



Hearing: Operation Tambora

Before the Hon M F Adams QC, Chief Commissioner

Held at The Byron Community Centre Cavanbah Room,
69 Jonson Street, Byron Bay

On Monday, 23 July 2018 at 10.07am

CORRECTED TRANSCRIPT

1 THE CHIEF COMMISSIONER: This is a continuation of the
2 public hearings which were conducted in Sydney by the
3 Commission.
4

5 The purpose of this hearing is to enable the public to
6 be aware of the matters considered by Counsel Assisting the
7 inquiry to be relevant to the determinations of the
8 propriety and conduct of police who were involved in the
9 incident.
10

11 Since Counsel Assisting's submissions are made in
12 public, it is only fair that those representing the
13 particular police officers should have an opportunity also
14 publicly to state the position which their clients wish the
15 Commission to take on those matters.
16

17 The identities of the police officers will remain
18 confidential as the Commission considers there to be no
19 public interest in their identities. This is a matter that
20 needs to be considered in principle. Whether any of their
21 identities will be made public in the ultimate report is
22 another matter and counsel or the legal representatives for
23 the officers will be invited to make submissions on that
24 matter at an appropriate time.
25

26 Yes, I think that's all. Thank you, Mr Rowles.
27

28 MR ROWLES: Thank you, Commissioner. My names is Terence
29 Rowles and I am Counsel Assisting the inquiry.
30

31 I have prepared and forwarded to representatives of
32 the police officers some submissions as to what, as
33 Counsel Assisting, I submit ought to be the findings the
34 inquiry should make. Those submissions amount to some 49
35 pages. What I have done is then reduced to an executive
36 summary those submissions to a document of 13 pages and
37 I now intend reading that on to the record. It deals with
38 the general nature of the evidence that was given to the
39 inquiry, the procedures the inquiry adopted, the
40 submissions that I make as to the matters that the inquiry
41 ought to consider and the relevant law involved.
42

43 The inquiry was in respect of the general scope and
44 purpose of an investigation as to whether any New South
45 Wales police officers involved in the apprehension and
46 arrest of a 16-year-old male at Lateen Lane, Byron Bay, on
47 11 January 2018 engaged in criminal conduct or serious

1 police misconduct.

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1 report was obtained from Professor Duflou, a consulting
2 forensic pathologist. He considered that the injuries
3 sustained by [A0] were likely as a result of compressed
4 force applied to the chest with a shod foot or something
5 similar. He did not exclude that it was possible the
6 fractures to [A0]'s rib were caused as a result of one or
7 more blows with a baton, although the professor also
8 expressed the view it was entirely possible for the
9 fracture to have been sustained some time prior to the
10 arrest. He was of the view that the activities depicted in
11 the arrest could be reasonably expected to have resulted in
12 the fracture of one or more ribs.

13
14 Taking the evidence as a whole, it is open for the
15 Commission to conclude it's more probable than not that the
16 strike or strikes inflicted by [Officer E] caused this
17 fracture, though that would be clearly unintentionally.

18
19 [A0] was not called to give evidence before the
20 Commission. Shortly before the Commission held its public
21 session [A0]'s treating clinical psychologist was
22 interviewed by a Commission investigator. In a report
23 provided by the psychologist, it was stated that [A0] was
24 not psychologically fit to be interviewed or to appear to
25 give evidence before the Commission.

26
27 The five police officers, the subject of the inquiry,
28 were all independently represented at the inquiry, and
29 their legal representatives were present when their clients
30 gave evidence in private session and at all times when
31 evidence was taken in public session. The police officers'
32 legal representatives were provided with statements
33 obtained by the Commission investigators, transcripts of
34 evidence which had been given in private session, and
35 material was made available prior to any of the witnesses
36 giving evidence in the public inquiry. The legal
37 representatives were also provided with all copies of
38 exhibits tendered, including ambulance and hospital
39 records, and photographs showing bruising and abrasions to
40 various parts of [A0]'s body.

41
42 As it had been referred to in some of the police
43 officers' evidence, after the public hearing had been
44 completed, the Commission obtained information about a
45 violent incident which had occurred some two and a half
46 weeks earlier at a car park on Lighthouse Road, Byron Bay.
47 This incident occurred at approximately 10.55pm on

1 25 December 2018. It involved a 23-year-old apparently
2 drug-affected naked male. When police attended the scene
3 as a result of the complaint, they were confronted by a
4 male person in a disturbed state threatening to kill
5 himself.
6

7 The person then ran at at the police vehicle and threw
8 himself head first over the bonnet into the front
9 windshield, smashing and and showering the two police
10 officers with broken glass. He then proceeded to jump on
11 the bonnet of the vehicle and kick in the windscreen. He
12 then jumped off the vehicle and began to head-butt and
13 punch the passenger side window.
14

15 In an attempt to subdue him, a taser was deployed but
16 did not appear to have any effect. The police officers,
17 after a violent struggle, managed to subdue the male and
18 take him into custody. Even when in custody, the male
19 continued to resist and attempted to attack the police
20 officers.
21

22 Subsequent inquiries revealed the male had used the
23 prohibited drug LSD. He has been charged with a number of
24 offences, including assault police, resisting arrest and
25 malicious damage.
26

27 Returning to this incident, the evidence given before
28 the inquiry establishes that at approximately 2.26 am on
29 11 January 2018, after a telephone call was received at the
30 Byron Bay police station - the call was to the effect that
31 there was a naked person acting inappropriately in
32 Lateen Lane - two police vehicles, each containing two
33 police officers responded to the call. At the time
34 [Officer B] and [Officer C] were in the process of signing
35 off, having completed a full shift, but the decision was
36 made that all four officers would attend the incident.
37

38 The first police vehicle to arrive contained
39 [Officer D] and [Officer E], and the second vehicle
40 contained [Officer B] and [Officer C]. The time between
41 the arrival of the first and second police vehicles was
42 short. CCTV footage from a hotel in the vicinity records a
43 gap of some 22 seconds between the passing of the police
44 vehicles, the time gap between the arrival would have been
45 about the same.
46

47 By the time the police in the second vehicle had

1 arrived, [A0] had been capsicum sprayed and a taser was
2 being deployed as those officers vacated their vehicle. It
3 appears that neither the use of the OC spray nor the taser
4 resulted in [A0] complying with police demands to go to the
5 ground and [A0] was finally forced to the ground after a
6 baton strike to one of his legs.

7
8 The police evidence was that they had difficulty in
9 restraining [A0]. He was naked and he was sweating
10 profusely and there's little doubt that the police would
11 have had difficulties in getting a proper grip upon him.
12 Shortly after [A0] was brought to the ground, a video
13 commenced recording interaction between [A0] and the police
14 officers. The video records [Officer B] administering one
15 baton strike.

16
17 THE CHIEF COMMISSIONER: Mr Rowles, I think then before
18 you move on, we might play that video.

19
20 MR ROWLES: Certainly, Mr Commissioner.

21
22 THE CHIEF COMMISSIONER: Most people have seen the
23 Channel 9 recording, which is somewhat abbreviated and
24 repetitious. They haven't seen the whole video. For the
25 purpose of understanding the submissions --

26
27 MR ROWLES: Certainly. Could I just finish with one, and
28 item that is that the video records [Officer B]
29 administering one baton strike, [Officer E] 18. And if the
30 video could please be shown at this time.

31
32 (CCTV footage played)

33
34 THE CHIEF COMMISSIONER: I propose to have it played a
35 second time because it is difficult to work out the first
36 time what the detail is. A second viewing is often more
37 informative, so would you play it again.

38
39 (CCTV footage played)

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41 THE CHIEF COMMISSIONER: Yes, Mr Rowles.

42
43 MR ROWLES: As you've heard, the sound recording on the
44 video clearly records [Officer E] shouting at [A0] to stop
45 resisting and [A0]'s response "I'm not resisting" is also
46 clearly recorded. It shows that a large number of baton
47 strikes were administered at a time when [A0] was either

1 under police restraint, handcuffed or both.

2
3 Witnesses [W1] and [W2], who observed what had
4 occurred but from different positions. Both gave evidence
5 to the effect that [A0]'s conduct and demeanour at no time
6 appeared to be threatening any person including the police.
7 They described his condition as being more confused and
8 disorientated than aggressive. CCTV footage taken at the
9 Byron Bay police station where [A0] was detained for
10 approximately one hour does not show [A0] acting
11 aggressively. It is more consistent with someone who is
12 confused, disoriented and probably in pain.

13
14 Whilst at the Byron police station [A0] was kept in
15 the dock-holding area. He was not provided with clothing,
16 water or blankets and remained naked while at the station.
17 As to an explanation why these items were not provided,
18 [Officer A]'s explanation, as the sergeant station custody
19 manager at the relevant time, appears to be that the
20 arrangements had already been put in place to transfer [A0]
21 to Tweed Heads Hospital, and he was only going to be at the
22 station for a relatively short period of time before being
23 sedated and transferred there. Also it was apparently
24 decided only to open his cell door when arrangements had
25 been made to sedate [A0] to minimise any risk of further
26 violent confrontation.

27
28 At the Tweed Heads Hospital [A0] was examined and
29 found to have a fractured eighth rib. After spending the
30 night at the hospital, he was examined by a staff
31 psychiatrist and was found to be not suffering from any
32 psychosis and was released into the custody of his parents.

33
34 The duties imposed upon a police officer in exercising
35 their powers of arrest and other related functions are
36 contained in section 230 and 231 of the Law Enforcement
37 (Powers and Responsibilities) Act 2002. They provide that
38 a police officer is entitled to use such force as is
39 reasonably necessary to effect an arrest, or keep a person
40 in detention having effected that arrest.

41
42 The question of what is reasonable of course has been
43 considered by the courts on a number of occasions and it
44 appears that the following principle can be extracted:

45
46 *What is reasonable depends upon two*
47 *factors: the officer is entitled to use*

1 *such a degree of force as in the*
2 *circumstances he reasonably believe to be*
3 *necessary to effect his purpose, provided*
4 *that the means adopted by him are such as a*
5 *reasonable man placed as he was placed*
6 *would not consider to be disproportionate*
7 *to the evil to be prevented.*

8
9 *But it is important in judging the*
10 *reasonability of the police conduct, the*
11 *matter must be judged by reference to the*
12 *pressure of events and the agony of the*
13 *moment, not by reference to hindsight.*
14 *Arrests are frequently in circumstances,*
15 *turmoil and panic [and it is] altogether*
16 *unfair to the police force as a whole to*
17 *sit back in the then comparative calm and*
18 *leisurely atmosphere of a courtroom and*
19 *there make minute, retrospective criticisms*
20 *of what an arresting constable might or*
21 *might not have done, or believed [or might*
22 *not have believed] in the circumstances.*

23
24 It is considerations such as these that the Commission
25 should keep in mind when considering whether the police
26 action was reasonable.

27
28 The evidence given to the inquiry was not clear-cut.
29 There were significant variations between the accounts
30 given by [W1] and [W2] as opposed to the account given by
31 [W3] and various police witnesses. The variations are not
32 explained by poor lighting or difficulties with
33 observation. There is no suggestion that all witnesses
34 were not in a position to fully observe the interaction in
35 Lateen Lane. The variation of witness's evidence may in
36 part be explained on the basis of length of time between
37 the occurrence and when the witnesses provided statements
38 and the giving of the evidence, although this time of time
39 was comparatively short.

40
41 The most significant explanation for variations in the
42 evidence is the difficulties commonly encountered in
43 witnesses seeking to recount a large amount of activity
44 taking place in a short period of time. This is
45 particularly so when matters involve violent interaction,
46 such as occurred in this place. The human memory is
47 fallible and can frequently lead to inaccuracies, sometimes

1 substantial in both observation and recollection.

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1 This appears to be confirmed by the CCTV video recorded at
2 the Byron Bay police station.

3
4 Although there were various time estimates given
5 between the time of the arrival of the first police van and
6 the use of the OC spray, it is clear on the evidence that
7 the spray was used in a very short period of time after the
8 police arrived.

9
10 CCTV footage from the hotel immediately in the
11 vicinity of Lateen Lane showed the delay in recording the
12 police vehicle's passing at 22 seconds. There does not
13 appear to be any real dispute that, by the time the second
14 police vehicle arrived, the capsicum spray had been used
15 and the taser was being deployed as the officers were
16 alighting from the second vehicle.

17
18 When [Officer D] was asked whether there was more
19 appropriate option than the use of the OC spray, and it was
20 suggested that he could have called for assistance of his
21 partner to physically restrain [A0], [Officer D] did not
22 agree. What is also significant is that [Officer D]'s
23 partner, [Officer E], stated in evidence that he was aware
24 that the second police vehicle containing a further two
25 officers had been dispatched. This would mean that four
26 relatively tall and well-built officers would be available
27 to attempt to subdue [A0] and take him into custody.

28
29 It is regrettable that no attempt was made to exercise
30 this option. Indeed, one of obvious problems was the
31 failure to have even the most rudimentary plan for what the
32 officer should do, the need for which was made all the more
33 necessary if they were worried that they might be facing a
34 similar reaction to that which had occurred shortly before
35 on Christmas Day. That was the time for them to come
36 together and coordinate their actions given [A0]'s lack of
37 aggression at that point.

38
39 There are conflicting accounts as to the police
40 demeanour and language used when initially confronting
41 [A0]. Whatever the true account is, the period of time
42 between the initial confrontation and the use of the OC
43 spray was too short to allow an accurate assessment of the
44 position and to consider what other options might have been
45 available to achieve a peaceful resolution. A greater
46 period of time ought to have been allotted in an attempt to
47 establish a dialogue with [A0] in an endeavour to take him

1 peacefully into custody. If this proved unsuccessful, an
2 attempt ought to have been made to physically restrain [A0]
3 by the police officers. Only if these methods proved
4 unsuccessful should the use of the OC spray have been
5 considered. Its use at the time that it was was premature.
6

7 It is common ground that the OC spray use did not have
8 the desired effect of making [A0] compliant with the police
9 demands. The evidence appears that [A0] became
10 disorientated, but he was neither trying to escape nor
11 offering any violence to the police officers.
12

13 An attempt by [Officer D] to subdue [A0] was
14 unsuccessful and [Officer E] was incapacitated for a short
15 period of time because he came into contact with the OC
16 spray. He appears, however, to have recovered in a
17 relatively short period of time because he then deploys the
18 taser. On the evidence it appears that the delay between
19 the use of the OC spray and taser was somewhere between
20 5 and 15 seconds.
21

22 Immediately before deploying it, [Officer E]
23 apparently gave a warning "Taser, taser." This was
24 apparently for the benefit of the other police officers
25 rather than any warning to [A0] that he was about to be
26 tasered if he did not comply. It may be that [A0] was
27 incapable of heeding any warning given, in any any event.
28 However, again no attempt was made to establish a dialogue
29 with [A0] or to endeavour to physically restrain him at
30 that point in time.
31

32 It is stressed that [Officer E] knew there was a
33 back-up vehicle containing two further officers who would
34 be, or were. On the scene very shortly thereafter. In the
35 circumstances, it is my submission that that situation may
36 have escalated to a point where use of the taser was
37 required, but that point had certainly not been reached by
38 the time it was used and its use was premature.
39

40 The use of the taser was ineffective in obtaining
41 compliance by [A0] to the police officers' request.
42 [Officer B] then armed himself with a long baton exiting
43 the vehicle and found himself in the situation where [A0]
44 was approaching him. He describes [A0] as looking like a
45 zombie coming towards him, not being responsive, virtually
46 looking through [Officer B]. [Officer B] states that he
47 thought [A0] was going to "overpower us" meaning all four

1 police officers. Accepting the possibility that this was
2 what the officer feared, there was no objective evidence
3 that this was possible, let alone likely.
4

5 [Officer B] expressed considerable concern for the
6 safety of himself and the other police officers and
7 possibly other persons. He delivered a baton blow to
8 [A0]'s left arm, which apparently was to no effect. He
9 thought that he might have delivered a second blow to the
10 same area, however he was not sure. He then delivered a
11 blow to [A0]'s knee, which had the effect of bringing [A0]
12 to the ground.
13

14 The difficulty with [Officer B]'s evidence is that he
15 portrays [A0], at that particular point in time, as being a
16 non-responsive zombie seeming immune to pain who did not
17 appear to be capable of giving any rational response to
18 requests or commands.
19

20 This evidence is very much in contrast with [A0]'s
21 presentation as demonstrated on the video. That
22 demonstrates within a very short period of time, possibly a
23 minute or less, [A0] is hearing commands and comments and
24 is responding to them in a rational manner. [Officer B]'s
25 evidence is difficult to accept on this point as a
26 reasonable description of what happened. The most
27 sympathetic view of [Officer B]'s evidence was that he had
28 in mind some aspects of the previous incident and was
29 reconstructing events.
30

31 It appears that there were certainly some difficulties
32 with handcuffing [A0], and [Officer B] administered one
33 baton strike with a long baton. This was apparently to
34 attempt to procure [A0]'s compliance with the police
35 direction that was being given. Whilst it is questionable
36 as to whether, in the circumstances, a baton strike was an
37 appropriate way of attempting to obtain compliance, there
38 was only one strike, and it was inflicted in an agony of
39 the moment situation. It is my submission that that baton
40 strike did not amount to police misconduct.
41

42 The Commission had the advantage of viewing the video
43 on a number of occasions and also hearing the explanations
44 given by [Officer E] for his administration of those baton
45 strikes. The explanation of [Officer E] gives as to why he
46 administered the baton strikes was that, in his opinion, it
47 was necessary. He states the need for a number of baton

1 strikes administered was because [A0] was violent and very
2 confrontational. It was noted in private session that the
3 explanation that [Officer E] gave as to the reason for
4 administering the baton strikes was that they were
5 necessary to get control of [A0]'s hands, as they were
6 under his body, and giving an elaborate account, he
7 repeated several times as to these attempts.
8

9 [Officer E]'s evidence changed when the film was shown
10 in public session and it was clear that, at all relevant
11 times, [A0] was on his back and the evidence given by
12 [Officer E] in private session could not stand. It is
13 submitted that the explanation offered by him is not
14 acceptable. Something in the vicinity of 18 baton strikes
15 were administered to [A0] when he was on the ground and
16 being restrained by at least three other police officers.
17 If [Officer E] had put his baton down and assisted, it
18 would have been four police officers, all of whom were much
19 stronger in build than [A0].
20

21 The video does not support the proposition that [A0]
22 was likely to escape from the control of the police
23 officers or represented any threat to the police officers.
24 In answering to a command from [Officer E], "Stop
25 resisting", [A0] replies "I'm not resisting."
26 Notwithstanding this, more baton strikes were administered
27 by [Officer E], the last few strikes at a time when [A0]
28 was clearly handcuffed. It is submitted that there was
29 not, and there could not be. Any justification for the
30 large number of baton strikes administered by [Officer E]
31 to [A0] as depicted in the video.
32

33 It is admitted in the police evidence that at least
34 one baton strike was administered to [A0] by [Officer E]
35 when [A0] was being placed in the police vehicle. [W2]'s
36 evidence was though he could not see the baton strike,
37 administered at that time, he heard the distinct sound a
38 baton strike makes when in coming into contact with a body.
39 He thinks that there were two strikes. There certainly was
40 at least one, as [Officer C] admits that he was struck by
41 the baton wielded by [Officer E] at that time when [A0] was
42 being placed in the police vehicle. There is no issue
43 that, at that time, [A0] was handcuffed and in the presence
44 of four police officers all who were of much larger build
45 than he was.
46

47 It is my submission that there was not, and could not

1 be, any possible justification for the administering of
2 those baton strikes or strikes at that point in time.

3
4 [A0] was transported in a police vehicle from Lateen
5 Lane to the Byron Bay police station where he was under the
6 care and control of [Officer A], the custody manager. The
7 custody manager is charged with ensuring the welfare of
8 persons who are detained in accordance with part 16 of the
9 Law Enforcement (Powers and Responsibilities) Act 2002.

10
11 [Officer A] stated that at no time was he intending
12 to take [A0] into detention at the Byron Bay police
13 station. Whilst he argued that [A0] was in the holding
14 dock of the police station, he was certainly under
15 detention there. The reason that [Officer A] gives as to
16 why [A0] was placed in the police station was because it
17 was a much safer and more comfortable place of detention
18 than the back of a police vehicle.

19
20 [Officer A] conceded [A0] was not provided with any
21 clothing or blankets and gives as a reason that [A0]
22 appeared to be suffering from extreme overheating at that
23 point in time. So far as the lack of provision of water is
24 concerned, [Officer A] stated that he had observed people
25 who were grossly affected by hallucinogens or amphetamines
26 and they can suffer water intoxication and giving them
27 large amounts of water could be dangerous to their health.

28
29 Although the lack of provision of water and the
30 failure to provide clothing and/or blankets, or even
31 a towel, leaving [A0] naked in the dock for a period in
32 excess of three quarters of an hour was certainly not
33 optimum treatment, it was better treatment than being left
34 in the back of a police vehicle.

35
36 The Commission, in my submission, should find that the
37 use of both the OC spray and the taser in securing [A0]
38 were unreasonable as they were both undertaken prematurely
39 and without sufficient attempt taken to establish some form
40 of dialogue with [A0] to take him peacefully into custody
41 to restrain him.

42
43 Once the OC spray and the taser were deployed, it was
44 most likely that the only way [A0] was going to be taken
45 into detention was by physical means. This probably
46 justified the baton strike administered by [Officer B] to
47 [A0]'s left leg to bring him to the ground. The allegation

1 by [Officer B] that the other strikes were administered to
2 attempt to detain him because of his zombie-like status is
3 not consistent with what is observed and heard on the video
4 which portrays [A0]'s actions and responses in a very short
5 period of time later. At best it appears the officers'
6 evidence was reconstruction.

7
8 It can be accepted that the action of the responding
9 police was heavily influenced by the apparent similarities
10 between the incident and the Christmas Day incident.
11 There, however, was an important difference. The Christmas
12 Day incident clearly involved a violent confrontation at
13 the outset, whereas. On the totality of the evidence given
14 before the inquiry, there was no such violent conduct
15 engaged in by [A0].
16

17 However, even accepting that there was one ineffectual
18 haymaker, [A0]'s conduct, as distinct from his appearance,
19 which was naked, sweaty and intoxicated, bore no similarity
20 to that exhibited by the earlier offender. Time and space
21 and not much of either would have made it clear that there
22 was no real risk to the officers or members of the public.
23 However, in the circumstances, the conduct of the officers
24 in relation to the use of the OC spray and the deployment
25 of the taser and the use of the baton in restraining and
26 bringing [A0] to the ground were subjectively extreme.
27

28 At the same time, what the video clearly shows is [A0]
29 on the ground being restrained by three police officers,
30 all of whom appear to be physically much bigger than him
31 with another there to help, if he chooses. While in this
32 position, [A0] was subjected to a large number of baton
33 strikes, almost all of them administered by [Officer E].
34

35 At the private inquiry [Officer E] gave evidence that
36 the baton strikes were justified in order to get [A0]'s
37 hands out from under his body as he was lying on his
38 stomach. This clearly was not the cases and when
39 [Officer E] saw the video recording. He changed his
40 evidence in this regard. It is difficult to avoid the
41 conclusion that this account was a fabrication designed to
42 justify by reference to the acceptable use of baton
43 strikes, which was otherwise known to the officer to be
44 unreasonable.
45

46 [Officer E] was given the opportunity to justify the
47 use of his baton and, in particular, the decision he made

1 as to the number of strikes administered after being shown
2 the full video. His response was that he administered a
3 number of baton strikes to obtain [A0]'s compliance with
4 directions.

5
6 Even if one were to accept that that was the
7 appropriate reason for administering the baton strikes,
8 which I submit the Commission ought not to accept, the
9 number of baton strikes administered was excessive and not
10 required in the circumstances. Indeed, a number of the
11 baton strikes were administered at the time when [A0] was
12 apparently handcuffed and effectively under the control of
13 the police officers.

14
15 In relation to each of the police officers, it is my
16 submission as follows: the conduct of officer A as custody
17 manager of the Byron Bay police station at all relevant
18 times did not amount to police misconduct. Whilst there
19 was no water, blankets nor clothing provided to [A0] during
20 this period of time when he was detained in the police
21 station, the explanation given by [Officer A] that he was
22 going to be detained there only for a short period of time
23 and then transferred to the Tweed Heads Hospital appears
24 correct.

25
26 To enable this to be achieved, [A0] was kept in the
27 cell dock area for a relatively short period of time. It
28 is my submission with no further action be taken against
29 [Officer A]. So far as the conduct of [Officer B] is
30 concerned, there are some difficulties in accepting his
31 explanation for the need to administer the baton strikes to
32 [A0]'s left forearm. So far as the baton strike to the
33 left knee is concerned, given the number of police officers
34 in the immediate vicinity at the time, there were certainly
35 other options other that could have been used to bring [A0]
36 to the ground by physical force, either alone or in
37 conjunction with some of the other police officers.

38
39 The use of the baton by [Officer B] at that time,
40 however, could be reasonably explained as an action taken
41 in the agony of the moment and my submission is that no
42 further action being taken in relation to this officer.

43
44 [Officer C] was not involved in the capsicum spray
45 nor, in the use of the taser, nor in any use of the baton.
46 It is my submission that there is nothing in his conduct
47 that requires any further action.

1
2 Although [Officer D] may have acted prematurely using
3 a capsicum spray which may have precipitated the
4 unfortunate series of events, this was, at worst, an error
5 of judgment which could easily be explained by his fear of
6 a repetition of the violent confrontation which occurred on
7 Christmas Day 2017. It is my submission that no further
8 action should be taken in relation to this officer.

9
10 The conduct of [Officer E], however, falls into a
11 different category. It is submitted that the Commission
12 should find he unjustifiably used grossly unnecessary force
13 on [AO], hitting him as hard as he was physically able, and
14 attempted to mislead the Commission as to the circumstances
15 in which, and the reasons for which he did so.

16
17 Consideration should be, therefore, given by the
18 Commissioner of Police to taking of action against
19 [Officer E] under section 181D of the Police Act 1990;
20 or, alternatively of the taking of the action against
21 [Officer E] under section 173 of the Police Act 1990. The
22 advice of the Director of Public Prosecutions taken in
23 respect of [Officer E]'s conduct should be sought in
24 relation to whether proceedings ought to be commenced
25 against this officer for criminal offences against the laws
26 of New South Wales. They are the submissions of
27 Counsel Assisting the inquiry.

28
29 THE CHIEF COMMISSIONER: Thank you. Just before you sit,
30 I understand that there is a report to hand, as previously
31 proposed.

32
33 MR ROWLES: Yes, that should be read on the record.

34
35 THE CHIEF COMMISSIONER: Counsel may recall that, on the
36 last occasion, I said that the Commission had intended to
37 obtain a report from the Use of Force Unit of the
38 NSW Police force stating from their point of view the
39 relevant considerations arising from this particular
40 conduct. That report only came to hand on Friday.

41
42 It, broadly speaking, I think it is fair to say,
43 supports the submissions made by Counsel Assisting, but
44 obviously it is not fair that you be required to respond to
45 it at this stage.

46
47 What is proposed is that it will be made available.

1 It will become a confidential exhibit because it contains
2 discussion of operational matters which ought not to be in
3 the public domain, but the relevant authorities have agreed
4 that it may be supplied to your clients and to their legal
5 representatives, but it must not be further published.
6 That will be made available to you in the course of the
7 next few days and any additional submissions that you wish
8 to make in respect of it will be made in writing.

9
10 You tender that report, Mr Rowles?

11
12 MR ROWLES: I do.

13
14 THE CHIEF COMMISSIONER: It will be confidential
15 exhibit number 29.

16
17 THE CHIEF COMMISSIONER: It may well be that parts of it
18 can be made public and can be placed in the ultimate
19 report. It is obvious as that much as can be in the public
20 domain ought to be. That will be a matter for later
21 consideration by the Commission, but the whole report will
22 be made available to the subject officers and their legal
23 representatives.

24
25 MR ROWLES: By way of description, can it be identified as
26 a report from Chief Instructor weapons and tactics, policy
27 and review, dated 19 June 2018 NSW Police Force.

28
29 THE CHIEF COMMISSIONER: Thank you.

30
31 **EXHIBIT #CONFIDENTIAL EXHIBIT 29 REPORT FROM NSW POLICE**
32 **FORCE CHIEF INSTRUCTOR WEAPONS AND TACTICS, POLICY AND**
33 **REVIEW, DATED 19 JUNE 2018**

34
35 MR ROWLES: Those are my submissions.

36
37 THE CHIEF COMMISSIONER: Have you agreed as to who is to
38 go first? I will just go down the list. My list first of
39 all, Mr Lawrence.

40
41 MR LAWRENCE: Yes, thank you, Commissioner.

42
43 THE CHIEF COMMISSIONER: You appear for [Officer B].

44
45 MR LAWRENCE: That's right. Commissioner, in reply to
46 submissions, I have submitted a written submission and it
47 was forwarded it to the Commission. I intend to rely on



1 that. The only point that I wish to raise is --

2

3 THE CHIEF COMMISSIONER: I might say that that written
4 submission, together with a transcript of your present
5 remarks, as is true of the extensive submission made by
6 Counsel Assisting, as well as his oral remarks, will be
7 available on the Commission's website I expect tomorrow.
8 It will be available tomorrow. Yes, so just bear in mind
9 what you say now is being recorded and will be placed on
10 the Commission's website so it will be in the public arena.

11

12 MR LAWRENCE: Certainly, thank you, Chief Commissioner.
13 The only additional matter or rather further submissions
14 I would like to make is in relation to the strikes that the
15 Counsel Assisting mentioned to the forearm of [A0] by
16 [Officer B].

17

18 THE CHIEF COMMISSIONER: I think [Officer B] was clear
19 that he did so once and possibly twice, but he's unclear
20 about the second.

21

22 MR LAWRENCE: That's right.

23

24 THE CHIEF COMMISSIONER: Yes.

25

26 MR LAWRENCE: That's right. I don't intend to address
27 about the strike to the knee. Counsel Assisting has
28 already accepted that as being a reasonable one. In
29 relation to the questionable strike or strikes in relation
30 to the forearm, I think it is important to bear what
31 actually [Officer B] saw at the time and also, for the
32 transcript, this is not part of the media clip. It was
33 only short time prior to this, but it happened prior to the
34 video clip commencing.

35

36 [Officer B] was one of the officers who was involved
37 in taking out the person involved on the Christmas Eve
38 incident. He was actually the officer who, when the van
39 arrived at the station that was following arrest and
40 handcuffing, he --

41

42 THE CHIEF COMMISSIONER: Am I right in saying, correct me
43 if I am wrong, I don't think he was at the scene.

44

45 MR LAWRENCE: No.

46

47 THE CHIEF COMMISSIONER: He was at the police station,

1 called out to help remove the offender from the van.
2
3 MR LAWRENCE: From the van, that's right.
4
5 THE CHIEF COMMISSIONER: Of course, the whole matter would
6 have been the subject of discussion well known to all the
7 police, I readily accept that.
8
9 MR LAWRENCE: My submission is he's more likely to have
10 been significantly affected than the other officers.
11
12 THE CHIEF COMMISSIONER: Possibly, yes.
13
14 MR LAWRENCE: Particularly having seen it at the end
15 stage --
16
17 THE CHIEF COMMISSIONER: But the difficulty is he did it -
18 "Come any closer and I'll hit you" - without any warning at
19 all. I don't now recall, as I sit here, how far away [A0]
20 was from him, but he was some distance.
21
22 MR LAWRENCE: He was some distance, yes.
23
24 THE CHIEF COMMISSIONER: That's part of the problem. No
25 attempt is made really to communicate with him. Witnesses
26 differ. One witness says that the police did say, "Calm
27 down, we're here to help you", and so on, but he's alone in
28 that. The other witness, who I think was in the best
29 position to hear, said they just swore at him - I won't
30 repeat that language now - and told him to get on the
31 ground. But when he comes towards [Officer B], he's not
32 saying anything. I think that's your client's evidence.
33
34 MR LAWRENCE: That's right.
35
36 THE CHIEF COMMISSIONER: And [Officer B] gives him no
37 warning - "Come any closer and I'm going to give it to
38 you" or "I'm going to hit you" or --
39
40 MR LAWRENCE: No, I don't think - there was no address on
41 any warning, except his observations, and I think it is
42 important to remember he had arrived after the OC spray was
43 deployed.
44
45 THE CHIEF COMMISSIONER: But he didn't know. Did he see
46 the OC spray?
47

1 MR LAWRENCE: He saw the taser, as he was getting from the
2 car in the process of either getting out of the car first
3 or going back to get the baton --
4

5 THE CHIEF COMMISSIONER: There was some confusion.
6

7 MR LAWRENCE: There was some confusion, but around that
8 vicinity of time, moments either side of it, he did see the
9 taser and he could hear the taser. In fact, he recalls a
10 second so-called discharge - there was only one taser but,
11 the end bits of the first taser. At that stage, in his
12 mind, he would have known the OC spray was deployed and
13 also he has known that the taser has been deployed.
14

15 He is then faced with those two having no effect. In
16 other words, what is meant to happen --
17

18 THE CHIEF COMMISSIONER: All the evidence is they did in
19 fact have an effect, that it caused [A0] to scream loudly,
20 rub his eyes, obviously in pain. The taser, I think the
21 evidence, is dropped him to the ground, although he got up
22 straight away --
23

24 MR LAWRENCE: He got up.
25

26 THE CHIEF COMMISSIONER: -- or very close to straight
27 away. So it is not true they had no effect.
28

29 MR LAWRENCE: No, it did have the desired --
30

31 THE CHIEF COMMISSIONER: I think that's fair enough to
32 say.
33

34 MR LAWRENCE: -- or intended effect. In other words,
35 someone who is being tasered, you would expect them to be
36 on the ground. In normal circumstances you wouldn't expect
37 them to be up and standing and at least walking towards
38 you.
39

40 THE CHIEF COMMISSIONER: All right.
41

42 MR LAWRENCE: Given that short time that [Officer B] had
43 to observe and the fact that he was probably very
44 significantly affected by the incident on Christmas Eve, it
45 is not unreasonable in his mind to have the fear that he
46 did. It has probably been heightened because of that. It
47 certainly would not have been to the extent that he

1 anticipated.

2

3 THE CHIEF COMMISSIONER: Mr Lawrence, Counsel Assisting
4 has submitted I think, in effect, that although what he did
5 may be thought to have been unreasonable, the uncertainties
6 surrounding the event at this time the speed with which
7 things were happening meant that the Commission should not
8 view his conduct as warranting disciplinary findings by the
9 Commissioner.

10

11 I understand it is perfectly reasonable for you to
12 respond to the criticism that is made of this conduct.
13 I simply point out that in the end - whether the Commission
14 takes that view is another matter - Counsel Assisting has
15 not submitted that your client should be subjected to a
16 disciplinary outcome.

17

18 MR LAWRENCE: That is so, Chief Commissioner, and I do
19 adopt the Counsel Assisting's submissions on that. The
20 only short sentence that I cavil with is rather than being
21 questionable, I think under those particular circumstances
22 it is explainable. In hindsight, it may not be excusable,
23 but in the circumstances that occurred I think it is
24 explainable as being limited to the time of observation
25 that he was able to have.

26

27 THE CHIEF COMMISSIONER: The difficulty facing your
28 client, Mr Lawrence, if I may say so, which is more
29 explained in the extensive written submissions, is your
30 client's description of his conduct at the time. What we
31 know is relatively within seconds he is responding to the
32 police. He may not be responding as they wish, but he's
33 certainly not acting like a zombie in any sense, that is to
34 say, unperceptive, doing only what he wants to do without
35 regard to what is being done to him or has been done to
36 him.

37

38 That marked contrast, which is, by the way, marked
39 contrast to every description of his behaviour by every
40 witness, it makes one question the reliability - let's not
41 talk about honesty - of your client's account. If one does
42 not accept the reliability of his account and one is,
43 therefore, left in real doubt about it, it follows that one
44 must be left in real doubt about the reason he gave for
45 striking [A0]. It may, in the end, all become a cloud of
46 uncertainty, but there are reasons that make it difficult
47 to accept the reliability of your client's account of what

1 [A0] was doing at that point. Counsel Assisting has said,
2 I think sympathetically, that he may be reconstructing,
3 although the difficulty with that excuse is that the
4 conduct of the offender at Christmas Day was anything but
5 that of a zombie in the sense that he was aggressive, madly
6 aggressive from the very get-go; whereas your client is not
7 asserting aggression, he's certainly asserting an
8 unresponsive movement towards him, I think, is the --
9

10 MR LAWRENCE: That's so, Chief Commissioner. He doesn't
11 say that he was aggressive at all and, in fact, as the
12 Chief Commissioner has pointed out there was significant
13 difference between the two.
14

15 THE CHIEF COMMISSIONER: However, I might tell you that
16 I think, in the end, it is not possible to conclude to the
17 necessary level of certainty that your client acted
18 improperly in the relevant sense, and it may simply have
19 been bad judgment in the agony of the moment, and that
20 happens. You can't expect perfect judgment in these
21 circumstances.
22

23 MR LAWRENCE: That's so too, Chief Commissioner. It is
24 also at that heightened level when you see some
25 similarities - a couple of similarities - the sweating, the
26 nakedness, the so-called blank. That could have taken his
27 thought process completely in a tangent and that could
28 also --
29

30 THE CHIEF COMMISSIONER: That's not impossible.
31

32 MR LAWRENCE: I think that's to the level that I can put
33 that.
34

35 THE CHIEF COMMISSIONER: Very well.
36

37 MR LAWRENCE: Otherwise, I will just rely on the
38 submissions.
39

40 THE CHIEF COMMISSIONER: Your submissions will also go on
41 to the website.
42

43 MR LAWRENCE: I do adopt what Counsel Assisting has said,
44 that no action be taken and I do highly recommend the
45 Commission take that into regard. Thank you,
46 Mr Commissioner.
47

1 THE CHIEF COMMISSIONER: Mr Harris?

2

3 MR ROWLES: Before Mr Harris is called, could I mention
4 one aspect. Mr Lawrence notified the Commission of a
5 problems that he had in relation to him being required to
6 give via videolink by Byron Bay police station at 11.30.

7

8 THE CHIEF COMMISSIONER: I see.

9

10 MR ROWLES: That can be approached two different ways. It
11 can be approached on the basis the Commission taking a
12 short adjournment to allow that to be dealt with. But that
13 may not be necessary if in fact neither of the legal
14 representatives who are going to make further submissions
15 have no submission that cuts across [Officer B], the
16 situation may well be that it can continue because
17 Mr Lawrence's attendance here would not be required.

18

19 THE CHIEF COMMISSIONER: Are you happy with that?

20

21 MR LAWRENCE: I'm certainly happy.

22

23 THE CHIEF COMMISSIONER: Is that the position; you don't
24 intend to cut across what might interest Mr Lawrence in
25 relation to [Officer B]?

26

27 MR HARRIS: Chief Commissioner. I think I can say that my
28 submissions won't touch upon Officer [B].

29

30 MR TAYLOR: I would submit in the same way.

31

32 THE CHIEF COMMISSIONER: In that case, Mr Lawrence, you
33 are free to go. Thank you very much.

34

35 MR LAWRENCE: Thank you, Commissioner, and thank you
36 Counsel Assisting.

37

38 THE CHIEF COMMISSIONER: Yes, Mr Harris?

39

40 MR HARRIS: Chief Commissioner, thank you. Just to
41 clarify, I represent the interests of [Officer C]. As you
42 will know Chief Commissioner I have made written
43 submissions on his behalf and I am grateful for the
44 opportunity to just briefly summarise those. Which would
45 be to urge the Commission to adopt the conclusion of
46 Counsel Assisting that [Officer C] wasn't involved
47 personally in the use of the capsicum spray, the taser nor

1 the baton.

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I would also respectfully submit that the observation can clearly be made, I think not contentiously that [Officer C] wasn't involved in any decision making either as to the use of the OC spray or capsicum spray, the baton nor the taser.

THE CHIEF COMMISSIONER: The only criticism that might be made, and this is a sort of general one, is that this was an occasion which required some planning, even if rudimentary, about what they were going to do and the [Officer C] was part of the group, and if there were to be a criticism, it would be he that had his own independent responsibility and he should have said, "Hold on guys. What are we going to do", or something like that.

MR HARRIS: Yes.

THE CHIEF COMMISSIONER: I must say, I don't think that's a counsel of perfection. I rather think that it is so glaringly obvious that you would take 10 or 15 seconds because it wouldn't be long for you to decide that it was the Charge of the Light Brigade.

MR HARRIS: Yes.

THE CHIEF COMMISSIONER: I agree, they weren't given much help by [A0]. So that's the only kind of criticism that might be made of him. He was a senior constable after all as well. But I think you're right, I don't think he can be criticised - he had nothing to do with the OC spray; he had nothing to do with the taser; he was at the feet. He really, in that hubbub, may not have been aware of any more I can't now precisely recall his memory -- that is [Officer E]'s. He heard some blows, but as to the extent of those blows he probably didn't have an idea.

MR HARRIS: I will stand to be corrected, Chief Commissioner, but my vague recollection of [Officer C]'s evidence was he was pretty much focused on this young person's legs and wasn't really taking a great deal of notice of what was occurring.

THE CHIEF COMMISSIONER: One of the matters, can I say, which I think I can refer to publicly, because it is an obvious point once you hear it, is it was essential, if

1 they could, to get him on his stomach because it's much
2 easier to control, and someone with handcuffs behind their
3 back is also much easier to control than someone with
4 handcuffs in front of him. This is all obvious once you
5 state it. Had he just said, "Let's get him on his belly",
6 that would have been a useful guide and so obvious, you
7 would expect the other officer to say, "Oh, yeah." But
8 no-one seemed to think of it, and each officer in this
9 situation has an independent responsibility. Obviously,
10 I'm not suggesting a counsel of perfection, but even that
11 suggestion, if adopted, might have changed this entire
12 scenario.

13
14 MR HARRIS: It may have, of course, Commissioner.
15 Firstly, I don't think the Commission has any evidence that
16 there was any particular consultation or communication.

17
18 THE CHIEF COMMISSIONER: Oh, no, there was none.

19
20 MR HARRIS: It didn't arise. It might be said it was done
21 too quickly, but the fact was on behalf of [Officer C] it
22 was suggested he wasn't himself involved in any way with
23 the decisions which were made in relation to the capsicum.

24
25 THE CHIEF COMMISSIONER: That's fair enough.

26
27 MR HARRIS: There is no evidence that there was really
28 much decision making taken and, with respect, I would be
29 submitting that that ought not be a ground of criticism of
30 him.

31
32 In relation to your observations, Chief Commissioner,
33 about the positioning of [A0] and what ought or might have
34 been done, I do recollect that the evidence of [Officer C]
35 was that he had great difficulty even getting hold of
36 [A0]'s legs because they were so sweaty and slippery. To
37 that extent, it may well be seen as a factor in [Officer C]
38 not doing a great deal else, given that it was a
39 significant challenge, it seemed, to just get hold of these
40 slippery legs that were perhaps flailing. Certainly that
41 is a suggested scenario he put as to what he was trying to
42 do.

43
44 The aspect that I raised in my written submission that
45 I would urge the Commission to consider is given the
46 general scope and purpose of Operation Tambora, which is to
47 investigate whether any New South Wales police officer

1 engaged in criminal conduct or serious police misconduct,
2 it is respectfully submitted now, Chief Commissioner,
3 that it might be appropriate for this inquiry to reach a
4 definitive finding in relation to the conduct of
5 [Officer C] to the effect that not only is there nothing in
6 his conduct that requires no further action, but a
7 definitive finding might be properly made with respect to
8 the effect that [Officer C] did not engage in serious
9 misconduct or police misconduct. Let alone criminal
10 conduct. It is a more definitive finding I would be urging
11 rather than just to say "No action required".
12

13 It is also, and finally, submitted, Chief
14 Commissioner, that in the light of what is suggested as to
15 the findings regarding [Officer C], the Commission could go
16 further and conclude or make a finding to the effect that
17 the performance of [Officer C] in his duties was in
18 accordance with the Law Enforcement (Powers and
19 Responsibilities) Act in that he lawfully used such force
20 and only such force as was reasonably necessary to exercise
21 his official function. So it is a little more than merely
22 saying that no further action ought be taken, but urging
23 that the Commission consider making an actual finding that
24 his conduct was lawful in accordance with the law at the
25 time.
26

27 Commissioner, is it appropriate that I might make any
28 submissions at this stage in relation to the continuation
29 use of the codenames?
30

31 THE CHIEF COMMISSIONER: I have already stated that, for
32 the present, I think that those matters are better dealt
33 with in the context of the ultimate findings because they
34 are obviously related. I might say, though, I don't really
35 anticipate or expect that [Officer C] would be named in the
36 report. If that changes, we will let you know.
37

38 MR HARRIS: Commissioner, I have made - they are, of
39 course, available if you're not already well familiar with
40 them - submissions as to why his name ultimately ought not
41 be --
42

43 THE CHIEF COMMISSIONER: I think you have to show it is in
44 the public interest in the end. I do not see a public
45 interest in it, as I see the matter at present.
46

47 MR HARRIS: On a final note, then, might I say there may

1 be a significant interest in not revealing his name --
2
3 THE CHIEF COMMISSIONER: Indeed.
4
5 MR HARRIS: -- in that, his name might be forever
6 associated with an adverse finding of the --
7
8 THE CHIEF COMMISSIONER: You're pushing an open door.
9
10 MR HARRIS: Yes, I won't press it any further. Thank you
11 Chief Commissioner.
12
13 THE CHIEF COMMISSIONER: Mr Taylor?
14
15 MR TAYLOR: Thank you, Chief Commissioner. I formally
16 seek your authority to appear for [Officer E] in place of
17 Ms Goodwin, who became unavailable after the public
18 hearings.
19
20 THE CHIEF COMMISSIONER: Yes.
21
22 MR TAYLOR: Chief Commissioner, I forwarded to the
23 Commission on Friday my written submissions on behalf of
24 [Officer E].
25
26 THE CHIEF COMMISSIONER: I've read them.
27
28 MR TAYLOR: I've heard what you've said today about the
29 publishing of the submissions of the various legal
30 representatives. You will note in my submissions I sought
31 that my submissions be kept confidential. It is quite
32 clear that [Officer E] is in a different category than the
33 other police officers in relation to the Commission's
34 investigations.
35
36 THE CHIEF COMMISSIONER: I'm sorry, I must say that I have
37 then misunderstood you. You are seeking that your
38 submissions remain confidential?
39
40 MR TAYLOR: That's so. That's in paragraph 813 and 814,
41 and that's for the reason --
42
43 THE CHIEF COMMISSIONER: But you do not seek, however,
44 that the submissions of Counsel Assisting in respect of
45 your client remain confidential?
46
47 MR TAYLOR: I don't think I have any standing to make that

1 application.

2

3 THE CHIEF COMMISSIONER: You do, actually, but --

4

5 MR TAYLOR: In the circumstances where --

6

7 THE CHIEF COMMISSIONER: You're entitled to make any
8 submissions - it is proper for you to make any submissions
9 that you think ought to be made in fairness to your client,
10 which would include any matters which, in your submission,
11 ought to remain confidential. I just noted you have not
12 made such a submission about the submissions of
13 Counsel Assisting. In that regard, I thought it would be
14 fairer for your client for your responding submissions to
15 be in the public arena. But if you prefer them not to be
16 in the public arena, at least at this stage, I will need to
17 think about it.

18

19 MR TAYLOR: Chief Commissioner, my client's concerns are
20 in that we acknowledge that he's in a very different
21 position to the other police officers --

22

23 THE CHIEF COMMISSIONER: Yes, certainly.

24

25 MR TAYLOR: -- with the possibility of both criminal and
26 disciplinary action being taken against him. He is
27 concerned that if the submissions on his behalf are made
28 public, those processes may be compromised. I don't put it
29 any higher than that.

30

31 I note that, at this stage, at least, the identity of
32 the police officers and the other witnesses is to remain
33 confidential. I acknowledge that, in some way, that would
34 protect his position, perhaps not so much in relation to --

35

36 THE CHIEF COMMISSIONER: Let us assume - and it is only an
37 assumption because it is a matter entirely for the Director
38 of Public Prosecutions, not for me - that he were to be
39 charged, the offence would be assault occasioning actual
40 bodily harm - either common assault or assault occasioning
41 actual bodily harm.

42

43 MR TAYLOR: More likely both.

44

45 THE CHIEF COMMISSIONER: As an alternative, yes.

46

47 MR TAYLOR: With assault as a back-up.

1
2 THE CHIEF COMMISSIONER: Yes. The actual bodily harm
3 might be the broken rib. On the other hand, there are
4 doubts about how that was actually caused, although I think
5 I would be satisfied in finding that it was caused in that
6 confrontation, but the bruising, of course, is actually
7 bodily harm as well because it is a physical injury.

8
9 MR TAYLOR: I concede that, Chief Commissioner.

10
11 THE CHIEF COMMISSIONER: That would certainly come before
12 a magistrate, it would not be the subject of a jury trial.
13 A magistrate is most unlikely to be influenced by any
14 publicity. Indeed, our entire system is based upon the
15 fact that judicial officers act independently of anything
16 they hear or see is not evidence in the trial.
17 That would lead me to conclude that the risk of some unfair
18 prejudice, were there to be a trial, is, frankly,
19 non-existent.

20
21 The reasons for not publishing his name are somewhat
22 different. Being entirely fair to you, I find it difficult
23 to accept that there is a risk, were he to be prosecuted,
24 of anything adverse to him, especially since what you say
25 is in response - that is, in defence of his actions.

26
27 MR TAYLOR: I appreciate that, Chief Commissioner. My
28 view in relation to making submissions on his behalf may
29 not ultimately be the view of whoever represents him if
30 there are criminal disciplinary proceedings. They may well
31 adopt a different approach. That's the prejudice he's
32 worried about.

33
34 THE CHIEF COMMISSIONER: It is also the Commission's
35 practice, when someone is charged, to remove the material
36 relating to the particular operation that has led to the
37 charging from its website. In other words, assume a jury
38 trial, no juror will be able to access the website and
39 access this material.

40
41 MR TAYLOR: You understand entirely, Commissioner.
42 I can't put it any higher than that.

43
44 THE CHIEF COMMISSIONER: Thank you.

45
46 MR TAYLOR: The only matter that I wish to raise, over and
47 above the written submissions which I rely upon, is in

1 relation to the lack of planning. One explanation that
2 could be advanced on behalf of all of the officers why
3 there was no planning was because things happened far too
4 quickly for them to consider getting their heads together.

5
6 THE CHIEF COMMISSIONER: Yes, but the point is there are
7 two sides to that.

8
9 MR TAYLOR: I understand that.

10
11 THE CHIEF COMMISSIONER: And I agree it is a hindsight
12 view, so you have to be very cautious about it, but he
13 being in that place for 10, 15 minutes or so - annoying but
14 obviously not attacking anyone, bizarre conduct which would
15 have caused concern, that's what the evidence is - there
16 was no reason to suppose that there would be a change
17 simply because the police turned up, although there is a
18 risk because of what happened in the previous occasion.
19 "Let's get him on his belly" is not a great deal of
20 planning.

21
22 MR TAYLOR: No, I appreciate that, Chief Commissioner,
23 but the circumstances in which the police find themselves
24 are quite different from the ordinary course of events and
25 when they're dealing with someone in the obvious state --

26
27 THE CHIEF COMMISSIONER: No they're not. This is part of
28 the problem, I must say, that we will be looking at. They
29 have received training about this.

30
31 MR TAYLOR: I am not aware there's any evidence about the
32 detail of the training in relation to that, but it is
33 certainly the case where, for his part. [Officer E]
34 conceded that his training wasn't much use to him on this
35 particular occasion.

36
37 THE CHIEF COMMISSIONER: No, it seems so.

38
39 MR TAYLOR: That, of course, is a much broader and
40 different issue the Commission will consider in making
41 recommendations regarding future training of police
42 officers, which they'd all benefit from, no doubt.

43
44 In the circumstances that they are facing, I use the
45 analogy, it is a little bit like self-defence; you don't
46 have to wait for someone to attack you to do something and
47 take action in your own self-defence. In other words, you

1 don't have to wait until someone has hit you over the head
2 with a shovel before you take some action to ward off what
3 you perceive to be the risk of threat. Each of the
4 officers did give evidence about their perception of risk
5 or potential risk and threat that they faced.
6

7 Counsel Assisting has, quite properly, summarised the
8 evidence in saying that there was no actual aggression
9 towards anyone prior to their arrival, there was no, other
10 than the haymaker punch to [Officer D], no --
11

12 THE CHIEF COMMISSIONER: Even [Officer D] said that it was
13 some distance away and it wasn't altogether - in other
14 words, it wasn't an altogether serious attack.
15

16 MR TAYLOR: I think he said he had to take evasive action.
17

18 THE CHIEF COMMISSIONER: Well, it is easy to do.
19

20 MR TAYLOR: Easy or otherwise, each of the police
21 officers, seeing what they saw, their own perception of
22 what's reasonable or not reasonable in the circumstances as
23 far as trying to formulate a plan, must be dictated by
24 those circumstances. On anyone's view, this matter
25 escalated. Whether that's reasonable or not in the whole
26 of the circumstances is a different question. It certainly
27 escalated where they reasonably didn't have the opportunity
28 of actually stepping back and saying, "Hang on. Let's talk
29 about this," particularly in the circumstance where, on
30 anyone's view --
31

32 THE CHIEF COMMISSIONER: I wasn't suggesting have a cup of
33 tea and confer.
34

35 MR TAYLOR: No, I wasn't suggesting that at all, Chief
36 Commissioner. It is a situation where, on anyone's
37 version, [AO] was not in a condition where talking to him
38 or trying to reason with him was likely to achieve
39 anything.
40

41 THE CHIEF COMMISSIONER: Well, subjectively that might be
42 so, but objectively I don't think it is. When he is on the
43 ground, there's no doubt that he's responding. He's
44 responding shouting - on the other hand, he is being
45 shouted at and he is in a position where they're inflicting
46 a fair bit of pain. The one thing that you usually have
47 when pain is inflicted is you seek to avoid the pain and it

1 never seems to have occurred to your client that the
2 struggles that [A0] was making was an attempt to avoid the
3 violence that was being inflicted upon him.
4

5 At that point, which is the true focus of the
6 submission of Counsel Assisting, he was, for all practical
7 purposes, under the control of three - and if your client
8 hadn't been using a baton, four - police officers. Now,
9 four on one is not bad odds, and they're all bigger than he
10 is.

11
12 In fairness, I can't remember whether it was your
13 client, it might have been your client was pointing that
14 out, he was getting tired, he had been already on a shift,
15 so he was tired. I think you have to take that kind of
16 consideration in mind, but --

17
18 MR TAYLOR: His evidence was that he was on a 12-hour
19 shift, as were all the police officers. One group was
20 going off towards the end of it.

21
22 THE CHIEF COMMISSIONER: Yes, I think, in fairness, that's
23 not irrelevant at all, but they're not 70-year-olds.
24

25 MR TAYLOR: No, not at all. It is the situation, however,
26 that the Commission does have evidence from, say, witness
27 [W3]. He describes [A0]'s actions as the person having the
28 strength of three or four men. Whilst it is quite clear
29 concessions were made by each of the police officers about
30 their weight and height --

31
32 THE CHIEF COMMISSIONER: But it is perfectly obvious,
33 when you look at the video, if he had it, he wasn't using
34 the strength of three or four men, because otherwise it
35 would have been like a Marvel movie. They would have just
36 gone flying into the air, but that never was close to
37 happening.

38
39 MR TAYLOR: No, but the perception of the officers at the
40 time is what's important, in my submission, as I've
41 referred to in my written submissions.
42

43 THE CHIEF COMMISSIONER: Even assuming he had that
44 strength, what would justify those blows of your client -
45 18 of them? That's what this case comes down to, and
46 that's the difficulty.
47

1 MR TAYLOR: The problem is in judging reasonable use
2 of force, it is not a black and white situation, Chief
3 Commissioner.
4
5 THE CHIEF COMMISSIONER: No, I agree.
6
7 MR TAYLOR: Quite obviously, we can all think of examples
8 that fall at the the spectrum of using reasonable force.
9 But there's a very large grey area. Put simply. The
10 submissions on behalf of [Officer E] are that, faced with
11 what he knew of the circumstances, faced with what he was
12 dealing with on this particular occasion, his actions fall
13 within the grey area.
14
15 THE CHIEF COMMISSIONER: I understand the submission. .
16
17 MR TAYLOR: Thank you. I have nothing further.
18
19 THE CHIEF COMMISSIONER: Very well. Thank you.
20
21 MR ROWLES: I just want to respond very, very shortly,
22 Chief Commissioner, to the last point that was made, with
23 regard to potential fatigue. The team that were completing
24 the shift was [Officer B] and [Officer C].
25
26 THE CHIEF COMMISSIONER: Not [Officer D] and [Officer E].
27
28 MR ROWLES: Yes.
29
30 THE CHIEF COMMISSIONER: Yes. You don't want to say
31 anything else in reply?
32
33 MR ROWLES: No.
34
35 THE CHIEF COMMISSIONER: I take it everything you wanted
36 to say --
37
38 MR ROWLES: Everything I wanted to say it in my written
39 submissions. I am not being critical of anything that was
40 said, but I don't think anything there is any matter
41 I haven't dealt with.
42
43 THE CHIEF COMMISSIONER: Mr Taylor, I do not think your
44 submissions should remain confidential. I think they
45 should be placed on the public record. They say for
46 [Officer E], if I may say so, everything that could be said
47 in his favour and I think it is fairer to him if they are

1 on the public record.

2

3 MR TAYLOR: As you wish, Chief Commissioner. I have
4 nothing further to add.

5

6 THE CHIEF COMMISSIONER: For the present, I will not
7 publish his name, but that might be reconsidered when we
8 come to the final terms of the report. If I do think that
9 his name needs to be published in the public report, I will
10 let you know and give you a chance to make a submission
11 before a final decision is made on that point.

12

13 MR TAYLOR: I am indebted. Thank you.

14

15 THE CHIEF COMMISSIONER: Very well. This hearing is now
16 completed. All public hearings are completed. A redacted
17 copy of the final report from the Use of Force Unit may be
18 placed on the Commission's website, but because it contains
19 matters of operational significance, that is a matter that
20 needs to be negotiated with the Commissioner of Police and
21 I can't make any definitive statement about that at
22 present.

23

24 Otherwise, all the submissions, including the oral
25 submissions, will be placed on the Commission's website,
26 hopefully by tomorrow. Thank you.

27

28 **AT 11.38AM THE COMMISSION ADJOURNED ACCORDINGLY**

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