, then you’re not Anzac then. Just because your family served doesn’t mean you did”⁵⁹
- b) 1.54pm: “Well, put the knife down and come outside and we’ll try that unarmed combat thing you’re talking about”⁶⁰
- c) 2.11pm: “I’ll take my gun off, come out the back and have a proper fight”⁶¹
- d) 2.42pm: In response to Todd stating that “It’s not that I’m fuckin’ speaking fuckin’ dribble”, Sen Cst Larrain responded “Well, you are a little bit”⁶²
- e) 2.44pm: “At the end of the day, Todd, everything you’re saying’s basically a lie. I know you never served. I know you’re not an Anzac. I know you’re not in the British Royal Guard. ... All you showed me was a couple of coins”⁶³
- f) 2.50pm: “Well, it’s just you and me, mate, how about you come out and do me like a soldier then?”⁶⁴
- g) 3.01pm: “Todd, give us a look at them fake medals of yours again hey? You know, the ones that aren’t actually medals?”⁶⁵
- h) 3.10pm: “...you’ve done nothing for your country, except to be a drain on it. You get Centrelink? How do you pay for this house?”⁶⁶

78. It must be acknowledged that Sen Cst Larrain also made more innocuous efforts to build rapport and engage Todd. He asked him about his dog, mentioned the fact that people were worried about him, offered him some cigarettes, said that police were not there to hurt him, and stated that they wanted him to come out of the house unarmed.⁶⁷

79. Sen Cst Larrain justified his approach as follows:

⁵⁹ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 34.

⁶⁰ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 5.

⁶¹ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 44.

⁶² Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 62.

⁶³ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 64.

⁶⁴ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 67.

⁶⁵ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 72.

⁶⁶ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 78.

⁶⁷ See, e.g., Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at pp. 68 [2.51pm] and 71 [2.58pm].

- a) He was doing this, not to provoke a response, but because it seemed effective in keeping Todd engaged, and also got him to come back to the kitchen area, where police could see him.⁶⁸
 - b) He was doing it to keep Todd talking, to try and get Todd to come out of the house without the knife, to keep an eye on Todd, and to avoid getting into a verbal loop.⁶⁹
 - c) Sgt Horsington had instructed him to challenge Todd's delusions to try to draw him out of the house. Sgt Horsington accepted he did suggest that Sen Cst Larrain challenge Todd's beliefs, saying the 4-day Mental Health Intervention Team (**MHIT**) mental health course instructed officers "not to enter into their fantasy".⁷⁰ He further accepted that at about 2.43 pm, he could be heard on the BWV encouraging Sen Cst Larrain, in talking to Todd, to challenge Todd by saying that he (Todd) was lying.⁷¹
 - d) Sen Cst Larrain also recalled mental health training where he was told to tell a delusional person that other people are not experiencing what they are.⁷²
 - e) More senior officers at the scene were aware what he was doing and did not try to stop him.
80. At about 3.00pm, Ch Insp Fuller was in the process of engaging negotiators and tactical police.⁷³ He spoke with Officer T10 and Negotiation Coordinator by phone in Sydney. In the course of this call, Negotiation Coordinator advised "try to keep Mr McKenzie engaged and not to challenge his thoughts at this stage" as a team of negotiators were being deployed.⁷⁴
81. Ch Insp Fuller telephoned Sen Cst Murray and then spoke to Sen Cst Larrain (on Sen Cst Murray's phone) to pass on this advice in a phone call made at 3.11pm (heard at Sen Cst Larrain's end on the BWV).⁷⁵ Ch Insp Fuller told Sen Cst Larrain to not challenge Todd's delusions and to appease him by going along with Todd's thought

⁶⁸ Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) at p. 196 [Q732].

⁶⁹ T103.41; T105.10; and T106.19-34 (18 April 2023).

⁷⁰ Tab 58 (Certified Transcript – Interview with Sergeant Horsington) at pp. 21 [A117] and 38 [A239].

⁷¹ T742.46-743.4 (5 April 2023).

⁷² Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) at p. 164 [A491].

⁷³ Having initially requested the involvement of TORS and negotiators in a call to Officer T12 at approximately 1.55pm: T511.4 (3 April 2023); Tab 71A (Notes made by Chief Inspector Fuller) at p. 492.

⁷⁴ Tab 92 (Statement of Negotiation Coordinator) at [7].

⁷⁵ T517.19 (3 April 2023).

patterns. It is clear from the transcript that Sen Cst Larrain understood the advice.⁷⁶ He confirmed that in his oral evidence.⁷⁷ Despite that, Sen Cst Larrain continued his approach as before. At 3.22pm he is captured on his BWV again challenging Todd:

“At the end of the day I’d much rather you just come out of here with your bloody knife and try go us all because I’m getting a bit fucking sick of this.”⁷⁸

82. Sen Cst Larrain acknowledged that in saying those words to Todd, he was doing exactly the opposite of what had been advised by the Forward Commander.⁷⁹ He explained his actions on the basis of the stress of the situation and being extremely frustrated and tired.⁸⁰

Deployment of TORS and Negotiators

83. At approximately 1.50pm, Officers T2 and T6 discussed the initial Emergency Action Plan (or Immediate Emergency Action Plan (**IEAP**)) they had created with Ch Insp Fuller and Ch Insp Power. It was a basic plan covering what police would do if Todd exited the house and confronted police while armed with a knife [REDACTED] while in the house. It also contained a surrender plan.⁸¹ The IEAP and surrender plans were then communicated to perimeter teams.
84. At 1.52pm, Todd telephoned his father, Mark. Todd was unable to get through to him (as Mark was driving in an area with only intermittent reception). Todd left Mark a voice message. In it, Todd said that about 20 police that were “sieging” him.⁸²
85. At 1.55pm, Ch Insp Fuller sought the deployment of tactical police (being the TORS officers and negotiators) from the Region’s Operations Coordinator, Officer T12. Assistant Commissioner Mitchell gave his approval for the deployment shortly thereafter.⁸³
86. At 2.11pm, Mark telephoned Todd who told him that there were “approximately 20 armed police” in his front and back yard. Mark asked Todd why police were there but

⁷⁶ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at pp. 79 and 84.

⁷⁷ T114.20 - T115.3 (28 March 2023).

⁷⁸ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) p. 84.

⁷⁹ T115.35 (28 March 2023)

⁸⁰ T116.1-33 (28 March 2023).

⁸¹ Tab 71A (Notes made by Chief Inspector Fuller) at p. 491; Tab 70 (Forward Command Log) at p. 400; T509.40 (3 April 2023).

⁸² Tab 11 (Statement of Mark McKenzie) at [21].

⁸³ Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence) by Senior Constable Antoinette Daley).

Todd did not answer. Mark told Todd to “deal with this himself” because he was on the road.⁸⁴ Mark then lost phone reception for around an hour.

87. Starting from 2.10pm, Officer T1 sent a number of messages, via the WhatsApp application, to Officers T3, T4, T5, T7, T8, and T9 to arrange for them to attend the job at Todd’s address.⁸⁵
88. At around 2.20pm, Officers T2 and T6 (who, as noted above, were already present at Todd’s address) left in order to collect their tactical equipment. They arrived back at Todd’s address at 2.45pm.⁸⁶
89. At 2.32pm, Assistant Commissioner Mitchell provided permissions for TORS to conduct “tactics only”.⁸⁷
90. At 2.46pm, Sen Cst Zabeth prepared a POI profile for Todd, which was emailed to Ch Insp Fuller. At 3.44pm, Sen Cst Zabeth prepared a second version.⁸⁸ Again, it was emailed to Ch Insp Fuller.
91. At around 3.00pm, Ch Insp Fuller directed negotiators to attend Todd’s premises. At 3.22pm, Negotiation Coordinator telephoned Negotiation Commander to inform her of this.⁸⁹
92. Whilst the TORS operatives (other than Officers T2 and T6) were enroute to Todd’s premises, they exchanged certain information about the job over WhatsApp, including a “mud-map” of Todd’s home.⁹⁰
93. Between 3.22pm and 3.35pm, Officers T1, T3, T4, T5, T7, T8, and T9 arrived at Todd’s address. Officers T3 and T4 arrived at 3.22pm in vehicle [REDACTED] 15.⁹¹ Officer T9 arrived at 3.25pm.⁹² Officers T1, T4, and T5 arrived between 3.30pm and 3.35pm.⁹³

⁸⁴ Tab 11 (Statement of Mark McKenzie) at [23].

⁸⁵ Tab 221 (Log of entire WhatsApp group chat ‘SPSU Jobs Only’) at p. 1839.

⁸⁶ Tab 70 (Forward Command Log).

⁸⁷ Tab 111 (Statement of Assistant Commissioner Mitchell) at [14]; Tab 71A (Notes made by Chief Inspector Fuller) at p. 492. [REDACTED]

⁸⁸ Tab 114 (Statement of Senior Constable Zabeth) at [8].

⁸⁹ Tab 91 (Statement of Negotiation Commander) at [7].

⁹⁰ Tab 221 (Log of entire WhatsApp group chat ‘SPSU Jobs Only’) at p. 1842.

⁹¹ Tab 26 (Certified Police Radio Transcript of Calls between 1:10pm and 10:05pm) at p. 15.

⁹² Tab 70 (Forward Command Log); Tab 78A (TORS Field Supervisor Log).

⁹³ Tab 78A (Certified Transcript of Interview with Officer T9); Tab 80 (Certified Transcript of Interview with Officer T1) at p. 958 [A320].

94. Upon his arrival, Officer T9 assumed the role of Field Supervisor. He went to the Command Post, a vehicle where the Forward Commander (Ch Insp Fuller) and, later, Negotiation Team Leader were also located. Officer T9 also had discussions about every hour with Officer T10. They discussed progress and tactics and fed information to the TORS team via radios.
95. At 3.24pm, Belinda McKenzie telephoned Mark. She told him that Ms Shandelle Smyth (Todd's cousin and neighbour) had told her that Todd has been in the street with a knife.⁹⁴
96. At 3.27pm, Mark again called Todd. He told him to think about the consequences of his actions. At 3:32pm, Mark called Todd said "Todd imperative you open your door and let police sort this" before the phone went quiet and Mark assumed Todd had ended the call. At 3:34pm, Mark called Todd and said "Todd make sure you leave some options open" before the call ended, with Mark assuming that Todd had hung up..⁹⁵ At 4.05pm, Mark telephoned the front desk of Taree Police Station in order to seek police permission for him to attend the scene so he could support Todd.⁹⁶
97. At around 3.40pm, paramedics arrived at Todd's address.⁹⁷ At 4.55pm, notes made by one those Ambulance Officer, Operations Commander Smyth, record that he had a conversation with Ch Insp Fuller regarding the operational plan.
98. At 3.53pm, Sen Cst Larrain was asked by the TORS officers to switch off his BWV. He did so and his recording ceases. Sen Cst Harris was also asked to switch off his BWV and his video ceases shortly thereafter (at 4.07pm).
99. From around this time, Ch Insp Fuller directed officers to obtain statements from Todd's neighbours. Relevantly for present purposes, statements were obtained from Ms Cross (at 4.15pm) and from Ms Smyth (at 5.06pm). As will be noted in more detail below, both witnesses told police that Todd had accused them of entering his house. It appears that this information was not provided to negotiators on 31 July 2019.
100. By 4.47pm, the negotiation team had arrived. At 4.54pm, Primary Negotiator and Secondary Negotiator went to the rear of Todd's premises to commence

⁹⁴ Tab 11 (Statement of Mark McKenzie) at [24].

⁹⁵ Tab 11 (Statement of Mark McKenzie) pp. 6-7.

⁹⁶ Tab 11 (Statement of Mark McKenzie) p. 7.

⁹⁷ Tab 27 (Patient Health Care Record for Mr McKenzie and handwritten notes of Duty Inspector Joshua Smyth).

negotiations.⁹⁸ During his attempted negotiations, Primary Negotiator communicated the surrender plan to Todd and, at one stage, delivered a “reality check” to him by saying that as Todd had threatened people with a knife, police had been called and that he had to walk out to police and be arrested. Primary Negotiator was not able to establish rapport. Primary Negotiator also says that, at one point, he told Todd that his father was on his way to attend the address.

101. While Primary Negotiator was attempting to conduct negotiations, Fourth Person commenced collecting information about Todd.
102. At 5.07pm, Officer T9 prepared a formal Emergency Action Plan. This was approved by Ch Insp Fuller.⁹⁹ Unlike the later Deliberate Action Plan (discussed below), the Emergency Action Plan was reactive. It only contemplated that police would take action (such as entering the premises) if certain specified triggers were met. [REDACTED]
[REDACTED]¹⁰⁰ The Emergency Action Plan (and, indeed, the earlier IEAP which it replaced), contemplated that, if a trigger for the entry was met, the entry would be through the back of the premises.
103. At some stage, the TORS operatives were divided into two teams: Alpha and Bravo. Alpha team was located at the back of Todd’s premises (which is where any entry pursuant to the Emergency Action Plan would be effected). It was comprised initially of Officers T2, T3, T6 (who was allocated the role of team leader) and T8. Bravo Team was situated at the front of Todd’s premises. It was comprised of Officers T1 (team leader), T4, T5, and T7.
104. After his arrival, Officer T2 conducted a reconnaissance by looking through various windows at the rear of Todd’s address.¹⁰¹ Officer T2 observed Todd [REDACTED]
[REDACTED] This caused Officer T2 to have concerns as to the potential effectiveness of the tasers.
105. At 5.18pm, Ms Smyth attended the perimeter at Todd’s address. At around that time, Fourth Person spoke to her.¹⁰²

⁹⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1891 [A188]; Tab 93 (Statement of Primary Negotiator) at [11].

⁹⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader), at p. 1977; Tab 78B (Emergency Action orders), at pp. 761-6.

¹⁰⁰ Tab 173 (Statement of [Operator 76] (Tactical Operations Unit) at [32]-[36].

¹⁰¹ T1347; T1365 (15 June 2023).

¹⁰² Tab 70 (Forward Command Log); Tab 90 (Statement of Fourth Person), at [12].

106. At around 5.02pm, Fourth Person spoke to Mark.¹⁰³ What was said in that conversation is the subject of contested evidence. It appears uncontroversial, however, that Fourth Person told Mark not to attend. Mark was unable to indicate to Fourth Person whether Todd had received his last depot injection of the medication Invega Trinza. However, Mark contacted Todd's mother, June, in an effort to find this out and then convey it.
107. At 5.50pm, Mark texted Belinda to inform her that he had spoken to a police negotiator, who had asked that the family not attend.¹⁰⁴
108. At 6.12pm, it seems that Negotiation Team Leader and Negotiation Commander may have discussed the option of using a consultant psychiatrist in an attempt to engage Todd.¹⁰⁵ It is noted, however, that Negotiation Team Leader has said in his subsequently provided affidavit that he did not hold discussions with anyone about the use of a consultant psychiatrist.¹⁰⁶
109. At around 6.23pm, Fourth Person spoke with June. It is noted that June:
- a) Provided some detail of Todd's mental illness;
 - b) Provided contact details for Dr Neale, Todd's psychiatrist and his GP, Dr Singh;
 - c) Made certain observations regarding the type of communication styles that Todd did not respond well to;
 - d) Informed Fourth Person that Todd sleepwalks and when he wakes up thinks people may have been in his house; and
 - e) Outlined Todd's medication and expressed a concern that Todd may not have received his most recent injection.
110. This information was recorded by Fourth Person in iSurv.¹⁰⁷ After recording what June had told her about Todd sleep walking, waking, and thinking that persons had been inside his home, Fourth Person also added the words "(Possibly today's trigger?)".
111. A short time later (at 6.45pm), June texted Fourth Person advising her that Todd did receive his injection (of Invega Sustenna) on 25 July 2019. June relayed this

¹⁰³ Noting that Fourth Person appears to have created an entry in respect of that call in iSurv at 5.24pm. See also Tab 88 (Certified Transcript of Interview with Negotiation Team Leader), at p. 1977.

¹⁰⁴ Tab 10 (Statement of Belinda McKenzie) at [20].

¹⁰⁵ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at pp. 1938 [A626-A628] and 1945 [A700-A701].

¹⁰⁶ Tab 88-1 (Affidavit of Negotiation Team Leader) at [31].

¹⁰⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1978.

information via text message because the calls to Fourth Person's mobile had been diverted.¹⁰⁸

112. At 6.48pm, Todd tapped windows with a knife in front of Primary Negotiator.¹⁰⁹
113. From 7pm, Sen Cst Reardon made a number of attempts to obtain information about Todd from his treating clinicians. These efforts are described in the context of Issue 6 below.
114. By 7.25pm, Primary Negotiator had still been unable to engage Todd in negotiations. Accordingly, the members of the Negotiation Team stood down temporarily and conferred to discuss alternative approaches. It was agreed that Fourth Person should take over negotiations from Primary Negotiator.¹¹⁰
115. At 7.50pm, Fourth Person commenced attempts to negotiate with Todd. She too was ultimately unable to establish meaningful engagement with Todd. However, in her evidence, Fourth Person refers to a brief moment when she thought that she "had him" (meaning that she thought she had been able to engage Todd). The evidence does not permit a finding to be made as to the precise point during Fourth Person's attempted negotiations with Todd that this occurred relative to other events (such as the opening of the window, referred to below).¹¹¹
116. At 7.55pm, Ch Insp Power directed Sen Cst Forrester to go to Manning Base Hospital to speak with Dr Neale. However, Dr Neale was not on duty. As noted below, Sen Cst Forrester then left messages for Dr Neale asking him to contact police negotiators.¹¹²
117. At 8.10pm, Dr Neale spoke with Primary Negotiator. Dr Neale had no recollection of Todd but offered to check his notes to assist in his recollection.¹¹³
118. At around 8.14pm, Officers T10 and T9 discussed a plan to open an unlocked window at the right rear of Todd's premises in order to try and enable negotiation from there.

¹⁰⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1979.

¹⁰⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1979.

¹¹⁰ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1979; Tab 90 (Statement of Fourth Person), at [18]; Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1897 [A214].

¹¹¹ T325; T343 (30 March 2023).

¹¹² Tab 67 (Statement of Senior Constable Forrester) at [10]-[11].

¹¹³ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1980; Tab 93 (Statement of Primary Negotiator), at [24].

As discussed below, it appears that Negotiation Team Leader was not made aware of this plan.¹¹⁴

119. As a result, at 8.17pm, Officers T6 and T8 opened a window at the rear of the house and drew the curtains. They also propped open the window with tent poles. This caused Todd to come into room with a knife, push the props away, and to shut and lock the window. In his contemporaneous notes, Negotiation Team Leader noted that at 8.20pm: "Subject not happy with this + has acted angrily + now closed the window. Subject not conversing anything meaningful".¹¹⁵
120. While the precise timing is unclear, it appears that, at some point after Todd had slammed shut the window, at the latest, Ch Insp Fuller and Officer T9 began discussing the possibility of conducting a breach and hold. These discussions were the subject of considerable oral evidence and will be dealt with in the part of these findings that deal with Issues 9 and 10.
121. In addition, the question of whether, and, if so, the extent to which Negotiation Team Leader was involved in the discussions between Officer T9 and Ch Insp Fuller regarding the breach and hold is the subject of some conflicting evidence. However, it appears largely uncontroversial that Negotiation Team Leader was present in the command bus at the time of these discussions.
122. It is reasonably clear that subject to any reaction by Todd, the breach and hold was intended to be followed by a related, but separate, strategy of [REDACTED]. The relationship between these actions will also be considered in the findings in relation to Issue 9 below.
123. At 8.21pm, Officer T12 updated Assistant Commissioner Mitchell about the progress of the job.¹¹⁶
124. At 8.27pm, Primary Negotiator again spoke with Dr Neale. The relevant iSurv entry records:

"Have spoken with the treating psychiatrist from Taree, Dr. Brian Neil. He stated he has seen the POI three times over the last three years and that was just so the POI could have a medical to get his drivers licence. Each time he has seen him he has been fine and well. A year ago his medication was changed to an injection every

¹¹⁴ Tab 85 (Statement of Officer T10) at [24]; Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1981; Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1926 [A507].

¹¹⁵ Tab 88C (Contemporaneous notes/Log made by Negotiation Team Leader) at p. 1989.

¹¹⁶ Tab 113 (Statement of Officer T12).

three months with the drug Trinza which was a new formula of his previous drug, Sustena. The psychiatrist is of the belief that the GP for the POI is Anubah Singh.”¹¹⁷

125. At 8.34pm, Officer T9 contacted Officer T10 and informed him that negotiations were still not progressing and that he and Ch Insp Fuller had discussed the option of conducting a breach and hold. Officer T10 suggested that Officer T9 record the plan on the iSurv log.¹¹⁸
126. Ch Insp Fuller conducted an “appreciation process” which weighed the alternatives available to police in dealing with Todd. He weighed up the pros and cons of each. This appreciation process records the alternatives as being to conduct a “breach and hold [REDACTED] A third alternative, for police to leave Todd’s premises, was recorded but dismissed by Ch Insp Fuller on the basis of the seriousness of the conduct Todd was alleged to have engaged in prior to police arrival.
127. At 8.38pm, Officer T10 contacted Negotiation Commander to update her on the status of the job. Officer T10 suggested that the Negotiations Team Leader should be reminded of confirming the results of locating the treating doctor. Negotiation Commander passed this message onto the Negotiation Team Leader.¹¹⁹
128. At 8.39pm, the following entry was made on the iSurv system:
- “In consultation with police fwd commander insp fuller, negs t/l proposed breach and hold of white door I. White window 1 would, be reamed to provide cover while this was occurring. Try to have poi engaged at rear of premises with negs or while playing drums in room in red black corner. Assess outcome try and re-engage negotiations.”¹²⁰
129. At 8.40pm, Negotiation Team Leader made a request for Todd’s GP, Dr Singh, to be contacted in an attempt to find out whether Todd had received his medication (notwithstanding that June had already provided information that he had).¹²¹ Shortly before 9pm, Sen Cst Forrester attempted to contact Dr Singh (and another GP at the Harrington clinic, Dr Thu-Ya) contacting both Manning Base Hospital and Access Health Care. These efforts were unsuccessful.¹²²

¹¹⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1981.

¹¹⁸ Tab 85 (Statement of Officer T10) at [25].

¹¹⁹ Tab 85 (Statement of Officer T10) at [27].

¹²⁰ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1981.

¹²¹ Tab 88, at p. 1898 [A220].

¹²² Tab 67 (Statement of Senior Constable Forrester).

130. Between 8.45pm and 8.56pm, Officer T12 and Assistant Commissioner Mitchell exchanged the following texts:

“Mitchell: What is the planned DA?

T12: Looking at breach and hold to try and get him to engage then recommence negs. He just ignores negs and plays his drums

Mitchell: Well some decisions need to be made. Is he threatening self harm or not?

T12: Nil threats of self harm

Mitchell: Hmm decisions need to be made on strategy

T12: Mr Fuller, Negs, FS discussing them now with [T10] TOU. You may get a call soon

Mitchell: Whats the actual background of this job [T12]? He’s armed with a knife ... no threat if self harm ... no hostage ... what was the original offence/call for police? Is he drug or alcohol affected? Criminal history etc.

T12: Armed with a knife harassing/threatening neighbour. Police attended and threatened them . Police drew firearms and POI retreated in house stating he was going to cut their throats. Nil threats of self harm. Stated during NEGS didn’t wish to hurt police. Diagnosed with bi-polar and schizophrenia. Has not taken his medication. Extensive history for B&E, property, drugs, sex offence. 60 plus events.

Mitchell: [Thumbs up emoji]”¹²³

131. At 8.48pm, Todd pushed a ladder away which had been used by Officer T2 to look in through his bedroom window.¹²⁴ Todd then locked the window.¹²⁵
132. An iSurv entry of 9.05pm records that “further enquiries to be made with GP prior to tactical plan being commenced; no permissions yet granted”.¹²⁶
133. At 9.08pm, Belinda called Todd, connecting twice.
134. At 9.28pm, Negotiation Team Leader called Negotiation Commander. He advised her that the negotiation was still not progressing and that there had been no engagement with Todd for a considerable period of time. Ch Insp Fuller, Officer T9, and Negotiation

¹²³ Tab 113 (Statement of Officer T12) at [21].

¹²⁴ T1365 (15 June 2023).

¹²⁵ Tab 87 (Statement of Officer T8) at [27]; Tab 78A (TORS Field Supervisor Log of Officer T9) p. 758.

¹²⁶ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1982.

Team Leader had discussed a breach and hold.¹²⁷ By this stage at least, it appears that Negotiation Team Leader supported the plan.¹²⁸

135. At around 9.30pm, Officer T10 spoke with Officer T9. Officer T9 says that Ch Insp Fuller, Negotiation Team Leader, and himself believed the job had reached a point where a further option was required. Officer T9 outlined the plan and confirmed that, in his view, he had sufficient equipment to conduct it. Officer T10 agreed that it was reasonable to perform a breach and hold.¹²⁹
136. At 9.32pm, Officer T10 telephoned Assistant Commissioner Mitchell to brief him about the situation to date as recorded on the Isurv log and indicated that there had been no meaningful dialogue or progression. Officer T10 also outlined and explained the intent of the breach and hold plan.¹³⁰
137. Assistant Commissioner Mitchell approved this plan. His approval was communicated at 9.36pm.¹³¹ Ch Insp Fuller had the operational discretion about when and if that option was to be pursued.
138. At around 9.44 pm, Ch Insp Fuller gave the order to execute the breach and hold.¹³²
139. What follows below is taken from the interviews of the members of Bravo team and the oral evidence of Officers T1, T5, and T2. The evidence was consistent in material respects.
140. The plan was for Bravo team to conduct the breach and hold at the front of Todd's premises. The Bravo team was supplemented by Officers T2 and T7 (who joined that team from Alpha team). The role of Alpha team was to create a distraction at the rear, whilst Bravo team effected the breach. For this purpose, Fourth Person remained at the rear of the premises (in the company of the Alpha team).
141. At some stage, members of the Bravo team assembled on the front verandah and performed a brief rehearsal. They also removed some items of furniture.

¹²⁷ Tab 91 (Statement of Negotiation Commander) at [13].

¹²⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1930 [A546].

¹²⁹ Tab 85 (Statement of Officer T10) at [31]-[34].

¹³⁰ Tab 85 (Statement of Officer T10) at [35]-[36]; Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1983; Tab 111 (Statement of Assistant Commissioner Mitchell) at [18].

¹³¹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1982; Tab 71 (Certified Transcript – Interview with Chief Inspector Fuller), at pp. 440-1 [A144] and 475-6 [A370]; Tab 85 (Statement of Officer T10), at [37]; Tab 70 (Forward Command Log) at p. 10.

¹³² Tab 78A (TORS Field Supervisor Log of Officer T9) at p. 758.

142. Initially, Officers T5, T1, and T7 were positioned by Todd's front window. The other officers were positioned near the door.
143. Officer T5's role was to effect the breach. For this purpose, he was equipped with a "Halligan tool". He used this successfully to ram the front window of Todd's premises and clear the glass. This allowed Officers T7 and T1 to see into Todd's front room.
144. Officer T5 then picked up a ram and broke the door open at the lock.¹³³ Officer T4 held back the screen door and used his foot to keep the front door open. He then stood in the doorway holding a large Perspex shield.¹³⁴
145. After a period of some seconds,¹³⁵ members of the Bravo team saw Todd appear from the back of the house. Officer T1 observed that he was carrying a knife¹³⁶ and Officer T4 called out to Todd to put the knife down. Todd continued to advance towards Officer T4. Officer T7 fired two rounds of super sock (or, colloquially,¹³⁷ bean bag) ammunition at Todd through the front window. These struck Todd in the upper body, with one bean bag spinning him slightly and a second one knocking him to the ground. However, Todd bounced back up and the bean bags did not prevent him from moving forward.¹³⁸
146. At the same time, Officer T1 fired his Taser through the window. This struck Todd and caused him to go to ground. However, Todd quickly regained his footing. Officer T1 stepped to the side to reload but did not get another clear opportunity to deploy the Taser.
147. Meanwhile, Officer T5 also fired his Taser. This also seems to have hit Todd but to have had no obvious effect.
148. Officer T4 fired his OC foamer at Todd, which hit him in the face. At the same time, Officer T2 (who was equipped with metal mesh gloves and whose role was to try and seize the knife) discharged his OC stream. Neither had any effect.
149. Officer T4 moved his shield to allow Officer T3 to fire further super sock rounds at Todd from the doorway. He fired at Todd from close to "point blank" range.¹³⁹ These failed to incapacitate Todd.

¹³³ Tab 80 (Certified Transcript of Interview with Officer T1) at p. 1068.

¹³⁴ Tab 81 (Certified Transcript of Interview with Officer T4) at pp. 1578-80.

¹³⁵ Officer T5 says perhaps 20-30 seconds (T677.27) as did Officer T1 (T837). Officer T2 says 12-15 seconds (T1421).

¹³⁶ Tab 80 (Certified Transcript of Interview with Officer T1) at p. 1073.

¹³⁷ T727 (5 April 2023); T837 (6 April 2023).

¹³⁸ Tab 83 (Certified Transcript – Interview with Officer T7), p. 24.

¹³⁹ T843 (6 April 2023).

150. Todd then started stabbing at Officer T4's shield. T4 pushed back in an attempt to pin Todd to the wall. However, Todd was able to reach around the shield and grabbed at Officer T4 causing him to take a step back. This allowed Todd to get past Officer T4 and into the enclosed verandah space outside Todd's front door. At this point, Todd and the TORS operatives were in close vicinity with Todd waving and slashing his knife at them.
151. As Officer T2 was attempting to grab the knife from Todd, he slipped. At this point, Todd stabbed towards Officer T2 with the knife, striking him twice on his ballistic helmet. On seeing this, Officer T1 yelled "someone shoot him".
152. By the point that Officer T1 had called this out, Officer T5 had already drawn his firearm. He fired a number of shots in quick succession.
153. Todd was conveyed to Manning Hospital by ambulance, arriving at 10.02pm. Todd died as a result of the gunshot wounds he sustained. The time of death recorded was 10.10pm.

Preliminary matters

154. There are a number of preliminary matters to be addressed prior to a consideration of the issues explored at the inquest. Those matters concern:
 - a. information provided by Mr Knight regarding an unconfirmed report that Todd obtains drugs on 31 July 2019;
 - b. Junes' submission regarding incorrect information conveyed via VKG broadcast;
 - c. the Commissioner and Ch Insp Fuller's submission that Counsel Assisting's submissions are tainted by an unacceptable degree of hindsight bias; and
 - d. the Commissioner's submission in relation to the issue of mental health in regional Australia.

Certain information provided by Mr Knight

155. As noted in the chronology above at [5455], there is an unconfirmed report in information provided by Mr Knight that Todd obtained drugs at some stage on 31 July 2019.

Submissions

156. The Commissioner points to that information provided by Mr Knight as another explanation for Todd's paranoia on the day (in addition to the explanation that Todd had a paranoia about people entering his home).¹⁴⁰
157. Mark¹⁴¹ submits that while the rules of evidence do not apply in coronial proceedings, Mr Knight's evidence should be rejected due to a lack of reliability and relevance, which nevertheless remain touchstones in this jurisdiction.¹⁴²
158. Mark notes that there are no other references in the brief that suggest Todd obtained or used drugs on 30 or 31 July 2019. He submits that there a number of reasons as to why Todd did not possess or use drugs, namely: that the toxicology report did not detect the presence of any amphetamines;¹⁴³ no drugs or drug paraphernalia related to ice were located in Todd's home following his death¹⁴⁴ (including after two further investigative searches by police);¹⁴⁵ and contemporaneous statements from neighbours did not indicate anything regarding the use of drugs.
159. Furthermore, Mark submits that: Mr Knight does not identify the persons who reported this information to him; that Mr Knight's statements are inconsistent in material respects as to the persons who gave him this information; and the actual cause of Todd's agitation, and the date on which the drugs were bought and used.
160. Mark submits that the Court ought to consider making a finding that Todd had not consumed the drug ice prior to his death and that this was not a factor to his psychosis on 30 and 31 July 2019.
161. June¹⁴⁶ submits that there is no conclusive evidence that Todd had bought or used ice in the days prior to his death. June refers to the results of the toxicology report and the lack of drug paraphernalia in Todd's home.
162. In their submissions in reply, Counsel Assisting¹⁴⁷ submit that:

¹⁴⁰ Written submissions of Commissioner dated 13 October 2023 at [137].

¹⁴¹ Written submissions of Mark McKenzie dated 12 October 2023 at [9]-[14].

¹⁴² *Walter v Mining Pty Ltd v Coroner Hennessey* [2009] QSC 102; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256.

¹⁴³ See Tab 3 (Toxicology Report).

¹⁴⁴ See Tab 9 (Statement of Detective Sergeant Adam Child) at [599]; Tab 242 (Property Seizure Form B110890); Tab 243 (Investigative Search Note); Tab 244 (Investigative Search Note).

¹⁴⁵ See Tab 9 (Statement of Detective Sergeant Adam Child) at [599].

¹⁴⁶ Written submissions of June Wilkins dated 13 October 2023 at [29].

¹⁴⁷ Written submissions in reply of Counsel Assisting dated 10 November 2023 at [3].

- i. Little weight should be afforded to Mr Knight's account in light of the inconsistencies in his various statements, the failure of toxicological analysis to detect any amphetamines in Todd's blood, the fact that police did not find any drugs or drug paraphernalia related to ice at his house despite a number of searches and the contemporaneous statements obtained from neighbours which did not report anything regarding the use of drugs.
- ii. It is ultimately not necessary to make a factual finding as to whether Todd had obtained and taken ice on 30 or 31 July 2019 because it is simply not possible to know what led to Todd's behaviour on those days. In that regard, Dr Kerri Eagle, forensic psychiatrist, indicated that Todd's acute relapse of psychosis could have been precipitated by substance abuse, mood disturbance and/or stressors.¹⁴⁸

Consideration

163. I place little weight on the hearsay account of Todd obtaining drugs on 30 or 31 July 2019, particularly given the post mortem toxicology and the complete lack of evidence of drugs or drug paraphernalia apparently found in his house after a thorough police search. While Mr Knight may be accurately reporting information he heard after Todd's death, rumours and stories can grow after a tragedy of this sort and one must be very careful in accepting them as accurate. It is not established that Todd *was* affected by drugs at the time of his death.
164. The Commissioner seemed particularly keen to urge a finding that drugs may have precipitated Todd's mental health decline and influenced his behaviour on the day. If the submission carried with it an inference that Todd was somehow culpable for his behaviour, the approach is misguided. Dr Eagle made it clear that Todd's acute relapse into psychosis could have been caused by a number of factors. Very little would turn on whether the relapse was triggered by earlier drug use, even if it had been established.

Incorrect information conveyed via VKG broadcast

165. As noted in the chronology above at [59]-[60], the reference in the VKG broadcast of 1.13pm to intelligence on Todd indicating a history of sexual offences was an error.

¹⁴⁸ Tab 11C (Expert report of Dr Kerri Eagle) at p. 36

June submits that this misinformation contributed to the hostility that Todd faced from the first responding officers.¹⁴⁹

166. The Commissioner¹⁵⁰ submits that there is no evidence to suggest that this contributed to the hostility Todd faced from first responders.¹⁵¹ It has not been established that the general duty officers were even aware of this intelligence at the time of interacting with Todd or that this information was used as a basis for “hostility”. It was also never suggested that Todd was convicted of sexual offences, but simply part of an intelligence briefing which takes into account a range of information. The second intelligence pack makes clear that Todd had no prior convictions.¹⁵²

Consideration

167. I acknowledge how distressing it must have been for family to hear that completely incorrect “intelligence” was conveyed to officers involved on the day. I understand that the completely false suggestion that Todd had a history of sexual offending was particularly distressing for his family. I am pleased that the record has been corrected.
168. I accept the Commissioner’s submission that there is no evidence that the first responding officers were aware of this false information. Nevertheless, the mistake had the capacity to influence their behaviour and underlines the importance of providing accurate information.

Hindsight bias

169. The Commissioner¹⁵³ submits that Counsel Assisting’s submissions are tainted to an unacceptable degree by hindsight bias. The Commissioner refers to certain case law in relation to proceedings that followed a police operation, noting that this is a familiar problem.¹⁵⁴ This includes a reference to *Woodley v Boyd* [2001] NSWCA 35 at [37], which noted that “in evaluating police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight”.
170. In the context of specific issues, Ch Insp Fuller also submits that Counsel Assisting’s submissions involve an unacceptable degree of hindsight bias.¹⁵⁵

¹⁴⁹ Written submissions of June Wilkins dated 13 October 2023, at [43].

¹⁵⁰ Written submissions of the Commissioner dated 25 October 2023 at [14].

¹⁵¹ Written submissions of June Wilkins dated 13 October 2023 at [42], [44], [52].

¹⁵² Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence) at p. 2144.

¹⁵³ Written submissions of the Commissioner dated 25 October 2023 at [6]-[8].

¹⁵⁴ *Rosenberg v Percival* [2001] HCA 18 at [16]; *Woodley v Boyd* [2001] NSWCA 35 at [37]; *McIntosh v Webster* (1980) 43 FLR 112 at 123.

¹⁵⁵ Written submissions of Superintendent Paul Fuller at [4(b)], [32], [44], [108], [124].

171. Submissions have been made on behalf of both the Commissioner et al¹⁵⁶ and Chief Inspector Fuller¹⁵⁷ to the effect that the submissions of Counsel Assisting are tainted to an unacceptable degree by hindsight bias, particularly in respect of the decision to deploy the breach and hold.
172. In their submissions in reply, Counsel Assisting submit that it is proper and indeed necessary to be conscious of the distorting effects of hindsight and in that regard, it is useful to repeat what State Coroner Barnes said in his findings and recommendations in respect of the Inquest into the deaths arising from the Lindt Café siege at [25]. Specifically, his Honour stated:
- “Concern that the inquest might unfairly judge the performance of individuals by relying on the benefits of hindsight is understandable but unnecessary. The inquest compiled a more complete picture of the events of 15 – 16 December than was available to any individual at the time. The insight this knowledge afforded can be applied to the benefit of police and the public. Such use of hindsight is fair and proper. Using hindsight to criticise individuals by reference to things that they did not know and could not reasonably have been expected to know would be unfair. That has not been done in this report.”
173. Similarly, every effort has been made in preparing Counsel Assisting’s submissions to avoid the type of unfairness State Coroner Barnes referred to.
174. To the extent that the Commissioner relies on what was said in *Woodley v Boyd* at [37], it is accepted that it is proper to judge the actions of the police officers in this inquest by reference to the pressure of events and the agony of the moment, not by reference to hindsight. However, it is emphasised that by contrast to the facts in *Woodley v Boyd*, which involved an interaction between a member of the public and police officers over about two minutes and a decision about how to effect an arrest made in a matter of seconds, the events in this matter involve actions and decisions made over a number of hours. With respect, the key judgments and decisions in respect of which evidence was called and which have been the subject of submissions in this matter were not made in circumstances of excitement, turmoil and panic.

Consideration

175. I have considered the submissions made by the Commissioner and Ch Insp Fuller on this issue carefully. It is always helpful to raise the operation of hindsight bias.

¹⁵⁶ Written submissions of the Commissioner dated 25 October 2023 at [6]-[8].

¹⁵⁷ Written submissions of Superintendent Paul Fuller at [4(b)].

However, I am satisfied that the manner in which these events have been examined in this inquest is free from hindsight bias. The coronial process is useful because it compiles all the available information, more than would be available to any single person on the day. That does not mean that the conduct of involved individuals is judged as though they knew everything we may now know.

Mental health in the regions is in crisis

176. The Commissioner¹⁵⁸ submits that the evidence presented at the inquest demonstrates the need for a significant expansion of services, intervention and supports for people with mental illness across the continuum of care and better coordination of clinical care for patients with severe, chronic and complex needs. The greater provision of health-related services is needed at the back-end, to ensure that those with mental health conditions are properly cared for and to minimise situations in which policing agencies are required to become involved.
177. The Commissioner refers to the following extract from an article published in the *FBI Law Enforcement Bulletin*, which article is referred to by Dr Eagle in her report:¹⁵⁹
- “... prior to the 1960s, doctors often institutionalised patients with schizophrenia. However, this pattern began to reverse in the 1970s due to the advent of anti-psychotic medication, changing attitudes of individuals towards people with mental illness, revelations about poor conditions at hospitals, and concerns about costs. This pattern accelerated in the 1980s and continues today. While many people with schizophrenia can live more normal lives in the 1990s, a lack of funding for community-based care has led a number of these individuals to deteriorate and lapse into behaviour that law enforcement now must address. Experts estimate that more than one half of all people with schizophrenia receive inadequate therapy, while fewer than 30 percent get appropriate medication. Some mental health experts believe that the burden of responsibility and risk is shifting to law enforcement.”
178. The Commissioner notes that Negotiation Commander confirmed that the Australian experience is not dissimilar, with officers such as Sgt Watt also acknowledging that there had been a transfer of a burden away from the healthcare sector towards police. In addition, Negotiation Commander and Officer T10 gave evidence that there were

¹⁵⁸ Written submissions of the Commissioner dated 13 October 2023 at [39]-[41] and [44]-[49].

¹⁵⁹ Tab 11C(iii) (Article by Kris Mohandie and James E Duffy titled “Understanding Subjects with Paranoid Schizophrenia”, *FBI Law Enforcement Bulletin*, 1999” at p. 10.

missed opportunities for managing mental health in the community. With reference to this case, Negotiation Commander stated the following:¹⁶⁰

“...in the perfect world it would have been great if Mr McKenzie was case managed when his medication was changed, or there should've - would've been some oversight around potential break through symptoms or someone following up with him. That's what I mean that sometimes that intervention could have happened earlier to prevent a crisis occurring. I put that in the context of people on community treatment orders for schizophrenia where we have non-compliance with medication, but due to resourcing they may not get picked up for some months and by that stage, they're already in a psychotic state. So I certainly do not say that the family should have picked this up and managed. What that is about, is missed opportunities managing mental health in the community.”

179. The Commissioner also refers to the findings of the State Coroner in the inquest into the death of CS at [503],¹⁶¹ where her Honour noted evidence given at the inquest that mental health services generally, and in particular in regional Australia, are in crisis. The Commissioner also notes that PACER is not available for situations such as the situation concerning Todd on 31 July 2019.
180. The Commissioner submits that policing agencies are increasingly put in the position of being asked to respond to more mental health jobs, often in circumstances where no other agencies is willing or able to attend, only to be criticised to do so. That is not to say that the NSWPF has not done what they can to respond to the inequitable shift in the burden of responsibility towards police.

Consideration

181. I have no difficulty in endorsing the Commissioner's call for a significant expansion of services, intervention and supports for people with mental illness across the continuum of care and better coordination of clinical care for patients with severe, chronic and complex needs. It is a call I have made myself on occasions in other proceedings. However, it does not appear to me that a lack of community mental health care is the principal issue in these proceedings. The evidence before me indicates that Todd had been reasonably stable in the community and had engaged well with health providers for some time. While he lived with a chronic illness, he appears to have been largely compliant with his medication and did not require ongoing inpatient care.

¹⁶⁰ T457.43 – T458.13 (31 March 2023).

¹⁶¹ Delivered on 15 June 2022.

Notwithstanding his engagement with mental health providers his illness was described by Dr Eagle as treatment-resistant.

182. The flashpoint examined in these proceedings was the sudden development of a more acute episode of psychosis. It involved the intersection of a police response with the need for immediate mental health care. This is the territory we need to re-think. If, as was suggested, we are placing too heavy a burden on the NSWPF, then perhaps it is time to allow greater health-led participation in planning a response to the kind of circumstances which existed when NSWPF attended Todd's house on 31 July 2019. It is useful to remember that the first report of Todd wielding a knife occurred the day before and when police could not find him, they took no particular action. Nobody was hurt. Was this the time to contact his mental health provider? How could that have occurred when NSWPF was the only agency involved? It was explained in these proceedings that the PACER program is not available when the incident is classed as "high risk." But this should not be the end of it. How do we better involve a health-informed response? It is an issue to which I will return.

Issues for consideration

183. A list of issues (comprising 11 issues) to be explored at the inquest was prepared and circulated to the parties before the hearing commenced. Those issues are considered in detail below.

Issue 1 – What was the nature of Todd's psychiatric condition as at 30 and 31 July 2019?

Evidence

184. The evidence regarding Todd's mental health, including his diagnoses of schizophrenia (at [19]-[42]) and observations of him on 30 and 31 July 2019 ([43]-[45] and [55]-[58]) are summarised above.
185. In addition to that evidence, Dr Eagle prepared an expert report to assist this inquest. Dr Eagle is of the view that Todd had treatment-resistant schizophrenia and that his illness had been relatively stable during the months and years leading up to his death.¹⁶²
186. In Dr Eagle's opinion, on 30 July 2019 and 31 July 2019, Todd displayed signs and symptoms of an acute relapse of psychosis, that may have been precipitated by

¹⁶² Tab 11C (Expert report of Dr Kerri Eagle) at p. 35.

substance use, mood disturbance and/or stressors. This resulted in bizarre persecutory delusions, auditory hallucinations, severe thought disorder and disorganised behaviour, which impaired Todd's ability to determine what was real, impacted on his cognitive function, reduced his capacity to communicate clearly and influenced his behaviour. In particular, his capacity to understand and comply with directions from police would have been significantly impaired.¹⁶³

187. Dr Eagle gave evidence that, from the BWV footage of 31 July 2019, it was clear to her that Todd was floridly psychotic. He had disorganised and intense persecutory or paranoid beliefs that involved being part of the military and fighting a war. Todd would also incorporate his surroundings into those delusions. In Dr Eagle's view, at least up to the point where the BWV finished, Todd was suffering from and affected by auditory hallucinations and was constantly affected by delusions, albeit with the intensity and presence of those delusions varying to a degree depending upon the level of Todd's emotional arousal, anger, and agitation. Todd would incorporate his surroundings into his delusions and would have interpreted communication through the lens of those delusions.¹⁶⁴
188. Symptoms of psychosis can fluctuate with periods of relative composure, interspersed with intense delusional preoccupation. A person in an acute psychosis could be more lucid on some occasions than they might be on other occasions. Subject to the operation of their delusion, there may be periods where they are not so cognitively impaired as to not be able to appreciate their circumstances. Where the delusion incorporates their circumstances that would influence their perception of almost everything that is occurring, which would be viewed through the lens of a fixed false belief. At the same time, there may be people who are not incorporated into that belief, such as a friend, a father or dog, who is outside that belief (for instance, because of an existing relationship), they may be able to operate logically or coherently with that person.¹⁶⁵
189. Dr Eagle identified "moments of lucidity" as a potential window for engagement. She suggested that you might hope to communicate when Todd was more composed and in a way that could engage him, in particular with "some commonality or common theme that distracts him from what he believes is going on that might be upsetting him". Dr Eagle observed that Todd's level of anger, agitation and irritability increased

¹⁶³ Tab 11C (Expert report of Dr Kerri Eagle) at p. 35-36.

¹⁶⁴ T1567.4 – T1567.42 (20 June 2023); T1568.25 (20 June 2023); Tab 11C (Expert report of Dr Kerri Eagle) at p. 36.

¹⁶⁵ T1618.4 – T1618.26 (20 June 2023).

when challenged or antagonised.¹⁶⁶ In her view, Todd was still able to sense and pick up on sarcasm and antagonism, and that it would have played into his beliefs and made him feel angry and agitated, even though he was really unwell and impaired.¹⁶⁷

190. Dr Eagle observed that Todd appeared to have a substance use disorder. Todd would have likely used substances to cope with distressing symptoms and stressors. However, the use of cannabis and amphetamine substances would have exacerbated his severe mental illness.¹⁶⁸

Submissions

191. Counsel Assisting¹⁶⁹ submits that the evidence supports the following findings. First, having regard to the body of treating records available for Todd and the unchallenged opinion of Dr Eagle, who gave thoughtful and impressive expert evidence to the inquest, the appropriate finding is that for many years prior to 31 July 2019, Todd had suffered from schizophrenia, a chronic psychotic illness. Further, Todd's schizophrenia was relapsing in nature and characterised by delusions (including that neighbours were breaking into his house and stealing his possessions), referential ideas, and auditory hallucinations.¹⁷⁰
192. In terms of Todd's specific condition as at 30 and 31 July 2019, the evidence suggests that he was suffering from a severe episode or relapse of his psychosis to the point where he was floridly psychotic. The Court would accept Dr Eagle's opinion that during 31 July 2019, at least up to the point where the BWV finished, Todd was suffering from and affected by auditory hallucinations and was constantly affected by delusions, albeit with the intensity and presence of those delusions varying to a degree depending upon the level of Todd's emotional arousal, anger, and agitation.¹⁷¹
193. Secondly, the evidence supports a finding that, for many years, Todd had suffered from a substance use disorder, with some of the substances he used, particularly cannabis and amphetamines, serving to exacerbate his schizophrenia.¹⁷²
194. Thirdly, the evidence supports a finding that Todd's schizophrenia was relatively stable in the years leading up to his death, during which time he was on depot injections of

¹⁶⁶ T1570.13 – T1570.24 (20 June 2023); Tab 11C (Expert report of Dr Kerri Eagle) at p. 36.

¹⁶⁷ T1580.41 – T1580.43 (20 June 2023).

¹⁶⁸ Tab 11C (Expert report of Dr Kerri Eagle) at p. 35.

¹⁶⁹ Counsel Assisting's written submissions dated 30 August 2023 at [156]-[162].

¹⁷⁰ Tab 11C (Expert report of Dr Kerri Eagle) at p. 35.

¹⁷¹ T1567.4 – T1567.42; T1568.25 (20 June 2023).

¹⁷² Tab 11C (Expert report of Dr Kerri Eagle) at p. 35.

Invega Sustenna and later, Invega Trinza. Notwithstanding that, Todd's schizophrenia can be appropriately characterised as treatment resistant. In that regard, the Court would accept Dr Eagle's view that despite him being on therapeutic doses of anti-psychotic medication over time, with relative stability, he would nonetheless have suffered from auditory hallucinations and paranoid delusions from time to time.

195. Finally, the evidence supports a finding that on 31 July 2019, during Todd's dealings with police, he was substantially affected by his acute psychotic symptoms and, thus, significantly impaired in his capacity to understand and comply with directions from police.¹⁷³
196. That is not to say that at no point during the presence of police at his house on 31 July 2019 was Todd capable of any rational communication with police. Rather, his capacity was always significantly impaired and even more impaired at times when he became agitated and angry (which was frequently). As Dr Eagle acknowledged, symptoms of psychosis can fluctuate with periods of relative composure, interspersed with intense delusional preoccupation,¹⁷⁴ and that certainly seems to have been the case with Todd. The BWV footage which is available supports a finding that at times, when Todd was challenged or confronted, he became more agitated and upset and more affected by his delusions.
197. While there is no BWV footage available after approximately 4.00pm, the later observations of both tactical police and negotiators do not suggest any meaningful change in Todd's condition. It supports a finding that through to the execution of the breach and hold and Todd's death, Todd remained acutely psychotic, subject to hallucinations and delusions, and significantly impaired in his capacity to understand and comply with police directions.¹⁷⁵
198. The Commissioner¹⁷⁶ submits that there is a "logical tension" in Dr Eagle's evidence that Todd's ability to understand and comply with police was significantly impaired¹⁷⁷ while also implying that Todd would have been able to follow directions coming from his family and/or consultant psychiatrist. She submits that Dr Eagle appears to place little clinical significance in evidence of Todd's "moments of lucidity", including, for example, being able to recognise that people in his yard were police, his "rational"

¹⁷³ Tab 11C (Expert report of Dr Kerri Eagle) at p. 36; T1578.4 - T1579.7 (20 June 2023).

¹⁷⁴ Tab 11C (Expert report of Dr Kerri Eagle) at p. 36.

¹⁷⁵ Counsel Assisting's written submissions dated 30 August 2023 at [156]-[162].

¹⁷⁶ Written submissions of the Commissioner dated 13 October 2023 at [11]-[14].

¹⁷⁷ T1578.13 (20 June 2023); Tab 11C (Expert report of Dr Kerri Eagle) at p. 36 [273.1.2].

discussions with his father¹⁷⁸ and descriptions by police officers of Todd being “very high functioning” or playing music.¹⁷⁹ The Commissioner further submits it is perhaps paradoxical that Dr Eagle thought that Todd would be able to pick up on understand sarcasm and laughter.¹⁸⁰

199. Mark¹⁸¹ agrees with Counsel Assisting’s submissions. He further submits that, as supported by Dr Eagle’s report and evidence, Todd remained frequently if not predominately fearful during the events of 31 July 2019,¹⁸² and that Todd’s fearfulness exacerbated his psychosis.¹⁸³
200. June¹⁸⁴ agrees with Dr Eagle’s diagnosis of treatment-resistant schizophrenia and substance use disorder. She submits that the Court should accept that Todd’s illness often included delusions of people entering his home.¹⁸⁵
201. June agrees that Todd’s mental health had been relatively stable until the events of 30-31 July 2019 and he had been receiving treatment. She also agrees that Todd was substantially affected by his acute psychotic symptoms on the day of his death, which would have significantly impaired his capacity to understand and comply with police directions even though he may have had some capacity for rational communication.¹⁸⁶ June submits that Todd’s symptoms were worsened by the disproportionately large presence of police at Todd’s home.
202. In his submissions in reply, Mark¹⁸⁷ asserts that the Court should reject the Commissioner’s submission that there is a “tension” or “paradox” in Dr Eagle’s evidence in relation to Todd understanding some interactions but still have impaired understanding and ability to process information. He submits that Dr Eagle was a compelling witness who gave cogent evidence on the complexities of Todd’s psychosis, including explanations for some of Todd’s behaviours which may be misinterpreted by a lay person.¹⁸⁸

¹⁷⁸ T1463.9 (16 June 2023).

¹⁷⁹ T898.45-50) (6 April 2023).

¹⁸⁰ Tab 11C (Expert report of Dr Kerri Eagle) at p. 37.

¹⁸¹ Written submissions of Mark McKenzie dated 12 October 2023 at [21]-[23].

¹⁸² See Tab 11B (Letter of instruction to Dr Kerri Eagle) at p 37; T1579.40; T1580.13; T1581.12; T1639.16 (20 June 2023).

¹⁸³ T1579.40; T1580.35 (20 June 2023).

¹⁸⁴ Written submissions of June Wilkins dated 13 October 2023 at [60]-[65].

¹⁸⁵ Tab 11C (Expert report of Dr Kerri Eagle) at p. 35

¹⁸⁶ Tab 11C (Expert report of Dr Kerri Eagle) at p. 36; T1578.4 - T1579.7 (20 June 2023).

¹⁸⁷ Written submissions of Mark McKenzie in reply dated 3 November 2023 at [5]-[7].

¹⁸⁸ See, eg, T1579.30 (20 June 2023); the evidence of T2 at T1414.41 – T1415.38 (16 June 2023).

203. In their submissions in reply, Counsel Assisting¹⁸⁹ submits that, with respect, it is not agreed that, properly understood and in proper context, Dr Eagle’s evidence was inconsistent. The matters raised by the Commissioner at [11]-[13] of her written submissions assert inconsistency between Dr Eagle’s comments about Todd always having been substantially impaired by his symptoms of psychosis and her references to him having moments of lucidity. Counsel Assisting submit there is no relevant inconsistency. Dr Eagle’s consistent evidence in relation to such moments was that Todd’s level of emotions and the intensity of his symptoms would have fluctuated and would have been “*incorporated more or less into his perspective of what was going on depending on what was happening to him*”.¹⁹⁰ Accordingly, the “*moments of lucidity*” referred to in the Commissioner’s written submissions should be understood in that context.
204. Dr Eagle identified the “*moments of lucidity*” as a potential window for engagement. She suggested that one might hope to communicate when Todd was more composed and in a way that could engage him, in particular with “*some commonality or common theme that distracts him from what he believes is going on that might be upsetting him*”.¹⁹¹
205. Finally on this point, it was submitted on behalf of the Commissioner that Dr Eagle’s suggestion that Todd would be able to pick up on sarcasm was indicative of him having an understanding of what was being said to him, rather than a significant impairment.¹⁹² With respect, that is not what Dr Eagle said. She indicated her view that Todd was still able to sense and pick up on sarcasm (and antagonism) and that it would have played into his beliefs and made him feel angry and agitated, even though he was really unwell and impaired.¹⁹³

Consideration

206. I accept the totality of Dr Eagle’s evidence without reservation. It was compelling, considered and unchallenged by any other expert. I do not accept that there is any “logical tension” in her opinion. She gave a nuanced account of the way in which opportunities for engagement can exist even when a person is experiencing symptoms of psychosis. She explained that it is likely that Todd could still register antagonism and sarcasm, even when he was unwell. Her opinions are based on close examination

¹⁸⁹ Counsel Assisting’s written submissions in reply dated 10 November 2023 at [35]-[37].

¹⁹⁰ T1570.13 – 1570.24 (20 June 2023).

¹⁹¹ T1621.44 – 1621.50 (20 June 2023).

¹⁹² See written submissions of the Commissioner dated 13 October 2023 at [13].

¹⁹³ T1580.41 (20 June 2023).

of the BWV and her extensive practical experience in talking with people in active psychosis.

Issue 2 – Were adequate steps taken by police on 30 July 2019?

Evidence

207. The evidence relevant to this issue is set out in the chronology above at [43]-[52].
208. In addition to that evidence, oral evidence was given relevant to this issue. Sen Cst Larrain ultimately accepted in oral evidence that notwithstanding the other tasks he and Sen Cst Harris had to attend to on 30 July 2019, a call should have been made to the informant, Mr Smith, and an attempt should have been made to knock on the door at 3 Robertson Street, Taree.¹⁹⁴
209. Sen Cst Larrain also acknowledged in his interview that the house number was in the report and that he ought to have knocked on the door and contacted the informant.¹⁹⁵
210. In addition, in his evidence to the inquest, DCI Walpole also indicated his view that the response by TE15 on 30 July 2019 was inadequate. He suggested that with the available information, a call should have been made to Mr Smith and a location check should have been done at 3 Robertson Street.¹⁹⁶

Submissions

211. Counsel Assisting¹⁹⁷ submits that the police response to information provided by Paul Smith about Todd being on the street with a knife at 4.25pm on 30 July 2019 was cursory and inadequate. It is accepted that as TE15 was the only police car on duty in Taree at the time, Sen Csts Larrain and Harris were very busy and had multiple demands at that time. The evidence indicates that on the late afternoon of 31 July 2019 they had other commitments at an address in Iluka Circuit, Taree and at Manning Hospital. Even allowing for those matters, the way in which they responded to information about Todd, which was first broadcast at 4.28 pm, was inadequate. Counsel Assisting make the following submissions.
212. First, it was inadequate to spend one minute and eight seconds driving around Robertson Street, Golf Avenue, and Stewart Street. At a bare minimum, Sen Cst

¹⁹⁴ T91.11 (28 March 2023).

¹⁹⁵ Tab 44 (Certified Transcript of Interview with Senior Constable Larrain) at pp. 132-3 and 135 [A255-A256; A272].

¹⁹⁶ T45.16-28 (27 March 2023).

¹⁹⁷ Counsel Assisting's written submissions dated 30 August 2023 at [163]-[168].

Larrain should have telephoned Mr Smith in order to seek more information when no one was sighted on the street with a knife. That would have resulted in Mr Smith confirming the address to attend and the identity of Todd McKenzie. That would have permitted police to search his name on the COPS system and discover, amongst other things, that there was a psychiatric risk warning for Todd, as well as a history of some previous psychiatric treatment and admissions.

213. Sen Cst Larrain ultimately accepted, notwithstanding the other demands on him and Sen Cst Harris on the day, that a call should have been made to Mr Smith and an attempt should have been made to knock on the door at 3 Robertson Street, Taree.
214. Second, no real criticism can be made of Sen Cst Harris. He was driving TE15 and was reliant on Sen Cst Larrain to properly digest information available via CAD. That information in this case included the name and phone number of the informant, Mr Smith, and further information that the person who had been seen on the street with a knife was from 3 Robertson Street. Unfortunately, that information did not register with Sen Cst Larrain.
215. In Counsel Assisting's view, it cannot now be known how events might have progressed if in fact Sen Cst Larrain had called Mr Smith and he and Sen Cst Harris had gone to Todd's home on 30 July 2019. It may have simply brought forward the events of 31 July 2019. It is at least possible though that Todd may have been less acutely unwell and more amenable to discussion and engagement on 30 July 2019. It is possible that he may have been conveyed to the hospital for review and admission.
216. The Commissioner¹⁹⁸ agrees that no real criticism can be made of Sen Cst Harris and submits that any attempt to predict what may have unfolded if Sen Cst Larrain had called Mr Smith and gone to Todd's home on 30 July 2019 would be speculative.
217. Mark¹⁹⁹ agrees with Counsel Assisting's submissions on this issue. June²⁰⁰ agrees with Counsel Assisting that the police response was cursory and inadequate and that no real criticism can be made of Sen Cst Harris. She further agrees that police spent an inadequate amount of time driving around the streets and that the officers could have discovered Todd's psychiatric history and risk warning if they had searched the COPS system. She agrees that these enquiries could have prepared the officers for their

¹⁹⁸ Written submissions of the Commissioner dated 13 October 2023 at [55].

¹⁹⁹ Written submissions of Mark McKenzie dated 12 October 2023 at [27].

²⁰⁰ Written submissions of June Wilkins dated 13 October 2023 at [66], [68]-[70].

interaction with Todd and potentially result in Todd being conveyed and admitted to hospital.

Consideration

218. The evidence establishes that the police response on 30 July 2019 was both cursory and inadequate. I accept that a simple search of the COPS system would have alerted officers to the fact that Todd had a significant mental health history and could have triggered more curiosity about what was going on for him at the time.
219. One can only speculate about what might have happened if Todd's mental health provider had been contacted at this time and tasked with making telephone contact with Todd to assess his state of mind and query the need for inpatient care. It is one of a number of points in the chronology where gaps between the police and health systems appear. I do not criticise the officers for not taking that further step, I have no doubt that it did not occur to them, nor would they have been trained or equipped to take it. Nevertheless, the lack of police action or contact with health providers on 30 July 2019 is a missed opportunity.

Issue 3 – Was the initial response by police on 31 July 2019 adequate?

220. The "initial response" covers the time from the arrival of general duties police officers at 1.18pm through to the arrival of the specialist tactical police from TORS and the negotiation unit. The TORS officers were present by 3.35pm and the negotiators were present by 4.47pm. As set out above in the chronological narrative at [70], it was during this period that the forward command was established in a police bus two doors up from Todd's home. Excluded from this analysis is Sen Cst Larrain's engagement and negotiation with Todd. That is dealt with under Issue 5 below.²⁰¹
221. In relation to this issue, Counsel Assisting note that, at the outset, it is accepted that general duties police arrived promptly and that it was appropriate for them to remain outside Todd's house through the afternoon in order to secure the perimeter. In circumstances where he had been seen on the street with a knife and had been screaming abuse and threats at neighbours and had gone to Ms Cross' home with a knife, scraping it across the door and doorbell, it would not have been appropriate for police to leave Todd within his house and depart the premises. Objectively speaking, he presented a risk to his neighbours and possibly to himself.

²⁰¹ Counsel Assisting's written submissions dated 30 August 2023 at [170].

222. Mark and June support Counsel Assisting's observations at the outset of this issue.²⁰²
223. I accept that police arrived promptly and that it was appropriate for them to attend.
224. Counsel Assisting raise the following specific matters as being relevant to a consideration of the adequacy of police's initial response on 31 July 2019:
- a. limitations in information available;
 - b. insufficient emphasis on the fact that it was a mental health incident; and
 - c. oversight over Sen Cst Larrain.
225. Those matters are considered in turn below.

Limitations in information available

Evidence

226. The 1.13pm VKG broadcast confirmed that Todd was known under the *Mental Health Act 2007* (NSW) (***Mental Health Act***), a reference to his earlier involuntary admissions. A subsequent VKG broadcast at 1.37pm included reference to Todd having a historical diagnosis of schizophrenia and his last mental health event being in 2014.²⁰³
227. Soon after arrival at the scene, Ch Insp Power directed an intelligence officer attached to the Manning Great Lakes Crime Management Unit, Sen Cst Alison Sewell, to contact the Taree Community Mental Health Unit to see if Todd was known to them. Sen Cst Sewell confirmed Todd's details on the COPS system and then telephoned the community mental health team. She was told that he was not a current patient and had not been seen for some time. Sen Cst Sewell relayed that information back to Ch Insp Power.²⁰⁴
228. Separate to those efforts through local intelligence resources, the Real-Time Intelligence Unit in Sydney was tasked with gathering information that resulted in Sen Cst Zabeth preparing two POI profile documents, the second of which contained a mental health history and was emailed to Ch Insp Fuller at 3.44pm.²⁰⁵

²⁰² Written submissions of Mark McKenzie dated 12 October 2023 at [29]; Written submissions of June Wilkins dated 13 October 2023 at [71].

²⁰³ Tab 26 (Certified Police Radio Transcript of Calls between 1:10pm and 10:05pm) at pp. 5 and 11.

²⁰⁴ Tab 72 (Interview with Chief Inspector Power) at p. 15 (Q&A 86); Tab 109 (First Statement of Senior Constable Sewell); Tab 110 (Second Statement of Senior Constable Sewell).

²⁰⁵ Tab 114 (Statement of Senior Constable Zabeth); Tab 115 (Profile of Mr McKenzie - Version 1 (Real Time Intelligence)); Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence)).

229. Ch Insp Fuller confirmed in his oral evidence that while he understood that enquiries were being made at the scene with some of the neighbours to seek information about Todd, he did not seek any local intelligence assistance in speaking to the family about who was treating Todd.²⁰⁶

Submissions

230. Counsel Assisting²⁰⁷ observes that during the initial response, police had some, but limited, information available in respect of Todd, particularly as regards his mental health history. Counsel Assisting accepts that early enquiries were made during the afternoon of 31 July 2019 to try and obtain up-to-date information in respect of Todd's mental health condition and any treatment he was receiving. In that regard, Counsel Assisting points to the enquiries made by Sen Cst Sewell on Ch Insp Power's direction.
231. In circumstances where the initial enquiries made by Sen Cst Sewell did not result in any information being obtained about Todd's current condition or treatment and where a negotiation team was to be assembled, Counsel Assisting submit that it would have been prudent to have initiated some enquiries of family early on in the afternoon of 31 July 2019 as to who Todd was currently seeing for treatment (if anyone).
232. Furthermore, given that any up-to-date information about Todd's condition and treatment would be valuable to the negotiators when they arrived, Counsel Assisting submit that there is some force in the expert opinion of Mr Nick Perry that once the initial enquiry with the Taree community mental health team did not turn up any useful information, proactive steps should have been taken, including through local intelligence resources, to seek background information about Todd's condition and treatment (possibly through interviewing family members, clinicians, friends, or associates).²⁰⁸ At the very least, it would have been helpful to speak to Todd's parents at an early stage and find out from them who they understood was treating Todd so that up-to-date treating information could be obtained.
233. The Commissioner²⁰⁹ does not accept Mr Perry's opinion that proactive steps should have been taken to obtain information as to Todd's condition and treatment. The Commissioner submits that this overlooks the fact that a number of these

²⁰⁶ T1269.33; T1271.4 (14 June 2023).

²⁰⁷ Counsel Assisting's written submissions dated 30 August 2023 at [172]-[178].

²⁰⁸ Tab 11E (Expert report of Nick Perry) at pp. 15 and 32; T1655.34; T1660.17 (21 June 2023).

²⁰⁹ Written submissions of the Commissioner dated 13 October 2023 at [119].

investigations had already been conducted, including that police officers were sent to the local hospital to obtain Todd's medical records.

234. Ch Insp Fuller²¹⁰ submits that, Ch Insp Power was, to his understanding, making these background enquiries, including deploying Sen Cst Sewell to interrogate COPS and enquire with the local mental health unit.²¹¹ He accepts that enquiries of the kind contemplated by Counsel Assisting were not made at an earlier time but would have been made in an ideal world and were initiated upon the arrival of the negotiators.
235. Ch Insp Fuller further submits that the medical practitioners who had seen Todd could not have provided the sort of information or third-party intervention contemplated by Counsel Assisting as none of the doctors were readily available, had any real therapeutic relationship with Todd, or could provide any information of utility.²¹² He submits that nothing of substance was lost from having those enquiries being made later in the afternoon after negotiators were deployed.
236. Mark agrees with the submissions of Counsel Assisting in relation to this matter.²¹³

Consideration

237. I accept that some early attempts were made to obtain background information about Todd's condition and treatment. However, when the local community mental health team could not assist with up-to-date information, further efforts were called for to identify his current treatment provider. Early contact with Todd's parents, especially June, would also have resulted in useful information, including the name of Todd's private health provider. I accept Mr Perry's opinion that more pro-active inquiries were called for at an early stage.

Insufficient emphasis on the fact that it was a mental health incident

Evidence

238. There is no evidence that an explicit offer was made to Todd for mental health treatment or care. There was evidence before the inquest regarding the criminal justice and mental health aspects of a response to certain incidents and in this case.

²¹⁰ Written submissions of Superintendent Paul Fuller at [5]-[9].

²¹¹ T1264.8 – T1271.6 (14 June 2023).

²¹² Tab 299 (Statement of Dr Phillip Knowles (GP)) at [6]; Tab 209 (Statement of Francene Reo) at [13] and [15].

²¹³ Written submissions of Mark McKenzie dated 12 October 2023 at [29].

239. Ch Insp Fuller gave evidence that it is not always the case that the criminal justice side and the mental health side are separate, rather they can run in parallel. Police can take a person into custody by charging them and get them assessed by a psychiatrist or a clinician. Police can also take a person to hospital and charge them on a later date.²¹⁴
240. In this case, Ch Insp Fuller noted that there is a criminal action, specifically a Table 1 offence, being use weapon to avoid apprehension. The Police Handbook specifically deals with mentally ill or cognitive impaired persons committing Table 1 offences. He gave evidence that he would not have neglected Todd's mental health and would have had him assessed or taken him to the hospital or mental health unit in Taree. As to whether that would have been after charging Todd, Ch Insp Fuller stated that it would depend on how he presented at the time and that he would have most likely gone under police escort to the mental health unit or the hospital.²¹⁵
241. Ch Insp Fuller was hopeful that Todd would come out of his home voluntarily. Subject to the negotiators' success in trying to get him out, the plan was that Todd would be charged.²¹⁶ In the afternoon of 31 July 2019, he determined that Todd would be charged with offences relating to his conduct earlier that day and organised for officers to take statements in order to support the charge.²¹⁷
242. Ch Insp Fuller considered that the matter of whether an offer might be made to Todd to try to convey him to hospital to see a doctor with a view to encouraging him to emerge from the house was a matter best dealt with by Negotiation Team Leader or Fourth Person.²¹⁸
243. An entry in Ch Insp Fuller's notes for 4:00pm records that "POI is to be charged".²¹⁹ A subsequent entry records "not a [mental health] intervention".²²⁰ In respect of that entry, Ch Insp Fuller noted that, at that stage, he was wanted for criminal offences and stated that if Todd was to surrender or be arrested, the mental health side runs parallel to the charge process.²²¹ He also noted that the references means "not solely a mental health intervention".²²²

²¹⁴ T526.8 – T526.19 (3 April 2023).

²¹⁵ T526.32 – T526.48 (3 April 2023).

²¹⁶ T527.28 – T527.50 (3 April 2023).

²¹⁷ T524.38 – T524-46 (3 April 2023).

²¹⁸ T527.33 – T527.38 (3 April 2023).

²¹⁹ Tab 71A (Notes made by Chief Inspector Fuller) at p. 492.

²²⁰ Tab 71A (Notes made by Chief Inspector Fuller) at p. 495.

²²¹ T538.45 – T539.3 (3 April 2023).

²²² T1297.18 – T1297.27 (14 June 2023).

244. The purpose of the NSW Health – NSW Police Force Memorandum of Understanding 2018 (**MOU**) is “to assist staff of the NSW (including NSW Ambulance) and the NSW Police Force to work collaboratively in responding to situations involving people with mental health problems in a manner that best meets the clinical and safety needs of the person and the safety of others”. The MOU notes that the NSWPF primary responsibility in relation to its response to incidents is to ensure public safety.²²³

245. The MOU records that incident response, timeframes and resources will be informed by the nature and degree of risk. It is further noted that:²²⁴

“Attendance at an incident involving a person displaying signs of a mental health issue may involve single or multiple agencies. Initially, the role of partner agencies is to ensure the safety of those involved. Police may be required to attend situation which pose a threat to public safety, e.g. involving violence or the imminent threat of violence, or where weapons are involved or where a crime is being committed.

Once everyone’s safety is established, the attending agencies will consult with each other to determine the best course of action to facilitate the person accessing appropriate care in a safe and timely manner ...”

Submissions

246. Counsel Assisting²²⁵ makes the following submissions in relation to this matter. First, the evidence suggests that through the initial response (and later on, once specialist tactical police and negotiators became involved) the attending police largely treated Todd as having committed an offence and someone needing to be charged rather than someone to whom mental health assistance might have been offered. In that regard, it is accepted, as Ch Insp Fuller said on a number of occasions, that a decision to charge someone does not exclude offering mental health assessment or assistance.²²⁶

247. It is, however, emphasised that as Ch Insp Fuller’s evidence indicated, what he had in mind was initially having Todd taken into custody and charged for offences related to his use of a knife and avoiding apprehension and then possibly organising a review by a psychiatrist or clinician. Counsel Assisting submit that that was Ch Insp Fuller’s intention on the afternoon of 31 July 2019. The 4.00pm entry in his notes confirms that by that time he had determined that Todd was to be charged²²⁷ and it seems that, at

²²³ Tab 269C (NSW Health – NSW Police Force Memorandum of Understanding 2018) at pp. 4 and 9.

²²⁴ Tab 269C (NSW Health – NSW Police Force Memorandum of Understanding 2018) at p. 10.

²²⁵ Counsel Assisting’s written submissions dated 30 August 2023 at [179]-[185].

²²⁶ See, e.g., T526.8 – 527.3 (3 April 2023).

²²⁷ Tab 71A (Notes made by Chief Inspector Fuller) at p. 492.

about the same time, Ch Insp Fuller directed officers to obtain statements from Todd's neighbours with a view to charging Todd.

248. Secondly, what does not seem to have occurred during the initial police response was any explicit offer to Todd to organise mental health assistance or treatment for him. No such offer was made by Sen Cst Larrain, although at various times during the afternoon he did ask if Todd wanted to speak to someone else.²²⁸ If, for instance, early enquiries had been made of Todd's family and those enquiries had identified that his regular GP practice was Access Health in Taree (as June ultimately indicated at 6.23pm),²²⁹ the practice could have been contacted during business hours and information could have been obtained as to Todd's recent treatment. That would presumably have included confirmation that he had received his last depot injection on 24 July 2019 and information to the effect that Dr Neale had approved the occasional use of diazepam or temazepam on 13 March 2019.²³⁰
249. Counsel Assisting accepts that it cannot now be known what might have occurred had Todd been offered mental health treatment or assistance of some sort during the early period of the police response on 31 July 2019. Todd may not have been amenable to such an offer, noting that he told Sen Cst Larrain that he did not want to talk to anyone soon after police arrived on 31 July 2019.²³¹ Additionally, there were occasions when Todd had seemingly hung up on his father, Mark, during phone calls on the afternoon of 31 July 2019.²³² Given how acutely unwell he was on the day, he may not have been in a position to rationally respond to such an offer if made by police, but there was certainly little downside in making it.
250. Thirdly, it did not seem to occur to Sen Cst Larrain to offer mental health treatment or assistance, though it is not suggested he should be criticised for that omission, given the limited mental health training he had and what little he could recall of it.²³³ Ch Insp Fuller seems to have been aware that an available option was to initially take Todd to hospital for assessment and later consider charging him.²³⁴ However, that was not his

²²⁸ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at pp. 41, 60-1.

²²⁹ Tab 88B (Clarification of iSurv log during interview with Negotiation Team Leader) at p. 1978.

²³⁰ Tab 298 (Access Health records) at p. 420.

²³¹ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 24.

²³² Tab 11 (Statement of Mark McKenzie) at [23], [26] and [27].

²³³ T94.37 – T95.8 (20 March 2023); Tab 257 (Summary of Training and Qualifications – Senior Constable Larrain).

²³⁴ T526.17 (3 April 2023).

approach on the day and, accordingly, he did not direct that any of the general duties police officers offer any form of mental health review, assessment, or treatment.

251. Counsel Assisting acknowledges that if an offer of mental health review, assessment, or treatment were to have been made early in the afternoon of 31 July 2019, it could only have proceeded if Todd were to emerge from the house without his knife.
252. Finally, an opportunity was lost during the initial response on 31 July 2019 to contact Todd's family, find out who was treating Todd, and then offer review and assessment (with a view to mental health treatment) by a clinician he knew. In practical terms, that would have meant either Dr Knowles or Dr Neale (though counsel assisting acknowledges that neither had a long-standing therapeutic relationship with Todd).²³⁵
253. The Commissioner²³⁶ makes the following submissions. First, Counsel Assisting's submission creates a "false dichotomy" between treating the event as a mental health incident versus treating Todd as having committed an offence. Todd's actions were capable of constituting a serious indictable offence and the processes of arresting Todd and diverting him under mental health legislation would have run concurrently.
254. Secondly, NSWPF officers are trained in mental health, with negotiators receiving substantive additional mental health education. The Commissioner suggests that the police officers did prioritise Todd's mental health, as seen by the actions of Sen Cst Larrain, the attendance of an ambulance and attempts by police to obtain Todd's background medical information.
255. Thirdly, in accordance with the MOU between NSW Health and NSWPF,²³⁷ which provides that police may be required to attend situations which pose a threat to public safety, the officers' ability to "take a more mental health approach...could not proceed to the fullest extent". However, the Commissioner asserts that properly construed, the mental health framework under s 22 of the *Mental Health Act* and the MOU "amalgamates the needs for control and therapeutic care".
256. Finally, with respect to the police officers' decision to breach and hold, the Commissioner submits that its purpose was to bring the matter to a peaceful resolution by not only charging Todd but also providing mental health assistance in "parallel".

²³⁵ Counsel Assisting's written submissions dated 30 August 2023, at [185].

²³⁶ Written submissions of the Commissioner dated 13 October 2023, at [96]-[106] and [108].

²³⁷ Tab 269C (NSW Health – NSW Police Force Memorandum of Understanding 2018).

257. Ch Insp Fuller²³⁸ makes the following submissions. First, Todd could not be reviewed and assessed by a clinician he knew as there was no clinician with whom Todd had an ongoing relationship who could have provided this assistance.
258. Secondly, Ch Insp Fuller did not see this incident as a criminal matter as opposed to “a mental health intervention”. Rather, he submits that treating the incident as a criminal matter did not affect his decision making on the day. He asserts that the incident “was not merely a mental health intervention” and Todd’s actions of threatening the public and police should not be ignored.
259. Thirdly, Ch Insp Fuller was acting consistently with the Police Handbook, which provides that a person who is committing a Table 1 Indictable Offence should be charged as soon as possible. He submits that he was also acting pursuant to s. 22 of the Mental Health Act which provides that a person is to be “apprehended” before being taken to a mental health facility.
260. Finally, Ch Insp Fuller’s intention for Todd to be mentally assessed was not “subordinate to the dominant purpose of charging Todd” and that Todd would not be prevented from receiving appropriate mental health care upon his arrest. His evidence was that Todd would be arrested and a decision as to whether he would be charged immediately or at a later point (such as after being taken to hospital) would be made after the incident resolved.
261. Mark²³⁹ agrees with Counsel Assisting’s submissions. In particular, he agrees that police overwhelmingly saw this as a criminal matter rather than a matter requiring mental health intervention. The evidence of police, and in particular that of Ch Insp Fuller, suggests that charging Todd was a priority and therefore he needed to be brought out of the house.²⁴⁰ Mark submits that police retain a discretion to lay charges and that undue emphasis was placed on arresting Todd to charge him in a context where he was floridly psychotic and therefore doubtful that a charge would result in a conviction.²⁴¹
262. June²⁴² also submits that Ch Insp Fuller’s actions were centred around arresting Todd rather than motivated by a need to seek therapeutic assistance. She did not agree with Ch Insp Fuller’s claim that mental health intervention and the criminal process would

²³⁸ Written submissions of Superintendent Paul Fuller at [10]-[22].

²³⁹ Written submissions of Mark McKenzie dated 12 October 2023 at [29]-[32].

²⁴⁰ See T528.3, T538.35; T573.34 (3 April 2023).

²⁴¹ T524.38-T524.41 (3 April 2023).

²⁴² Written submissions of June Wilkins dated 13 October 2023 at [41]-[42], [44] and [72]-[75].

run parallel as his notes do not refer to the possibility of arranging mental health treatment for Todd, such as by consulting an independent psychiatrist or family or friends. This lack of mental health assistance reflects NSWPF's attitude that the response was not to be treated as a mental health incident. June submits that Todd's medical history and treatment could have been revealed had earlier enquiries been conducted with Todd's family or his GP. Police would therefore have been in a position to implement an early mental health intervention, such as by an offer of medication.

263. June also submits that while police have a duty of care to protect the community from a person holding a weapon, intelligence gathering should have led to the formation of a mental health action plan led and implemented by a health professional. In particular, June states that police had inadequate training to formulate a mental health action plan and their focus was entirely centred on Todd's arrest, containment and detention.
264. In reply, the Commissioner²⁴³ submits that, like those of Counsel Assisting, Mark and June's submissions create a dichotomy that did not exist in suggesting that the NSWPF did not treat this as a mental health situation. The MOU, the operation of the relevant mental health legislation and the Police Handbook all support Ch Insp Fuller's evidence that mental health and criminal apprehension run in parallel.²⁴⁴
265. The Commissioner further submits that in creating a polarity that does not exist, Mark and June's submissions tend to elevate Todd's welfare and safety over that of the general public. While there is a public interest in ensuring that those with mental illness receive the treatment they need, in this case there was also a public interest in ensuring that Todd was apprehended (if only so he could get the care and treatment he needed) in circumstances where he made violent threats to his neighbours, brandished a knife, and refused to put it down and surrender to the NSWPF. In managing the two public interests and considerations of public safety, it was Ch Insp Fuller's intention to not only apprehend and charge Todd, but in parallel, to ensure that he received the treatment he required. This is supported by unchallenged evidence given by Ch Insp Fuller.²⁴⁵
266. In response to June's submissions regarding the matter of a 'mental health action plan', the Commissioner notes that no particularity is given as to what this means, including its operational or statutory basis. It is difficult for the Commissioner and involved

²⁴³ Written submissions in reply of the Commissioner dated 25 October 2023 at [5]-[9] and [13].

²⁴⁴ Tab 269C (NSW Health – NSW Police Force Memorandum of Understanding 2018); T573.20 (3 April 2023); submissions of Superintendent Paul Fuller at [20] onwards.

²⁴⁵ T526.33 – T526.50 (3 April 2023); T573.35 – T573.50 (3 April 2023); T574.0 – T574.5 (3 April 2023); written submissions of Superintendent Paul Fuller dated 24 October 2023 at [17]-[19].

officers to respond to that matter in circumstances where witnesses were not cross-examined in relation to it.

267. In reply, Ch Insp Fuller²⁴⁶ submits that the Coroner should not accept Mark or June's submissions relating to the treatment of the matter as a criminal matter rather than one of mental health. Rather, Ch Insp Fuller's actions were about securing Todd safely and effectively in a timely way. He further submits that the processes of mental health intervention and criminal justice system operate in parallel on a regular basis and was indeed occurring during this incident through the deployment of negotiators and information gathering process. Ch Insp Fuller submits that he acted dispassionately and not with hostility towards Todd.
268. Ch Insp Fuller notes that there is no basis for police in the field to distinguish between deliberate criminal intent and the intention of a person suffering from a mixture of fear and paranoid delusion. Ch Insp Fuller further submits that Mark's submission that police retain discretion for laying charges and that determination of guilt is not solely a matter for Court should not be accepted. Discretion is to be exercised in accordance with the Police Handbook.
269. Ch Insp Fuller also rejects June's submissions that police should have formulated a mental health action plan. That is not the role of police. Anyone suffering significant ongoing mental health issues should have a mental health plan in place, developed by treating doctors or clinicians. Whether one uses the language of detention, apprehension (for example, under s 22 of the *Mental Health Act*) or arrest, the first and primary concern is to extract Todd from the stronghold.
270. In reply, Counsel Assisting²⁴⁷ submit that the MOU is not inconsistent with what is said in their primary submissions, particularly the reference to the fact that a mental health review "could only have proceeded if Todd were to emerge from the house without the knife". Further, Counsel Assisting submit that the Commissioner's statement that s 22 of the *Mental Health Act* and the MOU is "a framework that amalgamates the needs for control and therapeutic care" is not accurate as the word "control" in that sense does not appear in either s 22 or the MOU. The emphasis, rather, is on the safety of all persons in a mental health response.²⁴⁸

²⁴⁶ Written submissions in reply of Superintendent Paul Fuller dated 24 October 2023 at [12]-[18].

²⁴⁷ Counsel Assisting's written submissions in reply dated 10 November 2023 at [9]-[10].

²⁴⁸ Tab 269C (NSW Health – NSW Police Force Memorandum of Understanding 2018) at p. 10, 3.2.2.

Consideration

271. I have given this issue considerable thought. I accept, in line with Ch Insp Fuller's submissions, that in theory criminal and mental health approaches can run in tandem. However, it appears to me that on this occasion they did not. Once police arrived at Todd's home, their "dominant purpose", to use Ch Insp Fuller's words, was to arrest Todd. Within minutes the situation had escalated dangerously and a gun had been drawn and pointed in Todd's direction. I have no problem accepting that had an arrest occurred, consideration might *later* have been given to having Todd assessed. However, it does not appear to have been at the forefront of anyone's mind at the scene. Nor does it appear to have influenced the planning of the initial police approach.
272. Prior to arrival, police knew there was an allegation that Todd had a knife. However, there was no apparent consideration of how Todd's mental health issues might be prioritised or factored into in any police response. As June points out there was no plan involving mental health considerations.
273. In my view it is telling that there is no evidence that Todd was ever explicitly offered a mental health review, assessment or treatment, particularly at an early stage. When one scours the transcript of the initial conversation between police and Todd, there is no suggestion to him that he may wish to see his doctor or be taken to the hospital or any explicit offer that if he emerges without a knife that this could happen. There is no record of exactly what the negotiators said, because all the BWV was turned off pursuant to policy, but I was not taken in oral evidence to any explicit offer of this sort made by them either.
274. It is fairly clear that Todd believed he was in a do or die standoff with police. I accept Mark and June's submissions on this issue.

Oversight over Senior Constable Larrain

Evidence

275. Sgt Horsington and Ch Insp Fuller were more senior to Sen Cst Larrain and were present for various periods of time during Sen Cst Larrain's engagement and negotiation with Todd in the rear of the property. Following his arrival on the scene, Sgt Horsington took up a position in the rear of the property.²⁴⁹ Ch Insp Fuller was also

²⁴⁹ Tab 57 (Statement of Sergeant Horsington) at p. 2; Tab 58 (Certified Transcript – Interview with Sergeant Horsington) at pp. 10-11.

in or by the rear of the property on a number of occasions in the period prior to the arrival of the negotiators.²⁵⁰

276. In his evidence, Sgt Horsington confirmed that he took on the task of securing the rear yard while Sgt Broadley spent most of the time at the front. He had responsibility for the officers who were at the rear of the property. Sen Cst Larrain took on the role of securing the rear yard and he had communication with Todd.²⁵¹ Aside from brief periods, Sgt Horsington was present in the backyard from about 1:30pm until about 4:00pm.²⁵² He was present at various points when Sen Cst Larrain challenged Todd about different things.²⁵³
277. Sgt Horsington agreed that Sen Cst Larrain's crossed over into inappropriate and unprofessional conduct in the way he went about communicating with Todd.²⁵⁴ He also agreed that he did not counsel Sen Cst Larrain about what he had said to Todd.²⁵⁵
278. Ch Insp Fuller did not deny that he heard Sen Cst Larrain say words to Todd to the effect of "I'll take my appointments off if you drop the knife and come outside. I'll send all the guys out front and take my gun off and you can come out the back. You come out the back and we'll have a proper fight".²⁵⁶ He confirmed that he also heard Sen Cst Larrain challenge Todd that what Todd was showing him was not in fact medals but commemorative coins.²⁵⁷

Submissions

279. Counsel Assisting²⁵⁸ submits that based on the problems identified in the way Sen Cst Larrain sought to engage with and negotiate with Todd, he should have been relieved of the task at some point during the afternoon of 31 July 2019 prior to the arrival of negotiators.
280. In Counsel Assisting's submission, that could have come about in two ways. The first is that Sgt Horsington, who was present in the backyard for almost all of the time Sen Cst Larrain was at the back door, should have recognised that he was behaving

²⁵⁰ Tab 49 (Part 2 of the Transcript of Body Worn Video Recording by Sergeant Broadley); T729.49 – T729.23 (5 April 2023).

²⁵¹ T731.6 – T732.5 (5 April 2023).

²⁵² T725.21 – T725.32 (5 April 2023).

²⁵³ T734.33 – T734.35 (5 April 2023).

²⁵⁴ T740.31 – T740.38; T749.19 – T749.27 (5 April 2023).

²⁵⁵ T749.29 – T749.31 (5 April 2023).

²⁵⁶ T1260.29 – T1260.37 (14 June 2023).

²⁵⁷ T1262.15 – T1262.26 (14 June 2023).

²⁵⁸ Counsel Assisting's written submissions dated 30 August 2023 at [186]-[192].

inappropriately through challenging Todd, accusing him of lying, and inviting him to fight. Compared to whatever Sgt Horsington had been taught in the 31 March 2016 intensive Mental Health Intervention Officers' Course about not engaging in or supporting delusional views,²⁵⁹ what he saw Sen Cst Larrain say to Todd on 31 July 2019 went far beyond that.

281. Sgt Horsington accepted he was responsible for the officers who were at the rear of the property, including Sen Cst Larrain.²⁶⁰ He recalled that after being in the backyard for a period of time and observing communications between Todd and Sen Cst Larrain, it became obvious that Todd was detached from reality.²⁶¹ Sgt Horsington further accepted (notwithstanding that he did not now have a clear recollection of aspects of what Sen Cst Larrain said to Todd in the backyard) that he had been present when Sen Cst Larrain challenged Todd to come outside and fight at 1.54pm.²⁶² The evidence suggests that there were other occasions through to 3.10pm when Sgt Horsington was present and Sen Cst Larrain invited Todd to come outside and fight, called him a liar, and gratuitously insulted him.²⁶³ Even though Sgt Horsington understandably only had a limited and incomplete recollection of what was said on the afternoon of 31 July 2019 when giving evidence, he acknowledged that he was only absent from the backyard for perhaps a couple of occasions when he went to the side of the house. That supports a finding that he was present and would have heard most of what Sen Cst Larrain said to Todd.
282. Sgt Horsington also accepted in his oral evidence that what he heard Sen Cst Larrain say was inappropriate and unprofessional.²⁶⁴ Sgt Horsington further accepted that as the sergeant who had control of the backyard, it fell to him to become involved when Sen Cst Larrain acted inappropriately.²⁶⁵ While Sgt Horsington suggested that he should have had a chat with Sen Cst Larrain, the more appropriate course, it is submitted, would have been to rotate a different general duties officer in to try and communicate with Todd or, at the very least, raise the matter with Ch Insp Fuller.
283. Once Sgt Horsington learned of the advice that Ch Insp Fuller gave to Sen Cst Larrain at about 3.11pm to not challenge Todd's delusional thinking and to appease him by going along with his thought patterns, he should have intervened when, less than ten

²⁵⁹ T735.10 (5 April 2023).

²⁶⁰ T731.12 (5 April 2023).

²⁶¹ T732.39 (5 April 2023).

²⁶² T736.34 (5 April 2023).

²⁶³ T738.1 -28 (5 April 2023).

²⁶⁴ T740.32 (5 April 2023).

²⁶⁵ T755.27 (5 April 2023).

minutes later, he was present when Sen Cst Larrain appeared to lose his patience and challenge Todd to come outside with his knife and “try go us”.²⁶⁶ Given Sgt Horsington’s concession that the invitation to fight by Sen Cst Larrain was inappropriate and unprofessional, he should have either replaced Sen Cst Larrain himself or spoken to Ch Insp Fuller to seek that he be replaced.

284. Furthermore, Sen Cst Larrain’s further challenging of Todd also occurred in circumstances where the senior officer who was present in the backyard on the day, Sgt Horsington, actually encouraged Sen Cst Larrain to continue to challenge Todd despite hearing the 3.11pm phone conversation between Ch Insp Fuller and Sen Cst Larrain. While Sgt Horsington was uncertain as to the timing of that encouragement²⁶⁷ and transcripts of Sen Cst Larrain’s BWV and Sen Cst Harris’ BWV are unclear as to who was speaking to Sen Cst Larrain directly after the telephone discussion with Ch Insp Fuller at 3.11pm,²⁶⁸ it is open to the Court to find that Sgt Horsington in fact encouraged Sen Cst Larrain to continue to challenge Todd before Sen Cst Larrain challenged Todd to come out with his knife and “go” police at 3.22pm.
285. Counsel Assisting submit that the second avenue by which Sen Cst Larrain should have been relieved is by Ch Insp Fuller directly. That is because Ch Insp Fuller had been present in the backyard at times and specifically, had heard Sen Cst Larrain challenge Todd to come out and fight at 2.11pm and further challenge Todd as to him possessing military medals at 2.47pm.
286. In circumstances where Ch Insp Fuller had information to suggest that Todd suffered from long-term schizophrenia, was having an acute psychotic episode, and was delusional, he should have appreciated that Sen Cst Larrain was not communicating appropriately with Todd and that what he was saying had the potential to escalate the situation, rather than deescalate it. In the circumstances, even before the call from Negotiation Coordinator at approximately 3.00pm, Ch Insp Fuller should have spoken to Sgt Horsington about having Sen Cst Larrain replaced as the general duties officer chiefly communicating with Todd. Even if he had not done so by the time of the 3.00pm call, having already witnessed Sen Cst Larrain communicating with Todd in precisely the way the Negotiation Coordinator recommended against, that should have prompted Ch Insp Fuller to have Sen Cst Larrain replaced at that time.

²⁶⁶ T748.40 – T749.16 (5 April 2023).

²⁶⁷ T748.17 (5 April 2023).

²⁶⁸ Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 79; Tab 46 (First statement of Senior Constable Harris) at pp. 266-7.

287. Sgt Horsington²⁶⁹ submits that it was ultimately the opinion of Ch Insp Fuller that Sen Cst Larrain did not need to be replaced by Sgt Horsington.²⁷⁰ He further submits that training provided to general duties police should be significantly improved, particularly with respect to training relating to negotiation and dealing with persons with mental health complications.²⁷¹ Sgt Horsington submits that he undertook his task as a Sergeant in good faith and should not be criticised for any deficiencies arising from a lack of training.²⁷²
288. The Commissioner²⁷³ rejects Counsel Assisting's argument that Sen Cst Larrain should have been replaced, noting that it is affected by hindsight bias and does not have proper regard to a number of important countervailing considerations. In particular, the Commissioner points to the following consideration. First, Sen Cst Larrain's contributions need to be seen in totality and that he employed a number of techniques that were "quintessential negotiation strategies".
289. Secondly, Ch Insp Fuller advised Sen Cst Larrain not to engage Todd in confrontational conversation and he was entitled to believe that Sen Cst Larrain would act on this advice.²⁷⁴ Ch Insp Fuller's style was not that of micro-management and he was overseeing a dynamic situation of which Sen Cst Larrain formed only one part.
290. Thirdly, the Commissioner submits that in matters of this kind there is always a tension between having a focal point for the subject to speak to, and introducing a new person into the scene. Negotiators were also on their way to the incident.
291. Fourthly, the Commissioner submits that while the negotiation process would have been difficult for Sen Cst Larrain, this does not mean he was unsuitable for the role. Sen Cst Larrain is a senior constable with seven years' experience²⁷⁵ and he was of the view that "he knew how to talk to people" due to his rural experience.²⁷⁶ Sen Cst Larrain had completed mental health training²⁷⁷ and could ascertain that Todd had a mental health issue.²⁷⁸

²⁶⁹ Written submissions of Sergeant Matthew Horsington.

²⁷⁰ T568.31 – T568.47 (3 April 2023).

²⁷¹ Written submissions of Sergeant Matthew Horsington, at [3].

²⁷² Written submissions of Sergeant Matthew Horsington at [5].

²⁷³ Written submissions of the Commissioner dated 13 October 2023 at [77]-[85].

²⁷⁴ See Sen Cst Larrain at Q745-746 of his directed interview which shows that he understood that he was not to engage Todd in a confrontational style.

²⁷⁵ T778.49 – T779 (5 April 2023).

²⁷⁶ See A810 of his directed interview.

²⁷⁷ Directed interview A488.

²⁷⁸ Directed interview A493.

292. Fifthly, Sen Cst Larrain was subject to several welfare checks by his colleagues throughout the negotiation. He did not consider himself too junior for the role, that he required a break or a replacement.²⁷⁹
293. Mark²⁸⁰ agrees with Counsel Assisting's submissions. He notes that while Sen Cst Larrain should be criticised, the fact that Sgt Horsington failed to correct or replace him signifies that this was also a collective failing of the NSWPF.
294. June²⁸¹ also supports the submissions of Counsel Assisting. She submits that a general duties officer with no training in negotiations and took over the negotiations with Todd and this was done in an ad hoc way without intervention from more senior and experienced officers.
295. June further submits that the senior officers at the scene should be held responsible for Sen Cst Larrain's actions. She contends that Sen Cst Larrain should have been relieved at an earlier point, at the latest when Ch Insp Fuller was speaking with Sen Cst Larrain on the phone at 3.12pm.²⁸² Sen Cst Larrain should not have been permitted to maintain the primary liaison role for an extended period of time.
296. In reply, Counsel Assisting²⁸³ submits that while scope for improved training is accepted, Sgt Horsington's failure to intervene cannot be attributed solely to a lack of mental health training. In light of his concessions that he was responsible for the officers at the rear of the property, including Sen Cst Larrain, Counsel Assisting submit that it is appropriate to criticise Sgt Horsington for his inaction on the day.

Consideration

297. I was surprised by the attitude of the Commissioner to this issue. Criticisms of Sgt Horsington and Ch Insp Fuller are not affected by hindsight bias.
298. In my view the evidence clearly establishes that Sen Cst Larrain's approach was frequently inflammatory and ultimately counter-productive. He was placed in a stressful situation for a lengthy period of time and should have been relieved. Inviting Todd to fight, using derogatory language and hurtful insults and accusing Todd of lying were

²⁷⁹ BWV (Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p. 89; Directed interview A495 – A49; A496 of his directed interview; see e.g. T779 (5 April 2023).

²⁸⁰ Written submissions of Mark McKenzie dated 12 October 2023 at [33].

²⁸¹ Written submissions of June Wilkins dated 13 October 2023 at [16(a)] and [76]-[78].

²⁸² Tab 41 (Transcript of Body Worn Video Recording by Senior Constable Larrain) at p 79.

²⁸³ Counsel Assisting's written submissions in reply dated 10 November 2023 at [11].

clearly inappropriate strategies and that should have been obvious to Sgt Horsington, who had completed mental health training. Instead there is evidence of an occasion where he apparently encourages Sen Cst Larrain to continue to challenge Todd to come out with his knife and “have a go” at police. This occurs after there has been advice to the contrary. I am critical of the supervision provided to Sen Cst Larrain by Sgt Horsington that afternoon.

299. I am also critical of Ch Insp Fuller. Even before he received advice from the Negotiation Coordinator at about 3pm that afternoon, he should have realised that Sen Cst Larrain was out of his depth and needed to be replaced. After the call, knowing as he did that Sen Cst Larrain had been confronting and challenging Todd for some time, it was appropriate for him to immediately discuss a replacement with Sgt Horsington. It was put to me that Ch Insp Fuller was not a micro manager and had wide responsibilities overseeing a dynamic situation of which this was just a part. I accept that. It was submitted that he was entitled to believe that once the advice was given, Sen Cst Larrain would change his approach. In my view if Ch Insp Fuller was too busy elsewhere he should have explicitly delegated management and oversight of the communication with Todd to Sgt Horsington.
300. I note that Sgt Horsington had completed the intensive four-day MHIT course. While it is not possible to take a concluded view on such a small sample, one can only wonder if that course was sufficiently practical. It is difficult to understand how Sgt Horsington did not see the need to intervene in the communication between Sen Cst Larrain and Todd.
301. In my view the rambling and frequently insulting communication between Todd and Sen Const Larrain should not have been allowed to continue. I am certain the tone it set did not assist negotiators when they ultimately arrived. At times it appeared to exacerbate and escalate Todd’s behaviour. It was ill-judged.
302. It is also relevant to mention the effect of what occurred on Sen Cst Larrain. I had the opportunity to observe him give evidence and he appeared to suffer ongoing trauma flowing from the events of 31 July 2019. I have no doubt that as a police officer he had previously been involved in many positive interactions. He has now lost the police career he loved. In my view more senior police offered him inadequate guidance that afternoon, and the consequences for both Todd and Sen Cst Larrain have been catastrophic.

Issue 4 – Were adequate resources allocated to the response?

Evidence

303. The evidence relevant to this issue is set out in the chronology above at [61]-[70] and [83]-[100].

Submissions

304. Counsel Assisting²⁸⁴ does not submit that any adverse comment should be made as to the resources which were allocated to the initial police response on 31 July 2019. The general duties officers were on scene very quickly and remained in place, at all sides of Todd's house, through to the arrival of TORS operatives.²⁸⁵ Through the Scarce Resources Coordinator, an early request was made for negotiators and TORS operatives to attend and Counsel Assisting does not suggest that there was anything inappropriate in the time that it took for them to assemble. That simply reflected the country location and the travel times involved in police officers travelling from nearby towns.
305. It is also noted that NSW Ambulance officers were present at 3 Robertson Street by 3.40pm and remained at the scene through to the execution of the breach and hold.
306. In all of the circumstances, Counsel Assisting submit that adequate and appropriate resources were allocated to the initial police response. Likewise, Counsel Assisting does not submit that there was any lack of resources once TORS and negotiators became involved. The approval obtained from Assistant Commissioner Mitchell was for "tactics only" and, consistent with that, the TORS team had available a range of less than lethal options (including various forms of OC spray, Tasers, a shield, shotguns which discharged beanbag rounds, metal mesh gloves, and standard issue Glock pistols). Lighting was obtained when it was required early in the evening.
307. June²⁸⁶ agrees with Counsel Assisting's submissions in part. She submits that the Court should consider whether the lack of BWV falls within the scope of this issue and contends that, in the context of BWV, adequate resources were not allocated.

²⁸⁴ Counsel Assisting's written submissions dated 30 August 2023 at [193]-[195].

²⁸⁵ See the diagram of the house created at 2.10pm in the Ford Command Log: Tab 70 (Forward Command Log) at p. 400. See also Sgt Horsington's evidence commencing at T725.47 (5 April 2023).

²⁸⁶ Written submissions of June Wilkins dated 13 October 2023 at [79]-[80].

308. Counsel Assisting in reply submits that BWV should not be considered under this issue as the NSWPF practice and policy at the time was that it was not open to the TORS to use BWV.²⁸⁷

Consideration

309. I accept Counsel Assisting's submissions in this regard. A lack of police resources does not appear to have been an issue in these proceedings.

Issue 5 – Was the nature of the negotiation undertaken by Sen Cst Larraine appropriate? What, if any, impact did it have on the events that followed?

310. Counsel Assisting note that it is appropriate to acknowledge that Sen Cst Larrain's communication with Todd may not fairly be described as a negotiation in the sense of a process conducted by a trained and accredited negotiator. At various points, objection was taken to questions on that basis, notwithstanding that certain police documents, including Ch Insp Fuller's "appreciation process" part of his log seemed to refer to what Sen Cst Larrain engaged in as a form of negotiation. It is convenient to continue to use the term "negotiation" in relation to Sen Cst Larrain's attempts to engage and communicate with Todd, while nonetheless distinguishing those attempts from the negotiations conducted later in time by trained negotiators.

311. I am comfortable referring to Sen Cst Larrain's communication with Todd as an informal negotiation. In saying that I clearly understand he was not a trained negotiator.

Evidence

312. The evidence relevant to this issue is set out in the chronology above at [62]-[63] and [71]-[82].

Submissions

313. Counsel Assisting²⁸⁸ submits that the appropriate finding is that in a number of his communications with Todd, particularly as time passed during the afternoon of 31 July 2019, Sen Cst Larrain acted inappropriately and unprofessionally. Counsel Assisting note that opinions to that effect were given by a number of Sen Cst Larrain's superior officers and indeed the OIC of the coronial investigation.²⁸⁹ Even allowing for the limited mental health training he had completed and the even more limited parts of that training

²⁸⁷ Counsel Assisting's written submissions in reply dated 10 November 2023 at [13].

²⁸⁸ Counsel Assisting's written submissions dated 30 August 2023 at [197]-[207].

²⁸⁹ See Ch Insp Fuller at T524.11 (3 April 2023), Sgt Horsington at T740.33 and T749.21 (5 April 2023), and DCI Walpole at T50.24 (27 March 2023).

that he said he could recall, Sen Cst Larrain was overly confrontational and at times made offensive and derogatory comments towards Todd, including calling him a liar.

314. Counsel Assisting submit that Todd was plainly suffering from an acute mental health episode, even if Sen Cst Larrain was in no position to know precisely what type. Based on what he did know, there was an appreciable risk that confronting Todd and insulting him could well escalate the situation and make it harder to achieve the outcome police were ultimately striving for, which was to end the incident without harm to Todd or police officers. It should have been obvious that in speaking to Todd as Sen Cst Larrain did, it made it unlikely that any rapport or trust would be built.
315. Sen Cst Larrain's main justification for his conduct (that he wanted to keep Todd talking and keep police eyes on him) only goes so far. While accepting that Todd did not always respond positively to discussion about more neutral topics, it should have been apparent that challenging and insulting Todd served to upset and aggravate him in circumstances where he was already patently angry, elevated, and irrational. To act that way carried inherent risks for both Todd and police.
316. Counsel Assisting submit that perhaps even more inappropriate and unprofessional was Sen Cst Larrain's various challenges to Todd to come outside and fight. In so speaking, Sen Cst Larrain was overtly inviting escalation of the incident in circumstances where he could have no confidence that if Todd emerged from the house, it would be without a knife. To challenge Todd to fight was entirely inappropriate and even without any advice or warnings from superiors, Sen Cst Larrain ought not to have spoken to Todd in that way. The words spoken served to put both Todd and the attending general duties police (including Officers T2 and T6, who were TORS officers but present in a general duties capacity), at increased risk of injury or death.
317. Counsel Assisting contend that, in conclusion, Sen Cst Larrain made a number of significant errors in the way in which he attempted to communicate with and negotiate with Todd. However, any relevant criticisms of him must be tempered by the fact that he was still a relatively junior officer (with seven years of experience at the relevant time) and he had had limited mental health training. Even more importantly, he was not well supervised on the day. In that regard, Sgt Horsington at no point counselled him about his behaviour or sought to replace him. Sgt Horsington in fact encouraged Sen Cst Larrain to continue challenging Todd.
318. Ch Insp Fuller passed on Negotiation Coordinator's advice about not challenging Todd's thought process and seeking to appease him, which was entirely appropriate.

However, Ch Insp Fuller missed opportunities while he was in the backyard to counsel Sen Cst Larrain about his communication and negotiation style and content. Accepting that Ch Insp Fuller had many responsibilities on the day, he had nonetheless witnessed instances of Sen Cst Larrain challenging Todd to fight and challenging his honesty.

319. Counsel Assisting considers that it is important, however, to acknowledge that many other aspects of Sen Cst Larrain's communication and negotiation with Todd were appropriate. In particular, earlier in the afternoon, Sen Cst Larrain sought to understand what was upsetting Todd and reassure him that police did not want to harm him and tried to talk to him about various everyday matters with a view to try to establish some rapport. It seems that as the afternoon went on and Sen Cst Larrain became tired and frustrated, the quality of his communication and negotiation deteriorated.
320. In terms of what impact Sen Cst Larrain's communication and negotiation with Todd had on the events that followed, Counsel Assisting accepts that the evidence does not ultimately permit a finding on the balance of probabilities that had it not occurred, the incident of 31 July 2019 would have ended peacefully. There are far too many unknowns in what might have occurred for such a finding to be made. Nonetheless, Counsel Assisting submit that the evidence supports a finding that Sen Cst Larrain's inappropriate and unprofessional communication and negotiation had an adverse effect on later police attempts to establish some engagement with Todd and, ultimately, resulted in a lost opportunity to establish rapport. The evidence from Dr Eagle in that regard is persuasive.
321. Counsel Assisting draw attention to Dr Eagle's conclusion that the prolonged antagonistic interactions between Sen Cst Larrain and Todd potentially reinforced his persecutory delusions about the surrounding police and heightened his fear in the circumstances, thus reducing the potential to establish trust and build rapport.²⁹⁰ As Dr Eagle explained, in circumstances where Todd had delusions of a military nature and about being at war, Sen Cst Larrain's conduct likely led to Todd feeling even more threatened, fearful, paranoid, and agitated.²⁹¹ Dr Eagle raised the prospect that Sen Cst Larrain's conduct may have perpetuated Todd's belief that he needed to defend himself and his house, which ultimately came to a head through the breach and hold.²⁹²
322. Counsel Assisting submit that given the nature of Todd's delusions, he was not likely to respond well to heavily armed, dark-uniformed, tactical police breaking his window

²⁹⁰ Tab 11C (Expert report of Dr Kerri Eagle), at p. 37; T1581.26 (20 June 2023).

²⁹¹ T1580.13 (20 June 2023).

²⁹² T1581.14 (20 June 2023).

and breaking open his door. That is even more so in circumstances where he had been confronted, challenged as to his honesty, and challenged to fight over a period of time by Sen Cst Larrain.

323. The Commissioner²⁹³ accepts that the language used by Sen Cst Larrain was at times unacceptable and was not aligned with the values of the NSWPF and the Commissioner. The Commissioner submits that regardless of his intentions, Sen Cst Larrain ought to have used more appropriate language.
324. The Commissioner draws attention to several examples of Sen Cst Larrain attempting to engage Todd in which he, in the Commissioner's submission, employed techniques in line with rapport building and negotiation training. This includes offering Todd a smoke, asking if he would like to speak with a neighbour and enquiring about his personal interests. The Commissioner submits that Sen Cst Larrain's contributions need to be taken collectively and agrees with Counsel Assisting that the evidence does not permit a finding on the balance of probabilities that had the communications not occurred, the incident would have ended peacefully.²⁹⁴ The Commissioner also concurs with Dr Eagle and Counsel Assisting that the failure of negotiation objectives in the past does not mean it would not work in the future.²⁹⁵
325. June²⁹⁶ submits that Sen Cst Larrain's negotiation with Todd was highly inappropriate. She refers to Dr Eagle's evidence that this would have reinforced Todd's persecutory delusions²⁹⁷ and in particular his belief that he was engaged in some military battle.
326. June disagrees that Sen Cst Larrain's communication may not be fairly described as negotiation. She submits that Sen Cst Larrain was engaged in negotiations with Todd as the overall objective to safely get Todd out of the house was shared. June contends that Sen Cst Larrain was not equipped to be the primary officer and the supervising officer's negligence allowed Cst Larrain to become fatigued which impacted his judgment and ability to communicate with Todd.
327. June notes that while Sen Cst Larrain did make genuine efforts to build rapport, this was undermined by instances where he was being "overly confrontational and antagonistic". She agrees with Counsel Assisting's submissions that Sen Cst Larrain

²⁹³ Written submissions of the Commissioner dated 13 October 2023 at [56]-[57], [62]-[76].

²⁹⁴ Counsel Assisting's written submissions dated 30 August 2023 at [205].

²⁹⁵ Counsel Assisting's written submissions dated 30 August 2023 at [647].

²⁹⁶ Written submissions of June Wilkins dated 13 October 2023 at [81]-[85].

²⁹⁷ Tab 11C (Expert report of Dr Kerri Eagle) at p. 37.

should be found to have acted inappropriately and unprofessionally²⁹⁸ and also that it was highly unlikely that Todd would respond well to the entry of tactical officers in the context of Todd's delusions and the effects of Sen Cst Larrain's conduct.²⁹⁹

328. Mark³⁰⁰ agrees with Counsel Assisting's submissions on this issue. He submits that while Sen Cst Larrain's actions should be criticised, Counsel Assisting is correct to observe that he was not well supervised and indeed encouraged by Sgt Horsington to challenge Todd and his delusions.³⁰¹ Further, Mark submits that these problems do not lie simply with Sen Cst Larrain as other general duties police officers who engaged with Todd(took a similar approach by engaging Todd in challenging interactions.³⁰²
329. In reply, the Commissioner³⁰³ notes that it is procedurally unfair to criticise an officer who was not called to give evidence nor received a sufficient interest letter.
330. In reply, Counsel Assisting³⁰⁴ submit that the evidence of other interactions by police with Todd suggests there is a broader lack of understanding of persons suffering mental health episodes and this lends greater weight to the submission for greater mental health training for general duties officers.

Consideration

331. As I have already stated Sen Cst Larrain's attempt at informal negotiation was unprofessional and ill-judged. It appears that this was accepted by all parties, to varying degrees. I accept that Sen Cst Larrain also made appropriate attempts to establish rapport at times, but these were overshadowed by the instances where he was antagonistic and offensive. His conduct demonstrates a lack of skill rather than a lack of care.
332. I accept Dr Eagle's conclusion that the prolonged antagonistic interactions between Sen Cst Larrain and Todd potentially reinforced his persecutory delusions about the surrounding police and heightened his fear in the circumstances, thus reducing the potential to establish trust and build rapport. She told the Court that this conduct may have perpetuated Todd's belief that he needed to defend himself and his house, which

²⁹⁸ Counsel Assisting's written submissions dated 30 August 2023 at [197]; see Ch Insp Fuller at T524.11 (3 April 2023), Sgt Horsington at T740.33 and T749.21 (5 April 2023), and DCI Walpole at T50.24 (27 March 2023).

²⁹⁹ Counsel Assisting's written submissions dated 30 August 2023 at [207].

³⁰⁰ Written submissions of Mark McKenzie dated 12 October 2023 at [35]-[39].

³⁰¹ See Counsel Assisting's Written Submissions dated 30 August 2023 at [69].

³⁰² Tab 49 (Part 2 of the Transcript of Body Worn Video Recording by Sergeant Broadley) at p. 282-286.

³⁰³ Written submissions in reply of the Commissioner dated 25 October 2023 at [17].

³⁰⁴ Counsel Assisting's written submissions in reply dated 10 November 2023 at [14]-[15].

ultimately came to a head through the breach and hold. I have no difficulty in finding that the manner in which Sen Cst Larrain interacted with Todd negatively impacted the situation.

333. I acknowledge Mark's submission that there were others present in the backyard who appeared to encourage the flawed approach which was taken. I do not single out any others for particular adverse comment and accept the fact that nobody present cautioned against the antagonistic approach taken demonstrates a more pressing and general need for enhancing the training offered to all. It would be a mistake to think that Sen Cst Larrain's resignation from NSWPF solves the problem. To regard his actions as individually flawed is to miss the greater opportunity to understand the culture in which his informal negotiation was allowed to continue.
334. I accept that I am unable to know what would have happened had Todd been treated with calm courtesy and respect at an early stage, but I am convinced that approach should have been actively encouraged by more senior police and it was not.

Issue 6 – Were sufficient steps taken to obtain background information about Todd, from family members, friends, treating clinicians?

Evidence

335. Steps taken to obtain background information about Todd from family members, neighbours and medical practitioners are set out below.

Information obtained from Mark and June

336. The general duties police did not make contact with the closest members of Todd's family, Mark, June and Belinda. However, on her arrival, Fourth Person obtained a great deal of relevant information from both of Todd's parents.
337. In particular, Fourth Person first spoke with Mark by phone at 5.02pm.³⁰⁵ Fourth Person recorded the conversation with him in the iSurv system. The relevant entry records:

“[Mark] stated that Todd had called him about four times that afternoon. He did not say much just that there were Police outside. Dad dismisses his comments thinking he was making it up. Dad thinks ... [Todd] receives medication for bi polar and schizophrenia

³⁰⁵ Tab 216 (iSurv Log) at p. 1775; Counsel Assisting's written submissions in reply dated 10 November 2023 at [2].

by injection every 3 months. He has a regular GP which he has a treatment plan through. Dad will gather information and doctor details and phone negotiators back.”³⁰⁶

338. Consistently with that entry, Mark indicated that he telephoned June and asked her to provide the contact details of Todd’s doctor and psychiatrist.³⁰⁷

339. As will be addressed in submissions in response to issue 7(b) below, Mark has a different recollection of aspects of this conversation. He says that he never “dismissed” Todd. For present purposes, however, the relevant point is that Fourth Person made contact with Mark and, through him, arranged to obtain important information about Todd’s medication.”

340. Mark says that he also provided further information about Todd’s sleeping patterns to Fourth Person, saying that Todd usually went to sleep at 5am.³⁰⁸

341. At 6.23pm, Fourth Person spoke with June. The relevant iSurv entry records:

“Todd ordered his medication last wed at the Pharmacy however ...[June] believes he did not attend his GP on Thurs to receive the injection as he received an SMS reminder from a different doctor and he did not want to see a different doctor.”³⁰⁹

342. June also provided a contact number for Dr Neale. The iSurv entry continues (emphasis in original):

“points to AVOID don’t talk down on him, don’t be too direct, does not like straight talking down the line, don’t disagree with him.

LIKES his dog “Violet” 14 yr Staffy. Recent I’ll [sic ill] health concerned he has to put her do [sic down]. Not sure when it the right time. House proud, loves gardening and his herbs/succulents. Likes art, paints pictures of his dog and his sister Belinda. Has great memories of his Great Grandad “Hank” he was a ww1 vet who was 101 yrs old when he died. Todd attended his full military funeral and inherited coins and medals. He has great love and respect for servicemen and the military. Love[s] his sister Belinda and her kids ... [names and ages omitted]

During psychotic episodes he has people in his head. The people are generally nice and positive. He is never violent or aggressive. He sleep walks and whilst asleep he smokes and eats food, when he wakes he thinks people have been in his house (Possibly today’s trigger)?

³⁰⁶ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1977.

³⁰⁷ Tab 11 (Statement of Mark McKenzie) at [35].

³⁰⁸ Tab 11 (Statement of Mark McKenzie) at [31].

³⁰⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1978.

If concerned about being hospitalised his mum will pay for rent look after house and dog".³¹⁰

343. Around 20 minutes later (6.45pm), the iSurv log records Fourth Person received a text message from June stating that Todd did receive his injection of Invega Sustenna on 25 July 2019.³¹¹ It appears that she sent a text because the phone Fourth Person was using had been diverted to voicemail.
344. Again, it may be appreciated that important information was obtained from June including:
- a. Details of Todd's medication (Invega Sustenna);
 - b. (After some initial uncertainty) confirmation that Todd was up to date with his medication;
 - c. Information which could be used by negotiators in an attempt to develop rapport with Todd (information about Violet and some of Todd's interests such as gardening, painting, and his grandfather's military service) and Todd's close relationship with family members (Belinda and her children);
 - d. Information that suggested that Todd had a paranoia regarding persons entering his home (which was interpreted by Fourth Person to suggest that this was "possibly" a "trigger" for the events of that day),³¹² and
 - e. Suggestions (based on June's experience as Todd's mother) as to negotiation strategies that would and would not work, which could potentially inform an assessment of Todd's most likely response to a breach and hold.
345. Fourth Person did not make any further contact with Mark or June. Primary Negotiator did not make any contact with members of Todd's family after he had assumed the role of Fourth Person.³¹³ Perhaps importantly, their views were not sought regarding Todd's likely response to a breach and hold. In retrospect, this information ought to have been obtained.

Information obtained from neighbours Karen Cross and Shandelle Smyth

346. At a point after Negotiation Team Leader and Secondary Negotiator had attended Todd's address (but before Primary Negotiator and Fourth Person had arrived), Ch

³¹⁰ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader), at p. 1978.

³¹¹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1979.

³¹² T321.33-38 (30 March 2023).

³¹³ T255.31 (29 March 2023).

Insp Fuller asked officers to investigate the circumstances including by attending and taking statements from witnesses.³¹⁴

347. Accordingly, Police (including Sen Cst Edwards³¹⁵ and Sen Cst Murray³¹⁶) took statements from a number of Todd's neighbours. In particular, Sen Cst Edwards took a statement from Ms Karen Cross at 4.15pm, who stated:

"... [Todd] was accusing us of leaving DNA in his house ... He was saying something about us going into his house and I think he said something about us taking his dog".³¹⁷

348. Sen Cst Edwards also took a statement from Todd's cousin, Ms Smyth, at 5.06pm, who stated:

"... [Todd] was screaming "You filthy cunt, how dare you! Come into my house when I'm out man up and get out her[e]".³¹⁸

349. Fourth Person next spoke with Ms Smyth, who explained about Todd's outbursts, although did not apparently refer to his paranoia about people entering his home.

Information from medical practitioners

350. Police also made a number of inquiries with Todd's mental health practitioners on 31 July 2019.

351. At about 7pm, Sen Cst Reardon was asked to make contact with Todd's doctors.³¹⁹ Sen Cst Reardon spoke to a receptionist at Manning Base Hospital and asked whether they had any recent records relating to Todd or whether they knew a Dr Nolan or Dr Nolls.³²⁰ This receptionist could not see any recent records for Todd and did not know who Dr Nolan/Nolls was. Sen Cst Reardon was then put through to a nurse in the Mental Health Unit who suggested that contact be made with the Mater Hospital.

352. Sen Cst Reardon next made contact with the Mater Hospital and spoke to a staff member who advised that that hospital's last contact with Todd was in 2015. Again, that staff member did not know a Doctor Nolan/Nolls.

³¹⁴ T525.26-27 (3 April 2023).

³¹⁵ Tab 55 (Statement of Senior Constable Edwards).

³¹⁶ Tab 56 (Statement of Senior Constable Murray).

³¹⁷ Tab 146A (Statement of Karen Cross); Tab 146B (Statement of Karen Cross).

³¹⁸ Tab 144B (Statement of Shandelle Smyth (6 Robertson St)).

³¹⁹ Tab 76 (Second Statement of Senior Constable Reardon) at [20].

³²⁰ It is inferred that Sen Cst Reardon has confused Dr Neale's name. If so, nothing comes of this confusion as police were able to contact Dr Neale.

353. At 7.55pm, Sen Cst Forrester attended Manning Base Hospital³²¹ in an effort to obtain contact details for Dr Neale. He was advised that Dr Neale worked at the Mayo clinic and obtained a number for that clinic. Sen Cst Forrester eventually left a text message to Dr Neale's private number requesting him to make contact.³²²
354. At about 8.28pm, Primary Negotiator (who by then had assumed the role of Fourth Person) spoke with Dr Neale. Dr Neale told Primary Negotiator that a year ago, Todd's medication had changed from Sustenna to Trinza. Dr Neale also told Primary Negotiator that Todd's GP was Dr Singh.³²³ Significantly, however, Primary Negotiator says that Dr Neale was unable to provide a lot of information because he had only seen Todd three times in the last few years.³²⁴ He does not recall if he made inquiries with another doctor whose details had been passed on by Dr Neale.³²⁵ He says that the time of night made these inquiries "quite difficult".³²⁶
355. Dr Neale has subsequently provided a statement about this.³²⁷ He states that he did not feel he knew Todd well enough to provide any insight. Dr Neale had never seen Todd in an acute episode of psychosis. It does not appear he referred police to Dr Richardson (although Dr Richardson was out of the country in any event).
356. Primary Negotiator seems to have mistakenly believed that Todd had not taken the most recent dose of his medication.³²⁸ Primary Negotiator says that he had received information to the effect that Todd had not taken his medication.³²⁹ This was not correct. As outlined above, whilst both Mark and June were not initially certain whether Todd had received his last injection, June (some 20 minutes after she had spoken to Fourth Person) provided information that he had. Primary Negotiator says that Todd started calling him a liar after he had said this. Primary Negotiator believed this information to be true, otherwise he would not have provided that information.³³⁰ However, Primary Negotiator did not accept that it had any impact on his ability to develop rapport with Todd.³³¹

³²¹ Tab 67 (Statement of Senior Constable Forrester) at [10].

³²² Tab 67 at [11].

³²³ Tab 216 (iSurv Log) at p. 1779.

³²⁴ T255.46-48 (29 March 2023).

³²⁵ T256.11 (29 March 2023).

³²⁶ T263.21 (30 March 2023).

³²⁷ Tab 213 (Notice to Directly Involved Officer - Senior Constable Larrain).

³²⁸ T282.14 (30 March 2023).

³²⁹ Tab 83 (Certified Transcript – Interview with Officer T7) at [19].

³³⁰ T283.44-46 (30 March 2023).

³³¹ T284.5 (30 March 2023).

357. No attempts were made to contact Dr Richardson (Todd's previous psychiatrist). Dr Richardson was overseas on 31 July 2019.³³² However, he states that he was easily available by phone.³³³
358. Police continued, unsuccessfully, to attempt to contact Dr Singh. A particular interest was to confirm whether Todd had received his injection (although, as noted, June had already confirmed this) and any information Dr Singh might have to assist negotiation and avoid the need to take planned action.³³⁴
359. In an attempt to contact Dr Singh or find more details about Todd's medication, general duties police were tasked to attend the "local hospital" (presumably Manning Base Hospital).³³⁵ Shortly before 9pm, Sen Cst Forrester attempted to contact Dr Singh (and another GP at the Harrington clinic, Dr Thu-Ya), Manning Base Hospital, Access Health Care (the after-hours mobile number), Taree Police, and the Mayo Private Clinic. Despite these efforts, Sen Cst Forrester could not obtain the contact details of any of these doctors.³³⁶
360. The iSurv entries record that police were ultimately unable to obtain Dr Singh's details or the medications that were administered to Todd.³³⁷

Submissions

361. Counsel Assisting³³⁸ submit that significant efforts were made to obtain background information from police holdings, neighbours, family and treating doctors and that the steps taken were mostly adequate. Police had a great deal of relevant information about Todd. Counsel Assisting observe that the real issue is the way in which this information was or was not considered in the assessment to execute the Deliberate Action (which is a matter addressed in the context of Issue 9).
362. Counsel Assisting submit that from these efforts (particularly that of Sen Cst Edwards), police had an independent source of information that Todd's paranoia of people entering his home was related to his behaviour on 31 July 2019.
363. Counsel Assisting contend that police ought to have asked Todd's parents specifically about how Todd might react to the Deliberate Action, noting that this may not have

³³² Tab 309 (Statement of Dr Michael Richardson (Psychiatrist) at [15].

³³³ Tab 310 (Second Statement of Dr Michael Richardson (Psychiatrist)) at p. 51 and p.3.

³³⁴ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1929 [A533].

³³⁵ Tab 88, (Certified Transcript of Interview with Negotiation Team Leader) at p. 1982.

³³⁶ Tab 67 (Statement of Senior Constable Forrester) at [13].

³³⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1982.

³³⁸ Counsel Assisting's written submissions dated 30 August 2023 at [208]-[209], [224], [236]-[240].

affected police's risk assessment that a breach and hold was the best tactical option to take.

364. Counsel Assisting submit that it is unlikely that any information provided by Dr Singh or Dr Richardson would have made a significant difference. Dr Singh had moved and last saw Todd in January.³³⁹ Furthermore, police already had information as to Todd's medication and when he last took it, which gave them sufficient information to assess the risks. Dr Richardson was not recently involved in Todd's treatment and it can be inferred that his suggestions would be similar to that of June.
365. Counsel Assisting note that while police may have for the most part made appropriate inquiries, this does not mean that the Deliberate Action was an appropriate strategy or that police should not have continued negotiations. Counsel Assisting submit that there was opportunity to do so as there was no urgency in the job.
366. Ch Insp Fuller³⁴⁰ rejects Counsel Assisting's submissions that police ought to have obtained the views of Todd's parents as seeking their views would expose an unacceptable risk of that information being communicated to Todd, which may enable preparatory steps or countermeasures to take place and therefore expose Todd and/or police to increased risk.
367. Mark³⁴¹ agrees with Counsel Assisting's submissions on this issue subject to the qualification that police's initial contact with Mark occurred at 4.02pm when he made contact with Taree Police Station of his own accord, as supported by Fourth Person's oral evidence that she was given Mark's contact details upon arrival.³⁴² Further, Mark submits that Fourth Person only obtained June's contact details after speaking to Ms Smyth and Mark.³⁴³
368. Additionally, Mark submits that the evidence indicates, and Fourth Person accepted at inquest,³⁴⁴ that he attempted to obtain more information as Fourth Person requested and had tried unsuccessfully to reach her.³⁴⁵ Mark also accepts Counsel Assisting's submissions that his views were not sought with respect to the breach and hold and that he would have been able to advise police of Todd's reaction to this.

³³⁹ Tab 8 (Statement of Detective Chief Inspector Wayne Walpole) at [231].

³⁴⁰ Written submissions of Superintendent Paul Fuller, at [24]-[25].

³⁴¹ Written submissions of Mark McKenzie dated 12 October 2023, at [40]-[42], [44]-[46].

³⁴² T313.50-T314.2 (30 March 2023).

³⁴³ Tab 90 (Statement of Fourth Person) at [12].

³⁴⁴ See, T338.17-T338.18 (30 March 2023).

³⁴⁵ See, T338.1-T338.18 (30 March 2023).

369. June³⁴⁶ submits that the steps taken to obtain background information about Todd was insufficient.
370. June submits that Fourth Person's attempts to obtain information regarding Todd's mental health history were cursory and inadequate and that June and Neil were not afforded adequate opportunity to provide additional information about Todd's medical history. June notes that she tried to call Fourth Person 20 minutes after the initial phone call but could not reach her and that Fourth Person did not contact her after she advised the date of Todd's last injection.³⁴⁷ June submits that the negotiating team gave little credence to June and Neil's expertise as appropriate Third-Party Intervenors.
371. June contends that had negotiators contacted her after the initial phone call at 6.23pm,³⁴⁸ she would have shared information relating to a previously successful interaction between Todd and Taree Police during a mental health episode.³⁴⁹ She submits that she was the person best equipped to assist with police enquiries due to her knowledge of Todd's medical history and potential communication tools and techniques based on the family's personal experiences with Todd. She also notes that June was working at Department of Community Services at the time, had experience as a Senior Caseworker and had worked in consultation with Dr Richardson.
372. June notes that the evidence provided by Ms Cross and Ms Smyth indicates that police had an independent source of information suggesting that Todd had a paranoia regarding persons entering his home and this was related to his behaviour on 31 July 2019. June submits that Todd may still be alive if police had treated Todd with kindness or friendliness or if he had spoken with family or friends early in the afternoon. This information was not given the consideration it should have received, which led Ch Insp Fuller to make the wrong tactical decision.
373. June notes that Counsel Assisting's submissions at [222] suggest that Todd was screaming at Ms Smyth, which was not the case. Ms Smyth had overheard Todd speaking outside her house, but it appeared to be directed at Ms Smyth's neighbour.
374. June agrees with Counsel Assisting's submissions³⁵⁰ that she should have been consulted as to the use of the breach and hold.

³⁴⁶ Written submissions of June Wilkins dated 13 October 2023 at [86]-[92], [94]-[99].

³⁴⁷ Tab 88, (Certified Transcript of Interview with [Negotiation Team Leader]) at p. 1979.

³⁴⁸ Tab 11 (Statement of Mark McKenzie) at [31].

³⁴⁹ Tab 297 (Timeline of Medical Records) at p. 1646.

³⁵⁰ Counsel Assisting's written submissions dated 30 August 2023 at [237].

Consideration

375. I accept that the NSWPF made efforts to obtain background information from police holdings, neighbours, family and treating doctors.
376. However, in my view the efforts were insufficient. In particular, there should have been stronger communication with Todd's parents at an early stage. I note June's number was only obtained when Mark attended Taree Police Station and that both Todd's parents had trouble contacting police at crucial moments on the telephone number they had been given. One can only imagine how frustrating and frightening that must have been. Mark and June had information and insights about Todd that the NSWPF needed. Crucially, they both had experience calming Todd. They could have offered considerable insight at an earlier point. They knew he was protective of his home and that he had a particular paranoia about people entering it. They could have explained that Todd would respond best to kindness and provided further guidance that may have assisted to soothe and calm him at an early stage.
377. I accept the submissions of Counsel Assisting and of Todd's parents that they should have been asked specifically how Todd might react to the Deliberate Action plan. Any advice they could give was an important piece of information which should have been factored into the decisions which were made. I do not accept Ch Insp Fuller's submission that this may have increased the risk to Todd.

Issue 7(a) – Would it have been appropriate, in the circumstances, for the negotiation team to obtain advice from an independent psychiatrist?

378. The NSWPF did not consider obtaining input from an independent psychiatrist on 31 July 2019 in relation to the incident concerning Todd. An "independent psychiatrist" is a psychiatrist who was not involved in Todd's care (as opposed to a psychiatrist who is independent of the NSWPF). Police have a panel of consultant psychiatrists. Issue 7(a) directs attention to whether one of those psychiatrists ought to have been used.

Evidence

Evidence of Negotiation Commander

379. The evidence of Negotiation Commander (the most senior officer to give evidence on this issue) outlines the circumstances in which the NSWPF consider it appropriate to utilise the services of their consultant psychiatrists. In her first statement, she says that



380. Further to that last point, Negotiation Commander explains that negotiators may consult with a consultant psychiatrist as to:³⁵²



³⁵¹ Tab 91 (Statement of Negotiation Commander) at [33].

³⁵² Tab 91 (Statement of Negotiation Commander) at [35].



381. Negotiation Commander has also given the following oral evidence in response to a question as to whether, on 31 July 2019, it was open to her to suggest to Negotiation Team Leader that one of the “on call” (consultant) psychiatrists be used:

“we’ve [Negotiation Command] worked significantly hard after the Lindt recommendations around the use of a consultant psychiatrist[s]. And that has involved how we’d utilise them, and extra training we’ve done around mental health. With an aide memoire to assist the negotiations, in negotiators around dealing with different types of mental illness. That’s been reviewed by our consultant psychiatrists, that gives them assistance and guidance around strategy and communication techniques. So, and I’m mindful that the Lindt recommendation was that to recognise sometimes the limitation of the use of a consultant psychiatrist, and not using the consultant psychiatrist in the development of negotiation strategy and objectives. So - and I couch that because if the team leader felt that they needed any further assistance about Mr McKenzie’s behaviour, then yes, it is open to them to request it. But it’s not necessarily that I’m going to delve down into it and suggest it.”³⁵³

382. Negotiation Commander’s reference to Lindt is to the inquest into the deaths arising from the Lindt Café siege (**Lindt**).

383. Negotiation Commander also emphasised in her oral evidence that following the Lindt recommendations there are “very clear boundaries” as to what the Consultant Psychiatrist’s areas of expertise were and what they want are “the diagnosis, the symptoms, and the behaviour”.³⁵⁴

384. Because negotiators are trained to “understand schizophrenia and psychosis” Negotiation Commander did not see the principal benefit of a psychiatrist to be about understanding Todd’s diagnosis. She accepted, however, that a consultant psychiatrist could be of assistance in “getting actual information from people who knew Todd...and

³⁵³ T435.28-40 (31 March 2023).

³⁵⁴ T441.18-19 (31 March 2023).

who may...be able to offer insightful information specific to [him].”³⁵⁵

385. Negotiation Commander also accepted that a consultant psychiatrist could assist with

56

No consideration was given to the use of an independent psychiatrist

386. It is reasonably clear on the evidence that none of the members of the negotiation team ever gave any detailed consideration to the use of an independent psychiatrist on 31 July 2019.

387. For his part, Primary Negotiator was not involved in any discussions about independent psychiatrist.³⁵⁷ Whilst Fourth Person had some discussions with Negotiation Team Leader about contacting Todd’s treating psychiatrist at some after she had conducted her briefings with Todd’s family members, she does not recall any discussions about contacting an independent psychiatrist. Fourth Person said that the consideration of this issue was more a matter for Negotiation Team Leader.³⁵⁸

388. In his interview, Negotiation Team Leader suggests that he discussed the option of engaging a consultant psychiatrist with Negotiation Commander.³⁵⁹

389. However, in his affidavit, Negotiation Team Leader says that he did not consider seeking the opinion of a consultant psychiatrist. Since Dr Neale had been contacted Negotiation Team Leader could see no reason to speak to a psychiatrist who “had no knowledge of Mr McKenzie”.³⁶⁰

Evidence of Dr Eagle

390. In her report, Dr Eagle acknowledges that it is difficult to say with certainty whether engaging an independent psychiatrist might have peacefully resolved the job on 31 July 2019. She says however, that it would have been appropriate and “potentially highly beneficial” for an independent psychiatrist to have consulted. Dr Eagle notes that, as negotiations had “stalled”, there was an opportunity for these consultations to occur.³⁶¹

³⁵⁵ T415.17-19 (31 March 2023).

³⁵⁶ T435.19 (31 March 2023).

³⁵⁷ T247.39 (29 March 2023).

³⁵⁸ T310.36 (30 March 2023).

³⁵⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at pp. 1938 [A626-628] and 1946 [A700-A701].

³⁶⁰ Tab 88-1 (Affidavit of Negotiation Team Leader) at [28].

³⁶¹ Tab 11C (Expert report of Dr Kerri Eagle) at p. 38.

391. Dr Eagle identifies the following potential benefits to using a consultant psychiatrist (which seem substantially to accord with the police policies, referred to by Negotiation Commander as to their use:³⁶²
- a. a consultant psychiatrist could have provided input into alternative communication approaches to Todd, such as in relation to the language, tone and nature of the interactions with him given his mental state (positive reinforcement, showing respect, distraction; empathic communication; active listening, fulfilling promises);
 - b. a consultant psychiatrist could have provided expert psychiatric consideration of alternative strategies that might be available, such as offering food and/or medication in exchange for cooperation;
 - c. a consultant psychiatrist could have evaluated the role of the family and (in particular) whether the family could provide more meaningful dynamic input into communication with Todd and/or whether direct attempts by the family to communicate with Todd could be safely utilised (the question of third party intervention is addressed under the next subheading); and
 - d. a consultant psychiatrist could provide expert advice on how Todd might react to a plan to enter his home, and whether there were steps that might have been taken (such as a staged approach), that might have been less confronting for Todd. (The possibility of offering medication to Todd is addressed in issue 9).

Submissions

Submissions of Counsel Assisting

392. Counsel Assisting³⁶³ submit that, whilst police made considerable efforts to contact Todd's treating medical practitioners (and ultimately succeeded in contacting Todd's psychiatrist at the time, Dr Neale), the evidence is clear that no one from the NSWPF (and in particular, Negotiation Team Leader) considered obtaining input from an independent psychiatrist on 31 July 2019. This is something that ought to have been considered. Consulting an independent psychiatrist could have brought a range of benefits with no real downside. Counsel Assisting expand on this submission by reference to the following points:

³⁶² Tab 11C (Expert report of Dr Kerri Eagle) at p. 38.

³⁶³ Counsel Assisting's written submissions dated 30 August 2023 at [241].

- a. The relevant policies and procedures did not preclude the use of a consultant psychiatrist in the circumstances of 31 July 2019;
- b. The engagement of a consultant psychiatrist could lead to a number of potential benefits; and
- c. There was no real downside to their use.

[a. It was open, on the relevant policies and procedures, for NSWPF to use a consultant psychiatrist on 31 July 2019](#)

393. Counsel Assisting³⁶⁴ submit that the policies and procedures to which Negotiation Commander has referred seem to contemplate the possibility of a consultant psychiatrist of being used on 31 July 2019. In the first place, the job on 31 July 2019 was “ [REDACTED] ”.³⁶⁵

394. Counsel Assisting further submit that more broadly, a consultant psychiatrist could have provided advice³⁶⁶ on a number of matters relevant to the job. Perhaps most significantly, [REDACTED]

[REDACTED] As Counsel Assisting submit below, to the extent that the breach and hold was intended to [REDACTED] that was misconceived – an independent set of eyes may have brought a fresh perspective to the consideration given to that issue.

395. Counsel Assisting note that this accords with the opinion of Dr Eagle, who says:

“...[A] consultant] psychiatrist could have reviewed clinical information that was available about Mr McKenzie, a consultant psychiatrist could have spoken to the family, a consultant psychiatrist could have taken accounts of how he was behaving, and even observed, if they were present, how he was behaving, and then provided some strategies or advice as to how you might be able to de-escalate the situation and engage Mr McKenzie.”³⁶⁷

396. Counsel Assisting consider that what Dr Eagle is proposing is not understood to go beyond the sort of advice referred to by Negotiation Commander.³⁶⁸ She is not understood to be suggesting that a consultant psychiatrist would be making a tactical

³⁶⁴ Counsel Assisting’s written submissions dated 30 August 2023 at [257]-[265].

³⁶⁵ Tab 91(Statement of Negotiation Commander) at [34(d)].

³⁶⁶ Tab 91(Statement of Negotiation Commander) at [34(f)] and [35(h)].

³⁶⁷ T1583.47 – T1584.3 (20 June 2023).

³⁶⁸ Tab 91 (Statement of Negotiation Commander) at [34(d)].

decision. For this reason, as submitted in more detail below, Dr Eagle's opinion does not cut across any of the findings or recommendations made by State Coroner Barnes in Lindt.

397. Counsel Assisting submit that the evidence of Negotiation Commander seems to reveal a reluctance on the part of the NSWPF to use consultant psychiatrists because of a particular understanding of the findings and recommendations made in the Lindt matter. It may, therefore, be of benefit to briefly consider what findings and recommendations were (and more importantly were not) made in that inquest.
398. The facts of Lindt are notorious and need only briefly be described. It involved a siege in circumstances where the subject of the police operation had expressed an allegiance to the radical Islamic world view held by the Islamic State group (**IS**).
399. In his Honour's findings (Chapter 13, Negotiation, [195] and following), State Coroner Barnes was critical of the role played by the consultant psychiatrist in that operation. His Honour found that the consultant psychiatrist had overstepped his role and that police placed undue reliance on the advice that he had provided (Lindt Findings, [2044]). In particular, his Honour found that, in many instances, the advice received from the consultant psychiatrist was appropriate and fell within the psychiatrist's level of expertise (for example, advice as to the subject's diagnosis with narcissistic personality disorder and how that subject might behave if he became frustrated) (Lindt Findings, [214]).
400. However, his Honour found that, in other respects, the Consultant Psychiatrist overstepped his responsibilities by giving opinions on what negotiation strategy and tactics should be used. Examples included telling negotiators when to engage directly with the subject, advising police that the subject should be provided with an IS Flag, and advising police what information should be provided to the media (Lindt Findings, [215]). That consultant psychiatrist also gave advice that the behaviour of the subject was not consistent with a person who believed in the ideals of IS (Lindt Findings, [216]), a matter which, his Honour held, fell outside the psychiatrist's area of expertise (Lindt Findings, [221]). His Honour was also critical of the quality of some of the advice that that consultant psychiatrist gave (Lindt Findings, from [225]-[246]).
401. His Honour made a recommendation aimed at clarifying the role of a consultant psychiatrist in police operations and to ensure that the limitations of that psychiatrist's role is properly understood by police (recommendation 16). His Honour also

recommended that police consider expanding its panel of psychological advisers (recommendation 17).

402. In summary, the evidence of Negotiation Commander perhaps suggests that police have misunderstood the effect of the findings and recommendations made in Lindt. His Honour's findings should not be understood as suggesting that a consultant psychiatrist ought not to have been used on 31 July 2019. In particular, nothing found by his Honour in Lindt cuts across the opinion of Dr Eagle that engaging a consultant psychiatrist would have been of some benefit on 31 July 2019. It is not proposed that those psychiatrists would tell negotiators what steps to take in the negotiations or make tactical operational decisions; rather, the consultant psychiatrist could be used to provide advice or assistance to the negotiations team in the more limited ways described above. Ultimately, the tactical decision would be for the relevant officers in the NSWPF to make.

b. The potential benefits of using a consultant psychiatrist on 31 July 2019

403. Counsel Assisting³⁶⁹ notes that Negotiation Commander accepted there were benefits in using a consultant psychiatrist [REDACTED]

404. More generally, Fourth Person says that in her experience a consultant psychiatrist can be a benefit. She gave evidence that she had been in two previous jobs in which the consultant psychiatrists had been used.³⁷⁰ She said that, in her experience, that these psychiatrists can provide "very helpful advice" in situations like that on 31 July 2019.

1. A consultant psychiatrist could have offered advice as to the symptoms and the effect of Todd's medication

405. [REDACTED]
- ³⁷² As noted above, while Dr Neale provided some information about Todd's medical history, that information was limited. Further, police either did not know of or how to contact Todd's previous psychiatrist, Dr Richardson, or, if they

³⁶⁹ Written submissions of Counsel Assisting dated 30 August 2023 at [266]-[273].

³⁷⁰ T312.40-49 (30 March 2023).

³⁷¹ Tab 91 (Statement of Negotiation Commander) at [35(a)].

³⁷² Tab 91 (Statement of Negotiation Commander) at [35(e)].

did, did not think it necessary to contact him. As further noted, Todd's GP, Dr Singh, was also not able to be contacted. Additionally, Primary Negotiator and Negotiation Team Leader appear to have been confused as to whether or not Todd had received the latest dose of his medication. As will be submitted below, the uncertainty as to the medication that Todd was taking was felt, by Officer T10, to justify the breach and hold.

406. Counsel Assisting submit that a consultant psychiatrist may have been able to bring clarity to Todd's medical state. She or he could have [REDACTED] [REDACTED] and clarified any confusion that Primary Negotiator, Negotiation Team Leader, or Officer T10 had in this respect. She or he could then have advised as to whether Todd's [REDACTED]

2. A consultant psychiatrist could have reviewed the medical records available/suggested what further medical information should be obtained

407. Counsel Assisting submit that a consultant psychiatrist could also have been used to [REDACTED] that were available³⁷³ and, relatedly, could have guided requests for further medical information. Once again, this could have supplemented the (limited) information that Dr Neale was able to provide or have provided information that Dr Neale was unable or unwilling to provide. On this point, Dr Eagle has expressed the following opinion:

"Dr Neale was asked specific questions, from the look of it, about what his knowledge of Mr McKenzie was and what his involvement in Mr McKenzie's care was, and so he provided that information. It's not clear whether Dr Neale was asked about information on how to respond to Mr McKenzie as he was presenting or how to respond to a person with psychosis. I mean, Dr Neale presumably would have had extensive knowledge and experience of people with psychosis - he may not have been asked about that general level of information, and individual psychiatrists have different levels of experience and willingness to engage in these types of scenarios, so he would have probably been concerned about - he may well have been concerned about his last consultation with Mr McKenzie and worried about that as opposed to what was unfolding. He may have had limited knowledge or understanding of the police involvement and understanding with Mr McKenzie or the circumstances, so I think there are a lot of assumptions about what Dr Neale was able to offer at the time."³⁷⁴

³⁷³ Tab 91, at [35(e)].

³⁷⁴ T1585.48 – T1586.14 (20 June 2023).

408. Counsel Assisting again submit that as noted above, Dr Neale could not provide any information of assistance to negotiators. A consultant psychiatrist may have been able to suggest other ways to get that information (for example, by suggesting inquiries be made of Todd's previous psychiatrist which may have enabled Dr Richardson to be identified and potentially contacted).
409. A consultant psychiatrist could have also analysed the information that became available. In this regard, Dr Eagle says that, even if there were "copious" amounts of information available regarding Todd's mental health, a consultant psychiatrist would still offer the benefit of helping negotiators understand that information in the context of [REDACTED]³⁷⁵

3. A consultant psychiatrist could have offered advice as to whether members of Todd's family should have been engaged as third party interveners

410. Counsel Assisting submit that, importantly, pursuant to the consideration described in [35(f)] of Negotiation Commander's statement,³⁷⁶ the consultant psychiatrist could [REDACTED] on 31 July 2019. Counsel Assisting submit that at least Mark³⁷⁷ was available and prepared to assist. Further, Ms Smyth, Todd's cousin, lived nearby and, at one point, attended the scene. Negotiation Team Leader appears to have discounted Mark, perhaps somewhat peremptorily, as a suitable person for third party intervention. Negotiation Team Leader does not appear to have considered, in any detail, whether other family members could have been used. A consultant psychiatrist may have brought a different [REDACTED] [REDACTED]. Counsel Assisting note that Dr Eagle perceived this as a benefit.³⁷⁸

c. There were no reasons not to engage a consultant psychiatrist

411. Counsel assisting³⁷⁹ submit that Dr Eagle could not see any downsides to the use of a consultant psychiatrist in the circumstances of 31 July 2019.³⁸⁰ She did not agree with the limitations and difficulties that were suggested to her. She also did not accept or

³⁷⁵ T1587 (20 June 2023).

³⁷⁶ Tab 91 (Statement of Negotiation Commander).

³⁷⁷ The evidence is less clear regarding June and Belinda.

³⁷⁸ T1630 (20 June 2023).

³⁷⁹ Counsel Assisting's written submissions dated 30 August 2023 at [274]-[279].

³⁸⁰ T1586.44-45 (20 June 2023).

give potential reasons why, on 31 July 2019, a consultant psychiatrist may not have added value.

412. For instance, in light of Negotiation Team Leader's explanation as to why he did not consider the use of a consultant psychiatrist, it was suggested to Dr Eagle that a consultant psychiatrist may not have sufficient knowledge of Todd's background to provide useful advice. Dr Eagle did not accept this suggestion. Dr Eagle opined that this could, in fact, be an advantage. She said:

"I think a psychiatrist deals with people who present with psychosis for the first time all the time, so I think, you know, hearing a story for the first time is not necessarily going to prevent a person from helping interpret that situation and engage with that person."³⁸¹

413. Counsel Assisting submit that in any event, as previously noted, the information that was obtained from Dr Neale was quite limited. Therefore, to the extent that Negotiation Team Leader considered that he had sufficient information from Todd's treating psychiatrist as to make it unnecessary for a consultant psychiatrist to be engaged, that view was misplaced. As noted above, Dr Neale was able to provide only limited information about Todd. Police did not attempt to contact Dr Richardson (and may not have had the means of doing so) and were unable to contact Dr Singh. This meant that police had limited information as to strategies that could be used in an attempt to engage Todd.

414. It was also suggested that Negotiation Commander's experience and training as a negotiator and a forensic mental health nurse meant that it was not necessary for a consultant psychiatrist to be engaged on 31 July 2019. Dr Eagle did not accept this proposition. She accepted that Negotiation Commander seemed "very experienced".³⁸² She did not accept, however, that Negotiation Commander's experience as a forensic nurse and experience as a negotiator meant that she had a greater level of engagement with psychotic persons than a consultant psychiatrist.³⁸³ Dr Eagle points out that a [forensic] psychiatrist:

"has a medical degree, has undergone years of working as a doctor and then years of training as a psychiatry registrar and have been required to assess multiple people at the front line of mental health services over many years presenting in various states of intoxication psychosis, mania, depression, with various levels of risk, in various

³⁸¹ T1586.26-29 (20 June 2023).

³⁸² T1611.35 (20 June 2023).

³⁸³ T1611 (20 June 2023).

different circumstances, both in the community with acute care teams, in emergency departments, in mental health units, in correctional facilities, and I guess the accumulated knowledge and understanding of psychosis and how it operates on a person's mind, you would hope, might be able to provide - may be able to provide a limited amount of value in helping police come up with some different approaches or different strategies that might be able to engage that person given that that psychiatrist has tried and used those strategies on multiple occasions over many years."³⁸⁴

415. In any event, Dr Eagle explained that she did not recommend the involvement of a consultant psychiatrist as a substitute for Negotiation Commander's experience and expertise, rather it was an "add value".³⁸⁵
416. Counsel Assisting submit that the evidence discloses that the 31 July 2019 job was not urgent. There were no hostages, [REDACTED] and no apparent resourcing limitations requiring the job to be brought to an end. While these matters are traversed in the submissions dealing with Issue 9, for present purposes Counsel Assisting consider it is enough to observe that there was available time to consult with and receive appropriate advice from a consultant psychiatrist.

Conclusion to Counsel Assisting's submissions

417. The evidence discloses that the use of a consultant psychiatrist had the potential to realise a number of significant benefits. The evidence of Dr Eagle to that effect was clear and cogent and should be accepted. In particular, there was a possibility that the use of a consultant psychiatrist on 31 July 2019 could have meant that police refrained from executing the misconceived and risky strategy of conducting a breach and hold (with the apparent object of facilitating negotiations). Further, the evidence discloses no real downside to the use of a consultant psychiatrist.
418. Counsel Assisting³⁸⁶ submit that accordingly, Negotiation Team Leader made an error in judgment by not considering the use of a consultant psychiatrist and recommending this to Ch Insp Fuller.

³⁸⁴ T1633.47 – T1634.9 (20 June 2023).

³⁸⁵ T1613.29 (20 June 2023).

³⁸⁶ Counsel Assisting's written submissions dated 30 August 2023 at [280]-[281].

Submissions of the Commissioner

419. The Commissioner³⁸⁷ rejects the submission that a consultant psychiatrist would have meaningfully assisted in this incident. The Commissioner submits that NSWPF negotiators undertake significant training in mental health disorders and negotiation strategies,³⁸⁸ with NSWPF consultant psychiatrists contributing to this training.³⁸⁹ Further, training records show that tactical officers are being trained in precisely these sorts of scenarios.³⁹⁰
420. The Commissioner questions what additional value the consultant psychiatrist could have brought that is not already within the knowledge, skills and abilities of Negotiation Commander, who at the time held a number of qualifications in nursing (Acute Psychiatric Nursing) and psychology, as well as being herself a registered psychologist. There is also limited scope for the role of a medical practitioner in this scenario where Todd was wielding a knife and this is supported by the evidence of Mr Knight³⁹¹ and Dr Eagle.³⁹²
421. Further, the Commissioner draws attention to the evidence of Dr Neal, who said that he did not know Todd well enough to provide any insight. This being the view of Todd's own treating psychiatrist, the Commissioner submits that it is difficult to know what more a consultant psychiatrist would have achieved. Alternatively, the Commissioner submits that Dr Neale's response on the day was inadequate and offered very little assistance to either Todd or the NSWPF. The Commissioner rejects any implication that that NSWPF were somehow remiss in failing to contact Dr Richardson as he was overseas³⁹³ and left practice in 2017.³⁹⁴
422. The Commissioner submits that it has not been established on the evidence that a consultant psychiatrist would have access to Todd's medical records [REDACTED] [REDACTED] or, had they been available, would have meaningfully assisted with ending the siege. The Commissioner also rejects Mr Perry's contention that proactive steps should have been taken to obtain further information by interviewing family,

³⁸⁷ Written submissions of the Commissioner dated 13 October 2023 at [109]-[128].

³⁸⁸ Tab 91 (Statement of Negotiation Commander) at [36].

³⁸⁹ T435.28-40 (31 March 2023).

³⁹⁰ Second statement of Officer 10, Chief Inspector, dated 26 June 2023, at [17]-[18]. See also the lesson plans, course material and range and practical sequences which are contained within the brief of evidence at Volume 18, Tabs 344-353.

³⁹¹ Tab 11C (Expert report of Dr Kerri Eagle) at [164.12.5] and [164.14.27].

³⁹² T1622.15 (20 June 2023).

³⁹³ Tab 309 (Statement of Dr Michael Richardson (Psychiatrist) at [15].

³⁹⁴ Counsel Assisting's written submissions dated 30 August 2023 at [6].

clinicians, friends or associates as this overlooks the investigations already conducted, as acknowledged in Counsel Assisting's submissions.³⁹⁵

423. The Commissioner disagrees with the strategies that Dr Eagle suggested a consultant psychiatrist may have been able to assist with.³⁹⁶ First, the Commissioner submits that police negotiators are extensively trained in alternative communication approaches and had already tried these approaches during the course of the incident. Second, Sen Cst Larrain had also tried to employ tactics such as offering Todd food and cigarettes to no avail. Third, Dr Eagle's suggestion regarding a [REDACTED] overlooks the fact that third-party intervention is not axiomatically used due to the risks involved and that the NSWPF had determined it was not appropriate to use in this case based on their own risk assessment. Fourth, the Commissioner submits that Dr Eagle's final suggestion does not consider that breach and hold is a staged or graduated tactical option.
424. The Commissioner submits that the Court should be cautious about accepting Dr Eagle's opinion in relation to how a police tactical operation could have been resolved. The Commissioner contends that: Dr Eagle does not possess the tactical or policing experience to have the necessary expertise to opine on this topic. The Commissioner also contends that Dr Eagle does not grapple with the fact that Negotiation Commander, with qualifications and experience as a registered psychologist who has worked directly with consultant psychiatrists at the NSWPF, was able to provide guidance in stead of a psychiatrist if necessary.
425. The Commissioner disagrees with Counsel Assisting's submission that there is no reason not to use a consultant psychiatrist. The capacity of Dr Eagle to encroach upon tactical considerations in her expert report, as well as the psychiatrist's intrusion during the Lindt siege of which State Coroner Barnes was critical,³⁹⁷ demonstrates that use of a consultant psychiatrist is not without risk.

Submissions of Negotiation Team Leader

426. Negotiation Team Leader³⁹⁸ submits that the negotiations team generally made contact with Todd's treating psychiatrist, who did not offer any practical assistance in

³⁹⁵ Counsel Assisting's written submissions dated 30 August 2023 at [208], [236].

³⁹⁶ Tab 11C (Expert report of Dr Kerri Eagle) at p. 38.

³⁹⁷ See Chapter 13. Available at: <https://www.lindtinquest.justice.nsw.gov.au/Documents/findings-and-recommendations.pdf> (accessed on 10/10/23).

³⁹⁸ Submissions of Negotiation Team Leader at [4], [15].

reaching Todd. The negotiators acted in accordance with their training and prevailing practices and they should not be subject to criticism.

Submissions of senior next of kin

427. Mark³⁹⁹ agrees with Counsel Assisting's submissions on this issue. He strongly endorses the submission that it would have been appropriate for police to consider the use of a consultant psychiatrist. There was a number of potential benefits associated with this, no particular urgency preventing police from contacting a consultant psychiatrist and no evidence of any downside to doing so. Mark also agrees with Counsel Assisting's observation that the evidence of Negotiation Commander tends to suggest a misunderstanding of the recommendations of Lindt.
428. Mark further submits that police's failure to obtain useful information from a current treating mental health professional was another reason for obtaining a consultant psychiatrist. Mark notes that a consultant psychiatrist may have brought "clarity" to Todd's mental state by "connecting the dots" between the history of Todd's paranoia, neighbour's witness accounts and what behaviours he was exhibiting to help determine the trigger for psychosis (which could have assisted police with crafting a strategy to address Todd's mental state).
429. June⁴⁰⁰ also agrees with Counsel Assisting's submissions on this issue. She highlights Counsel Assisting's submission that a consultant psychiatrist could assist with obtaining information from people who knew Todd⁴⁰¹ as well as assist with appropriate strategy and resourcing issues.⁴⁰² June submits that the evidence of Negotiation Commander appears to suggest that consulting an independent psychiatrist is to be avoided by the NSWPF.
430. June submits that there would be no harm in consulting an independent psychiatrist. A psychiatrist could have negotiated and built rapport with Todd while he was calm whilst playing his drum kit. June further notes that a further benefit of consulting an independent psychiatrist would be the reassurance it would provide to the family.

³⁹⁹ Written submissions of Mark McKenzie dated 12 October 2023 at [47]-[51].

⁴⁰⁰ Written submissions of June Wilkins dated 13 October 2023, at [100]-[114].

⁴⁰¹ T415.17-19 (31 March 2023).

⁴⁰² T435.19 (31 March 2023).

Submissions in reply

431. The Commissioner⁴⁰³ rejects Junes' submissions that the evidence of Negotiation Commander suggests that the NSWPF's attitude is to avoid consulting an independent psychiatrist. Contrary to this, the Commissioner notes that Negotiation Commander's evidence was that the NSWPF has a panel of consultant psychiatrists.
432. The Commissioner disagrees with Counsel Assisting and Mark's submission that Negotiation Commander misunderstood the recommendations of the Lindt inquest.⁴⁰⁴ Rather, Negotiation Commander was highlighting the need for professional demarcation between NSWPF and consultant psychiatrists.⁴⁰⁵ The recommendations of the Lindt inquest demonstrates that there are downsides to the use of consultant psychiatrists.
433. In relation to the Commissioner's submissions concerning the evidence of Dr Eagle and the utility of consultant psychiatrists, Mark⁴⁰⁶ submits in reply that a consultant psychiatrist, based on their general expertise,⁴⁰⁷ may have understood the complexities of Todd's psychosis and been able to explain this to police on the day. This would have assisted police with formulating options for a peaceful resolution of the incident or strategies to de-escalate.⁴⁰⁸ Otherwise, police may misunderstand Todd's behaviours as "rational" or "high functioning".⁴⁰⁹
434. Mark also submits that, contrary to the Commissioner's submissions, Dr Eagle accepted that family members and a consultant psychiatrist may have difficulties with engaging with Todd.⁴¹⁰ Her evidence was not that family members or a consultant psychiatrist would be able to give "directions" to Todd, but that they may be utilised by police to provide options that may assist in reducing Todd's agitation, anger and fear⁴¹¹ and therefore create opportunities for de-escalation.
435. Mark observes that Dr Eagle's evidence was not beyond the scope of her expertise as she repeatedly provided her answers with the qualification that they were from "the perspective of a psychiatrist" and recognised that there were policing decisions to be

⁴⁰³ Written submissions in reply of the Commissioner dated 25 October 2023 at [15], [18].

⁴⁰⁴ Written submissions of Mark McKenzie dated 12 October 2023 at [50].

⁴⁰⁵ T441.18-19 (31 March 2023).

⁴⁰⁶ Written submissions in reply of Mark McKenzie dated 3 November 2023 at [7]-[19].

⁴⁰⁷ T1586.15 (20 June 2023).

⁴⁰⁸ T1583.2 (20 June 2023).

⁴⁰⁹ Written submissions of the Commissioner dated 13 October 2023 at [12].

⁴¹⁰ See T1608.11 (20 June 2023).

⁴¹¹ See T1589.40-T1590 (20 June 2023).

made.⁴¹² The Commissioner's view that there has been an inequitable shift of the burden of mental health jobs from health to police⁴¹³ also provides a further reason for the use of a consultant psychiatrist.

436. In relation to the Commissioner's submissions regarding the expertise of Dr Eagle and Negotiation Commander, Mark submits that the Court should reject the Commissioner's submission that Dr Eagle did not adequately consider Negotiation Commander's experience and that a consultant psychiatrist was not required due to Negotiation Commander's qualifications as a psychologist. The Court should also reject the submission that Negotiation Commander's prior study negated the need for a consultant psychiatrist to be briefed.
437. Dr Eagle's evidence was that the roles of a psychologist and a psychiatrist are different and not interchangeable.⁴¹⁴ Negotiation Commander was not employed by NSWPF as a psychologist at the time,⁴¹⁵ nor is it clear that she was ever employed in this capacity during her time in the NSWPF.⁴¹⁶ Negotiation Commander also gave evidence that her role was one of oversight and it is typically not her role to give advice unless requested.⁴¹⁷ Her views on using a consultant psychiatrist were not sought on the day and her evidence was that she thought a consultant psychiatrist was not necessary as she knew the advice that they provide and that Todd's psychosis was typical in a number of "barricade siege situations" involving schizophrenic people.⁴¹⁸
438. Mark contends that there is a dissonance in Negotiation Commander's inability to comment on the decisions of Negotiation Team Leader or tactical police,⁴¹⁹ which is within her expertise in negotiation,⁴²⁰ and her ability to dismiss the utility of psychiatry, which is not within her expertise.
439. In reply, Counsel Assisting⁴²¹ maintain their submissions that there is no downside to using a consultant psychiatrist on the proviso that the NSWPF's Standard Operating Procedure – Negotiation Unit, Counter-Terrorism and Special Tactics Command (**Negotiation SOPS**) is followed. [REDACTED]

⁴¹² T1583.25; T1585.48; T1590.3; T1595.45 (20 June 2023); T1621.38 (20 June 2023).

⁴¹³ Written submissions of the Commissioner dated 13 October 2023 at [49].

⁴¹⁴ T1611.49 – T1612.8; T1613.23 – T1613.31 (20 June 2023).

⁴¹⁵ Tab 91 (Statement of Negotiation Commander) at [6] and [7].

⁴¹⁶ In 2001 Negotiation Commander commenced with the Negotiation Unit having commenced with the police in General Duties at an unspecified time.

⁴¹⁷ T403.30; T382.36; T435.27; T411.8 (31 March 2023).

⁴¹⁸ T447.46-T447.49 (31 March 2023).

⁴¹⁹ Submissions of Mark McKenzie dated 12 October 2023 at [63].

⁴²⁰ Tab 91 (Statement of Negotiation Commander) at [4].

⁴²¹ Counsel Assisting's written submissions in reply dated 10 November 2023 at [17]-[19].

440. Counsel Assisting also emphasise Dr Eagle’s evidence that NSWPF consultant psychiatrists are also forensic psychiatrists who have an understanding of police procedures, risk assessment and de-escalation techniques.⁴²⁴

Consideration

441. Having carefully considered the evidence and the submissions put in relation to this issue, I accept Counsel Assisting’s overarching submission that there was no downside to fully considering the use of a consultant psychiatrist on 31 July 2019. Rather, the evidence discloses that the use of a consultant psychiatrist had the potential to realise a number of significant benefits. I note that both Mark and June endorse the submission.
442. I do not accept the Commissioner’s submission urging caution in relation to Dr Eagle’s opinion on this issue because she does not possess policing or tactical experience. Dr Eagle’s opinions lie within her area of expertise. Further I do not accept the fact that Negotiation Commander was available somehow reduces the need to consider the consultation of a psychiatrist. As Dr Eagle points out psychology is a different expertise to psychiatry. In short I accept the evidence of Dr Eagle in relation to this issue. In particular, she states that there was a possibility that the use of a consultant psychiatrist on 31 July 2019 *could* have meant that police refrained from executing the misconceived and risky strategy of conducting a breach and hold (with the apparent object of facilitating negotiations). She acknowledges that it is difficult to say with any certainty whether engaging an independent psychiatrist might have peacefully resolved the job on 31 July 2019, but it would have been an appropriate strategy to try and was “potentially highly beneficial”. Dr Eagle noted that, as negotiations had apparently “stalled”, there was an opportunity for these consultations to occur.⁴²⁵ In my

⁴²² Tab 342 (Standard Operating Procedure – Negotiation Unit, Counter Terrorism and Special Tactics Command) at [58(h)].

⁴²³ Tab 342 (Standard Operating Procedure – Negotiation Unit, Counter Terrorism and Special Tactics Command) at [59].

⁴²⁴ T1582.40 (20 June 2023).

⁴²⁵ Tab 11C (Expert report of Dr Kerri Eagle) at p. 38.

view in the absence of clear threats of self harm, the situation was not so urgent that proper consultation with a forensic psychiatrist should have been taken off the table as an option.

443. It was clearly open for negotiators to consider consulting one of their on-call psychiatrists to assist. [REDACTED] While I accept that following the Lindt Inquiry, more care is taken to ensure that clear boundaries are in place and that psychiatrists do not get involved in making tactical decisions, there is nothing in State Coroner Barnes's findings that would act as an impediment to the proper use of a psychiatric consultant in these circumstances.
444. The Commissioner reminded the Court that Dr Neale could not provide much advice and submitted that in those circumstances a consultant who had never met Todd would be unlikely to materially assist. On the contrary, it appears to me that given the limited information that was available from doctors that had actually treated Todd, the usefulness of a consultation with forensic psychiatrist was likely to have been increased.
445. Counsel Assisting⁴²⁶ submitted Negotiation Team Leader made an error of judgment by not considering the use of a consultant psychiatrist and recommending this to Ch Insp Fuller. I accept that view.
446. The Commissioner submitted, among other things that there would have been little additional value in contacting a consultant psychiatrist given the availability of Negotiation Commander who had considerable skills and experience. She held a number of qualifications in nursing (Acute Psychiatric Nursing) and psychology, as well as being herself a Registered Psychologist. However, she gave evidence that her role was one of oversight and that it was not her role to give advice unless requested.⁴²⁷
447. Negotiation Commander gave evidence that her views on using a consultant psychiatrist were not sought on the day and her evidence was that she thought a consultant psychiatrist was not necessary as she knew the advice that they provide and that Todd's psychosis was "typical" in a number of "barricade siege situations" involving schizophrenic people.⁴²⁸
448. As I have already noted, her evidence conflicts to some extent with the evidence of Negotiation Team Leader. In his original interview, Negotiation Team Leader stated

⁴²⁶ Counsel Assisting's written submissions dated 30 August 2023 at [280]-[281].

⁴²⁷ T382.36; T403.30;; T411.8; T435.27 (31 March 2023).

⁴²⁸ T447.46-T447.49 (31 March 2023).

that he discussed the option of engaging a consultant Psychiatrist with Negotiation Commander.⁴²⁹ A matter she appears to remember differently. However, in his affidavit, Negotiation Team Leader says that he did not consider seeking the opinion of a consultant psychiatrist. He stated that as Dr Neale had been contacted he could see no reason to speak to a psychiatrist who “had no knowledge of Mr McKenzie”.⁴³⁰

449. Negotiation Team Leader was excused from giving evidence on medical grounds and for that reason it is difficult to come to a firm view about whether the use of a consultant psychiatrist was ever actually discussed. However, given the state of the evidence I am comfortably satisfied that if it was mentioned in the conversation between Negotiation Team Leader and Negotiation Commander, it was dismissed summarily and was not a matter on which Negotiation Commander was asked to specifically advise. If it had been the subject of formal advice, I would expect there to have been a full contemporaneous record of the advice given.
450. I found the manner in which Negotiation Commander described Todd’s psychosis as typical in a number of “barricade siege situations involving schizophrenic people” as somewhat troubling. It seems to indicate insufficient consideration of the specifics involved. Any suggestion that the operation was approached as “typical” - if it implies that it was always likely to end up grinding a relentless course towards tactical intervention - is disturbing. While the situation was not urgent, any advice that even provided for the possibility of shifting the course of the afternoon should have been considered.
451. I accept the matters set out in Counsel Assisting’s submissions which point to the useful interventions a consultant psychiatrist could have made, including advice on medication, a review of the available medical records with advice about what further could have been obtained and an opinion about the use of third party interveners.
452. In my view, not contacting an available resource such as a skilled consultant psychiatrist with expertise in police matters was a clear missed opportunity. I find that, in all the circumstances of 31 July 2019, it would have been appropriate for the negotiation team to obtain the advice of an independent psychiatrist.

⁴²⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at pp. 1938 [A626-628] and 1946 [A700-A701].

⁴³⁰ Tab 88-1 (Affidavit of Negotiation Team Leader) at [28].

Issue 7(b) – Would it have been appropriate, in the circumstances, for the negotiation team to consider seeking the assistance of a family member in trying to engage with Todd?

453. Issue 7(b) concerns whether, in the circumstances of 31 July 2019, it would have been appropriate for the negotiation team to consider seeking the assistance of a family members (or “third party intervention” as it was commonly referred to in the evidence) in trying to engage with Todd.

Evidence

The general approach of the NSWPF to third party intervention

The perceived risks with third party intervention

454. The evidence discloses that the general approach of police is not to use third party intervention in light of its potential for risk. The NSWPF practice regarding third party intervention was described in substantially those terms by Counsel for the Commissioner in the course of his examination of Dr Eagle.⁴³¹

455. The rationale behind these policies was explained by Negotiation Commander in the course of her evidence. In her first statement, Negotiation Commander says that third party intervention can be a “high-risk” proposition which ought to be considered carefully.⁴³² Negotiation Commander goes on to make the following assertion:

“From experience in this State, the use of family members to intervene on behalf of the policing response to high-risk situations is generally unsuccessful.”⁴³³

456. In her oral evidence, Negotiation Commander did not really elucidate or expand upon that assertion. She said that she had experience where a third party has resolved the situation, but she had “certainly had matters where it’s ended in fatality”.⁴³⁴ It is difficult to know what weight that evidence should be attributed. How many such matters Negotiation Commander is referring to is unknown. Nor does the evidence disclose any detail of the background and circumstances of those matters to enable a comparison with the circumstances of 31 July 2019.

⁴³¹ T1630 (20 June 2023).

⁴³² Tab 91 (Statement of Negotiation Commander) at [39].

⁴³³ Tab 91 (Statement of Negotiation Commander) at [40].

⁴³⁴ T458.29 (31 March 2023).

457. However, Negotiation Commander's evidence that there are risks in the use of third party intervention ought to be accepted (as set out below, there is little dispute between Negotiation Commander and Dr Eagle in this respect).

458. The first risk identified by Negotiation Commander is that family members can lack objectivity. In her first statement, Negotiation Commander says:

"Family members and friends are often under the perception that because of their closeness to the subject, that they are in a better position than a member of the Negotiation Team to understand the problems experienced by the subject and ...[consequently] [that negotiators] are more likely [than family members] to resolve the situation. Because of the emotions involved between family members there is a real potential for a detrimental effect on the negotiations than assisting in the peaceful resolution on the situation."⁴³⁵

459. A second risk identified by Negotiation Commander is that, in some cases, the relationship between the subject of a police operation and members of her or his family may not be known. In particular, Negotiation Commander agreed with the suggestion made by her Counsel (and Counsel for the Commissioner) that a risk with third party intervention is that police may not always know the background "family dynamic".⁴³⁶

460. In this regard, Negotiation Commander's statement includes the following statement:

"We are advised by Psychiatrists, Psychologists and subject matter experts that if family members were likely to be in a better position than police to resolve the situation, at the time, then these people would have identified the problem and resolved it prior to the subject being in a crisis situation and placing their life at risk. It is highly unlikely for that reason that family members, friends and members of Mental Health Crisis Teams would be in a position to resolve the problem. From experience it is quite likely that they could exacerbate the issues."⁴³⁷

461. In her oral evidence, Negotiation Commander qualified what she had said in this part of her statement as follows:

"I'm not suggesting that on the day, the family should have been in a position to have managed this. That refers to, for example with Mr McKenzie - and this is something your Honour if I can assist the Court, that we often struggle with in high risk policing with persons with schizophrenia. Because when their medication is changed or they're non-compliant with medication or they're using substances or they're not case

⁴³⁵ Tab 91 (Statement of Negotiation Commander) at [40].

⁴³⁶ T476.46 (31 March 2023).

⁴³⁷ Tab 91 (Statement of Negotiation Commander) at [41].

managed, is that we often do find that we're now, unfortunately in this situation of being in a high risk siege, which for all the negotiators that were - we don't want to find ourselves in, because they are very difficult.

What I mean by that paragraph is, in the perfect world it would have been great if Mr McKenzie was case managed when his medication was changed, or there should've - would've been some oversight around potential break through symptoms or someone following up with him. That's what I mean that sometimes that intervention could have happened earlier to prevent a crisis occurring. I put that in the context of people on community treatment orders for schizophrenia where we have non-compliance with medication, but due to resourcing they may not get picked up for some months and by that stage, they're already in a psychotic state. So I certainly do not say that the family should have picked this up and managed. What that is about, is missed opportunities in managing mental health in the community."⁴³⁸

462. Counsel Assisting note that it may be that the Court would not accept the qualification Negotiation Commander sought to make at [41] of her statement. The reference to "these people" in [41] seems to pick up on the earlier reference Negotiation Commander made to "family members". Read that way, it seems as though Negotiation Commander was intending in her statement to say that family members ought to have identified issues before they came to police attention. Counsel Assisting also observe that it may be accepted from her oral evidence that Negotiation Commander has moved on from the view that she expressed in her statement. It is pleasing that this issue has been clarified. There is absolutely no place for any suggestion that Mark and June were remiss in any way and I firmly reject the possible implication.
463. A third risk identified by Negotiation Commander was that the information provided by a third party might be unreliable. In this regard, Negotiation Commander agreed with the suggestion made by Counsel for the Commissioner that it can be hard for police to verify in a short amount of time what background information is reliable and accurate or might receive competing or conflicting information.⁴³⁹
464. Negotiation Commander was firmly of the view that the risks inherent in third party intervention outweighed the risks of conducting a breach and hold.⁴⁴⁰

⁴³⁸ T457.43 – T458.13 (31 March 2023).

⁴³⁹ T476; T477 (31 March 2023).

⁴⁴⁰ T457 (31 March 2023).

The circumstances in which police consider that it might be appropriate to engage in third party intervention

465. Negotiation Commander explained that police would consider the use of third party intervention in the following circumstances:

“It’s generally used in circumstances where the negotiation is progressing, but not reached a resolution. We feel that the person nominated or third party has a strong relationship with the person and that we believe that that influence will be positive. But also in a negotiation where there is negotiation. So there’s good rapport. There’s good empathy. There’s good engagement with the subject. That’s when generally we would use a third party.”⁴⁴¹

466. Negotiation Commander also gave evidence that Police would involve a third party in negotiations in a context where negotiation is progressing well but there might be some “roadblocks” to someone coming out. She did not consider 31 July 2019 to fall within that category.⁴⁴²

467. Negotiation Commander gave evidence that police would only do a full assessment of whether a third party should be involved if there was an intent on using that strategy.⁴⁴³ Counsel Assisting observe that, to some extent, Negotiation Commander’s reasoning places the cart before the horse; unless a full assessment is performed it would be impossible to assess whether or not the strategy ought to be used. I accept that observation and question a procedure where such an important option is rejected without full consideration.

468. Negotiation Commander would expect any such “full assessment” to be recorded.⁴⁴⁴

The specific consideration to third party intervention on 31 July 2019

Negotiation Team Leader’s consideration of third party intervention

469. The evidence discloses that third party intervention was briefly considered by Negotiation Team Leader but dismissed by him at an early stage.⁴⁴⁵ Significantly, it appears to have been dismissed by him without any full assessment of its suitability (of the type referred to by Negotiation Commander) being conducted. This is because

⁴⁴¹ T451.42-47 (31 March 2023).

⁴⁴² T453 (31 March 2023).

⁴⁴³ T453 (31 March 2023).

⁴⁴⁴ T454.11-12 (31 March 2023).

⁴⁴⁵ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

there is no record of any such assessment (noting that Negotiation Commander would expect a written record to have been made of any such assessment).

Negotiation Team Leader's reasons for dismissing third party intervention on 31 July 2019

470. Negotiation Team Leader gives the following evidence regarding his decision not to conduct a written assessment of the merits of using third party intervention on 31 July 2019:

- a. Mark had struggled to relay correct information about Todd, did not know other information about Todd, and he had spoken to Todd that afternoon and dismissed what Todd had told him.⁴⁴⁶ In his interview, Negotiation Team Leader noted that Mark had mis-described Belinda (Mark's daughter) as his wife and suggested that this caused him to harbour some doubts regarding Mark's reliability.⁴⁴⁷ It appears that this information found its way to Negotiation Team Leader via Fourth Person.⁴⁴⁸ In his affidavit, Negotiation Team Leader makes it clear that he did not discount Mark simply because he believed him to have misspoken as to the name of his ex-wife – he says that the totality of the interactions with Mark caused him to have doubts about Mark and his ability and led him to deem Mark as unsuitable. Negotiation Team Leader also had regard to the "volatility" of the situation.
- b. He recalls that June was not in the area.⁴⁴⁹
- c. No other members of the family were mentioned.⁴⁵⁰

471. With the benefit of hindsight, Negotiation Team Leader remained of the view that he made the right decision not to involve third parties. He says that Mark's unsuitability added stress (although he does not say to whom).⁴⁵¹

Other potential risks with using third party intervention on 31 July 2019

472. In addition to the matters relied upon specifically by Negotiation Team Leader, the evidence disclosed some other potential reasons why third party intervention may not have been suitable on 31 July 2019.

⁴⁴⁶ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

⁴⁴⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1937 [A617].

⁴⁴⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1893 [A197].

⁴⁴⁹ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

⁴⁵⁰ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

⁴⁵¹ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

473. First, there was some history of Todd acting violently towards members of his family. In September 1999, Todd is reported to have had a verbal argument with his mother during which he forced entry to her home by kicking in a door. An AVO was issued which remained in force until November 2000.⁴⁵² Todd is also reported to have made threats to his mother in July 2000 and to have assaulted his sister in July 2005.⁴⁵³ Todd is also reported to have punched his father on the nose in December 2005.⁴⁵⁴
474. Secondly, as raised in the course of the examination of Dr Eagle, there was a possibility that family members might be incorporated into the subject's delusions.⁴⁵⁵
475. Thirdly, it is possible that members of Todd's family might not have appreciated the seriousness of the job.
476. Fourthly, there is some suggestion in the evidence that police understood that Todd did not want his father to "come down". This was referred to by Negotiation Commander in her oral evidence.⁴⁵⁶ It is noted that an iSurv entry of 5.24pm records Todd as having dismissed the fact that police were outside.⁴⁵⁷ Fourth Person also gives evidence to this effect following her conversations with Mark.⁴⁵⁸ To my mind there is no clear evidence that Todd ever told the NSWPF officers that he did not want his father to come down.

Evidence suggesting that a greater degree of consideration may have been given to the involvement of Mark as a third party intervener

477. Notwithstanding that Negotiation Team Leader has said that he dismissed Mark as a potential third party intervener at an early stage, there is some indication that he might have, at least at some stage, been considered.
478. In particular, Primary Negotiator says that he said to Todd that "his dad was going to come down and help sort it out and that everything would be ok".⁴⁵⁹ He stood by this in his oral evidence.⁴⁶⁰ In his oral evidence, Primary Negotiator also said that there would have been some basis for him to have said this to Todd.⁴⁶¹ That is consistent

⁴⁵² Exhibit 3, COPS Event E7882643; Tab 8 (Statement of Detective Chief Inspector Wayne Walpole), at [35].

⁴⁵³ Tab 11C (Expert report of Dr Kerri Eagle) at [14], [18].

⁴⁵⁴ Tab 11C (Expert report of Dr Kerri Eagle) at [19].

⁴⁵⁵ T1645.5-10 (20 June 2023).

⁴⁵⁶ T463.21 (31 March 2023).

⁴⁵⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1977.

⁴⁵⁸ Tab 90 (Statement of Fourth Person) at [10].

⁴⁵⁹ Tab 93 (Statement of Primary Negotiator) at [13].

⁴⁶⁰ T275 (30 March 2023).

⁴⁶¹ T250.35 (29 March 2023).

with the evidence given by Negotiation Commander that members of the negotiation command “are trained to be honest with people” and “don’t proactively deceive people”.⁴⁶²

479. At a later point of his evidence, Primary Negotiator gave the following more specific answer “one part of it would have been that his dad would come down, cause I was of the belief that he got along with his father”.⁴⁶³ The additional level of detail provided by Primary Negotiator suggests that he, at least, had turned his mind to the possibility of Mark attending the scene. It is unfortunate that there is no transcript of this conversation.
480. Primary Negotiator’s evidence is difficult to reconcile with Negotiation Team Leader’s evidence that third party intervention was dismissed at an early stage. Whilst it is possible, as Primary Negotiator says that “by sort it out” he was referring to the possibility of Mark attending and not being involved as a third party, it is difficult to see why Primary Negotiator would have felt the need to have told Todd that his father was “coming down”.⁴⁶⁴ That he communicated these things to Todd strongly suggests that, in Primary Negotiator’s mind, Mark was going to be involved in some capacity in an attempt to engage Todd or to [REDACTED]. The only other explanation is that Primary Negotiator said it in an attempt to build rapport but had not yet checked with others about the likelihood that it would actually occur or that confusion existed among the team about whether it was possible that Mark could come down. Clearly it should not have been said if it was not true.
481. Fourth Person’s evidence (which is consistent with the iSurv log) is that she did not advise Mark to attend the scene and was of the belief that he was not going to attend unless negotiators asked him to.⁴⁶⁵ Mark’s evidence on this point is broadly consistent with that of Fourth Person.
482. Ultimately, it seems that this evidence does not go anywhere. It is clear that Negotiation Team Leader did not ultimately conduct the sort of “full assessment”, as described by Negotiation Commander, that would be conducted in cases where negotiators had formed an intention to utilise a third party intervener. However, Primary Negotiator’s impression that Todd got along well with his father is useful information that perhaps ought to have been considered by Negotiation Team Leader. Further, the possibility

⁴⁶² T460.37.38 (31 March 2023).

⁴⁶³ T252.20-21 (29 March 2023).

⁴⁶⁴ T280.4-5 (30 March 2023).

⁴⁶⁵ T318.37-40 (30 March 2023).

that Todd had received incorrect information about his father's attendance may have warranted greater attention to the consideration of third party intervention in the circumstances of 31 July 2019.

Evidence of Dr Eagle

483. Dr Eagle is of the opinion that third party intervention ought to have been considered on 31 July 2019. I accept her view. She was cognisant of, and accepted that, there were risks involved. In particular, Dr Eagle acknowledged that, even from a psychiatric perspective, involving family is a difficult decision.⁴⁶⁶ She acknowledged that it needed to be considered "very carefully so you don't make the situation worse".
484. Dr Eagle is of the view, however, that this consideration ought to have occurred on 31 July 2019. She notes that the negotiations had stalled and that, accordingly, there was no need to bring the situation to an end urgently.⁴⁶⁷ This provided an opportunity for an assessment of the pros and cons and any risks involved with the involvement of third parties to be conducted. In this regard, Dr Eagle noted that a consultant psychiatrist would be able to advise on the manner of involvement of a third party and to conduct an assessment of the risks involved.⁴⁶⁸
485. Dr Eagle thought that the involvement of a third party family member brought the potential (and she does not express her opinion any higher than that) for the following benefits:
- a. A third party family member may be able to make contact with and "distract" the subject from their disturbed thought processes.⁴⁶⁹
 - b. A third party family member could, in circumstances where police have been unable to do so develop trust with the subject. Where the subject is a person who is mentally unwell, Dr Eagle notes that a family member is often best placed to provide her or him a "caring" approach because the family members will often be a mentally unwell person's primary support.⁴⁷⁰ She notes that people respond "innate[ly]" to such an approach.⁴⁷¹

⁴⁶⁶ T1589.14-15 (20 June 2023).

⁴⁶⁷ Tab 11C (Expert report of Dr Kerri Eagle) at p. 39.

⁴⁶⁸ T1590 (20 June 2023).

⁴⁶⁹ T1595.41 (20 June 2023).

⁴⁷⁰ Tab 11C (Expert report of Dr Kerri Eagle) at p. 39.

⁴⁷¹ T1583.14 (20 June 2023).

- c. Obtaining information from the family as to how the subject of the operation was interacting and what strategies might be adopted to try and engage the person. Dr Eagle gave the following evidence:

“Family members are people that know the person more, better than anybody else in the world in most cases, and so they will have been through these situations themselves, and may well know, you know, how to respond to them in a way that’s going to be beneficial.”⁴⁷²

486. Even though she acknowledged the risks in third party intervention, Dr Eagle said that the fact that police had been unable to de-escalate the situation amounted to “an exceptional circumstance” justifying their use on 31 July 2021.⁴⁷³
487. Dr Eagle conceded that the situation was likely to be stressful to family members and the likelihood that they would be emotional.⁴⁷⁴ However, that would not prevent an assessment of the sort that Negotiation Commander referred to from being performed. Indeed, Dr Eagle thought that each of these matters would need to be carefully assessed (including with the input of the consultant psychiatrist).
488. Dr Eagle also made the specific point that the purpose of engaging third parties would not be to get objectivity from that person. Dr Eagle acknowledged that a family member is “never going to have any objectivity” so “you would be involving them for a different purpose to objectivity. You would invariably want to use their subjectivity.”⁴⁷⁵ By that, it is understood that Dr Eagle was referring to the relationship between the person and his or her family members.
489. Dr Eagle also made the point that there are different forms of third party intervention. She made it plain that she was not suggesting that family members “might necessarily be sent into the home unsupported to physically de-escalate Mr McKenzie”, rather there were other ways the use of Todd’s family could have been considered on 31 July 2019.⁴⁷⁶ What Dr Eagle had in mind, it appears, was having a family member write Todd a letter, asking Todd whether he wanted to speak to the family member on the phone or otherwise passing on communications from the family member to Todd.⁴⁷⁷ On a more basic level, Dr Eagle suggests that Todd could simply have been asked

⁴⁷² T1590.19-23 (20 June 2023).

⁴⁷³ T1595.35 (20 June 2023).

⁴⁷⁴ T1608 (20 June 2023).

⁴⁷⁵ T1623.44-46 (20 June 2023).

⁴⁷⁶ T1631.4-6 (20 June 2023).

⁴⁷⁷ T1590 (20 June 2023).

whether Todd wanted to speak to his family; Todd's response could have been used to inform the subsequent police response.⁴⁷⁸

490. Dr Eagle accepted that there was some potential that Todd could have behaved violently towards family members on 31 July 2019.⁴⁷⁹ However, she did not have enough information to enable her to consider this.
491. Dr Eagle was satisfied that Todd came from a family which was present and loving and involved in Todd's care. The history of violence did not alter her view. In this regard, she said:

"... [That history of violence is] a product of the person being unwell. It is something that does need to be considered certainly, and if this is a recurrent pattern of behaviour where when the person gets unwell they target their family, which can happen, that needs to be considered but that didn't appear to be the case in Mr McKenzie's situation where he really hadn't had any evidence of antagonism with his family for a long period of time."⁴⁸⁰

492. Dr Eagle emphasised the importance of the processes for engaging with a person suffering from mental illness to be "flexible" and "patient".⁴⁸¹ Dr Eagle observed that it would be necessary to consider each case on its merits.⁴⁸²

Submissions

Submissions of Counsel Assisting

493. Counsel Assisting⁴⁸³ submit that the question of whether, in the circumstances of 31 July 2019, the involvement of family members (or "third party intervention" as it was commonly referred to in the evidence) ought to have been considered is less clear cut than whether advice from a consultant psychiatrist should have been obtained. It must be acknowledged that the involvement of members of Todd's family brought a measure of potential risk. However, there were also clear potential benefits.
494. Counsel Assisting submit that the Court could not conclude that third party intervention on 31 July 2019 would have succeeded in facilitating the peaceful resolution of the job.

⁴⁷⁸ T1645.44-46 (20 June 2023).

⁴⁷⁹ T1630 (20 June 2023).

⁴⁸⁰ T1597.4-9 (20 June 2023).

⁴⁸¹ Tab 11C (Expert report of Dr Kerri Eagle) at p. 39; T1595 (20 June 2023).

⁴⁸² T1631.1 (20 June 2023).

⁴⁸³ Counsel Assisting's written submissions dated 30 August 2023 at [283]-[286] and [327]-[328].

It follows that the Court also could not conclude that third party intervention ought to have been conducted on 31 July 2019.

495. However, Counsel Assisting submit that the Court could and should conclude that third party intervention ought to have been more seriously considered than it was. In particular, the evidence discloses that the involvement of members of Todd's family was dismissed by Negotiation Commander at an early stage without conducting any real consideration of the potential benefits (and risks) inherent in that course. The potential that third party intervention could have delivered some benefit, the fact that negotiations had "stalled", and the lack of urgency to bring the job to an end all combined to make it appropriate for such consideration to have been given. Whilst third party intervention brought its own risks and may not ultimately have brought the job to an end in a peaceful way, the same could be said of the option that police did employ (the breach and hold).
496. To the extent that the evidence discloses a general practice or policy on the part of the NSWPF against the use of third party intervention, Counsel Assisting submit that this practice or policy is unnecessary and ought not to be continued. Rather, in every case where negotiations have become protracted or are "stalled", there should be a genuine process of weighing up the risks of the involvement of family members against the potential benefits. That process could, it is suggested, be usefully informed by the input of a consultant psychiatrist (as described in the submissions responding to issue 7(a) above).

Potential benefits that third party intervention could have realised on 31 July 2019

1. The relationship between Todd and the members of his close family

497. Counsel Assisting⁴⁸⁴ submit that the evidence discloses there was a loving and supportive relationship between Todd and his father. Mark describes a close relationship with his son which had only got stronger and closer since 2012 with Todd's progress in coming to terms and accepting his mental illness and need for medication.⁴⁸⁵ Mark also describes June as having a loving relationship with Todd.⁴⁸⁶ The information available suggested to Dr Eagle⁴⁸⁷ that Todd had a very good relationship with both parents and she notes that Todd's parents were involved in his

⁴⁸⁴ Counsel Assisting's written submissions dated 30 August 2023, at [329].

⁴⁸⁵ T1456.40-42 (16 June 2023).

⁴⁸⁶ T1457.9 (16 June 2023).

⁴⁸⁷ T1596 (20 June 2023).

life right up until his death. Dr Eagle also notes that Todd's other family, friends, and neighbours were involved in his life as well.

2. Strategies that close family members could have deployed as a third party intervener

498. Counsel Assisting⁴⁸⁸ submit that the question of the potential benefits the engagement of Todd's family could have brought will be approached primarily by reference to the contribution that Mark could have made as a third party. This is not intended as any disrespect or slight either to June or Belinda (or any other members of Todd's family). However, because no other members of Todd's family gave oral evidence (and June did not provide a statement) the Court has heard more detailed evidence as to what Mark may have been able to offer were he permitted to engage as a third party.
499. The strength of the relationship and Mark's familiarity with Todd's conditions tends to suggest that he could have offered insights or suggestions given that the negotiations had stalled.
500. For his part, Mark says that, as Todd's father, he felt he knew Todd better than Todd's treating physicians. He said that he had recognised that he could not "extinguish" Todd's delusion but could calm him down. Dr Eagle was of the opinion that this demonstrated that Mark had insight into Todd's illness, describing Mark's evidence as "very consistent" with her impression that, throughout the entirety of the police operation of 31 July 2019, Todd was subject to delusions. Dr Eagle had no doubt that Mark had knowledge and understanding of Todd's illness.⁴⁸⁹
501. In particular, Mark described a strategy he as a father had developed when Todd experienced episodes of psychosis. In Mark's words, it involved "flicking Todd's switch". This involved redirecting Todd's thoughts to topics of interest to Todd (he was clearly an intelligent man with a diverse range of interests including cosmology and astronomy, music, and art) and avoiding what Mark referred to as "trivial prompts" (trivial topics of conversation that would cause Todd to lose respect for the person with whom he was speaking). Mark said that he also knew how to avoid pushing Todd's buttons, saying that if those buttons were pressed, Todd's psychosis could easily progress to another level.⁴⁹⁰
502. Mark felt that it would have been "quite easy" for him to restore Todd's ability to communicate on 31 July 2019. He would have used "hooks" and "flicked Todd's

⁴⁸⁸ Counsel Assisting's written submissions dated 30 August 2023 at [330]-[335].

⁴⁸⁹ T1593.48 (20 June 2023).

⁴⁹⁰ T1462; T1463 (16 June 2023).

switches". He would have put basic propositions (of the type Sen Cst Larrain put to Todd during his "negotiations" with Todd) but have done so more often than what Sen Cst Larrain had (perhaps 20 times). He would have used empathy and put questions to Todd with respect. The question Mark would have put to Todd is "why the commotion in the street?"⁴⁹¹

503. Counsel Assisting submit that significantly, the strategy of "flicking Todd's switches" as described by Mark appears consistent with Dr Eagle's description of family members having the potential to distract Todd from his symptoms as referred to above.⁴⁹²

3. Advice as to Todd's most likely reaction to a breach and hold

504. Counsel Assisting⁴⁹³ submit that a particular benefit that both Mark and June could have offered was that they could have provided advice as to how they expected Todd might react to a breach and hold. Regrettably, it does not seem that police sought this information from them.

4. It would corroborate Primary Negotiator's assurances to Todd that his father was going to attend

505. Counsel Assisting⁴⁹⁴ submit that Primary Negotiator was of the impression that Mark was going to attend Todd's address. As also noted above, there is inconsistent evidence on this question.
506. Assuming that Primary Negotiator's version of events is accepted, it would mean that incorrect information was relayed to Todd. Both Negotiation Commander⁴⁹⁵ and Dr Eagle⁴⁹⁶ suggest that it can be harmful to provide a person suffering from delusions with false or incorrect information.
507. Counsel Assisting submit that in the circumstances of 31 July 2019, therefore, what Primary Negotiator said to Todd about his father attending (assuming that the Court finds as a fact that Primary Negotiator did say these things) may have comprised an additional reason for more fulsome consideration to have been given to third party intervention on 31 July 2019.

⁴⁹¹ T1470.28-29 (16 June 2023).

⁴⁹² T1581 (20 June 2023).

⁴⁹³ Counsel Assisting's written submissions dated 30 August 2023 at [336].

⁴⁹⁴ Counsel Assisting's written submissions dated 30 August 2023 at [337]-[339].

⁴⁹⁵ T460.34-38 (31 March 2023).

⁴⁹⁶ T1580 (20 June 2023); T1632 (20 June 2023).

The risks of third party intervention were not so great as to preclude third party intervention from consideration

508. Counsel Assisting⁴⁹⁷ note that whilst the various risks in the use of third party intervention outlined above might ultimately have meant that third party intervention would not have assisted (and may have hindered) the facilitation of negotiations on 31 July 2019, they ought not to have precluded a formal assessment (in the sense, described by Negotiation Commander) of third party intervention on 31 July 2019.

1. The general concerns regarding the use of third party intervention

509. Counsel Assisting⁴⁹⁸ submit that, as a general proposition, it may readily be accepted that there was a potential for third party intervention to have provided incomplete, unreliable, unobjective, or conflicting information. It can also readily be accepted that the situation was volatile and stressful and, accordingly, it was possible that members of Todd's family may not have had the relevant skills to assist. It was also possible that the dynamics between Todd and his family were such that their involvement on 31 July 2019 may not have assisted (and could, in fact, have hindered the attempts to engage Todd in negotiations).

510. The short answer to the above is that these are all matters that could have been assessed had a "full assessment" of the type referred to by Negotiation Commander been conducted.

511. In addition, the reliability of the information which is provided is only one consideration for the use of third party intervention. Another, perhaps more important, reason is to explore whether there is a loving and trusting relationship between the subject of the police operation and the family member.

512. Further, as Dr Eagle suggests, third party intervention did not mean that the family members did not prevent negotiators from exploring other ways of obtaining information (as indeed occurred on 31 July 2019).

513. Counsel Assisting submit that, there is, as Dr Eagle suggests, limited value in considering these matters in the abstract.

⁴⁹⁷ Counsel Assisting's written submissions dated 30 August 2023 at [340].

⁴⁹⁸ Counsel Assisting's written submissions dated 30 August 2023 at [341]-[345].

2. Negotiation Team Leader incorrectly assessed Mark as unsuitable

514. Counsel Assisting⁴⁹⁹ draw attention to the specific reasons why Mark was considered unsuitable. As noted, Negotiation Team Leader formed (apparently quite peremptorily) a view that Mark was not a suitable person to conduct a third party intervention. Negotiation Team Leader relied particularly on:
- a. The fact that Mark could not, immediately, tell Fourth Person what Todd's medication was; and
 - b. Because he thought that Mark had mixed up the name of his wife and his daughter.
515. Counsel Assisting submit that neither of these matters compelled a conclusion that Mark was so unreliable that there could be no benefit in conducting a full assessment of his suitability.
516. It is submitted that Negotiation Team Leader's emphasis on Mark's inability to tell Fourth Person immediately what Todd's medication regimen entailed was misplaced. Todd was an adult who did not live with his father. It is respectfully suggested that it was perhaps somewhat unreasonable for Negotiation Team Leader to expect that the father of an adult son who lived away from home would know, off the top of his head, the precise details of his son's medication regimen. Of course, Negotiation Team Leader may not have known about Todd's living arrangements because he did not conduct a full assessment – to that extent, Counsel Assisting submit that this is precisely why such an assessment ought to have occurred.
517. More fundamentally, what ought to have been of more concern to Negotiation Team Leader was the quality of Mark's relationship with his son. Mark's lack of knowledge of Todd's medication did not speak to that issue (and, absent the sort of assessment described by Negotiation Commander being conducted, Negotiation Team Leader could not make any meaningful assessment of the strength of that relationship).
518. Turning to Negotiation Team Leader's belief that Mark had confused the name of his daughter, for the reasons set out below, Counsel Assisting submit this was far from being such a compelling indicator that Mark was unreliable such that no assessment of his suitability ought to have been performed.

⁴⁹⁹ Counsel Assisting's written submissions dated 30 August 2023 at [346]-[358].

519. In the first place, it may be doubted that Mark did provide the inaccurate information. It is perhaps more plausible that either Fourth Person misunderstood the information Mark had provided her or that Negotiation Team Leader misunderstood what Fourth Person told him.
520. In his evidence, Mark says that he told Fourth Person that he was going to speak to Belinda.⁵⁰⁰ His assumption is that Fourth Person had incorrectly recorded that Belinda was his wife.⁵⁰¹ The relevant iSurv entry for 5.24pm does not make any specific reference to Mark saying that Belinda was Todd's mother.⁵⁰²
521. In her evidence, Fourth Person said that she thought Mark had indicated that his wife's name was "Belinda" but her recollection on this point was not firm.⁵⁰³ Fourth Person accepted that Mark appeared rational and lucid and willing to help Fourth Person conduct her inquiries.⁵⁰⁴ She also accepted the proposition put to her by Mark's Counsel that Mark misspeaking was "neither here nor there".⁵⁰⁵
522. Counsel Assisting submit that it seems unlikely that Mark, who impressed as a reasonably calm and intelligent man when giving evidence, would have been confused as to the identity of his wife and his daughter. A more plausible explanation is that there was some misunderstanding on the part of either Fourth Person or Negotiation Team Leader.
523. More to the point, however, is that even if Mark did misspeak, it seems a leap for Negotiation Team Leader to have concluded that Mark could not have offered any assistance (such that no assessment of his suitability was conducted). Assuming that Mark did mistakenly identify Belinda as his wife, a distinct (and Counsel Assisting submit the most probable) explanation for this is that it was a mere slip of the tongue. It could readily be understood that Mark might make such a slip of the tongue given the circumstances. The apparently very cursory dismissal by Negotiation Commander of Mark's suitability meant that there was no opportunity for any meaningful assessment of whether, assuming Mark did make such a slip, this meant that he was not a person who was suitable to intervene as a third party.
524. Counsel Assisting further submit that assuming that the Court would find, contrary to the above submissions, that Mark was genuinely confused and thought that Belinda

⁵⁰⁰ T1460.34-35 (16 June 2023).

⁵⁰¹ T1467.33-38 (16 June 2023).

⁵⁰² Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1977.

⁵⁰³ T338.23 (30 March 2023).

⁵⁰⁴ T338.36 (30 March 2023).

⁵⁰⁵ T338.26 (30 March 2023).

was his wife, this must have indicated that Mark himself was mentally unwell (this could really be the only explanation for a person mistaking his daughter for his wife). A person who was mentally unwell might indeed be an unsuitable person to conduct a third party intervention. However, this is not necessarily the case. As Dr Eagle observes, a third party would not necessarily (or even usually) be used to attempt to elicit objective information about a person. What is more important was the strength and nature of the relationship between Mark and his son and Mark's level of insight into Todd's condition. Mark's perceived confusion between the name of his wife and daughter (assuming, contrary to the above submissions, that the Court finds, as a fact, that Mark was indeed confused) did not mean that his relationship with Todd was such that Mark could not have provided any benefit as a third party.

525. Similarly, whilst it could perhaps be accepted that a person who had genuinely mixed up the name of his wife and daughter might not be able to conduct negotiations alone and unsupported, this did not preclude the possibility of Mark being involved as a third party in the other more limited ways described by Dr Eagle (making a phone call to Todd whilst supervised and supported by negotiators and writing Todd a letter).
526. Counsel Assisting note that Primary Negotiator has given evidence that he formed the impression that Todd got along well with his father.⁵⁰⁶ This matter, it is suggested, ought to have received more attention than either Mark's inability to immediately describe Todd's medication or the (with respect, frankly quite far-fetched) possibility that Mark had mixed up the name of his wife and his daughter.
527. In any event, as Dr Eagle has observed, to engage Mark as a third party did not require him to assume carriage of the negotiations singlehandedly (or to go into the premises alone and unsupported). He could have provided support in other ways (such as by providing a letter or making a telephone call to Todd). Counsel Assisting submit that these latter forms of intervention could not only have been informed by Todd's wishes but also done with the support and supervision of the negotiators. It could also have been informed by input from the consultant psychiatrist.

3. Mark did not "dismiss" Todd early in the day

528. Counsel Assisting⁵⁰⁷ note that Negotiation Commander was of the view that Mark had "dismissed" Todd earlier in the day. This appears to have come from Fourth Person's account of her conversation with Mark. It is unclear whether Negotiation Team Leader

⁵⁰⁶ T252.21 (29 March 2023).

⁵⁰⁷ Counsel Assisting's written submissions dated 30 August 2023 at [359]-[366].

took this into account in his decision not to proceed to a full assessment of third party intervention. Nevertheless, if that indeed occurred, it is a consideration that was capable of suggesting that the relationship between Mark and Todd was such that Mark's involvement on 31 May 2019 may not have been of assistance. It will be considered in that context.

529. Counsel Assisting submit that the evidence does not establish that Mark, at any stage, "dismissed" his son. Mark has given evidence explaining that he was driving back from Tamworth with limited reception which explains why some of the discussions he had with Todd over the course of the day were relatively brief.
530. In a conversation at 2.11pm, Todd told Mark that there were "approximately 20 armed police" in his front and back yard. Mark told Todd to "deal with this himself".⁵⁰⁸ During a later conversation (at 3.27pm), Mark asked Todd whether he had "sorted this" and asked him "what are you going to do?". Mark talked to his son about the possibility of him losing his house and Violet, his dog. A few minutes later (at 3.32pm) Mark also told Todd that it was imperative that he open the door and let police sort this.⁵⁰⁹ Todd disconnected and Mark called back at 3.34pm, telling his son to "leave some options open".
531. In his oral evidence, Mark said that, at the time of these conversations, he believed that police were literally at Todd's premises.⁵¹⁰ He said that he was giving Todd advice because he believed that Todd was "in full receipt of his sanity", noting especially that Todd had, for the past seven years, been stable with only minor episodes of the recurrence of his delusions. Mark felt that, at this point in time, Todd had overcome many of the challenges of his mental health and was "quite capable".⁵¹¹ Mark felt from Todd's tone of voice during those conversations that he felt Todd had this under control⁵¹² and could manage things.⁵¹³ Mark felt that Todd was able to understand the advice that he was giving him.⁵¹⁴
532. Mark candidly accepted that some of the advice he gave was "not great" and was at times highly self-critical of things he said to Todd.

⁵⁰⁸ Tab 11 (Statement of Mark McKenzie) at [23].

⁵⁰⁹ Tab 11 (Statement of Mark McKenzie) at [26].

⁵¹⁰ T1463 (16 June 2023).

⁵¹¹ T1479.4 (16 June 2023).

⁵¹² T1477.42 (16 June 2023).

⁵¹³ T1478.10 (16 June 2023).

⁵¹⁴ T1464.44 (16 June 2023).

533. Counsel Assisting submit that to some extent, this self-criticism is misplaced. Mark's initial advice to Todd should be assessed in the context in which Mark had received that information. He was on the road in an area with poor phone reception. His experience was that his son had largely been stable during the previous few years. He did not, at least in the early conversations, have the detail that Todd was armed with a knife (Mark learned that detail from speaking with Belinda at 3.24pm.⁵¹⁵ This is capable of explaining Mark's early confidence that his son could deal with the situation.
534. It is noted that Mark was challenged extensively by Counsel for the Commissioner on his evidence that he believed that police officers were in attendance at the time he had spoken to Todd. He did not resile from his evidence. Counsel Assisting submit that his evidence in this respect ought to be accepted.
535. Counsel Assisting submit that, therefore, contrary to what Negotiation Commander believed, Mark did not "dismiss" Todd and that this did not provide a basis for dismissing the option of third party intervention without conducting a full assessment.

4. Mark appreciated the seriousness of the situation

536. Counsel Assisting⁵¹⁶ submit that the fact that Mark did not attend the address does not suggest that Mark was not taking the situation seriously.
537. Mark responded promptly to each of the police requests for information (where he did not know an answer, he liaised with June in an effort to try and find it out).
538. Once again, Mark has been highly self-critical of his dealings with police. He feels he should have been more forceful in his dealings with police. Counsel Assisting submit that Mark's self-criticism is misplaced. While he ultimately did not attend, this is because police did not grant him the approval, which he felt was appropriate to ask of them.⁵¹⁷
539. In addition, Mark's response must be assessed in light of his evidence that, in his conversation with Fourth Person at 5.02pm, Fourth Person had told him that police were going to keep him posted of any developments, they were "prepared to negotiate with ...[Todd] for as long as it takes", that "officers will not try a forced entry to resolve situation", and that the "situation would be treated as a purely mental health incident". Mark was emphatic in his oral evidence that Fourth Person had said these things. The

⁵¹⁵ Tab 11 (Statement of Mark McKenzie) at [24].

⁵¹⁶ Counsel Assisting's written submissions dated 30 August 2023 at [367]-[375].

⁵¹⁷ T1465 (31 March 2023).

effect of his evidence was that he had in mind saying other things to Fourth Person, including that if police were to break into Todd's home it would kill him, however, in light of Fourth Person's advice, he decided not to because it would only "elevate the conversation". Mark says that he trusted police to resolve the incident in a peaceful way.⁵¹⁸

540. Counsel Assisting acknowledge that Fourth Person does not recall saying those things to Mark. She says that she would not have said that forceful entry was not an option because, in her experience, it sometimes was an option. Whether or not to use that option was not her decision to make. Fourth Person does accept the possibility that she said to Mark words to the effect of "we are prepared to negotiate with him [Todd] for as long as it takes".⁵¹⁹
541. Mark gives a detailed account of each of the conversations he had on 31 July 2019. This is based on a letter he prepared on the following day (1 August 2019) when his memory was still fresh.⁵²⁰ He is able to recall his state of mind at the time of the conversation with Fourth Person, including things he wanted to, but did not, say to Fourth Person. By contrast, Fourth Person's statement was made some 16 days later (16 August 2019). On 31 July 2019, she was involved in taking in a lot of information. The conversation she has had with Mark may not have been at the top of her priorities. For these reasons, to the extent it is necessary for the Court to reconcile the evidence of Fourth Person with that of Mark, Counsel Assisting submit that Mark's account should be preferred to that of Fourth Person's.
542. However, Counsel Assisting submit that it may ultimately be unnecessary for the Court to reconcile this evidence. What is important is what Mark understood from his conversations with Fourth Person. From his evidence, it is clear that Mark felt after that conversation that police were not going to force entry. This is likely to have informed his subsequent response on that day. Accordingly, Counsel Assisting contend that the Court could not conclude that Mark did not wish to attend the premises.
543. Mark is also self-critical of the manner in which he provided information to Fourth Person. For example, he described the conversation he had with Fourth Person in which he said (he describes in his statement as "light-heartedly") that police "are in for a long night" as an example of "Todd's father's stupidity". Counsel Assisting submit that the Court would find that, in that instance, Mark was again being overly self-critical.

⁵¹⁸ T1466.45.48 (31 March 2023).

⁵¹⁹ T317.29-30 (30 March 2023).

⁵²⁰ T1454.7-8 (31 March 2023).

Todd's sleeping patterns were relevant to informing whether a breach and hold ought to have been performed. For her part, Fourth Person did not perceive the tone of that conversation as "light-hearted".⁵²¹

544. There was no indication in the police dealings with Mark that he did not appreciate the seriousness of the situation and, for that reason, that it was unnecessary or inappropriate to conduct a full assessment of his suitability.

5. The previous violence by Todd towards members of his family did not mean that a full assessment for third party intervention did not need to be conducted

545. Counsel Assisting⁵²² note that Todd had previously been violent to family members. As Dr Eagle accepts, this is something that needed to be assessed. However, given that this was some time ago and the evidence of the recent level of improvement in Todd's relationship with the close members of his family (because the Court has not heard from June and Belinda, Counsel Assisting submit that the evidence goes particularly to an improvement in Todd's relationship with his father), this ought to have not precluded a full assessment from being conducted.

6. Todd never indicated that he did not want Mark to attend

546. Counsel Assisting⁵²³ submit that Negotiation Commander has overstated the evidence in relation to Todd telling his father not to "come down". According to Mark, what Todd in fact told him was "Dad probably best you stay out of it",⁵²⁴ which Mark took to indicate that Todd had things sorted.
547. Counsel Assisting submit that the Court should find that Todd had not expressed a view that his father not be involved which would be incompatible with a formal assessment of Mark's suitability being conducted.
548. Counsel Assisting contend that in any event, as Dr Eagle has observed, Todd's wishes as to whether he wished to speak to his father could have been ascertained.⁵²⁵ If Todd had indicated to police that he did not want his father's attendance, that could have been used to inform the suitability (or otherwise) of Mark's participation as a third party intervenor. Even then, this would not have precluded an attempt for Mark to

⁵²¹ T322.12 (30 March 2023).

⁵²² Counsel Assisting's written submissions dated 30 August 2023 at [376].

⁵²³ Counsel Assisting's written submissions dated 30 August 2023 at [377]-[379].

⁵²⁴ Tab 11 (Statement of Mark McKenzie) at [29].

⁵²⁵ T1645 (20 June 2023).

communicate with Todd in the other ways suggested by Dr Eagle (such as by a phone call or letter).

7. The potential for family members to be incorporated into the delusions did not suggest that a full assessment ought not be performed

549. Counsel Assisting⁵²⁶ acknowledge that Dr Eagle also accepted the potential for family members to be incorporated into delusions. However, Dr Eagle did not see any evidence to suggest that Todd had incorporated his father into the delusional beliefs he was experiencing on 31 July 2019.⁵²⁷ Dr Eagle thought that this was a matter that needed to be assessed carefully. It was not a matter which precluded a full assessment from being conducted.

8. Family members other than Mark were available

550. Counsel Assisting⁵²⁸ submit that it is unclear on the evidence whether or not Negotiation Team Leader's recollection that June was not in the area was accurate. Assuming that it was, that would not have precluded June from being engaged as a third party intervention in the other ways suggested by Dr Eagle (through providing a letter or over the phone).

551. Nor is there any evidence that Negotiation Commander considered the involvement of family members other than Mark or June. There is no evidence that Belinda was considered. Nor is there any evidence that Todd's cousin, Ms Smyth, who lived nearby, was ever considered. It is notable, in this regard, that at around 5.20pm, the Forward Command Log records that Todd's cousin (presumably, Ms Smyth) attended the perimeter of Todd's property.⁵²⁹ This gave rise to an opportunity for her to be considered for third party intervention. It appears that Fourth Person spoke to Ms Smyth at around this time.⁵³⁰ As Counsel Assisting note below, Ch Insp Fuller may have been unaware of this.

Conclusion to Counsel Assisting's submissions

552. Counsel Assisting⁵³¹ submit that, accepting that there were inherent risks involved in any third party intervention, the evidence does not disclose any reason why the suitability of family members could not have been more thoroughly assessed

⁵²⁶ Counsel Assisting's written submissions dated 30 August 2023 at [380]-[381].

⁵²⁷ T1597; T1645 (20 June 2023).

⁵²⁸ Counsel Assisting's written submissions dated 30 August 2023 at [382]-[383].

⁵²⁹ Tab 70 (Forward Command Log).

⁵³⁰ Tab 90 (Statement of Fourth Person) at [12].

⁵³¹ Counsel Assisting's written submissions dated 30 August 2023 at [384]-[389].

(in particular, by way of the written assessment process described by Negotiation Commander in her evidence).

553. Further, whilst Counsel Assisting submit that the Court could not conclude that the involvement of third parties on 31 July 2019 would have made any difference, the evidence (particularly that of Mark) suggests a real possibility that they might have. Not only did Todd come from a loving and supportive family who knew Todd well and who therefore might have been more able than negotiators to win Todd's trust and establish rapport with him, but Mark also demonstrated a high degree of insight into Todd's illness and the ability to articulate valid strategies to deal with that illness. It is regrettable that the cursory consideration given to the involvement of family members caused these opportunities to be lost.
554. Negotiation Commander's evidence suggests an unnecessarily limited approach on the part of the NSWPF to the use of third party intervention. The consideration of whether to use a third party in the course of negotiations ought not necessarily be limited to situations where negotiators had already established rapport and there are simply "roadblocks" (whatever is meant by that) to the person coming out. Dr Eagle's evidence suggests that a potential benefit of the use of third parties lies in establishing rapport (at least in circumstances where police negotiators had been unable to do so).
555. Counsel Assisting submit that the Court would also not accept Negotiation Commander's evidence that the risks in considering third party intervention "definitely"⁵³² outweighed the risks in pursuing a breach and hold. As Counsel Assisting submit in response to Issue 9 below, there was a high level of risk in the breach and hold strategy. Whilst there were potential risks involved in the involvement of members of Todd's family as third party interveners, such risks could not, it was suggested, be regarded as the equivalent of the risks inherent in knocking down the front door and smashing in the front window of a mentally unwell man who had expressed a desire to defend his home and who harboured the delusional beliefs that people had, earlier in the day, been inside his home and that police's weapons had been "disarmed".
556. Counsel Assisting suggest that responsibility for the failing to consider third party intervention lay primarily with Negotiation Team Leader (as the officer with responsibility for considering this issue). However, Counsel Assisting submit that the Court would not be too critical of Negotiation Team Leader in an individual capacity. As noted above, this was a difficult judgment on which, in the circumstances of 31 July

⁵³² T457.18 (31 March 2023).

2019, minds could reasonably differ. In particular, the evidence reveals a general reluctance on the part of the NSWPF to engage in this practice. It seems likely that this significantly informed the approach that Negotiation Team Leader took on 31 July 2019.

557. Counsel Assisting submit that that this consideration equally draws attention to an institutional failing on the part of the NSWPF. It is submitted that moving forward, police ought to be more prepared to consider third party intervention in an appropriate case (at least where negotiations have not resulted in any significant engagement with the subject of a police operation). For all its risks, Counsel Assisting submit that the engagement of third parties is unlikely to have been a riskier option than the only real alternative to what was considered on 31 July 2019 (the breach and hold).

Submissions of the Commissioner

558. The Commissioner⁵³³ submits that third party intervention was not suitable in this case and that Mark was not an appropriate vehicle for such intervention. The Commissioner observes that third party intervention can be a high-risk proposition and notes Negotiation Commander's evidence that using family members to intervene in high-risk situations is "generally unsuccessful".⁵³⁴
559. In response to Counsel Assisting's submission that Negotiation Commander did not elucidate or expand upon her evidence that third party intervention was generally unsuccessful, the Commissioner contends that Dr Eagle did not provide any examples where third party intervention by family members was successful. Additionally, Dr Eagle does not have expertise to provide such evidence regarding tactical operations. Furthermore, the Commissioner contends that this submission is procedurally unfair as Negotiation Commander was not questioned on this point in evidence.
560. The Commissioner argues that Counsel Assisting appears to approach third party intervention as the norm rather than the exception and seems to "reverse the onus" by exploring in their submissions the specifics of third party intervention⁵³⁵ without establishing that the baseline requirement for its use have been met.
561. The Commissioner submits that the NSWPF's decision not to progress third party intervention was appropriate on the basis of information from intelligence packs which

⁵³³ Written submissions of the Commissioner dated 13 October 2023 at [193]-[218].

⁵³⁴ Tab 91 (Statement of Negotiation Commander) at [40].

⁵³⁵ Counsel Assisting's written submissions dated 30 August 2023 at [303] onwards, in particular [327].

state that Todd had previously made threats towards his parents in a manic state⁵³⁶ and the fact that Todd's father, from the totality of his interactions with Negotiation Team Leader,⁵³⁷ was having difficulty relaying correct or important information about Todd.⁵³⁸

562. The Commissioner further submits that Counsel Assisting creates a false polarity between third party intervention and a breach and hold,⁵³⁹ which does not fairly acknowledge the range of tactical options available to police.
563. In response to Dr Eagle's evidence that a consultant psychiatrist could conduct a risk assessment of a third party intervention, the Commissioner submits that any risk assessment conducted by a consultant psychiatrist would be incomplete due to the risk to the person that Todd posed by being in possession of a knife.
564. The Commissioner submits that Dr Eagle's evidence supporting the use of family in third party intervention is predicated on generalisations. The Commissioner contends that some family relationships may be fractured and not conducive to providing support and it is difficult for the NSWPF to assess the workings of family units while in high risk situations to determine whether the use of a family member as third party intervenor would be appropriate. A family member may even exacerbate existing delusions or aggravate the situation. Negotiation Commander also gave evidence that family members generally lack the knowledge of and skills for negotiation tactics and techniques.⁵⁴⁰
565. The Commissioner submits that the family provided competing information about the start date of Todd's mental illness⁵⁴¹ and different accounts of Todd's tendency for violence compared to the accounts of his neighbours.⁵⁴² Most importantly, medical records summarised by Dr Eagle indicate a history of violence towards his family members which casts doubt on their ability to act third party intervenor and "extinguish" the situation.
566. The Commissioner submits that the Court should not accept submissions that these past incidents do not bear upon the question of third party intervention simply because

⁵³⁶ Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence)) at p. 2144.

⁵³⁷ See Counsel Assisting's written submissions dated 30 August 2023 at [304].

⁵³⁸ Tab 88-1 (Affidavit of Negotiation Team Leader) at p.13.

⁵³⁹ Counsel Assisting's written submissions dated 30 August 2023 at [298], see also [387] and [389].

⁵⁴⁰ Tab 91 (Statement of Negotiation Commander) at [42].

⁵⁴¹ Tab 90 (Statement of Fourth Person) at [14].

⁵⁴² Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1978; see also vol 11, at p. 2502.

they are historical events. While Todd's treatments were impressive and substantial, schizophrenia is an organic condition which does not abate completely, and therefore a relapse or deterioration of his condition is not precluded despite the passing of time.

567. The Commissioner notes that Sen Cst Larrain had offered for Todd to speak with his neighbours and brought up his mother, sister and grandfather, however he was unsuccessful in engaging him in this way.⁵⁴³ The Primary Negotiator's attempts to engage Todd in relation to his family members and his dog, but those attempts were also unsuccessful. The Commissioner also draws attention to instances where Mark failed to engage Todd on the phone,⁵⁴⁴ when Mark had "missed the cues" with respect to Todd's mental state,⁵⁴⁵ and other "not great" advice that Mark had given to Todd during the course of the incident.⁵⁴⁶ In the Commissioner's submission, this demonstrates the risks associated with involving family members as third party intervenors, who may struggle to maintain the necessary insight and objectivity required in high-risk situations.
568. The Commissioner observes that Counsel Assisting's written submissions advert to a conflict of evidence between Mark and Fourth Person in relation to whether Fourth Person disavowed the idea of forced entry when she spoke to him. Fourth Person's evidence is that she would not have said to Mark that forceful entry was not an option because, in her experience, it sometimes was an option. In respect of Counsel Assisting's conclusion that "to the extent it is necessary for the Court to reconcile the evidence of Fourth Person with that of Mark, Mark's account should be preferred to that of Fourth Person's", the Commissioner submits that to proceed in that way would be procedurally unfair in circumstances where Fourth Person has not received a sufficient interest letter.
569. The further evidence from Mark was served after Fourth Person had given her evidence and no objection was taken to the late service of Mark's second statement subject to various matters going to procedural fairness being placed on the record.⁵⁴⁷ In circumstances where his second statement was served late and the Fourth person had not received a sufficient interest letter, the Commissioner submits that a finding adverse to the Fourth Person would not be consistent with natural justice.

⁵⁴³ Tab 93 (Statement of Primary Negotiator), at [21].

⁵⁴⁴ Counsel Assisting's written submissions dated 30 August 2023, at [182]; Tab 11 (Statement of Mark McKenzie) at [23], [26] and [27].

⁵⁴⁵ T1463.9 (16 June 2023).

⁵⁴⁶ T1464 (16 June 2023).

⁵⁴⁷ T1451 (16 June 2023).

570. The Commissioner submits that the decision to effect a breach and hold is quintessentially a tactical decision. Policing agencies throughout the world do not axiomatically consult family members as to tactical options. It would be very difficult to imagine any tactical option used by a policing agency being embraced with readiness by family members. Understandably, most families would be distressed at the mere prospect that their loved one was the subject of a police operation or intervention, let alone a siege.
571. The Commissioner further submits that Counsel Assisting have not provided evidence about examples where it was appropriate to involve family members in the planning of a what is a highly technical and specialist tactical option. [REDACTED]
- [REDACTED] By reason of their extensive experience, the Court would accept that the NSWPF were best placed to determine whether the breach and hold tactical option was appropriate.

Submissions of Negotiation Team Leader

572. Negotiation Team Leader⁵⁴⁸ submits that the use of third party intervenors would not be appropriate as Todd was not engaging with negotiators; the negotiators could not take a proper history from a third party intervenor to ensure there were no risks involved to their use; there was no guarantee that use of a third party intervenor would not make the situation worse; and there was no guarantee that third party intervenors would not be at risk of harm.
573. Negotiation Team Leader submits that the evidence from police suggest that third party intervenors were not regularly or even occasionally used. Primary Negotiator gave evidence that third party intervention is not necessarily safe or can be controlled due to the history between Todd and his family.⁵⁴⁹ Fourth Person also gave evidence about the risks involved due to the unknown history or the relationship between them.⁵⁵⁰
574. Negotiation Team Leader cites DCI Walpole's evidence stating that third party intervention is rarely used by negotiators around the world⁵⁵¹ and in his experience, third party intervenors in previous incidents have not ended well.⁵⁵² Further,

⁵⁴⁸ Written submissions of Negotiation Team Leader at [1]-[15].

⁵⁴⁹ T280.7-T280.12; T298.34-T298.40; T299.22-T300.2 (30 March 2023).

⁵⁵⁰ T317.16-T317.25; T352.6 (30 March 2023).

⁵⁵¹ T1062.33-T1062.44 (19 April 2023).

⁵⁵² T1063.18-T1064.30 (19 April 2023).

Negotiation Commander gave evidence that third party intervention is only used where there is rapport between the negotiators and the subject. Negotiation Team Leader submits that no such rapport had been developed.⁵⁵³

575. Negotiation Team Leader submits that no weight should be given to Mr Perry's evidence as he has had no experience as a one-on-one negotiator or as a negotiation team leader.⁵⁵⁴

576. Ultimately, Negotiation Team Leader submits that the use of third party intervention would not have been suitable for the following reasons:

- a. Todd was not engaging with the negotiators at all.
- b. The negotiations did not and could not have taken a proper history from a third party intervenor such that they would be sure there was no risk involved in utilising a third party intervenor.
- c. There was no guarantee that the use of a third party intervenor would not make the situation worse.
- d. There was no guarantee that the third party intervenor would not be at risk of harm. In this regard, the NSWPF has obligations to persons who are not officers or employees and which would cover third party intervenors (s 19(2), *Work Health and Safety Act 2011* (NSW)).

577. Negotiation Team Leader submits that any criticism should be addressed at third party intervention as a system and not the individual officers, including Negotiation Team Leader. The negotiators acted in accordance with their training and practices for undertaking negotiation.

Submissions of Mark McKenzie

578. Mark⁵⁵⁵ agrees with Counsel Assisting's submissions on this issue subject to several qualifications.

579. In contrast with Counsel Assisting's submissions that third party intervention was briefly considered and dismissed, Mark submits that the evidence suggests that no assessment had in fact taken place because as a matter of practice, it is exceptionally

⁵⁵³ T451.37-T451.47; T451.49-T452.17 (31 March 2023).

⁵⁵⁴ T1726.29-T1726.38 (21 June 2023).

⁵⁵⁵ Written submissions of Mark McKenzie dated 12 October 2023 at [52]-[63].

rare for the NSWPF to use third party intervention.⁵⁵⁶ He agrees that such an assessment would have been recorded in writing.

580. Mark submits that the Court should not accept Negotiation Commander's evidence that if family members were in a better position than police to resolve the situation, the issue would have been resolved prior to reaching a crisis situation.⁵⁵⁷ He submits that this demonstrates a lack of insight into the experiences of families who care for those with significant mental illness. I accept his view on this issue, but have noted earlier, it appears Negotiation Commander clarified her stated opinion on this issue in oral evidence.
581. Mark highlights Dr Eagle's evidence that the family members' familiarity with the person can assist with defusing the situation where other attempts to de-escalate have been unsuccessful.⁵⁵⁸ Dr Eagle accepted that the role of family in communicating and supporting people with mental illness is crucial and they often have a "wealth of information" from their knowledge, care and experience of that person.⁵⁵⁹
582. Mark contends that Negotiation Commander's view that the risks of third party intervention outweighed the risks of breach and hold was inexplicable as this is inherently a tactical assessment, which Negotiation Commander has repeatedly asserted was outside her area of expertise.⁵⁶⁰

Submissions of June Wilkins

583. June⁵⁶¹ submits that police failed to meaningfully consider third party intervention as a means of understanding Todd's mental health, communicating with him and de-escalating the situation. She further submits that the decision to conduct a breach and hold was made without any consultation with Todd's family or his health practitioners.
584. June further submits that the negotiation team ought to have considered involving the family to assist with engaging Todd and that an independent psychiatrist would have

⁵⁵⁶ T1062.38 (19 April 2023).

⁵⁵⁷ Tab 91 (Statement of Negotiation Commander) at [41].

⁵⁵⁸ See T1590.19-T1590.23 (20 June 2023); see T1595.36-T1595.45 (20 June 2023).

⁵⁵⁹ See T1595.36-T1595.45 (20 June 2023).

⁵⁶⁰ See T423.7; 424.15;426.7-426.27; T468.46; T469.15; T470.17; T471.26-.38; T382.25-T382.39; T390.33-T390.41; T393.39-T393.46; T394.17-T394.29; T395.1-T395.24; T397.19-T397.42; T400.44-T401.1; T402.16-T402.21; T403.31-T403.41; T406.44-T406.50; T408.11-T408.24; T411.5-T411.22; T412.1-T412.22; T413.21-T413.29; T414.40-T414.50; T417.3-T417.23; T418.39-T419.12; T426.19-T426.33; T426.39-T426.46; T427.9-T427.20; T433.1-T433.13; T433.45-T433.49; T434.17-T434.28; T435.10-T435.12; T435.21-T435.43; T436.19-T436.26; T436.47-T437.4; T440.10-T441.7; T443.21-T443.28; T446.41-T447.3; T448.17-T448.28; T451.1-T451.8; T453.20-T454.2 (31 March 2023).

⁵⁶¹ Written submissions of June Wilkins dated 13 October 2023 at [16(c), (d)], [115]-[144].

been able to assist police with inquiries relating to the third party intervention assessment process. June submits that the risk assessment process was inadequate. While she accepts Counsel Assisting's submissions regarding the potential risks of family involvement,⁵⁶² she suggests that an independent psychiatrist can be utilised to assist police with this risk assessment process.

585. June observes that Negotiation Commander's evidence lacks detail to determine the risks of third party intervention. Her submission that the use of family is "generally unsuccessful"⁵⁶³ is a "one size fits all approach based on a small sample size".
586. June submits that contrary to Negotiation Team Leader's recollection that June and Neil were not in the area,⁵⁶⁴ they were in fact located within a 30-minute drive of the location of the incident. This indicates that Negotiation Team Leader did not conduct an adequate preliminary investigation as to June's suitability for third party intervention.
587. June notes that the incidents of violence between Todd and his mother as outlined in Counsel Assisting's submissions occurred 20 years ago. She states that Todd was never violent towards either Neil or herself and the negotiation team should have discussed this with them rather than simply accepting this information.
588. June notes that she and Neil were very close with Todd and had taken on a support role for Todd in the years leading up to his death. They were involved in his life and understood the complexities of his mental illness and were highly skilled in calming him down.
589. June submits that direct and indirect strategies could have been employed for third party intervention. She outlines a number of possibilities, including putting questions to Todd to bring him back to a lucid state and assisting police officers with the use of tone and subject matter during negotiations. Indirectly, June could have provided relevant information about Todd's medical history and interactions with police over the phone, as well as conducted inquiries with Todd's treating clinicians such as Dr Richardson.⁵⁶⁵
590. June is supportive of Counsel Assisting's submissions on this issue.

⁵⁶² Counsel Assisting's written submissions dated 30 August 2023 at [290]-[298].

⁵⁶³ T458.29 (31 March 2023).

⁵⁶⁴ Tab 88-1 (Affidavit of Negotiation Team Leader) at [29].

⁵⁶⁵ Tab 310 (Second Statement of Dr Michael Richardson (Psychiatrist)) at p. 513.

Submissions in reply

591. In reply, in relation to the Commissioner's submission that preferring Mark's account of his conversation with Fourth Person over that of Fourth Person is not consistent with natural justice, Mark⁵⁶⁶ submits that the content of his second statement was not controversial or complex and was provided to assist the Court and the parties he was available to be examined in relation to it and his earlier statement. In addition, it was placed on the record that Fourth Person would be entitled to provide a supplementary statement if the Commissioner wished.⁵⁶⁷ This has not occurred.
592. The factual finding that was invited by Counsel Assisting is that to the degree there is an inconsistency between the evidence of Fourth Person and Mark, Mark's account should be preferred. This is not inviting adverse comment of Fourth Person or suggesting Fourth Person's account is disingenuous. This statement also appears to place weight on the contemporaneity of Mark's first statement given in 2019, which had also highlighted some differences with Fourth Person's account of events.
593. Taking into account the reasons behind the timing of Mark's second statement, and that Fourth Person was provided an opportunity to submit a further statement if she or the Commissioner so wished, it is submitted that it cannot be said that there has been a denial of procedural fairness.
594. In relation to this issue, Counsel Assisting⁵⁶⁸ submits in reply that preferring Mark's accounts of his communications with Fourth Person to her is it is not procedurally unfair and that it is appropriate to prefer Mark McKenzie's account. That does not involve any criticism or adverse comment on Fourth Person; rather, it reflects the reasons already outlined as to why Mark McKenzie's evidence on the topic is likely to be more reliable. Further and significantly, and as noted by Mark McKenzie in his Reply Submissions at [25], Fourth Person was explicitly given the opportunity to put on a further statement to deal with matters raised in Mark McKenzie's last statement and did not do so.
595. Ultimately, to the extent that there is inconsistency between the versions, Counsel Assisting submit that while it is appropriate for Mark's evidence to be preferred. However, it is not strictly necessary for the Court to determine whose version should be preferred for the purposes of making findings on Issue 7(b).

⁵⁶⁶ Submissions in reply of Mark McKenzie dated 3 November 2023 at [24]-[29].

⁵⁶⁷ T1451.30 (16 June 2023).

⁵⁶⁸ Reply Submissions of Counsel Assisting dated 10 November 2023 at [20]-[25].

596. I have considered the evidence and submissions on this issue carefully. Given that Fourth Person made no further statement on the issue, I am content to make a finding on what is before me. I make no adverse finding in relation to Fourth Person, but have formed the view that she is likely to be mistaken on this issue and does not have an accurate recollection of her interaction with Mark back in 2019.
597. I found Mark's evidence compelling and consistent with the actions he took that day. I accept that after speaking with Fourth Person at about 5.02pm he believed that police were going to keep him posted of any developments, they were "prepared to negotiate with ...[Todd] for as long as it takes", that "officers will not try a forced entry to resolve situation", and that the "situation would be treated as a purely mental health incident". I had the opportunity to observe Mark over many days and noted his forthright manner. I have no doubt that if he had not been given this kind of assurance his interaction with police would have taken a different course. Both Mark and June had been present and loyal to Todd throughout his entire life. Had either of them been told that negotiations would stop while tactical police forcibly entered Todd's home, they would have tried to intervene or persuade police against the approach. It is an issue to which I will return.
598. In relation to Negotiation Team Leader's submissions, Counsel Assisting note that at [13] it is argued that there were a number of bases upon which the use of a third party intervenor in relation to interactions with Todd would have been unsuitable. One of the factors relied upon was that Todd was not engaging with negotiators at all. With respect, that was a factor weighing in favour of at least undertaking an assessment of a third party intervenor according to Dr Eagle.
599. While it is accepted that there is, self-evidently, an inherent degree of risk involved in any third party intervention, Counsel Assisting submit that it is nonetheless a straw man argument to cite an inability to guarantee the use of a third party intervenor would not make the situation worse or would not create a risk of harm as factors weighing against third party use. Counsel Assisting submit that the appropriate consideration here, acknowledging that there was inherent risk, was to at least consider the information available about Todd and potential third-party intervenors and thoroughly assess it, before dismissing the prospect. Additionally, it needs to be borne in mind that there was evidence as to a number of different forms of third party intervention that could take place.
600. It is again submitted that for all of the risks associated with third party intervention in this case, the engagement of third parties was unlikely to have been a riskier option than the only real alternative that was considered, the breach and hold.

601. Ultimately, it is submitted in slightly different ways on behalf of Mark and June that police concluded that the use of a third party intervenor was too risky, the use of a consultant psychiatrist was unlikely to be helpful and that breach and hold was [REDACTED] [REDACTED] because of a confirmation bias. In other words, police inappropriately dismissed the use of a third party intervenor or a consultant psychiatrist and decided to proceed with a breach and hold based on pre-existing beliefs and values, without paying due regard to the information actually in front of them. Counsel Assisting join in those submissions.

Consideration

602. I have considered the evidence and extensive submissions on this important issue carefully. Firstly it appears clear to me that there is a general reluctance within the NSWPF to properly consider third party intervention in situations such as the one which developed on 31 July 2019. Negotiation Commander stated that it can be a “high risk” proposition which ought to be considered carefully. However the evidence reflected that the option may be closed off *prior to* being considered carefully.

603. As noted above, Negotiation Commander stated that the experience in this state is that the use of family members to intervene “is generally unsuccessful” and that she had “certainly had matters where it’s ended in fatality”. However, beyond this assertion I was not referred to any study or reliable evidence in this regard and I place little weight on it. Nevertheless, having regard to her expertise and the evidence of Dr Eagle I accept that it is a strategy that must be considered cautiously and that it involves risk. I accept that family members may lack objectivity, that the family dynamic may not always be clear, or the information provided always accurate. In my view these are factors to be weighed up, but are not in themselves reasons to foreclose consideration of the strategy. I do not accept Negotiation Commander’s evidence that, without having given third party intervention proper consideration in this case, it can possibly be said that its inherent risk outweighed the risks of conducting a breach and hold. In any event it is not useful to present them as competing options, particularly when one is predominantly a tactical option.

604. As set out above, Negotiation Team Leader gave evidence regarding his decision not to conduct a written assessment of the merits of third party intervention on 31 July 2019. In my view his reasons are misjudged or likely to have been based on incorrect information. His pre-emptory decision that Mark was “unsuitable” is difficult to fathom. If he gave any weight to his belief that Mark had used his daughter’s name for his wife, it was misjudged. In my view it is likely that a misunderstanding had arisen on the part

of Fourth Person or Negotiation Team Leader in respect of something Mark had told Fourth Person. It is not clear how he came to the conclusion that June was “not in the area” and thus unavailable and it is not clear what efforts he made to find out about other family members.

605. In my view, taking the evidence as a whole, it is likely that an unofficial policy affected Negotiation Team Leader’s lack of real consideration of this issue and for that reason I am not overly critical of him individually. I accept his submission that third party intervenors are not regularly or even occasionally used and have no doubt that this reality factored into the decision he made. He acted in line with his training or experience.
606. Other issues raised for consideration were the fact that there was some history of family violence, notably police records disclosed incidents in 1999, 2000 and 2005. While these were relevant, given the age of the events they should not have been enough to foreclose proper consideration of involving Todd’s family. Similarly while it was appropriate to consider whether Todd’s mental state might incorporate family members into his delusions, the possibility was not sufficient to take involving them off the table.
607. There is no clear evidence that Todd was ever asked if he wanted his family to attend the scene, noting of course that there is no BWV to review from the time tactical police arrived. In my view Todd’s family would have been able to understand how serious the situation was if they had been involved and would have been guided by the experts in relation to what that involvement might be. There were a number of options, including phone calls, letters or other messages which could have been developed and considered. Nobody would suggest pushing family members through the front door and asking them to disarm Todd.
608. In my view Dr Eagle gave compelling evidence on this issue, not from a tactical perspective but from a deep understanding of psychosis. She was not at all blind to the potential pitfalls, and frankly acknowledged the need for careful consideration so as to not increase the risks already involved in the interaction. I accept the possible benefits she alluded to and I accept her opinion that given police had been unable to de-escalate the situation themselves, it was a strategy well worth giving careful consideration, preferably under the guidance of a consultant psychiatrist.
609. There is clear evidence that Todd had a loving and supportive relationship with his parents. The fact was obvious to Primary Negotiator who gave evidence that he formed

the impression that Todd got along well with his father. Since Todd's mental health had stabilised in recent years there were no reported incidents of violence. The strength of the family relationships suggests that they would have been able to have offer insights and information that could have assisted. Their willingness to do this was demonstrated by the information June provided. But there was more they could have provided if they had been asked. I did not hear evidence from June, but I am convinced it is likely she knew Todd as well as anybody could and I accept her submission that she and her partner were skilled in calming Todd and well understood the complexities of his illness due to their close contact. The fact that she was never considered as a third party intervenor is not adequately explained on the evidence before me.

610. I note that the Commissioner went further on this issue than just submitting that third party intervention is usually unsuccessful and was not suitable in this case, and asserted that Mark was not an appropriate vehicle. I reject that submission and the bases on which it was put, which have been itemised above.
611. I had the opportunity to hear from Mark and he demonstrated significant insight and intelligence. He told the Court that he had developed strategies of "flicking Todd's switch", and of calming and redirecting him when he was actively unwell. Empathy and respect were essential. Mark had much to offer in how to help Todd. Mark also told the Court of the strength of Todd's relationship with his mother. There is no evidence that Mark "dismissed" his son. His brief conversation with Todd was interrupted by poor mobile reception and he had no idea at that time of the level of Todd's psychosis.
612. Todd's parents should have been kept properly up-to-date about what was occurring as the evening wore on. They should have been asked for specific de-escalation advice at an early stage.
613. Mark has no reason to be critical of himself in relation to the decisions he made on 31 July 2019. He did not attend Todd's house because he did not believe he had been granted that approval and he believed that he would be kept informed. He attempted to gather information from June and he trusted that the incident could be resolved in a peaceful way. I accept his evidence that his trust was partially based on an assurance that Fourth Person had given him. Mark believed the police were "prepared to negotiate for as long as it takes" and that entry would not be forced. I base my view on the fact that he made a recording of these matters the following day when they would have been very fresh in his mind. Both June and Mark had been very involved in Todd's life, neither would have hesitated to assist if they knew Todd's house was to be

breached. Mark's actions on the day are consistent with him having received a substantial reassurance of some kind.

614. At the conclusion of the evidence and having taken into account the extensive submissions on this issue I am satisfied that third party intervention should have been given serious consideration on 31 July 2019. I find specifically that it would have been appropriate for the negotiation team to consider seeking the assistance of a family member in trying to engage with Todd as the circumstances presented on 31 July 2019. On the more general issue of when third party involvement should be considered, I find that the evidence tends to establish that reluctance to use third parties has transformed into a de facto policy where the issue is rarely given proper consideration and the potential benefits are rarely fully reviewed.

Issue 8 – What is the PACER program and how does it currently operate?

Evidence

615. The Court has heard evidence about the Police Ambulance Clinician Early Response (**PACER**) program from Dr Flynn, the Acting Executive Director, Mental Health Branch, NSW Health. Dr Flynn's evidence has been usefully supplemented by Mr Holt, the Acting Executive Director of Hunter New England Mental Health Service.⁵⁶⁹ The Court has also heard from A/Inspector Masters on this issue.

616. Dr Flynn describes the PACER program as:

“a mental health secondary response model that involves NSW Health mental health services, NSW Police Force (NSWPF) and NSW Ambulance working in collaboration to provide a mental health response for people experiencing mental health crisis in the community.”⁵⁷⁰

617. Amongst the many benefits Dr Flynn ascribes to the program is that it provides a model that “de-escalates what may otherwise become a prolonged Police event”.⁵⁷¹

618. The PACER program operates under the auspices of NSW Health who administers and funds the program (by supplementation of the funding made to the Local Health Districts). The Local Health District is responsible for operational oversight and clinical governance. PACER clinicians are NSW Health employees.⁵⁷²

⁵⁶⁹ Statement of Jonathan Holt dated 20 July 2023.

⁵⁷⁰ Tab 269F (Statement of Dr Brendan Flynn) at [4].

⁵⁷¹ Tab 269F (Statement of Dr Brendan Flynn) at [4].

⁵⁷² Tab 269F (Statement of Dr Brendan Flynn) at [7].

619. The PACER program exists in two forms. In the South Eastern Local Health District/the St George Local Area Command (since 2018) and more recently in other police area commands within the greater Sydney Metropolitan area and the Central Coast,⁵⁷³ the PACER program involves a PACER clinician being embedded in the first responder team (including, relevantly, the NSWPF).⁵⁷⁴ The embedded clinicians tend to be senior and experienced community mental health staff.⁵⁷⁵ Psychiatrists are not embedded but the embedded clinicians have the capacity of obtaining information from a psychiatrist back at the hospital for the area.⁵⁷⁶
620. Outside of those areas, the PACER program is provided on a “virtual” basis or on a hybrid model which involves some in person and some virtual assessments of the patient.⁵⁷⁷ In its virtual or hybrid form, the PACER program does not involve mental health clinicians working out of a police station (or out of the premises of other first responders).⁵⁷⁸ Rather, the clinician provides advice to the first responder via a device in the first responder’s vehicle.⁵⁷⁹
621. In the Hunter New England Local Health District, the virtual model of the PACER program is called the Mental Health First Responder. This is a solely virtual service.⁵⁸⁰ It is currently available to the NSWPF in the Manning Great Lakes Police District in Gloucester and Bulahdelah (and has been since April 2023).⁵⁸¹
622. In his oral evidence, Dr Flynn clarified that the original rationale of the PACER program was to divert people from emergency departments.⁵⁸² He was quite clear that the PACER program would not have any role in a scenario such as that which occurred on 31 July 2019. This was because Todd was in possession of a weapon⁵⁸³ which made the situation a police negotiation. The PACER program was not set up to assist police in the conduct of a negotiation.⁵⁸⁴ Dr Flynn explains that PACER clinicians are not contacted if there are weapons on the scene.⁵⁸⁵ Dr Flynn also offers the opinion

⁵⁷³ T1787.49 – T1788.1 (22 June 2023).

⁵⁷⁴ T1786.40-43 (22 June 2023).

⁵⁷⁵ T1787.9.10 (22 June 2023).

⁵⁷⁶ T1787.26 (22 June 2023).

⁵⁷⁷ T1790.22-34 (22 June 2023).

⁵⁷⁸ T1792.17-19 (22 June 2023).

⁵⁷⁹ T1789.50 (22 June 2023).

⁵⁸⁰ Statement of Jonathan Holt dated 20 July 2023 at [4].

⁵⁸¹ Statement of Jonathan Holt dated 20 July 2023 at [7].

⁵⁸² T1788.38-39 (22 June 2023).

⁵⁸³ T1795.48 – T1796.5 (22 June 2023).

⁵⁸⁴ T1796.9-25 (22 June 2023).

⁵⁸⁵ T1797.39-42 (22 June 2023).

that it is not generally within the remit of mental health clinicians to de-escalate a situation with a mentally unwell person.⁵⁸⁶

Submissions

623. Counsel Assisting⁵⁸⁷ submit that the context for this issue being included on the issues list was to explore the possibility that the PACER program might have provided an opportunity to have allowed the police response on 31 July 2019 to have been informed by a mental health perspective. Counsel Assisting submit that the evidence quite clearly indicates that the PACER program is not designed or apt to achieve that result.
624. Counsel Assisting observe that because it is a model which was designed primarily to take pressure off emergency departments and which was not designed to be available in situations where the mentally unwell person is armed, the PACER program is not a service which, it appears, had the potential to deliver any benefits in the circumstances of 31 July 2019. That is not to say that mental health clinicians cannot offer a role in the de-escalation of incidents – to the extent that Dr Flynn suggested otherwise, Counsel Assisting suggests that the Court would prefer the contrary evidence of Dr Eagle (which has been discussed in the context of Issue 7(b) above). However, it is submitted by Counsel Assisting that the consultant psychiatrists available to police seem a more appropriate way, relative to the PACER program, of providing that benefit.
625. The Commissioner⁵⁸⁸ submits that Dr Flynn was quite clear that the PACER program would not be able to be utilised in this situation as Todd was in possession of a weapon, which made the situation a police negotiation. Dr Flynn's evidence was that PACER clinicians are not contacted if there are weapons on the scene and that mental health clinicians generally do not de-escalate a situation involving a person who is mentally unwell.⁵⁸⁹
626. Mark⁵⁹⁰ agrees with Counsel Assisting's summary of the PACER program and partially agrees with their conclusion that the current model of the PACER program does not appear to have the potential to deliver any benefits on 31 July 2019. However, Mark submits that the deployment of trained mental health clinicians under the PACER program would have provided benefits had the program been available at the time.

⁵⁸⁶ T1800.12-20 (22 June 2023).

⁵⁸⁷ Counsel Assisting's written submissions dated 30 August 2023 at [390], [398].

⁵⁸⁸ Written submissions of the Commissioner dated 13 October 2023 at [104].

⁵⁸⁹ Counsel Assisting's written submissions dated 30 August 2023 at [397].

⁵⁹⁰ Written submissions of Mark McKenzie dated 12 October 2023 at [64]-[76].

627. Mark submits that not only is the PACER program designed to take the pressure off emergency departments, the program has been described as providing “person-centred trauma informed care”,⁵⁹¹ and further that the program provided early de-escalation in its formative years.⁵⁹² He submits that this trauma-informed approach does not diminish when a person suffering from a mental health episode is wielding a knife. Rather, the need for a mental health response is heightened due to the risks involved to the person and others.
628. Mark draws attention to Dr Eagle’s evidence which demonstrates the trauma-informed way in which a trained mental health clinician may respond to the threat of a knife being brandished by an acutely psychotic person.⁵⁹³ Mark submits that had the police response on 30 July 2019 been adequate, the availability of the PACER program may have resulted in a more therapeutic outcome, such as Todd being scheduled under the *Mental Health Act*.
629. Mark also submits that the characterisation of incidents as high risk where a mentally unwell person is in possession of a knife risks further escalating the situation and reflects a current limitation to the PACER program’s design and operation which should be reviewed. He notes that the benefits of having mental health clinicians at the scene include the advantage of their training in the observations of symptoms, training in de-escalation, and knowledge and expertise as to medications.⁵⁹⁴ Mark highlights that Dr Flynn accepted that where available, PACER clinicians could help first responders to understand persons suffering from mental health episodes and de-escalate their behaviour.⁵⁹⁵
630. June⁵⁹⁶ supports the submissions of Counsel Assisting on this issue.
631. In reply, the Commissioner⁵⁹⁷ submits that the NSWPF is limited in its ability to make changes to the PACER program as it is funded by and operates under the aegis of NSW Health.⁵⁹⁸

⁵⁹¹ See Tab 269D (NSW Health webpage titled ‘PACER – Police, Ambulance, Clinical, Early, Response’).

⁵⁹² See Tab 269D (NSW Health webpage titled ‘PACER – Police, Ambulance, Clinical, Early, Response’).

⁵⁹³ T1622.22-T1622.23; T1622.23-T1622.28; T1622.31-T1622.42 (20 June 2023).

⁵⁹⁴ See T1634.45-T1635.7 (20 June 2023).

⁵⁹⁵ See T1788.15-T1788.40 (22 June 2023). It is accepted though that under the current PACER model, in a situation where a person is holding a weapon a PACER clinician would be precluded and it would become an exclusively police response. See, T1795.48-T1796.5 (22 June 2023).

⁵⁹⁶ Written submissions of June Wilkins dated 13 October 2023 at [145].

⁵⁹⁷ Written submissions in reply of the Commissioner dated 25 October 2023 at [19].

⁵⁹⁸ Counsel Assisting’s written submissions dated 30 August 2023 at [393].

Consideration

632. It is clear that the PACER program as it is currently envisaged and provided had no immediate relevance to the incident that developed on 31 July 2019. A weapon was involved and the incident developed into a lengthy negotiation and thus fell outside the program guidelines. I note Dr Flynn's evidence that the program was designed to take pressure off emergency departments. I think this is something that has been misunderstood by coroners, myself included.
633. The PACER program may not be the answer, but certainly the facts before me indicate that there was a need to elevate mental health expertise in the decision making process. I cannot help but think the parallel processes Ch Insp Fuller spoke of were in reality a two step process that foresaw arrest and *then* assessment. What was actually required was factoring in the mental health issue at the start and continuing to make decisions with that in mind. It may be, as Dr Eagle suggested that consultation with a psychiatrist from the NSWPF panel may have assisted with this goal. Whatever the case, we need to start re-imagining the way we deal with situations such as that which faced Todd on 31 July 2019 so that treatment can be provided in a timely manner.

Issue 9 – Was the Deliberate Action an appropriate tactical option to take at the time it was executed, in light of the information known about Todd and other options available?

634. A "Deliberate Action" is defined as a step taken proactively by police (as opposed to an Immediate or an Emergency Action Plan which is reactive).⁵⁹⁹ A "breach and hold" and the related (but separate) [REDACTED] are Deliberate Actions.
635. A breach and hold involves [REDACTED]
[REDACTED] The permission of the Region Commander is required for this Deliberate Actions. [REDACTED] is described as a slow methodical movement through a "stronghold" and it requires separate permissions.⁶⁰⁰
636. In this case, the Deliberate Action was to effect a breach and hold. On the evidence of Officer T10, there were two breach and holds. The first was at around 8.20pm when a window was opened (as opening a window is breaching a "seal"). This action required

⁵⁹⁹ See, e.g., Tab 5 (Certificate of Analysis) at p. 605.

⁶⁰⁰ T542 (3 April 2023) (Ch Insp Fuller); T616 (4 April 2023) (Officer T5); T949 (17 April 2023) (Officer T10); T1374 (15 June 2023) (Officer T2).

permissions from the Regional Commander (Assistant Commissioner Mitchell). The second breach and hold was the action performed in respect of the front door at around 9.45pm. Unless otherwise indicated, references to the breach and hold are to the later action.

637. Assistant Commissioner Mitchell gave permission for the breach and hold. Counsel Assisting note that it is less clear whether he also authorised a [REDACTED] [REDACTED] did not ultimately take place.
638. Counsel Assisting submit that, on the strength of this evidence, the Court would accept that Assistant Commissioner Mitchell had given permission for not only a breach and hold but also to [REDACTED]. In addition, there is evidence from Assistant Commissioner Mitchell that, at the time authority was sought for a breach and hold, authority was also requested for a [REDACTED] if the breach and hold did not provide the ability to communicate with Todd. To activate a [REDACTED] [REDACTED] the Forward Commander would be required to first seek an overview of the situation from negotiators on scene before making a decision to continue with this plan.⁶⁰¹ It seems most likely that Assistant Commissioner Mitchell gave permission for both actions, although only one was completed.
639. Before setting out the evidence and submissions it is desirable to outline in general terms the respective roles and responsibilities of the principal police actors in the 31 July 2019 job (a more detailed identification of their roles is addressed in the context of issue 10 below). Those actors and their roles are as follows:
- Ch Insp Fuller was the Forward Commander. He had overall responsibility for the job on the day.⁶⁰²
 - An officer of the Negotiations Command (Negotiations Team Leader) and an officer from the tactical branch, Officer T9 (who held the position of Field Supervisor) advised Ch Insp Fuller. The relationship between Ch Insp Fuller, Negotiation Team Leader, and Officer T9 is described by Officer T10 as a “triangle” of persons involved in a “collective decision making process”.⁶⁰³
 - Officer T10 (an Inspector in the Tactical Operations Unit (**TOU**)) was the Operations Coordinator and Tactics Commander. He described his role in relation to the TORS on 31 July 2019 was to provide “oversight and quality assurance”. He

⁶⁰¹ Tab 111B (Supplementary statement of former Assistant Commissioner Mitchell).

⁶⁰² T1299 (14 June 2023).

⁶⁰³ T941.9 (17 April 2023).

was not deployed on that day.⁶⁰⁴ Officer T10 described his role relative to Ch Insp Fuller (as Forward Commander) as providing advice.⁶⁰⁵ He said that he would not ordinarily discuss proposed tactics directly with a forward commander.⁶⁰⁶

- Negotiation Commander played a similar role with respect to Negotiation Team Leader. She described her role as to provide “strategic advice” and “oversight”.⁶⁰⁷
- Officer T1 was the team leader of the Bravo team (one of the two teams into which the TORS officers were divided). Bravo team was responsible for effecting the breach and hold (the other team, Alpha team, was at the back to ensure that Todd did not escape through his back door). The Court heard oral evidence from Officers T5 and T2 who were also members of that team.
- Officer T12 occupied the role of resource coordinator. It was his responsibility to ensure that sufficient resources were available. He was also responsible for obtaining the requisite approvals for a Deliberate Action from the Regional Commander, Assistant Commissioner Mitchell.

Submissions and consideration

640. Drawing on matters that Counsel Assisting raised as relevant and submissions of Counsel Assisting and the interested parties, including the summary of evidence specific to those matters, these matters were set out for my consideration:

- a. Evidence of NSWPF officers
- b. Evidence of persons outside the NSWPF
- c. The risk of violent physical confrontation from a breach and hold
- d. The risks that the less lethal options would be ineffective
- e. The breach and hold was not an effective way of facilitating negotiations
- f. A breach and hold was not otherwise apt to peaceably subdue Todd
- g. There were alternatives available to the breach and hold
- h. Overall conclusions regarding Issue 9

⁶⁰⁴ T928.24 (17 April 2023).

⁶⁰⁵ T927.50 (17 April 2023).

⁶⁰⁶ T940 (17 April 2023).

⁶⁰⁷ T382.25-30 (31 March 2023).

641. In my view the matters set out and summarised in Counsel Assisting's submissions accurately identify the matters that fall to me for consideration on this issue.

a. Evidence of NSWPF officers

Submissions of Counsel Assisting

642. Counsel Assisting note that questions of particular importance in relation to the evidence from police include what the evidence reveals about:

- a. The reasons for the breach and hold and the benefits that the Deliberate Action was anticipated to realise.
- b. What each of the officers involved in the breach and hold understood its objective to be.
- c. How each of those officers anticipated Todd would react to the breach and hold.
- d. In the case of those officers involved in proposing the breach and hold for approval by Assistant Commissioner Mitchell (namely, Ch Insp Fuller, Officer T9, and Negotiation Commander), what consideration they gave to considering whether the breach and hold was an appropriate action in the circumstances of 31 July 2019, including by way of consideration of any alternatives (as Forward Commander, Ch Insp Fuller's evidence will assume particular importance in this respect).
- e. What the officers involved in effecting the breach and hold (that is, the members of Bravo team) understood their roles to be (and in the case of the tactical officers, whether they thought they had permissions to enter Todd's house) – as team leader, Officer T1's evidence assumes a particular importance in this respect.
- f. The information available to those officers.

Evidence of Operator 76

643. Before turning to the specific evidence of the officers involved on 31 July 2019, Counsel Assisting⁶⁰⁸ consider that it is useful to consider the evidence of Operator 76 (an inspector in the TOU and an accredited tactical commander). He provides a

⁶⁰⁸ Counsel Assisting's written submissions dated 30 August 2023 at [425]-[510].

general indication of what police consider the potential benefits of a breach and hold to be. Operator 76 says that a breach and hold may be considered:

a.



b.



c.



Evidence of Sgt Watt

644. Sgt Watt, a weapons instructor within the NSWPF, has given evidence that on the tactical model of policing sometimes police attendance will be enough to resolve an incident.⁶¹⁰ However, Sgt Watt was not asked to comment on the specific operation of 31 July 2019.⁶¹¹ He also conceded the possibility that in a case of mental health, police presence might escalate the situation.⁶¹² To that extent, Sgt Watt's evidence does not add much to Operator 76's evidence.

645. Relevantly, Sgt Watt accepted that it would be desirable to have as much specific information about the subject of a police operation (including the type of person the subject was and, in the case of a mentally unwell subject, a history of their condition).⁶¹³ Sgt Watt qualified that he would "absolutely" be benefitted by that information in "circumstances where I have time"⁶¹⁴ and also agreed that the best approach would

⁶⁰⁹ Tab 173 (Statement of [Operator 76] at [21]).

⁶¹⁰ T1514.25-27 (19 June 2023).

⁶¹¹ T1514 (19 June 2023).

⁶¹² T1514.46-27 (19 June 2023).

⁶¹³ T1511.44-46 (19 June 2023).

⁶¹⁴ T1511.49 (19 June 2023).

be to try and get as much information as possible and try to assimilate it in the time available.⁶¹⁵

646. Sgt Watt also gave detailed evidence about the limitations of each of the less lethal options available to police on 31 July 2019. That aspect of Sg Watt's evidence is set out at a later point in these findings.

Evidence of Ch Insp Fuller

1. The options considered by Ch Insp Fuller on 31 July 2019

647. Ch Insp Fuller, as Forward Commander, prepared a reasonably comprehensive "appreciation process" comparing the proposed breach and hold with other options available. Ch Insp Fuller identified the options as being:

- a. Conduct the breach and hold;
- b. Continuing the current negotiations; and
- c. Police leaving the premises.

648. Ch Insp Fuller dismissed the third option (police leaving) as a viable option given the offences Todd was suspected of having committed earlier in the day. Counsel Assisting submit that this judgment was correct given the potential risk to public safety Todd presented. I am not certain that it is quite so clear cut. On the day before police also had a report that Todd was waving a knife around, and yet when they could not find him, they left and apparently took no further action in relation to that report. Given Todd was in his own home, perhaps a partial retreat should have been considered. I note that Counsel Assisting submitted that an option might have been for police to retreat to a perimeter of the premises rather than withdrawing entirely. In my view it could have been considered.

649. In terms of the other two options (the breach and hold and continuing the current negotiations), Ch Insp Fuller identified the pros and cons of each.⁶¹⁶

650. In terms of the option of continuing current negotiations, the pros were listed as:

- a. Todd was "contained in house";
- b. Todd was "not mobile";

⁶¹⁵ T1559.49 (19 June 2023).

⁶¹⁶ Tab 71A (Notes made by Chief Inspector Fuller) at pp. 494-5.

- c. There were no known firearms;
- d. No hostages; and
- e. No threats of self harm.

651. The cons of continuing current negotiations were:

- a. Todd is in “comfortable environment and feels in control”;
- b. Todd “has supplies”;
- c. How long is psychosis;
- d. Further resources and replacement;
- e. Won’t engage with negotiations;
- f. Negotiations at a stalemate;
- g. Psychiatrist could offer no suggestion;
- h. “Negs” [negotiators] advised that psychosis can last for days and Todd’s sleep patterns; and
- i. Time for POI to possibly barricade house.

652. The pros of conducting a breach and hold (and [REDACTED] were identified as:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]
- e. [REDACTED]
- f. [REDACTED]
- g. [REDACTED]
- h. [REDACTED]

653. The considerations against conducting a breach and hold were identified as:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]
- e. [REDACTED]
- f. [REDACTED]
- g. [REDACTED]

654. In his oral evidence, Ch Insp Fuller describes the objectives of the breach and hold (and any subsequent [REDACTED]) as being to [REDACTED]. Ch Insp Fuller says that he envisaged that, [REDACTED]. [REDACTED]

655. In his oral evidence, Ch Insp Fuller emphasised the importance of having a “visual” on Todd.⁶¹⁷

656. In his oral evidence, Ch Insp Fuller also expanded on his view that Todd’s level of comfort and control was a consideration against continuing current negotiations and that a [REDACTED] was a consideration in favour of a breach and hold. Ch Insp Fuller said:

“So, ...[Todd] had control of when he wanted to speak to the officers who - whether it be negotiators or he’d come to the front and talk to the tactical police. He was quite comfortable moving around the house. We didn’t have eyes on him at all times. So, he was cooking - cooked a meal, he’d play the drums, he was doing rap songs and - but - yes, I thought he felt in control of the situation.”⁶¹⁸

657. At a later point in his evidence, Ch Insp Fuller expanded on this as follows:

“... [Todd] He was noncompliant, we knew that, and he was roaming the house, choosing - he was playing the drums at one stage. He was cooking. I think he cooked a meal. So, he was choosing when he would speak to negotiators. So, there was no

⁶¹⁷ T544.31-32 (3 April 2023).
⁶¹⁸ T540.6-11 (3 April 2023).

impetus in - there was no ongoing negotiation at any stage.”⁶¹⁹

658. At a later point of his evidence, Ch Insp Fuller seems ultimately to have accepted that there could be some value in making Todd feel comfortable because it would have meant that he was in a “more emotionally stable state”.⁶²⁰

659. Ch Insp Fuller made the following clarification to the reference in his appreciation process to resources being a consideration against [REDACTED]:

“I’m not saying that it’s a problem. I’m saying it’s a consideration. We’d have to plan for the future, if it was going to be prolonged.”⁶²¹

660. He said that he gave “very minimal” consideration to the resource issue.⁶²² Ch Insp Fuller felt that additional resources were available should the job reach a point where it was necessary to organise replacements.⁶²³

661. Ch Insp Fuller also accepted that there was no specific urgency to effect the breach and hold.⁶²⁴

2. Ch Insp Fuller’s experience with previous breaches and holds

662. Ch Insp Fuller gave evidence of being involved in five breaches and holds with only one fatality (which, in fairness, it should be noted was a suicide).⁶²⁵

3. The indications that Ch Insp Fuller placed a 90-minute time limit on negotiations at around 4.55pm

663. Counsel Assisting consider that one matter that potentially suggests that Ch Insp Fuller might, from an early stage, have preferred the option of conducting a breach and hold to the [REDACTED] is a suggestion in some of the evidence that Ch Insp Fuller had placed a 90-minute time frame on negotiations.

664. An operational log, completed by Ambulance Officer Joshua Smyth records the following at 4.55pm:

⁶¹⁹ T1289.37-41 (14 June 2023).

⁶²⁰ T1311.39 (14 June 2023).

⁶²¹ T541.37-39 (3 April 2023).

⁶²² T1295.3 (14 June 2023).

⁶²³ T1336.1-5 (14 June 2023).

⁶²⁴ T1293.13-14 (14 June 2023).

⁶²⁵ T495 (3 April 2023).

“Spoke to Paul Fuller (superintendent NSWPF). At this stage plan is to negotiate [indecipherable- with patient?] for 90 mins. Failing getting pt to surrender knife etc tactical options will be to breach front [indecipherable- in?] breach & hold.”⁶²⁶

665. Ch Insp Fuller did not make any entry in his own notes regarding his conversation with Mr Smyth. In his oral evidence, Ch Insp Fuller said that he does not believe that he would have put a time limit on negotiations⁶²⁷ and his later submissions urge against a finding in this regard. None of the officers who gave oral evidence recall a 90-minute limitation being discussed.⁶²⁸ The Court has not heard from Mr Smyth.
666. Nevertheless, it is difficult to see why Ambulance Officer Smyth would have invented the entry at 4.55pm. Further, the information in that entry is quite specific and refers specifically to a breach and hold, which is a specific police term with which Mr Smyth, who is not a police officer, may be expected not to be familiar. Counsel Assisting note that this suggests that in all likelihood there was some discussion as to a limitation on negotiations. Counsel Assisting consider that it would be open to the Court, on the balance of probabilities, to make such a finding. Notwithstanding Ch Insp Fuller’s evidence on the issue, in my view it is more likely than not that the time frame was mentioned. I accept it does not mean that Ch Insp Fuller spoke of a strict or unmovable time limit.
667. Counsel Assisting submit that the reference to a 90-minute negotiation period suggests that, for whatever reason, Ch Insp Fuller felt a need to bring the job to an end. That sense was misplaced – there were no objective reasons why negotiations could not have continued.

4. Ch Insp Fuller’s assessment of the risk of violent physical confrontation upon police executing a breach and hold

668. In his directed interview, Ch Insp Fuller assessed the risk of Todd confronting⁶²⁹ police after a breach and hold was executed as “medium to low”.⁶³⁰
669. In his oral evidence (and with the benefit of hindsight), Ch Insp Fuller accepted that the risk was “probably medium” (at least after mitigation strategies of tactics and less lethal options had been taken into account).⁶³¹ Ch Insp Fuller ultimately accepted that

⁶²⁶ Tab 28 (Statement of Duty Inspector Joshua Smyth) at [8].

⁶²⁷ T531.24-25 (3 April 2023).

⁶²⁸ T1093 (19 April 2023) (Officer T9); T1359 (T2) (15 June 2023).

⁶²⁹ For context, it appears that by “confront” Ch Insp Fuller had in mind violent physical confrontation.

⁶³⁰ Tab 71 (Certified Transcript – Interview with Chief Inspector Fuller) at p. 473 [A357-A358].

⁶³¹ T1295.14 (14 June 2023).

a strategy which sought to “compel communication via a breach and hold which involved smashing a window and breaking down a door... invariably meant increasing the risk of physical confrontation, at least to some degree”. Nevertheless, Ch Insp Fuller remained comfortable that the breach was an appropriate step and the correct option.⁶³²

670. Ch Insp Fuller’s assessment that there was, at most, a medium risk of violent physical confrontation if a breach and hold were to be executed appears to be based on inferences Ch Insp Fuller drew from Todd’s behaviour when Sen Cst Stewart had drawn the firearm on him earlier in the day. Ch Insp Fuller appears to have concluded that this meant that it was likely that Todd would not confront police. In his oral evidence, Ch Insp Fuller agreed with the proposition that this consideration was a “very important” part of the appreciation process he had conducted.⁶³³
671. Ch Insp Fuller’s appreciation process also suggests that he received advice from the negotiations team that the person of interest may surrender and not engage in confrontation. This advice is attributed to Primary Negotiator. However, in his oral evidence, Ch Insp Fuller understood this advice to have been placed at the level of possibility and not an expectation that surrender would necessarily occur.⁶³⁴

5. The consideration Ch Insp Fuller gave to dealing with the job as a mental health job

672. Counsel Assisting submit that, perhaps consistently with his focus on the need to control Todd, the evidence suggests that Ch Insp Fuller focussed more on the need to arrest Todd for offences related to his possession of the knife and the conduct involving his neighbours earlier in the day, than on the need to seek treatment for Todd’s mental illness. In other words, Ch Insp Fuller saw this as a criminal matter rather than a mental health intervention. I accept this submission.
673. Ch Insp Fuller said in his oral evidence that he intended to charge Todd for the offence of intimidation which Ch Insp Fuller (reasonably) considered Todd to have had committed that day.⁶³⁵ His notes indicate that he formed the view there was sufficient evidence to suggest that an indictable offence had been committed.⁶³⁶
674. By contrast, Ch Insp Fuller’s notes do not make any reference to the possibility of arranging for mental health treatment for Todd. Indeed, Ch Insp Fuller’s notes

⁶³² T1337.27 (14 June 2023).

⁶³³ T574.34-38 (3 April 2023).

⁶³⁴ T544.14 (3 April 2023).

⁶³⁵ T573.36-39 (3 April 2023).

⁶³⁶ Tab 71A (Notes made by Chief Inspector Fuller) at p. 492.

expressly record that the 31 July 2019 job was “not a MH [Mental Health] intervention”.⁶³⁷ In his oral evidence, Ch Insp Fuller acknowledged that this is what his notes said but nevertheless explained that it was his intention that mental health intervention would run parallel to the criminal processes.⁶³⁸

675. Whilst it may be accepted that mental health treatment could run in parallel to criminal proceedings, it is evident that he had in mind a process which would, in the first instance require Todd to be arrested.⁶³⁹ To the extent that Ch Insp Fuller did contemplate mental health intervention for Todd (and his contemporaneous notes suggest that he did not), it appears clear that Ch Insp Fuller had in mind that such treatment would be ancillary or subordinate to the dominant purpose of charging Todd.
676. That Ch Insp Fuller intended to arrest Todd rather than to attempt to deal with the job as a mental health incident derives further support from his evidence that he chose to deploy his available resources (the officers who had been relieved but were still holding the outer perimeter to obtain statements) as opposed to, for example, finding information about Todd’s mental health which might have enabled the job to be dealt with by way of a mental health intervention.⁶⁴⁰

Evidence of Officer T9

1. Officer T9’s understanding of the rationale for/assessment of the benefits of the breach and hold

677. In his evidence, Officer T9 emphasised that the breach and hold was [REDACTED]

[REDACTED] Officer T9 said the following in that regard:

“I mean, ideally the concept of this whole breach and hold thing is [REDACTED]

[REDACTED] So ideally, that’s what we want. You know, we want to be able [REDACTED]

[REDACTED] Whether that means because he’s retreated to the back of the house and we can see him and we can communicate with him there, that certainly was a potential option, a potential outcome.”⁶⁴¹

678. Officer T9 described the rationale of the breach and hold as follows:

⁶³⁷ Tab 71A (Notes made by Chief Inspector Fuller), at p. 495.

⁶³⁸ T539.1-3 (3 April 2023).

⁶³⁹ T526.36-50 (3 April 2023).

⁶⁴⁰ T1302 (14 June 2023).

⁶⁴¹ T1122.28-34 (19 April 2023).

[REDACTED]

679. Officer T9 made it clear that, as he understood it, the objective of the breach and hold was not “about tactical police going in and effecting an arrest or subduing Todd...It’s about, [REDACTED]

[REDACTED]

680. Like Ch Insp Fuller, Officer T9 also emphasised the importance of “control” as a motivation for the breach and hold. In Officer T9’s mind, it was necessary to breach the door (as opposed to merely reaming the window) given what it communicated to Todd. Officer T9 says:

“It is saying, you know, we could come in if we wanted to, but we’re not coming in. So it’s just a bit of that, getting some of that control back, that potentially we’ve lost through the - the length of the - the situation as well.”⁶⁴⁴

681. Like Ch Insp Fuller, Officer T9 considered that the fact that Todd was too “comfortable” and “empowered” was a reason for effecting the breach and hold.⁶⁴⁵ This meant that there was a need for tactical officers to “reassert tactical advantage.”⁶⁴⁶

682. Officer T9 has explained that the reaming of the window was more about tactical protection than conducting negotiations.⁶⁴⁷

683. Officer T9 gives evidence that he did not consider the length of the job to be a factor in the decision to propose a breach and hold.⁶⁴⁸

2. Officer T9’s assessment of Todd’s most likely response to the breach and hold

684. Officer T9 thought that there was a possibility that Todd would retreat or surrender upon the breach and hold being executed. However, Officer T9 accepted that the possibility of Todd retreating was “down the list of probable outcomes”. Similarly, Officer T9 also accepted that, at least at the time of the initial breach, Todd surrendering “was a very small possibility”.⁶⁴⁹

685. Some of Officer T9’s evidence suggests that he thought that there was a considerable likelihood of Todd reacting to the breach and hold by way of violent physical

⁶⁴² T1210.47-48 (20 April 2023).

⁶⁴³ T1210.3-6 (20 April 2023).

⁶⁴⁴ T1189.47-50 (20 April 2023).

⁶⁴⁵ Tab 78 (Certified Transcript of Interview with Officer T9) at p. 682 [Q538].

⁶⁴⁶ T1145.47 19 April 2023).

⁶⁴⁷ T1217.12 (20 April 2023).

⁶⁴⁸ T1174.38 (20 April 2023).

⁶⁴⁹ T1126.38-43 (19 April 2023).

confrontation. In his directed interview, Officer T9 stated that he expected that after the breach and hold had been conducted, Todd would “probably jump in immediately” and the probability of Todd engaging in confrontation was at around “50 50”.⁶⁵⁰ On the first day of his oral evidence, Officer T9 initially stood by the answers he had earlier given. He accepted the proposition that the possibility of violent physical confrontation with police was “really the toss of a coin”.⁶⁵¹ Officer T9 also initially accepted that the possibility that Todd would “physically confront” police was “probably the most likely outcome”.⁶⁵²

686. On the second day of oral evidence, however, Officer T9 did not accept that objectively there was a high likelihood of confrontation⁶⁵³ and said that he was not certain as to the likelihood of a “physical confrontation”.⁶⁵⁴ At a later point (in response to questioning from his counsel), Officer T9 sought to modify the answers he had given earlier, saying that he did not necessarily think that the confrontation was “physical confrontation”, rather, it was “potentially like verbal confrontation.”⁶⁵⁵ In re-examination, Officer T9 confirmed that he intended to depart from his evidence the previous day after thinking about it overnight.⁶⁵⁶ In this regard, Officer T9 said that he had intended to draw a distinction between the words “physically confront” and “being physical”, stating:

“I mean, physically confront is we walk up to someone and be physically in each other’s presence and we’re confronting not so much as a physical roll around on the floor type confrontation.”⁶⁵⁷

687. Counsel Assisting submit that the Court would not accept Officer T9’s qualifications on the second day of his oral evidence to the evidence he gave on the first day of his evidence as to the likelihood of violent physical confrontation.

688. The answers Officer T9 gave on the first day were clearly responsive to a risk of physical confrontation (this was the subject of an objection made during the course of his examination, leading to the specific question he was asked being rephrased as specific to “physical confrontation”).⁶⁵⁸ Counsel Assisting submit that, in any event, the

⁶⁵⁰ Tab 78 (Certified Transcript of Interview with Officer T9) at pp. 716 [A743] and 729 [A824].

⁶⁵¹ T1125.46 (19 April 2023).

⁶⁵² T1128.48 (19 April 2023).

⁶⁵³ T1191 (20 April 2023).

⁶⁵⁴ T1211.50 (20 April 2023).

⁶⁵⁵ T1229.35-43 (20 April 2023).

⁶⁵⁶ T1239.21-31 (20 April 2023).

⁶⁵⁷ T1240.16-19 (20 April 2023).

⁶⁵⁸ T1128 (19 April 2023).

distinction Officer T9 attempted to draw between a “physical confrontation” and “being physical” do not accord with the commonly understood meaning of those terms. The evidence given by Officer T9 on the second day of his evidence has the hallmarks of Officer T9 considering his evidence overnight and forming a view that it was unhelpful and seeking to tailor his evidence as a result. The evidence given by Officer T9 on the first day he gave oral evidence is also more consistent with the evidence he gave in his directed interview (which cannot fairly be understood as being limited to the likelihood of a mere “verbal” confrontation).

689. I have considered the evidence Officer T9 gave in Court and the account he gave in his directed interview. I am persuaded that the earlier account is more likely to reflect Officer T9’s thinking at the time. Officer T9 thought that Todd would “probably jump in immediately” and the probability of Todd engaging in confrontation was at least 50:50.

3. Whether Officer T9 communicated to Ch Insp Fuller his perception that violence was probably the most likely outcome

690. Counsel Assisting submit that the Court could not find that Officer T9 communicated his perception that violence was “probably the most likely outcome to Mr Fuller”. Ch Insp Fuller has no recollection of receiving this advice from Officer T9 (though he recalls discussions with Officer T9 as to the likelihood of confrontation).⁶⁵⁹ That Ch Insp Fuller received advice from Officer T9 to this effect does not appear in the documentation of the appreciation process Ch Insp Fuller subsequently prepared.⁶⁶⁰ Counsel Assisting submit that the absence of any evidence that Ch Insp Fuller received from Officer T9 advice to the effect that violent confrontation was “probably the most likely outcome” should inform any criticism the Court is minded to make of Ch Insp Fuller in a personal capacity in this respect.

Evidence of Negotiation Team Leader

691. Negotiation Team Leader had only been involved in one other breach and hold prior to 31 July 2019. In that instance, it did not achieve the result of allowing negotiations to resolve and the situation needed to be resolved by “further tactical steps”.⁶⁶¹

692. As set out below (in response to Issue 10), Negotiation Team Leader gives evidence that he was not involved in the proposal to request approval to conduct a breach and

⁶⁵⁹ T1275.24 (14 June 2023).

⁶⁶⁰ T1277 (14 June 2023).

⁶⁶¹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1931 [A548].

hold. He was not initially involved in discussions⁶⁶² and learned that it had been submitted to Assistant Commissioner Mitchell upon reading this on iSurv.⁶⁶³ Negotiation Commander says that he wanted to continue to build a rapport and develop negotiations but said that if this was not successful, “breach and hold will probably be our next step”.⁶⁶⁴ Negotiation Team Leader ultimately supported the breach and hold conducted on 31 July 2019.⁶⁶⁵

693. Negotiation Team Leader identified the benefits of a breach and hold as being either Todd would see the breach and hold and [REDACTED] [REDACTED] “because he knows or he’d have the idea that police could enter through that open door at any time.”⁶⁶⁷

Evidence of Negotiation Commander

694. Negotiation Commander (who was not responsible for any tactical decision made on 31 July 2019) described the objective of negotiators as being to establish rapport with Todd. The techniques she described that negotiators are trained to deploy include empathy and active listening in an attempt to try and understand the circumstances that Todd was in.⁶⁶⁸
695. Negotiation Commander does not (it is inferred) see any inconsistency between the deployment of those techniques and the execution of a breach and hold. She says that although it may not appear that way to an outsider, a breach and hold is aimed at trying to receive a resolution. In her experience, it “can be an effective strategy”.⁶⁶⁹
696. Negotiation Commander gave evidence that in her experience a breach and hold was used at least once a month.⁶⁷⁰ She said that she had never seen a violent reaction to a breach and hold (other than on 31 July 2019).⁶⁷¹ By “violent confrontation”, she meant something like a “melee”.⁶⁷²

⁶⁶² Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1929 [A531].

⁶⁶³ Tab 88-1 (Affidavit of Negotiation Team Leader) at [15].

⁶⁶⁴ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1912 [A359].

⁶⁶⁵ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1930 [A544].

⁶⁶⁶ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1912 [A361].

⁶⁶⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1912 [A362].

⁶⁶⁸ T372; T374 (31 March 2023).

⁶⁶⁹ T419.2 (31 March 2023).

⁶⁷⁰ T419.48 (31 March 2023).

⁶⁷¹ T421.11 (31 March 2023).

⁶⁷² T421.49 (31 March 2023).

697. In her second statement, Negotiation Commander compiled statistics of the 1980 matters classed as high risk between 2017 and 2022, of which nine have resulted in a coronial inquest and eight were as a result of suicide or self-inflicted fatal injury.⁶⁷³

Evidence of Officer T10

698. Officer T10 (who was not in the field but had a quality assurance role in terms of the advice Officer T9 was providing to Ch Insp Fuller) understood that a breach and hold was an option for progressing negotiations,⁶⁷⁴ potentially (though not necessarily) leading to a [REDACTED]⁶⁷⁵

699. Officer T10 only assessed there as being a “possibility” that Todd might react by way of violent confrontation to a breach and hold being executed.⁶⁷⁶

Evidence of Officer T1

700. Officer T1, who has done more than ten breaches and holds⁶⁷⁷ and speaks of his experience of a breach and hold having a “high chance of success” in the operation resolving peacefully⁶⁷⁸ maintained that, even in hindsight, it was an appropriate option.⁶⁷⁹

701. Officer T1 speaks of the value of the breach and hold of providing a “focal point” to negotiations.⁶⁸⁰ Officer T1 added:

“if he [Todd] retreats - after a breach and hold and he retreats and he says whatever he wishes to say, [REDACTED]

[REDACTED]⁶⁸¹

702. Officer T1 says that, in his experience, after a breach and hold is effected:

“Usually one of two things can happen. They [the subject of the operation] surrender immediately. Or they will not approach you. They’ll just basically tell you to go away”.⁶⁸²

703. Another theme of Officer T1’s evidence is that (like Ch Insp Fuller and Officer T9) he felt that the negotiations with Todd had stalled and there was a need to change the

⁶⁷³ Tab 91A (Second statement of Negotiation Commander).

⁶⁷⁴ T943.41-43 (17 April 2023).

⁶⁷⁵ T945.30-36 (17 April 2023).

⁶⁷⁶ T974.43 (17 April 2023).

⁶⁷⁷ T813.39 (6 April 2023).

⁶⁷⁸ T831.13 (6 April 2023).

⁶⁷⁹ T832.22 (6 April 2023).

⁶⁸⁰ T820.1 (6 April 2023).

⁶⁸¹ T825.39-42 (6 April 2023).

⁶⁸² T816.7-8 (6 April 2023).

situation. He perceived that Todd was too comfortable or had too much control in his home and that this needed to be changed. For example, in his directed interview, Officer T1 gave evidence that a benefit of the breach and hold was “changing the situation” because Todd “was safely tucked up in there you know...we’re not gunna, you know, we will come in and get him if we need to be there. It might just change things, that’s all...[it] shows a bit more, when we’re a bit more fair dinkum”.⁶⁸³ In oral evidence, Officer T1 stood by this, saying that it was important to communicate to Todd that police could enter his house (or, to use Officer T1’s words, Todd’s “safe space”) at any time.⁶⁸⁴ On Officer T1’s evidence, this made the opening of Todd’s front door (as opposed to the mere reaming of the front window) of considerable importance because it communicated to Todd this ability of police to enter his home.⁶⁸⁵

704. Consistently with this view, Officer T1 says that the reaming of the window was more for tactical operatives’ safety than anything else.⁶⁸⁶ This suggests that, in Officer T1’s mind at least, breaching the window was not intended to achieve a visual.
705. Officer T1 was of the view that he and the other operatives “can’t stay out for an indefinite period” which meant that “we have to get negotiations going somehow”.⁶⁸⁷
706. Officer T1 accepted that knocking down a door was a “violent act”. However, he thought this was a benefit because it was a “very confronting thing” for Todd to encounter “a tactical team in ...[his] doorway”. It would cause Todd to think to himself “I really don’t want to mess with that”.⁶⁸⁸
707. Officer T1’s thought was that there was a strong likelihood that this could lead Todd to surrender. In his interview, he says that surrender occurred 9 times out of 10.⁶⁸⁹ Officer T1 stood by this in his oral evidence⁶⁹⁰ and he also said that in his experience the subject would “sheer[ly] surrender” the majority of the time.⁶⁹¹ Officer T1 also thought it possible that Todd would go to another part of the house. He thought that once he had gone to another part of the house, Todd would “start abusing” the tactical officers.⁶⁹²

⁶⁸³ Tab 80 (Certified Transcript of Interview with Officer T1) at p. 1187 [A2277-A2278].

⁶⁸⁴ T881.41 (6 April 2023).

⁶⁸⁵ T834; T867 (6 April 2023).

⁶⁸⁶ T834.10 (6 April 2023).

⁶⁸⁷ T815.13 (6 April 2023).

⁶⁸⁸ T831.50; T832.2-4 (6 April 2023).

⁶⁸⁹ Tab 80 (Certified Transcript of Interview with Officer T1) at p. 1034 [Q946].

⁶⁹⁰ T823.1 (6 April 2023).

⁶⁹¹ T822.43-4 (6 April 2023).

⁶⁹² T823.11 (6 April 2023).

708. Officer T1 accepted the possibility of confrontation upon the breach and hold being executed. However, it was not until he saw Todd walking towards the Bravo team after the breach and hold had been effected that he considered there to be a chance that Todd might not surrender voluntarily. At this point, Officer T1 appreciated that things “might get ugly”⁶⁹³ and that “this is not good.”⁶⁹⁴
709. Officer T1 did not think that the Bravo team had permission to enter. He says that Ch Insp Fuller had emphasised to him that members of the Bravo team were not to enter the house.⁶⁹⁵

Evidence of Officer T5

710. Officer T5 has done “multiple” breaches and holds which have had “positive outcomes”.⁶⁹⁶ Officer T5 went on to say that he assumed that the less lethal options would suffice to subdue Todd because in the “vast majority” of cases “generally that’s how they would play out”.⁶⁹⁷
711. Officer T5 understood the rationale and potential benefits of breach and hold as follows:
- “it can be enough for them [the subject of the operation] to go, oh okay I’ve had enough...Or if we open a doorway, then we can actually communicate with them - what we want them to do. It’s kind of a - it’s hard to say what someone’s going to do or what they’re not going to do or - yeah.”⁶⁹⁸
712. Officer T5 says that he would have arrested Todd if he had the opportunity to do so and believes that he had the permissions for this to occur.⁶⁹⁹
713. In response to questions from Counsel for the Commissioner, Officer T5 also referred to a further potential benefit of the breach and hold. He gave evidence that in his experience, the intimidating uniforms which he and the other tactical operatives were wearing could cause people to surrender.⁷⁰⁰

⁶⁹³ T839.32 (6 April 2023).

⁶⁹⁴ T840.4 (6 April 2023).

⁶⁹⁵ T873.37 (6 April 2023).

⁶⁹⁶ T617.35 (4 April 2023).

⁶⁹⁷ T661.29-30 (4 April 2023).

⁶⁹⁸ T617.9-13 (4 April 2023).

⁶⁹⁹ T656.10 (4 April 2023).

⁷⁰⁰ T675 (4 April 2023).

714. Despite this and unlike Officer T1, Officer T5 thought that the breach and hold was going to lead to confrontation of a violent nature⁷⁰¹ or of some form of contact.⁷⁰² He did not think that Todd would peacefully surrender.⁷⁰³ He assessed the level of risk of contact as a “high risk”.⁷⁰⁴
715. Officer T5’s evidence suggests that his expectation was that the Bravo team would enter the property not long after the breach had been effected. In his interview, when asked about the period of time after the door had been breached and stating his expectation that he considered from past experience that “something” would “happen”,⁷⁰⁵ Officer T5 says that he asked Officer T1 “are we gonna get this clearance going?”⁷⁰⁶ Whilst Officer T5 does not recall Officer T1’s response (and Officer T1 has given evidence that he understood from Ch Insp Fuller that the Bravo team was not to enter), for his part Officer T5 said he had “kind of gone back with the intent in my mind that, well, we’re about to do it”.⁷⁰⁷ From context, it appears that Officer T5 was referring to an entry of the premises.

Evidence of Officer T2

716. Officer T2 explains his understanding of the rationale for breach and hold as [REDACTED]
717. During his oral evidence, Officer T2 initially said that he did not turn his mind to the likely response of Todd to confrontation, giving the following evidence:

“It doesn’t form part of my thinking at that time. My thinking is that I have a role to - to do and I have a job to do. There’s every anticipation that there could be a confrontation. It could be verbal. There could be more yelling and screaming, more idle threats, it could be something more direct. A missile thrown. Could be withdrawal back inside another part of the house at the realisation that tactical police have broken the seal so to seal. There are many different outcomes. Those outcomes didn’t happen and I’m standing there perceiving what I’m seeing in front of me, which developed very quickly as I’ve already said.”⁷⁰⁹

⁷⁰¹ T621.36-42 (4 April 2023).

⁷⁰² T660.15-21 (4 April 2023).

⁷⁰³ T661.19 (4 April 2023).

⁷⁰⁴ T660.15-21 (4 April 2023).

⁷⁰⁵ Tab 79 (Certified Transcript of Interview with Officer T5) at p. 876 [Q780].

⁷⁰⁶ Tab 79, at p. 877 [Q781].

⁷⁰⁷ Tab 79, at p. 877 [Q782].

⁷⁰⁸ T1369.49-50 (15 June 2023).

⁷⁰⁹ T1390.24-32 (15 June 2023).

718. However, at a later point of his evidence, Officer T2 did accept that there was a “high risk” of confrontation upon breach but that this risk could be mitigated.⁷¹⁰

Evidence of Primary Negotiator

719. Primary Negotiator said that in his experience a breach and hold had always worked in the past.⁷¹¹

Evidence of Fourth Person

720. Similar to Primary Negotiator, Fourth Person said that in her experience breaches and holds have always been successful.⁷¹² Fourth Person said that in her experience, a benefit of the strategy is that it facilitates eye contact, opening up avenues of trust between herself and Todd.⁷¹³ This evidence is significant given that by the time the breach and hold came to be effected, Fourth Person had taken over the negotiations from Primary Negotiator. In particular, Fourth Person said:

“Opening up that opportunity can advance our negotiations quite positively in that – he [Todd] had body language. I can see what he’s doing. He can see what I’m doing. It opens that avenue of trust as well. I’m standing, unarmed, at a doorway still talking with him. And it just - yeah, can open up that level of trust. If he can see all the things that I’m saying and doing and vice versa.”⁷¹⁴

721. When asked specifically as to how she intended to overcome the deficit of trust which would be caused by knocking in the door, Fourth Person responded:

“It’s worked in the past, it’s, yeah. I can only go off experience, and what the past tells us, and it has worked, yeah. It wasn’t an outcome that anybody expected, myself included, so yeah, it’s a really hard one to answer because my experience is that it’s worked.”⁷¹⁵

Relevance of the success of the breach and hold in previous cases

722. Counsel Assisting note that a particular theme of the evidence was that, in the experience of all the relevantly involved officers, a breach and hold had in previous matters been successful.

⁷¹⁰ T1394.28 (15 June 2023).

⁷¹¹ T258.16 (29 March 2023).

⁷¹² T363.19 (30 March 2023).

⁷¹³ T331.12-18 (30 March 2023).

⁷¹⁴ T331.12-18 (30 March 2023).

⁷¹⁵ T333.5-8 (30 March 2023).

723. The Commissioner had prepared a table⁷¹⁶ which summarises the results of breaches and holds (and [REDACTED] in the period July and August 2019. There are 18 incidents described as occurring within that period. The limited descriptions provided in the table means that the circumstances of each incident is not entirely clear on the face of the document. Officer T10 agreed with the suggestion put to him by his Counsel and Counsel for the Commissioner that the table records only one critical incident during that period.⁷¹⁷
724. Counsel Assisting submit that the reliance that can be placed on this table is very limited. The table itself bears the disclaimer that it does not cover a number of deployments including where “EA or DA tactics have been utilised”. That is understood to be a reference to Emergency Action or Deliberate Action. If that understanding is correct, that table is of no assistance in the present case given that the present case involved a Deliberate Action. Further, the provenance of that table is unknown other than it was created by more than one officer in the Target Action Group.⁷¹⁸ What records those officers interrogated is not explained or otherwise disclosed in the evidence. The table also disclaims that due to a transition in record keeping systems “there may be inaccuracies or inconsistencies in the records”. By a combination of these factors, it is submitted that the Court is not in a position to assess the reliability of that table.
725. In any event, Counsel Assisting submit that the table covers too limited a period (two months) to enable any conclusion to be drawn as to whether a breach and hold truly represents a safe option (which is understood to be the significance the Commissioner seeks to attach to that table). It may be thought that one death in a period of two months does not particularly demonstrate the strategy’s effectiveness as a non-lethal option (noting that, in fairness, that death was said to have been as a result of an act of self-harm).
726. Most fundamentally, the table contains insufficient detail about the nature of the incidents it records as to permit meaningful comparison between those jobs and the present job. It is self-evident and was accepted by Officer T10 that devising an appropriate tactical plan required those responsible to take into account specific information relating to the person and the circumstances in the day.⁷¹⁹ The particular features of Todd’s case that made a breach and hold inapposite were his mental health

⁷¹⁶ Tab 173A (Statement of Operator 76).

⁷¹⁷ T1037.21 (18 April 2023).

⁷¹⁸ T1035.41 (18 April 2023).

⁷¹⁹ T975.26 (17 April 2023).

(noting the themes of his paranoia included that the weapons were disarmed and had a focus on a paranoia on persons entering his home). The table does not elucidate whether similar or analogous features were present in the cases it describes. It does not even record whether any of those cases involved a subject who was suffering from mental health issues.

727. For these reasons it is submitted that the Court should put the table entirely to one side in its considerations of the appropriateness of the breach and hold strategy on 31 July 2019. I accept these submissions and for the reasons set out by Counsel Assisting and discussed below I place little weight on the table.
728. Picking up on the theme of the table, all of the relevantly involved officers gave evidence of their experience of the breach and hold being successful in previous matters. Once again, however, this previous experience is of limited utility in assessing the appropriateness of the breach and hold on 31 July 2019 because much depended on the individual circumstances and not enough is known about those circumstances as to permit meaningful comparison (the evidence does not, for example, disclose whether those cases involved a person who was mentally unwell and/or whose delusions consisted of military and policing themes and who had expressed a particular paranoia regarding people entering his or her home).
729. In relation to the specific evidence of Negotiation Commander concerning the causes of deaths considered at previous inquests in which police had involvement, her evidence is at too high a level of generality (dealing with “high risk incidents” rather than previous examples of jobs where a breaches and hold had been executed) to be of any real utility.

Summary

730. Counsel Assisting note that the police evidence indicates that they considered the breach and hold would be effective to [REDACTED] It was felt that this would demonstrate to Todd that police were serious and did not intend to leave the premises. Todd was too comfortable in his premises and had the control of his premises. Therefore, it was also necessary to communicate to Todd that police could enter at any time and his home was not a “safe space”. [REDACTED] [REDACTED] Experience showed that this tactic worked. There were, however, risks that Todd would engage in violent confrontation.

Submissions of the Commissioner

731. In relation to evidence regarding Ch Insp Fuller, the Commissioner⁷²⁰ submits that Ch Insp Fuller had considerable experience to oversee the decision to conduct the breach and hold. Ch Insp Fuller has completed training including in tactical courses, mental health courses, weapons and armed offender courses and policing in high-risk situations training.⁷²¹ Ch Insp Fuller has also been involved in five breach and hold situations, with only one involving a fatality (from suicide).⁷²²
732. In relation to Officer T9's assessment of Todd's most likely response to the breach and hold, the Commissioner submits that⁷²³ Officer T9's assessment that Todd would "probably" have confronted TORS officers and that the risk of this was around 50:50 does not advance the point sought to be made Counsel Assisting's submissions. Officer T9 gave evidence regarding the need for a distinction between physical and verbal confrontation. The Commissioner further submits the evidence that there was a 50:50 risk of confrontation should be placed in the proper context. That is, a question must be asked as to the risk of confrontation as opposed to other possibilities, including the possibilities for self-harm, retreat, barricading or surrender.
733. In relation to data regarding high-risk incidents and the use of the breach and hold tactical option, the Commissioner submits⁷²⁴ that this matter was an exception rather than the norm. Between 2017 and 2022, the TOU was involved in 1,980 high risk incidents, out of which nine resulted in a coronial inquest. Out of those nine inquests, eight deaths were a result of suicide or armed self-inflicted fatal injury prior to tactical intervention.⁷²⁵
734. The Commissioner further highlights that out of the 16 breach and holds that took place in 2019, this incident was the only matter which resulted in a critical incident. In 2020 and 2021, none of the breach and holds undertaken resulted in a fatality. The Commissioner submits that from the 29 total breach and holds over this period,⁷²⁶ the following can be gleaned:

⁷²⁰ Written submissions of the Commissioner dated 13 October 2023, at [148]-[149].

⁷²¹ Tab 265 (Summary of Training and Qualifications – Chief Inspector Fuller).

⁷²² Counsel Assisting's written submissions dated 30 August 2023 at [443].

⁷²³ Written submissions of the Commissioner dated 13 October 2023 at [146]-[147].

⁷²⁴ Written submissions of the Commissioner dated 13 October 2023 at [154]-[166].

⁷²⁵ Tab 91A (Second statement of Negotiation Commander) at [7].

⁷²⁶ See T1034 (18 April 2023).

- a. Many subjects had weapons and/or mental health issues and were making threats towards police or others;
- b. All resolved without serious injury, harm or death, with the exception of Todd's incident;
- c. Less lethal options were successfully deployed;
- d. A number of jobs did not require the use of force or give rise to injury; and
- e. Breach and holds were executed at various times and there was no minimum prescribed time before a breach and hold was authorised.

735. The Commissioner submits that the Court should rely on the table at Tab 173-3 as the "best evidence" with respect to breach and holds and that the available data indicates that the breach and hold has been used effectively as a tactical decision. This information extends beyond the information in the table considered in Counsel Assisting's primary submissions above (being the table at Tab 173A).

736. The Commissioner observes that the available data indicates that as a tactical decision, the breach and hold technique has been efficacious (accepting that any death is one too many and warrants review so that lessons can be learnt).

737. The Commissioner submits that a number of police officers have reported favourable experiences with the breach and hold tactic. They believe that this technique would have resulted in Todd's surrender or advanced the negotiations,⁷²⁷ such as [REDACTED] [REDACTED] This evidence is supported by Ch Insp Fuller⁷²⁹ and Officer T1, the latter of whom also gave evidence that this would provide more distance to deploy less lethal options⁷³⁰ and allow police officers to determine the presence of weapons, booby traps or barricades in the house.⁷³¹

⁷²⁷ T285.45 (30 March 2023); Tab 80 (Certified Transcript of Interview with Officer T1) at p. 1034; T823 (6 April 2023); Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 9; T617 (4 April 2023); T258.16 (30 March 2023); Tab 78 (Certified Transcript of Interview with Officer T9) at pp. 84-85.

⁷²⁸ T328.26; T363.45 (30 March 2023).

⁷²⁹ T544.31-32 (3 April 2023).

⁷³⁰ T895.40-50 (6 April 2023).

⁷³¹ T896 (6 April 2023).

Submissions of Ch Insp Fuller

738. In relation to Ch Insp Fuller's assessment of the risk of violent physical confrontation upon police executing a breach and hold, Ch Insp Fuller⁷³² appreciated that this was a possible outcome at all times.⁷³³ He assessed the risk as "medium to low" at a time when the information available to him included that Todd had retreated into the house when confronted by police earlier; that Primary Negotiator had advised that "he may surrender" if confronted; and that TORS officers had "ample non-lethal options at their disposal". While it was a consideration, Ch Insp Fuller submits that his decision was not simply based on "inferences" from Todd's behaviour.⁷³⁴
739. It was submitted that the Court should not accept Counsel Assisting's submission that Ch Insp Fuller "appears to have concluded that this meant that it was likely that Todd would not confront police".⁷³⁵ Rather, confrontation was identified as one of the three likely responses to breach and hold. He submits that his assessment of the risk as medium to low was not unreasonable. It was based on the information available to him at the time and his understanding of the TORS team's ability to deal with any physical confrontation.
740. In relation to evidence that he placed a 90-minute time limit on negotiations at around 4.55pm, Ch Insp Fuller submits that it is not open to the Court to find that there was discussion about this limitation⁷³⁶ or that Ch Insp Fuller preferred the option of a breach and hold rather than continuing negotiations.⁷³⁷
741. Ch Insp Fuller submits that, first, contrary to Counsel Assisting's submissions, the breach and hold tactic is to [REDACTED] rather than be an alternative to it.
742. Second, the suggestion there was some time limitation imposed is directly inconsistent with the evidence of Officer T9,⁷³⁸ Officer T10⁷³⁹ and Negotiation Team Leader.⁷⁴⁰ Ch

⁷³² Written submissions of Superintendent Paul Fuller at [110]-[113], [123], [43]-[48], [90]-[92], [119]-[120].

⁷³³ Tab 71A (Notes made by Chief Inspector Fuller) at p. 495.

⁷³⁴ Cf Counsel Assisting's written submissions dated 30 August 2023 at [451].

⁷³⁵ Counsel Assisting's written submissions dated 30 August 2023 at [451].

⁷³⁶ Counsel Assisting's written submissions dated 30 August 2023 at [447].

⁷³⁷ Counsel Assisting's written submissions dated 30 August 2023 at [444].

⁷³⁸ T1093.18-42 (19 April 2023).

⁷³⁹ T988.1-7 (17 April 2023).

⁷⁴⁰ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1939; Tab 88-1 (Affidavit of Negotiation Team Leader) at [7].

Insp Fuller gave evidence that he would not and did not place any time limit on negotiations or give consideration as to how long negotiation would be pursued.⁷⁴¹

743. Third, Ch Insp Fuller submits that the idea of some limitation of negotiation at around 5pm is inconsistent with the evidence of events and the chronology of how this tactic evolved as an option in the Forward Command at around 8:30pm. Further, the reference to “90mins” in Josh Smyth’s notebook is likely to be a reference to assess progress after this time rather than to impose a limitation on negotiations. There was no evidence of such a limitation in any other entries made by Mr Smyth.
744. In relation to data regarding high-risk incidents and the use of the breach and hold tactical option, Ch Insp Fuller⁷⁴² draws attention to the table at Tab 173-3, which provides various examples of breach and hold involving subjects with apparent mental health issues being successfully deployed. While the information in the table is not particularly detailed, it nonetheless contains a sufficiently broad spectrum of incidents. He submits that the information provided in this table and police officers’ evidence of their successful experiences with breach and hold cannot be “entirely put to one side”.⁷⁴³
745. In relation to Officer T9’s assessment of Todd’s most likely response to the breach and hold and communication of that assessment to Ch Insp Fuller, Ch Insp Fuller submits⁷⁴⁴ that read fairly and as a whole, Officer T9’s evidence was that there was a 50:50 chance of physical confrontation, whereby physical confrontation was possible, but a view as to Todd’s precise reaction could not be formed due to Todd’s mental state.⁷⁴⁵ Nevertheless, Ch Insp Fuller agrees with Counsel Assisting that Officer T9 did not communicate that physical confrontation was the most likely outcome.

Submissions of Mark McKenzie

746. Mark agrees with Counsel Assisting’s written submissions as to the nature of the NSWPF officers’ evidence.⁷⁴⁶
747. Mark⁷⁴⁷ also agrees with Counsel Assisting’s submission regarding the weight to be given to the table at Tab 173A. He submits that the contents of the table in fact tend to

⁷⁴¹ T530.27-43 (3 April 2023).

⁷⁴² Written submissions of Superintendent Paul Fuller at [90]-[92].

⁷⁴³ Counsel Assisting’s written submissions dated 30 August 2023 at [507].

⁷⁴⁴ Written submissions of Superintendent Paul Fuller at [119]-[120].

⁷⁴⁵ Tab 78 (Certified Transcript of Interview with Officer T9) at p. 728-729.

⁷⁴⁶ Written submissions of Mark McKenzie dated 12 October 2023 at [79].

⁷⁴⁷ Written submissions of Mark McKenzie dated 12 October 2023, at [82]-[83].

demonstrate that violent confrontation is a likely outcome of a breach and hold. Excluding the incidents in which no one was located at the premises, six out of the remaining fourteen incidents resulted in violent confrontation, and only two resulted in surrender without incident and two resulted in [REDACTED]

Submissions of June Wilkins

748. In relation to Ch Insp Fuller's assessment of the risk of violent physical confrontation upon police executing a breach and hold, June submits⁷⁴⁸ that his assessment of medium to low was not from a careful consideration of the facts, but a "one size fits all" approach to a crisis.
749. In relation to the consideration Ch Insp Fuller gave to dealing with the job as a mental health job, June submits⁷⁴⁹ that Ch Insp Fuller considered the incident as a criminal matter and that his role was to control and arrest Todd.

Submissions in reply

750. In relation to the table of information regarding past instances of the use of the breach and hold tactic, Mark submits⁷⁵⁰ that his position with respect to the effectiveness of the breach and hold is not altered by the table at Tab 173-3. This information remains untested, is likely to be self-serving for the NSWPF and accordingly its evidential utility is very low.
751. June submits⁷⁵¹ that the Commissioner's submissions regarding the statistical success of breach and hold is unscientific and misleading as there is no context, key criteria or scientific basis for this data.
752. Counsel Assisting note that it is correct that their primary submissions mistakenly refer to the table at Tab 173A, not the updated table at Tab 173-3. Nonetheless, the submissions made in relation to the table at Tab 173A are maintained with respect to Tab 173-3.⁷⁵²
753. In relation to June's submission that Ch Insp Fuller's assessment of the risk of violent physical confrontation upon police executing a breach and hold, Ch Insp Fuller⁷⁵³

⁷⁴⁸ Written submissions of June Wilkins dated 13 October 2023, at [162].

⁷⁴⁹ Written submissions of June Wilkins dated 13 October 2023 at [163]-[164].

⁷⁵⁰ Written submissions in reply of Mark McKenzie dated 3 November 2023 at [20]-[23].

⁷⁵¹ Written submissions in reply of June Wilkins dated 26 October 2023 at [14].

⁷⁵² Counsel Assisting's written submissions in reply dated 10 November 2023 at [26].

⁷⁵³ Written submissions in reply of Superintendent Paul Fuller dated 24 October 2023 at [27].

submits that he did not adopt a “one size fits all approach”, but took into account a range of factors specific to the incident.

Consideration

754. As I have already stated, I place little weight on the table. I am not persuaded that the information is accurate or helps me to understand the appropriateness of the breach and hold technique on *this* occasion. What emerged from the evidence was general adherence to a culture that accepted the usefulness of breach and hold almost as a foundational doctrine. Listening to the evidence it appeared as though from the moment tactical police were called, the operation was heading relentlessly in that direction. While the pros and cons were recorded contemporaneously, no officer spoke seriously of any other alternative tactical option in oral evidence.
755. It is also clear that there was significant confusion or tension in the evidence about why it should occur. A number of themes emerged. Some suggested that its usefulness and purpose was in its ability to re-instate peaceful negotiations, some spoke of its importance to assert control and authority over Todd, others concentrated on its ability to force surrender. Similarly there was no real agreement about what the likely outcome might be. Officers such as Officer T5 thought that the breach and hold was going to lead to confrontation of a violent nature⁷⁵⁴ or of some form of contact.⁷⁵⁵ As we have seen he did not think that Todd would peacefully surrender⁷⁵⁶ He assessed the level of risk of contact as a “high risk”.⁷⁵⁷ Officer T9 thought it was probable. Others thought the risk was low or medium and focussed on their knowledge of past success with the technique. To my mind there was a lack of critical thinking involved in such an important decision and a failure to think through and weigh up the likely consequences.
756. To my mind, the evidence reveals that there was an inevitability to the breach and hold once it appeared NSWPF were not making progress with their negotiations. It was just a matter of when it would occur. No other tactical response seems to have been given real consideration. I accept that some police genuinely believed the breach and hold could subdue or force Todd to surrender, but idea that it would ever have [REDACTED] [REDACTED] appears to me to be entirely fanciful.

⁷⁵⁴ T621.36-42 (4 April 2023).

⁷⁵⁵ T660.15-21 (4 April 2023).

⁷⁵⁶ T661.19 (4 April 2023).

⁷⁵⁷ T660.15-21 (4 April 2023).

b. Evidence of persons outside the NSWPF

Submissions of Counsel Assisting

757. Counsel Assisting⁷⁵⁸ submit that those outside the NSWPF have a different perspective as to the appropriateness of the breach and hold.

Evidence of Dr Eagle

1. How to establish rapport with Todd

758. Counsel Assisting observe that Dr Eagle has a different view from police as to how best to facilitate rapport with Todd. She considers that the police response generally was not conducive to establishing the sort of rapport with Todd that would have been required to [REDACTED]. In particular, in answering the question as to the effects that the events since 1.18pm had on Todd's mental state (which included events prior to the tactical response and the effect of former Sen Cst Larrain's interactions with Todd), Dr Eagle said:

“Mr McKenzie was also surrounded by police in his home. His home was his sanctuary and safe space, an area he retreated to when he felt fearful. Police officers also appeared to be interacting with him from different points around the house in response to his verbal outbursts. The situation would likely have made Mr McKenzie feel trapped, increasing his fearfulness and heightening his persecutory beliefs.”⁷⁵⁹

759. Dr Eagle accepted that, for a person suffering schizophrenia, a home might provide a place of solace. She opined that it was common for people who have persecutory delusions to experience persecutory delusions about persons entering their home. This is because they seek out a place that they see as safe and because it is common for persons who suffer from persecutory delusions to isolate, meaning that their homes “become a huge part of their day-to-day world”.⁷⁶⁰

760. In particular, Dr Eagle did not regard Todd's paranoia regarding people entering his home as a reason to move him from that home. As Dr Eagle has explained, the house itself was not the source of that paranoia.⁷⁶¹

761. Consistently with that opinion, in her oral evidence, Dr Eagle observes people respond innately to a caring approach.⁷⁶² She suggests that this is the approach that ought to

⁷⁵⁸ Counsel Assisting's written submissions dated 30 August 2023 at [511]-[529].

⁷⁵⁹ Tab 11C (Expert report of Dr Kerri Eagle) at p. 37.

⁷⁶⁰ T1602.42-43 (20 June 2023).

⁷⁶¹ T1632.5-6 (20 June 2023).

⁷⁶² T1583.13-14 (20 June 2023).

have been conducted (including offering Todd food or support). She further suggests that this would be more likely to cause a mentally unwell person to feel as though she or he could trust the person speaking with them and is more likely to lead to engagement.⁷⁶³

762. I accept her opinions on this matter and note they were unchallenged by other expert psychiatric advice. Unfortunately, the interaction got off on the wrong foot and very soon after police surrounded the home, Todd emerged full of rage. A gun was pointed directly at him. It would have taken enormous skill to bring it back from that point, but it was not impossible.

2. Whether it was necessary to “control” Todd

763. Counsel Assisting note that Dr Eagle does not share police’s view that control was more important than providing this sort of caring approach. In her oral evidence, Dr Eagle suggested that the police emphasis on the need to assert control was inconsistent with an approach that ought to have been taken (which was to deal with the incident on 31 July 2019 as a mental health incident suitably informed by input from a consultant psychiatrist). Dr Eagle said:

“Like I understand that police are, you know, they’re professionals and they want to - they have an image and they need to show the community that they’re the ones that are responsible for law enforcement, and it must be very difficult for them when someone is resisting arrest, but this in my mind was a mental health incident number one [and] primarily....”⁷⁶⁴

764. In any event, Dr Eagle did not consider that Todd felt in control. She did not think that Todd going and making himself a meal, playing drums, and rapping was evidence that he felt comfortable and in control, stating:

“I think ... [the behaviours referred to by Mr Fuller are] consistent with someone who’s very much disorganised and irrational and operating in the throes of a distorted reality. I think it’s actually unusual for a person to go off and make a meal when they’re surrounded by police if you didn’t have a mental illness. So, I think that it’s all part of the picture of a person who was very unwell at the time, actually. I don’t think he was in control and calling the shots. I think that’s a perception.”⁷⁶⁵

⁷⁶³ T1583.15-16 (20 June 2023).

⁷⁶⁴ T1494.17-22 (16 June 2023).

⁷⁶⁵ T1640.1-6 (20 June 2023).

765. Similarly, Dr Eagle did not regard Todd's reference to guns being disarmed as suggesting that Todd felt in control. Rather, she thought this suggested that Todd felt threatened.⁷⁶⁶

766. I accept Dr Eagle's specific evidence on this point. It was an odd characterisation of Todd's behaviour to suggest he was "in control." Having reviewed the BWV footage and read the involved officers' accounts Todd appears to me threatened and frightened.

3. Dr Eagle's assessment of Todd's level of impairment on 31 July 2019

767. Dr Eagle is also of the opinion that Todd lacked the ability to respond rationally. She opines that Todd would have been affected by delusions throughout the entire course of the police operation on 31 July 2019.⁷⁶⁷ Dr Eagle also says that Todd would have lacked the ability to understand directions.⁷⁶⁸ Dr Eagle does not think that Todd ever shifted throughout the course of the day (although at times, it was possible that Todd could be composed if he was feeling safe or more relaxed, making it harder to pick up on the signs).

768. In particular, Dr Eagle does not consider Todd's ability to spontaneously come up with what are described as impressive rap lyrics or his considerable musical ability⁷⁶⁹ as meaning that he had the capability of understanding who police were and to comply with directions given to him. Dr Eagle notes that these abilities are in a different part of the brain.⁷⁷⁰ Dr Eagle makes similar observations in respect of her opinion that Todd could recognise sarcasm, noting that the ability to pick up on tone was one of the last things to be removed by a severe psychosis.⁷⁷¹

769. Dr Eagle did slightly qualify her opinion by accepting that Todd might, at some points, have been able to understand that he was surrounded by police. However, she added that:

"[Todd's]... interpretation of what was occurring would have been influenced by his belief that he was involved in a war, that they were potentially insurgents, that they weren't really police, and that might have fluctuated, he might have thought 'Oh, they're police but they're coming to get me as part of a bigger war', or he might have thought that they're not really police, they're actually terrorists. In fact, there's evidence that

⁷⁶⁶ T1639.35 (20 June 2023).

⁷⁶⁷ T1567 (20 June 2023).

⁷⁶⁸ T1578 (20 June 2023).

⁷⁶⁹ T799.33-8 (6 April 2023); T854.40-3 (6 April 2023).

⁷⁷⁰ T1637.50 – T1638.1 (20 June 2023).

⁷⁷¹ T1637.46 – T1638.4 (20 June 2023).

that's what was occurring, so he's trying to make sense of what's going on through the lens of a very distorted perspective, and it's distorted by his illness."⁷⁷²

770. Similarly, in Dr Eagle's view, whilst Todd may have had some understanding of the roles of police (as evidenced by his description of Primary Negotiator as a "fuckhead negotiator"),⁷⁷³ he also would have incorporated this into his delusions.

771. Her evidence was unchallenged by other expert opinion and I accept it.

4. Dr Eagle's suggested alternatives to conducting a breach and hold

772. Dr Eagle has suggested a number of alternatives to conducting the breach and hold. I consider that aspect of Dr Eagle's report at a later point in these findings.

Evidence of Mr Perry

773. Mr Perry is critical of the decision to conduct a breach and hold. He says:

"Taking all the available intelligence into consideration, especially Todd McKenzie's behaviour and language on the afternoon of the incident, it is difficult to escape the conclusion that he would confront police officers if and when they entered his house."⁷⁷⁴

774. Mr Perry agrees with Officer T9's assessment of confrontation⁷⁷⁵ as being probable.⁷⁷⁶ In his oral evidence, Mr Perry stood by this evidence, describing Officer T9's assessment of confrontation as being "probable" as "on the mark".⁷⁷⁷

775. Mr Perry also gave evidence about the limitations of each of the less lethal options available to police on 31 July 2019.

776. In my view Mr Perry's assessment that confrontation was "probable" is extremely measured. My own view, taking into account the totality of the evidence, is that it was almost assured.

Evidence of members of Todd's family

777. Todd's father, Mark, had a different perspective from the tactical police as to Todd's most likely reaction to the breach and hold.

⁷⁷² T1618.33-40 (20 June 2023).

⁷⁷³ T251.35-37 (29 March 2023).

⁷⁷⁴ Tab 11E (Expert report of Nick Perry) at p. 41.

⁷⁷⁵ Mr Perry is understood to be referring to the possibility of violent physical confrontation.

⁷⁷⁶ Tab 11E (Expert report of Nick Perry) at p. 59.

⁷⁷⁷ T1670.33-34 (21 June 2023).

778. Mark gave this evidence: “all ...[Todd] had to do was open the door, and with that calm voice, he could’ve sorted out whatever the misunderstanding was because my son is no killer. He’s not.”⁷⁷⁸

779. Mark is of the view that there was a risk of confrontation, saying that, from Todd’s viewpoint, it would have seemed as though he was being “terrorised”⁷⁷⁹ because he was in his house “with the idea that he’s really done nothing wrong.”⁷⁸⁰

Submissions of Mark McKenzie

780. Mark⁷⁸¹ agrees with Counsel Assisting’s submissions as to the evidence of Dr Eagle, Mr Perry and Todd’s family.

Submissions of June Wilkins

781. June agrees⁷⁸² with Counsel Assisting’s submissions regarding Dr Eagle’s report.

Consideration

782. Having reviewed the police evidence in some detail, I am not persuaded that Deliberate Action was appropriate, certainly not at the time it commenced.

c. The risk of violent physical confrontation from a breach and hold

Submissions of Counsel Assisting

783. Counsel Assisting⁷⁸³ submit that the Court would find that the most likely response of Todd to the breach and hold was to engage in violent confrontation. Counsel Assisting submit that the Court would prefer the view that this was the opinion of Officer T9. This accords with the opinion of Mr Perry, set out above. It is submitted that this aspect of Mr Perry’s evidence would be accepted.

784. Alternatively, even if violent physical confrontation was not the most likely outcome, Counsel Assisting submit that the Court would find that it was sufficiently likely that the possibility of a violent physical confrontation ought to have caused serious reservations about the appropriateness of that strategy.

⁷⁷⁸ T1478.27-29 (16 June 2023).

⁷⁷⁹ T1468.43 (16 June 2023).

⁷⁸⁰ T1469.17 (16 June 2023).

⁷⁸¹ Written submissions of Mark McKenzie dated 12 October 2023 at [80].

⁷⁸² Written submissions of June Wilkins dated 13 October 2023 at [160].

⁷⁸³ Counsel Assisting’s written submissions dated 30 August 2023 at [530]-[543].

785. These of course are judgments made in retrospect. Counsel Assisting note that the Court should be mindful of the effects of hindsight bias. Even making due allowance for hindsight bias, it is submitted that it ought to have been apparent that a breach and hold was likely to provoke violent physical confrontation.

The nature of Todd's mental illness

786. It might readily be accepted that a person who was not mentally unwell might well respond to heavily armed and intimidatingly clothed police knocking down his or her front door and smashing his or her window by either surrendering or retreating. Either is certainly a rational response to overwhelming force. However, Todd was profoundly mentally unwell and incapable of acting rationally on 31 July 2019. The apparent assumption on the part of police that Todd would make the rational decision of surrendering or retreating was misconceived.

787. In particular, as already noted, Dr Eagle says that Todd was affected by delusions (at varying levels of intensity) throughout the entirety of the operation. It may be doubted that Todd had the capacity to respond in a rational way to the overwhelming force police had brought to bear on him.

788. In particular, there are two aspects of Todd's delusional beliefs which may be thought to have predisposed him towards responding violently.

789. First, the fact that a reported focus of Todd's paranoia was people entering his home and policing and military themes gave rise for the real potential for the armed tactical police who had knocked down Todd's front door and smashed in his front window to be incorporated into his delusions. As noted, this was thought by Fourth Person to have been a potential trigger for the day's events.⁷⁸⁴ In particular, during her evidence, Fourth Person accepted that, by her reference to a "trigger", she was concerned that the delusions that Todd was suffering from regarding the potential that people had been inside his house may have necessitated police involvement.

790. Secondly, Todd's delusional belief that the weapons had been "disarmed" may have meant that he may have, mistakenly, believed that police had no capacity to cause him harm.

791. There is an element of hindsight judgment involved in the question of the extent to which Todd's mental illness contributed to his violent reaction to the breach and hold. However, Counsel Assisting state that it is a matter on which a police consultant

⁷⁸⁴ T321.38 (30 March 2023).

psychiatrist could have offered assistance to police responsible for making these assessments in real time.

792. Therefore, to the extent that Ch Insp Fuller relied on a supposed rational action by Todd to retreat earlier in the day (when Sen Cst Stewart had drawn his firearm), Counsel Assisting submit that that reliance was misconceived. This view requires acceptance of the proposition that Todd had sufficient awareness of who police were, the reasons for their attendance, and of the fact that police had the means to subdue (or even, sadly, kill) him if he did not respond to their directions. It also ignores Todd's delusional belief that the police weapons were disarmed.
793. It is acknowledged that one aspect of Mr Perry's evidence appears to support the reliance Ch Insp Fuller placed on Todd's behaviour when Sen Cst Stewart had drawn the firearm. In particular, Mr Perry thinks that Todd acted in a calculated way to avoid being incapacitated by the Taser which Sen Cst Harris had drawn.⁷⁸⁵ Mr Perry is also of the view that Todd putting on a jacket and sunglasses showed a measure of tactical appreciation.⁷⁸⁶ Officer T10 is critical of that aspect of Mr Perry's report, commenting that this aspect of Mr Perry's report involves a "fair leap".⁷⁸⁷ Counsel Assisting submit that Officer T10's evidence on that point should be accepted (and Mr Perry's rejected). In light of Dr Eagle's evidence, it is clear that Todd continued to see the involvement of police through the prism of his delusions.

Todd's reactions to opening of the back window and the placing of the ladder next to his bedroom window earlier in the day

794. Both Todd's reaction to police opening his window earlier and to police placing the ladder in order to look into his bedrooms in the day ought also to have provided police with an indication as to how he would react when police took the (more drastic) action of knocking in his front door and smashing his front window.
795. As earlier noted at around 8.17pm, Todd's window was propped open by tactical police. This is at the window where Fourth Person felt that she may momentarily have been able to engage Todd (the back window by the driveway).⁷⁸⁸ Fourth Person cannot recall whether tactical police had propped open the window before or after she had her momentary engagement with Todd. However, she describes Todd attempting to slam

⁷⁸⁵ T1668.24-39 (21 June 2023).

⁷⁸⁶ Tab 11E (Expert report of Nick Perry) at p. 38.

⁷⁸⁷ T1043.10 (18 April 2023).

⁷⁸⁸ Tab 343 (Command Guidelines – Counter Terrorism & Special Tactics Command).

the window shut and some “fluffing around” as Todd attempted to remove the prop.⁷⁸⁹ Fourth Person also describes Todd slamming and opening windows a number of times.⁷⁹⁰

796. The contemporaneous notes of Negotiation Team Leader record that Todd was “not happy with this” and reacted “angrily”. He ceased conversing.⁷⁹¹
797. The fact that Todd reacted angrily to the window being opened suggests that he would also react angrily to police smashing a window or a door in.
798. At 8.48pm, Todd reacted to the ladder being placed to enable a view into his bedroom window by pushing that ladder away and slamming the window shut. This further suggested that he was concerned to prevent police from entering his premises.

Submissions of the Commissioner

799. The Commissioner⁷⁹² submits that the focus on Todd’s paranoia of people entering his home⁷⁹³ is distorted by hindsight bias. The Commissioner asserts that the assessment of Todd’s thought processes during the incident is problematic as it unduly elevates certain explanations for his conduct over others.
800. The Commissioner disagrees with Counsel Assisting’s argument that due to Todd’s paranoia of people entering his home, a breach and hold should not have been conducted. The Commissioner reasons that Todd had previously allowed other people onto his premises for the supply of drugs; that he had often called police to attend his property when he had concerns of other people entering his home (the NSWPF were often seen as the solution rather than the problem); that there was expected to be a greater degree of barricading to prevent police from entering;⁷⁹⁴ that there is an argument for extricating Todd from his home due to the nature of his delusions; and that there were potential reasons for his potential paranoia other than people entering his home.⁷⁹⁵

⁷⁸⁹ T344.22 (30 March 2023).

⁷⁹⁰ T345.12 (30 March 2023).

⁷⁹¹ Tab 88 (Certified Transcript of Interview with [Negotiation Team Leader] at p. 1989.

⁷⁹² Written submissions of the Commissioner dated 13 October 2023 at [129]-[145], [171].

⁷⁹³ Counsel Assisting’s written submissions dated 30 August 2023 at [14].

⁷⁹⁴ Officer T10’s evidence on this front is summarised at [605] and [615] of Counsel Assisting’s written submissions dated 30 August 2023. See also T1055 (18 April 2023).

⁷⁹⁵ Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence)) at p. 2144; Tab 144 (Statement of Shandelle Smyth (6 Robertson St)) at [17]; Tab 89 (Statement of Secondary Negotiator) at [46], [47] and [53]; Gregory Knight, Report to the Coroner dated 3 April 2023.

801. The Commissioner submit that deploying the breach and hold was to [REDACTED] rather than confrontation. Other outcomes such as retreat, barricading, surrender or changing the status quo were also possible. The NSWPF is adept at dealing with people who are not amenable to police entering their home to effect an arrest.⁷⁹⁶
802. The evidence suggests that Todd did not have any history of being violent or confrontational towards police.⁷⁹⁷ Both June and Mark have stated that Todd did not have any issues with interacting with police.⁷⁹⁸ The Commissioner further submits that the NSWPF officers were entitled to take into account intelligence regarding Todd's previous incidents of evading police.⁷⁹⁹
803. The Commissioner suggests that the arguments against the use of breach and hold are problematic in other respects. For example, Dr Eagle was of the view that Todd had a belief that he needed to defend himself despite stating that the police's "guns had been disarmed".⁸⁰⁰ There is also a conflict in Mr Perry's analysis that Todd would "probably" retreat when he first became aware that Sen Cst Harris was attempting to use a taser, while also opining that confrontation would occur if breach and hold is deployed.⁸⁰¹
804. In relation to Todd becoming unhappy and/or angry after the window was opened or had pushed the ladder away later in the evening, the Commissioner submits that pointing to those matters to suggest that the breach and hold was an erroneous strategy proceeds on an incorrect premise. It suggests these were the only times Todd was angry, when that was not the case. According to the Commissioner, Counsel Assisting's emphasis on some actions rather than others is redolent with hindsight bias.

Submissions of Ch Insp Fuller

805. Ch Insp Fuller submits⁸⁰² that Counsel Assisting's submissions at [533] that "The apparent assumption on the part of police that Todd would make the rational decision

⁷⁹⁶ See, eg, T1042 (18 April 2023) ; T891.0-11 (6 April 2023).

⁷⁹⁷ Tab 115 (Profile of Mr McKenzie - Version 1 (Real Time Intelligence)); Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence)) at p. 2144.

⁷⁹⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 72; Tab 90 (Statement of Fourth Person), at [14]; T1475.19; T1475.39 (16 June 2023).

⁷⁹⁹ Tab 116 (Profile of Mr McKenzie - Version 2 (Real Time Intelligence)) at p. 2144.

⁸⁰⁰ Eg, Tab 11E (Expert report of Nick Perry) at p. 41.

⁸⁰¹ Tab 11E (Expert report of Nick Perry) at p. 37, 59.

⁸⁰² Written submissions of Superintendent Paul Fuller at [101]-[109], [115].

of surrendering or retreating was misconceived”, would not be accepted. In his submission, the evidence does not demonstrate either:

- a. CI Fuller proceeded on the “apparent assumption” that Todd “would” surrender or retreat; nor
- b. to the extent surrender or retreat were identified as possible outcomes, such a consideration was “misconceived”.

806. Ch Insp Fuller addresses Counsel Assisting’s submission regarding reliance on a supposed rational action by Todd to retreat earlier in the day when Sen Cst Stewart drew his firearm as being misconceived. He accepted, after viewing the BWV footage of this exchange at cross-examination, that it was not as clear that Todd had been acting rationally.⁸⁰³ However, Ch Insp Fuller submits that neither the BWV footage nor transcript of that exchange was available to him at the time.

807. Further, Todd’s irrational comments relating to police firearms being disarmed does not detract from his overall response in the exchange, whereby he did not advance on police despite believing they were disarmed. Ch Insp Fuller asserts that Counsel Assisting’s submission regarding this comment⁸⁰⁴ overstates the evidence. Todd only believed that the guns were disarmed and it was possible that Todd stopped believing that the firearms were disarmed at a later point. Ch Insp Fuller also highlights Mr Perry’s evidence that, upon viewing the BWV footage and transcript, Todd was acting with a degree of rationality when retreating from a taser.⁸⁰⁵

808. Accordingly, Ch Insp Fuller submits that it was not irrational for him to give weight to Todd’s retreat in assessing his possible response to a breach and hold. Reliance on that retreat by Todd as a consideration is not “misconceived”. Ch Insp Fuller submits that in this respect Counsel Assisting’s submission is affected by an unacceptable level of hindsight bias.

809. In relation to the matter of the report focus of Todd’s paranoia being people entering his home, Ch Insp Fuller submits that it is understandable that this information was missed by Forward Command on the day due to the way in which information was received during the events of the siege.⁸⁰⁶

⁸⁰³ T577.18-19 (3 April 2023).

⁸⁰⁴ Counsel Assisting’s written submissions dated 30 August 2023 at [537], [620].

⁸⁰⁵ T1668.14-44; T1689.34 – 1690.7 (21 June 2023).

⁸⁰⁶ T1669.46 – 1670.10 (21 June 2023).

Submissions of Mark McKenzie

810. Mark⁸⁰⁷ agrees with Counsel Assisting's submissions that a breach and hold posed an unacceptable high risk of physical violence given Todd's condition and Todd did not have the capacity to respond in any rational way to the overwhelming force police had brought to bear on him.

Submissions in reply

811. In reply, Counsel Assisting⁸⁰⁸ address the Commissioner's submission that the focus during the inquest on Todd having a longstanding, recurrent or particular paranoia about people going into his house is a good example of the distorting effects of hindsight bias at play.⁸⁰⁹ That submission is developed on the basis of an argument that "*it is simply assumed [by Counsel Assisting] that the complaints Todd made about people trespassing or interfering with his property are without merit and a product of his delusions*" and that "*may not be the case*".⁸¹⁰
812. Counsel Assisting observe that the submissions made on behalf of the Commissioner miss the point. Whether Todd's concerns and fears around people entering his house without permission were real or the product of his delusions, it remains the case that it was a particular area of sensitivity and concern for him. Given Todd's history of reporting incidents of people breaking into his house or smashing windows to police on prior occasions⁸¹¹ and Todd's severe psychotic symptoms on 31 July 2019, there was good reason to believe that he would respond badly to police smashing a window and breaking open his door.

Consideration

813. As will already be clear, in my view the breach and hold strategy held an extremely high risk of violent catastrophe. Inadequate attention was given to Todd's fears around people entering his house without permission. I have considered the Commissioner's submission that a focus on Todd's paranoia of people entering his home is an example of hindsight bias, but I do not accept it. I note her submission that Todd did not have a history of prior confrontations with police and that he apparently "retreated" when earlier threatened with a taser. These are undoubtedly matters that should have been

⁸⁰⁷ Written submissions of Mark McKenzie dated 12 October 2023 at [81].

⁸⁰⁸ Reply submissions of Counsel Assisting dated 10 November 2023 at [38]-[39].

⁸⁰⁹ Written submissions of the Commissioner dated 13 October 2023 at [129].

⁸¹⁰ Written submissions of the Commissioner dated 13 October 2023 at [132].

⁸¹¹ See Exhibit 3, E16094632, at pp. 41 – 45, E38050801, at pp. 98 – 101 and E28648368 at pp. 74 – 78.

considered. Nevertheless, I accept Counsel Assisting's view that there is clear evidence that Todd's fear of people entering his home was a *particular* area of sensitivity and concern for him. Given Todd's history of reporting incidents of people breaking into his house or smashing windows to police on prior occasions⁸¹² and Todd's severe psychotic symptoms on 31 July 2019, there was good reason to believe that he would respond badly to police smashing a window and breaking open his door. I fail to see how anyone could think the breach and hold was likely to trigger calm negotiation.

814. I am satisfied that it was a strategy most likely to end disastrously either for Todd or police or both.

d. The risks that the less lethal options would be ineffective

Submissions of Counsel Assisting

815. Counsel Assisting submit⁸¹³ that violence and physical confrontation was a real risk of the breach and hold. That risk was compounded by a number of the specific features about the job on 31 July 2019.

[Lack of appreciation of what was behind the doorway](#)

816. Counsel Assisting note that one risk inherent in the breach and hold strategy was that the tactical operatives had only an imperfect knowledge of the area behind the front door⁸¹⁴ (though all of the officers appreciated that the area behind the door was likely to be small).⁸¹⁵ Whilst a crude mud map had become available through the Department of Housing,⁸¹⁶ that map lacked the sort of detail which enabled meaningful planning for the deployment of less lethal options in the event that the breach and hold precipitated violent physical confrontation.
817. Counsel Assisting submit that this was significant because, if the breach and hold were to result in violent confrontation, that confrontation might be expected to occur in or near the front door. The officers involved in the implementation of the breach and hold had no way of knowing whether the physical layout of the room was conducive to the deployment of the less lethal options they had available.

⁸¹² See Exhibit 3, E16094632, at pp. 41 – 45, E38050801, at pp. 98 – 101 and E28648368 at pp. 74 – 78.

⁸¹³ Counsel Assisting's written submissions dated 30 August 2023 at [544]-[581].

⁸¹⁴ T619 (4 April 2023); T656 (4 April 2023) (Officer T5); T1243 (14 June 2023) (Officer T9).

⁸¹⁵ See, e.g., T1375 (15 June 2023).

⁸¹⁶ T1377 (15 June 2023); Tab 216 (iSurv Log), at p. 1769.

818. It is acknowledged that part of the rationale of the breach and hold was to permit the operatives to see into the premises – the objective itself illustrates a potential risk with that tactical option.

The size of Todd's premises

819. Counsel Assisting submit that a further risk inherent in the breach and hold strategy was that the area behind the front door and the enclosed balcony or verandah outside the front door were too small to permit the effective deployment of a number of the less lethal options.

820. The estimated distance from the kitchen behind the living area behind the front door was around four metres.⁸¹⁷

The available space was less than the optimum distance for a knife job

821. In his interview, Officer T1 gave evidence that, in a knife job, a distance of seven metres is desirable. This is consistent with the so called “Tueller Rule”, a United States Model which posits that, as a guide, a distance of 21 feet (approximately 6.4 metres) should be given to the speed by which a subject of an operation can close that gap (estimated to be 1.5 seconds).⁸¹⁸

822. In his oral evidence, Officer T1 stood by this evidence. He stated “anything under that [seven metre distance] usually someone is going to get injured”.⁸¹⁹ Officer T1 did subsequently attempt to clarify this quite emphatic statement by adding that he was referring to a risk of injury in a “sterile area” being an area where there were no trip hazards or barriers. However, for reasons previously noted, on 31 July 2019, tactical police had no way of knowing the area behind the door was such a “sterile area”.

823. Officer T5 was aware that it was desirable to keep a seven-metre distance with a subject who was in possession of a knife. He said, however, that the seven metres was “an ideal” and it was necessary for the tactical officers “to work with what we have.”⁸²⁰ Officer T2 was not aware of a specific rule regarding seven metres.⁸²¹

824. Counsel Assisting submit that the reason why it is desirable to keep a seven-metre gap is plain. If a person holding a knife closes the gap on an officer it means that the officer will need to turn to a lethal option to protect his or her own safety. This means

⁸¹⁷ Tab 125A (Statement of Detective Sergeant Shane Guymer) at p. 1523.

⁸¹⁸ Tab 11E (Expert report of Nick Perry), at p. 64.

⁸¹⁹ T794.22 (6 April 2023).

⁸²⁰ T620.17 (4 April 2023).

⁸²¹ T1376 (15 June 2023).

that, at anything less than 6.4 metres, an officer would have less than 1.5 seconds to consider whether it is necessary to deploy lethal force. If nothing else, that increases the risk of injury.

The limited space available may have reduced the effectiveness of the Taser

825. Counsel Assisting note that both Mr Perry and Sgt Watt agreed that a stand-off distance of between two to seven metres was the optimal distance to deploy a Taser.⁸²²
826. Sgt Watt accepted that with the angle of the window, a Taser would be deployed (such as Officer T1 attempted to do) on Todd from somewhere between the 1.5 to 4 metre mark.⁸²³ Sgt Watt further accepted the proposition that depending on how quickly the Taser could be deployed, the distance from the kitchen to the door was such that it was possible that by the time the Taser was deployed, Todd would be beyond what is regarded as the optimal range for the Taser to have effect.⁸²⁴
827. A number of the relevantly involved officers raised (or were led) to the possibility of performing a dry or press stun, a manoeuvre which involves pressing the Tasers directly into the body of the subject as a fall back in the event that the Taser fails to achieve incapacitation from a distance.⁸²⁵ Sgt Watt agreed with the proposition that it meant that a Taser “can be effective right up to the point of hand to hand combat”.⁸²⁶
828. Mr Perry, however, gave evidence to the effect that a drive stun would not be an ideal option as “you’re gonna be hard up against the person who you’re using it against”. He said that he would not be using that option in a situation as with Todd.⁸²⁷

829. Officer T1 gave evidence in his interview that the [REDACTED]
[REDACTED]²⁸ Officer T1 accepted that this was the minimum safe distance.⁸²⁹ Officer T5 considered this to be a “consideration”.⁸³⁰ Officer T2 was aware of this as well.⁸³¹

⁸²² Tab 11E (Expert report of Nick Perry), p. 53; Tab 270-1 (Second statement of Sergeant Watt).

⁸²³ T1524.6-8 (19 June 2023).

⁸²⁴ T1524.14-16 (19 June 2023).

⁸²⁵ T676 (4 April 2023) (Officer T5); T822 (6 April 2023) (Officer T1); T1215 (20 April 2023) (Officer T9).

⁸²⁶ T1557 – T1558 (19 June 2023).

⁸²⁷ T1708.47-49 (21 June 2023).

⁸²⁸ Tab 79 (Certified Transcript of Interview with Officer T5) at p. 227.

⁸²⁹ T797.20 (6 April 2023).

⁸³⁰ T624.11 (4 April 2023).

⁸³¹ T1378 (15 June 2023).

830. The [REDACTED] to Todd. Indeed, on Officer T1's evidence, the first time a beanbag round was discharged from approximately two metres away⁸³² and Officer T3 deployed the beanbag "pretty much from point blank".⁸³³ Officer T7 also discharged his bean bag from the front window.
831. Whilst Officer T5 has given evidence that the initial plan called for Officer T3 to deploy the beanbag rounds from a point further down the stairs⁸³⁴ which Officer T5 thinks would have been greater than a seven metre distance,⁸³⁵ the preponderance of the evidence suggests that Officer T3 was right by the door when he discharged the beanbag.⁸³⁶ Bearing in mind that the breach and hold contemplated Officer T4 being in the doorway with a shield (to prevent Todd from getting outside), it is hard to see how Officer T3 could have discharged his firearm from the bottom of the stairs without striking Officer T4.
832. Similarly, Officer T1 described a plan to discharge the bean bags at Todd's extremities,⁸³⁷ however, the reality of the situation was that the ammunition was discharged from much closer.
833. Counsel Assisting submit that the size of Todd's premises meant that super-socks were not a realistic (or at least a realistic less lethal) option to subdue Todd.

The limited space available reduced the potential effectiveness of the OC spray

834. Similarly, the tactical operatives were aware there was a potential for the spray to take some period to become effective.⁸³⁸ Whilst Officer T1 described his experience with OC spray as "fairly instantaneous", by that he meant probably a "couple of seconds".⁸³⁹
835. Counsel Assisting observe that the small area raised the potential that Todd would approach the officers before the spray had an opportunity to take effect. Officer T5 was conscious of this possibility but did not think it was a problem because the tactical

⁸³² T877.25 (6 April 2023).

⁸³³ T843.46 (6 April 2023).

⁸³⁴ T620.43-46 (4 April 2023).

⁸³⁵ The evidence is that super-socks are lethal from 10 metres, so the significance Officer T5 has attributed to 7 metres is not clear. It is possible that Officer T5 had mixed up the distance at which super-socks could be fatal (10 metres) with the 7 metre distance of the Tuller Rule.

⁸³⁶ See, e.g., Tab 81 (Certified Transcript of Interview with Officer T4), at p. 1581 [Q154].

⁸³⁷ T829.30-1 (6 April 2023).

⁸³⁸ T622 (4 April 2023) (Officer T5); T1379 (15 June 2023) (Officer T2).

⁸³⁹ T830.30 (6 April 2023).

officers had access inside and were separated from him.⁸⁴⁰ This is understood to be a reference to the shield that Officer T4 was deploying in the doorway.

The potential interaction between the mesh gloves and the Taser

836. A further less lethal option was the metal gloves, which when used in conjunction with the shield would permit officers to seize the knife from Todd. Officer T1 noted that because the gloves were metal, this had the potential to interact with the use of the Taser. Once again, Officer T1 was very confident that their training would suffice to allow operatives to overcome that difficulty in the event that Tasers needed to be used. He talked about getting the shield bearer on top of the person. Counsel Assisting submit that, once again, however, there was no real consideration as to how this strategy could be deployed in the small area either behind or outside the door. That give rise to a possibility that the Taser would have to be deployed in close vicinity to the glove wearer.

The clothing that Todd was wearing

837. At some point during the operation (whilst he was still in the Alpha team), Officer T2 noted that Todd had [REDACTED]⁸⁴¹ This matter was of concern to Officer T1 as [REDACTED] Officer T1 also said that it meant that operatives would have to come a lot closer due to the [REDACTED]⁸⁴² Officer T1 said that potential impacts to the effectiveness of the Taser was a matter discussed between Officers T9, T5, and T2.⁸⁴³ Officer T1 remained “very confident”, however, that the Taser was an option. This was because of “the combination of all the less lethal tactics and the team tactics that we’d employ”.⁸⁴⁴

838. Officer T5 recalled this in his interview and raised a concern about the effectiveness of the Tasers.⁸⁴⁵ In his oral evidence, whilst his recollection was not good, Officer T5 said that he felt that this would have been discussed and that this was a “consideration”.⁸⁴⁶

⁸⁴⁰ T622.41 (4 April 2023).

⁸⁴¹ T1366.10 (15 June 2023).

⁸⁴² T821.41 (6 April 2023).

⁸⁴³ T821.32-3 (6 April 2023).

⁸⁴⁴ T821.49-50 (6 April 2023).

⁸⁴⁵ Tab 79 (Certified Transcript of Interview with Officer T5) at p. 808 [A249].

⁸⁴⁶ T624.11 (4 April 2023).

839. Mr Perry attributes a particular significance to this. He describes the [REDACTED] [REDACTED] (as well as Todd putting on sunglasses)⁸⁴⁷ as counter-measures which Todd had taken to defeat the tactical options sought to be deployed against him.⁸⁴⁸ Mr Perry goes so far as to suggest that “if Chief Inspector Fuller was aware of those factors when he was making the decision about the breach and hold, I hazard a guess that he’d be probably having second guesses about - well, second thoughts about initiating it.”⁸⁴⁹ As noted above, Counsel Assisting submit that Mr Perry’s opinion that Todd had acted deliberately to defeat the tactical options would not be accepted. However, that does not alter the fact that, as Mr Perry had observed, a number of the tactical officers had identified it as a risk with conducting a breach and hold.

840. Against this, Officer T10 gave evidence that he would only start to become concerned if a person was starting to put on [REDACTED]
[REDACTED]

841. Counsel Assisting note that Todd’s level of psychosis raised the potential that OC spray would not be effective.

842. In his statement, Sgt Watt notes that the effectiveness of OC spray depends on, amongst other things, [REDACTED]
[REDACTED]
[REDACTED] The latter is consistent with the fact that [REDACTED]
[REDACTED] in the Tactical Operations Model.⁸⁵² In his oral evidence, Sgt Watt stood by this evidence⁸⁵³ stating that whilst the OC spray would “almost inevitably” have an effect because it is “highly irritating”, it may not be enough to bring the subject under control.⁸⁵⁴

843. Contrary to Sgt Watt’s evidence, Officer T1 had not noticed any difference in the response of persons who were psychotic to OC spray.⁸⁵⁵

⁸⁴⁷ The fact that Todd had been wearing sunglasses may be put to one side because the evidence is that Todd was not wearing the sunglasses at the time when the breach and hold was effected: see T1366.33 (15 June 2023) (Officer T2).

⁸⁴⁸ Tab 11E (Expert report of Nick Perry), at p. 62.

⁸⁴⁹ T1709.26-29 (21 June 2023).

⁸⁵⁰ T1043.38 (18 April 2023).

⁸⁵¹ Tab 270 (Statement of Sergeant Watt) at [14].

⁸⁵² Tab 270 (Statement of Sergeant Watt).

⁸⁵³ T1519.14-16 (19 June 2023).

⁸⁵⁴ T1520.11 (19 June 2023).

⁸⁵⁵ T835.6 (6 April 2023).

844. Officer T9 was aware of the possibility that [REDACTED] but felt that the other less lethal options would be effective to subdue Todd.⁸⁵⁶

Conclusion to Counsel Assisting's submissions

845. Counsel Assisting submit that the truism that less lethal options would not always be effective to subdue a person would be accepted. So too would the proposition that it is not always possible for police to exercise less lethal options in ideal or optimal circumstances. It would also be accepted that police had a variety of less lethal options available to them on 31 July 2019.

846. None of these matters are, however, to the point. What is relevant is that there were indications, known to a number of the tactical police, that a number of the less lethal options available may not be effective to subdue Todd in the circumstances that confronted police on 31 July 2019. The failure of each brought the potential use of lethal force a step closer – a proposition accepted (at least, “theoretically”) by Sgt Watt.⁸⁵⁷ This increased the likelihood that police would need to deploy lethal force

847. It is important to appreciate that, on 31 July 2019, police were engaged in a Deliberate Action. By definition, this meant that the decision to effect the breach and hold was a proactive decision made by police. In other words, police held the initiative. This gave police the opportunity to assess the risks of the proposed action prior to implementing it.

848. This stands in contrast to general duties police or police responding in an Emergency Action. It may be accepted that, in that sort of situation, police may be required to take action in a less than ideal situation. For example, they might need to use a Taser in circumstances where a subject was [REDACTED] which had the potential to cause that Taser to be ineffective or use OC spray in circumstances where that spray might not be effective. Importantly, however, the Deliberate Action was not such a situation.

849. Because police held the initiative, it is not to the point to suggest that the clothing Todd was [REDACTED] a Taser from being used. As Sgt Watt correctly

⁸⁵⁶ T1134 (19 April 2023).

⁸⁵⁷ T1558.42 (19 June 2023).

accepted, [REDACTED]

850. Nor, for the same reasons, is it to the point to suggest, as Counsel for the Commissioner did both in the course of his examination of Officer T5,⁸⁵⁹ Officer T10,⁸⁶⁰ and Mr Perry⁸⁶¹ that police have no control over the clothes a person who might need to be tasered is wearing. It may readily be accepted that, in a general duties situation, it can be necessary to use a Taser [REDACTED]. [REDACTED] However, police were not in a general duties situation. Rather, they were executing a plan of their own making in circumstances where they held the initiative. This accorded an opportunity for a detailed consideration of the effectiveness or otherwise of each of the lethal options (including, relevantly for present purposes, of the Taser). This is understood to be the effect of Mr Perry's answer when Counsel for the Commissioner put this proposition to him.⁸⁶²
851. Accordingly, Counsel Assisting submit that Officer T10's evidence that Tasers were not rolled off the shelf to work on people who were not wearing clothes,⁸⁶³ with respect, entirely misses the point. The point is that there were limitations in the less lethal option which police had the opportunity to (and ought to have) considered.
852. Counsel Assisting suggest that Officer T1's evidence that one would deploy a bean bag from a distance from less than seven metres if that was the only option available⁸⁶⁴ may be accepted. However, on 31 July 2019, the dimensions of the house made that the only option available.

Submissions of the Commissioner

853. The Commissioner submits⁸⁶⁵ that less lethal options are relied upon by the NSWPF as a whole. They should not be analysed for their individual limitations. It is further submitted that no police tactic is without limitation and optimal conditions are rarely present in a policing environment.

⁸⁵⁸ T1525.26-29 (19 June 2023).

⁸⁵⁹ T615 (4 April 2023).

⁸⁶⁰ T1043 (18 April 2023).

⁸⁶¹ T1710 (21 June 2023).

⁸⁶² T1730 (22 June 2023).

⁸⁶³ T1043.31-34 (18 April 2023).

⁸⁶⁴ T797.49 (6 April 2023).

⁸⁶⁵ Written submissions of the Commissioner dated 13 October 2023 at [180], [182]-[191].

854. The Commissioner disagrees with Counsel Assisting's submission that the NSWPF were executing a plan of their own making simply because it was a Deliberate Action. Limitations and risks continued to be assessed and police officers gave evidence of feeling a lack of control over the situation. The Commissioner also draws attention to Todd's apparent imperviousness to the less lethal options which were deployed.⁸⁶⁶
855. The Commissioner submits that it was difficult to properly assess the layout of the property through closed doors and obscured windows and notes that, in addition to conducting a rehearsal, the police had obtained a mud map of the premises prior to executing the breach and hold.
856. The Commissioner submits that the Tueller Rule should be viewed as a guide only⁸⁶⁷ and each case should be assessed on its own individual circumstances. The Commissioner reasons that the Tueller Drill is often used for "surprise attacks", which did not apply in this incident. The Tueller Rule does not take into account the availability of less lethal options, which are often used in close proximity.⁸⁶⁸ It is also submitted that Counsel Assisting's submission regarding the Tueller Rule also appears to erroneously suggest a hierarchy of force, which is not the use of force model adopted by the NSWPF.⁸⁶⁹ TORS and TOU operatives receive training which do not accord with general rules, including rules from other jurisdictions, and they are often faced with varied and exigent circumstances including, for example, the requirement to work in small areas.⁸⁷⁰

Submissions of Ch Insp Fuller

857. Ch Insp Fuller submits⁸⁷¹ that Counsel Assisting's submissions regarding the potential limitations of less lethal options is infected by hindsight bias. He does not accept Counsel Assisting's submissions that the officers had no way of knowing whether the layout of the room was conducive to the deployment of less lethal options.
858. Ch Insp Fuller asserts that specialist tactical police receive training in a variety of less lethal options in high-risk situations.⁸⁷² Tactical police officers also receive training on the use of less lethal options against subjects who have mental illnesses or are in a

⁸⁶⁶ See T893 (6 April 2023); Tab 78 (Certified Transcript of Interview with Officer T9), p. 725, 736.

⁸⁶⁷ Tab 11E (Expert report of Nick Perry), p. 64.

⁸⁶⁸ To be fair CAPWS at [556] acknowledge the evidence of Sgt Watt who agreed with the proposition that a Taser "can be effective right up to the point of hand to hand combat".

⁸⁶⁹ See evidence of Sgt Watt at Tab 270 (Statement of Sergeant Watt), at [8]; Inquest into the death of Courtney Topic (30 July 2018), at [139]-[140]; T1543; T1561-T1562 (19 June 2023).

⁸⁷⁰ Tab 173-3 (Breach and Hold Committed Statistics from 1 January to 31 December 2019).

⁸⁷¹ Written submissions of Superintendent Paul Fuller at [124]-[139].

⁸⁷² T978.20-42 (17 April 2023).

psychotic state.⁸⁷³ However, the effectiveness of less lethal options on people in psychotic states was not specifically discussed with Ch Insp Fuller.⁸⁷⁴

859. He notes that less lethal options are not separately delineated, but rather a “golf bag” approach is adopted by officers to ensure that a range of options are available in a variety of circumstances. The evidence suggests that a number of less lethal options can be deployed in face-to-face contact and confined spaces.⁸⁷⁵
860. Ch Insp Fuller submits that the Tueller Rule is taught as a guide for officers to be mindful of physical proximity due to minimum reaction times when dealing one on one with a person armed with a knife in a ‘sterile environment’. The Tueller Rule does not apply in this situation where tactical police are involved and have a number of less lethal options available to them. Police officers assessed the risks of the proposed action prior to implementation and considered information including Todd’s clothing, the external dimensions of the house and the mud map.
861. Ch Insp Fuller asserts that it was not unreasonable for the Forward Command to form the view that the TORS team would be able to adequately deal with any physical confrontation resulting from the breach and hold.

Submissions of Mark McKenzie

862. Mark⁸⁷⁶ agrees with Counsel Assisting that police should have recognised that there was a risk that less lethal options would be ineffective in the circumstances. This means that police would only be left with lethal options if the less lethal options were unsuccessful, as occurred in this case.

Consideration

863. On the evidence before me I am satisfied for the reasons set out by Counsel Assisting that there are clear factors in relation to the specific environment of Todd’s home and his apparel which should have alerted police on the scene that certain less than lethal options may have been compromised or unavailable. Recognising this raises the risk of the breach and hold, because if it went badly the likelihood of a firearm being discharged was increased.

⁸⁷³ Tab 173-1 (Second statement of Operator 76) at [15], [17]; T1134.1-31 (19 April 2023).

⁸⁷⁴ T1134.33-40 (19 April 2023).

⁸⁷⁵ T1217.23-41; T1214.34 – T1215; T1215.29 – T1216.26 (20 April 2023).

⁸⁷⁶ Written submissions of Mark McKenzie dated 12 October 2023 at [84].

e. The breach and hold was not an [REDACTED]

Submissions of Counsel Assisting

864. Counsel Assisting⁸⁷⁷ submit that the risks that a breach and hold would lead to violent confrontation and that the less lethal options would not be effective suggests that it may not have been a suitable strategy to deploy on 31 July 2019. However, if the breach and hold had a realistic potential of realising the stated aims of [REDACTED] [REDACTED] it could conceivably be regarded as a viable tactical option.
865. Counsel Assisting submit that there was never a realistic prospect of the breach and hold [REDACTED] with Todd on 31 July 2019. If anything, the breach and hold would (assuming it did not immediately lead to violent confrontation) make the conduct of future negotiations more difficult.

The breach and hold would damage rapport

1. The importance of rapport

866. Counsel Assisting observe that the self-evident proposition that, in order for [REDACTED], it was necessary for police to establish rapport with Todd was a consistent theme of the evidence. It required police to attain Todd's trust⁸⁷⁸ as well as the deployment of the techniques of empathy and active listening to try and understand the circumstances that Todd was in.⁸⁷⁹ This is because, as Dr Eagle observes, people respond innately to a caring approach.⁸⁸⁰
867. The breach and hold was perhaps (and, with its focus on control and depriving Todd from feeling comfortable or being able to access his safe space was perhaps calculated to be) the antithesis of a "caring approach". It involved heavily armed police wearing intimidating clothing knocking in Todd's front window and front door. It is hard to see how those actions could be perceived as other than inherently hostile.

2. Smashing in Todd's front window and knocking in his front door was not apt to overcome the deficits in Todd's trust of police

868. Counsel Assisting note that, as was acknowledged by both Negotiation Commander and Officer T1, the rationale of a breach and hold as a tool to [REDACTED] is not something that is self-evident. It is hard to see how it is consistent with the sorts of

⁸⁷⁷ Counsel Assisting's written submissions dated 30 August 2023, at [582]-[608].

⁸⁷⁸ T274 (Primary Negotiator); T323 (30 March 2023) (Fourth Person).

⁸⁷⁹ T372; T374 (31 March 2023).

⁸⁸⁰ T1583.13-14 (20 June 2023).

techniques described by Negotiation Commander as needed to be employed to establish rapport and to encourage someone to trust police.

869. In particular, negotiators needed to overcome the deficit in trust caused by aspects of the police operation that preceded the deployment of the specialist resources. This included the effect of the negotiations conducted by former Sen Cst Larrain (see submissions in response to Issue 5 above). It also included the effect of Sen Cst Stewart drawing his firearm on Todd. Given these earlier developments, it would not have been easy for negotiators to rebuild trust with Todd. An indication of how Todd felt as a result of the tactical operation is provided by this statement he made to Fourth Person: "You have tried to shoot me, I won't hurt anyone in here, what have [I] done".⁸⁸¹
870. It is hard to see how the perpetuation of a strategy which involved heavily armed police deliberately confronting Todd and damaging his property and which was intended, at least in part, to make Todd feel less comfortable and in control and to deprive him of access to a "safe place" police could meaningfully have ameliorated this deficit in trust (even if matters had progressed to a [REDACTED]).
871. This is especially so given that (as recorded by Negotiation Team Leader) Todd had ceased conversing with police after the window had been opened.⁸⁸²

3. The intimidating clothing and weapons inhibited the development of rapport

872. Counsel Assisting submit that the clothing and equipment of the officers responsible for affecting the breach and hold also made it inherently unlikely that rapport could subsequently be established.
873. The tactical police were wearing body armour and balaclavas. They were equipped with standard issue Glock pistols. Amongst the less lethal options with which they were equipped were rifles which discharged "super sock" ammunition (a form of less lethal ammunition). Todd was not told that these rifles were a less lethal weapon apparently out of a concern that this would disclose "methodology".⁸⁸³
874. There was no dispute that this clothing and this equipment was intimidating. As noted above, some of the evidence suggests that the TORS operatives considered this to

⁸⁸¹ T327.1 (30 March 2023).

⁸⁸² Tab 88C (Certified Transcript of Interview with Negotiation Team Leader) at p. 1989.

⁸⁸³ T1392.50 (15 June 2023).

be an advantage (as it might encourage Todd to surrender).⁸⁸⁴ Although it is noted that Officer T9 did not accept that this was a deliberate aspect of the strategy.

875. The natural immediate reaction of a person seeing a group of balaclava clad men carrying what appear to be (and which included) lethal weapons standing outside a door and a window they had just knocked down and smashed in is more likely to be of fear than of trust. Counsel Assisting submit that this must have made it difficult for negotiators to establish rapport with Todd.

4. The nature of Todd's delusions meant that the breach and hold was likely to inhibit the development of rapport

876. In Todd's case, this natural reaction was compounded by the nature of the delusion from which he was suffering.

877. Counsel Assisting note that Todd's delusions included military, terrorism, and policing themes. Additionally, Todd's delusions included a paranoia of people entering his home (a matter identified by Fourth Person as a potential "trigger" for his behaviour on 31 July 2019 and which was something that was "potentially" within her mind).⁸⁸⁵ As previously mentioned, the unfortunate potential of heavily armed and balaclava clad men knocking in Todd's front door was to feed directly into and perpetuate those delusions.

5. The objectives of obtaining "control" were inconsistent with achieving rapport

878. Whilst each of the relevantly involved officers has described the objective of the breach and hold as being to [REDACTED] some of the officers (particularly the tactical operatives responsible for its implementation) described a need to cause Todd a level of discomfort (out of a concern that Todd was too much in control). In other words, it was felt that the breach and hold was required in order for tactical police to [REDACTED]

879. Counsel Assisting observe that this objective appears directly inconsistent with the development of rapport with Todd. A relationship of trust seems more likely to be developed if Todd felt a measure of comfort or safety (or the "caring approach" described by Dr Eagle). This is precisely what tactical officers sought to deprive him of.

⁸⁸⁴ T671 (4 April 2023) (Officer T5); T1137 (19 April 2023) (Officer T9).

⁸⁸⁵ T321.33-38 (30 March 2023).

880. It is acknowledged that Officer T1 gave evidence that he was making efforts to be “friendly” to Todd and was trying to avoid antagonising him.⁸⁸⁶ That evidence is not easy to reconcile with Officer T1’s previously referred to evidence that he felt that Todd was too comfortable in his own home and that there was a need to do something differently. Counsel Assisting submit that, in any event, Officer T1’s ability to be “friendly” towards Todd given the equipment he was carrying and the clothing he was wearing must seriously be doubtful (it is noted, however, that Officer T1 did not accept the proposition that it was “unrealistic” to expect that Todd would engage them in a “friendly” manner).
881. A further impairment to Officer T1’s ability to develop rapport with Todd including through being “friendly” with him arises from the fact that at an earlier point in the day (when the window had been opened), Officer T1 raised his Taser to Todd and covered him with its aiming laser. Officer T1 says in his oral evidence that he wanted to communicate to Todd that he was covering him and that he had a weapon.⁸⁸⁷ This again draws attention to the mixed objectives of the breach and hold (Counsel Assisting do not suggest that Officer T1 was not operationally justified to have sought to cover Todd with his Taser; rather, the point is that the focus of tactical officers on obtaining control seems entirely inconsistent with the development of rapport with Todd).

Creating an entry and exit point was likely to make further negotiations more difficult

882. Fourth Person (echoing observations made by Operator 76) has identified that a benefit of the breach and hold in terms of [REDACTED] was that it would provide the benefit of enabling her to maintain eye contact with Todd, thereby [REDACTED]. Counsel Assisting submit that, to the extent that this was a benefit, such a benefit was minimal (and did not justify pursuing the tactical option of a breach and hold).
883. Although Fourth Person was at the back of Todd’s premises at the time that the breach and hold was effected, she says that the plan, as she understood it, was that after the door was breached at the front, she would assume a position at the front (if Todd went there).⁸⁸⁸ The breached door and window would of course mean that Fourth Person would have a visual on Todd.

⁸⁸⁶ T859.48-T860.33 (6 April 2023).

⁸⁸⁷ T863 (6 April 2023).

⁸⁸⁸ T355.2-8 (30 March 2023).

884. However, the effect of knocking down the front door also meant that there was no physical barrier between Todd and Fourth Person. Therefore, considerations of her safety meant that Fourth Person would need the tactical operatives to stand between her and Todd.⁸⁸⁹ Counsel Assisting note that the need for Fourth Person to have conducted negotiations around the heavily armed and intimidatingly clothed tactical police must have significantly impaired her ability to establish meaningful rapport with Todd and must be supposed to have outweighed any benefit in terms of the increased eye contact a breach and hold may have realised.
885. It is noted that both Officers T9 and T1 have explained that the reaming of the window was more about tactical protection than conducting negotiations⁸⁹⁰ which again suggests that the negotiations were not at the forefront of their thinking.
886. Furthermore, the benefit of eye contact could have been achieved simply by forcing a window open – as indeed occurred earlier in the day – or by simply reaming the front window without breaching the door. This might be thought to be more conducive towards achieving the benefits of having eye contact with Todd. Amongst other things, breaching (or opening) a window would mean that there was no easy exit point for Todd such that Fourth Person might not have needed to attempt to negotiate with Todd from behind the (heavily armed and intimidatingly clothed) tactical police. It is noted that, in his evidence, Officer T1 accepted that reaming the window would have achieved all that was sought to be achieved by the breach and hold (most relevantly, by providing a focal point for negotiations and promoting discussion with Todd).⁸⁹¹
887. Officer T10 holds a different view from Officer T1. Officer T10 says that he would not have advised tactical officers in the field to have merely breached the window without also knocking in the door (notwithstanding that this is almost precisely what occurred at an earlier point in the operation when Todd’s bedroom window was raised and propped open so as to prevent Todd from shutting it). Officer T10’s reasons as to why he would not have given that advice are as follows:

“Well, in any house there’s two natural entry and exit points. The back door and the front door. Both of which he has control of, yeah. Like, he can open and shut. The window was already opened and closed. That option failed. If we were to breach just the window, that’s another entry or exit point that I’m assuming Mr McKenzie would have been concerned about. He can’t close that door or control it. And my concern

⁸⁸⁹ T867.4-8 (6 April 2023).

⁸⁹⁰ T834.10 (6 April 2023); T1217.12 (20 April 2023).

⁸⁹¹ T867.21 (6 April 2023).

would have been at that point in time - and then again this is hindsight right and a conversation that I would've - some of the concerns that I would've raised with T9 in his deliberations with the police forward commander and negs team leader. That up until that point in time, as I understood, he hadn't taken any active steps to barricade the place - that is put furniture up against doors or windows. And if there was an open window or exit point or entry point - which that would have created, I would expect that maybe would have prompted him to start thinking about barricading doors and windows, because it was something he could not control. That would have been my concern with doing it."⁸⁹²

888. Counsel Assisting submit that elements of this explanation do not make sense. It is true that breaching the front window created another entry or exit point for Todd to have been concerned about. However, breaching the front door as well as the front window created two such exit points (with the door providing the easier means of entry and egress). In any event, at least in the mind of some of the tactical operatives (including Officers T9 and T10), having Todd feel "concern" about an entry or exit point was precisely what they intended the breach and hold to achieve.
889. Further, whilst it is possible that breaching the door may have prompted Todd to start thinking about erecting barricades, Officer T1 (who, as team leader, was in charge of the actions of the members of the Bravo team) did not think that the team had permission to enter the house and understood that Ch Insp Fuller had emphasised that they were not to enter the premises.⁸⁹³ Accordingly, Officer T1's evidence suggests that the Bravo team was not going to enter the room immediately and could not have prevented Todd from retreating and erecting barricades (irrespective of whether or not the door had been breached). Officer T10's evidence also overlooks the fact that the window had been opened (and forcibly propped open) earlier in the day (a fact which was equally likely to prompt Todd into erecting barricades). In this regard, it is noted that in Ch Insp Fuller's appreciation process, barricades were a consideration against both continuing negotiations and conducting the breach and hold.
890. Officer T10's evidence may be understood as pointing to a difficulty with the breach and hold strategy generally (that is, it created the potential for Todd to react defensively or aggressively), however, it does not explain why, if the object of the strategy was to [REDACTED] that could not have been achieved simply by reaming the window.

⁸⁹² T1001.23-37 (17 April 2023).

⁸⁹³ T873.38 (6 April 2023).

Submissions of the Commissioner

891. The Commissioner⁸⁹⁴ largely agrees with the content of the submissions furnished on behalf of Ch Insp Fuller (save to the extent that they rely on hindsight to reason that the breach and hold may not have been the most appropriate strategy in the circumstances). The Commissioner's submissions in relation to Counsel Assisting's overall conclusion to Issue 9 are set out below.

Submissions of Ch Insp Fuller

892. In relation to Counsel Assisting's submissions that the breach and hold would damage trust and rapport, Ch Insp Fuller accepts⁸⁹⁵ that a pre-planned action such as the breach and hold may impact on the ability of police negotiators to develop trust and rapport with a person bailed up in a stronghold. However, he contends that Counsel Assisting's submissions wrongly assume that the breach and hold had resulted in a lost opportunity to establish trust and rapport with Todd. Police had failed to develop trust and rapport prior to the breach and hold despite attempting for hours. He submits that the ability to develop trust and rapport had been lost by the exchange with Sen Cst Stewart and Sen Cst Larrain, and the opening of the window. By that time Todd had entirely ceased conversing with police.

893. Ch Insp Fuller highlights Dr Eagle's evidence that Todd's psychosis likely impacted police's ability to develop trust and rapport due to the nature of his persecutory delusions⁸⁹⁶ and that his delusions were exacerbated by his interactions with police prior to the breach and hold. Therefore, it is submitted that there was no trust or rapport to damage in the first place and it would be pure speculation to suggest what type of interactions would damage trust and rapport with Todd. Dr Eagle's evidence was that even with the use of a consultant psychiatrist or third party intervenor, Todd may have incorporated the third party into his delusions, and thereby damaging trust and rapport.⁸⁹⁷

894. Ch Insp Fuller submits that Counsel Assisting's submission that breach and hold is a poor way to develop trust and rapport is not borne in the evidence, which shows that this tactic is often deployed by the NSWPF with a high rate of success.

⁸⁹⁴ Written submissions in reply of the Commissioner dated 25 October 2023 at [20].

⁸⁹⁵ Written submissions of Superintendent Paul Fuller at [80]-[81], [84]-[89].

⁸⁹⁶ Tab 11C (Expert report of Dr Kerri Eagle) at [237.1.2]; T1578.22 – T1579.39; T1580.14-21 (20 June 2023).

⁸⁹⁷ T1608.11-41 (20 June 2023).

Submissions of Mark McKenzie

895. Mark agrees⁸⁹⁸ that the breach and hold was not effective in facilitating negotiations for the reasons set out by Counsel Assisting. He observes that the breach and hold would more likely induce fear than trust.

Submissions of June Wilkins

896. June submits that⁸⁹⁹ it would be impossible to restart negotiations after the breach and hold was deployed. This is particularly the case due to the police's intimidating uniforms and weapons and the fact that the operation occurred at night.

Consideration

897. It was, in my view, completely misguided to think that the breach and hold could ever have increased the rapport necessary for a successful negotiation. I accept June's submission that restarting negotiations after it was deployed was likely to have been impossible. While numerous officers maintained that the purpose of the technique was to ██████████ struggled to understand how that could have been a genuinely held belief in the circumstances under current consideration.

898. The logic of the operation was to end the siege, by smashing the window and ramming the door. If that did not bring surrender, it appears a ██████████ was to occur. It is important to think about how this must have felt to Todd - the noise, the force and the vision of heavily armed men breaking down the door to his home. In my view the technique was used to assert and maintain control through a show of force and if it became necessary the use of actual force, it had little to do with creating circumstances for a negotiation.

f. A breach and hold was not otherwise apt to peaceably subdue Todd

Submissions of Counsel Assisting

899. Counsel Assisting⁹⁰⁰ submit that apart from being an ineffective way of facilitating negotiations, there were other aspects of the breach and hold which made it unlikely that it would result in police being able to peacefully subdue Todd.

⁸⁹⁸ Written submissions of Mark McKenzie dated 12 October 2023 at [95].

⁸⁹⁹ Written submissions of June Wilkins dated 13 October 2023 at [153]-[154].

⁹⁰⁰ Counsel Assisting's written submissions dated 30 August 2023 at [609]-[622].

The tactical operatives lacked insight into or the training to deal with Todd's mental health issues

900. Counsel Assisting submit that the first limitation was that the breach and hold necessarily involved, at least in the first instance, the need for the tactical operatives (rather than the negotiators) to have had a high level of interaction with Todd. As set out below, each of the tactical officers involved in executing the breach and hold lacked the training and insight into dealing with the mental health issues presented by Todd and were unable to articulate any real de-escalation strategy.

901. Officer T5 gave some evidence of conducting “a lot” of training based on mental- health type training but could not remember the specific content of that training.⁹⁰¹ The main point he took from that training was not to “enter into the delusions” of a mentally ill person.⁹⁰² At a later point, Officer T5 gave this evidence regarding whether the training he had received was helpful in terms of equipping him to communicate with mentally unwell persons:

“Yes and no. As a tactical officer, we don't often - we're not trying to negotiate with a lot of these people because there's negotiators there all the time. It's only if there's a lag period between us as tactical operators and negotiators turning up that we may have to engage with them.”⁹⁰³

902. For his part, Officer T1 (whose evidence in this respect assumes a particular importance in light of the fact that he was the team leader of the Bravo team and the most senior officer with responsibility for adapting the breach and hold in light of Todd's response to it) says that the strategies he developed in terms of dealing with mentally unwell persons was more “experienced based” as a result of things he had learned as a result of “formalised training”.⁹⁰⁴ Officer T1 described only a very basic strategy for dealing with mentally unwell persons in basic terms. He described displaying empathy in the following way:

“Oh - the main thing is, we're not here to hurt you. Just calm down, whatever it's been thrown back at us. It's to have a bit of a higher threshold, so to speak. So, if any insults or well you're not trying to take it personally...”⁹⁰⁵

⁹⁰¹ T592.3 (4 April 2023).

⁹⁰² T592.50 – T593.1 (4 April 2023).

⁹⁰³ T647.46-49 (4 April 2023).

⁹⁰⁴ T789.7 (6 April 2023).

⁹⁰⁵ T789.22-7 (6 April 2023).

903. Officer T1 said that he would not otherwise adapt his response to a mentally unwell person in light of the training he had received in relation to mental health. In relation to whether that training would cause him to approach a situation differently, he said:

“Not - it does and it doesn’t, if that makes - I’m not trying to be clouded, but my tolerance for someone with mental health does go up, and I mean you sympathise a lot more, if that makes - versus someone who’s sort of like a down and out black-hearted criminal type. This is a person that’s obviously suffering from an illness.”⁹⁰⁶

904. The main lesson that Officer T2 derived from his mental health training was that mentally unwell persons might believe that police are “evil”. He also learned that communication not a “one-way street” and that “you have to take a different approach” sometimes.⁹⁰⁷

905. Some of the tactical officers seem to be unconvinced that Todd even had a mental illness. For example, Officer T10 did not think (contrary to the undisputed medical evidence) that Todd was really all that paranoid (noting, by way of justification, the absence of any efforts made by Todd to barricade himself inside the house). It is worth setting out Officer T10’s evidence in this respect:

“if the paranoia was such that ...[Todd] was that fearful and paranoid of people entering his home, that there would have been some more overt acts by him. And what I mean - I touched on this yesterday in relation to the breaching of the window, of the window alone, that I would expect, and I’ve been at situations with people who are schizophrenic, who are diagnosed schizophrenics, I would expect - and that’s not to say it would always happen - but I would expect to see fewer more overt acts, and what I mean by that is, your Honour, barricading doors and windows, and that not being at jobs where that has occurred, where it’s clear that they have - they don’t want people to enter and there’s an overt act in support of that. I would expect to see - I would have expected to have seen something like that if that was level in which the paranoia was, and there was no way of telling at that point in time, because I wasn’t aware of those conversations with police earlier in the day.”⁹⁰⁸

906. Counsel Assisting note that, to similar effect, Officer T2 gave evidence that he believed that Todd had deliberately set out to intimidate him.⁹⁰⁹ Officer T2 also felt that Todd

⁹⁰⁶ T851.29-33 (6 April 2023).

⁹⁰⁷ T1341.40-47 (15 June 2023).

⁹⁰⁸ T1042.40 – T1043.3 (18 April 2023).

⁹⁰⁹ TT1364.19 (15 June 2023).

could understand him⁹¹⁰ and that it was possible he could have responded rationally (but, perhaps inconsistently, does not believe Todd to have been feigning his mental illness).⁹¹¹

907. These perceptions of Officers T10 and T2 run counter to the expert evidence of Dr Eagle and so would not be accepted. However, it illustrates how poorly equipped police who are trained primarily to give in a tactical response are to deal with a job that involves complex considerations of mental health.
908. Counsel Assisting note that this is not intended as a criticism of those officers. They had a tactical role to perform and had no particular experience or training in dealing with mentally unwell persons. However, it directs attention to the difficulties in attempting to resolve the situation on 31 July 2019 via the tactical means of executing a breach and hold. In particular, as a consequence of the limited training in communication with the mentally unwell that they had received, it appears that the tactical officers lacked an ability to propose communication strategies which might have de-escalated the situation after Todd reacted angrily to the breaching of his front door. At the very least, it suggests the tactical operatives could have profited from the involvement of a consultant psychiatrist.
909. Counsel Assisting submit that the difficulties caused by the tactical operatives' lack of insight and training into dealing with persons who are suffering mental illness is thrown into sharper relief by the fact that, at the time when the breach and hold was conducted, there was no negotiator present nearby. Fourth Person, at that time, was still at the back of the premises, tasked with creating a distraction. Indeed, Fourth Person gives evidence that she was not aware of a plan to have negotiations at the front door at the time when the tactical operatives effected the breach.⁹¹² This meant, therefore, that the task of the initial communications with Todd fell to the tactical operatives; a role which, as the above evidence suggests, they were poorly equipped to perform.

Todd lacked the ability to respond rationally to the breach and hold so as to conduct negotiations

910. Counsel Assisting submit that a further deficiency in the breach and hold was that each of the two possibilities other than violent physical confrontation discussed above (that is, the possibilities of surrender or retreat) presupposed that Todd had the capacity to

⁹¹⁰ T1371.24 (15 June 2023).

⁹¹¹ T1372.23-24 (15 June 2023).

⁹¹² T329.41 (30 March 2023).

behave in a rational way. They required Todd to appreciate the overwhelming force that the tactical operatives were bringing to bear and to make a coherent and informed decision in relation to it. This was problematic in the circumstances of 31 July 2019 given that Todd appeared to believe that the weapons were disarmed.

911. In addition, the possibility of surrender presupposed that Todd had the ability to respond to directions given by police to that effect. The possibility of retreat (and any subsequent [REDACTED]) presupposed that Todd had the ability to follow directions given by tactical police so as to ensure any surrender (in the event that negotiations were successful).
912. However, Dr Eagle is of the view that Todd lacked the ability to respond in a rational fashion on 31 July 2019. Instead, he would have incorporated police into the delusions he was experiencing. Assuming Dr Eagle's evidence is accepted, it follows that Todd lacked the ability to respond rationally to the breach and hold or to follow directions that might have been issued by police to him in the course of any subsequent [REDACTED]. In Counsel Assisting's view, this meant that the breach and hold was not an option that was likely to subdue Todd peacefully.

Submissions of the Commissioner

913. The Commissioner⁹¹³ largely agrees with the content of the submissions furnished on behalf of Ch Insp Fuller (save to the extent that they rely on hindsight to reason that the breach and hold may not have been the most appropriate strategy in the circumstances). The Commissioner's submissions in relation to Counsel Assisting's overall conclusion to Issue 9 are set out below.

Submissions of Ch Insp Fuller

914. In relation to Counsel Assisting's submissions regarding Todd lacking an ability to respond rationally to the breach and hold so as to conduct negotiations, Ch Insp Fuller⁹¹⁴ draws attention to Dr Eagle's evidence that that does not mean police should not negotiate with him. Although Todd's judgment would be substantially affected by his delusions, Dr Eagle's evidence was that Todd's lucidity and cognitive capacity will fluctuate, during which periods police are seeking to engage him.
915. In relation to Counsel Assisting's submission that the possibility of surrender presupposed that Todd had the ability to respond to directions given by police to that

⁹¹³ Written submissions in reply of the Commissioner dated 25 October 2023 at [20].

⁹¹⁴ Written submissions of Superintendent Paul Fuller at [94]-[95], [97]-[99], [122].

effect, Ch Insp Fuller submits that, as accepted by Mr Perry,⁹¹⁵ surrender was a possible response to the breach and hold.

916. In relation to Counsel Assisting's submission that tactical operatives lacked insight into or the training to deal with Todd's mental health issues, Ch Insp Fuller contends that the tactical officers deploying the breach and hold would not be the ones engaging in negotiations, as negotiations would have occurred after breaching the door. It is unrealistic to suggest that negotiations would commence immediately upon the front door being opened.
917. Officer T10 considered that Todd had demonstrated less "overt acts" (such as barricading doors or windows), than he might have expected from someone who was severely paranoid or fearful of people entering their home. Ch Insp Fuller submits that this evidence does not support Counsel Assisting's submission that "some of the tactical officers seem to be unconvinced that Todd even had a mental illness". Ch Insp Fuller is of the view that, reading the evidence as a whole, there is no reason to doubt that Officer T10 accepted that Todd was suffering from psychosis. Similarly, the evidence that Todd had at times deliberately threatened Officer T2 is consistent with Todd's persecutory delusions and Dr Eagle's evidence that his behaviour would fluctuate over time.⁹¹⁶ Ch Insp Fuller also notes that there is nothing in Officer T2's evidence in that connection that suggests he believed Todd was not in psychosis or did not have a mental illness at the time.

Submissions of Mark McKenzie

918. Mark agrees⁹¹⁷ that a breach and hold was not suitable for peacefully subduing Todd for the reasons detailed by Counsel Assisting. He submits that Todd would have perceived the breach and hold as a serious risk to his safety and would have believed that he had no option but to defend himself and his home.

Submissions of June Wilkins

919. June⁹¹⁸ agrees with Counsel Assisting that one of the major flaws of the breach and hold was that the tactical operatives had no insight or training to deal with a man undergoing a mental health crisis. As set out above, Officer T1 noted in evidence that

⁹¹⁵ T1690.9-16 (21 June 2023).

⁹¹⁶ T1617.47 - T1618.14; T1568.19 - 40; T1570.13 - 47; T1578.32 - T1579.44 (20 June 2023).

⁹¹⁷ Written submissions of Mark McKenzie dated 12 October 2023 at [86]-[87].

⁹¹⁸ Written submissions of June Wilkins dated 13 October 2023 at [168].

he had to make a special effort not to take any remarks from a mental unwell person “personally”.

Consideration

920. I accept Counsel Assisting’s submissions on this issue, noting that they were supported by both Mark and June. I was taken aback by some of the comments made by tactical officers which appeared to show a lack of understanding of mental health issues. However, I accept that they had a tactical role to perform and had no particular experience or training in dealing with mentally unwell persons. I accept Counsel Assisting’s submission that their commander could have profited from the involvement of a consultant psychiatrist.

g. There were alternatives available to the breach and hold

Submissions of Counsel Assisting

921. Counsel Assisting⁹¹⁹ submit that notwithstanding its risks and the limited benefits it was capable of providing (both in terms of [REDACTED], [REDACTED], had no other options been available, it is conceivable that the Court could find that the breach and hold may have represented an appropriate option for police to take on 31 July 2019. However, the evidence suggests that options were available to police. The presence of these alternative options suggests that the breach and hold was not an appropriate option for police to have taken.

922. To some extent, Ch Insp Fuller identified these options in his appreciation process. The general proposition that the option of effecting a breach and hold, continuing “current” negotiations, or withdrawing entirely may be accepted. However, there was more nuance in the options of continuing the “current” negotiations than is reflected in Ch Insp Fuller’s notes. Counsel Assisting are of the view that an inference arises that these options were not considered as fulsomely as they ought to have been.

923. Counsel Assisting submit that police ought to have pursued the “current” negotiations as an alternative to conducting the breach and hold.

[The considerations identified in Ch Insp Fuller’s “appreciation process”](#)

924. Counsel Assisting note that it is convenient to start the analysis of this question by reference to the considerations identified in Ch Insp Fuller’s appreciation process as against continuing the “current” negotiations. For the reasons set out below, it is

⁹¹⁹ Counsel Assisting’s written submissions dated 30 August 2023 at [623]-[670].

submitted by Counsel Assisting that these considerations (either separately or cumulatively) do not indicate that continuing the current negotiations was not the preferable option for police on 31 July 2019.

1. Todd was in a “comfortable environment” and was “in control”

925. Counsel Assisting submit that to the extent that Ch Insp Fuller’s appreciation process records that Todd “was in a comfortable environment and feels in control” was a consideration against continuing negotiations, for reasons previously submitted, that overlooks (or is inconsistent with) the fact that Todd needed to feel a certain level of comfort and control in order to develop trust with police so as to enable him to develop rapport with the negotiators.
926. Nor was there any tactical reason for such a high level of control. DCI Walpole accepted that once Todd had retreated into the premises, Todd was no longer a threat.⁹²⁰ Fourth Person said in her evidence that she did not feel threatened by Todd, saying that in her view Todd’s delusions were “so generalised I never felt like there was a threat”.⁹²¹
927. Counsel Assisting submit that, for these reasons, the Court would not conclude that this represented a factor against continuing negotiations.

2. The length of the job

928. A number of the other considerations Ch Insp Fuller identified against the breach and hold (for example, Todd had supplies and it was not known how long his psychosis might last)” appear to point to a concern regarding the length of the job. The evidence suggests this concern was misplaced.
929. In particular, as noted above, Ch Insp Fuller and Officer T9 ultimately accepted there was no specific urgency to effect the breach and hold.⁹²² Counsel Assisting submit that for the reasons set out below, this evidence should be accepted.
930. First, as Ch Insp Fuller notes as a consideration in favour of continuing the current negotiations, there were no hostages inside the premises and no indication that Todd had access to firearms. Further (as Ch Insp Fuller also notes), Todd was not mobile and was contained. This suggests that continuing to attempt negotiations (in the way

⁹²⁰ T48.34 (27 March 2023).

⁹²¹ T328.21-22 (30 March 2023).

⁹²² T1293.13 (14 June 2023); T1174 (20 April 2023).

that they had been attempted prior to the breach and hold) did not present any risk to public safety.

931. Secondly,



⁹²³ In a similar vein, Negotiation Commander agreed with the suggestion of her Counsel that there was a risk that Todd could trip and fall on the knife.⁹²⁴ In Officer T10's opinion, this risk meant that there was a need to keep eyes on Todd.⁹²⁵

932. Counsel assisting submit that whilst there is no doubt as to the benefit of police being able to see Todd, it is unclear why this required the door to be knocked in or how that was going to be achieved (at least in the short-term following the breach and hold) given that Officer T1 did not think his team had permission to enter.

933. Counsel Assisting accept that there was a possibility of Todd committing suicide or accidentally coming to harm. However, that did not mean that waiting and conducting further negotiations was not an option. There is an element of incongruence between Officer T10's concern for Todd's welfare and the previously referred to evidence of the tactical officers that an effect (if not in fact one of the aims) of the breach and hold strategy was to shake Todd out of his sense that he was too comfortable in his own home and to send him a message that they could enter at any time. In addition, Ch Insp Fuller's evidence indicates that, to the extent that he was concerned with Todd's mental health issues at all (noting in particular that his notes expressly record that the job was not to be dealt with as a "MH intervention"), mental health treatment was treated as ancillary to the main objective of securing Todd's arrest. Further, there was the real potential that effecting the breach and hold would (given the inherently hostile nature of the act and Todd's paranoia on the day) have the result of precipitating an act of self-harm or increasing the possibility of Todd suffering accidental injury.

934. Counsel Assisting observe that it may also be thought that if wanting to protect Todd from a risk of self-harm was a concern, it may have been of benefit for police to have received advice from an independent psychiatrist.

⁹²³ See, e.g., Tab 91A (Second statement of Negotiation Commander) at [7]; T420 (31 March 2023); T1048 (18 April 2023).

⁹²⁴ T473.49 – T474.1 (31 March 2023).

⁹²⁵ T1048 (18 April 2023).

935. Thirdly, whilst the negotiation had been protracted, the whole event lasted about nine hours. It is not unknown for sieges to last much longer.⁹²⁶ For perspective, the longest siege that each of the negotiators (who had each only been in attendance for around five hours by the time the breach and hold was effected) had attended was ten to twelve hours.⁹²⁷ The senior officers, Negotiation Commander and Officer T10, had attended significantly longer jobs, respectively 54 hours⁹²⁸ and “a day and a bit”.⁹²⁹ Counsel Assisting note that a period of only around 3.5 hours had elapsed between the time that the negotiators arrived and permissions for the breach and hold were sought and a period of only around 4.5 hours had elapsed between the arrival to when the breach and hold was effected.
936. Fourthly, a consistent theme of the evidence is that limitations in the available resources was not considered to be a reason why negotiations could not continue or was given only “minimal” consideration. Whilst resourcing is recorded as a consideration against the continuation of negotiations in Ch Insp Fuller’s appreciation process, in his oral evidence, Ch Insp Fuller says that he gave only “very minimal” consideration to this issue⁹³⁰ and saw it not so much as a “problem” as a “consideration”.⁹³¹
937. Counsel Assisting observe that the evidence suggests that there were replacement resources available if the job was to extend to such a time that the officers on the job could be placed. As noted, Ch Insp Fuller is of the impression that such resources were available.⁹³² Officer T1 (who earlier in the day had performed the role of resource coordinator) felt that the region was in a position to “organise more troops”.⁹³³ Most significantly, the evidence of the resource coordinator, Officer T12, was that there were available resources from other commands who could arrive in about an hour⁹³⁴ and that there were sufficient resources to replace the eight to ten officers that Officer T12 thought were on the ground.⁹³⁵

⁹²⁶ Tab 80 (Certified Transcript of Interview with Officer T1) at pp.1173-4 [Q2156-Q2160].

⁹²⁷ T268; T335 (30 March 2023).

⁹²⁸ T466.11 (31 March 2023).

⁹²⁹ T984.42 (17 April 2023).

⁹³⁰ T1295.3 (14 June 2023).

⁹³¹ T541.36-39 (3 April 2023).

⁹³² T1336.14-22 (15 June 2023).

⁹³³ T793.24 (6 April 2023).

⁹³⁴ T1439 (16 June 2023).

⁹³⁵ T1440.16 (16 June 2023).

938. In this regard, whilst some of the officers had been on duty for around 14 hours, as pointed out by a number of officers, including (most relevantly, given his role as resource coordinator) Officer T12, a shift of this length was “not uncommon”.⁹³⁶
939. Fifthly, there does not appear to have been any pressure coming from more senior officers (in particular, Assistant Commissioner Mitchell) to bring the job to an end within a particular time frame. In this regard, Officer T12 (who had responsibility for relaying information between the directly involved officers and Mr Mitchell) did not perceive that Mr Mitchell had made a direction that a breach and hold be implemented within a particular time frame and, for his part, did not feel any pressure to implement that direction.⁹³⁷
940. Sixthly, for her part, Dr Eagle (who is not tactically trained) gives evidence that there was no urgency precisely because the negotiations had stalled. To her mind, this gave an opportunity for other options to be explored (including, as discussed above, the potential for a consultant psychiatrist to be engaged or for an assessment of third party intervention to occur).⁹³⁸
941. Counsel Assisting submit that, for these reasons, the length of the job did not provide a reason against continued attempts to [REDACTED] (without engaging in a breach and hold).

3. Todd had not engaged in negotiations/the negotiations were at a stalemate

942. A number of the considerations identified by Ch Insp Fuller against the continuation of current negotiations relate to his perception that negotiations had stalled and that no other alternatives had been identified.
943. Counsel Assisting acknowledge that the negotiations had stalled (indeed, they had never really commenced, notwithstanding the “fleeting moment” when Fourth Person thought that she had succeeded in getting Todd to listen to her).⁹³⁹ Counsel Assisting also acknowledge that earlier efforts made by former Sen Cst Larrain to establish rapport (including by offering cigarettes or asking after Todd’s welfare) had also not been successful.
944. Counsel Assisting observe that, contrary to what is implicit in Ch Insp Fuller’s appreciation process, continuing negotiations did not necessarily involve repeating

⁹³⁶ T1429.33 (15 June 2023).

⁹³⁷ T1431 (15 June 2023).

⁹³⁸ T1583 (20 June 2023).

⁹³⁹ T325.45-49 (30 March 2023).

strategies that had been unsuccessful previously. As expanded on below, Dr Eagle has proposed a number of other measures which could have been incorporated in future negotiations (assuming that a breach and hold had not been executed).

945. Counsel Assisting note that, in any event, as Dr Eagle has opined, just because those options had not worked in the past does not mean that they would not work in the future.⁹⁴⁰ There was nothing to prevent things that had unsuccessfully been tried in the past from being exercised again.

4. Psychiatrist could not offer an alternative

946. To the extent that Ch Insp Fuller relied on the fact that the psychiatrist could not offer an alternative, Counsel Assisting submit that this did not provide a reason against continuing to attempt negotiations (without effecting a breach and hold).

947. As submitted above, despite the best efforts of police, police had only limited information about Todd's mental health on 31 July 2019. They did not consider the use of a consultant psychiatrist. They received only limited information from Dr Neale. They did not contact Dr Richardson and were unable to contact Dr Singh. There was an opportunity for police to do each of these things.

948. At various points of the evidence, it was suggested that privacy concerns may have prevented further inquiries being made. Counsel Assisting submit that the Court would not accept this proposition.

949. The principal legislation regulating the conduct of those persons who held medical or other information about Todd are the *Privacy and Personal Information Protection Act 1998 (PIIPA)* and the *Health Records and Information Privacy Act 2002 (HRIPA)*. Both these Acts have exceptions permitting the disclosure and use of information:

- a. For a "law enforcement purposes" (*HRIPA* Sch 1, cl 10(1)(i), 11(1)(j); *PIIPA* ss 23(4), (5));
- b. Where that use or disclosure is necessary "to lessen or prevent a serious and imminent threat to the life, health or safety of an individual" (*HRIPA* cl 10(c), 11(b1); *PIIPA* ss 17(c), 18(c)); and
- c. If that use or disclosure is "lawfully authorised" or "required" (*HRIPA* cl 10(2), 11(2); *PIIPA*, s 25(1)).

⁹⁴⁰ T1634 (20 June 2023).

950. It is likely that the urgent and dangerous circumstances of 31 July 2019 would have enlivened each of these exceptions. This makes it unnecessary to consider the terms of any MOU between NSW Health and the NSWPF.
951. It is further noted that privacy considerations do not appear to have prevented Sen Cst Reardon from obtaining information from Manning Base Hospital or from the Mater Hospital.
952. It is, of course, possible that there may have been practical impediments (practitioners or agencies may have been reluctant to hand information over and the difficulty Mark encountered in obtaining medical information is acknowledged in this respect). However, these difficulties did not prevent further efforts from being made (noting that Ch Insp Fuller acknowledged that he had the resources at his disposal to conduct these inquiries, which he tasked to investigate the criminal matter).
953. Counsel Assisting note that, at several points in his evidence, Officer T10 is understood to have suggested that, in his view, the fact that it was felt that not enough was known about the effect of Todd's medication may have counted against continuing negotiations (in the manner that they had previously been conducted).⁹⁴¹ Counsel Assisting consider that it is difficult to follow Officer T10's logic on this point. The potential unpredictability of Todd's behaviour (in light of his medication) must have been a consideration in continuing negotiations in their then form. This would have permitted an opportunity to see whether more information in this respect could become available.

5. Possibility that Todd might erect a barricade

954. Counsel Assisting note that Ch Insp Fuller's appreciation process included barricades as a consideration against both continuing negotiations and conducting the breach and hold. Certainly, there was some possibility that Todd might erect a barricade if given the time to do so. However, Todd could have also retreated from the breach and hold and erected a barricade in one of the back rooms (noting that Officer T1 did not think he had permission to enter the house). To that extent, the breach and hold may have, therefore, prompted Todd to erect a barricade.
955. Counsel Assisting note that Todd had not erected a barricade despite the police operation extending over a number of hours. Accordingly, it is difficult to conceive how continuing the negotiations exacerbated this risk.

⁹⁴¹ T959 (17 April 2023); T993 (17 April 2023).

Other things that could have been in done in an attempt to facilitate negotiations

956. Counsel Assisting note that Dr Eagle has identified a number of things that could have been tried (other than a breach and hold) to attempt to have Todd engage. These alternatives are discussed below.

1. Having persons other than police approach Todd

957. Dr Eagle suggests that an approach could have been made to Todd through someone who was not a police officer. She suggests that the approach could have been made by someone in “a care role”, a “family member”, or “a mental health clinician”.⁹⁴²

958. The option of engaging a family member is set out in the submissions relating to Issue 7(a) above. For the reasons submitted above, Counsel Assisting suggest that it was an option available on 31 July 2019.

959. As discussed in Counsel Assisting’s submissions in relation to Issue 6 above, whilst police did make extensive inquiries with Todd’s medical practitioners, they had not contacted Dr Richardson or a consultant psychiatrist. Contacting Dr Richardson might have opened up the possibility of obtaining contact with Todd’s caseworker, Mr Knight (who was familiar to Dr Richardson as referred to in Dr Richardson’s statement).

2. Withdrawal of police to a safe distance

960. Dr Eagle also suggests that police could have considered withdrawing “to a safe distance, so that they weren’t as seemingly as present, and as visible to Mr McKenzie”.⁹⁴³

961. Both Ch Insp Fuller and Officer T10 suggest that this was not a good tactical option. In addition to their concerns about the need to have a visual on Todd (addressed above), both those officers consider that retreating to the perimeter gave rise to a possibility that Todd might escape.⁹⁴⁴ Presumably, those officers were concerned of a risk to the public Todd might present given his actions from earlier in the day.

962. In addition, Ch Insp Fuller also agreed with the suggestion by his Counsel that it was not possible for police to go completely covert as they would need to wear armour which would enable them to be identified as police.⁹⁴⁵

⁹⁴² T1583.9-10 (20 June 2023).

⁹⁴³ T1583.6-7 (20 June 2023).

⁹⁴⁴ T979 (17 April 2023) (Officer T10; T1287 (14 June 2023) (Ch Insp Fuller).

⁹⁴⁵ T1331.48 (15 June 2023).

963. For the reasons set out below, Counsel Assisting submit that the difficulties raised by Ch Insp Fuller and Officer T10 to the alternative of waiting by the perimeter should not be accepted.
964. In relation to the concern that this would provide Todd an opportunity to escape and present a risk to the public, this may be regarded as a further instance of the over-emphasis police placed on importance of “controlling” Todd. There were no indications on that day that Todd intended to escape and commit a violent crime. Rather, Todd’s behaviour earlier in the day had involved Todd’s neighbours in the context of Todd having delusional thoughts that they had entered his home. Further, police had information from June, Ms Cross and Ms Smyth to suggest that Todd’s behaviour was due to his paranoia about his own home. In addition, as earlier noted, Todd said to Fourth Person “You have tried to shoot me, I won’t hurt anyone in here, what have [I] done”.⁹⁴⁶ In that same comment, Todd indicated that his intention was “to sit tight”. Todd had also made remarks earlier in the day concerning his intent to defend his home. Counsel Assisting submit that, taken together, these matters suggested that Todd was not a particular flight risk and did not present a particular risk to the public whilst he was inside his own home.
965. Nor does Dr Eagle’s suggested retreat to the perimeter require the necessity for tactical police to go completely covert. Police could still have been present (and seen to be present) at a distance where they were less confronting to Todd. This avoids the difficulties suggested to, and adopted by, Ch Insp Fuller.⁹⁴⁷
966. While it is not suggested that, given the serious conduct it was alleged Todd had committed earlier in the day, it was an option for police to withdraw entirely (option three identified in Ch Insp Fuller’s appreciation process), there appears to be no good reason why they could not have withdrawn so as to have maintained a less visible presence.

3. Offering Todd medication

967. Dr Eagle suggests that Todd could have been offered medication. Dr Eagle considers that in Todd’s case Valium may have been an option.⁹⁴⁸

⁹⁴⁶ T327.1-2 (30 March 2023).

⁹⁴⁷ T1331.37-48 (14 June 2023).

⁹⁴⁸ T1635.5 (20 June 2023).

968. Counsel Assisting note that this option would, as Dr Eagle has observed, be attended by potential difficulties in terms of oversight and safety.⁹⁴⁹ However, these options may not have been insurmountable and could, at the very least, have been explored. As Dr Eagle suggests, these are matters on which an independent psychiatrist was capable of providing guidance and oversight.⁹⁵⁰

4. Participation of independent psychiatrist or third party intervention

969. Counsel Assisting submit that perhaps the most readily available option was to deploy a strategy based on a consultant psychiatrist which might include appropriate intervention by Todd's family. This is the subject of Issue 7(b) above. As submitted by Counsel Assisting in relation to that issue, this could have provided a number of potential benefits which could have informed further negotiation strategies. Amongst other things, a consultant psychiatrist could have advised on the desirability or appropriateness of a number of the additional steps discussed above.

Submissions of the Commissioner

970. The Commissioner⁹⁵¹ largely agrees with the content of the submissions furnished on behalf of Ch Insp Fuller (save to the extent that they rely on hindsight to reason that the breach and hold may not have been the most appropriate strategy in the circumstances). The Commissioner's submissions in relation to Counsel Assisting's overall conclusion to Issue 9 are set out below.

Submissions of Ch Insp Fuller

971. Ch Insp Fuller submits⁹⁵² that the additional steps for continuing negotiations were not presented to Ch Insp Fuller. He was given and accepted the advice of Officer T9 that the TORS team were equipped and sufficiently skilled to deal with anything Todd may have presented, and therefore saw the risk of potential confrontation as medium to low. Whilst there was no "urgency" to end the negotiations, bringing the siege to a safe, effective and timely resolution is always the goal. No decision is risk-free and risk of self-harm is always a consideration for police.

972. Ch Insp Fuller considers that his role was "not entirely passive" and he would (and did) ask questions, including of the specialist teams that were assisting him.⁹⁵³ As Mr Perry

⁹⁴⁹ T1583 (20 June 2023).

⁹⁵⁰ T1635 (20 June 2023).

⁹⁵¹ Written submissions in reply of the Commissioner dated 25 October 2023 at [20].

⁹⁵² Written submissions of Superintendent Paul Fuller at [49]-[53], [71]-[77].

⁹⁵³ T1334.34-44 (14 June 2023).

accepted, it is entirely appropriate for a forward commander to give significant weight to the advice and guidance provided by two specialist police who were present in the field and deployed specifically for the purpose of giving that advice.⁹⁵⁴ In the circumstances presented to him, Ch Insp Fuller would arguably have been derelict to ignore the recommendation made to him by those advising him and essentially do nothing (noting that the negotiation team had posited no further strategies, despite Ch Insp Fuller's enquiry).

973. In relation to matters that Counsel Assisting point to as appearing to a point to a concern Ch Insp Fuller had regarding the length of the job, Ch Insp Fuller submits that he was not concerned about the length of the job but to progress negotiations towards a safe and effective resolution.

974. There was no basis in the evidence for a submission that Ch Insp Fuller had a concern regarding the length of the job. No officer gave evidence to that effect. That the situation was not "urgent" does not mean that a forward commander and those advising them should not do all they reasonably can to bring a high-risk domestic siege to a safe and effective resolution as quickly as reasonably practicable.

Submissions of Mark McKenzie

975. Mark agrees⁹⁵⁵ with Counsel Assisting's submissions that there were available alternatives to the breach and hold which should have been adequately explored. He further submits that alternative options could have been deployed with the "safety net" of the Emergency Action Plan, [REDACTED]

[REDACTED] At all material times the Emergency Action Plan remained in place. [REDACTED]

976. Mark also notes that Todd could have been offered Valium as an alternative option as he had been seeking this medication from his GP in the days prior but was refused.⁹⁵⁶

Submissions of June Wilkins

977. June submits⁹⁵⁷ that there were a number of alternative options available to police which would not have involved harm or death. She agrees with Dr Eagle's opinion that

⁹⁵⁴ T1742.15-25 (22 June 2023).

⁹⁵⁵ Written submissions of Mark McKenzie dated 12 October 2023 at [88]-[91].

⁹⁵⁶ Tab 8 (Statement of Detective Chief Inspector Wayne Walpole) at [91]; T1635.5 (20 June 2023).

⁹⁵⁷ Written submissions of June Wilkins dated 13 October 2023 at [171]-[175].

negotiations were not assisted by the large police presence outside of Todd's home. She submits that it would have been impossible for a breach and hold to achieve its stated aim.

978. June concurs with Dr Eagle's evidence that other people such as Todd's family could have assisted in the negotiations and that Todd could have been offered Valium through a third party to enable his safe and peaceful removal from his house.

Consideration

979. I accept the submissions of Counsel Assisting, Mark and June and am comfortably satisfied that there were other options that could have been explored. Leaving aside whether the breach and hold was *ever* going to be a good idea in the circumstances of this case, it was certainly not a good idea at the time it commenced. As Officer T9 ultimately accepted there was no urgency to effect the breach and hold. A number of police recollected sieges they had been involved with which were considerably longer in duration.
980. Ch Insp Fuller recorded at the time that Mark was contained and not mobile, did not appear to have access to firearms, there was no known explicit threat of self-harm. While there was always risk, it was not at a level that a solution needed to be found immediately.
981. Dr Eagle made a number of pertinent suggestions from a psychiatric perspective. She thought consideration could have been given to someone other than a police officer approaching Todd. That approach need not have been physical. She thought consideration of police withdrawing to a safe distance could have been considered; a consideration both Ch Insp Fuller and Officer T10 rejected as dangerous. She raised the possibility of offering Todd medication such as Valium, noting it could have been done under the guidance of a consultant psychiatrist. Each of these ideas has merit.
982. I have already stated that I think consideration should have been given to involving a consultant psychiatrist for advice and a third party intervenor.

h. Overall conclusion regarding Issue 9

Submissions of Counsel Assisting

983. Counsel Assisting⁹⁵⁸ submit that the Court would find that the Deliberate Action (the breach and hold, potentially followed by, as a separate action, a [REDACTED])

⁹⁵⁸ Counsel Assisting's written submissions dated 23 August 2023 at [399]-[406], [671]-[672].

██████████) was not an appropriate tactical option for police to take on 31 July 2019. Broadly stated, this is because that tactical option placed too significant an emphasis on the need to control Todd and, as consequence, did not place sufficient emphasis on the particular considerations regarding his mental health.

984. There is no doubt that the breach and hold carried a considerable degree of risk. This was recognised by all three officers in the field with responsibility for proposing the Deliberate Action for approval by Assistant Commissioner Mitchell (Ch Insp Fuller, Officer T9 of the TORS, and Negotiation Team Leader). In particular, the breach and hold brought a very real risk of violent confrontation. Furthermore, a number of particular circumstances of the job gave rise to a risk that the less lethal options would not be effective.
985. All of the NSWPF witnesses have given evidence that the main (if not only) purpose for conducting breach and hold ██████████ It was anticipated that the breach and hold would deliver a number of benefits, including a greater control in the negotiations, a greater control over where Todd was inside his home, a greater ability to see him, and the possibility of communicating more directly and effectively with Todd (including through eye contact).
986. If it the rationale for the breach and hold was indeed to ██████████ it was misconceived. The possibility of negotiations being successful on 31 July 2019 depended ultimately on the ability of police in attendance (specifically, the members of the negotiation team) to develop rapport with Todd and gain his trust. A breach and hold (involving, as it did, a number of heavily armed and intimidatingly clothed police officers knocking down a front door and smashing in a front window) was a poor way for police to attempt to develop rapport or trust with any person, let alone a mentally unwell person. In Todd's case, it was particularly likely that a breach and hold would be damaging to attempts to develop rapport because of the nature of his delusions (which, specifically, included military themes and a fear of persons entering into his home). Counsel Assisting note that, there was a real potential that Todd would incorporate the heavily armed and intimidatingly clothed tactical officers who knocked down his door into these delusions.
987. Counsel Assisting consider that, to a very real extent, the objectives of the officers in achieving "control" of Todd seem inconsistent with the development of trust and rapport. In particular, some of the involved officers have reported that the breach and hold needed to be effected because they perceived that Todd was too comfortable in his own home (suggesting that Todd needed to feel less comfortable). This could only

have been inimical to the development of rapport and the further progress of any negotiations.

988. Counsel Assisting also submit that the breach and hold was otherwise unlikely to achieve the aim of peacefully subduing Todd. This is because none of the tactical officers responsible for implementing the breach and hold were trained in, or had any particular insight into, dealing with persons with mental illness. Whilst Negotiation Commander did, the fact that the breach and hold created an opening for Todd meant that the officer conducting the negotiations would need to do so from behind the tactical police. In practical terms, at least immediately after the door was smashed down and the window knocked in, the tactical officers would be at the forefront of Todd's line of sight and attention. This must have greatly undermined any benefit of seeing Todd or maintaining eye contact in terms of establishing trust and rapport.
989. Further, the expectation that Todd would, after his door had been knocked down and window smashed in, have the capacity to respond rationally to such directions may have [REDACTED] seems far-fetched when considered in light of his illness and how he had presented on the day.
990. Counsel Assisting note that, the alternative to conducting the breach and hold (attempting to conduct the negotiations without effecting a breach and hold) was an option that was available in the circumstance.
991. Counsel Assisting acknowledge that the situation was risky. There was a possibility that whatever option the police took, Todd (or police) could come to harm. The evidence is clear that the negotiators were unable to engage Todd at any time (the evidence that Fourth Person had engagement with Todd for a fleeting moment does not permit a conclusion to the contrary). Furthermore, the Court (and the experts) are approaching this question with the benefit of hindsight and in quite different circumstances from those police involved in the development and implementation of the breach and hold. Nevertheless, the risks with the breach and hold were obvious, as were its limitations as a strategy to [REDACTED]. As there was no real reason why police needed to go in and there was an obvious alternative available (which was considered), Counsel Assisting suggest that the Court would find that the police involved in the recommendation of the breach and hold made an error of judgment.

992. For the foregoing reasons, Counsel Assisting submit that the Court would find that the breach and hold was not an effective mechanism for achieving the stated purpose of facilitating negotiations. In particular:
- a. It carried a number of risks, including a risk of violent confrontation (subheading (c) above) and a number of specific risks regarding the effectiveness of the less lethal options in the event that violent confrontation came to pass (subheading (d));
 - b. It was unlikely to realise its [REDACTED]
[REDACTED]; and
 - c. The option of simply continuing negotiations was available and represented a better option (subheading (g)).
993. Counsel Assisting note that although the Court would give due deference to the tactical experience of the relevantly involved tactical officers as well as to Ch Insp Fuller, the deficiencies in the breach and hold means that this is not a tactical option on which it could be said that minds could reasonably differ. To the extent Mr Perry could be understood to have accepted otherwise⁹⁵⁹ (and it is not clear that he did), Counsel Assisting submit that that opinion would not be accepted.

Submissions of the Commissioner

994. In relation to Counsel Assisting's submission that the job was not urgent, the Commissioner⁹⁶⁰ submits that Todd was a danger to himself in addition to presenting a danger to others. The Commissioner observes that evidence was given before the inquest that simply because a person does not evince suicidal ideation or a risk of self-harm, that does not mean that such an eventuality will not occur. [REDACTED]
[REDACTED].⁹⁶¹
995. The Commissioner emphasises the evidence of Sgt Watt in relation to the training material in the Active Armed Offender Response Course for the 2018-19 year that indicates that of the 242 incidents from 2000 to 2016 that were analysed: 50 percent ended before police arrived; and 35.2 percent involved suicide.⁹⁶² The Commissioner notes that while Todd's situation was not an Armed Active Offender situation, the data

⁹⁵⁹ T1740 (22 June 2023).

⁹⁶⁰ Written submissions of the Commissioner dated 13 October 2023 at [31]-[32], [35] and [37].

⁹⁶¹ Second statement of Officer T10; T1030 and T1045.14 (18 April 2023).

⁹⁶² Tab 270A (Active Armed Offender PowerPoint Presentation 18/19) at pp. 30-31.

is nevertheless useful in demonstrating that the risk of self-harm is an ever-present risk.

996. The Commissioner also emphasises evidence given by Negotiation Commander that between 2017-2022, the Tactical Operations Unit and the Negotiation Unit assisted in the resolution of 1,980 high risk incidents, of which 8 of the 9 deaths arising involved the subject taking their own life by suicide or armed self-inflicted fatal injury prior to any tactical intervention.⁹⁶³
997. As set out above, the Commissioner has made submissions in relation the factors that form the basis for Counsel Assisting's overall conclusion regarding Issue 9.

Submissions of Ch Insp Fuller

998. Ch Insp Fuller accepts⁹⁶⁴ that it is open for the Court to find that the deployment of breach and hold was not the most appropriate option at the time, and that further attempts at negotiation using a consultant psychiatrist or third party intervenor ought to have been considered. However, he does not accept Counsel Assisting's contention that the deployment of breach and hold was "not *an* appropriate tactical option for police to take on 31 July 2019",⁹⁶⁵ that "the police involved in the recommendation of the breach and hold made an error of judgment"⁹⁶⁶ and that it was "not a tactical option on which it could be said that minds could reasonably differ".⁹⁶⁷
999. Ch Insp Fuller submits that he did not err by deciding to accept the recommendation of specialist police. He submits that Counsel Assisting's submissions in this regard are based upon information and advice that should have, but were not, provided to Ch Insp Fuller. In his submission, he cannot be criticised for failing to take into account information that was not known to him.
1000. Ch Insp Fuller further submits that the decision to give permission to deploy the breach and hold was not so unreasonable that no reasonable decision maker could have made it. His decision was based on the advice of trained specialist tactical team which was agreed to by the specialist negotiation team. This tactic had been successfully deployed in past incidents.

⁹⁶³ Tab 91A (Second statement of Negotiation Commander) at [6]-[7].

⁹⁶⁴ Written submissions of Superintendent Paul Fuller at [26]-[32], [37]-[42], [65], [96].

⁹⁶⁵ Counsel Assisting's written submissions dated 23 August 2023 at [399].

⁹⁶⁶ Counsel Assisting's written submissions dated 23 August 2023 at [406].

⁹⁶⁷ Counsel Assisting's written submissions dated 23 August 2023 at [672].

1001. Ch Insp Fuller contends that Counsel Assisting's submissions can only be accepted if there was no possibility that the tactic would have resulted in a peaceful resolution or that the tactic was inconsistent with NSWPF policy. These conclusions are not available on the evidence. It cannot be said whether the use of a consultant psychiatrist or third party intervenor would or even would likely have had a material impact on the incident.
1002. Ch Insp Fuller refers⁹⁶⁸ to the emphasis in Counsel Assisting's submissions that the job was not urgent and that "there was no real reason why police needed to go in". He submits that a pre-planned action⁹⁶⁹ (or Deliberate Action) is not reserved for situations where the use of such a tactic is "urgent". It is available where all alternative options have been exhausted or are likely to fail, as was the case on 31 July 2019. The breach and hold tactic is a [REDACTED] not to quickly bring the job to an end. Ch Insp Fuller contends that it was open for him to find that previous attempts at negotiations had failed to establish rapport. He submits that the decision to deploy the breach and hold tactic was consistent with relevant policy.
1003. The command structure and permissions process is clearly designed to provide a layered approach to the deliberation of any form of pre-planned action, ensuring consideration by those with very different perspectives, knowledge, skills, training and experience. Ch Insp Fuller submits that the Court would be slow to conclude that the considered and unanimous judgment of all those persons in the command structure and permissions process that a breach and hold was a reasonable tactic to be deployed at the time it was on 31 July 2019 was "erroneous" or so unreasonable that no reasonable decision maker (let alone six of them) could have made it.
1004. Ch Insp Fuller also disagrees with the submission that the officer conducting the negotiations would need to do so from behind tactical police. Negotiations could have continued from the reamed front window.⁹⁷⁰

⁹⁶⁸ Written submissions of Superintendent Paul Fuller at [37]-[42].

⁹⁶⁹ In his written submissions (undated) at [36], Superintendent Fuller observes that "in the TORS context the proper label is that of a "Pre-planned action", rather than a Deliberate Action, but in circumstances where it is not suggested the action is intended to resolve the situation by force ... there appears little meaningful distinction in the label".

⁹⁷⁰ Tab 71 (Certified Transcript – Interview with Chief Inspector Fuller) at p. 472, 439, 480.

Submissions of June Wilkins

1005. June agrees with Counsel Assisting's submission that the breach and hold was not appropriate and was misconceived in the circumstances.⁹⁷¹

Submissions in reply

1006. In reply, the Commissioner⁹⁷² largely agrees with the content of the submissions furnished on behalf of Ch Insp Fuller, save to the extent that they rely on hindsight to reason that the breach and hold may not have been the most appropriate strategy in the circumstances. The Commissioner notes that, at an inquest, actions are assessed with the clarity of hindsight, often with the benefit of information which those in the midst of a siege did not have, and in entirely different conditions to those they faced. Based on the information known at the time and the available data before the Court, it is maintained the breach and hold was an appropriate strategy.

Consideration

1007. Having reviewed the evidence and considered submissions from all parties, I am satisfied that the breach and hold was not appropriate and was misconceived in the circumstances that existed at Todd's home on the evening of 31 July 2019.

1008. All of the NSWPF witnesses gave evidence that the main (some said only) purpose of conducting the breach and hold was [REDACTED]. In my view there was no chance it could have increased trust or rapport. I have considered whether it could have subdued Todd, by frightening him into submission and it seems unlikely. Serious physical confrontation was almost assured. I have no doubt that the tactical officers were confident that they could eventually bring Todd down and successfully arrest him, given the weapons and appointments they held, but I question whether any of the tactical officers really thought their actions would [REDACTED].

1009. An apparent tension ran through the police evidence. It was continually stressed that the purpose of the breach and hold was to [REDACTED], while at the same time tactical officers gave evidence about their confidence in forcing surrender, if necessary using the weapons they were trained to employ.

1010. The decision to enact the breach and hold was taken when there were other options still available to police. Ch Insp Fuller recorded in his "appreciation process" that one of the options was continuing "current" negotiations. I accept Counsel Assisting's

⁹⁷¹ Written submissions of June Wilkins dated 13 October 2023 at [151]-[152], [165].

⁹⁷² Written submissions in reply of the Commissioner dated 25 October 2023 at [20].

submission that what might have been included in “current negotiations” was not adequately explored. Other measures such as those suggested by Dr Eagle could have been considered, including involving a consultant psychiatrist and considering third party intervenors. The passage of time may have assisted and while there was no imminent risk, in my view negotiations should have continued and been planned with a more open-minded approach.

1011. The Commissioner, as has been set out above, stands by the decision made to enact a breach and hold, noting among other factors that Todd may have been a risk to himself and emphasising the fact that the tactic is usually successful. I accept that the possibility of self-harm should always be considered given that the risk is difficult to assess and may be unpredictable. I also accept that the threat of tactical officers will at times bring a siege to an immediate end, I just do not accept these matters can be extrapolated to suggest it was appropriate here. The usual success of breach and hold was a recurring theme in the police evidence. I remain concerned that the enthusiasm for the tactic may have clouded the critical thinking about its use on this occasion.
1012. A more nuanced and indeed reflective approach was put by Ch Insp Fuller. Ch Insp Fuller accepted that *with the benefit of hindsight* it was open to the Court to find that the deployment of breach and hold was not the most appropriate option at the time and that further attempts at negotiation using a consultant psychiatrist or third party intervenor ought to have been considered. Nevertheless, in his view breach and hold was *an* available option about which reasonable minds may differ. He submitted that it could not be said that the tactic had no possibility of success or was inconsistent with NSWPF policy. I accept Ch Insp Fuller’s decision was not contrary to NSWPF policy but I do not accept it was correct.

Issue 10 – Was the Deliberate Action adequately planned, resourced and documented?

1013. Issue 10 directs attention to a different issue (but related to Issue 9) of whether the process that led Ch Insp Fuller to the result of recommending a breach and hold involved a sufficient degree of planning.
1014. Drawing on matters that Counsel Assisting have raised as relevant to a consideration of this issue, submissions of Counsel Assisting and the interested parties, including the summary of evidence specific to those matters, and a consideration of those matters, are set out with reference to the following headings:
- a. Certain deficiencies associated with the planning of the breach and hold;

- b. Insufficient involvement of the negotiations team in the development of the breach and hold;
- c. Insufficient planning regarding the execution of the breach and hold;
- d. Insufficient planning by negotiators as to how to engage Todd;
- e. Adequacy of the resources for and documentation of the Deliberate Action; and
- f. Attribution of responsibility to the officers who have received letters of “sufficient interest”.

1015. The summary of evidence and submissions in the context of Issue 9 above is also relevant to Issue 10. I regard the summary of evidence set out in the submissions as accurate and do not repeat it in the context of Issue 10.

a. Certain deficiencies associated with the planning of the breach and hold

Counsel Assisting’s submissions

1016. Counsel Assisting submit that elements of the process in respect of the planning of the breach and hold were deficient. The process of planning relied too heavily on the perceived success of the breach and hold in previous jobs. This meant that insufficient attention was given to the particular circumstances of 31 July 2019. Those responsible for devising the Deliberate Action had enough information to have been aware of these deficits in the Deliberate Action and their decision to propose that strategy was misconceived.

Insufficient planning in the process of recommending the breach and hold for approval

1017. Counsel Assisting⁹⁷³ acknowledge that Ch Insp Fuller did undertake some planning before requesting approval to conduct a breach and hold. In particular, as part of his appreciation process, Ch Insp Fuller made some effort to weigh up the pros and cons (as he saw them) of each of the options that were available to resolve the situation on 31 July 2019. However, aspects of the planning were deficient.

1018. Counsel Assisting note that it is convenient to consider the planning that Ch Insp Fuller and Officer T9 gave to this issue together. The evidence suggests that they were jointly involved in the planning processes (though, ultimately, the decision was for Ch Insp Fuller to make). The third member of the decision making “triangle”, Negotiation Team

⁹⁷³ Counsel Assisting’s written submissions dated 30 August 2023 at [676]-[689].

Leader, will be considered separately because, as submitted below, it is unclear whether he played any role in the planning for this process.

Insufficient consideration given to the possibility that Todd would react violently to the breach and hold

1019. Counsel Assisting suggest that Ch Insp Fuller and Officer T9 did not adequately plan for the possibility that Todd would react violently to the breach and hold. As was suggested to Ch Insp Fuller in his oral evidence, whilst his appreciation process acknowledged the possibility of violent confrontation, it did so at a high level of generality (simply recording this as a “possibility”).⁹⁷⁴ Ch Insp Fuller did not consider the sort of specific information which enabled him to arrive at a meaningful assessment of that risk.
1020. In part, this appears to be due to the limitations in the information that was available to Ch Insp Fuller and to Officer T9 (on whose advice Ch Insp Fuller relied). Amongst other things, Ch Insp Fuller also does not recall being told that a specific focus of Todd’s paranoia (and a possible trigger for his behaviour on 31 July 2019) was a fear of persons entering his home. Ch Insp Fuller also says that he did not see the information provided by Ms Smyth and Ms Cross. Ch Insp Fuller also cannot recall ever having seen the entry made by Fourth Person recording the information provided by June and recording her comments that these were “possibly” a “trigger” for the day’s events. Although Ch Insp Fuller says that “quite possibly” he was involved in a conversation on that topic, the fact that he does not have any specific recollection of such conversations⁹⁷⁵ leaves open the possibility that he was not provided that information.
1021. Officer T9 was also unaware of the information that suggested that Todd had a paranoia regarding persons entering his home (including both the information provided by the witnesses and the information provided by June).⁹⁷⁶ Officer T9 accepted that it would potentially have been useful to have had at least a summary of the information provided by the witnesses⁹⁷⁷ (although Officer T9 later gave evidence that this information provided by Ms Smyth and Ms Cross would have only have been of “marginal” relevance in determining the appropriateness of a breach and hold in any event).⁹⁷⁸

⁹⁷⁴ T550 – T551 (3 April 2023).

⁹⁷⁵ T548.40 – T549.1 (3 April 2023).

⁹⁷⁶ T1107 (19 April 2023).

⁹⁷⁷ T1104 (19 April 2023).

⁹⁷⁸ T1130.50 (19 April 2023).

1022. Evidently, if Ch Insp Fuller was not aware of these matters, he could not have factored them into his decision making. Significantly, Ch Insp Fuller said that if he had specific information about delusions, he would probably have recorded this as a consideration against conducting the breach and hold in his appreciation process.⁹⁷⁹
1023. Although he was present during former Sen Cst Larrain's "negotiations"⁹⁸⁰ with Todd, Ch Insp Fuller was not aware that Todd had stated earlier in the day that his intention was to "defend his home".⁹⁸¹ Counsel Assisting note that this means that Ch Insp Fuller could not have factored this into his planning (and, in particular, his assessment of the likelihood that Todd would respond violently to a breach and hold).
1024. Ch Insp Fuller seems to have been unaware that Ms Smyth had approached the perimeter at one point during the day.⁹⁸²
1025. Officer T9 had only limited information about the aspects of the police operation that preceded his arrival. He says that when he first arrived he was not told anything in detail.⁹⁸³ In particular, he was not told anything specific about the "negotiations" former Sen Cst Larrain had conducted with Todd.⁹⁸⁴ Officer T9 was unaware that Todd had communicated to general duties police his intention to defend his home.⁹⁸⁵
1026. By contrast, Ch Insp Fuller was aware that Todd had reacted angrily when the ladder had been placed against the wall and when the window on the right side of the building had been opened.⁹⁸⁶ Officer T9 was aware of these events as well⁹⁸⁷ but did not observe that this caused any change in Todd's behaviour.⁹⁸⁸ However, he did not record this in his appreciation process⁹⁸⁹ and it is unclear whether he gave any specific attention to this or in any way factored this into his process of planning.

⁹⁷⁹ T552 (3 April 2023).

⁹⁸⁰ The inverted commas are intended to signify that former Sen Cst Larrain was not a trained negotiator.

⁹⁸¹ T578.20 (3 April 2023).

⁹⁸² Tab 71 (Certified Transcript – Interview with Chief Inspector Fuller) at p. 455 [A229].

⁹⁸³ T1080.18 (19 April 2023).

⁹⁸⁴ T1083.36 (19 April 2023).

⁹⁸⁵ T1139 (19 April 2023).

⁹⁸⁶ T535.48 – T536.24 (3 April 2023).

⁹⁸⁷ T1109 (19 April 2023).

⁹⁸⁸ T1111 (19 April 2023).

⁹⁸⁹ T543.49-50 (3 April 2023).

Insufficient planning regarding Todd's mental health

1027. Counsel Assisting observe that, more broadly, it is difficult to see how any allowance at all was made to accommodate the mental illness which police, including Ch Insp Fuller, was aware that Todd was suffering from.
1028. As noted in Counsel Assisting's submissions dealing with Issue 9 above, police appear to have assumed that Todd could and would rationally react to the breach and hold (either by surrendering or retreating, giving an opportunity for police to [REDACTED] [REDACTED] That may well have been a valid assumption in the case of a person who was not suffering from a delusion that police may have been terrorists, that their weapons had been disarmed, and that people had been entering his home. However, there was no specific consideration given to how Todd, as a mentally unwell person who held each of those delusional beliefs, might respond. It is submitted that this demonstrates a failure of planning.

Insufficient consideration given to the potential limitations in the less lethal options

1029. In addition, whilst Ch Insp Fuller had regard to the fact that there was an opportunity to plan a tactical assault as well as the fact that less lethal options were available, the evidence suggests that he did not turn his mind to how those tactical options could be deployed on the day and the specific limitations in each of those options discussed above.
1030. Counsel Assisting submit that it may not have been Ch Insp Fuller's responsibility to do so. He was entitled to rely on the advice of Officer T9 in this respect. However, Ch Insp Fuller has given evidence that he cannot recall having a discussion with anyone (including Officer T9) as to the potential limitations in the less lethal options or how they might be deployed at Todd's premises.⁹⁹⁰ For his part, Officer T9 also does not recall any specific discussion with Ch Insp Fuller regarding the impact the size of the house⁹⁹¹ or Todd's psychotic state might have⁹⁹² on the effectiveness of those less lethal options.⁹⁹²

Submissions of the Commissioner

1031. The Commissioner largely agrees with the content of the submissions furnished on behalf of Ch Insp Fuller (save to the extent that they rely on hindsight to reason that

⁹⁹⁰ T1281.2-26 (14 June 2023).

⁹⁹¹ T1134.45-48 (19 April 2023).

⁹⁹² T1134.36 (19 April 2023).

the breach and hold may not have been the most appropriate strategy in the circumstances). The Commissioner's submissions relevant to this point are also summarised in the context of Issue 9 and are detailed below in the context of Issue 10.

Submissions of Ch Insp Fuller

1032. Ch Insp Fuller⁹⁹³ submits that the Court should not accept Counsel Assisting's submission that he "did not consider the sort of specific information which enabled him to arrive at a meaningful assessment" of the risk. He contends that it is not an error of judgment for failing to take into account information of which he was unaware at the time, including Todd's paranoia about people entering his premises and his statement that he would defend his home. Nevertheless, this information was considered by the tactical team⁹⁹⁴ in formulating their advice to Ch Insp Fuller.

Submissions of Mark McKenzie

1033. Mark⁹⁹⁵ agrees with the submissions of Counsel Assisting.

Submissions of June Wilkins

1034. June⁹⁹⁶ submits that the decision to deploy the breach and hold was subject to confirmation bias based on previous experience that the subject would immediately surrender. This prevented decision makers from considering a more tailored and appropriate response.

Submissions in reply

1035. Ch Insp Fuller⁹⁹⁷ rejects June's contention, asserting that based on the evidence, police considered surrender to be a possible outcome, not something that *would* occur.

Consideration

1036. There is no evidence that resourcing played a role in the catastrophic events of 31 July 2019. The issue which caused me concern was the planning prior to the operation.

1037. Ch Insp Fuller and Officer T9 were actively involved in the planning process. While it was ultimately Ch Insp Fuller's decision, there was talk of a "triangle" involving Ch Insp

⁹⁹³ Written submissions of Superintendent Paul Fuller at [114], [117]-[118].

⁹⁹⁴ T1130.47-T1131.4; T1163.30-49 (19 April 2023).

⁹⁹⁵ Written submissions of Mark McKenzie dated 12 October 2023 at [92].

⁹⁹⁶ Written submissions of June Wilkins dated 13 October 2023 at [155].

⁹⁹⁷ Written submissions in reply of Superintendent Paul Fuller dated 24 October 2023, at [22].

Fuller, Officer T9 and Negotiation Team Leader. I will return shortly to what part Negotiation Team Leader actually played.

1038. I accept Counsel Assisting's submission that information of great importance was not brought to Ch Insp Fuller, or that if it was it was at a level of great generality. As we have seen he does not recall having been made aware of a number of significant factors such as Todd's paranoia about people entering his home or Todd's earlier statements that he would defend his home.

1039. I accept that Ch Insp Fuller's decision was based on the recommendation he received from specialist police. I accept that he was entitled to rely on the advice of Officer T9, nevertheless the command structure and permissions process should require critical thinking at every level. Tactical police are there to bring tactical solutions. They are kitted up and ready for action. Ch Insp Fuller was there to take the overall view, to weigh up what should occur and what had the best chance of bringing a peaceful solution. In my view there was no breach of NSWPF policy, there was a decision that placed too much weight on the advice of tactical officers and taking the path that "usually works", rather than the path best suited for the particular circumstances that existed at the time.

b. Insufficient involvement of the negotiations team in the development of the breach and hold

Counsel Assisting's submissions

1040. Counsel Assisting⁹⁹⁸ submit that there is some suggestion in the evidence that Negotiation Command was not involved in the process of recommending the breach and hold and was somewhat sidelined from the decision-making processes that occurred on that day. Counsel Assisting submit that the potential consequence is that the expertise that negotiators brought (in terms of potential de-escalation strategies) was not sufficiently incorporated into the planning process for the Deliberate Action.

[Negotiation Team Leader was not made aware of the decision to open the window](#)

1041. In his record of interview, Negotiation Team Leader says that he was not aware of the decision to open and prop open the window before it occurred.⁹⁹⁹ In his experience, it was not normal for him to not be aware of information of that character.¹⁰⁰⁰

⁹⁹⁸ Counsel Assisting's written submissions dated 30 August 2023, at [690]-[716].

⁹⁹⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1926 [A505].

¹⁰⁰⁰ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1926 [A507].

1042. Counsel Assisting observe that this seems significant given the indications that Todd acted angrily upon the window being forced open and the fact that it caused him to cease having conversations with police.¹⁰⁰¹
1043. Counsel Assisting note that Officer T10 accepted that opening the window amounted to a breach and hold for which permissions from Assistant Commissioner Mitchell were required.¹⁰⁰² It might be expected, therefore, that this act would involve Negotiation Team Leader as a member of the “collective”¹⁰⁰³ decision-making triangle being informed of this before it occurred.

Negotiation Team Leader only became aware of the breach and hold from reading the iSurv entry

1044. Counsel Assisting note that, perhaps even more importantly, in his record of interview, Negotiation Team Leader says that he came into the “tail end” of discussions between Officer T9 and Ch Insp Fuller. He says that Ch Insp Fuller and Officer T9 had been having those conversations first.¹⁰⁰⁴ At that point in time, Negotiation Commander agreed with the breach and hold.¹⁰⁰⁵
1045. In his affidavit of 22 May 2023, Negotiation Team Leader confirms that he first learned of the breach and hold proposal upon reading the iSurv log.¹⁰⁰⁶
1046. In his affidavit, Negotiation Team Leader cannot recall whether or not he was “miffed” or “annoyed” by first learning about the breach and hold from reading the iSurv log. However, he agreed that any conversation he had with the other members of the decision triangle would have been an “adult conversation”.¹⁰⁰⁷
1047. It may be noted that Negotiation Commander gave evidence that she was not aware that Negotiation Team Leader had not been informed. However, she would have expected Negotiation Team Leader to have been told if that discussion was regarding the implementation of the strategy. She accepted that Negotiation Team Leader ought to have been informed of this and it would be unusual for Negotiation Team Leader to find out about it from reading iSurv.¹⁰⁰⁸

¹⁰⁰¹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1989.

¹⁰⁰² T1050.48 (18 April 2023).

¹⁰⁰³ T945.17 (17 April 2023).

¹⁰⁰⁴ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1929 [A536-A537].

¹⁰⁰⁵ Tab 88, at p. 1930 [A544].

¹⁰⁰⁶ Tab 88-1 (Affidavit of Negotiation Team Leader) at [15].

¹⁰⁰⁷ Tab 88-1 (Affidavit of Negotiation Team Leader) at [18].

¹⁰⁰⁸ T439.21 (31 March 2023).

1048. Similarly, Officer T10 was also unaware that Negotiation Team Leader was concerned about learning of breach and hold from iSurv. He gave evidence that if he had been aware of that he would have advised the members of the decision-making team to start talking to each other.¹⁰⁰⁹

The evidence of Ch Insp Fuller and Officer T9

1049. The other members of the decision-making triangle did not accept that Negotiation Team Leader had not played a part in the discussions surrounding the breach.

1050. Ch Insp Fuller's notes record that Negotiation Team Leader "saw DA [Deliberate Action Plan] on iSurv and expressed concern".¹⁰¹⁰ The notes also recorded that "both T9 and I spoke with [Negotiation Team Leader] and were of the belief that he had been involved the conversations re same."

1051. In his oral evidence, Ch Insp Fuller described the interactions with Negotiation Team Leader as an "adult conversation". He explained the sequence of events as follows:

"I think when it [the relevant iSurv entry] was uploaded by officer T9, the negotiation team leader as I said he expressed concerns that he hadn't been consulted. Both T9 and I believed he had been. We then - we had adult conversation about it. We looped back - have you got any alternatives. He basically expressed an opinion that it'd already been authorised by AC Mitchell and I said, yes but the choosing of when to - when and if to enact that plan rests with me. We had this conversation about what were the alternatives, or to voice his opinion on alternative methods that he thought would work."¹⁰¹¹

1052. Ch Insp Fuller was at pains that he perceived the decision-making triangle as a "democracy" and not a "dictatorship" and placed considerable emphasis on Negotiation Team Leader's inability to suggest alternatives during the "adult conversation".¹⁰¹²

1053. Counsel Assisting submit that Ch Insp Fuller's reference to the democratic nature of the decision-making process should be understood in the hierarchical nature of police and the fact that Ch Insp Fuller was the commander and ultimately responsible for the

¹⁰⁰⁹ T965 (17 April 2023).

¹⁰¹⁰ Tab 71A (Notes made by Ch Insp Fuller) at p. 497.

¹⁰¹¹ T556.8-15 (3 April 2023).

¹⁰¹² T557.34-36 (3 April 2023).

decisions.¹⁰¹³ It may also be of significance that Negotiation Commander was junior to Ch Insp Fuller in terms of rank.¹⁰¹⁴

1054. Officer T9 gave evidence that the first that he had heard of Negotiation Team Leader expressing concerns about the window not being opened was during the course of his oral evidence.¹⁰¹⁵
1055. In relation to the discussions regarding the breach and hold, the effect of Officer T9's evidence was that he thought that Negotiation Team Leader had agreed, or at least acquiesced, to that action. Negotiation Team Leader did not "say a lot" but Officer T9 inferred from Negotiation Team Leader's body language that he had understood and was in agreeance.¹⁰¹⁶ Officer T9 accepted that it was possible that the Negotiation Team Leader was doing something else at the time.¹⁰¹⁷ Any discussions, according to Officer T9, would have only taken place for a period of a few minutes.¹⁰¹⁸
1056. Officer T9 recalled Negotiation Team Leader complaining that he felt like that he had not been consulted, which he thought was "strange".¹⁰¹⁹ Officer T9 offered to contact Officer T10 about it and says that after he had made this offer, Negotiation Team Leader appeared "happy with it".¹⁰²⁰
1057. Officer T9 did not accept the proposition that because by the time the Negotiation Team Leader became aware of the breach and hold, the approvals had already been given by Assistant Commissioner Mitchell making the breach and hold a "fait accompli".¹⁰²¹
1058. Officer T9 felt that if any of the decision-making triangle had any concerns, that member would have raised those concerns for them to be discussed.¹⁰²²
1059. Officer T9 accepted that the conversations with Negotiation Team Leader in which he complained about not being consulted were probably a little tense. He felt that Negotiation Team Leader was a bit "miffed" but that this did not last long.¹⁰²³

¹⁰¹³ See, e.g., T1041 (18 April 2023) (Officer T10).

¹⁰¹⁴ T562.29 (3 April 2023).

¹⁰¹⁵ T1113.25 (19 April 2023).

¹⁰¹⁶ T1115.42 (19 April 2023).

¹⁰¹⁷ T1118 (19 April 2023).

¹⁰¹⁸ T1118.2 (19 April 2023).

¹⁰¹⁹ T1118.29 (19 April 2023).

¹⁰²⁰ T1118.39 (19 April 2023).

¹⁰²¹ T1118.41-49 (19 April 2023).

¹⁰²² T1118.45-49 (19 April 2023).

¹⁰²³ T1208.7 (20 April 2023).

Consideration: Negotiation Team Leader was not involved in the planning of the breach and hold

1060. Counsel Assisting submit that it would be open to the Court to find on the balance of probabilities that Negotiation Team Leader was not involved in the development of the breach and hold. No other explanation is consistent with his evidence that he learned of the breach and hold upon reading it in iSurv. The fact that this is how Negotiation Team Leader found out that the breach and hold had been proposed suggests he did not have any real input into developing that recommendation.
1061. There may well have been an “adult conversation” about it later. However, this seems more like an attempt to “smooth things over” with Negotiation Team Leader after the decision had already been made as opposed to an attempt to seek his views. It could be regarded as an attempt to have Negotiation Team Leader go along with the option that Ch Insp Fuller clearly preferred.
1062. There is some suggestion that Ch Insp Fuller, as early as 4.55pm, placed a 90-minute limitation on negotiations. One way of regarding this is that he always had a preference for a breach and hold as opposed to extended negotiations. Negotiation Team Leader may have felt uncomfortable being heard against this opinion (noting that Negotiation Team Leader was junior to Ch Insp Fuller).
1063. Counsel Assisting submit that there is perhaps a degree of criticism in some of Ch Insp Fuller’s and Officer T9’s remarks regarding Negotiation Team Leader’s inability to propose alternatives referred to above. This criticism may have inhibited Negotiation Team Leader from expressing views contrary to Ch Insp Fuller’s preferred position.
1064. Against this, Negotiation Team Leader’s evidence that he ultimately supported the breach and hold should be acknowledged. However, by that stage, the breach and hold had gone to Assistant Commissioner Mitchell for approval and it may have been uncomfortable or difficult for Negotiation Team Leader to have spoken against that proposal.
1065. This is not to absolve Negotiation Team Leader of all responsibility. The plan was flawed and his role required him to voice his concerns or to propose an alternative plan. Ultimately, it appears that he did not.
1066. Counsel Assisting conclude that the consequence was that the decision-makers appear to have been deprived the perspective of the Negotiation Team Leader in deciding to seek approval for the breach and hold.

Submissions of the Commissioner

1067. In the context of Todd becoming argumentative following the action of opening a window, the Commissioner¹⁰²⁴ submits that Negotiation Team Leader's evidence was that Todd was argumentative throughout their attempts to negotiate with him.
1068. The Commissioner submits that Negotiation Team Leader worked well with Officer T9 and Ch Insp Fuller.¹⁰²⁵ Negotiation Team Leader did not have issue with the initial lack of consultation regarding the breach of hold¹⁰²⁶ and he ultimately agreed with the deployment of this tactic,¹⁰²⁷ believing that it would provide an opportunity for further negotiations¹⁰²⁸ and providing input into the timing of the deployment.¹⁰²⁹
1069. The Commissioner contends that this evidence does not support Counsel Assisting's submission that Negotiation Team Leader felt uncomfortable to speak out about the proposed breach and hold.¹⁰³⁰ Evidence from Officer T1 suggests that despite the hierarchical nature of the NSWPF, this does not prevent independent thought and discussions from taking place.¹⁰³¹

Submissions of Mark McKenzie

1070. Mark¹⁰³² agrees with the submissions of Counsel Assisting. He submits that Ch Insp Fuller's inability to expand on the contents of the "adult conversation" and Officer T9's evidence that the discussion was "probably a little tense"¹⁰³³ indicate that there was disagreement between Negotiation Team Leader, Officer T9 and Ch Insp Fuller with respect to deploying the breach and hold. He submits that their broad agreement with the plan was made after the fact.

Submissions of June Wilkins

1071. June submits¹⁰³⁴ that the "siloiing" between general duties officers, negotiators and TORS officers led to a disjointed, fragmented and disorganised process of discussing the breach and hold's deployment, the tactic's failure and Todd's death. The evidence

¹⁰²⁴ Written submissions of the Commissioner dated 13 October 2023 at [89]-[95].

¹⁰²⁵ Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 8; Tab 78 (Certified Transcript of Interview with Officer T9) at p. 145.

¹⁰²⁶ Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 8.

¹⁰²⁷ Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 10.

¹⁰²⁸ Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 9.

¹⁰²⁹ Tab 88-1 (Affidavit of Negotiation Team Leader) at p. 11.

¹⁰³⁰ Tab 88-1 (Affidavit of Negotiation Team Leader) at pp. 8, 10.

¹⁰³¹ T901.16 (17 April 2023).

¹⁰³² Written submissions of Mark McKenzie dated 12 October 2023 at [94].

¹⁰³³ T1119.15 – 23 (19 April 2023).

¹⁰³⁴ Written submissions of June Wilkins dated 13 October 2023 at [156]-[157], [166].

provided establish a distorted and incoherent understanding of who was responsible for the design and execution of the police response on 31 July 2019.

1072. June further submits that Ch Insp Fuller wanted a breach and hold from the outset and was indifferent to any option other than the deployment of a breach and hold.

Submissions in reply

1073. Ch Insp Fuller¹⁰³⁵ asserts that there is no evidence of any argument between himself, Officer T9 and Negotiation Team Leader. He submits that Mark's contention that they came to an agreement after the fact ignores the contemporaneous records, the chronology of the decision making and the uncontested evidence of the three individuals that they were in agreement by the time permission was sought to undertake the breach and hold.

1074. Ch Insp Fuller rejects June's submissions regarding his desire to deploy a breach and hold. He submits that there is also no basis for the submission that there was a siloing of information that led to a fragmented process of decision making. With respect to the responsibility over the breach and hold, the evidence delineates the roles of each officer. In particular, Ch Insp Fuller was the officer on scene responsible for decision making.

Consideration

1075. I am satisfied that the process in relation to the decision to recommend a breach and hold permission was flawed. Specifically, I am concerned that the decision was made prior to properly seeking and valuing the contribution of the negotiation team.

1076. I accept Negotiation Team Leader's evidence that he was not aware of the decision to open the window before it occurred. More significantly I accept his evidence that he first learned about the Deliberate Action plan when he read about it on the iSurv log. I note that Ch Insp Fuller stated that when Negotiation Team leader raised the issue that he had not been consulted, both he and Officer T9 "believed" he had. Officer T9 stated that he also thought Negotiation Team Leader had agreed or at least acquiesced and although he did not say much, his body language suggested he understood and was in agreeance.

1077. From an outsider's perspective it is extraordinary that anybody could think it was appropriate that such an important decision could properly be inferred by someone's

¹⁰³⁵ Written submissions in reply of Superintendent Paul Fuller dated 24 October 2023 at [19]-[20], [23]-[25].

body language. It suggests that there was a lack of real appreciation of what Negotiation Team Leader could bring to the conversation. It does not reflect the existence of a real “triangle”.

1078. The Court heard evidence that there was then “an adult conversation” and Negotiation Team Leader was asked whether he had “any alternatives”. Negotiation Team Leader raised that it had already been approved, but according to Ch Insp Fuller he was once again asked if Negotiation Team Leader knew of any “alternative methods that he thought might work”.

1079. The conversation was described as “adult” by Ch Insp Fuller and as “probably a little tense” by Officer T9. Officer T9 described Negotiation Team Leader as “a bit miffed” but that it didn’t last long. The descriptions were to my mind a little coy, if not avoidant. Negotiation Team Leader was unable to give oral evidence before me due to medical reasons, but in an affidavit he provided to the Court he agreed that there would have been “an adult conversation”. In my view the involved officers were reluctant to provide the court with a fulsome account of this “adult conversation,” wanting to focus on the fact that they all ultimately agreed. I do not accept that this is a useful approach. Neither Ch Insp Fuller nor Officer T9 were prepared, even with hindsight, to adequately reflect upon the process and properly consider how difficult it would have been for Negotiation Team Leader, who was junior to Ch Insp Fuller, to fully engage in the process after the decision appeared to be a *fait accompli*.

1080. I find that in all the circumstances the decision was made without adequate input from Negotiation Team Leader. This skewed the process and is likely to have meant that negotiation insights were not given sufficient weight.

c. Insufficient planning regarding the execution of the breach and hold

Counsel Assisting’s submissions

1081. Counsel Assisting¹⁰³⁶ submit that while the members of the Bravo team performed a “rehearsal”,¹⁰³⁷ they did not think it necessary to discuss with each other what their respective roles in the breach and hold would be. Rather, the tenor of their evidence (and Officer T1’s in particular) was that planning was not required due to the experience and training of the members of the team.

¹⁰³⁶ Counsel Assisting’s written submissions dated 30 August 2023 at [717]-[727].

¹⁰³⁷ Tab 80 (Certified Transcript of Interview with [Officer T1]) at p. 1067 [A1238]; Tab 79 (Certified Transcript of Interview with Officer T5) at p. 866 [A697].

1082. Counsel Assisting further submit that it is clear that there was no discussion, for example, as to how the limited space might impact on how the less lethal options might be deployed. Officer T5 says that this was not “specifically discussed” because “everyone, kind of, is trained enough to know where they need to stand”.¹⁰³⁸
1083. Nor in Officer T5’s recollection was there any discussion between the members of the team on the question of how the OC spray would be deployed.¹⁰³⁹ As Officer T5 explains, this was because of the high level of training the operatives have.
1084. Bravo team leader (Officer T1) had a very high level of confidence that in light of his and his team’ skills and experience, the team would be able to subdue Todd peacefully. Given his experience, he did not see the need for specific planning for the breach and hold on 31 July 2019. Officer T1 said in his directed interview that jobs like this were “like a broken record” because “we’ve all done it before”.¹⁰⁴⁰ Officer T1 clarified in his oral evidence that by his reference to a “broken record” he was intending to draw a comparison between the 31 July 2019 job and other jobs in which he had been involved.
1085. Officer T1’s attitude is reflected in his understanding of his responsibilities and role as team leader. He describes the process by which he became team as being as simple as “you can be team leader”.¹⁰⁴¹ When asked to outline his responsibilities as team leader, Officer T1 said:
- “We’re [Bravo team are] a bit different to most other - most teams because we’re a fairly experienced team. So everyone knows their roles. They’re pretty well rehearsed over the years, so. There’s much really - too much for me to do.”¹⁰⁴²
1086. Counsel Assisting content that whilst it is not suggested that Officer T1 took a cavalier approach to his responsibilities as Bravo team leader, it is clear that he held a high level of confidence in his own abilities and experience, as well as that of his team. Counsel Assisting submit that it would be open to the Court to conclude that this caused him to pay less attention to the specific circumstances of the 31 July 2019 job than may have been required.
1087. Officer T2’s evidence reflected a similarly high level of confidence in his own abilities and experience. He says that there was no specific discussion as to how the less lethal

¹⁰³⁸ T620.25 (4 April 2023).

¹⁰³⁹ T622.17-23 (4 April 2023).

¹⁰⁴⁰ Tab 80 (Certified Transcript of Interview with Officer T1) at pp. 994-5 [A627].

¹⁰⁴¹ T803.3 (6 April 2023).

¹⁰⁴² T800.44-7 (6 April 2023).

options would be deployed due to his confidence in his abilities and training. Officer T2 gives the following evidence:

“Well, we each have a role there and each person has a different form of device or weapon, whatever word you choose. Together with our training if one device or weapon was ineffective, the other one would be deployed as a means to control of the subject. It’s not something you would have to give a ticket for, it just happens.”¹⁰⁴³

1088. It may be noted that whilst Officer T1 did have some experience in conducting breaches and holds, it was perhaps not extensive experience (at least not when measured against the experience of more senior police). Officer T1 says he performed “more than ten” breaches and holds (suggesting that it was not significantly more than 10).¹⁰⁴⁴ To put this in perspective, Officer T10 had been involved in around 700 to 800 high risk incidents, the majority of which involved siege-like situations.¹⁰⁴⁵
1089. Some of the members of Bravo team were even less experienced. Officer T2 was less experienced than Officer T1, having only been involved in two previous breaches and holds.¹⁰⁴⁶ However, it is acknowledged that Officer T5 brought considerable experience to bear by virtue of his earlier employment in the TOU. He had been involved in a siege-like incident “maybe a hundred times”¹⁰⁴⁷ and probably around 50 breaches and holds.¹⁰⁴⁸
1090. To some extent, it appears that the confidence exhibited by Officers T5, T1, and T2 was based on an assessment that Todd would surrender upon encountering police knocking down his door as had occurred on previous occasions (Officers T1’s and T5’s evidence in this regard has been outlined above). This is consistent with Officer T1’s evidence that the first time he appreciated that there might be violent confrontation was when Todd started to walk towards the Bravo team.
1091. Counsel Assisting submit that the defect with this type of thinking displayed by members of the Bravo team is that it fails to give sufficient attention to the particular circumstances of the 31 July 2019 job. No amount of training or experience could compensate for the fact that the less lethal options might not work in the size of the area available because of the clothing Todd was wearing or because of Todd’s levels of motivation and mental state. To deal with these matters, Bravo team needed to have

¹⁰⁴³ T1379.4-8 (15 June 2023).

¹⁰⁴⁴ T813.44 (6 April 2023).

¹⁰⁴⁵ T932.35-37 (17 April 2023).

¹⁰⁴⁶ T1342.40 (15 June 2023).

¹⁰⁴⁷ T630.1 (4 April 2023).

¹⁰⁴⁸ T657.27 (4 April 2023).

a plan of some sort (or recommend that a breach and hold could not safely be executed). The evidence discloses that Bravo team did neither of these things.

Submissions of the Commissioner

1092. The Commissioner¹⁰⁴⁹ submits that there is no basis for Counsel Assisting's submission that the involved officers were either complacent or overconfident. The Court would not accept the proposition that Officer T5, who had been involved in the Lindt Café siege, would approach Todd's matter with a sense of complacency or overconfidence.¹⁰⁵⁰
1093. The Commissioner submits that, contrary to Counsel Assisting's submissions, the Court would find that it is important for TORS and TOU operatives to be confident in their abilities and that of their colleagues in such situations. Doubts can lead to injury or failure in an operation. It does not follow that confidence resulted in the officers paying less attention during the course of the incident.
1094. The Commissioner notes that the officers are highly trained and discussions and plans for the breach and hold were undertaken prior to its deployment.¹⁰⁵¹ She submits that their work is often reactive rather than overly prescriptive and pre-planned due to the fluid nature of these types of situations. Additionally, she states that there was complementarity of skills among the officers.¹⁰⁵²

Submissions of Mark McKenzie

1095. Mark¹⁰⁵³ agrees with the submissions of Counsel Assisting. He submits¹⁰⁵⁴ that a one-size-fits-all approach was applied in deploying the breach and hold, as supported by Officer T1's evidence that jobs like this (breach and hold) were "like a broken record" and Officer T5's evidence that at a certain point, the incident generally moves towards some sort of breach and hold.¹⁰⁵⁵ The officers did not appear take into account specific characteristics of the incident when planning the breach and hold.

¹⁰⁴⁹ Written submissions of the Commissioner dated 13 October 2023 at [168]-[170].

¹⁰⁵⁰ Tab 79-1 (Statement of Officer T5).

¹⁰⁵¹ T897.0-13; T897.30; T898.0-10; T898.23; T897.45-50 (6 April 2023).

¹⁰⁵² T897 (6 April 2023).

¹⁰⁵³ Written submissions of Mark McKenzie dated 12 October 2023 at [92].

¹⁰⁵⁴ Written submissions of Mark McKenzie dated 12 October 2023 at [95]-[96].

¹⁰⁵⁵ T617.30 (4 April 2023).

Submissions of June Wilkins

1096. June¹⁰⁵⁶ agrees with Counsel Assisting's submissions that the officers were not properly informed as to Todd's specific circumstances before deploying the breach and hold. While the superiors must bear the responsibility for this failure, the officers must also share the blame for failing to inquire into the details at hand. Confrontation between police and Todd was inevitable following the execution of the breach and hold.

Consideration

1097. The evidence suggests that the tactical police were well used to deploying the breach and hold technique. Some had been involved its deployment many times before. Like Mark I was somewhat concerned by evidence such as that given by Officer T1 who said that jobs like this were "like a broken record" because "we've all done it before"¹⁰⁵⁷ and Officer T5 who gave evidence that he was familiar with the technique and that at a certain point the incident generally moves towards some sort of breach and hold.¹⁰⁵⁸ This perception that the tactic was somehow inevitable, rather than specifically chosen is alarming.

1098. Given that I have found it likely that the negotiation side of the "triangle" may have been undervalued at the point where the decision to seek permission was made, I am concerned that in terms of tactical solutions breach and hold was considered by some as almost inevitable.

1099. I do not accept that restoring negotiation opportunities was at the forefront of the tactical officers' minds. They saw the best outcome would be being able to subdue or if necessary overpower Todd. Given that, I am concerned that the planning process did not involve greater consideration of how the particular space and the particular circumstances on the day might impact the operation of their less than lethal weapons.

d. Insufficient planning by negotiators as to how to engage Todd

Counsel Assisting's submissions

1100. From the evidence outlined above, Counsel Assisting¹⁰⁵⁹ submit that it is apparent that the negotiators (particularly Fourth Person) appreciated that their task on 31 July 2019

¹⁰⁵⁶ Written submissions of June Wilkins dated 13 October 2023 at [158]-[159].

¹⁰⁵⁷ Tab 80 (Certified Transcript of Interview with Officer T1) at pp. 994-5 [A627].

¹⁰⁵⁸ T617.30 (4 April 2023).

¹⁰⁵⁹ Counsel Assisting's written submissions dated 30 August 2023 at [728]-[738].

was to try and establish rapport or for specific strategies to be deployed. There may be some truth in former Sen Cst Larrain's observations that when negotiators arrived "they didn't really seem to do very much different to what I had been doing for the last three hours, apart from the fact they didn't have their body-worn cameras on."¹⁰⁶⁰

1101. Counsel Assisting submit that it must be accepted that the negotiators were faced with a volatile and unpredictable situation. It is perhaps unrealistic to expect them to have completed a formal or documented negotiation strategy. However, at the very least, there was no plan for how the negotiators might use the considerable information police had collected to facilitate negotiations.
1102. Primary Negotiator cannot recall having any discussions with general duties police at the time he arrived (but assumes that he would have had some discussions because he "wouldn't have gone in totally cold").¹⁰⁶¹ Fourth Person does not recall speaking to, or receiving any briefing from, either the general duties or tactical operatives present.¹⁰⁶²
1103. This is significant because it means that first Primary Negotiator and, later Fourth Person, did not have the information that would equip them to tailor their strategies to attempt to recover the rapport that had been lost as a result of aspects of former Sen Cst Larrain's "negotiations".
1104. In this respect, Counsel Assisting note that it is significant that Negotiation Commander gave evidence to the effect that she would ordinarily expect her negotiators to brief with general duties police at least in circumstances where those general duties police had been there for a three-hour period.¹⁰⁶³ Negotiation Commander also conceded the value in the negotiators speaking with former Sen Cst Larrain on 31 July 2019.¹⁰⁶⁴ Negotiation Commander expected that finding out what occurred before negotiators had arrived would have been given some priority.¹⁰⁶⁵ Her evidence in this regard should be accepted.
1105. In particular, although Negotiation Team Leader was aware that Sen Cst Stewart had drawn his firearm on Todd earlier in the day,¹⁰⁶⁶ Fourth Person was unaware of that

¹⁰⁶⁰ T111.20 (19 April 2023).

¹⁰⁶¹ T249.28 (29 March 2023).

¹⁰⁶² T307.30 (30 March 2023).

¹⁰⁶³ T392.13 (31 March 2023).

¹⁰⁶⁴ T394.9 (31 March 2023).

¹⁰⁶⁵ T393.12 (31 March 2023).

¹⁰⁶⁶ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1922 [A460].

fact.¹⁰⁶⁷ Whilst Fourth Person does not consider that to have been particularly important information, it was at least capable of going to the inability of police to establish rapport. Further, it seems possible that, if armed with that information, a different negotiation strategy (to facilitating negotiations by way of a breach and hold) could have been adopted.

1106. Similarly, Primary Negotiator and Fourth Person were also not made aware of the information collected by Sen Cst Edwards who was tasked by Ch Insp Fuller to investigate the perceived intimidation offence that two witnesses (Ms Smyth and Ms Cross) had observed and that Todd had a paranoia of people entering his home. Primary Negotiator does not recall receiving any information that a particular focus of Todd's delusions involved people entering his home.¹⁰⁶⁸ Fourth Person also does not recall receiving this information through Sen Cst Edwards¹⁰⁶⁹ and did not sight Sen Cst Edwards' notebook.¹⁰⁷⁰ In a general sense, Fourth Person considered this to have been relevant because "it forms part of his psychosis".¹⁰⁷¹ In addition, as submitted previously, it is information that informed Todd's likely response to a breach and hold being conducted on 31 July 2019.

1107. Counsel Assisting submit that it is possible that the fact that Primary Negotiator and Fourth Person did not know this information was of less significance for two reasons:

- a. Fourth Person had a conversation with Ms Smyth later in the day, which she would have passed on to Negotiation Team Leader and from there, through to Secondary Negotiator and Primary Negotiator;¹⁰⁷² and
- b. June provided information that a theme of Todd's paranoia was his belief that persons had been inside his house which was enough for Fourth Person to query in her mind the possibility that this was a trigger for the day's events.

1108. That being said, receiving this information from Sen Cst Edwards when it became available (at around 5pm) could have informed the early response to Primary Negotiator to the negotiations. Counsel Assisting note that whether this meant that an opportunity for Primary Negotiator to develop rapport with Todd is not something which can be determined.

¹⁰⁶⁷ T327.21 (30 March 2023).

¹⁰⁶⁸ T254.45-50 (29 March 2023).

¹⁰⁶⁹ T323.36-41 (30 March 2023).

¹⁰⁷⁰ T324.24 (30 March 2023).

¹⁰⁷¹ T319.29 (30 March 2023).

¹⁰⁷² T319.39 (30 March 2023).

1109. For his part, Negotiation Team Leader also does not recall receiving information that a particular focus of Todd's paranoia was people entering his home.¹⁰⁷³ This seems particularly significant, given that it was his responsibility to advise Ch Insp Fuller in relation to the negotiation aspects of the job.

1110. Negotiation Team Leader also does not recall receiving information that Todd had been challenged by former Sen Cst Larrain earlier in the day.¹⁰⁷⁴

1111. Ch Insp Fuller conceded that the statements from Ms Cross and Ms Smyth ought to have been provided to negotiators.¹⁰⁷⁵ This accords with the view of Negotiation Commander who accepted that the information provided by Ms Smyth and Ms Cross might be useful and, subject to considerations of reliability, relevant.¹⁰⁷⁶

Submissions of Mark McKenzie

1112. Mark¹⁰⁷⁷ agrees with the submissions of Counsel Assisting. He further submits¹⁰⁷⁸ the neighbours' statements were collected for the purposes of charging Todd rather than for informing a mental health response. As such, he submits that it is unsurprising that Primary Negotiator and Fourth Person were unaware of these statements.

Consideration

1113. I found it difficult to understand why there was not a more comprehensive handover of the information police had collected or had become aware of when the first negotiators arrived. By then police had been in place for almost three hours. I accept Negotiation Commander's evidence that finding out what occurred before negotiators had arrived should have been given some priority.¹⁰⁷⁹ It was not. Information was passed on in an informal and piecemeal manner with different negotiation team members knowing facts that were not consistently shared with others.

¹⁰⁷³ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1922 [A463].

¹⁰⁷⁴ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1961 [A874].

¹⁰⁷⁵ T528.43 (3 April 2023).

¹⁰⁷⁶ T406.42 (31 March 2023).

¹⁰⁷⁷ Written submissions of Mark McKenzie dated 12 October 2023 at [92].

¹⁰⁷⁸ Written submissions of Mark McKenzie dated 12 October 2023 at [97].

¹⁰⁷⁹ T393.12 (31 March 2023).

e. Adequacy of the resources for and documentation of the Deliberate Action

Counsel Assisting's submissions

Was the Deliberate Action adequately resourced?

1114. Counsel Assisting¹⁰⁸⁰ submit that all in all, the Deliberate Action appears to have been adequately resourced (given that it occurred in a rural area). Sufficient resources were assembled. Although a number of staff were on leave or offline¹⁰⁸¹ this does not appear to have had any impact on the job.
1115. Similarly, whilst a number of specific limitations were identified (for example, Officer T1 was in a trial with no device linked to the police network and Officer T2 possibly did not have a radio), there is no evidence that this caused any shortcoming in the operation.¹⁰⁸²
1116. Accordingly, Counsel Assisting submit that the Court could find that the Deliberate Action was adequately resourced.

Was the Deliberate Action adequately documented?

1117. Counsel Assisting submit that Ch Insp Fuller kept a reasonably good record of his appreciation process. While aspects of the planning were (it is respectfully suggested) deficient, they were well recorded.
1118. Similarly, Ch Insp Fuller recorded the Immediate Emergency Action Plan (at 3.03pm) and the Surrender Plan and the Emergency Action Plan (at 5.27pm). Relevant information was recorded in iSurv.
1119. As noted during the opening, the Deliberate Action Plan itself was not recorded formally. This is the prevailing practice in the TOU. However, it was recorded in adequate detail in iSurv (entry at 8.39pm).¹⁰⁸³
1120. It would not be expected that the members of the Bravo team would have recorded their plans in writing (in any event, as earlier noted, they do not appear to have developed any real plans for the entry).

¹⁰⁸⁰ Counsel Assisting's written submissions dated 30 August 2023 at [739]-[746].

¹⁰⁸¹ T791.10-26 (6 April 2023).

¹⁰⁸² T612; T791 (6 April 2023); T1346 (15 June 2023).

¹⁰⁸³ Tab 88, (Certified Transcript of Interview with Negotiation Team Leader) at p. 1981.

1121. For these reasons, Counsel Assisting submit that the Court could be satisfied that the Deliberate Action was adequately documented.

Submissions of the Commissioner

1122. The Commissioner¹⁰⁸⁴ submits that the breach and hold was well resourced and contained within it measures to mitigate the risk of serious harm of death. Furthermore, not everything was reduced to writing. Ch Insp Fuller's notes outline the considerations taken into account during a thorough appreciation process.¹⁰⁸⁵ The evidence also suggests that Officer T10 discussed the plan and raised a number of issues including medical information, containment and less lethal options.¹⁰⁸⁶ The tactic was deployed by highly trained and experienced TORS operators. An ambulance was also appropriately arranged to attend the scene.

Submissions of Ch Insp Fuller

1123. Ch Insp Fuller¹⁰⁸⁷ agrees with Counsel Assisting's submissions that the Court could and would find that the Deliberate Action was adequately resourced and documented.

Submissions of Mark McKenzie

1124. Mark¹⁰⁸⁸ does not wish to be heard in relation to this aspect of the issue.

Consideration

1125. I find that the Deliberate Action was generally adequately resourced. The tactic was documented, although as is recorded above, at least one of the important conversations, the triangular conversation before Ch Insp Fuller sought permission for the breach and hold does not reflect exactly what occurred or who participated.

f. Attribution of responsibility to the officers who have received letters of "sufficient interest"

Counsel Assisting's submissions

1126. Counsel Assisting¹⁰⁸⁹ submit that in deciding whether or not to make any criticism of any of the officers who have received sufficient interest letters for the failings of the

¹⁰⁸⁴ Written submissions of the Commissioner dated 13 October 2023 at [176]-[179].

¹⁰⁸⁵ Tab 71A (Notes made by Ch Insp Fuller) at p. 494-5.

¹⁰⁸⁶ Tab 85 (Statement of Officer T10).

¹⁰⁸⁷ Written submissions of Superintendent Paul Fuller at [140(a)-(b)].

¹⁰⁸⁸ Written submissions of Mark McKenzie dated 12 October 2023 at [93].

¹⁰⁸⁹ Counsel Assisting's written submissions dated 30 August 2023 at [747]-[765].

police operation on 31 July 2019, the Court must have regard to those officers' individual roles and knowledge of relevant information on 31 July 2019.

1127. A general overview of those roles and responsibilities of the principal police actors appears at Issue 9 above. The responsibility of each of the interested parties for the failings on 31 July 2019 is considered in more detail below.

Ch Insp Fuller

1128. As Forward Commander, Ch Insp Fuller was the most important member of the decision making "triangle" Officer T10 describes. He had the ultimate responsibility for the development of the Deliberate Action. Ch Insp Fuller accepted that he was ultimately responsible for all police at the scene.¹⁰⁹⁰

1129. Counsel Assisting submit that, the Court would accept, in discharging that responsibility, Ch Insp Fuller was entitled to rely on the expert advice of the specialist commands available (the TORS and the Negotiations Command).¹⁰⁹¹ Counsel Assisting submit that the distinction between this structure and the structure of the New Zealand Police (in which it is the tactical teams that are responsible for approving and implementing the action equivalent to a Deliberate Action) should be taken into account in assessing the weight which is to be given to Mr Perry's evidence in respect of Ch Insp Fuller (given that Mr Perry's experience is in the New Zealand Police).¹⁰⁹²

Officer T9

1130. The second member of the decision-making triangle, Officer T9, had an advisory role. In his evidence, Officer T9 emphasised that he was only one part of the "consultative" decision-making process¹⁰⁹³ and that he was really just "offering...a suggestion" to Ch Insp Fuller.¹⁰⁹⁴ However, Officer T9 accepted that "ultimately" it was his role to put proposals to the Forward Commander and that a breach and hold would have been one of those proposals.¹⁰⁹⁵

1131. Accordingly, Officer T9 is responsible for his role in advising Ch Insp Fuller to pursue the flawed breach and hold strategy. Counsel Assisting submit that, specifically, he ought to have advised Ch Insp Fuller of his view that there was at least a 50:50 chance (if it was not more likely than not) that the breach and hold would result in violent

¹⁰⁹⁰ T565.48 (3 April 2023).

¹⁰⁹¹ T1746.38-41 (22 June 2023).

¹⁰⁹² T1742 (22 June 2023).

¹⁰⁹³ T1169.41 (20 April 2023).

¹⁰⁹⁴ T1167.44-45 (20 April 2023).

¹⁰⁹⁵ T1173.27 (20 April 2023).

confrontation. He is also responsible for the failure to consider (and potentially, to advise) Ch Insp Fuller of the specific information that suggested that the less lethal options may not have been effective to subdue Todd on 31 July 2019.

Negotiation Team Leader

1132. Counsel Assisting note that the third member of that triangle, Negotiation Team Leader, does not appear to have had significant input into proposing the breach and hold (though he subsequently agreed with it). However, as a member of the decision-making triangle, he ought to have raised concerns regarding the appropriateness of the breach and hold. Counsel Assisting further note that if he held those concerns, he ought to have raised them. If he did not hold those concerns, he ought to have.

Negotiation Commander

1133. As noted above, Negotiation Commander was not present in the field. Her evidence is that she had only a “strategic oversight” and “quality control” role.

1134. In her evidence, Negotiation Commander went to considerable pains to stress that the nature of her role (even as negotiation coordinator, a role she had occupied earlier in the day) did not involve her making decisions (which was a matter for Negotiation Team Leader) or proactively provide advice to Negotiation Team Leader (she would only provide advice if Negotiation Team Leader asked for it).¹⁰⁹⁶ It was not for her to assess the risks in a situation.¹⁰⁹⁷ She gave evidence that her role required her to be aware of every job in the State¹⁰⁹⁸ which meant that she could not have “situational awareness”.¹⁰⁹⁹ She was reliant on Negotiation Team Leader to provide her relevant information.¹¹⁰⁰ She was not monitoring the iSurv system in real time.¹¹⁰¹

1135. Negotiation Commander’s understanding of her role meant that she did not, and did not expect to, receive detailed information about the job.¹¹⁰² In particular, Negotiation Commander says that she was not aware (and would not expected to have received):

¹⁰⁹⁶ T401.50 (31 March 2023).

¹⁰⁹⁷ T426 (31 March 2023).

¹⁰⁹⁸ T382.17 (31 March 2023).

¹⁰⁹⁹ T382.37 (31 March 2023).

¹¹⁰⁰ T413.26-29 (31 March 2023).

¹¹⁰¹ T379 (31 March 2023).

¹¹⁰² T381; T401; T408; T411; T417; T426 (31 March 2023).

- a. Information that suggested that Todd's paranoia about people entering his home¹¹⁰³ or the information provided by June;¹¹⁰⁴
- b. That Sen Cst Stewart had drawn the firearm on Todd earlier prior to negotiators arriving;¹¹⁰⁵ or
- c. Detailed information about whether Todd had taken his last injection (Negotiation Commander was only informed that there was some question about this).¹¹⁰⁶

1136. However, Negotiation Commander was aware of aspects of the job. Negotiation Team Leader says that during the last half hour Negotiation Commander was involved in discussions about what the next steps were going to be and when they were going to occur.¹¹⁰⁷ As previously noted, Negotiation Team Leader also says that he talked to Negotiation Commander about contacting a consultant psychiatrist.¹¹⁰⁸ According to Negotiation Team Leader, Negotiation Commander told him about Todd's sleeping patterns,¹¹⁰⁹ suggesting that, at least at some point, she was across detailed information about the 31 July 2019 job. Further, at around 6.12pm, Negotiation Commander contacted Officer T10 after Negotiation Team Leader had called her noting that Officer T10 (through Officer T9) had expressed concerns that negotiators were not going anywhere.¹¹¹⁰ She had further contact with Officer T10 at 8.38pm.¹¹¹¹ She had contact with Negotiation Team Leader at 7.03pm, 8.38pm, and 9.28pm.¹¹¹²

1137. Counsel Assisting submit that the Court would make allowance for the fact that: Negotiation Commander was not present at the scene; did not have all the relevant information (and was reliant on the quality of the information provided to her by the officers in the field); and did not have or could not be expected to have had detailed information.

1138. Counsel Assisting further submit that the Court would find that, as the commander of her unit, Negotiation Commander was ultimately responsible for the quality of the advice that was provided by her subordinates in the field to Ch Insp Fuller and for their

¹¹⁰³ T431.24 (31 March 2023).

¹¹⁰⁴ T403 (31 March 2023).

¹¹⁰⁵ T474.30-36 (31 March 2023).

¹¹⁰⁶ T411 (31 March 2023).

¹¹⁰⁷ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1898 [A221].

¹¹⁰⁸ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1945 [A701].

¹¹⁰⁹ Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at p. 1946 [A712].

¹¹¹⁰ Tab 91 (Statement of Negotiation Commander) at [10]; Tab 88 (Certified Transcript of Interview with Negotiation Team Leader) at pp. 1952-3 [A781-A782].

¹¹¹¹ Tab 91 (Statement of Negotiation Commander) at [12].

¹¹¹² Tab 91 (Statement of Negotiation Commander) at [11]-[13].

roles in the collective decision-making process leading to the breach and hold. It should not be enough for her to say that she lacked sufficient information about the job. Negotiation Commander had a role of providing “strategic advice/oversight” and “quality assurance” and her role required her to seek (from those in the field) sufficient information to discharge these responsibilities. The Court would not accept that Negotiation Commander was required only to provide advice if requested – her seniority and level of experience required her to play a more proactive role. Contrary to Negotiation Commander’s evidence, her role and seniority must have required her to conduct some assessment of the risk of the situation.

1139. Counsel Assisting submit that the Court would find that Negotiation Commander ought to have realised that the breach and hold was a misconceived strategy and to have issued advice to her subordinates to advise Ch Insp Fuller not to proceed with it.

Members of Bravo team

1140. Turning to the other tactical officers, the evidence is plain that none of the other officers involved in the Deliberate Action had a role in the development of the plan (although, in their evidence, each of those operatives expressed support for that plan and stated that they understood its rationale to be to promote further negotiations). Whilst the other tactical officers involved in implementing the breach and hold did provide input and suggestions, the tenor of their evidence is that this was in relation to the implementation of the breach and hold rather than the merits of that plan. Their role, as described by Officer T1, was to provide a conduit for relevant information and observations based on their observations at the “coalface”.¹¹¹³
1141. Counsel Assisting submit that, whilst they were not responsible for recommending the breach and hold, collectively, the members of the Bravo team were responsible for implementing it. They are responsible for the failure to plan adequately in the event that the breach and hold precipitated a violent confrontation and, in particular, to consider the limitations in the available less lethal options in the specific circumstances of 31 July 2019. As team leader, Officer T1 bears particular responsibility in this regard. His high level of confidence that his own abilities and the abilities of his team would suffice to subdue Todd peaceably was misplaced.

¹¹¹³ T804.19 (6 April 2023). Note: this has been incorrectly transcribed as the “cold face”.

Submissions of the Commissioner

1142. The Commissioner¹¹¹⁴ rejects any criticism that Negotiation Commander ought to have viewed the breach and hold as a misconceived strategy. Negotiation Commander¹¹¹⁵ was involved in an oversight and quality control role and she could not have a full appreciation of the scene. Negotiation Commander was highly experienced and agreed that the breach and hold was an effective tactical option in Todd's situation, that is, one involving someone experiencing a psychotic episode.¹¹¹⁶

Submissions of Ch Insp Fuller

1143. Ch Insp Fuller¹¹¹⁷ agrees with Counsel Assisting's submissions that the Court must consider the officers' individual roles and knowledge of relevant information on 31 July 2019. He agrees with the submission that Ch Insp Fuller was entitled to rely on the expert advice of the specialist commands available.

1144. Ch Insp Fuller submits that it is the Field Supervisor (Officer T9), who, in consultation with the Tactical Commander (Officer T10), was responsible for managing TORS resources, overseeing the resolution of the high risk situation and for providing advice to the Forward Commander on available tactical options.¹¹¹⁸

1145. Officer T9's evidence suggests that Officer T10 had "overreaching control" of tactical decisions to be put to the Forward Commander¹¹¹⁹ and that Officers T9 and T10 would discuss proposals and decisions with each other.¹¹²⁰ Ch Insp Fuller was not responsible for deciding roles within the tactical team or decide how the breach and hold would be implemented as that was a matter for the TORS officers.¹¹²¹

1146. As outlined in the 

¹¹¹⁴ Written submissions of the Commissioner dated 13 October 2023 at [150]-[153].

¹¹¹⁵ Counsel Assisting's written submissions dated 30 August 2023 at [754]; T400.44 (31 March 2023).

¹¹¹⁶ T419.0-12 (31 March 2023).

¹¹¹⁷ Written submissions of Superintendent Paul Fuller at [140(c) and (d)], [141]-[150], [155].

¹¹¹⁸ Tab 339 (Tactical Operations Regional Support Standard Operating Procedures) at p. 11, [56], [67], [73], [99], [100]; T1071.34-50 (19 April 2023).

¹¹¹⁹ T1073.25-28; T1074.23-25 (19 April 2023).

¹¹²⁰ T1073.10-19 (19 April 2023).

¹¹²¹ Tab 71 (Certified Transcript – Interview with Chief Inspector Fuller) at p. 467-469.

1147. Ch Insp Fuller submits that it was reasonable for him to conclude that alternative responses had been exhausted or were likely to fail and therefore his decision to implement a breach and hold at the time was consistent with NSWPF policy. Ch Insp Fuller was not involved in the negotiators' discussions as to how they should deal with Todd.¹¹²⁴
1148. The breach and hold tactic was recommended to him by the specialist police. Options to deploy a third party intervenor, consultant psychiatrist, or less lethal options were not discussed with him, and the tactical team were confident that they had the skills and resources to deal with any physical confrontation.
1149. Ch Insp Fuller submits that he acted appropriately in the circumstances, based on his decision that it was necessary to take some new step given the complete absence of progress up to that time, as well as on the recommendations of the specialist officers to deploy the breach and hold. He contends that it was not an error of judgment, nor was it a decision no reasonable decision maker could have reached in the circumstances. Ch Insp Fuller asserts that he did his best to deal with an extremely difficult set of circumstances and that no adverse finding should be made against him.

Submissions of Negotiation Team Leader

1150. Negotiation Team Leader submits that the negotiators acted in accordance with their training and prevailing practices for undertaking negotiations. Their work, including that of Negotiation Team Leader, should not be the subject of criticism.¹¹²⁵

Submissions of Mark McKenzie

1151. Mark¹¹²⁶ agrees with the submissions of Counsel Assisting.

Consideration

1152. In my view there was a strong cultural impetus from within the NSWPF tending towards the use of the breach and hold technique operating on all decision makers on 31 July

¹¹²² Tab 342 (Standard Operating Procedure – Negotiation Unit, Counter Terrorism and Special Tactics Command) at p. 6, 7-8.

¹¹²³ Tab 342 (Standard Operating Procedure – Negotiation Unit, Counter Terrorism and Special Tactics Command), p. 9.

¹¹²⁴ T527.43-46 (3 April 2023).

¹¹²⁵ Written submissions of Negotiation Team Leader (undated) at [15].

¹¹²⁶ Written submissions of Mark McKenzie dated 12 October 2023 at [92].

2019. Police witnesses were pretty much unanimous in describing the benefits and usual success of the technique. As I have stated, in my view it was an inappropriate decision at the time it was taken in the circumstances before me. Nevertheless, I recognise the strong organisational push operating on individuals involved.

1153. To his credit Ch Insp Fuller accepted that he was ultimately responsible for all police at the scene and that the decision to seek the necessary permission was his. I understand and accept that he was entitled to rely on the expert advice available and that meant listening to both the TORS and Negotiation Command. It involved having real curiosity about the expertise they brought to the table and providing a forum where each felt safe to express an opinion. In my view the evidence is sufficient to establish that the “triangle” decision making that was referred to miscarried and as a result insufficient weight was given to the expertise the negotiators could have brought to the table. The Court was told that “everyone agreed” with the decision, after a tense discussion, but I remain unconvinced that it was a sound process.
1154. The evidence discloses that Ch Insp Fuller mentioned the breach and hold idea to an ambulance officer at around 4.55pm.¹¹²⁷ There is a strong inference that once the tactical police arrived and negotiators had been given a chance to speak to Todd, the use of a tactical option was likely. No officer before me suggested that any other tactical option was discussed. In other words there existed a flavour of inevitability about what was going to happen. In my view this is likely to have affected Ch Insp Fuller’s ability to make a clear decision based on the specific facts before him.
1155. Officer T9 was responsible for giving tactical advice to Ch Insp Fuller. There is no evidence that he advised Ch Insp Fuller of his view that there was at least a 50:50 chance of a violent confrontation, or that some of the less than lethal options may not be effective in the particular circumstances they confronted. In my view he provided Ch Insp Fuller with inadequate or partial information in this respect.
1156. I have already dealt with Negotiation Team Leader’s evidence. It is difficult now to make a firm finding about what he may have said if he had been consulted prior to the decision being made. Nevertheless he clearly had a responsibility to raise concerns if he had them. I accept Counsel Assisting’s submission that if he did not have concerns, he should have.
1157. I have considered the role played by Negotiation Commander. Her role was described as strategic oversight and quality assurance and she stressed that she was not

¹¹²⁷ T1093 (19 April 2023) (Officer T9); T1359 (T2) (15 June 2023).

physically present on the day or making decisions. Nevertheless as is set out above she had numerous telephone calls with members of the team throughout the evening. She stated that she did not receive detailed information about the job, was unaware of a number of important matters and was never asked for specific advice by Negotiation Team Leader.

1158. I was extremely surprised that someone of her considerable expertise and seniority was comfortable reciting that Negotiation Team Leader did not ask for advice so she did not give it. Surely, if part of the role is quality assurance, some limited testing or at least curiosity is involved. If that is not part of her role, it should be. In the circumstances of this case a little proactive probing may have revealed that the strategy was misconceived and should not proceed.
1159. As a general proposition, an Operations Coordinator or Tactical Commander may be able to take certain proactive steps in respect of a job in order for the best advice to be provided to a Forward Commander. In the particular circumstances of this case, however, I have considered the written submissions¹¹²⁸ and make no comment or specific findings in relation to Officer T10.
1160. The members of the Bravo team were there to do a job and it is unfortunate that the views some of them held about the likelihood of a violent confrontation and the possibility that some of their less than lethal appointments might be compromised were not adequately communicated up the chain of command. I am critical of T1 whose high level of confidence that Todd could be peacefully subdued by deploying a breach of hold was misplaced.

Issue 11 – Was the decision to use lethal force justified in the circumstances?

Evidence

1161. The evidence relevant to this issue is set out in the chronology above at [138]-[152] and added to below.
1162. The members of the Bravo team attempted to subdue Todd via less lethal means. Officer T4 attempted to deploy a shield to confine Todd to the premises and to pin Todd against the wall.¹¹²⁹ Officers T1 and T5 both discharged their Tasers. Officers T3 and T7 both discharged super sock ammunition (Officer T3 from very close range).

¹¹²⁸ Written submissions of the Commissioner dated 13 October 2023 at [150]-[153]; Written submissions in reply of Counsel Assisting dated 10 November 2023 at [29].

¹¹²⁹ Tab 81 (Certified Transcript of Interview with Officer T4) at p. 1582 [A155].

Officers T4 and T2 both deployed OC spray. Officer T2 also attempted to use the gloves to snatch the knife from Todd.

1163. Todd was carrying a knife. Further, the evidence indicates that Todd was able to get to very close proximity to the members of the Bravo team with that knife. Indeed, after Officer T4 had failed to prevent Todd from exiting the house by use of the shield, Todd was able to exit onto the verandah in the middle of the officers.¹¹³⁰ At this time, Todd had his knife and, in Officer T1's words, was "slashing it around" at the TORS officers.¹¹³¹ The shade cloth and the low wall of the balcony prevented officers from retreating to a safe distance.
1164. Once Officer T2 had gone to ground, there was a reasonable basis for the belief that Todd could have killed, or at least serious injured, him. For his part, when on the ground, Officer T2 believed that he was going to be stabbed in the neck.¹¹³²
1165. Officer T1 (who called out the words "shoot him shoot him") had a reasonable belief that Officer T2 was going to be killed or seriously injured. Officer T1 saw Todd use the knife to strike Officer T2's "head area".¹¹³³ This caused Officer T1 to draw his firearm because from that point Officer T1 thought that someone was going to die. However, Officer T1 was unable to get a clear shot because Officer T7 passed in front of him. Officer T1 was, and remains, "quite satisfied" that Officer T2 "would've sustained an extremely horrific injury to his face and it probably would've killed him".¹¹³⁴ Counsel Assisting submit that this evidence would be accepted and that the fact that Todd had the knife and had struck Officer T2 to his head provided a reasonable basis for these views. I accept that that Officer T1 believed that Officer T2 was in danger of extremely serious injury or death.
1166. For his part, whilst Officer T5 heard Officer T1 say the words "shoot him, shoot him", by this point, Officer T5 had independently formed the opinion that lethal force was required and was already in the process of drawing his Glock.¹¹³⁵ Officer T5 had seen Todd attempt to strike at Officer T4 with the knife from over the top of the shield.¹¹³⁶ He also had seen Todd get past Officer T4, exit onto the verandah, and continue to make overhead slashing motions.¹¹³⁷ Officer T5 had seen a number of the TORS

¹¹³⁰ T843.29-30 (6 April 2023).

¹¹³¹ T843.46 (6 April 2023).

¹¹³² T1385.37-38 (15 June 2023).

¹¹³³ T844.39 (6 April 2023).

¹¹³⁴ T845.49-50 (6 April 2023).

¹¹³⁵ T645.7-8 (4 April 2023).

¹¹³⁶ T626.25 (4 April 2023).

¹¹³⁷ T627.17 (4 April 2023).

officers standing in front of Todd with their hands raised and formed the opinion that their life was in imminent danger.¹¹³⁸ Counsel Assisting submit that the circumstances of Todd slashing with the knife in close proximity to the TORS officers provided a reasonable basis for Officer T5's belief that lethal force was justified. I accept that by that time the situation had escalated so badly that there was a reasonable basis, in that moment, for Officer T5 to use lethal force.

1167. A view was conducted of the ballistic helmet that Officer T2 was wearing. There were scratches to that helmet (although, in the absence of expert evidence, it is not possible to say what had caused those scratches). Nevertheless, this objective evidence provides a measure of support to the account of each of the members of the Bravo team.³
1168. Officer T5 describes discharging three shots.¹¹³⁹ Officer T1 heard only three shots,¹¹⁴⁰ as did Officer T2.¹¹⁴¹ Whilst Officer T9 said in his directed interview that he heard four or five rounds,¹¹⁴² he accepted that he could have been mistaken. The objective evidence suggests that only three shots were fired. Officer T5's Glock had a magazine of [REDACTED]. This would have been full at the start of the day. The chamber would have been empty when the magazine was added to the pistol (though a bullet would have entered the chamber when the magazine was attached).¹¹⁴³ There were [REDACTED] bullets inside the magazine of Officer T5's Glock and one in the chamber. Further, only three Smith & Wesson fired cartridge cases were located.¹¹⁴⁴
1169. As to whether it was necessary to fire the three shots, Officer T5 says that he assessed whether there was still a threat after each shot.¹¹⁴⁵ He says that he fired the shots in quick succession. After the first and second shots, Todd was still moving forward with the knife still in his hand. It was only after the third shot that Todd went to ground.¹¹⁴⁶

¹¹³⁸ T627.35 (4 April 2023).

¹¹³⁹ T627.47 (4 April 2023).

¹¹⁴⁰ T847.23 (6 April 2023).

¹¹⁴¹ T1383.48 (15 June 2023).

¹¹⁴² Tab 78 (Certified Transcript of Interview with Officer T9) at p. 740 [A894].

¹¹⁴³ T1194.9-34 (20 April 2023).

¹¹⁴⁴ Tab 131 (Expert Certificate of Crime Scene Officer Preece).

¹¹⁴⁵ Tab 79 (Certified Transcript of Interview with Officer T5) at pp. 889-890 [A885], 901 [A985] and 902 [A994].

¹¹⁴⁶ T628.2-3 (4 April 2023).

1170. For his part, Officer T1 observed that the shots fired had “instantaneous effect” and caused the strength to go out of Todd immediately.¹¹⁴⁷ However, he says that Todd only fell after the third gunshot.¹¹⁴⁸

Submissions of Counsel Assisting

1171. Counsel Assisting¹¹⁴⁹ submit that the Court would find that the members of the Bravo team did their best, in difficult circumstances, to subdue Todd via less lethal means. The limited space available, ██████████ that Todd was wearing, and Todd’s mental illness/level of motivation contributed to the failure of these less lethal options. Whilst this is a matter which, as submitted in relation to Issue 10 above, ought to have been planned for and, as submitted in relation to Issue 9 above, meant that it was not appropriate for a breach and hold to be pursued on 31 July 2019, the failure of the less lethal options made it necessary for Officer T5 to use lethal force.

1172. Counsel Assisting submit that the Court would find that Officer T5 fired only three shots. While Officer T0 stated that he had heard four or five rounds, the objective evidence in relation to Officer T5’s Glock and the evidence of Officers T5, T1 and T2 that only three shots were fired, suggests that Officer T9 was mistaken. Counsel Assisting submit that the Court would conclude that because Todd had not gone to ground after the first and second shots, it was reasonable for Officer T5 to have fired each of the shots.

1173. Counsel Assisting¹¹⁵⁰ submit that the decision to use lethal force was justified. Counsel Assisting consider that it is tragic that Officer T5 needed to deploy lethal force on 31 July 2019. That ended the life of a man who was, by all accounts, a talented and engaging individual from a loving family who was coming to terms with his mental illness. It is a tragedy that may be expected to remain with members of Todd’s family for the remainder of their lives.

1174. Counsel Assisting acknowledge that it is also a tragedy for each of the involved officers. This is particularly so for Officer T2 (who believed, with good cause, that he might die during the operation) and to Officer T5 (who fired the fatal shots to save Officer T2’s life). Given that the breach and hold did not have to be conducted and that it seems to have caused Todd’s violent reaction, it is deeply regrettable that members

¹¹⁴⁷ T847.9 (6 April 2023).

¹¹⁴⁸ T880.43 (6 April 2023).

¹¹⁴⁹ Submissions of Counsel Assisting dated 30 August 2023 at [766]-[767], [774] and [778].

¹¹⁵⁰ Counsel Assisting’s written submissions dated 30 August 2023 at [766], [778].

of the NSWPF were needlessly put in a position where one could have been killed and the other needed to take a life.

Submissions of interested parties

1175. The Commissioner¹¹⁵¹ agrees that the use of lethal force was justified and that the members of the Bravo team did their best, in the circumstances, to subdue Todd via less lethal means. The Commissioner also draws attention to the way Officer T1 moved to render first aid on Todd following the fatal shots.¹¹⁵²

1176. Mark¹¹⁵³ did not wish to be heard on this issue. However, he does not accept Officer T5's evidence that he had assessed the threat after each shot was fired due to the rapidity of each shot.¹¹⁵⁴

Consideration

1177. I accept that at the time Officer T5 fired his weapon, he was legally entitled to do so. Other less than lethal weapons had been tried and Todd, in the grip of psychosis, full of fear and rage and hellbent of defending his home would have been a force to be reckoned with. The absolute tragedy of the situation is that it should not have been allowed to develop in the way it did. I have reviewed the evidence in this matter many times and I am convinced the decision to go ahead with the breach and hold at 9:44pm was wrong. It was misconceived and it was almost certainly destined to result in a significant conflict where either Todd or a police officer or both would be seriously harmed or killed.

1178. On the evidence before me I make no concluded finding on whether the threat was assessed separately before each shot. In particular I note that there is no body worn footage that I can assess.

The need for recommendations

1179. Section 82 of the *Coroners Act 2009* (NSW) confers on a coroner the power to make recommendations that he or she may consider necessary or desirable in relation to any matter connected with the death with which the inquest is concerned. It is essential that a coroner keeps in mind the limited nature of the evidence that is presented and

¹¹⁵¹ Written submissions of the Commissioner dated 13 October 2023 at [219]-[222].

¹¹⁵² T847.50-T848.0-5 (6 April 2023); T902.0-3 (6 April 2023); T902.25 (6 April 2023).

¹¹⁵³ Written submissions of Mark McKenzie dated 12 October 2023 at [98]-[100].

¹¹⁵⁴ In this connection, Mark refers to Tab 155-(S) (Video recordings taken by Bronwyn Oram).

focuses on the specific lessons that may be learnt from the circumstances of each death.

1180. Counsel Assisting put forward two recommendations to the Commissioner arising out of the evidence for the Court's consideration. Mark and June also proposed a number of recommendations be made to the Commissioner. I will deal with each in turn.

Tactical police should be required to wear body-worn video

1181. A recommendation regarding a requirement for tactical police to utilise BWV was made by Deputy State Coroner Ryan in the inquest into the death of Tateolena Tauaifaga (**the Tauaifaga inquest**) on 13 April 2022. Specifically, her Honour recommended that the Commissioner investigate all ways in which TOU vehicles and operatives could be fitted with a device which visually and audially records their operations (recommendations 16 and 17).

1182. In this case, which preceded the making of those recommendations, Counsel Assisting observed that, from the point in time that tactical police asked former Sen Cst Larrain and Sen Cst Harris to switch off their BWVs, the Court has no objective evidence as to what occurred. This has made the process of fact finding difficult.

1183. Counsel Assisting further note that, given that the BWVs of former Sen Cst Larrain and Sen Cst Harris were switched off on the arrival of the tactical police, this matter provides an opportunity for this Court to revisit these recommendations and the progress the NSWPF has made in their implementation. Recommendation 16 was directed at the use of equipping TOU vehicles with cameras (In Car Video (**ICV**)). This is perhaps less relevant for present purposes. Unlike the situation in the Tauaifaga inquest, the police operation that preceded Todd's death was not primarily a vehicle operation. Accordingly, these submissions will focus more on the steps that have been taken by police to attempt to comply with recommendation 17 (the requirement to wear BWV).

Evidence

1184. TOU Commander provided evidence to the inquest in relation to the matter of BWV use by tactical officers. He raised a number of difficulties associated with the wearing of BWVs and outlined the steps police had taken in response to Deputy State Coroner Ryan's recommendations in the Tauaifaga inquest.

Potential difficulties regarding the use of BWV

1185. TOU Commander identifies three difficulties regarding the use of BWV by tactical officers.

1. [REDACTED]

1186. [REDACTED]

1187. Counsel Assisting note that, during his oral evidence in the Tauaifaga inquest, TOU Commander raised a similar concern. In that inquest, TOU Commander acknowledged that he was aware of tactical units of the armed forces using go-pro cameras or similar devices on their ballistic helmets during tactical operations. He observed a number of potential difficulties with the use of cameras [REDACTED] [REDACTED]). Deputy State Coroner Ryan’s reasons record (at [418]) that, in relation to the practical challenges BWV would present: “the Commissioner has advised that the TOU will conduct a trial of a BWV camera that is currently in development, which may resolve some of those difficulties”.

2. The effect of the Surveillance Devices Act 2004

1188. [REDACTED]

a. [REDACTED]

b. [REDACTED]

c. [REDACTED]

1189. Counsel Assisting note that Primary Negotiator also felt that wearing BWV could be damaging to his ability to develop rapport with the subject of negotiations.¹¹⁵⁷

¹¹⁵⁵ Tab 174A (Statement of TOU Commander) at [12].

¹¹⁵⁶ Tab 174A, at [13]-[14].

¹¹⁵⁷ T293.16 (30 March 2023).

3. The potential that confidential methodology could be disclosed

1190. TOU Commander notes that there is a high degree of confidential and protected police methodology, tactics, identities of covert operatives, weaponry, or specialist tactical equipment that could be captured on BWV.¹¹⁵⁸ The disclosure of this recording, notwithstanding the Commissioner's ability to make a public interest immunity application, may jeopardise the integrity of present and future operations.
1191. Counsel Assisting observe that similar concerns were also raised during the Tauaifaga inquest. These concerns were addressed by Deputy State Coroner Ryan (Tauaifaga Findings, [410] and [417]). Notwithstanding these concerns, her Honour made recommendations about ICV and BWV (although her Honour's recommendations only required the Commissioner to explore these issues rather than to implement BWV or ICV).
1192. Against the above matters, TOU Commander accept as a possibility the proposition that BWV/ICV could, in addition to permitting the scrutiny of tactical operations, verify the operative's version of events. However, he thought that if BWV was worn in the same way as it is in general duties police, the equipment might block the camera and the audio might be distorted by the clothing the operative was wearing.¹¹⁵⁹

The steps that have been taken to explore solutions to these difficulties

1193. TOU Commander says that despite the concerns he has outlined, "the TOU continues to explore audio and visual technological options that meet the operational, legislative, identity/data/methodology protection and storage requirements suitable to a tactical policing environment".¹¹⁶⁰
1194. TOU Commander has explained that the TOU are part of the Integrated Connected Officer Project (**Project**). The Project is tasked with reviewing the use of BWV (and ICV) in a tactical environment. The Project was not set up as a response to the Tauaifaga recommendations¹¹⁶¹ and TOU was initially excluded from the terms of reference of that group. However, TOU now has representation on the Project in order that (in TOU Commander's words) "we can understand how that technology can be applied in a tactical environment".¹¹⁶²


¹¹⁵⁸ Tab 174A (Statement of TOU Commander) at [15].

¹¹⁵⁹ T1894.39-44 (23 June 2023).

¹¹⁶⁰ Tab 174A (Statement of TOU Commander) at [16].

¹¹⁶¹ T1871.42 (23 June 2023).

¹¹⁶² T1872.48-49 (23 June 2023).

1195. TOU Commander does not himself sit on the working group for the Project and does not receive formal reports from the officers who do sit on it. However, he says that he discusses the outcomes and progress of the working group with those officers.¹¹⁶³
1196. Despite the advice the Commissioner gave in the Tauaifaga inquest (as recorded at [418] of Deputy State Coroner Ryan’s findings), the Project remains in the “working and assessment phase”. TOU Commander clarified in his oral evidence that this means that “at the moment, we’re trying to get an understanding of suitable technology; suitable hardware; the significant storage that that video would require, as well as the ability to protect that footage and those recordings so it doesn’t necessarily go into the general storage database”.¹¹⁶⁴ TOU Commander raised concerns about the safe storage of the information that had been captured (the information, due to its sensitivity, would need to be stored in a separate area and viewed only by appropriately accredited or security cleared people).¹¹⁶⁵ He also said that it was not possible to uplift the BWV from general duties police.¹¹⁶⁶
1197. The Project has not led to the identification of suitable software or hardware.¹¹⁶⁷
1198. The Project has also not considered the use of a helmet mounted camera.¹¹⁶⁸ However, 
1199. TOU Commander also said that there was no timeframe for the completion of the Project.¹¹⁶⁹
1200. TOU Commander confirmed that the tactical police were not opposed to the introduction of suitable BWV but was bound by the present policy of the NSWPF, which was that tactical police were not required to wear it.¹¹⁷⁰ TOU Commander also said that the exploration of ways around the technical difficulties he had identified in the use of BWVs are “prioritised in line with the current policy and procedure of the New South Wales Police”¹¹⁷¹ and that this was the reason why no timeframe was proposed.¹¹⁷² He

¹¹⁶³ T1873.47-48 (23 June 2023).

¹¹⁶⁴ T1873.16-19 (23 June 2023).

¹¹⁶⁵ T1873.16-20 (23 June 2023).

¹¹⁶⁶ T1874.2-5 (23 June 2023).

¹¹⁶⁷ T1874.10 (23 June 2023).

¹¹⁶⁸ T1877.1-5 (23 June 2023).

¹¹⁶⁹ T1873.40 (23 June 2023).

¹¹⁷⁰ T1875.1-2 (23 June 2023).

¹¹⁷¹ T1897.36-37 (23 June 2023).

¹¹⁷² T1898.1-16 (23 June 2023).

said that, unless NSWPF policy required tactical police to wear BWV, the investigation into ways to overcome the difficulties wearing BWV are thought to present would not be given any particular “urgency”.¹¹⁷³

Developments in other jurisdictions

1201. TOU Commander describes that a number of other states have taken steps to introduce BWV to their tactical groups. He said that Western Australia is now wearing BWV in tactical operations. He also said that in Queensland a decision to this effect has been made but not implemented.¹¹⁷⁴

1202. Counsel Assisting observe that, notwithstanding that it received some press and given its immediate relevance to the work of the Project, TOU Commander was not aware that a recommendation made in the Brereton inquiry into the defence force conduct in Afghanistan was the use of official helmet cameras by special forces operators be introduced.¹¹⁷⁵ It appears that this technology is presently being rolled out across the Australian Defence Force (**ADF**).

Submissions

1203. Counsel Assisting and the interested parties made submissions in relation to whether the Court should make a recommendation that tactical police be required to wear BWV.

Counsel Assisting’s submissions

1204. Counsel Assisting¹¹⁷⁶ submits that, for the following six reasons, the Court would make such a recommendation.

1. Lack of meaningful response to the Tauafiaga inquest recommendations

1205. Counsel Assisting submit that it would be open to the Court to find that, notwithstanding recommendation 17 in the Tauaifaga inquest, police had not meaningfully explored any option which might allow for the mounting of a BWV on tactical operatives. Well over a year has elapsed between the time when the Tauaifaga recommendations were made and the date which TOU Commander gave his evidence. Each of the difficulties he pointed to [REDACTED] the difficulties the *Surveillance Devices Act* were thought to cause, and the possibility that confidential information would be captured which gives rise to a need for an appropriately secure

¹¹⁷³ T1898.14-15 (23 June 2023).

¹¹⁷⁴ T1886.32-45 (23 June 2023).

¹¹⁷⁵ T1878.41 (23 June 2023).

¹¹⁷⁶ Counsel Assisting’s written submissions dated 30 August 2023 at [801]-[823].

storage system) are the same difficulties that the Commissioner pointed to at the time of the Tauaifaga inquest. They were precisely the difficulties in respect of which Deputy State Coroner Ryan recommended the Commissioner investigate potential solutions.

1206. Counsel Assisting further submit that whilst the work of the Project is acknowledged, TOU Commander candidly acknowledged that it had not been set up as a response to the recommendations Deputy State Coroner Ryan made in the Tauaifaga inquest. More generally, TOU Commander was unable to point to one concrete measure the Project had achieved in its exploration of the use of BWV/ICV to tactical officers. In particular, no suitable software or hardware (or even a range of potentially suitable products) has been identified. Moreover, TOU Commander could not even identify a timeframe for completion of the Project.
1207. Counsel Assisting consider that whilst it may be accepted that requiring TOU to wear BWV (or for their vehicles to be equipped with ICV) could capture some sensitive methodology and that there may well be a need for separate storage requirements, it is hard to see how, a year later, nothing has occurred beyond the identification of this remaining a problem. As pointed out to, and accepted by, TOU Commander, the NSWPF already hold much sensitive information by the nature of its work and it would surely be able to provide a starting point to overcoming the sort of security and storage arrangements that would be needed.
1208. Counsel Assisting observe that, at the very least, it appears that the investigations the subject of Deputy State Coroner Ryan's recommendations appear not to have been prioritised because the policy of the NSWPF is not to require tactical police to wear BWV.¹¹⁷⁷

2. Making a recommendation that tactical police wear BWV will ensure that the investigations recommended by Deputy State Coroner Ryan will receive the priority that they require

1209. Counsel Assisting submit that because the lack of priority given to the investigations the subject of Tauaifaga recommendation 17 seems (at least in part) to be a result of the fact that the current policy of NSWPF is not to require tactical operatives to wear BWV (or their vehicles to be equipped with ICV), the simplest way to ensure that these investigations are given the importance they require would be for the Court to recommend a change to the NSWPF policies so as to require tactical operatives to

¹¹⁷⁷ T1898.1-16 (23 June 2023).

wear BWV. This would provide an impetus for the sort of investigations evidently contemplated by Deputy State Coroner Ryan to actually occur.

3. The difficulties pointed to by TOU Commander do not preclude a recommendation from being made that tactical police wear BWV

1210. Counsel Assisting submit that none of the difficulties alluded to in the evidence would preclude the Court from taking this step. At a general level, the fact that at least two Australian jurisdictions (Queensland and Western Australia) have taken this step suggests that the difficulties pointed to by the TOU Commander can be overcome. Two of the specific problems pointed to by the TOU Commander relating to the possibility that sensitive police methodology would be disclosed and the effect of the *Surveillance Devices Act* are addressed in more detail below.

4. The potential for sensitive police methodology to be disclosed would not preclude these recommendations from being made

1211. Counsel Assisting submit that at a general level, it may be accepted that any recording of police operations in which confidential methodology or tactics are deployed increases the risk of disclosure of those tactics. Against that, it must be emphasised that there is a range of legal recourse that would be available to protect the publication, disclosure, or dissemination of the information either in any subsequent proceedings or otherwise. These range from statutory non-publication orders (which would provide the minimal level of protection) to seeking the more fulsome protection that would be afforded by an exclusionary public interest immunity order (which would prevent the material being disclosed or used in any proceedings at all or to be produced pursuant to a subpoena). Similarly, any truly confidential operational information would almost certainly fall within one or more of the exemptions to the provisions in the *Government Information Public Access Act 2009* and, thus, not be required to be disclosed pursuant to that Act.

1212. Counsel Assisting note that it is worth recalling that courts (including this Court) routinely hear information of the utmost sensitivity (some of which might be even more sensitive than information relating to TORS operations). For example, in addition to hearing a range of sensitive police matters, courts are often required to hear evidence involving questions of national security or relating to secrets of State. For this reason, courts have a range of mechanisms (included, but not limited to, the exclusion of such information which are exercisable in an appropriate case) to prevent sensitive information from entering the public domain. In the present case, the concerns of the

Commissioner that confidential and sensitive information was contained in the coronial brief resulted in the Court crafting a very complex set of orders and controlling its processes so that certain aspects of the evidence were heard in closed Court.

1213. Moreover, there is, in the available evidence, no articulation as to what methodology would be prejudiced by the disclosure of information and how it would be so prejudiced. This makes it difficult for the Court to come to a meaningful assessment of the magnitude of such a risk.
1214. Counsel Assisting submit that in any event, neither the TOU nor the TORS are a unit that is principally involved in covert operations. Their involvement in effecting arrests is conducted in public (often necessarily in full view of the very persons who might have an incentive to exploit knowledge of that methodology).
1215. In particular, it may be expected that the Special Services Group of the ADF have a range of sensitive methodology (perhaps even more sensitive than that held by the TORS) which could be captured if their special operations were to be recorded. That Brereton J recommended the ADF to adopt BWV and that this technology is presently being rolled out across the ADF suggests that the concerns raised by the Commissioner in terms of the disclosure of methodology can appropriately be addressed.

5. *The effect of the Surveillance Devices Act 2004*

1216. Counsel Assisting submit that TOU Commander's concerns about the *Surveillance Devices Act* are misplaced. Section 50A(1) of the *Surveillance Devices Act* provides a level of protection to police who are using BWV by deeming any recording made pursuant to a BWV is lawful where certain conditions are met. That section notes:

“50A Police use of body-worn video

(1) The use of body-worn video by a police officer is in accordance with this section if –

- (a) the police officer is acting in the execution of his or her duty, and
- (b) the use of body-worn video is overt, and
- (c) if the police officer is recording a private conversation, the police officer is in uniform or has provided evidence that he or she is a police officer to each party to the private conversation” [emphasis added]

1217. Condition (a) would presumably always be satisfied whenever police negotiators or tactical police are engaged and condition (b) would also often be satisfied (depending

on the configuration of the vests and the form of technology used to effect the recording). Thus, it is only condition (c) that could potentially pose a problem. Whilst that subsection does require police to inform a person that she or he is being recorded, that obligation only arises in circumstances where the device is recording a “private conversation” (on a more general level, the Act does not regulate the recording of conversations other than private conversations: see ss 7, 11, and 12). This means that the recording by police of any conversation that is not a private conversation is not prohibited such that the deeming provision in s 50A would not be required.

1218. Consequently, the TOU or TORS operator or negotiator would not be required to make the notification in s 50A(c) unless she or he was engaged in a “private conversation”.

1219. It can seriously be doubted that any words said by a police negotiator or tactical officer during a police negotiation or tactical job could ever fall within the meaning of a “private conversation”. The phrase is defined in s 4 of the *Surveillance Devices Act* as meaning:

“any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only—

- (a) by themselves, or
- (b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.”

1220. The phrases “reasonably be taken” and “ought reasonably to expect” suggest that this is an objective test. Words spoken to the subject of a police negotiation (which would ordinarily involve a police negotiator in the company of other police and in circumstances where other persons might well be present both inside and outside the premises) could not, objectively, be said to have been spoken in the context where the person saying them desired them only to be listened to by the subject or the police officer who said the words (as the case may be). In any event, the person who said those words (the subject or the police officer) ought reasonably to have expected that they could be overheard (by the other police or persons inevitably present in such situations).

1221. Counsel Assisting submit that contrary to the evidence of TOU Commander, a requirement for tactical operatives to wear BWV would not require a negotiator or a tactical operative to turn on the BWV during negotiations or a tactical operation.

6. *The benefits of BWV/ICV*

1222. Counsel Assisting submit that that requiring tactical police to wear BWV will lead to two principal benefits.
1223. First, it makes police officers accountable. In the Tauaifaga inquest, Deputy State Coroner Ryan found that there was a “legitimate community expectation that police officers understand they are accountable for their actions” (Tauaifaga Findings, [420]). As TOU Commander accepted, BWV and ICV achieve this by allowing for an objective record of the actions.¹¹⁷⁸
1224. In the present case, this has meant that the aspects of the operation of 31 July 2019 that preceded the involvement of tactical police have been able to be scrutinised in more detail than what occurred afterwards. Further, in making its findings regarding the first part of the police operation, the Court can have a higher level of confidence as to what actually occurred. In this regard, as noted earlier in these submissions, former Sen Cst Larrain has complained that the reason why he and not the negotiators were called before the inquest was because the negotiators did not have their BWVs on.¹¹⁷⁹ Counsel Assisting submit that, whilst former Sen Cst Larrain is mistaken about the other negotiators not attending, his overall point is a good one and may be accepted. Ultimately, this Court is able to bring a far greater degree of scrutiny to bear on former Sen Cst Larrain’s manner of conducting negotiations with Todd than it can on the negotiations of either Primary Negotiator or Fourth Person simply because of what was recorded on former Sen Cst Larrain’s BWV.
1225. Similarly, it is anticipated, based on his questioning of Dr Eagle,¹¹⁸⁰ that Ch Insp Fuller’s Counsel will suggest that it is not possible to contend whether any of the communication strategies Dr Eagle has suggested should be deployed were not, in fact, deployed. That anticipated submission illustrates the difficulties in accountability that may be caused by a lack of BWV. It is important that this Court be able to exercise its important review and recommendation functions against all police (not merely the general duties police).

¹¹⁷⁸ T1894 (23 June 2023).

¹¹⁷⁹ T111.20 (19 April 2023).

¹¹⁸⁰ T1614 – T1615 (20 June 2023).

1226. Secondly, in a particular case, BWV might serve to protect tactical police from unjustified criticism. As noted, TOU Commander accepted the “possibility” that this benefit might be realised.¹¹⁸¹

1227. The wearing of BWV has other potential benefits that go beyond the scope of the 31 July 2019 job. One example is that it might, in an appropriate case, permit evidence to be obtained which could be used in the prosecution of the subject of a police operation.

Conclusion to Counsel Assisting’s submissions regarding the making of a recommendation

1228. In conclusion, Counsel Assisting submit that the benefits of BWV outweigh the potential risk of disclosure of (some unidentified) methodology given the protective measures that can (and would be expected to) be deployed (as they were during the present inquest). Counsel Assisting observe that the other objection concerning the effect of the *Surveillance Devices Act* is illusory. For tactical police in this State to be required to wear BWVs would appear to be consistent with movements being made in other jurisdictions. Counsel Assisting further submit that the use of BWV in tactical operations would address a concerning lack of real attempts to conduct the investigations contemplated in recommendations 16 and 17 of the Tauaifaga inquest. Counsel Assisting suggests that it is a recommendation that the Court ought to make.

Submissions on behalf of the interested parties

1229. The Commissioner¹¹⁸² submits that it is not appropriate to make the proposed recommendations in this inquest as these issues are already under review in other forums. As mentioned, the Project (of which TOU is a part) is presently tasked with reviewing the use of BWV in a tactical environment.

1230. The Commissioner disagrees with Counsel Assisting’s submissions that there has been a lack of meaningful response to the Tauaifaga recommendations and submits that it is not unreasonable to take over a year to examine best practice due to the safety and data security concerns involved in this issue. The Commissioner submits that rather than adding another layer of review by making a recommendation in this matter, the better course is to see what comes of the existing project.

1231. Mark¹¹⁸³ agrees with Counsel Assisting’s submissions and supports a recommendation that tactical police should wear BWV. Mark submits that a further reason for this

¹¹⁸¹ T1894 (23 June 2023).

¹¹⁸² Written submissions of the Commissioner dated 13 October 2023 at [223]-[224], [226].

¹¹⁸³ Written submissions of Mark McKenzie dated 12 October 2023 at [101]-[106]

recommendation is to assist family members in understanding what occurred and to obtain answers that would otherwise be provided on the balance of probabilities.

1232. June¹¹⁸⁴ submits that a recommendation should be made to the Commissioner that tactical police should be required to wear BWV.

Consideration

1233. I have thought carefully about the detailed submissions made by Counsel Assisting, supported by June and Mark. I have also considered the submissions provided by the Commissioner on this issue. It is clear to me that the benefits of mandating BWV for tactical police far outweigh any difficulties that may be caused. I note the historic reluctance of many in the NSWPF to wear BWV cameras during general duty shifts, a practice now widely accepted. Slowly officers have seen the benefits of preserving evidence and providing accountability.

1234. Counsel Assisting have carefully summarised the evidence before me on this issue. In my view it is clear that there is little appetite for BWV among tactical police. There has been no real movement since Magistrate Ryan raised the issue in April 2022 in connection with the Tauaifaga inquest. This must change. I am confident that the obstacles mentioned can be worked through. Given what is occurring in other states, I do not accept that either legal issues or technical issues should stand in the way of this initiative. It may be that a pilot could take place, with a view to identifying any issues for a later roll out. I intend to make the recommendation as drafted.

A review and audit of mental health training be undertaken within two years to ensure that adequate and regular mental health training is being provided to NSWPF officers of all ranks

1235. Mental health training provided to NSWPF officers was a matter that was explored during the inquest alongside the issues set out above.

Evidence

1236. The inquest heard evidence about mental health training for officers, which appears to have been available as at 31 July 2019 and that which is currently available. That evidence largely came from the former manager of the NSWPFMHIT, Ch Insp Matthew Hanlon, the former acting manager of the MHIT, A/Inspector Sharna Masters and Negotiation Commander.

¹¹⁸⁴ Written submissions of June Wilkins dated 13 October 2023 at [185(1)].

1237. As at July 2019, under the auspices of the MHIT, there were two streams of mental health training available. The first was a four-day intensive mental health intervention officers' course. It was only made available to select officers and because of resourcing issues, it seems to have been delivered to only 2,420 officers between its creation in February 2008 and September 2019.¹¹⁸⁵ The other stream of training involved a one-day mental health workshop programme, which was established in 2013 and then delivered to all officers in 2014-2015.¹¹⁸⁶
1238. After rolling out the one-day mental health workshop programme in 2014-2015, the course content was incorporated into the Associate Degree of Policing Practice (**ADPP**) that all trainee police officers complete at the NSW Police Academy in Goulburn. As part of the ADPP, all trainee police officers must complete 18 hours of mental health-related training and assessment in order to become probationary constables.¹¹⁸⁷
1239. The Court heard that the four-day mental health intervention officers' course was regarded by police officers as very good in terms of the information it provided as to the perspectives of people suffering from mental health conditions and the different behaviours people with mental health conditions can exhibit.¹¹⁸⁸ However, in circumstances where delivery to police across New South Wales was slow, it was discontinued in September 2019.¹¹⁸⁹
1240. A proposed replacement training programme, known as the Enhanced Policing Practise Module (**EPPM**), commenced in a pilot phase in November 2019, but never moved beyond the pilot phase. That seems to have been because of problems with rolling out face-to-face delivery during COVID and also because of concerns about it being delivered to adequate numbers of police even on the basis of a reduced length two-day programme.¹¹⁹⁰
1241. As a consequence of the cessation of the four-day intensive mental health intervention officers' course in September 2019 and the subsequent abandonment of the introduction of the EPPM, the position at the time of the hearing was that there is no

¹¹⁸⁵ Exhibit 5 (LECC report dated May 2023) at p. 43.

¹¹⁸⁶ Tab 268 (Statement of Chief Inspector Hanlon) at [10]; T1824.18 (23 June 2023).

¹¹⁸⁷ Tab 268, at [11]; T1826.26 (23 June 2023).

¹¹⁸⁸ See, e.g., T1539.1 (19 June 2023).

¹¹⁸⁹ Exhibit 5 (LECC report dated May 2023) at pp. 43–44; T1825.36 (23 June 2023).

¹¹⁹⁰ Exhibit 5 (LECC report dated May 2023) at p. 44; Tab 268 (Statement of Chief Inspector Hanlon) at [15]; T1827.1 (23 June 2023).

mandatory course of mental health training beyond the content incorporated into the ADPP course for trainee police.¹¹⁹¹

1242. However, in September 2022, a proposal regarding a significant revision of mental health training for police officers and an associated framework were submitted to the Commissioner of Police's Executive Team for consideration and approval.¹¹⁹² The proposal and framework were developed after the NSWPF Mental Health Leadership and Practitioners' groups were established, which involve the MHIT and a number of other Commands which have a mental health operational function or training remit.¹¹⁹³
1243. The training proposal and framework were ultimately endorsed by the Commissioner of Police's Executive Team on 24 April 2023. However, I was advised that no actual training programmes have yet been rolled out. At the present time, the Crime Prevention Command and the Mental Health Leadership and Practitioners' groups are drafting course content, course outcomes, and training packages.¹¹⁹⁴
1244. Negotiation Commander gave some evidence late in the inquest about the approach to revising mental health training under the proposal and framework which has recently been endorsed. She explained that it was a foundational response to mental health with the intention that greater mental health training will be delivered to a greater number of officers and with more consistency of training delivered across the NSWPF at all ranks.¹¹⁹⁵
1245. By reference to earlier evidence from A/Inspector Masters as to the content of the new mental health training proposal and framework, Negotiation Commander explained in practical terms the various packages which will be delivered to NSWPF officers, starting as trainees at the Academy and continuing through to the highest ranks. In summary, it seems to be as follows:
- (i) 18 hours of initial mental health training will be provided to all police trainees under the ADPP course, as is already the case;¹¹⁹⁶

¹¹⁹¹ T1826.39 (23 June 2023).

¹¹⁹² Tab 269H (Second statement of Acting Inspector Masters) at [5]-[8].

¹¹⁹³ Tab 269H (Second statement of Acting Inspector Masters) at [6].

¹¹⁹⁴ Tab 269H (Second statement of Acting Inspector Masters) at [7].

¹¹⁹⁵ T1858.11 (23 June 2023).

¹¹⁹⁶ T1859.10 (23 June 2023).

- (ii) There will be a Constable Education Programme, under which there will be some coursework and written assessments in relation to dealing with people with mental health conditions;¹¹⁹⁷
- (iii) There will also be a Constable Development Programme which will also have a mental health component;¹¹⁹⁸
- (iv) There will be two online training packages rolled out in the 2023/2024 training year:
 - i. The first will involve training in respect of signs and symptoms of mental health conditions and will look at conditions such as schizophrenia, psychosis, depression, and suicidal behaviour;
 - ii. The second online training package will address de-escalation through communication, communication for first responders in high-risk and crisis situations, verbal and non-verbal communication, communicating with persons suffering from mental illness, barriers to communication, and the use of active listening;
- (v) The intention is that the online training package in respect of the signs and symptoms of mental health conditions will be rolled into the Defensive Training and Tactics mandatory mental health scenario training commencing in 2024/2025 and will involve annual assessments through face-to-face training;
- (vi) The intention is that the online training package in respect of de-escalation through communication will be rolled into weapons and tactics training in 2024/2025 and will continue to be done online;¹¹⁹⁹
- (vii) There will be Commissioner's training directives as required, involving responses to evolving issues such as issues identified in particular coronial findings and recommendations;¹²⁰⁰ and
- (viii) There will be a Leadership in Mental Health/Mental Health Contact Officer's Forum, which is training for superintendents and inspectors

¹¹⁹⁷ Tab 269H (Second statement of Acting Inspector Masters) at [8]; T1859.38 (23 June 2023).

¹¹⁹⁸ Tab 269H (Second statement of Acting Inspector Masters) at [8]; T1859.38 (23 June 2023).

¹¹⁹⁹ Tab 269H (Second statement of Acting Inspector Masters) at [8], T1860.10 and T1860.12 (23 June 2023).

¹²⁰⁰ Tab 269H (Second statement of Acting Inspector Masters) at [8] and T1860.39 (23 June 2023).

held every two years to discuss emerging issues in mental health deployment, crisis intervention, and local health initiatives.¹²⁰¹

1246. What emerges from the above is that it is presently a time of significant change when it comes to the mental health training provided to NSWPF officers. Widespread changes are to be made in terms of the mental health training courses (and the associated course content) available to officers after completing the ADPP course.
1247. The aim of the changes is to improve the consistency and reach of training, after a period where most officers (particularly general duties officers) received no specific mental health training beyond a one-day mental health workshop course (either delivered in 2014/2015 or as part of the ADPP course). This leaves police officers who did not happen to secure a spot in the four-day intensive mental health intervention officers' course (prior to it being withdrawn in September 2019) to essentially learn more about mental health issues through experience on the job. It is noted that Sen Cst Larrain gave evidence that most of what he knew about communicating with people with mental health conditions was picked up on the job.¹²⁰² He could recall very little of what he was taught in the one-day mental health workshop course, which he had completed on 25 September 2014.¹²⁰³

Submissions

1248. Counsel Assisting¹²⁰⁴ submit that as set out above, the mental health training provided to NSWPF officers has been in a state of flux since the intensive four-day mental health intervention officers' course was discontinued in September 2019 and the EPPM did not proceed past a pilot phase. The evidence indicates that in more recent times, useful steps have been taken to try and bring about a fundamental review and overhaul of mental health training in order to supplement what, it is submitted, is limited mandatory mental health training presently available to officers.
1249. Counsel Assisting note that the proposal and framework approved by the Commissioner of Police's Executive Team on 24 April 2023 and the various training package elements of it, in respect of which course curricula and training materials are currently being developed, appear promising. The underlying rationale of improving mental health training through a consistency of approach, implementation of the training across all areas of the NSWPF with a mental health remit and providing the

¹²⁰¹ Tab 269H (Second statement of Acting Inspector Masters) at [8] and T1861.28 (23 June 2023).

¹²⁰² T95.31 (28 March 2023).

¹²⁰³ Tab 257 (Summary of Training and Qualifications – Senior Constable Larrain).

¹²⁰⁴ Counsel Assisting's written submissions dated 30 August 2023 at [825]-[829].

training by reference to common curricula for police of all ranks accords with common sense.

1250. It should also help to limit the scope for inconsistent understandings on the part of police officers, particularly general duties police officers, as to the approach to be taken to engaging with someone with a serious mental health condition. In that regard, Counsel Assisting submit that the disconnect between what Sen Cst Larrain was trying to do in communicating with Todd, with encouragement of Sgt Horsington, and what Negotiation Coordinator intended that the general duties police would do pending the arrival of trained negotiators, is telling.
1251. Counsel Assisting further submit that at this stage, while there is cause to be optimistic that Negotiation Commander's enthusiasm about how the new mental health training proposal and framework will better equip police in their frequent task of dealing with members of the public suffering from mental health conditions, it is too early to know how the new proposal and framework will be translated into practical outcomes. Indeed, given the difficulties encountered in the introduction of the EPPM, albeit it seems in part due to attempted rollout during COVID, it is not yet clear how many of the elements of the new proposal and framework will actually be translated into training programmes or packages which are used over the medium to longer term.
1252. In the circumstances, and noting that there was evidence from officers as diverse as Sgt Horsington and Sgt Watt (from Weapons and Tactics, Policy and Review) as to the utility of further mental health training,¹²⁰⁵ Counsel Assisting submit that the Court should make a recommendation to the Commissioner of Police that a review and audit of mental health training be undertaken within two years in order to ensure that adequate and regular mental health training is being provided to NSWPF officers of all ranks.
1253. The Commissioner¹²⁰⁶ submits that it is not appropriate to make this recommendation as these issues are already under review in other forums, namely the NSWPF Mental Health Leadership and Practitioners' groups, noting that the mental health training proposal and framework,¹²⁰⁷ which ensures delivery of a greater amount of mental health training to more officers at all ranks,¹²⁰⁸ was endorsed by the Commissioner's Executive Team on 24 April 2023. Accordingly, the Commissioner submits that rather

¹²⁰⁵ T753.36 (5 April 2023) and T1539.42 (19 June 2023).

¹²⁰⁶ Written submissions of the Commissioner dated 13 October 2023 at [223], [225]-[226].

¹²⁰⁷ Tab 269H (Second statement of Acting Inspector Masters).

¹²⁰⁸ T1858.11 (23 June 2023).

than adding another layer of review by making a recommendation, the better course is to see what comes of the existing project.

1254. Sgt Horsington¹²⁰⁹ submits that a recommendation for further mental health training to be deployed would clearly be beneficial to all police officers, especially when dealing with similar difficult situations.
1255. Mark¹²¹⁰ agrees with Counsel Assisting's submissions regarding this recommendation but submits that the review and audit should be undertaken immediately and completed within two years.
1256. June¹²¹¹ submits that a recommendation should be made to the Commissioner in the terms submitted by Counsel Assisting. June further submits that there is a lack of BWV footage to demonstrate everything that happened to Todd on the day of his death.

Consideration

1257. It is pleasing that the NSWPF see the need to change what it is doing in relation to mental health training. It is perfectly clear that every serving officer, including those in tactical roles should be put through mental health training annually, with a practical de-escalation component. The old four-day course reached comparatively few. De-escalation must be seen as a training priority for every officer.
1258. I heard Negotiation Commander give evidence on the proposed training and note her commitment and enthusiasm for change. Nevertheless, it is important that the NSWPF get this basic training right, after a number of years where very different approaches existed and were supported by senior management. In my view it is appropriate to call for a review and audit to occur and I intend to make the recommendation as drafted.

Tactical police and/or negotiators or their commanders should consult a consultant psychiatrist about the possible responses and/or consequences of effecting a breach and hold against someone suffering a mental health episode, such as psychosis where there are otherwise no immediate risks

1259. Mark¹²¹² submits that a recommendation in terms set out above should be made.
1260. Mark's proposed recommendation reflects his submissions regarding the benefits that may be realised by obtaining input from a consultant psychiatrist (as set out above in

¹²⁰⁹ Written submissions of Sergeant Matthew Horsington at [4].

¹²¹⁰ Written submissions of Mark McKenzie dated 12 October 2023 at [107].

¹²¹¹ Written submissions of June Wilkins dated 13 October 2023 at [16(b)] and [185(2)].

¹²¹² Written submissions of Mark McKenzie dated 12 October 2023 at [109].

the context of Issue 7(a)). This includes his observation that, in this case, a consultant psychiatrist may have provided an opportunity in this case to “connect the dots” as information was collected to identify things such as the history of Todd’s paranoia, what neighbours had witnessed and what behaviours Todd was exhibiting to help determine what may be triggering his psychosis.¹²¹³

1261. The Commissioner’s submissions in reply do not address Mark’s proposed recommendation.

1262. There is some force to Mark’s submission on this issue and I accept that in this case consideration should have been given to involving a police psychiatric consultant. I too was concerned by the apparent reluctance to take this step in Todd’s case. While I hope a review of Todd’s death will prompt the relevant officers to take this step where necessary in the future, I am not persuaded on the limited evidence before me that it should be *mandated* in all situations where breach and hold is considered when dealing with a mentally ill person. There may be situations where treating doctors are able to assist and give sufficient and appropriate advice.

1263. Nevertheless, where there is no immediate risk, some consideration should be given to seeking specific mental health advice on the possible effects or responses of deploying a breach and hold in relation to a person experiencing a mental health crisis.

[REDACTED]

In a case such as this a consultant psychiatrist was potentially very useful and should have occurred.

1264. As noted above, Negotiation Team Leader may have discussed the matter of a consultant psychiatrist with Negotiation Commander. Negotiation Team Leader has, however, subsequently stated in his affidavit that he did not discuss that matter. The matter of record keeping regarding consideration concerning whether or not to use a consultant psychiatrist could be made more explicit.

[REDACTED]

¹²¹³ Written submissions of Mark McKenzie dated 12 October 2023 at [47]-[51].

[REDACTED] In my view it would not be onerous to require a [REDACTED]
[REDACTED] on the iSurv log or some other
appropriate place.

1265. I note that the Commissioner made no particular comment on this issue and I intend to make an amended recommendation. I recommend that the Commissioner consider updating the Negotiation SOPS to include an additional paragraph [REDACTED]

[REDACTED]
[REDACTED]

A thorough review of PACER be undertaken, including in relation to the suitability of deploying PACER in mental health incidents involving the presence of a knife

1266. Mark¹²¹⁴ submits that a recommendation in terms set out above should be made.

1267. Mark submits¹²¹⁵ that, while the limitations of the current PACER program are accepted, a review of the suitability of PACER being deployed in circumstances where a mentally unwell person is yielding a knife should be reviewed. He observes that there appears to be at least some benefit in considering whether the deployment of trained mental health clinicians to incidents where a person has suffered a deterioration in their mental health should be considered.

1268. Mark notes that PACER was considered by the State Coroner when it was at a pilot stage. In the findings of the inquest into the death of Jack Kokaua,¹²¹⁶ her Honour recommended that consideration be given by NSW Health and NSWPF to expand the funding for and roll-out of the PACER program. Mark invites the Court to make a recommendation that a thorough review of the PACER program and its current design be undertaken.

1269. In reply submissions, the Commissioner¹²¹⁷ notes that PACER operates under the auspices of NSW Health who administers and funds the program (by supplementation of the funding made to the Local Health Districts). The Commissioner submits that, given that PACER is operated under the aegis of NSW Health, who were not an

¹²¹⁴ Written submissions of Mark McKenzie dated 12 October 2023 at [109].

¹²¹⁵ Written submissions of Mark McKenzie dated 12 October 2023 at [77]-[78].

¹²¹⁶ Findings delivered on 12 May 2021; see [348] and [458]-[460].

¹²¹⁷ Written submissions in reply of the Commissioner dated 25 October 2023 at [19].

interested party in this inquest, the Court would accept that NSWPF are limited in their ability to make changes to the program.

1270. Like Mark, I was disappointed in the reach and operation of the PACER program, which I had initially thought might provide some assistance in the kind situation Todd found himself in.
1271. Nevertheless, I accept the Commissioner's submission on this issue and do not intend to make the recommendation.
1272. I agree with the thrust of Mark's submission that NSWPF must continue to grapple with how to incorporate mental health knowledge and mental health practitioners in the work they do and in the decisions they take. This is particularly so where there is a demonstrated reluctance to involve the consultant psychiatrists and PACER is unavailable in "high risk" incidents.

That all police negotiations with mentally ill POIs should involve the preparation of a mental health action plan which should be implemented and lead by a health professional wherever possible

1273. June¹²¹⁸ submits that a recommendation in terms set out above should be made.
1274. As noted above, June¹²¹⁹ submits that while police have a duty of care to protect the community from a person holding a weapon, in this case, intelligence gathering should have led to the formation of a mental health action plan led and implemented by a health professional. June submits that police's duty of care to protect the community from a person holding a weapon and the formation and implementation of a mental health action plan are not mutually exclusive. In her submission, a mental health action plan should be developed for critical incidents involving mentally ill persons of interest. With reference to this case, June submits that such a plan should include obtaining relevant information such as:
- a. History of the individual's mental health treatment and diagnosis;
 - b. Gathering information from treating psychiatrists, doctors and mental Health workers;
 - c. The involvement of family in gathering a history of Todd's historical Mental Health episodes (including strategies that have worked or failed in the past);

¹²¹⁸ Written submissions of June Wilkins 13 October 2023 at [185].

¹²¹⁹ Written submissions of June Wilkins 13 October 2023 at [41]-[42] and [52].

- d. Current treatment prescribed;
- e. Todd's most trusted associates including friends, relatives and key medical staff (i.e. Dr Richardson);
- f. A strategy plan for extraction of Todd from his home including gathering the following information and developing the following plans:
 - i. Seeking advice from a Consultant Psychiatrist about Todd given his medical history including the use of tranquilisers using a "How and When" methodology.
 - ii. Seeking family advice on what strategies have worked in previous episodes.
 - iii. Considering the matters above when considering which police tactics may assist or hinder a successful outcome.
 - iv. Developing an action plan to implement a strategy to safely subdue Todd and transport him to Taree Mental Health Unit which focuses on de-escalation strategies.

1275. June further submits that, in future, third party intervention should be incorporated into a mental health action plan and include information about past episodes, including an accurate history of what strategies families and friends have said worked during past episodes.

1276. As noted above, in response to Ms Wilkins' submissions regarding a mental health action plan, the Commissioner¹²²⁰ notes that no particularity is given as to what this means, including its operational or statutory basis. It is difficult for the Commissioner and involved officers to respond to that matter in circumstances where witnesses were not cross-examined in relation to it.

1277. In my view June's suggestion is compelling, but I accept that the practical issues about how a plan might be incorporated into current practice was not the subject of specific evidence before me. I intend to bring it to the attention of Negotiation Commander for her further consideration.

¹²²⁰ Written submissions in reply of the Commissioner dated 25 October 2023 at [13].

That police policies, protocols and practices prioritise de-escalation and negotiation over the use of force and physical interventions such as the breach and hold

1278. June¹²²¹ submits that a recommendation in terms set out above should be made.
1279. The Commissioner's submissions in reply do not address June's proposed recommendation. In her primary submissions, the Commissioner¹²²² submits that the NSWPF Use of Force Manual emphasises the importance of de-escalation as a technique and tactical option for all serving police.¹²²³
1280. I accept that the NSW Use of Force Manual appears to emphasise the importance of de-escalation as a technique and tactical option. What may be needed is further education and support for officers to learn and practise those techniques. I understand, from the evidence of Negotiation Commander that the NSWPF accept the need for de-escalation training for every serving officer and that the new training will be rolled out this year. Particularly relevant in this case is the mental health aspect of that training, which is relevant to how officers practise de-escalation techniques in settings that involve a person with a mental illness. I noted the importance of mental health training with a practical de-escalation component above and made a recommendation in relation to that training.

If family members or friends are involved as third-party intervenors, an action plan and relevant steps should be communicated to those involved, including providing reasons as to why police may terminate involvement of a third-party intervenor

1281. June¹²²⁴ submits that a recommendation in terms set out above should be made.
1282. The Commissioner's submissions in reply do not address June's proposed recommendation. As noted above, the Commissioner¹²²⁵ has submitted that the decision to effect a breach and hold is quintessentially a tactical decision. Policing agencies throughout the world do not axiomatically consult family members as to tactical options.
1283. I have already stated that in my view the option of involving family as third party intervenors in this case should have been properly considered. What the result of that consideration would have been involves too many hypothetical decisions for me to

¹²²¹ Written submissions of June Wilkins 13 October 2023 at [185].

¹²²² Written submissions of the Commissioner dated 13 October 2023 at [49].

¹²²³ Tab 270-2 (NSW Police Force Use of Force Manual) at pp. 10-11.

¹²²⁴ Written submissions of June Wilkins dated 13 October 2023 at [185].

¹²²⁵ Written submissions of the Commissioner dated 13 October 2023 at [216].

comment further. Nevertheless, it occurs to me that even if a properly considered decision found that involving Todd's family created too much risk, there was still a need to keep the family better informed than they were in period leading up to Todd's death.

Findings

1284. The findings I make under section 81(1) of the *Coroners Act 2009* (NSW) are:

Identity

The person who died was Todd McKenzie

Date of death

He died on 31 July 2019

Place of death

He died at Manning Hospital, Taree NSW

Cause of death

He died of gunshot wounds

Manner of death

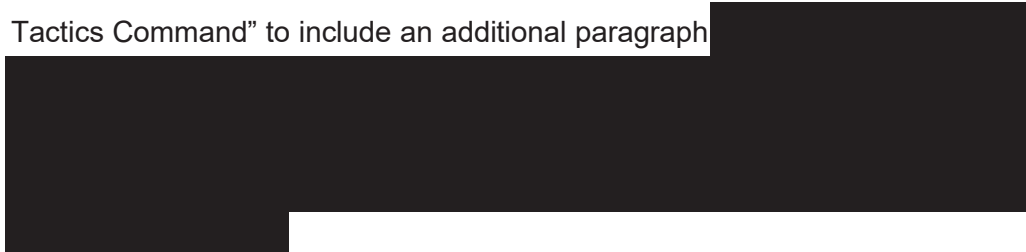
Todd was shot by NSWPF officers at his home in Taree. At the time Todd was experiencing psychosis and had been seen waving a knife earlier that afternoon. After an unsuccessful negotiation, police took deliberate action, executing a "breach and hold technique" which involved smashing Todd's window and ramming in his front door. Todd ran towards police with a knife and after using several less than lethal weapon options, an officer from the TORS shot Todd three times. His injuries were not survivable.

Recommendations

1285. For reasons stated above I make the following recommendations pursuant to s 82 of the *Coroners Act 2009* (NSW):

- a. Tactical police should be required to wear body-worn video.

- b. A review and audit of mental health training be undertaken within two years to ensure that adequate and regular mental health training is being provided to NSWPF officers of all ranks.
- c. The Commissioner consider updating the NSW Police Force's "Standard Operating Procedure – Negotiation Unit, Counter-Terrorism and Special Tactics Command" to include an additional paragraph



1286. A copy of these findings to Minister for Mental Health, Minister of Police and Negotiation Commander.

Conclusion

1287. There were very significant errors in the way Todd was approached on 31 July 2019. Some of them occurred very early and had a negative effect on the way the negotiation progressed. Others flowed throughout the evening where decisions were made without proper consideration being given to alternative paths. Todd's family were not adequately consulted or kept informed, available expertise was not always utilised and a strategy which was in my view always likely to be disastrous was enacted prematurely. Ultimately the breach and hold should not have occurred when it did and probably should not have occurred at all.

1288. While I have made some practical recommendations based on the evidence before me, long term improvements must involve substantially re-thinking the way we cope with situations where mental health issues intersect with policing. Solutions go well beyond individual recommendations that can legally be made by any coroner in relation to the particular facts of a single death. A whole of government approach is called for, one that includes strategic thinking from police and health professionals. I note that it is currently an issue in many other like jurisdictions both here and overseas and that new approaches are being trialled and change is occurring. In my view it is time to grapple with these issues in NSW, away from the pain of each individual death. These issues affect the whole community, not just those left forever with the grief associated with the death of a loved one. I acknowledge that current policies also place police under extreme pressure and cause many officers psychological harm and stress. I intend to send a copy of these findings to both the Minister of Police and the Minister

of Mental Health so that they may broadly consider the issues that have been raised. While I accept that it is beyond the scope of my recommendatory powers, it may be that those in government will see the need to auspice a summit of some kind bringing together police, health experts and mental health consumers and their families to shape better high-level policies in this difficult space. Like Todd's parents I hope that there may be better, kinder, and safer ways to deal with people like Todd who experience an acute mental health crisis.

1289. I would like to thank my assisting team, Mr Jason Downing SC, Mr Michael Dalla-Pozza of counsel and their instructing solicitors Messrs Tom Holcombe, James Prindiville and Ms Tina Wu for their very great assistance in this inquest. Their work and commitment over a long period was invaluable and is greatly appreciated.

1290. I extend my thanks to the officer in charge, Detective Chief Inspector Wayne Walpole, and to Detective Sergeant Hannah Packer and Detective Sergeant Rosie Allen for their assistance. I am also grateful for the assistance provided by the late Detective Sergeant Adam Child.

1291. Finally, I offer my condolences once again to Todd's family and thank them for their participation in these proceedings. I am well aware that nothing I can possibly say will ease the profound grief you feel. I am nevertheless compelled to express my respect and admiration for the way you and those close to you have steadfastly stood by your son in life and in death. I thank you for your generosity in sharing with me a little about the person Todd was, to provide that personal information when our system has failed to keep your son safe, is worthy of comment. Family participation in these proceedings is essential for the integrity of the inquest process and I thank you for attending.

1292. I close this inquest.

Magistrate Harriet Grahame
Deputy State Coroner
NSW Coroners Court, Lidcombe
5 April 2024

Amendments

18 April 2024

Paragraph 174 – The word “rely” has been amended to “relies”.

Paragraph 175 – The word “Isp” has been amended to “Insp”.

Heading on p. 33 – The word “crises” has been amended to “crisis”.

Paragraph 179 – The word “crises” has been amended to “crisis”.

Paragraph 874 – The word “TOU” has been replaced with the word “TORS”.

Paragraph 907 – The word “run” has been amended to “runs”.