



Hearing: Operation Corwen

Before the Hon Lea Drake, Commissioner

Held at Level 3, St James Centre,
Elizabeth Street, Sydney

On Wednesday, 13 June 2018 at 10.00am

Submissions

1 COMMISSIONER DRAKE: Good morning, could I have your
2 appearances, please.
3
4 MR WILLIS: Commissioner, my name is Willis and I seek
5 leave to appear for Officer 6.
6
7 MR MADDEN: Commissioner, Madden, solicitor. You
8 previously granted me leave to appear for Officer 1 and I
9 ask that continue.
10
11 MR OATES: My name is Oates, Commissioner. I previously
12 have been granted leave with respect to Officer 7.
13
14 MR EKSTEIN: Good morning, Commissioner, my name is
15 Ekstein. I have previously been given permission to act
16 for Officer 9. I ask that permission continue.
17
18 COMMISSIONER DRAKE: You can assume that the Commission is
19 continuing, thank you.
20
21 MR TAYLOR: If the Commission pleases, Taylor, solicitor.
22 I appear on behalf of Officer 8 and I'm also seeking your
23 leave to appear on behalf of Officer 2, previously
24 represented by Ms Hughes.
25
26 COMMISSIONER DRAKE: I noted that before, thank you.
27 She's absent, isn't she?
28
29 MR TAYLOR: Overseas.
30
31 MR DUNNE: My name is Dunne. I have been provided
32 authorisation to act for Officer 4.
33
34 MR PATTERSON: Good morning, Commissioner, Patterson,
35 solicitor, you previously granted me leave to appear for
36 Officer 3 and I seek renewal of that permission.
37
38 COMMISSIONER DRAKE: Leave is granted in all cases.
39
40 MR MUSICO: Commissioner, my name is Musico. I was
41 granted authorisation on the last occasion to appear for
42 Officer 5 and I seek that authorisation again.
43
44 COMMISSIONER DRAKE: Thank you, yes.
45
46 The Commission is conducting an investigation pursuant
47 to section 51 of the Law Enforcement Conduct Commission Act

1 2016. The purpose of the investigation is to investigate
2 whether any New South Wales police officer has been
3 involved in serious misconduct in relation to the arrest of
4 Ms A on 9 April 2016 and the subsequent prosecution of Ms A
5 for offences allegedly committed on 9 April 2016.

6
7 Pursuant to section 64 of the Act, the Commission has
8 appointed Mr Huen to assist the Commission in relation to
9 the investigation. The involved officers have already been
10 examined by the Commission in private hearings. The
11 purpose of today's public hearing is to hear submissions
12 from counsel assisting and the legal representatives of the
13 various witnesses who gave evidence in private.

14
15 I have determined that it is not in the public
16 interest for the involved individuals or the involved
17 police station to be identified. Code names will be used
18 to refer to all involved individuals. I direct that there
19 is to be no publication of any information that may
20 identify any of the involved persons or places, except in
21 such a manner and to such persons as the Commission may
22 specify.

23
24 The involved female has been codenamed Ms A. The
25 involved police officers have also been assigned codenames
26 and their legal representatives have been informed of those
27 codenames. The involved officers have been advised their
28 attendance is not required here today. I will take
29 appearances as I have done, noting the number allocated to
30 each officer and, therefore, counsel assisting will read a
31 summary of his submissions and I will invite submissions in
32 reply.

33
34 However, I think before we start, Mr Madden, you have
35 an application of which you have already notified me?

36
37 MR MADDEN: Yes, Commissioner. Commissioner, I received
38 counsel's submissions on 4 June. That night I wrote to the
39 Commission requesting a copy of all the documents that
40 counsel has. Whenever anyone says, I'm not complaining, it
41 always sounds like they are complaining, I'm not
42 complaining, but I should put on the record that I don't
43 know about others at the Bar table, but I didn't have the
44 evidence of anyone, including my own client, who gave
45 evidence here; I didn't have the evidence in the Local
46 Court; I didn't have any of the exhibits. Yet, counsel
47 assisting refers to those throughout his submissions.

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In my submission, I should have been given a copy of everything that counsel had. So I requested a copy. It wasn't forthcoming. I then sent a letter, I think, on the 5th, or maybe the 6th, and then last Thursday counsel assisting sent me an email - sent me the evidence --

COMMISSIONER DRAKE: Who did you make a verbal request to? I've only seen the written request, which I responded to and gave you the material, as far as I know. Was there a prior request?

MR MADDEN: I sent an email to your associate the day that I received the material asking that my email be forwarded to Ms O'Brien. I had no response to that, so then I sent a follow-up letter on the --

COMMISSIONER DRAKE: Mr Madden, I'm not criticising anybody, and I --

MR MADDEN: Neither am I.

COMMISSIONER DRAKE: I do think that you need to have as much time as possible to make submissions on behalf of your client. If you think you've been inconvenienced, then I'll give you an adjournment. However, I'll say this: on the last occasion it was clear that if anyone wanted to look at transcripts or seek any order for access to any of the material, it was made clear that you could make that application and at the Commission's order it would have been attended to or considered. I didn't receive it after the last hearing and if that had been given some consideration earlier, you would have had the material earlier. But I'll give you the adjournment. I don't want to have your client disadvantaged by any failure to see the material in a timely fashion. If you need the time, you can have it.

MR MADDEN: It's not a matter of me being inconvenienced, Commissioner, it's just a matter that, in fairness to my client --

COMMISSIONER DRAKE: I understand that. I'm saying yes.

MR MADDEN: Sorry?

COMMISSIONER DRAKE: I'm saying yes.

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MR MADDEN: All right, thank you. When the time comes, I'll make a very, very brief oral submission and then I will ask for an adjournment for, say, at least two weeks to prepare a written submission.

COMMISSIONER DRAKE: I have already said yes to that.

MR MADDEN: All right, thank you. I'll sit down then.

COMMISSIONER DRAKE: Very good, that would be nice. Is there any other application of that kind? All right. Mr Huen.

MR HUEN: Thank you, Commissioner. This is a public hearing for the purpose of making submissions about the commission's investigation into the conduct of a number of police officers when taking into custody a female civilian in the early hours of the morning of 9 April 2016. The female civilian was taken to an inner city police station and charged with various minor offences. This female civilian shall be referred to as Ms A.

The manner in which Ms A was handled whilst in police custody was recorded in part by CCTV cameras inside the police station. At the conclusion of the criminal proceedings against Ms A the presiding Magistrate dismissed all charges and requested that the parties refer the proceedings to this Commission. That was not done. The matter nevertheless came to the Commission's attention and an investigation was commenced on 24 August 2017.

The decision to investigate does not imply that the commission has determined that one or more of the involved police officers has committed a criminal offence or is guilty of serious misconduct. It means that, on the information available, it is appropriate that the commission investigate.

The Law Enforcement Conduct Commission Act 2016 provides that when the Commission decides to investigate a matter any police investigation must cease. Therefore, the only investigation on foot into this issue is that of the Commission.

On the other hand, if the Commission had decided to refer this matter to the police for investigation it would

1 have actively monitored the course of the investigation to
2 ensure that the public could be confident of its
3 competence, adequacy and objectivity.
4

5 For the purposes of its investigation, the Commission
6 may examine witnesses in a public or private hearing
7 depending on its view as to which course best serves the
8 public interest.
9

10 Witnesses giving evidence to the Commission cannot
11 refuse to answer questions. However, evidence given by
12 witnesses under compulsion to the Commission cannot be used
13 against those witnesses in any criminal proceedings.
14 Accordingly, an investigation cannot be frustrated by a
15 refusal to give information, but the important rights of
16 citizens not to be required to incriminate themselves is
17 maintained.
18

19 It is important that, as far as practicable, the
20 Commission's processes and decisions are seen to be
21 thorough, fair and reasonable. The public can only be
22 assured of these matters to the extent that they are able
23 to witness them. There is therefore an obvious public
24 interest in exposing the Commission's work, as far as
25 practical, in the public arena. Although, it does not
26 follow from this consideration that every investigation, or
27 even most investigations, should be made public.
28

29 The Commission is not conducting a trial; it is
30 conducting an investigation. It takes into account the
31 public interest in the protection of the privacy of persons
32 whose reputation might be unfairly prejudiced by evidence
33 given in the public arena. In this case, the Commission
34 has determined that the identity of the involved police
35 officers is not material to any of the matters being
36 investigated and no public purpose would be served by
37 identification at this stage.
38

39 In the early hours of 9 April 2016, Ms A was placed
40 under arrest by Officer 2. Upon receiving this
41 information, Officers 5 and 6 arrived in a caged police
42 truck to transport Ms A to the local police station. After
43 the police removed Ms A from the vehicle she can be seen to
44 be on the floor of the garage area within the police
45 station. In this area of the police station there were two
46 CCTV cameras which captured what happened next. That
47 footage has been made an exhibit in the Commission's

1 hearing. I would now like to have a pixelated version of
2 that footage played. That footage has the barcode 8345948.

3
4 (Footage of CCTV barcoded 8345948 played)

5
6 Would the Commission like to have that played again?

7
8 COMMISSIONER DRAKE: Well, I wasn't looking at the first
9 half, so, yes, I think so.

10
11 MR HUEN: If we could play that again, please.

12
13 (Footage of CCTV barcoded 8345948 played)

14
15 MR HUEN: In the CCTV footage, police officers can be seen
16 to be standing around Ms A as she lay on the floor.
17 Several police officers appear to be restraining her.
18 Police allege that at around this time, Ms A lashed out and
19 assaulted Officer 1 and Officer 3.

20
21 Officer 1 took hold of Ms A and began to pull her
22 towards the search room. Officer 6 took hold of Ms A's
23 right foot. All other officers, including the custody
24 manager, were looking on.

25
26 Ms A was searched in the search room and then walked
27 into the custody area where she was placed in the dock and
28 charged. The charges against Ms A were heard in the Local
29 Court in late 2016 and early 2017.

30
31 In preparation for those proceedings some of the
32 involved police officers prepared statements. In these
33 statements, they described Ms A as having been carried.
34 Her Honour found that Ms A had been dragged.

35
36 The evidence given by various officers in the Local
37 Court proceedings on this issue is of concern. It was
38 largely inconsistent with the CCTV footage shown to her
39 Honour.

40
41 The Commission has investigated the method of moving
42 Ms A from the garage area to the search area of the police
43 station, the preparation of the police officers' statements
44 and the police officers' evidence before the Local Court.

45
46 The Commission has decided to make the CCTV footage
47 public, noting that it is, as a matter of law, already in

1 the public arena as an exhibit in the Local Court.
2

3 It must be remembered that it is regrettably the case
4 that police officers may need to use force in the course of
5 their duties. However, that use of force must be no more
6 than is reasonable in the circumstances. The essential
7 issue in the present investigation is whether unreasonable
8 force was used in dealing with Ms A when she was in
9 custody.

10
11 In investigating these issues, the Commission must
12 consider the difficult task faced by police every day,
13 particularly when they are dealing with intoxicated people.
14 Balanced against this background are the police obligations
15 to a citizen's care in custody.
16

17 The Commission considers that, in the interests of
18 transparency and fairness, counsel assisting should
19 publicly outline the issues raised by the evidence of the
20 officers' conduct and that the officers, whilst retaining
21 their privacy, should have the opportunity of publicly
22 putting their response.
23

24 My oral submissions will be brief, but a full and
25 detailed written submission has already been provided to
26 the officers' legal representatives. The officers' legal
27 representatives will be given the opportunity, following my
28 outline, to make such submissions as they think can
29 properly be made in their clients' interests, so that their
30 response can also be made part of the public record.
31

32 In due course, the Commission will report to the
33 Minister and the Commissioner of Police.
34

35 The Commission reaches its findings on relevant facts
36 on the balance of probabilities. This is a civilian
37 standard as opposed to the criminal standard which requires
38 satisfaction beyond reasonable doubt.
39

40 The following are the findings which I submit are open
41 to the Commission: in relation to Officer 1, it would be
42 open to the Commission to find that using excessive force
43 whilst engaging in an inappropriate method of moving Ms A,
44 in preparing a statement that was untrue in parts for
45 tender in the Local Court, and giving untrue evidence in
46 the Local Court, Officer 1 engaged in serious misconduct
47 which was conduct which could result in either serious

1 disciplinary action against Officer 1 pursuant to section
2 10 of the Act or referral to the Director of Public
3 Prosecutions for advice with respect to a possible
4 prosecution for a serious offence, or both.
5

6 In relation to Officer 2, it would be open to the
7 Commission to find that his conduct, in relation to the
8 preparation of his statement for tender at the Local Court,
9 in his adherence to an inaccurate version of facts before
10 the Local Court and, to some extent, before the Commission,
11 was conduct which amounts to unsatisfactory performance.
12

13 In relation to Officer 3, it would be open to the
14 Commission to find that her conduct in relation to the
15 preparation of her statement for tender at the Local Court
16 was conduct which amounts to unsatisfactory performance.
17 It would also be open to the Commission to find that
18 Officer 3 did not understand her obligations in relation to
19 persons in her care and custody.
20

21 In relation to Officer 4, it would be open to the
22 Commission to find that her conduct in relation to the
23 preparation of her statement for tender at the Local Court
24 was conduct which amounts to unsatisfactory performance.
25 It would also be open to the Commission to find that
26 Officer 4 did not understand her obligations in relation to
27 persons in her care and custody.
28

29 In relation to Officer 5, it is submitted that it
30 would be open to the Commission to find that her conduct in
31 relation to the preparation of her statement for tender at
32 the Local Court was conduct which amounts to unsatisfactory
33 performance. It would also be open to the Commission to
34 find that Officer 5 did not understand her obligations in
35 relation to persons in her care and custody.
36

37 In relation to Officer 7, it is submitted that it
38 would be open to the Commission to find that his conduct,
39 in failing to perform the duties of a custody manager, was
40 conduct which amounts to serious misconduct.
41

42 In relation to Officer 9, it is submitted that it
43 would be open to the Commission to find that her conduct in
44 failing to give candid evidence to the Commission was
45 conduct which amounts to serious misconduct.
46

47 No adverse findings are recommended in relation to

1 Officers 6, 8 and 10.
2

3 In summary, those are the findings which it is
4 submitted would be open to the Commission to make. The
5 detailed submissions of counsel assisting have been served
6 on the witnesses and/or their legal representatives. I
7 submit that it would be appropriate for the Commissioner to
8 invite submissions in reply.
9

10 COMMISSIONER DRAKE: In relation to the detailed
11 submissions, rather than the executive summary provided by
12 counsel assisting, counsel assisting just indicated that
13 they would be made available to the public. That is not my
14 final decision. I don't intend to make the detailed
15 submissions available, only the executive summary.
16

17 Yes, are the parties ready to make submissions in
18 reply?
19

20 MR WILLIS: Commissioner, for my part, particularly having
21 regard to counsel assisting's amendment executive summary,
22 at this stage, there are no submissions that I feel I need
23 to make on behalf of Officer 6. In the unlikely event that
24 there are some submissions made by others that adversely
25 affect him, I may need to ask to make submissions in reply.
26

27 COMMISSIONER DRAKE: You will need to have a watching
28 brief, do you not?
29

30 MR WILLIS: I believe I do.
31

32 COMMISSIONER DRAKE: Do you wish to wait to the end and
33 then tell me if you wish to say anything?
34

35 MR WILLIS: Yes, thank you.
36

37 COMMISSIONER DRAKE: Yes, all right.
38

39 MR OATES: I think you have dealt with Mr Madden,
40 Commissioner.
41

42 COMMISSIONER DRAKE: I think he is going to have something
43 more to say a bit later but, yes, for the moment.
44

45 MR OATES: My submissions with respect to Officer 7 are in
46 relation to the executive summary. It's clear that my
47 client did not make a statement for the Local Court, and

1 did not give evidence in the Local Court.

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Paragraph 10 on page 2 of the executive summary refers to the three things the Commission has investigated in this matter: One, the method of moving Ms A; two, the preparation of police officers' statements; and, three, the police officers' evidence before the Local Court. My submission is, that it should be made clear on the public record that my client did not make a statement and did not --

COMMISSIONER DRAKE: Is your client Officer 7?

MR OATES: Yes.

COMMISSIONER DRAKE: It is submitted that it would be open to the Commission to find that his conduct in failing to perform the duties of custody manager was conduct that amounts to serious misconduct. I think that's the only finding recommended by counsel assisting.

MR OATES: Yes. I seek to correct a factual error.

COMMISSIONER DRAKE: Yes, which is where?

MR OATES: That the tenor of the executive summary is various police, which could include my client to the uninitiated or ignorant reader, made a statement which was potentially inappropriate or false, that he gave evidence at the Local Court, which was potentially inappropriate or false, whereas he did neither of those things. He was certainly investigated in relation to the way in which Ms A was moved, but not in relation to those other two matters. I just seek that the record reflect that.

COMMISSIONER DRAKE: Yes. Well, it's clear to me, and if it's not clear to any other person listening to these proceedings, your client is only being looked at for the purposes of examining his conduct in relation to the care and custody of Ms A.

MR OATES: I have no further submissions, Commissioner.

COMMISSIONER DRAKE: You don't have anything to say about the findings in relation to those matters of his care and custody?

1 MR OATES: I have no other submissions, if you please,
2 Commissioner.
3
4 COMMISSIONER DRAKE: All right.
5
6 MR EKSTEIN: Commissioner, I have taken the opportunity to
7 reduce my submissions to writing. I have served a copy on
8 counsel assisting and I'd seek to tender them.
9
10 COMMISSIONER DRAKE: Yes, certainly.
11
12 MR EKSTEIN: I don't seek to add anything orally to my
13 submissions. I'm for Officer 9.
14
15 COMMISSIONER DRAKE: Is that 1C? Would that be right,
16 counsel? The next exhibit, if I mark this submission?
17
18 MR HUEN: That sounds about right, Commissioner.
19
20 COMMISSIONER DRAKE: Right would be better than about
21 right. Is it 1C?
22
23 MR HUEN: Yes, it is.
24
25 COMMISSIONER DRAKE: Thank you. Mr Ekstein, could I have
26 that.
27
28 MR EKSTEIN: I have nothing further to add, thank you,
29 Commissioner.
30
31 EXHIBIT #1C SUBMISSIONS IN RELATION TO OFFICER 9
32
33 COMMISSIONER DRAKE: That's all you have to say?
34
35 MR EKSTEIN: Yes, thank you, Commissioner.
36
37 MR TAYLOR: Taylor, solicitor, for Officers 2 and 8. I
38 have also prepared some short written submissions in
39 relation to Officer 2 and some very short submissions in
40 relation to Officer 8. I have handed a copy to counsel
41 assisting this morning. I seek to tender those two
42 documents.
43
44 COMMISSIONER DRAKE: I won't delay everybody by looking up
45 the separate exhibit numbers, but I will mark them a bit
46 later.
47

1 EXHIBIT #2C SUBMISSIONS IN RELATION TO OFFICER 8
2
3 EXHIBIT #3C SUBMISSIONS IN RELATION TO OFFICER 2
4
5 MR TAYLOR: I have nothing further to the unless my
6 clients are mentioned by other submissions by any other
7 legal representatives.
8
9 MR HUEN: I can assist with the exhibit numbers now.
10
11 COMMISSIONER DRAKE: Thank you. In relation to Officer 8?
12
13 MR HUEN: That would be 2C.
14
15 COMMISSIONER DRAKE: And in relation to Officer 2?
16
17 MR HUEN: Officer 2, 3C.
18
19 COMMISSIONER DRAKS: Thank you.
20
21 MR DUNNE: Commissioner, I have reduced the submissions
22 for Officer 4 to writing. I haven't provided counsel
23 assisting with those submissions, but I have two to hand
24 up.
25
26 COMMISSIONER DRAKE: Thank you, you can tender them.
27
28 MR DUNNE: I've just noticed that I have made a written
29 amendment to the submissions because there is an inclusion
30 of paragraph 4. I amended it this morning and I have
31 deleted it. But that's been reflected on the document
32 that's being handed to you.
33
34 COMMISSIONER DRAKE: In relation to Officer 4, what is the
35 next exhibit number?
36
37 MR HUEN: 4C.
38
39 EXHIBIT #B4C SUBMISSIONS IN RELATION TO OFFICER 4
40
41 MR DUNNE: Unless I can assist the Commission.
42
43 COMMISSIONER DRAKE: I haven't read your submissions, so
44 I'm not in a position to ask you any questions about it, so
45 no, thank you.
46
47 MR PATTERSON: Thank you, Commissioner. I also have

1 prepared written submissions in relation to Officer 3.
2 Whilst I sit at the Bar table, I see that those submissions
3 require some minor amendment, or amendments. It may be
4 better if, with your leave, I was to read the submissions
5 on to the record.
6
7 COMMISSIONER DRAKE: Why don't you amend them and provide
8 them after the hearing and I'll mark them as an exhibit
9 then, unless you --
10
11 MR PATTERSON: I'm content to do that, Commissioner.
12
13 COMMISSIONER DRAKE: All right. Email them to counsel
14 assisting and I will mark them this afternoon.
15
16 MR PATTERSON: Thank you.
17
18 COMMISSIONER DRAKE: Mr Musico?
19
20 MR MUSICO: Thank you, Commissioner. I represent Officer
21 5, Commissioner. Commissioner, in the Commission's letter
22 of 4 June addressed to me, it was stated that Officer 5
23 could provide written submissions in response and they may
24 be made available for dissemination to the public at the
25 discretion of the representative of any officer client.
26
27 On the basis that the Commission does not distribute
28 to the public my client's submissions, I can --
29
30 COMMISSIONER DRAKE: They'll only be distributed if you
31 wish to do so, Mr Musico, certainly not by me.
32
33 MR MUSICO: No. Commissioner, on the basis that the
34 Commission will not publicly disseminate this document, I
35 have a copy of Officer 5's submissions, two copies - one
36 for yourself and one for counsel assisting - and I tender
37 those.
38
39 COMMISSIONER DRAKE: Thank you. Could I have the exhibit
40 number?
41
42 MR HUEN: 5C.
43
44 EXHIBIT #5C SUBMISSIONS IN RELATION TO OFFICER 5
45
46 MR MUSICO: Commissioner, just to assist you when you are
47 reading those submissions, Officer 5 urges the Commission

1 not to accept the recommendations of counsel assisting, and
2 instead make recommendations analogous to section 10 of the
3 Crime Sentencing Procedure Act 1999, in that officer
4 Officer 5 volunteers to informally participate in
5 retraining and counselling of the extent that counsel
6 assisting proposes in lieu of counsel assisting's proposals
7 for findings being accepted.
8

9 The nub of those submissions, Commissioner, is that of
10 all the officers involved in that incident of 9 April 2016,
11 she was the most inexperienced. She joined the police
12 force only in December 2015, so the incident of April 2016
13 occurred only four months after she became a police
14 officer. Her statement, which was drafted in June 2016,
15 prepared only six months later, and, I am instructed, that
16 was one of the first, if not the first, statements that she
17 ever prepared. When she gave evidence in the Local Court
18 on 2 March 2017, it was the first occasion she had ever
19 given evidence in court.
20

21 COMMISSIONER DRAKE: Thank you.
22

23 MR MUSICO: One more matter I'd like to raise,
24 Commissioner. At the beginning of today's hearing, you
25 made a suppression order over the identities of all of the
26 officers here. Is it your intention, Commissioner, that
27 that order continue indefinitely into the future?
28

29 COMMISSIONER DRAKE: Yes.
30

31 MR MUSICO: Thank you. My submissions are complete, thank
32 you, Commissioner.
33

34 COMMISSIONER DRAKE: Thank you. Mr Madden?
35

36 MR MADDEN: Thank you, Commissioner.
37

38 Commissioner, on behalf of Officer 1, it is submitted
39 that the Commission would not be satisfied that the
40 requisite degree of satisfaction that my client used
41 excessive force, or that he acted inappropriately in
42 relation to the preparation of his statement, or in the
43 manner in which he gave his evidence in the Local Court.
44

45 Counsel assisting seizes on one word, and that one
46 word is that my client's statement said "carried", whereas
47 counsel assisting says, well, it's not carried, she was

1 dragged. In the Local Court evidence that my client gave,
2 he did not maintain throughout that he carried her. He
3 said it could be a carry, it could be a drag. He gave that
4 evidence here, and other officers in their Local Court
5 evidence, and in their evidence here, also said that it
6 could be a carry, it could be a drag, it could be one of
7 both.

8
9 When I prepare some written submissions, I will refer
10 to their evidence.

11
12 To submit that consideration should be given to being
13 prosecuted for most serious public justice offences because
14 of one word in a statement that he prepared some six months
15 after the event, at a time when he didn't have access to
16 CCTV footage, I don't think there's evidence of this, I
17 will check, but, in my submission, he would have known that
18 there would be CCTV footage; he would have known that if he
19 was putting something in his statement that was just
20 absolutely wrong, that it would be shown to be wrong on the
21 footage. To suggest that one word was meant to mislead a
22 magistrate, or amounts to giving false evidence, in my
23 submission, is simply - it's not open on the evidence to
24 make that finding.

25
26 In relation to using excessive force, Ms A was a most
27 difficult person to deal with. From reading the evidence,
28 it appears that she admitted that she spat at the police at
29 the scene. It appears that she made some reference to the
30 Comancheros. I don't know if she was claiming to have some
31 affiliation with them, or whatever. She was --

32
33 COMMISSIONER DRAKE: I don't recall that, Mr Madden, where
34 is that?

35
36 MR MADDEN: If you give me a second, I will find it.

37
38 COMMISSIONER DRAKE: In any event, you're not suggesting
39 that somehow her conduct is some justification for lesser
40 conduct in care and custody, are you?

41
42 MR MADDEN: No. She was a difficult person to deal with,
43 Commissioner, when she was in the dock at the police
44 station. It hasn't been shown on the video that's been
45 tendered, but she spat on the Perspex door and the wall.
46 The police had to deal with her in the best way that they
47 could and, in my submission, whilst perhaps it could have

1 been dealt with differently, as my client conceded in his
2 evidence at this Commission, it did not amount to excessive
3 force. It may have amounted to an unwise way of conveying
4 her into the custody area, but it does not amount to an
5 assault. I'll refer to that in greater detail on the
6 written submissions that I have prepared.
7

8 COMMISSIONER DRAKE: Do you intend to make oral
9 submissions after you've prepared your written submissions?
10 If that is what your preference is, I can give you a date
11 and deal with that shortly, rather than have you do it in
12 oral submissions now and on another occasion written?
13

14 MR MADDEN: I was going to ask, could I have until 2 July
15 to forward written submissions?
16

17 COMMISSIONER DRAKE: I could list it on the morning of 6
18 July and you could tender your written submissions and make
19 short oral submissions in support if you wish, which would
20 stop you having to do it twice.
21

22 MR MADDEN: Obviously, it's a matter for you,
23 Commissioner, but I --
24

25 COMMISSIONER DRAKE: It's a matter for you, I'll give you
26 either. You can either get your submissions in by 2 July or
27 you can get them in and I'll give you a short time to make
28 oral as well.
29

30 MR MADDEN: I don't want to make any further oral
31 submissions.
32

33 COMMISSIONER DRAKE: All right. You can have until 2
34 July.
35

36 MR MADDEN: 2 July - right. Just one other thing, the
37 statement of Dr Quain, is that going to be made available
38 to the public?
39

40 COMMISSIONER DRAKE: I wasn't intending to make it
41 available.
42

43 MR MADDEN: Thank you, Commissioner. I'll have my written
44 submissions here by 4pm on 2 July.
45

46 COMMISSIONER DRAKE: I'll look forward to it, thank you.
47

1 Mr Ekstein, your submissions, I haven't been able to
2 read those, and given my counsel's recommendations about
3 the candid nature of your client's evidence, I want to read
4 them and then look at the video again and then perhaps hear
5 from you. I don't think I need to hear from anybody else,
6 but the recommendations from counsel assisting are very
7 serious in relation to your client and I would think it
8 might be that I might have some questions for you. So
9 would you mind remaining while I take the opportunity to
10 read them and come back?

11
12 MR EKSTEIN: Of course, Commissioner.

13
14 COMMISSIONER DRAKE: Would half past 11 suit you?

15
16 MR EKSTEIN: Whatever suits the Commission.

17
18 COMMISSIONER DRAKE: Is there anything arising for anybody
19 else, except Mr Madden?

20
21 MR TAYLOR: Just one housekeeping matter, Commissioner. I
22 have just noticed the copy of my submissions in relation to
23 Officer 2 that I have retained multiple pages, so am
24 fearful the stapler may not have done its job correctly.
25 Can I just have access to the document to make sure it's
26 the complete document?

27
28 COMMISSIONER DRAKE: Yes.

29
30 MR TAYLOR: That is a single complete copy, thank you.

31
32 COMMISSIONER DRAKE: The Commission is adjourned until
33 11.30, at which time I will hear from Mr Ekstein.

34
35 SHORT ADJOURNMENT

36
37 COMMISSIONER DRAKE: Mr Ekstein, I have had an opportunity
38 now to read your submissions, which I didn't have earlier
39 the opportunity to.

40
41 Officer 9 has not been a prosecutor very long?

42
43 MR EKSTEIN: No, only a couple of years as at --

44
45 COMMISSIONER DRAKE: 14 months of that was in training?

46
47 MR EKSTEIN: Yes, so I believe.

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COMMISSIONER DRAKE: What concerns me, particularly, is that I didn't call this witness to deal with the facts of the actual event, because I was interested to verify the evidence of another officer who was the actual prosecutor to check that his evidence about training was accurate. That was the purpose of Officer 9 coming to the hearing.

MR EKSTEIN: Sure.

COMMISSIONER DRAKE: In the course of that, I showed her the film and my review of that film is the difference between carrying and dragging is the difference between sitting and standing, and almost as clear.

When Officer 10 gave evidence about this matter, I asked Officer 10 what he saw in this film and his evidence was:

Certainly, it appears that they were taking a female person from the rear of a police car into the cell. Initially, it appeared that the woman was on the ground, the view was blocked so I didn't see how much - how she got on the ground. She appeared to keep her legs such that she was remaining on the ground and then the police, it would appear, dragged her to a room just before the charge room in which room she stood up with the assistance of police officers and then she walked into a cell.

Now, that, in my view, represents an accurate version of what was in the film, but when your client was here and I was asking her about these things, we went all around the room and back again and I got all sorts of answers. I won't go through them now, you are aware of it, you've read the transcript of your client's evidence. You were there when she gave it.

In the end, she wasn't prepared to say that the method of movement was inappropriate or that it was misconduct to move a woman handcuffed behind her back by one arm clasped above the wrist.

I was quite surprised to find it to be such a difficult concept. "I wasn't there", "I don't know", "it

1 could be carrying because one part of her buttock was off
2 the ground". Whilst your client is not a long-term
3 experienced prosecutor, she's an experienced police
4 officer. She gave this evidence under oath or affirmation,
5 I can't remember which now, and I don't think that the
6 matters on which her answers reflect what was in the CCTV
7 footage and she seemed very uncomfortable in giving a view
8 about what was taking place there.

9
10 You make a point in this matter, in your submission,
11 of saying she was under compulsion. What relevance does
12 that have? She's a prosecutor, she knew she was subpoenaed
13 to give evidence here, she understands her obligation to be
14 candid. Do you make some special point about her being
15 compelled to give evidence in this? Is that relevant for
16 some reason?

17
18 MR EKSTEIN: Only that it puts great pressure on the
19 witness to be as accurate as possible, and when Officer 9
20 was giving the evidence before your Honour, it was clear
21 from the tenor of that evidence that Officer 9 was being
22 cautious and almost of a view that she thought there was
23 some ambush coming down the line, so she was trying to be
24 specific.

25
26 COMMISSIONER DRAKE: Ambushed by whom?

27
28 MR EKSTEIN: By counsel assisting in the sense that there
29 was some trick as to the questions, as to the footage, that
30 would bear on relevance as to why Officer 9 was called
31 before this Commission to give evidence, which had nothing
32 to do with giving an opinion as to what footage was being
33 shown, but as to the training and supervision of trainee
34 prosecutors.

35
36 COMMISSIONER DRAKE: Yes, but when she was here, having
37 come here to give evidence about the training and
38 supervision of a trainee prosecutor, the film was shown to
39 her, as it was shown to Officer 10, and the summary I've
40 just read to you is Officer 10's answer and it seems to me
41 it reflects accurately what was in the CCTV footage.

42
43 It did not appear to me that your client's evidence
44 did accurately reflect what was in the footage.

45
46 MR EKSTEIN: Well, my reading of the transcript, with the
47 greatest of respect, Commissioner, is that ultimately the

1 propositions that have fallen from the bench this morning
2 were agreed by Officer 9 in that she said when given
3 assumptions to make, yes, it was inappropriate conduct.
4

5 COMMISSIONER DRAKE: Where is that?
6

7 MR EKSTEIN: The witness also, in giving evidence before
8 the Commission, agreed that it could be seen that A was
9 seen to be being dragged. Yourself, Commissioner, says on
10 page 12 at point 10:
11

12 At least her bottom might be half an inch
13 off the floor, but there you go. Yes, go
14 on.
15

16 COMMISSIONER DRAKE: You're suggesting that if her buttock
17 might have been half an inch off the floor, that somehow
18 that converts that to carrying rather than dragging? You
19 said she agreed that this might be inappropriate or
20 misconduct. Where was that?
21

22 MR EKSTEIN: I'll have to find that.
23

24 COMMISSIONER DRAKE: Yes, have a seat.
25

26 MR EKSTEIN: Commissioner, on page 24 at point 17, the
27 witness answers, "Yes, I agree" - that there's two men
28 dragging or carrying. Then the witness goes on on the same
29 page to say:
30

31 On the basis of the footage, it could be
32 seen as inaccurate ...
33

34 When referring to a another witness's statement, whose
35 codename I can't remember.
36

37 COMMISSIONER DRAKE: Let me take you to this, because I
38 think this is worrying - I'm sorry, did you find that?
39

40 MR EKSTEIN: Yes. Page 31, Commissioner, at point 43, the
41 question is:
42

43 If it did establish some misconduct, it
44 would be a matter that should be reported
45 to a senior officer in accordance with
46 section 211F?
47 A. Absolutely.

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Then earlier on that same page at 37:

If you thought that her Honour's finding established misconduct - that is, she finds that although they said they carried her, that in fact they dragged her - would you consider that to establish some misconduct?

A. Yes.

I can't find exactly where there was a question and answer with regards to the question of misconduct, I'm sorry, Commissioner.

COMMISSIONER DRAKE: All right. Let me take you to this. I will of course reread the transcript and if there is anything I've asked you that you think of later, you can send me a further note. This is what I find concerning. There are five police officers in the room, including the custody manager. I say:

Do you consider moving this woman by the wrist whilst her arms are handcuffed behind her back and the angle to be an appropriate way to move her?

A. Well, again, without me being there in that circumstance it would be difficult for me to pass judgment.

I say:

You don't have to pass judgment, that's my job. I just want to know whether you consider that is an appropriate way to move a prisoner from that area to another?

A. With what I have seen and the statements before me, at that point, and even now, I am not in a position to say whether it's inappropriate or not. I don't --

Then:

[Officer 9], you are in a position, because I'm asking you and you are obliged to answer the question. I understand you

1 don't know all of the background and I'm
2 not suggesting that you would be able to
3 take any of those matters into account, but
4 you are a senior officer and you've been in
5 the police force for a number of years.
6 You are looking at this particular film,
7 you can see at least five available police
8 officers to move this woman; do you think
9 it's appropriate or not, with the limited
10 information you have? I want you to
11 express a view one way or the other?
12

13 She says:

14
15 On the face of it, I don't think it's
16 inappropriate.
17

18 Q. You don't think it's inappropriate.

19 A. On the face of it.
20

21 Q. Do you think it's the best way to move
22 her.

23 A. Whether it's best practice, maybe not,
24 but whether it goes to inappropriate, I'm
25 not sure on the information I have.
26

27 Anyway, they are the matters that concern me, and you've
28 had an opportunity to put your submissions. Is there
29 anything else you want to say? Because I have read them
30 all now and I have reread the transcript.
31

32 MR EKSTEIN: Thank you, Commissioner. All we would submit
33 is that Officer 9, when giving her evidence, was answering
34 the questions to the best of her ability on the limited
35 information that was given to her. Officer 9 was never
36 given the whole picture --
37

38 COMMISSIONER DRAKE: She was given the video. It is the
39 whole picture. It is the matter we are investigating. We
40 see a woman being dragged by the wrist with her hands
41 handcuffed behind her back on her bottom across the room.
42 That is the thing I asked her about. I didn't ask her for
43 all the circumstances, I know she didn't know them. In
44 fact, I put that to her. When those ordinary matters were
45 put to her, it was the matter I asked her to express an
46 opinion about. She wasn't asked to express a view about
47 the findings of the judge. She wasn't asked to express a

1 view about the statements. She can't do that. What she
2 was asked, right here, was whether or not this conduct was
3 appropriate, and she was asked to look at video. That is
4 it, just like Officer 10 did.

5
6 MR EKSTEIN: With the greatest of respect, Commissioner,
7 even saying, "Well, have a look at this video", that's not
8 the whole story. You don't know what happens before the
9 video --

10
11 COMMISSIONER DRAKE: How could anything that happened
12 before - you're not suggesting that the conduct of the
13 person who is handcuffed can somehow affect the level of
14 care in custody they get, or the method of movement and how
15 it's inappropriate, are you? Knowing all of that, how
16 would it affect the answer?

17
18 MR EKSTEIN: All I would submit, Commissioner, is that
19 what immediately preceded the dragging or carrying or
20 movement of the prisoner is equally relevant to what you
21 see on that video. You see on the video clearly that
22 officers are attempting to move a person who is
23 uncooperative.

24
25 COMMISSIONER DRAKE: No, you don't see that on the video.
26 There's no level of cooperation or lack of cooperation on
27 the video because it's obscured by a pole. All that you
28 can clearly see is the lady on her stomach handcuffed
29 behind her back being moved across the floor on her bottom.
30 Whether there is or was or was not a level of cooperation
31 before she was handcuffed is not visible on the CCTV
32 footage.

33
34 MR EKSTEIN: It would be relevant to deciding the
35 appropriate conduct of the police as they attempt to move
36 her.

37
38 COMMISSIONER DRAKE: It might be, but there were five
39 officer there and what I was asking her was having one
40 officer move her by the wrist across the room with one
41 officer holding her by the heel was an appropriate method,
42 when there were, I think it was, five other officers in the
43 vicinity not doing anything but observed. That's what I was
44 asking her.

45
46 MR EKSTEIN: Given that Officer 9 gave evidence that she
47 could not form an opinion on that material, that is her

1 honest opinion.
2
3 COMMISSIONER DRAKE: I'm putting it to you that I have
4 doubts about whether that's a candid view. That's what I'm
5 putting to you. You say it was. That's a matter for me to
6 decide about, I suppose.
7
8 MR EKSTEIN: It is. Whatever you decide, Commissioner, to
9 go from that to a section 10 under the LECC Act is a very
10 big step.
11
12 COMMISSIONER DRAKE: It is.
13
14 MR EKSTEIN: It would be my submission that you would not
15 take that step, whatever view you may take as to her
16 opinion of what a short piece of video might show.
17
18 HIS HONOUR: I might form a view about the honesty of that
19 opinion, and that might be a very relevant matter. But I
20 understand your submission, Mr Ekstein.
21
22 MR EKSTEIN: It's an opinion, nevertheless, Commissioner,
23 not a statement of fact.
24
25 COMMISSIONER DRAKE: Maybe. Thank you.
26
27 MR EKSTEIN: If I can be of any further assistance?
28
29 COMMISSIONER DRAKE: No, I don't think so, but thank you
30 for waiting.
31
32 MR EKSTEIN: Thank you, Commissioner.
33
34 COMMISSIONER DRAKE: I note that there are persons in the
35 room from the public. During the course of my interchange
36 with Mr Ekstein I mentioned the officer's name, which I
37 didn't intend to do. I reiterate the orders of this
38 Commission that no officer is to be identified in any
39 fashion. Does everyone understand that? Good.
40
41 The Commission is adjourned.
42
43 AT 11.50AM THE COMMISSION WAS ADJOURNED ACCORDINGLY
44
45
46
47