



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.

1           In my submission, I should have been given a copy of  
2 everything that counsel had. So I requested a copy. It  
3 wasn't forthcoming. I then sent a letter, I think, on the  
4 5th, or maybe the 6th, and then last Thursday counsel  
5 assisting sent me an email - sent me the evidence --  
6

7  
8 COMMISSIONER DRAKE: Who did you make a verbal request to?  
9 I've only seen the written request, which I responded to  
10 and gave you the material, as far as I know. Was there a  
11 prior request?

12  
13 MR MADDEN: I sent an email to your associate the day that  
14 I received the material asking that my email be forwarded  
15 to Ms O'Brien. I had no response to that, so then I sent a  
16 follow-up letter on the --

17  
18 COMMISSIONER DRAKE: Mr Madden, I'm not criticising  
19 anybody, and I --

20  
21 MR MADDEN: Neither am I.

22  
23 COMMISSIONER DRAKE: I do think that you need to have as  
24 much time as possible to make submissions on behalf of your  
25 client. If you think you've been inconvenienced, then I'll  
26 give you an adjournment. However, I'll say this: on the  
27 last occasion it was clear that if anyone wanted to look at  
28 transcripts or seek any order for access to any of the  
29 material, it was made clear that you could make that  
30 application and at the Commission's order it would have  
31 been attended to or considered. I didn't receive it after  
32 the last hearing and if that had been given some  
33 consideration earlier, you would have had the material  
34 earlier. But I'll give you the adjournment. I don't want  
35 to have your client disadvantaged by any failure to see the  
36 material in a timely fashion. If you need the time, you  
37 can have it.

38  
39 MR MADDEN: It's not a matter of me being inconvenienced,  
40 Commissioner, it's just a matter that, in fairness to my  
41 client --

42  
43 COMMISSIONER DRAKE: I understand that. I'm saying yes.

44  
45 MR MADDEN: Sorry?

46  
47 COMMISSIONER DRAKE: I'm saying yes.

1  
2 MR MADDEN: All right, thank you. When the time comes,  
3 I'll make a very, very brief oral submission and then I  
4 will ask for an adjournment for, say, at least two weeks to  
5 prepare a written submission.

6  
7 COMMISSIONER DRAKE: I have already said yes to that.  
8

9 MR MADDEN: All right, thank you. I'll sit down then.  
10

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

14  
15 MR HUEN: Thank you, Commissioner. This is a public  
16 hearing for the purpose of making submissions about the  
17 commission's investigation into the conduct of a number of  
18 police officers when taking into custody a female civilian  
19 in the early hours of the morning of 9 April 2016. The  
20 female civilian was taken to an inner city police station  
21 and charged with various minor offences. This female  
22 civilian shall be referred to as Ms A.

23  
24 The manner in which Ms A was handled whilst in police  
25 custody was recorded in part by CCTV cameras inside the  
26 police station. At the conclusion of the criminal  
27 proceedings against Ms A the presiding Magistrate dismissed  
28 all charges and requested that the parties refer the  
29 proceedings to this Commission. That was not done. The  
30 matter nevertheless came to the Commission's attention and  
31 an investigation was commenced on 24 August 2017.

32  
33 The decision to investigate does not imply that the  
34 commission has determined that one or more of the involved  
35 police officers has committed a criminal offence or is  
36 guilty of serious misconduct. It means that, on the  
37 information available, it is appropriate that the  
38 commission investigate.

39  
40 The Law Enforcement Conduct Commission Act 2016  
41 provides that when the Commission decides to investigate a  
42 matter any police investigation must cease. Therefore, the  
43 only investigation on foot into this issue is that of the  
44 Commission.

45  
46 On the other hand, if the Commission had decided to  
47 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.

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.

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

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

36 In the early hours of 9 April 2016, Ms A was placed  
37 under arrest by Officer 2. Upon receiving this  
38 information, Officers 5 and 6 arrived in a caged police  
39 truck to transport Ms A to the local police station. After  
40 the police removed Ms A from the vehicle she can be seen to  
41 be on the floor of the garage area within the police  
42 station. In this area of the police station there were two  
43 CCTV cameras which captured what happened next. That  
44 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 MR HUEN: If we could play that again, please.  
11

12 (Footage of CCTV barcoded 8345948 played)  
13

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

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

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

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

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

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

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

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

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

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

28 In due course, the Commission will report to the  
29 Minister and the Commissioner of Police.

30 The Commission reaches its findings on relevant facts  
31 on the balance of probabilities. This is a civilian  
32 standard as opposed to the criminal standard which requires  
33 satisfaction beyond reasonable doubt.

34 The following are the findings which I submit are open  
35 to the Commission: in relation to Officer 1, it would be  
36 open to the Commission to find that using excessive force  
37 whilst engaging in an inappropriate method of moving Ms A,  
38 in preparing a statement that was untrue in parts for  
39 tender in the Local Court, and giving untrue evidence in  
40 the Local Court, Officer 1 engaged in serious misconduct  
41 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.  
2

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

11 COMMISSIONER DRAKE: Is your client Officer 7?

12 MR OATES: Yes.

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

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

19 COMMISSIONER DRAKE: Yes, which is where?

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

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

34 MR OATES: I have no further submissions, Commissioner.

35 COMMISSIONER DRAKE: You don't have anything to say about  
36 the findings in relation to those matters of his care and  
37 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 MR HUEN: I can assist with the exhibit numbers now.  
9

10 COMMISSIONER DRAKE: Thank you. In relation to Officer 8?

11 MR HUEN: That would be 2C.  
12

13 COMMISSIONER DRAKE: And in relation to Officer 2?  
14

15 MR HUEN: Officer 2, 3C.  
16

17 COMMISSIONER DRAKS: Thank you.  
18

19 MR DUNNE: Commissioner, I have reduced the submissions  
20 for Officer 4 to writing. I haven't provided counsel  
21 assisting with those submissions, but I have two to hand  
22 up.  
23

24 COMMISSIONER DRAKE: Thank you, you can tender them.  
25

26 MR DUNNE: I've just noticed that I have made a written  
27 amendment to the submissions because there is an inclusion  
28 of paragraph 4. I amended it this morning and I have  
29 deleted it. But that's been reflected on the document  
30 that's being handed to you.  
31

32 COMMISSIONER DRAKE: In relation to Officer 4, what is the  
33 next exhibit number?  
34

35 MR HUEN: 4C.  
36

37 EXHIBIT #B4C SUBMISSIONS IN RELATION TO OFFICER 4  
38

39 MR DUNNE: Unless I can assist the Commission.  
40

41 COMMISSIONER DRAKE: I haven't read your submissions, so  
42 I'm not in a position to ask you any questions about it, so  
43 no, thank you.  
44

45 MR PATTERSON: Thank you, Commissioner. I also have  
46

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

29  
30 COMMISSIONER DRAKE: Yes.  
31

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

34  
35 COMMISSIONER DRAKE: Thank you. Mr Madden?  
36

37 MR MADDEN: Thank you, Commissioner.  
38

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

45  
46 Counsel assisting seizes on one word, and that one  
47 word is that my client's statement said "carried", whereas  
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.

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                  MR EKSTEIN: Of course, Commissioner.

12                  COMMISSIONER DRAKE: Would half past 11 suit you?

13                  MR EKSTEIN: Whatever suits the Commission.

14                  COMMISSIONER DRAKE: Is there anything arising for anybody  
15 else, except Mr Madden?

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

22                  COMMISSIONER DRAKE: Yes.

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

24                  COMMISSIONER DRAKE: The Commission is adjourned until  
25 11.30, at which time I will hear from Mr Ekstein.

26                  SHORT ADJOURNMENT

27                  COMMISSIONER DRAKE: Mr Ekstein, I have had an opportunity  
28 now to read your submissions, which I didn't have earlier  
29 the opportunity to.

30                  Officer 9 has not been a prosecutor very long?

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

32                  COMMISSIONER DRAKE: 14 months of that was in training?

33                  MR EKSTEIN: Yes, so I believe.

1  
2 COMMISSIONER DRAKE: What concerns me, particularly, is  
3 that I didn't call this witness to deal with the facts of  
4 the actual event, because I was interested to verify the  
5 evidence of another officer who was the actual prosecutor  
6 to check that his evidence about training was accurate.  
7 That was the purpose of Officer 9 coming to the hearing.  
8

9 MR EKSTEIN: Sure.  
10

11 COMMISSIONER DRAKE: In the course of that, I showed her  
12 the film and my review of that film is the difference  
13 between carrying and dragging is the difference between  
14 sitting and standing, and almost as clear.  
15

16 When Officer 10 gave evidence about this matter, I  
17 asked Officer 10 what he saw in this film and his evidence  
18 was:  
19

20 Certainly, it appears that they were taking  
21 a female person from the rear of a police  
22 car into the cell. Initially, it appeared  
23 that the woman was on the ground, the view  
24 was blocked so I didn't see how much - how  
25 she got on the ground. She appeared to  
26 keep her legs such that she was remaining  
27 on the ground and then the police, it would  
28 appear, dragged her to a room just before  
29 the charge room in which room she stood up  
30 with the assistance of police officers and  
31 then she walked into a cell.  
32

33 Now, that, in my view, represents an accurate version  
34 of what was in the film, but when your client was here and  
35 I was asking her about these things, we went all around the  
36 room and back again and I got all sorts of answers. I  
37 won't go through them now, you are aware of it, you've read  
38 the transcript of your client's evidence. You were there  
39 when she gave it.  
40

41 In the end, she wasn't prepared to say that the method  
42 of movement was inappropriate or that it was misconduct to  
43 move a woman handcuffed behind her back by one arm clasped  
44 above the wrist.  
45

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

25 COMMISSIONER DRAKE: Ambushed by whom?  
26

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

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

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

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

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

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

20 MR EKSTEIN: I'll have to find that.  
21

22 COMMISSIONER DRAKE: Yes, have a seat.  
23

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

29 On the basis of the footage, it could be  
30 seen as inaccurate ...  
31

32 When referring to a another witness's statement, whose  
33 codename I can't remember.

34 COMMISSIONER DRAKE: Let me take you to this, because I  
35 think this is worrying - I'm sorry, did you find that?  
36

37 MR EKSTEIN: Yes. Page 31, Commissioner, at point 43, the  
38 question is:  
39

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

1  
2 Then earlier on that same page at 37:  
3

4 If you thought that her Honour's finding  
5 established misconduct - that is, she finds  
6 that although they said they carried her,  
7 that in fact they dragged her - would you  
8 consider that to establish some misconduct?  
9 A. Yes.

10  
11 I can't find exactly where there was a question and answer  
12 with regards to the question of misconduct, I'm sorry,  
13 Commissioner.

14  
15 COMMISSIONER DRAKE: All right. Let me take you to this.  
16 I will of course reread the transcript and if there is  
17 anything I've asked you that you think of later, you can  
18 send me a further note. This is what I find concerning.  
19 There are five police officers in the room, including the  
20 custody manager. I say:

21  
22 Do you consider moving this woman by the  
23 wrist whilst her arms are handcuffed behind  
24 her back and the angle to be an appropriate  
25 way to move her?

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

29  
30 I say:

31  
32 You don't have to pass judgment, that's my  
33 job. I just want to know whether you  
34 consider that is an appropriate way to move  
35 a prisoner from that area to another?

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

41  
42 Then:

43  
44 [Officer 9], you are in a position, because  
45 I'm asking you and you are obliged to  
46 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 On the face of it, I don't think it's  
15 inappropriate.

16 Q. You don't think it's inappropriate.  
17 A. On the face of it.

18 Q. Do you think it's the best way to move  
19 her.

20 A. Whether it's best practice, maybe not,  
21 but whether it goes to inappropriate, I'm  
22 not sure on the information I have.

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

27 MR EKSTEIN: Thank you, Commissioner. All we would submit  
28 is that Officer 9, when giving her evidence, was answering  
29 the questions to the best of her ability on the limited  
30 information that was given to her. Officer 9 was never  
31 given the whole picture --

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

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                  COMMISSIONER DRAKE: It is.

12                  COMMISSIONER DRAKE: It would be my submission that you would not  
13                  take that step, whatever view you may take as to her  
14                  opinion of what a short piece of video might show.

15                  HIS HONOUR: I might form a view about the honesty of that  
16                  opinion, and that might be a very relevant matter. But I  
17                  understand your submission, Mr Ekstein.

18                  MR EKSTEIN: It's an opinion, nevertheless, Commissioner,  
19                  not a statement of fact.

20                  COMMISSIONER DRAKE: Maybe. Thank you.

21                  MR EKSTEIN: If I can be of any further assistance?

22                  COMMISSIONER DRAKE: No, I don't think so, but thank you  
23                  for waiting.

24                  MR EKSTEIN: Thank you, Commissioner.

25                  COMMISSIONER DRAKE: I note that there are persons in the  
26                  room from the public. During the course of my interchange  
27                  with Mr Ekstein I mentioned the officer's name, which I  
28                  didn't intend to do. I reiterate the orders of this  
29                  Commission that no officer is to be identified in any  
30                  fashion. Does everyone understand that? Good.

31  
32                  The Commission is adjourned.

33                  AT 11.50AM THE COMMISSION WAS ADJOURNED ACCORDINGLY