



Law Enforcement
Conduct Commission

OPERATION TAMBORA

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

SEPTEMBER 2018



Law Enforcement
Conduct Commission

Office of the Chief Commissioner

20 September 2018

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

The Hon Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Madam Speaker,

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

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

Yours sincerely

A handwritten signature in black ink, appearing to read 'M F Adams', with a long, sweeping horizontal stroke extending to the right.

The Hon M F Adams QC
Chief Commissioner

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1. INTRODUCTION

- 1.1 The Commission's Operation Tambora arose out of events involving the taking into custody of a sixteen-year old male by four police officers at Lateen Lane, Byron Bay on 11 January 2018. Except that his nakedness may have constituted an offence, he had committed and was not committing any crime and he was not under arrest at the time of the relevant events.
- 1.2 On 6 February 2018, the Channel 9 program "*A Current Affair*" aired mobile phone footage showing four police officers apprehending the youth. The footage showed at least one police officer using a baton repeatedly to subdue him. The youth was later identified as a sixteen-year old who had had been holidaying with his family in Byron Bay at the time of the incident. He will be referred to as "AO" in this report.
- 1.3 On 7 February 2018, the Commission received several complaints about the conduct of the involved police which the complainants had seen either on the Channel 9 program or through a Facebook link. Over the next week or so, the Commission received further complaints in response to the broadcast. The complaints expressed concern at the conduct of the police officers which, it was claimed, showed an abuse of power and excessive use of force. The Commission decided it should investigate the possible serious misconduct demonstrated on the recording.
- 1.4 Following several private examinations, the Commission determined it should hold a public hearing in the matter. This decision was made after considering submissions (against the proposal) made on behalf of the Commissioner of Police, the relevant officers and the Police Association. The reasoning of the Commission is set out in Annexure 1. In particular, the Commission weighed up the public interest in exposing the matter as against the public interest in preserving the privacy of the persons concerned, being both lay witnesses and the police officers.¹ Ultimately, the Commission determined that the public interest in exposing the matter was not outweighed by the public interest in preserving the privacy of the witnesses, which could be maintained by other arrangements. Accordingly, the Chief Commissioner made an order during the course of the public hearing that all of the witnesses appearing before the Commission would have their true identities suppressed and were given codenames which are set out at Annexure 2.
- 1.5 The Commission has decided that the public interest does not require publication of the witnesses' names in this Report and, accordingly, they will be referred to by their codenames.
- 1.6 The investigation was primarily concerned with the conduct of the police officers when attempting to take AO into custody. This involved consideration as to whether the decisions by the police officers to use OC spray (Officer D) and a Taser (Officer E) were justified in the circumstances or, in any event, premature and whether other options ought to have been first considered. There was also a significant issue as to the need for the

¹ See s.63(5)(d) of the LECC Act.

use of a baton on AO (by Officers B and E) and, in particular, the number and force of baton blows that were administered to AO, particularly those administered by Officer E at a time when AO was under restraint.

- 1.7 The mobile phone footage referred to at paragraph 1.2 above should be viewed when reading this report. A pixelated version of the footage has been uploaded to the Commission's website with the report.

2. THE COMMISSION'S REPORT

- 2.1 This report is made pursuant to Part 11 of the *Law Enforcement Conduct Commission Act 2016*. Section 132(2) requires the Commission to prepare a report "*in relation to any matter that has been or is the subject of any examination by way of public hearing*".

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

(1) *The Commission is authorised to include in a report under section 132:*

(a) *statements as to any of the findings, opinions and recommendations of the Commission, and*

(b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*

(2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

(a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary infringement,*

(c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*

(d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*

(e) *the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

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

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

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

2.3 Part 4 of the LECC Act sets out the functions of the Commission. Pursuant to s 29 the Commission may, inter alia, make findings and form opinions on the basis of its investigations as to whether officer misconduct occurred and to make recommendations as to whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences or whether consideration should be given to the taking of action under Part 9 of the *Police Act 1990*. However, the Commission cannot include in a report under Part 11 of the LECC Act a finding or opinion that any conduct of a specified person is officer misconduct unless the conduct is serious misconduct.

2.4 Serious misconduct is defined in section 10 of the LECC Act as:

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

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

(b) *a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,*

(c) *corrupt conduct of a police officer, administrative employee or Crime Commission officer.*

(2) *In this section:*

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

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

2.5 In making assessments and forming opinions within section 29 of the LECC Act the Commission applies the civil standard of proof, as explained by Dixon J in *Briginshaw v Briginshaw*.² His Honour said:

The seriousness of an allegation made, the inherent unlikelihood of any occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the

² (1938) 60 CLR 336.

*answer to the question whether the issues had been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.*³

- 2.6 Section 143 (Persons to be heard) requires the Commission, before including in a report under Part 11 any comment about a person that the Commission considers adverse, so far as practicable, to inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions.⁴
- 2.7 The Commission is taken to have complied with section 143 if it has held an examination at which the person who is the subject of the adverse comment concerned was informed of the substance of the grounds of the adverse comment and given an opportunity to make submissions.⁵
- 2.8 The legal representatives of all the police officers were provided with all statements obtained by the Commission investigators and transcripts of the evidence of W1 and PM1 which had been given in private session. This material was made available prior to W1, W2, W3 and PM1 giving evidence in the public hearing. The legal representatives were also provided with copies of all exhibits tendered, including ambulance and hospital records and photographs of AO showing bruising and abrasions to various parts of his body.
- 2.9 The legal representatives were also provided with Counsel Assisting's opening and final submissions and had the opportunity to make both written and oral submissions in response at the public hearing on 23 July 2018. The legal representatives of Officers B, C and E attended the public hearing to make oral submissions in response in addition to their written submissions.
- 2.10 Officer A's legal representative informed the Commission that Officer A accepted the conclusions and recommendations of Counsel Assisting with regard to his role in the matters the subject of Operation Tambora and he did not wish to make either oral or written submissions to the Commission other than to adopt Counsel Assisting's recommendation.
- 2.11 Officer D, through his legal representative, informed the Commission that in light of the submissions made with respect to his role in the incident, he would not be making any written or oral submissions in reply.
- 2.12 The Commission considers that it has complied with section 143 of the LECC Act.

³ Ibid, p. 361.

⁴ LECC Act, s 143(1).

⁵ LECC Act, s 143(2).

3. HEARINGS OF THE COMMISSION

- 3.1 The Commission held private and public examinations. Seven of the former were held on 1 and 2 March in which W1, PM1 and Officers A, B, C, D and E gave evidence. PM2 was not available and was not summoned to appear in a public examination as the Commission considered PM1's evidence sufficient.
- 3.2 AO was not interviewed by Commission officers, nor was he called to give evidence because of his age and his state of mental health following the incident. The Commission also considered that AO's recollection of events would be likely to be greatly impaired due to his level of intoxication on the night in question and his evidence correspondingly of little cogency.
- 3.3 The public examinations were conducted on 26, 27, 28 and 29 March 2018 at the Commission's Sydney premises. In addition, a public hearing for the purpose of oral submissions was held on 23 July 2018 at Byron Bay at which Counsel Assisting presented his executive summary and closing submissions. The legal representatives of Officers B, C and E attended and made oral submissions in response.
- 3.4 The scope and purpose of the public hearing was:
- To investigate whether any New South Wales Police officer involved in the apprehension and arrest of a 16 year old male at Lateen Lane, Byron Bay on 11 January 2018 engaged in criminal conduct or serious police misconduct.*
- 3.5 The persons who gave evidence in public were W1, W2, W3, PM1, and Officers A, B, C, D and E.
- 3.6 Authorisation was sought and granted by the Commission for all of the police officers to be represented by legal practitioners at both private and public examinations. Legal practitioners were also authorised to appear for witnesses W2, PM1 and AO at the public hearing.
- 3.7 The Commission appointed Terence Rowles as Counsel Assisting the Commission.

4. THE EVENTS OF 11 JANUARY 2018

- 4.1 On 10 January 2018, AO was on holiday in Byron Bay with his family. He went for a walk after dinner and, later in the evening, he texted his mother to let her know that he had met some "kids on the beach" and would be "hanging" with them for a while.
- 4.2 In the early hours of 11 January (at around 2am) the Night Manager of the Nomads Backpacker Hostel, located in Lateen lane (W1) noticed AO acting in a strange manner. W1 watched AO for a period of what he estimated to be 15 to 20 minutes, during which time AO was walking around in a dazed manner, looking up at the sky, sweating profusely and either talking or yelling to God. AO was also asking for water. According to W1, he was not acting aggressively nor did he threaten anyone. W1 thought AO was clearly

under the influence of either alcohol or drugs. After a period of time, AO removed all his clothes and continued to carry on as he had before. W1 had asked AO several times to move on, and finally, having received complaints from a few women trying to walk back to the hostel who said that AO made them feel scared and uncomfortable, he made a telephone call to the Byron Bay Police Station to report the situation at about 2.26am on 11 January 2018.

- 4.3 At the time the call was received that a naked person was acting inappropriately in Lateen Lane, Byron Bay in the vicinity of the Nomads Backpacker Hostel, there were two police vehicles at the station, each manned by two senior constables. Both vehicles and their teams responded to the call. The first police vehicle to respond (BYR 22) contained Officers D and E, whilst the second (BYR 23) contained Officers B and C. Evidence was given that Officers B and C had just ended their shift but chose to attend the incident to support their fellow police officers as there were marked similarities to a violent incident involving a naked male which had occurred some weeks earlier (on 25 December 2017) in Byron Bay (outlined in greater detail later under the heading "*The Christmas Day Incident*").
- 4.4 BYR 22 arrived and parked in Lateen Lane and, shortly after (some 22 seconds), BYR 23 arrived and parked next to BYR 22. (There was no CCTV coverage in Lateen Lane but CCTV footage at a hotel close by recorded the 22 second gap as the vehicles turned into Lateen Lane.)
- 4.5 W1 observed most of the interaction between the attending police officers and AO from the time the officers arrived in Lateen Lane until AO was transported in one of the Police vehicles to the Byron Bay Police Station.
- 4.6 There were also two other witnesses who were staying in an apartment block overlooking Lateen Lane who witnessed the unfolding events of that evening (W2 and W3). W2 was on the balcony of one of the apartments nearest to the lane. His partner recorded on her mobile phone the latter part of the interaction between AO and the police officers. An edited version of this recording was subsequently aired by "*A Current Affair*". W3 was on holiday with his family and he witnessed the incident from the balcony of his apartment, which was one removed from that of W2.
- 4.7 It is not in dispute that, at the time of the arrival of the police, AO was intoxicated, naked and acting strangely. The police officers gave evidence that AO was acting aggressively but this view was not shared by the civilian witnesses W1 and W2, who gave evidence that AO appeared more confused and distressed than aggressive or threatening.
- 4.8 The police officers B, C, D and E gave evidence that they made attempts to communicate with AO but he was not responsive to any commands. The police officers then used OC spray, a Taser and finally physical force, including the use of batons, to restrain and handcuff him and to place him in the back of the police van. AO was taken back to Byron Bay Police Station and placed in a holding cell until paramedics arrived about 30 minutes later. AO was detained pursuant to s 22 of the *Mental Health Act 2007*. It is clear that this detention was lawful.

- 4.9 During his detention, AO remained naked and, despite his requests for water, he was not provided with any.
- 4.10 The Commission heard evidence from Officer A, who was the Custody Manager on the evening that AO was detained, as to what care and assistance was provided to AO during his time at the Byron Bay Police Station. He also explained why a custody record of AO's detention was not created.
- 4.11 When the paramedics (PM1 and PM2) arrived, AO was taken out of the holding dock and held down on the ground by six police officers, whilst PM1 administered a light sedative. AO was then secured on a stretcher and transported to Tweed Heads hospital. During his stay in hospital, AO was x-rayed and found to have a fractured rib. He also had extensive bruising to various parts of his body. AO told hospital staff that he had taken "acid". Toxicology tests could not identify any particular drug. AO remained in hospital overnight and was released, symptom free, into the care of his parents in the morning.

5. AUDIO VISUAL RECORDINGS

Mobile Phone

- 5.1 The mobile phone recording of the incident in Lateen Lane was 2 minutes and 49 seconds in length.⁶ It recorded both vision and audio. The recording began when AO was already on the ground and was being restrained by the four police officers. A transcript of the audio was prepared by the Commission.⁷ The legal representatives requested some changes and most of these suggestions were accepted by the Commission. The police officers were also asked to identify, where possible, which police officer said which words. Parts of the audio recording were unintelligible.
- 5.2 At the beginning of the recording, AO was seen to be on the roadway on his back and was being restrained by the four police officers, B, C, D and E. Over the next 2 minutes and 49 seconds one baton strike was administered by Officer B and eighteen baton strikes were administered by Officer E. At 42 seconds into the recording an unidentified police officer could be heard saying "*That's coming off*". Shortly after that time another unidentified police officer could be heard saying "*It's coming off, it's coming off, get another set*". It appears from the audio that, when AO was brought to the ground there may have been a difficulty with the first set of handcuffs that had been applied, in particular that one of the cuffs had not been properly applied and officers believed that AO may have been able to get at least one of his hands free (although the preponderance of evidence leads the Commission to conclude that he did not succeed). Hence the reference to "*it's coming off*" and the request to "*get another set*". This fear was confirmed by Officers B, D and E when they gave their evidence.
- 5.3 At 57 seconds, Officer E can be heard shouting "*Stop resisting*", to which AO is heard responding loudly, "*I'm not resisting*". Immediately following

⁶ Exhibit 1.

⁷ Exhibit 16.

that Officer B can be clearly heard saying “*Yes you are. Cunt, give me your hand*”. Shortly after this an unidentified police officer said, “*Unlock him, unlock him*”, and immediately after that Officer E said, “*Bring the truck right up here*”. Officer B is seen to leave the other officers and then bring the truck up to where AO was being held. After this, there were three further baton strikes with an extendable baton delivered by Officer E at 1 minute 54 seconds, two further strikes at 1 minute 57 seconds, and one further strike at 2 minutes 7 seconds. These strikes were administered when AO was handcuffed and restrained by Officers B, C and D.

- 5.4 In all, a total of eighteen baton strikes were administered by Officer E and one by Officer B. The recording did not show any signs of AO acting aggressively although it is consistent with his not complying with the officer’s attempts to handcuff him. He was responsive to what was said to him. The only swearing by AO which was captured on the footage was when AO said, “*Give me some fucking water*”.
- 5.5 It is significant that AO’s responses to some of the comments and questions directed at him were appropriate to the situation, in light of a description of his behaviour minutes before, when he approached Officer B. At one point an unidentified police officer can be heard to say “*(unintelligible)...stupid prick*” to which AO responds, “*Sorry I’m not a, I’m not a prick. Don’t call me prick.*” At a later point in time, when AO is handcuffed and under restraint by all four police officers, Officer B is heard to ask AO what his name was and AO clearly responded to the question by stating his first name.

CCTV footage from the Byron Bay Police Station

- 5.6 The Commission also had access to CCTV footage from within the police station which captured AO’s detention in the dock between 2.25am and 3.39am. It did not show AO acting in any aggressive manner, nor psychotic. His demeanour appeared to be that of a person who was subdued, uncomfortable and probably in pain.

6. EVIDENCE OF CIVILIAN WITNESSES

W1

- 6.1 The following evidence was given by W1⁸.
- 6.2 He was a Canadian citizen who was on a working holiday in Australia. He was employed at the relevant time as the night manager at Nomads Backpackers Hostel.
- 6.3 In the early hours of 11 January 2018, whilst performing his duties, he noticed AO pacing up and down the laneway in front of the backpacker hostel, acting strangely. He described AO as talking to God and the sky, asking, “*Why would you do this to me?*” and requesting water. There were a number of persons in the vicinity of the hostel at the time. AO continued

⁸ Public hearing 26/3/18 at T 56-76.

to conduct himself in this fashion for a period of 15 to 20 minutes. He was under W1's observation for the whole of that time.

- 6.4 W1 stated that AO was constantly mumbling, not really talking to anyone, and was not acting in a threatening manner to W1 or anyone in the vicinity. W1 believed AO was under the influence of either alcohol or drugs. After some time, AO removed all his clothes and continued to carry on as before. W1 asked him several times to move on and finally, having received complaints from several women walking back to the hostel, whom he described as scared and feeling uncomfortable, made a telephone call to the Byron Bay Police Station to report the situation.
- 6.5 Approximately 5 to 10 minutes after the call, police vehicles arrived and parked in Lateen Lane near the hostel. W1 saw two police cars arrive but (mistakenly) thought there might have been three. He recalled that the police all arrived around about the same time. He stated that the police gave no warning before AO was OC sprayed and that a number of them on a number of occasions were using the words, *"Get on the ground cunt"*. He thought that this was said about four or five times and that at least two of the police officers were using that kind of language. (That this was so is given some support by the use of this word by Officer B when AO was on the ground.)
- 6.6 When asked whether AO appeared to acknowledge the presence of the police, W1 stated:
- "Yes, at first, like you could – he kind of acknowledged them because he was scared when he saw them coming but kind of still off, like looking at the sky and mumbling still".⁹*
- 6.7 When asked whether AO moved towards the police officers as though to attack them, W1 stated *"No"*. W1 thought that that the period between the police arrival and the use of the OC spray was maybe 3 to 5 minutes but acknowledged that it could have been less. (As discussed below, it was in fact only a matter of seconds.) W1 did not recall any warning before the use of the OC spray, just AO being told to get on the ground. W1 was asked whether there was any warning to get on the ground where the word *"cunt"* was not used. His answer was *"I don't recall, I think it was used every time"*.
- 6.8 W1 thought that the Taser was deployed about 3 to 5 minutes after the use of the OC spray. He remembered hearing the word *"Taser"* being yelled by one of the officers. When asked whether that appeared to be a warning that someone was using a Taser, he replied:

"Yes, I would take it was supposed to be a warning but as soon as he said it for the first time that's when they like used it so it didn't seem like a total warning".¹⁰

⁹ Ibid, p.63.

¹⁰ Private examination W1, 1/3/18, p.19.

- 6.9 After AO was tasered, W1 returned to the counter area of the hostel to attend to some tasks. By the time he went back to the window (about a minute or two later), AO was on the ground with the police on top of him. He stated that one officer was hitting AO with a baton. He estimated that he observed at least five baton hits delivered in rapid succession, during which he heard a police officer say *"Stop resisting"* and AO reply *"I'm not resisting"*. Notwithstanding this, the police officer continued to hit AO. W1 stated on a number of occasions that he did not see AO offering any physical resistance or threatening police. Notwithstanding he was some 20 feet or so away from AO, he observed significant bruising to AO's body. W1 was called away to perform some other duties, and when he returned to view the scene, AO had been moved into the police vehicle.

W2

- 6.10 The following evidence was given by W2¹¹.
- 6.11 W2 was 35 years of age and resided in a second-floor unit with a balcony with a view of Lateen Lane and the Nomads Backpacker Hostel. W2 said that at about 2am he was asleep with his partner when he was awoken by a male shouting, yelling for water and saying *"Make this stop, make this feeling stop"*. W2's partner went out onto the balcony of the unit and came back to tell W2 that there was someone out there naked walking up and down the street.
- 6.12 About five minutes later, W2 became aware of flashing lights in the lane and so he went out to the balcony. He saw two police vehicles in the lane. Four police officers got out of the vehicles, formed a semi-circle and moved towards AO. At this time, AO was walking away from the police. He was yelling out for water, calling for help, saying *"Make this feeling stop"* and groaning. W2 stated that he heard a police officer or officers yell out very loudly *"Get on the ground, get on the ground"*. He heard no swearing. W2 then heard the words *"Spray him, spray him"* and one of the officers sprayed AO with OC spray. At the time, AO was not facing the police officer who used the spray; and the words seemed to come from the other officer. From the time the police vehicles arrived to the time the spray was discharged W2 described as:
- "... being quick, pretty much getting out of the car, walk maybe 10-15 metres, corralling the kid and then basically spraying him. AO put his hands to his face and continued yelling out. It appears it was the same things he was yelling out about previously"*.
- 6.13 At that point, a police officer started to hit AO just below the kneecap. W2 thought there were three or four blows. They had no effect on AO. There was more yelling from the officers for AO to get down. Then there was a call, *"Taser, Taser, shoot him with the Taser"*. He heard the Taser discharge. At this point, W2's partner went to get her phone and W2 walked to the door. By the time he had turned back around, AO was on the ground and

¹¹ Public hearing 26/3/18 at T 79-96.

four police officers were on top of him. That is when the mobile phone recording of the incident commenced.

- 6.14 W2 was certain that AO was on his back. He could hear the sound of a baton hitting flesh. It was very distinct, like a thud. W2 stated he heard the same sound of the batons striking when AO was being placed in the police vehicle. He believed there were at least two strikes at that time.
- 6.15 After AO was placed in the police vehicle, W2 saw one of the police officers approach approximately four persons outside Nomads Backpackers and say in an aggressive tone words to the effect of *"Have any of youse fucking recorded this?"*, or *"You had better not have fucking recorded this"*. W2 could not remember the exact words, but his recollection was that it was said in a very aggressive manner. Upon hearing this, W2 and his partner hurried inside.
- 6.16 W2 stated that the first interaction between the police and AO was the police telling him to get on the ground. He denied that the police used any language to calm AO down or adopt a friendly approach and stated that the incident started off in an aggressive tone. W2 stated that AO made no aggressive move towards any of the police officers, nor did he make any threats or abuse the police officers. W2 in effect denied that AO marched up towards a police officer, nor did he see a scuffle between AO and a police officer.

W3

- 6.17 The following evidence was given by W3¹².
- 6.18 W3 stated that he was a resident of Sydney but was on holiday with his family (wife and three children) in Byron Bay. He was staying in a unit in the same building as W2. The unit's balcony had a view over Lateen Lane and the front of the Nomads Backpacker Hostel.
- 6.19 W3 was awoken in the early hours of 11 January 2018. He heard screaming and words to the effect *"God help me"*, *"I need help"*, *"Can you give me some water?"* His evidence was that he also heard swearing. After about fifteen minutes, W3 went out onto the unit balcony. He confirmed that the area immediately in front of the hostel was reasonably well-lit. He indicated that AO continued to scream and yell, using words like *"I need fucking water"*, *"Can you get me some water?"*, *"God help me"*, *"Fucking hell"*.
- 6.20 W3 saw the police arrive and recalled that they all arrived at the same time. One of the police officers approached AO and said words to the effect *"All right buddy, just settle down"*, *"What's going on?"* He stated that AO seemed agitated, was not responsive, was sweating and he approached the police officer. He described AO marching up to one of the police officers and stating, *"Just get me some fucking water, God help me, I need some help"*. He then saw some type of scuffle between a police officer and AO. The police officer told AO to settle down, move back, not to resist and to sit down and he would be able to assist him or try to help him. W3 saw AO

¹² Public hearing transcript 26/3/18 at T 19-55.

coming towards the police officer, who put his hands up and AO then walking straight into the police officer. The police officer took a step back and said, *"Mate, you've got to keep your distance, we're here to help you"*. AO at the time was screaming *"Give me some fucking water"* and *"Help me God"*.

- 6.21 W3 thought the time delay between the time the police arrived and the time a spray was deployed was possibly between three to five minutes. W3 said that AO's movements might have been interpreted as being aggressive, although AO did not swear at, threaten or attack any of the officers.
- 6.22 W3 saw the Taser being deployed, after which time he decided to get his phone and record the incident. The explanation he gave was that he did not know how the whole incident was going to pan out, and he thought that he should probably record it. However, his phone battery was dead and he contemplated charging it but decided against it. The reason he gave was that he thought that, as the police had now sprayed AO, he would settle down and he would be taken away.
- 6.23 W3 then saw a police officer try to pull AO to the ground. However, that was unsuccessful and he saw a strike to the knee or the back of the leg with a baton. The first strike appeared to have no effect. After a second and third strike, AO fell to the ground. AO then got up again. At this point in time, a police officer took out his Taser and said, *"Don't resist, otherwise I will have to use - I will have to Taser you"*. AO at this point in time seemed annoyed and a little bit aggressive. The police officer screamed three or four times *"If you don't step back I'm going to use the Taser on you"*. The Taser was then deployed. W3 estimated the time between the spray being administered and the Taser being deployed was less than two minutes.
- 6.24 After being tasered, AO fell to the ground where he remained for a period of twenty to thirty seconds. AO then got up and was extremely angry and vocal. At that point in time an officer struck AO with a baton and he fell to the ground. The strike was to the leg. AO was then on the ground on his back and the police were asking him to roll over and lie on his stomach and not to resist.
- 6.25 W3 stated that he then observed approximately 6 strikes with the baton and heard possibly ten. He was of the opinion that the strikes were administered by two to three officers, and thought that a third police vehicle arrived. He conceded, however, that he may have been confused as to whether there were two or three vehicles.
- 6.26 W3 conceded that there was a lot of shouting, yelling and screaming but he did not concede that he was mistaken as to who was using various words. He stated that he had a clear recollection of what had occurred. W3 denied hearing any bad language used by the police officers. He saw one of the police officers walk over to address a number of persons outside the backpacker hostel after AO had been transported from the scene. There was a conversation but he could not hear clearly what was said. W3 stated that AO was being verbally abusive to persons in the vicinity before the police arrived. When asked to describe what he heard to the best of his

recollection, he answered that AO said *"Get me the fucking water"*, *"What the fuck is wrong with you guys?"*, *"God help me"*, *"I just want some fucking water"*. W3 stated that he saw baton strikes being administered when AO was on the ground and described them as full strikes and he thought that they were administered by more than one officer.

- 6.27 When asked again about the conversation that one of the police officers had with a person in the vicinity after AO had been taken away, W3 replied that he could not be certain of the conversation, but from recollection he was fairly certain that he heard somebody ask, *"Has anybody taped this?"*. He agreed that it was a police officer who would have said that but could not remember anything about the tone used.

PM1

- 6.28 PM1 gave the following evidence¹³.
- 6.29 He was one of two NSW ambulance officers who attended the Byron Bay Police Station at approximately 2.45am on 11 January 2018. On arrival at the station he observed AO crouched in the dock area; he was naked and appeared to be distressed and shouting. PM1 did not remember having any conversation with AO. He would have had conversations with police officers but could not recall which officers he spoke to or what was said.
- 6.30 AO was removed from the holding dock to permit administration of a sedative by injection. After the paperwork was completed, AO was taken to an ambulance and transported to the Tweed Heads Hospital at about 3.30am.
- 6.31 At the time AO was removed from the dock area for the purposes of having the sedative administered, PM1 observed AO lunge forward. AO was agitated and kept saying, *"Help me, help me"*, and appeared to resist anyone who was holding him. He observed bruising on AO's trunk as well as his arms and legs. AO told him *"I've taken acid"*. PM1 agreed that, to his observation, AO was not threatening police, nor was there anything in his presentation that suggested any psychosis.
- 6.32 PM1 was asked to assume that if AO had a broken rib, he would have been in considerable pain, and that could have provided an explanation for his conduct. He agreed that that would be the case but PM1 had no knowledge that AO had a fractured rib at that time.
- 6.33 PM1 had a limited recall of what occurred in the early hours of the morning in question. Most of his evidence went towards the condition AO was in at the time he was at the Byron Bay Police Station and his condition and behaviour on the way to the hospital.

¹³ Private examination PM1 1/3/18; Public hearing 26/3/18 at T 96-112.

7. EVIDENCE OF THE POLICE OFFICERS

Officer D

- 7.1 Officer D ¹⁴ was 50 years of age and had been a police officer for 11 years, with the rank of Senior Constable.
- 7.2 There were two Police teams on duty at the Byron Bay Police Station when a call was received in the early hours of 11 January 2018. Officer D and his partner, Officer E, responded to the call, Officer D stating that he thought their team was the only team doing so. They were in BYR 22. Officer D became aware of the presence of the other two police officers (who arrived some 22 seconds later in BYR 23) when Officer B made the first leg baton strike against AO, which he estimated was approximately a minute to a minute and a half after Officer D had arrived at the scene.
- 7.3 When Officer D left the police vehicle and started walking down Lateen Lane, he saw AO spring up from a lying down position. He was naked and started to walk towards the police officers. He was about 15 metres away. AO was yelling and screaming but Officer D could not remember specific words. AO was walking towards the police officers but was not threatening any violence.
- 7.4 Officer D took out the OC spray approximately 4-5 seconds after sighting AO. He said he did not intend using it at the time took it out as a precaution. AO walked in a zig-zag direction. He was not making any threat to him at the time. He was shouting and behaving unusually. Officer D was trying to form some idea as to AO's intentions. He saw that AO had no weapon and was sweating heavily. Officer D formed the impression that he was affected by some form of drug and did not appear to have acknowledged the police presence.
- 7.5 Officer D could not remember the exact words he then used but it was something like "*Calm down, better calm down mate, or you'll get a gob full of this*", referring to the OC spray.
- 7.6 AO came within quite a short distance of Officer D and "... *then done a right hand swing to*" Officer D's head. He was at least a metre away from Officer D when he did that. Though Officer D indicated AO was swinging his arms around, he was of the view that AO had made a definite swing at him though without any verbal threat. In response, Officer D sprayed AO's face. He said that he was unaware of BYR 23's arrival. (Officer E did not refer to any punch or attempted punch on AO's part during his private examination but did describe it in his public examination. He asserted, on both occasions, that Officer D had administered a check drill to AO when the latter "*marched up to him*". A check drill is a sharp push with the heels of the hands to the chest of someone in close proximity. Officer D denied administering any check drill.)
- 7.7 Officer D was asked about his knowledge of the circumstances where OC spray can be deployed. He stated: "*The first one is protection of a human*

¹⁴ Private examination of Officer D, 2/3/18; Public hearing 28/3/18 at T 261-330,443-444.

life, the second one was where a violent confrontation is occurring or possibly is likely to occur". It is evident that the mere fact that a person is not calm or compliant cannot justify the use of OC spray or, for that matter, the threat of its use. Officer D said that (following the arm swing) he thought resistance or confrontation was likely to occur and he deployed the OC spray.

7.8 Officer D said AO *"... did not have his hands up in a punching stance; he did not direct any threats directly to me, he seemed to be looking [at but] not focused on me, he was yelling and screaming"*. Officer D conceded that he could have attempted a dialogue with AO but thought it would be quite difficult to communicate with him. He said that: *"AO wasn't understanding whatever we were saying"*. (It should be noted, however, that on Officer D's account, there had been very little said and none of it such as to elicit a verbal response.)

7.9 Officer D thought the decision to use the OC spray was made shortly, probably 15 seconds, after arriving on the scene.

7.10 When asked whether a more appropriate option would have been to call for the assistance of his partner, Officer E, and then physically try to restrain the young person, Officer D replied:

"That's a possibility. I thought that the way that he approached me, his mannerisms, his swing, obviously I didn't get assaulted but he did have a swing, I thought: this will be, the OC spray will need to control him, would probably be the most effective method".

7.11 It was suggested to Officer D that it might have been preferable to attempt to interact with AO for a longer period than 15 seconds, and that the use of the OC spray was premature. Officer D did not agree, responding:

"I had the OC spray in my hand; I had it just in case; he done the swing at my head and I went: Right, okay, this is where this is going, so I sprayed him".

7.12 After the spraying, AO turned his back and started to walk away. He was screaming and wiping his eyes. Officer D confirmed that he was no longer a threat. Nevertheless, he sprayed him again. This made AO increase his yelling but he still made no attempt to attack the officer or make any aggressive move or threat.

7.13 Almost instantaneously, Officer D heard the sound of a Taser being deployed. The time between the second burst of OC spray and the use of the Taser was estimated by Officer D to have been between 5 and 15 seconds.

7.14 Officer D confirmed that he had no recollection of hearing anything like *"Hey mate we'll Taser you if you don't sit down or get on the ground."* He confirmed that he did not give AO any command other than saying *"Get on the ground"* at the beginning, although Officer D was unclear about that command. He could not remember hearing Officer E say anything prior to

deploying the Taser although he was between 3 and maybe 5 metres away from Officer E and in a position to hear if anything had been said.

- 7.15 After being tasered, AO fell to the ground and Officer D attempted to subdue him. However, AO was very sweaty and “*strong*”; moving and wriggling and difficult to get a grip on because he was naked. He got out of Officer D’s grip and started to walk away. Officer D then became aware that the other police team were on the scene, as he saw a leg strike administered by Officer B. AO called out in pain and went straight down. At this point in time, all four police officers were on the scene, trying to grapple with AO and grab an arm or a leg. Officer D attempted to place handcuffs on him.
- 7.16 Officer D confirmed from the visual record (as is plainly the case) that AO was on his back when he was attempting to handcuff AO. Officer D stated that the first attempted handcuffing was not satisfactory and AO was close to pulling his hand out of one of the cuffs. Officer D put his hand on the top of AO’s hand as the cuff was approaching his knuckles and asked Officer B to lend assistance to get another set of handcuffs.
- 7.17 To unlock and reposition the handcuffs already attached would have required a small key and, given AO’s thrashing around, this was practically impossible.
- 7.18 AO fiercely resisted placement of the second set of handcuffs; he was strong and struggling. Officer D was then asked the following:
- Q: *“Can we just go back to that scene where you and [Officer B] are securing the second set of handcuffs on AO? Now, do you agree that given the position that AO was in at the time, which was on his back...*
- A: *Yes.*
- Q: *Given the fact that both his hands were either in the air or certainly on top of his body and given the fact that his feet were secured by Officer C, that both you and Officer B could have secured the handcuffs on the young person without any need for those baton strikes?*
- A: *Short answer, yes”.*
- 7.19 Officer D was also asked:
- Q: *What is your opinion as to the degree of force used in relation to the subduing of the young person?*
- A: *I thought [it] was a bit over the top.*
- 7.20 When asked to explain this answer, Officer D said:
- “I was focusing on the handcuffing when I heard the baton strikes – the number of baton strikes, I was probably wondering why. I had – I hadn’t*

needed my baton. He was on the ground, face up. Just thought that, I thought it was unnecessary”.

- 7.21 Near the conclusion of Officer D’s evidence he was asked the following questions (about the COPS entry):

“Q: You also record that the young person swung a punch at Police?”

A: Yes.

Q: That’s the one punch you have referred to?

A: That’s correct.

Q: I think you have agreed that that’s the only sign of physical aggression that he made during the whole of the incident outside the backpackers?

A: Towards, yes.”

Officer B

- 7.22 Officer B¹⁵ was 48 years of age about 180cm tall, weighing about 90 kg. He is a Senior Constable and had been a member of the New South Wales Police Force for 6 years. On 11 January 2018 he was part of a team of two officers present at the Byron Bay Police Station. His partner was Officer C.
- 7.23 When the telephone call was received at the station, Officer B stated the other team (comprising of Officers D and E) acknowledged the job. He added that, *“... due to the nature of the job, being similar to an incident that occurred about two weeks prior, where a naked man, drug affected, jumped through a Police car, it was thought wise if we attended and accordingly, both vehicles attended the scene”.*
- 7.24 The other vehicle went first and Officer B estimated his vehicle was about a minute or so behind it. As Officer B arrived at the scene and was undoing his seatbelt to alight, he saw Officer D deploying OC spray. He had not seen anything that occurred prior to this. Officer C had already left the vehicle but Officer B’s exit was delayed as his door would not open. Officer B was moved across to alight through the driver’s door. At this point, he heard the first crack of a Taser being deployed. As he exited, he saw that AO was still on his feet and he decided to take a long baton from the vehicle.
- 7.25 Officer B said that, although AO was yelling, he was not physically aggressive at that time. (All officers are agreed that, whatever AO was yelling, they heard no threats.)

¹⁵ Private examination of Officer B 2/3/18; Public hearing 27/3/18, 28/3/18, 29/3/18 at T 197-214, 216-261, 332-368.

- 7.26 Officer B heard the officers in the other team telling AO to “*get on the ground*”. When asked whether they were swearing, Officer B said, “*They may have been swearing at him but I don’t recall*”.
- 7.27 Officer B was asked what actions of a person justified the use of OC spray. His answer was: “*If a violent confrontation was imminent and that’s why I believed that Officer D deployed his OC spray*”. When asked the same question about the Taser, he answered: “*The Taser is generally used when there is a risk of serious harm to yourself or actual bodily harm and an officer will not deploy the Taser unless he believes that’s the case*”.
- 7.28 Officer B was then asked: “*I think I am hearing you say that you would not use either spray or Taser except defensively? It would not be used simply to require compliance?*” His answer was: “*That’s correct*”. He added, “With our training ... communication is our biggest tool and nine times out of ten [with] communication we’re able to diffuse any particular situation”.
- 7.29 Officer B stated that the area was well-lit and he could make out facial features and things of that kind.
- 7.30 Having left the vehicle carrying the long baton, Officer B walked towards AO, who was walking towards him. Officer B then told AO to get on the ground but AO still advanced and Officer B struck him on the left forearm with no effect. Officer B said he was frightened and believed he was about to be overpowered. Officer B states that everything happened quickly and to his mind, AO was like a “*zombie*” coming towards him. He was not responsive, he was “*looking through*” Officer B.
- 7.31 Officer B stated that at that time he “... *thought that AO was going to overpower us*”. When asked to define “*us*”, he included himself and the three other officers. Officer B may have made a further strike to AO’s forearm, but the next strike he recalled was to AO’s knee. Officer B thought the second strike to the arm, if it occurred, would have probably been 3 to 4 seconds after the first strike. In any event, the strike to the knee was delivered a couple of seconds after the last arm strike.
- 7.32 After the knee strike, AO did not respond other than to stare at Officer B and after a short period of time, turned almost completely around and went down, certainly onto one knee and possibly onto both knees. Once AO was on the ground, all four officers attempted to restrain and handcuff him. Officer B confirmed that AO was on his back.
- 7.33 Officer B kept his baton in his right hand. Initially, Officer B stated he believed that he was assisting Officer D to apply the first set of handcuffs but was not confident of this first recollection. (The recording showed that Officer B was in fact standing next to AO with his baton in his right hand, whilst Officer D applied a set of handcuffs. It was not until later, captured at about 58 seconds into the recording, that Officer B is seen to place his baton on the ground and assist Officer D to apply a further set of handcuffs on AO). Officer B then delivered a further baton strike. He stated the reason was that the handcuffs were slipping off AO and were almost over his knuckles. Officer B struck AO as a distraction in the hope that he could restrain him again prior to him taking the handcuffs off. AO was extremely

slippery with sweat and Officer B was *"... concerned that we were going to lose him and he was going to have one handcuff to swing around at us"*.

7.34 Officer B stated that the baton strike he delivered was to the front of the thigh because AO was on his back.

7.35 Officer B said he and Officer D were putting a second set of handcuffs on AO whilst Officer C was holding his legs down and Officer E struck him a number of times with his extendable baton. Officer B thought it was 4 strikes, but could not recall the actual number as his focus was on the attempt to handcuff AO.

7.36 When AO had been handcuffed again, Officer B then asked him what was his name, which he gave. Officer B walked away to bring the truck (BYR 23) up to where AO was so he could be placed into the vehicle.

7.37 Officer B was aware a number of strikes were administered to AO when he was on the ground by Officer E.

7.38 Officer B denied saying: *"Cunt, give me your hands"*, maintaining he said *"Come on, give me your hands"*. He stated: *"I do remember that because that stood out to me when I watched the footage, I don't use words like that. It would have been 'Come on, give me your hands'. That's my recollection of that. I couldn't imagine myself saying, 'Cunt give me your hands'".* The Officer said, *"If I was going to use a profanity, it would be at the end of the sentence, not prior to the sentence beginning. It's just how I would normally speak but if that's the case, I don't agree with it. I agree I said: 'Come on.'"*

7.39 Officer B was then asked:

"Q: Do I take it that your disagreement is not because you don't use language to that effect but you use it at the end of the sentence?"

A: If I was going to say it, I would say 'Give us your hands, cunt'."

7.40 The Commission does not accept that this elaborate rationalisation was truthful and arose from a genuine failure of recollection, even after making every allowance for the rush and confusion of the moment, especially after he was able to see and hear the recording. The word "cunt" can be clearly heard and there is no doubt this was said by Officer B.

7.41 When asked whether at any time during the incident Officer B heard bad language being used by anyone, he answered: *"Not that I recall but it wouldn't surprise me if there was. It was a violent confrontation"*. Officer B said that, when AO was being put into the Police wagon, he opened the door on the pod on the other side and tried to drag AO forward to assist getting him inside.

7.42 Officer B was then asked a series of questions about why he delivered the first baton strike to AO's left arm. Officer B stated that AO was advancing towards him and he *"... feared that he was going to engage and I feared for*

my safety". He added that he had come to the view that AO was seriously affected by an illicit drug and needed to be restrained.

- 7.43 Officer B stated that, up until the time he used the baton, AO had not addressed him verbally, had not even acknowledged his presence, was clearly unarmed and had nothing in his hands.
- 7.44 In answer to a question: *"You cannot use a baton to prevent him from escaping, can you? You can only use it for the purposes of self-protection or protection of others, that's what it boils down to, is it not?"*, Officer B responded: *"I was using it to detain him"*.
- 7.45 Officer B described AO as having the same look as a male who was involved in a violent incident with police officers some two weeks earlier. That male had put his head through the windscreen of a police vehicle and then bashed his head into the side window of a vehicle. Officer B conceded that AO did neither of those things, nor attempted to attack him, but was advancing in his direction.
- 7.46 The following evidence was given:

"Chief Commissioner: Anyway, the real point is this, isn't it, when it boils down to it; this man was exhibiting some features - this young man - was exhibiting some features that you had seen in extremely dangerous conduct a week or two before. Is that right?"

A: That's correct.

Q: And you were worried that this young man might follow the same course of action?

A: That's correct.

Q: There was a risk?

A: There was a high risk.

Q: You didn't know what would happen, but you thought there was - but you believed there was a serious risk that he might, if so, he and other persons might be in danger; is that what it really boils down to?

A: That's correct. Based on my experience, unfortunate experience with these drugs in Byron Bay at the moment, that's exactly what I thought, the minute the clothes come off, you've got about a 15 minute window before the body overheats and that drug's peaking

.....

Q: I suppose it is fair to say you were frightened yourself?

A: Yes, I have seen the effect of the drug. I was in fear of being overpowered.

.....

Q: *So you are aware that the focus – or you would assume the focus of at least four police officers is on this young person at this point in time?*

A: *That's correct.*

Q: *And even in those circumstances you considered that there was a risk that you were going to be overpowered?*

A: *Yes."*

7.47 Officer B was asked:

"Q: Doing the best you can, whilst the young person was on the ground, whilst four Police officers were attending to either the handcuffing or after the handcuffing, what would have been the total number of baton hits that you would estimate were administered to the young person?

A: Perhaps 9 in sequence of 3.

Q: In fact, there were 19 or 18, depending upon how many occurred at the truck. What do you say about that? Possible?

A: It's possible, could be, but –."

7.48 Officer B stated at the time he left to get the vehicle AO was handcuffed and was effectively restrained. When asked then *"What would have been the purpose of the administering of any further baton strikes?"* Officer B answered, *"I don't know, I wasn't there".*

7.49 Officer B did not hear a number of baton strikes to AO when he was being placed into the police vehicle.

Officer C

7.50 Officer C¹⁶ was 43 years of age, a Senior Constable who had been employed as a police officer for 12 years. He was 103cms tall and weighed 105kg.

7.51 Officer C confirmed that he was part of two police teams at the Byron Bay Police Station in the early hours of 11 January 2018. Both teams responded to the call about AO. The Officers D and E went first, followed by Officers C and B. Officer C accepted, from the CCTV at the hotel on the corner of Lateen Lane that the vehicles were 22 seconds apart.

7.52 When he arrived at the scene, Officer C saw Officers E and D had alighted from their vehicle and were some distance away from it. As Officer C left his vehicle he saw a Taser being activated and AO hit the ground. The OC spraying had occurred prior to his arrival. Officer C said he saw the officer

¹⁶ Private examination of Officer C 2/3/18; Public hearing 27/3/18 at T 149-197.

pointing the Taser towards AO and could not recall the officer saying anything before he discharged the Taser. When the Taser was deployed, AO fell to the ground.

- 7.53 Officer C attempted to grab AO's left arm but his hands slipped straight off AO, who was difficult to control because he was naked and sweating all over. He was speaking to God and asking for water. He was moving his arms around and was very agitated. AO did not try to hit or kick at Officer C, or do anything like that. The officer managed to gain control of AO's left arm. Officer B struck the right side of AO's leg with a baton and AO fell to the ground.
- 7.54 Officers C and D then attempted to handcuff AO. They managed to get one handcuff on one wrist but, as they were attempting to handcuff the right wrist, AO's hand came out, he lifted the police officers off the ground and got back to his feet. AO was then put back to the ground and Officer C took control of his legs (at which point W2's partner commenced recording).
- 7.55 Officer C recalled that AO had one cuff dangling from the chain on his arm but he could not remember everything that happened as it happened so quickly. (Nothing hangs on this, but it is clear that, if AO was only cuffed to one wrist, this was only for a very brief time.) Officer C's memory was that AO was on his stomach. After being shown the recording, he agreed that it showed that AO was then on his back. Moreover that AO was on his back for the whole period of the time demonstrated in the footage. The Commission is satisfied that AO was never on his stomach when the officers were attempting to restrain him.
- 7.56 Whilst handcuffing AO was being attempted, Officer C heard about six baton strikes. Later, as AO was being placed in the vehicle, more baton strikes occurred, one of them glancing off his arm and hitting AO's thigh.
- 7.57 Officer C did not see AO take a swing at Officer B or at Officer D, or at anybody else. The only person who could have administered a baton blow at the time that AO was being placed in the vehicle was Officer E.

Officer E

- 7.58 Officer E ¹⁷ was 36 years of age and had been a New South Wales Police officer for 10 years, holding the rank of Senior Constable.
- 7.59 Officers E and D responded to the call about AO and Officer E assumed that, because of the nature of the incident, the other team at the station would also respond.
- 7.60 Officer E thought that the second police vehicle, crewed by Officers B and C, arrived 30 seconds after the first vehicle.
- 7.61 On arriving at the scene, Officer E saw a naked man lying down and then getting to his feet as he and Officer D alighted from their vehicle. The

¹⁷ Private examination of Officer E 2/3/18; Public hearing 29/3/18 at T 368- 442.

naked man was yelling and screaming incoherently. Officer E could not understand what he was saying. He saw Officer D attempt to engage with AO for a couple of seconds, but he could not remember what Officer D said.

- 7.62 In his public examination, Officer E described AO as marching up to Officer D which, he said, required Officer D to perform a check drill. He had not mentioned this occurrence in his private examination or in the COPS entry he made about the event although the use by Officer D of the check drill was highly relevant, because it was something that would justify the use of the OC spray. His explanations for these omissions (he had forgotten about it and was guided by Officer D, who did not mention it) are not credible.
- 7.63 Officer E said AO again approached Officer D, who said something like, *"Get back or you will be sprayed"*. Officer D was about 1 metre or 1½ metres away from AO whilst Officer E estimated he was about 5 metres away from AO.
- 7.64 Officer E described the area as *"lit, but I would not say well-lit"*, and agreed that he could make out the features of faces quite clearly.
- 7.65 Officer E heard Officer D say something to the effect of *"Get back or you'll get a face full of this"*. The OC spray by Officer D was activated within 1 or 2 seconds of the warning.
- 7.66 Officer E stated he would not describe AO as large. Indeed, compared to both Officer D and Officer E, he was much smaller, both in height and weight.
- 7.67 Officer E was asked: *"Given the proximity of he and Officer D to AO, was it not an easier and safer option to attempt to grapple with him at the time, rather than operate the spray?"* Officer E answered: *"Not necessarily"*. When asked why, he said, *"A punch had been thrown, we were in danger, there was no need for us to put ourselves in that situation"*. He said he could *"possibly"* have converged on AO quickly.
- 7.68 When asked to articulate the series of events, Officer E stated that what happened was Officer D performed a check drill on AO, who then came forward attempting to punch Officer D and the OC spray was used. Officer E agreed that the punch was a wild roundhouse sort of punch, which went nowhere near connecting.
- 7.69 The use of the OC spray agitated AO and his yelling became louder. Officer E received a waft of OC spray and was not able to see what was happening for about 5 or 10 seconds. Officer E estimated that the period of time between the use of the OC spray and the deployment of the Taser was between 15 and 20 seconds.
- 7.70 AO then came towards Officer E, who yelled *"Taser"* and immediately thereafter deployed it. He called out *"Taser"* as a warning to the other police officers in the vicinity that there was a Taser in operation. Officer E thought that at that point in time there was an attempt to handcuff AO by Officers C, D and B.

- 7.71 When the Taser was operated, it had an immediate effect upon AO. He screamed in pain and immediately fell to the ground. When Officer E gave evidence in his private examination, he thought that AO was handcuffed at that time but at the public hearing, he stated that he thought he was mistaken in relation to that evidence.
- 7.72 After the first deployment of the Taser, Officer E did not have a clear vision of AO or Officers D, B and C, who were grappling together, because whilst attempting to replace the cartridge on the Taser he had accidentally tasered himself. When he next looked at what was happening, AO was on his feet. Officer E then heard the sound of a baton strike and AO was on the ground once again and the other three Police officers were once again grappling with AO. Officer E was the last of the four to get there because he was re-holstering the Taser. At this time, attempts were being made to handcuff AO.
- 7.73 Officer E stated that at this point in time his memory was that AO was definitely on his stomach. He stated: *"I remember him being on his stomach; that was my memory."* When asked to look at the recording carefully, Officer E stated that he believed AO to be on his side at the start of it.
- 7.74 Officer E claimed in his private examination that he was using the baton as a lever to attempt to gain access to AO's hands which he was holding under his body whilst he lay on his stomach. It is clear that this evidence, given with elaboration, was not correct. Nothing like this occurred.
- 7.75 Officer E was played the recording and asked to comment at particular points in time as to why he used the baton and why the particular number of strikes. When questioned as to the need for the number of baton strikes administered, Officer E said he considered AO violent and very confrontational. When it was suggested that, at that point in time, he was being restrained by four police officers, he answered *"with great difficulty"*. When asked whether one baton strike might have caused AO to be compliant, he answered that he did not know. When asked why he hit AO so many times, he replied *"I felt the need to have him restrained"*. When asked whether it made any difference whether one strike or four strikes were administered, he answered *"I was of the opinion that it required more than one"*. Officer E admitted that he never told AO the reason for the strikes, nor did he give AO an option of making a decision as to whether AO wanted more pain and more baton strikes. Officer E accepted that there was no consistency in his strikes: on one occasion there was four, on a second occasion five, and on some occasions there was only one.
- 7.76 Officer E was asked why he administered 5 baton strikes in quick succession when AO was on the ground and Officer D was attempting to place handcuffs on him. The following exchange took place:

"Q: Why did you hit him 5 times?"

A: I think it needed five to have the desired effect. I think previously it showed that numerous worked.

Q: *What were you trying to achieve?*

A: *We needed him – we had to get him restrained.*

Q: *I'm asking what you were trying to achieve with those blows? What did you want from him?*

A: *Did I want from him?*

Q: *Yes.*

A: *He needed to be compliant and he needed to be restrained. That's what I wanted from him.*

Q: *Wouldn't you just administer one blow and then see whether that had the desired effect?*

A: *In my experience, one doesn't have a great deal of...*

Chief Commissioner: *What experience did you have of using these blows?*

A: *I've used my baton numerous times over the years, unfortunately.*

Q: *I see. And you found five is usually necessary, is it?*

A: *No, and there's no consistency with my number of strikes there.*

Q: *Here, did you ever say to him, before these blows, "Settle down or I'll have to hit you" – did you say that?*

A: *No.*

Q: *So, so far as he was concerned, he was getting these blows because you just wanted to inflict some pain on him?*

A: *That's not the case.*¹⁸

7.77 Later in evidence Officer E was asked the following:

"Chief Commissioner: Let's just think of what is happening here. You've got a young guy and it's agreed that he's not acting rationally, right, and we have got a situation where you are inflicting a fair amount of pain; correct?"

A: *Correct.*

¹⁸ Evidence of Officer E, Public examination 29 March 2018 at T404-405.

Q: *And what is the natural response of someone who is having pain inflicted – isn't the natural response they are going to try and escape whatever it is that is causing them the pain?*

A: Yes.

Q: *And isn't it likely, if you were doing it in this situation, it's going to lead to bodily movements in an attempt to either get comfortable or somehow avoid the hitting?*

A: This...

Q: *Isn't that to be expected?*

A: Yes, yes.

Q: *So the fact that he's moving around after your blows can be an effect of the blows, not what you are trying to do, which is to stop him from moving around; do you see?*

A: I see. It was...

Q: *Isn't that just common sense, officer?*

A: *I like to think I have common sense. It was a very volatile and very difficult situation.*¹⁹

7.78 Officer E agreed that AO appeared to be irrational and his understanding would therefore be limited. He did not initially strike AO just once with the baton to see if this gained compliance but, instead, used a sequence of four strikes. When put to him that one baton strike could well have been sufficient, Officer E answered: *"Perhaps it may have been sufficient"*. When asked why he did not investigate the situation by only hitting him once and seeing whether that worked, Officer E stated: *"I deemed that many strikes necessary"*. When asked why he expressed that view, he answered *"That was my opinion"*.

7.79 Officer E agreed that he would not describe AO as large and was a much smaller person to both himself and his partner in both height and weight.

7.80 Officer E stated he never considered how many baton strikes he was going to administer at any point and he did not count the strikes. He agreed he had used his full strength. He did not make a conscious decision to hit AO five times, it just happened. When asked why he stopped at five baton strikes rather than 6, 7 or 8, he indicated at that point AO had stopped wriggling and stopped attempts to be restrained. When asked whether his decision to strike AO for as long as he was moving was a conscious decision, Officer E stated no, he was administering baton strikes *"until we had gained control of him"*. When asked whether it ever occurred to him that he might tell AO why he was being struck, Officer E stated *"No it did*

¹⁹ Evidence of Officer E, Public examination 29 March 2018 at T 425.

not occur to me". When asked after he finished hitting AO he could have said something along the lines of *"If you are moving around I'm going to hit you"*, Officer E agreed with that proposition and agreed, on reflection, he should have said something like that.

- 7.81 Officer E agreed that the evidence that he gave during his private examination that the blows were administered to facilitate getting AO's arm from under his stomach was incorrect because the recording showed clearly that this was not the case. Officer E was asked whether he agreed that the proposition that he was about to be overcome by AO was difficult to accept, he responded that AO was very violent and at no point did he feel that the police had control of him.

Officer A

- 7.82 Officer A²⁰ was a Sergeant and had been a member of the New South Wales Police for 28 years.
- 7.83 On 11 January 2018 he was the officer in charge of the Byron Bay Police Station. His duties involved general supervision of the shift and also duties as Custody Manager for any persons detained at the Station.
- 7.84 His training consisted of attending a number of courses, before he was confirmed as a Sergeant. He attended a one day Custody Workshop which qualified him to perform the role of Custody Officer and in approximately 2012 he undertook a safe custody course at the Goulburn Police Academy that extended over a number of days.
- 7.85 He was aware of a call being received at the police station in respect of a naked male acting inappropriately in the vicinity of the Nomads Backpacker Hostel. He was aware police were dispatched to deal with the issue and that a male person had been taken into custody after having been sprayed and tasered.
- 7.86 Officer A went out to meet AO, who arrived at the police station in the back pod of a police truck. AO was handcuffed to the front, squirming and highly agitated, very sweaty and in obvious distress. He was yelling out and screaming, *"I want some water"*. To entice AO out of the vehicle, he told him that if he came out of the vehicle slowly he would be provided with some water. He did not come slowly with Officer A and water was not provided.
- 7.87 Officer A stated that another reason water was not provided was that, he understood that young persons who have taken amphetamine type substances, have died of water intoxication. He had also been a drug investigator in the past, worked at music festivals and spoken with medical professionals at music festivals.
- 7.88 With the assistance of other police officers, Officer A extracted AO from the police vehicle and walked him into the station, where he was placed in the dock area. It was small and did not allow him to fully lie down.

²⁰ Private examination of Officer A 2/3/18; Public hearing 27/3/18 at T 119-148.

(unbeknown to any of the officers, AO had suffered a broken rib, which must have been extremely painful, quite apart from the pain from the numerous baton strikes).

- 7.89 An ambulance had been called to the police station for the purpose of transporting AO to the Tweed Heads Hospital. AO's mental and physical condition needed to be assessed. Officer A examined AO himself and saw marks he described as red welts, which had obviously been caused by hits with a baton. He could not remember seeing any bruising.
- 7.90 Officer A stated that he had made the decision not to admit AO into his custody but that, as an interim measure, he thought it was safest to bring him into the station under observation of the CCTV camera, instead of leaving him in the pod. He also felt it would be safer to transfer him into the care of the Ambulance Service if he was in the dock.
- 7.91 Officer A agreed, notwithstanding the above, that AO was in restraint in custody, although it was never Officer A's intention to detain him any longer than until the arrival of the paramedics. Officer A was aware of provisions which govern the treatment of persons detained at police stations and he was aware that one of those provisions required the Custody Manager to open a Custody Record in such circumstances.
- 7.92 Officer A's explanation for not opening a Custody Record was that his first focus was the management of AO, focusing on his condition and ensuring that he was monitored appropriately. A further reason given as to why Officer A did not generate a Custody Management record was that it would require a field arrest form to be filled out. This required the entering of the details of the person and at the time AO was in custody at the police station, AO's identity was unknown.
- 7.93 Officer A said he did not attempt to provide any clothing or a towel to AO because he was concerned of the risk that AO may self-harm. He conceded, however, those risks were illusory because there were six police officers on duty at the Byron Bay Police Station at the relevant time and there would have been no difficulty in keeping AO under direct observation for the period of time that he was at the station prior to being released into the care of the paramedics.
- 7.94 Officer A stated he did not provide clothing as he did not think that that would in any way help AO "*as he was burning up*" at that time. As a further explanation as to why he did not provide AO with blankets or some form of covering in the cell, Officer A stated that he was concerned that if the door to the dock was opened, there was a risk that AO would engage in another confrontation. He understood there was a need to preserve the dignity of a person in AO's situation, but he did not wish to risk opening the door to engage AO until the paramedics were present with sedation ready and a number of officers there to restrain him.
- 7.95 When asked whether he was aware that the paramedics, on arrival at the Tweed Heads Hospital, filled out documentation that referred to AO's name and also some contact details in relation to his mother, Officer A stated he was never aware of that.

- 7.96 Officer A said AO was incoherent, shouting and not responsive. He agreed that AO was in obvious discomfort and did not show any signs of aggression.
- 7.97 Officer A agreed that there were six officers present at the Police Station and at least five of them who appeared before the Commission could all be described as fairly tall, well-built individuals, whilst the young person was fairly slight.
- 7.98 Officer A stated there was no delay in him advising his Command Superior of the incident and that he forwarded a “SITREP” detailing the incident to his Commander at 5.03am.

8. POST PUBLIC HEARING MATERIAL

The Christmas Day Incident

- 8.1 The Commission heard evidence from Officer B that, when the call about a naked male acting strangely was received, he thought it was very similar to an incident which had occurred a few weeks earlier and that the earlier incident was on his mind when he attended Lateen Lane.
- 8.2 Officer B gave the following evidence in his private examination:

“[Officer C] and myself were in the process of finishing our shift at three o’clock. Due to the nature of the job, being a naked male, we had another incident two weeks prior to that related to a naked male who had jumped through the police car. We thought it probably wise if two cars attend in the event that the male is affected by the same illicit drugs that we dealt with two or three weeks prior to that incident.”²¹

“The first thing I did, given the circumstances on Christmas Eve where the naked male had opened up the passenger driver’s seat and pulled out the senior constable who was sitting in it, as a precautionI locked my passenger side door in the event that I couldn’t be ambushed as I’m driving there.”²²

- 8.3 Officer B gave similar evidence about the incident which he described as occurring on Christmas Eve at the public hearing.²³ In addition, when questioned about what was occupying his mind during the incident with AO, Officer B said:

“On the evening of Christmas, I was involved in the extraction of a male – naked male from the back of a truck. He too was covered in sweat. As we had opened the door – he was cuffed prior to that incident – he had dove head first into a police car, smashed the window and then went across to the passenger side, head butted that window and then dragged the passenger out of that vehicle. On the return to the station, I was involved in the extraction from the back of the pod into the cell. It was

²¹ Private examination of Officer B 2/3/18 at T8.

²² Private examination of Officer B 2/3/18 at T10.

²³ Public hearing examination of Officer B 27/3/18 at T204.

the exact same look of this male that I extracted from the pod that I was dealing with a few weeks later ... It's a look I've never seen before. I've been in Byron for six and a half years, I've never used my baton once. I've never dealt with this type of behaviour before. It's a behaviour and a look that I can't explain. It's scary."²⁴

- 8.4 After the conclusion of the public hearings, the Commission conducted further enquiries in relation to the incident to which Officer B had referred. That incident occurred at about 10.55 pm on 25 December 2017, at the southern carpark of the lighthouse on Lighthouse Road, Byron Bay. The COPS event²⁵ recorded that two police officers attended after receiving calls that a 23-year-old male was threatening to kill himself. Upon seeing the police vehicle, the male ran at the police vehicle and threw himself headfirst over the bonnet of the vehicle and into the front windscreen. This smashed the windscreen and caused the shattered glass to cover police who were still seated in the vehicle. The male jumped up and kicked the windscreen and then jumped off and attacked the wound up passenger's side window by head butting and punching the glass. The male then opened the passenger door and stood there in an apparent "possessed state"²⁶ spitting and frothing at the mouth. He then lunged at one of the police officers who then deployed a Taser. This had little effect on the male.
- 8.5 A physical altercation then ensued with the man punching the police officers. The police began to physically fight with the man. The fighting and wrestling with the male continued for a considerable period of time and the police officers were only able to finally secure and place him in the caged area of a police truck with the assistance of the male's 4 friends. Those friends had in fact called the police to the scene as they had become very concerned about the male's behaviour.
- 8.6 The male was then conveyed to the Byron Bay Police Station. He continued to be extremely aggressive and, hence, was not removed from the rear of the police truck for some time. He was assessed by New South Wales Ambulance officers and deemed fit for custody. The male and his friends told police that he had used prohibited drugs, namely LSD. When the drug wore off, the male was transferred to a cell.
- 8.7 The male person was subsequently charged with a number of offences, including malicious damage, two counts of assaulting police and resisting arrest, to which he pleaded guilty.

Expert Opinion - Professor Duflou

- 8.8 A report by Professor Johan Duflou, consulting Forensic Pathologist, was obtained after the conclusion of the public hearing.²⁷ Professor Duflou was asked to express an opinion as to whether the fractured rib sustained by

²⁴ Public hearing examination of Officer B 27/3/18 at T223-224.

²⁵ COPS Event no. 66267845.

²⁶ Ibid.

²⁷ "Expert opinion - Operation Tambora - injuries sustained by AO", Prof J Duflou dated 18 May 2018.

AO was caused by the baton strikes. A supplementary report was obtained after Officer E's legal representative requested clarification of some matters.²⁸

- 8.9 In his initial report, Professor Duflou expressed the opinion that it was likely that AO sustained the fracturing of the lateral aspect of the 8th rib at the time of the altercation, as depicted in the mobile telephone footage, likely as a result of compressive force applied to the chest with a shod foot or similar. He did not, however, exclude as a reasonable possibility that one or more blows with a baton or one or more impacts with a surface or surfaces at any time prior to or after the depicted altercation resulted in a fracturing of the rib.
- 8.10 In his supplementary report, the Professor confirmed the view he had come to in his original report, that the bruising and abrasions to AO's body could be entirely and reasonably explained on the basis of the events during the arrest. With reference to the rib fracture, the Professor expressed the view that it remained entirely possible for the fracture to be sustained at some time prior to the arrest, although he again stated the activities depicted in the arrest footage can be reasonably expected to have resulted in the fracturing of one or more ribs.

Use of Force Report

- 8.11 The Commission requested a report from an expert Weapons and Tactics policy officer within the NSW Police Force (NSWPF) addressing, *inter alia*, the following:
- a) whether the use of force was reasonable prior to handcuffs being placed on AO;
 - b) whether the use of force was reasonable as a distraction technique while handcuffs were being placed on AO;
 - c) whether the use of force was reasonable once handcuffs had been successfully placed on AO.
- 8.12 The expert was provided with the mobile phone footage and transcript of the audio. He was not provided with any of the evidence given to the Commission by the police officers during the private examinations and public hearing. He expressed the following opinions, based on the material provided to him and taking into account NSWPF Policies and Guidelines as to use of weapons:
- a) it would appear that the use of the baton prior to handcuffs being placed on AO was not in accordance with the criteria for use;
 - b) it would appear that the use of the baton as a distraction technique in the circumstances was inappropriate and not in accordance with the criteria for use;
 - c) it would appear that, once AO was successfully handcuffed and apparently under control, the use of the baton in the circumstances was inappropriate, and, not in accordance with the criteria for use.

²⁸ "Supplementary Report", Prof Duflou dated 20 June 2018.

- 8.13 In making its findings, the Commission has taken into account the opinions expressed in the report bearing in mind the explanations for their conduct given by the involved officers in the context of the circumstances.

9. SUBMISSIONS

Counsel Assisting's Submissions - Summary

- 9.1 Counsel Assisting submitted that the Commission should find that the use of both the OC spray and the Taser in subduing AO were unreasonable as they were both undertaken prematurely and without sufficient attempts first being made to establish some form of dialogue with AO to take him peacefully into custody or to physically restrain him.
- 9.2 However, Counsel Assisting also submitted that it could be reasonably accepted that the actions of the responding police were very heavily influenced by apparent similarities between this incident and the Christmas Day incident although with the important difference that the latter clearly involved a violent confrontation from the outset, whereas, on the totality of the evidence given before the Commission inquiry, there was no such violent conduct engaged in by AO. Notwithstanding this difference, in the circumstances, the conduct of the officers in relation to the use of the OC spray, the deployment of the Taser and the use of the baton by Officer B to restrain and bring AO to the ground, though more forceful than objectively necessary, was explicable on this basis.
- 9.3 Counsel Assisting submitted that no adverse findings should be made against Officers A, B, C and D.
- 9.4 Counsel Assisting submitted that the conduct of Officer E with respect to his use of the baton was to be contrasted to that of the other police officers involved in restraining and detaining AO.

Officer A

Counsel Assisting's Submissions

- 9.5 It was the submission of Counsel Assisting that the conduct of Officer A as Custody Manager of the Byron Bay Police Station at all relevant times did not amount to police misconduct. Whilst no water nor blankets nor clothing were provided to AO whilst he was detained, the explanation given by Officer A that he was only going to be detained for a short period of time until he was sedated and transferred to the Tweed Heads Hospital, that giving him water might have been dangerous, as might have been giving him a blanket or clothing, is reasonable in the circumstances.

Officer A's Submissions in Response

- 9.6 Officer A's legal representative informed the Commission that Officer A accepted the conclusions and recommendations of Counsel Assisting with regard to his role in the matters the subject of Operation Tambora and he did not wish to make either oral or written submissions to the Commission other than to adopt Counsel Assisting's recommendation.

Officer B

Counsel Assisting's Submissions

- 9.7 Counsel Assisting submitted that there was some difficulty in accepting Officer B's explanation for the need to administer the baton strike to AO's left forearm. He also noted that, as far as the baton strike to the left knee was concerned, given the number of police officers in the immediate vicinity at the time, there were other options open that could have been used to bring AO to the ground by physical force, either alone or in conjunction with the other police officers.
- 9.8 Counsel Assisting submitted that, once the OC spray and the Taser were deployed, it was most likely that the only way AO was going to be taken into detention was by physical means. This probably justified the baton strike administered by Officer B to AO's left leg to bring him to the ground. The allegation by Officer B that other strikes were administered to attempt to detain him because of his zombie-like state did not fit with what was observed and heard on the recording which portrayed AO's actions and responses a very short time later. The use of the baton by Officer B at that time, however, could be reasonably explained as an action taken "*in the agony of the moment*".
- 9.9 It was the recommendation of Counsel Assisting that no further action be taken in relation to Officer B.

Officer B's Submissions in Response

- 9.10 It was submitted on behalf of Officer B that he supported Counsel Assisting's point that it was important to bear in mind the applicable law as to what was reasonable force and that regard should be had to the pressure of events, the agony of the moment, turmoil and panic. In such circumstances police officers rely on their own previous experience and what they have learned in their training and acquired knowledge.
- 9.11 Officer B submitted that, prior to the incident involving AO, there were a number of arrests involving the use of LSD in the Byron Bay region. Of particular note was the Christmas Day incident. Officer B was involved in this incident in extracting the arrested person from the police van at the police station. This incident was very distressing to Officer B and one not previously experienced by him. It was likely that this had a significant effect on Officer B. He observed some similar features involving that arrested person that were common with AO, notably the sweating, nakedness and non-responsiveness. Officer B ascribed these observations to overheating to the body due to use of ice and believed the effect of the drug in AO was about to peak.
- 9.12 This is likely to have heightened Officer B's perception of the risk level in dealing with AO. To his knowledge, around the time he was getting out of the police van and obtaining his baton, the OC spray had been discharged and the Taser gun deployed. Accordingly, Officer B formed the opinion that the risk of violent confrontation was imminent or occurring or likely to occur. This was in Officer B's mind when he saw AO looking towards him

but not acknowledging his presence which made him fearful of being attacked or overpowered.

- 9.13 It was in these circumstances that Officer B struck the arm of AO. In his evidence there may have been a second strike, but he was not sure. In any event this had no effect and he applied a strike to the knee which brought AO to one knee (or possibly to both knees). Although AO was responsive on the recording, that was after a short time following the administration of these strikes. It is important to bear in mind that at the time Officer B administered the strikes AO appeared to be unaffected by the Taser. Also it was a very short time after Officer B arrived on the scene. The heightened assessment of risk factors was reasonably based on his information at the time.
- 9.14 It was submitted on behalf of Officer B that the Commission should find that Officer B's observations were likely heightened due to his experience of the Christmas Day incident, and with the limited information and observation at the time, the actions of Officer B were explicable.
- 9.15 It was further submitted on behalf of Officer B that the Commission should find that the strikes administered by him were appropriate in the circumstances. It was submitted that the Commission findings should reflect the following: *"The use of baton by Officer B at the time could be reasonably explained as action taken based on his observations limited to the lack of effect of the OC spray, Taser gun and the fear that AO may overpower him."*
- 9.16 Officer B agreed with Counsel Assisting's submissions that no action should be taken against him in relation to the baton strikes on the forearm and that the one strike by Officer B seeking compliance during the handcuffing did not amount to police misconduct.
- 9.17 In relation to the bad language by Officer B, it was accepted that he used the word *"cunt"*. It was submitted that the Commission should not adopt the Counsel Assisting's observations that, *"The attempt at an elaborate explanation for denial is quite another."* First, Officer B gave evidence that his recollection of *"couple of things - wasn't quite clear and I am unable to retain some of the crucial information"*. Secondly, other witnesses who also could not recall certain events or their recollection was not in accordance with the recording. This showed the difficulty of observing every detail and recollecting every conversation that occurs in a heightened event as this one. Thirdly, while the apprehension was happening, a number of events were occurring. All officers were on full alert and focused on putting the second set of handcuffs on AO. It was easy not to recall all conversations exactly. Fourthly, Officer B was likely to be influenced by the events of Christmas evening. It was submitted that his evidence was based on his belief based on his memory and thoughts. Obviously it proved to be wrong. It was submitted that the Commission should accept that Officer B gave his evidence based on his memory truthfully but the recording showed that his recollection was incorrect.

Officer C

Counsel Assisting's Submissions

- 9.18 Officer C was not involved in the OC spray, nor the Taser, nor in any use of his baton. It was the submission of Counsel Assisting that there was nothing in his conduct that required any further action.

Officer C's Submissions in Response

- 9.19 Officer C, through his legal representative, accepted the conclusions reached by Counsel Assisting, namely that Officer C was not involved in the use of the OC spray, nor the use of the Taser, nor in any use of his baton. It was submitted on behalf of Officer C that the Commission should also reach further conclusions to the effect that Officer C was not involved in the making of any decision by another officer to: deploy OC spray; to use the Taser; to use batons; nor the number of times the batons were used.
- 9.20 Officer C agreed with Counsel Assisting's submission that the Commission should conclude that there was nothing in Officer C's conduct that required any further action.
- 9.21 Officer C's legal representative further submitted that given the general scope and public purpose of Operation Tambora was to investigate whether any New South Wales Police Officer engaged in criminal conduct or serious police misconduct, it would be appropriate for the Commission to reach a definitive finding in relation to the conduct of Officer C to the effect that Officer C did not engage in serious misconduct, police misconduct or criminal conduct. Further, the Commission should find that Officer C, in the performance of his duties, lawfully used such force as was reasonably necessary to exercise his official functions in accordance with sections 230 and 231 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Officer D

Counsel Assisting's Submissions

- 9.22 Counsel Assisting submitted that, whilst Officer D could be accused of prematurely using OC spray, which may have precipitated the unfortunate series of events, any error on his part was, at the worst, an error of judgment which could be easily explained by his fear of a repeat of a violent confrontation such as occurred on Christmas Day 2017.

Officer D's Submissions in Response

- 9.23 Officer D, through his legal representative, informed the Commission that in light of the submissions made with respect to his role in the incident, he would not be making any written or oral submissions in reply.

Officer E

Counsel Assisting's Submissions

- 9.24 Counsel Assisting submitted that the conduct of Officer E fell into a different category to that of the other police officers. The mobile phone footage clearly showed AO on the ground being restrained by three police officers, all of whom appeared to be physically bigger than him. Whilst in this position, AO was subjected to a large number of baton strikes, almost all of them administered by Officer E.
- 9.25 At the private examination, Officer E gave evidence that the baton strikes were justified in an attempt to get AO's hands out from under his body as he was lying on his stomach. This was clearly not the case and, once he had the opportunity to view the mobile phone footage shown at the Commission hearing, Officer E changed his evidence in that regard.
- 9.26 Officer E was given the opportunity of justifying the use of his baton, in particular the decision he made as to the number of strikes administered. His response was that he administered that number of baton strikes to gain AO's compliance with directions.
- 9.27 Even if one were to accept that that was an appropriate reason for administering baton strikes, the number administered was excessive and not required in the circumstances. A number of the baton strikes were administered at a time when AO was handcuffed and effectively under the control of the police officers. It was submitted that Officer E's use of force was deliberate and went significantly beyond a mere error of judgment in the heat of the moment and thus it was unreasonable. Counsel Assisting submitted that it was such a departure from the appropriate standard of behaviour as to constitute serious misconduct warranting disciplinary consequences.
- 9.28 Counsel Assisting submitted that the Commission should form the opinion that consideration should be given to the taking of action against Officer E under section 181D of the *Police Act 1990* or, alternatively, to the taking of action against Officer E under section 173 of the *Police Act 1990*.
- 9.29 It was also the submission of Counsel Assisting that the Commission should consider obtaining the advice of the Director of Public Prosecutions with respect to Officer E's conduct and whether any further action might be appropriate.

Officer E's Submissions in Response

- 9.30 In response, it was submitted on behalf of Officer E that with the benefit of hindsight and detachment from the actual circumstances confronting the police officers at the time of the incident on 11 January 2018 there may well have been several options which were available to Officer E other than the use of the Taser and the baton. Officer E conceded during his evidence that in one respect he could have taken different action on that morning of 11 January 2018. However, that did not mean that the actions of Officer E were unlawful or totally unreasonable.

- 9.31 It was submitted that the inferred knowledge of the Christmas Day incident of each of the police officers involved must have impacted on each of their perception of the actual and or potential threat that AO presented to them.
- 9.32 Prior to Officer E deploying the Taser, AO had been subjected to the use of OC spray. As far as Officer E was concerned, the usual or desired effect of the OC Spray had failed. In those circumstances it was submitted that the use of the Taser was not premature as submitted by Counsel Assisting.
- 9.33 It was also submitted that considered in isolation, the use of the numerous baton strikes by Officer E may prima facie be excessive. However, from Officer E's perspective, the use of OC Spray and the Taser had not had the desired effect on AO. The decisions made by Officer E as to the use of the baton strikes should not be judged solely on the basis of detachment and hindsight from the difficult and confronting situation that existed in Lateen Lane in those early hours.
- 9.34 Officer E's legal representative noted that there would always be differing views as to what was reasonable. It was conceded that Officer D expressed an opinion which was contrary to Officer E's position. However, the existence of a differing opinion as to what was reasonable was not conclusive.
- 9.35 It was further submitted that the conclusions reached by the expert in the Use of Force Report were at odds with other statements made in that report and were thus unreasonable. Whilst it might be said that at first blush the opinions expressed by the use of force expert generally supported the submissions of Counsel Assisting, it was submitted that a more detailed analysis would cast doubt on that statement and that the Commission needed to give careful consideration before making any finding of fact based on the opinions expressed therein.
- 9.36 Given the requisite standard of proof, it was further submitted that the opinions of the use of force expert should not play a significant role in respect of any findings of fact that the Commission reached or any recommendations that would be based thereupon.
- 9.37 It was submitted that the Commission should not find that Officer E's actions on 11 January 2018 constituted serious misconduct as defined under the LECC Act.
- 9.38 It was submitted on behalf of Officer E that the evidence did not justify an adverse finding such that a recommendation should be made by the Commission that advice should be sought from the Director of Public Prosecutions with respect to the prosecution of Officer E for a specified criminal offence.
- 9.39 It was further submitted on behalf of Officer E that the Commission should not express an opinion that consideration should be given to the taking of action against Officer E under section 181D or alternatively, under section 173 of the *Police Act 1990*.

10. EXCESSIVE USE OF FORCE - THE LAW

- 10.1 Section 230 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) makes it lawful for a police officer in the execution of his duty such as an arrest “*to use such force as is reasonably necessary to exercise the function.*”
- 10.2 Section 231 of LEPRA provides that a police officer who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.
- 10.3 In *Woodley v Boyd*,²⁹ the Court of Appeal considered, inter alia, whether excessive force was used by police during an arrest. By way of background, the facts of the case are that the appellant was stopped by police after they recorded his vehicle as exceeding the speed limit and also that it was fitted with a radar detector. An altercation ensued which resulted in the breaking of the appellant’s arm whilst he was being handcuffed. The appellant sued the police in the District Court for unlawful arrest, assault and malicious prosecution. The trial Judge accepted the police version of events, finding that the arrest was lawful and fully justified and no undue force was used. Thus, the appellant’s claims failed and he subsequently appealed that decision. Heydon JA dismissed the appeal (Davies and Foster AJJA concurring). Of relevance, Heydon JA stated at 37 that:

“According to some writers, at common law, which applied in New South Wales, a person effecting an arrest may use whatever force is ‘reasonable’ in the circumstances... or ‘reasonably necessary’ (Wiltshire v Barrett [1966] 1 QB 312 at 326, 331). Thus if the arrestee offered resistance, the arrestor could increase his force in proportion to the force of that resistance’ ... A more elaborate test has been propounded in the context of whether the killing of a felon in the course of committing a felony is a justifiable homicide, or manslaughter, or murder. It was put thus by the Full Court in R v Turner [1962] VR 30 at 36:

When a felony is committed in the presence of a member of the public, he may use reasonable force to apprehend the offender or for the prevention of the felony. What is reasonable depends upon two factors. The officer is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (ie the commission of a felony or the escape of the felon).

It may perhaps be questioned whether the tests stated apply where the arresting party causes injury to the arrested party, as distinct from death. However, for present purposes it is convenient to assume, as counsel for both the plaintiff and the defendants did, that R v Turner states the law in

²⁹ [2001] NSWCA 35.

that context as well. In evaluating what is reasonable, necessary or reasonably necessary the duties of police officers must be remembered. In *Lindley v Rutter* [1981] QB 128 at 134 Donaldson LJ said:

It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case.

The same duties and considerations apply where a police officer is deciding how to effect an arrest. And, in evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight. In McIntosh v Webster (1980) 43 FLR 112 at 123, Connor J said:

Arrests are frequently made in circumstances, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in then comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances."

- 10.4 *Woodley v Boyd* has been followed in many subsequent cases. The meaning of "reasonable force" was considered in *Makri v State of NSW*,³⁰ in which Gibson J cited *Woodley v Boyd* and noted that:

"The question is what information is available at and before the time of arrest (NSW v Zreika [2012] NSWCA 37 at 47) and the whole of the circumstances must be taken into account, as Heydon JA noted."

- 10.5 Hulme DCJ considered the question of excessive use of force in *R v Murray*.³¹ It was found that after the accused was informed that he was in breach of bail (which was a mistaken belief on the part of the two police officers but reasonable in the circumstances) and would be arrested, "there was an escalating level of violence. The actions of the police started with talking and progressed to holding, kneeing, punching, spraying, and then striking with a baton. None of these actions seemed to have any effect at all upon the accused." Ultimately, the accused was able to break free and escape lawful custody. His Honour was satisfied that "the violence emanating from the police was in response to their inability to restrain and

³⁰ [2015] NSWDC 131.

³¹ [2008] NSWDC 226.

detain the accused because of the increasing level of resistance he was offering.” Hulme DCJ was satisfied that the police actions remained within the concept of “*reasonable force*” in the circumstances that prevailed.

- 10.6 The Commission must consider the following when determining whether reasonable force was exercised by the police officers in restraining and detaining AO:
1. Did the officer ‘reasonably believe’ that the force that he or she exercised was necessary? and
 2. Would a reasonable person in the same position as the officer believe that such force was proportionate to the suspect’s actions?

11. FINDINGS

- 11.1 It is always difficult in circumstances such as the present to arrive at satisfactory detailed conclusions about particular actions and events, since not only are they taking place rapidly but also the witnesses view them from differing perspectives and with different frames of mind and levels of emotional involvement. The last of these is particularly important where what is happening involves not only physical confrontation but genuine fear and trepidation. Furthermore, problems with initial observations are adversely affected as time goes on given the universal frailty of memory. All these factors explain, in large part (but not entirely), why the witnesses differ so much in their narrative of events. Furthermore, some witnesses (here, the police officers) might have a significant interest to defend or maintain. Even if this does not lead to conscious manipulation of an account, unconsciously favouring apparent recollection that is in the interests of the witness to maintain is a likely risk and necessarily borne in mind when assessing credibility and reliability.
- 11.2 It is particularly important that care be taken before drawing adverse inferences to ensure that they are justifiable, having regard to the inevitable shortcomings of witness accounts and bearing in mind the considerations mentioned above.
- 11.3 In this case, the Commission’s consideration of the evidence is aided by two significant factors: first, evidence from independent witnesses; and, secondly, the audio visual record of most of the interaction between the officers and AO. Neither of these sources, of course, are without significant drawbacks. It is obvious that the accounts of W1 and W2 differ significantly about the initial interaction between AO and the police officers, not only between themselves but also as between them and the officers. The officers also differ significantly in their descriptions of what occurred at the outset. So far as the recording is concerned, although the general outline of events is clear enough, much of the detail of what happened is obscured by darkness and distance. Nevertheless, it provides a sound basis for assessing the reliability of at least some significant parts of the officers’ evidence.
- 11.4 There can be no doubt that the behaviour of AO in the early hours of the morning of 11 January 2018 warranted police intervention and taking AO

into custody. AO was naked in a public place and acting in a fashion that could only be described as highly irrational. There does not appear to be any issue that he was under the influence of drugs of some description. He might well have been a danger to others or to himself. The sight that greeted the police officers on their arrival at the Nomads Backpacker Hostel was that of a naked male person sweating heavily and acting irrationally.

- 11.5 The only police officer involved in the interaction in Lateen Lane to be involved in the Christmas Day incident was Officer B who played a part in extracting the male person from the police van into the Byron Bay Police Station. Notwithstanding this, the Commission accepts that the very distressing incident of Christmas Day, which had occurred only a short time before this incident, would have had a significant effect upon the attending police officers. It is probable that this goes a long way to explaining their conduct in dealing with AO on the morning of 11 January 2018 in the way they did.
- 11.6 The Commission accepts that the officers attending Lateen Lane feared that AO's behaviour might be similar to that of the male involved in the Christmas Day incident and they rightly thought that AO had to be restrained as a matter of urgency, notwithstanding that he was not from their point of view displaying the violent and crazed behaviour of the male in the earlier incident. This goes some way to explaining why the police officers made very little attempt to communicate with AO and in fact, commenced their interaction with AO in an aggressive manner, as attested to by W1 and W2. The OC spray was deployed within 30 seconds of arriving and shortly thereafter, the Taser was deployed. The effect of those interactions was to increase AO's discomfort and confusion. Thereafter, AO was struck at least 19 times with a baton, leaving him with extensive bruising. Whilst Professor Duflou could not discount the possibility that AO sustained the fractured rib prior to the interaction with the police officers, the Commission is of the view that it is most likely that AO sustained the fractured rib as a result of being struck by Officer E.

Officer A

- 11.7 The Commission finds that Officer A, as Custody Manager of the Byron Bay Police Station, did not engage in misconduct. Whilst AO was not provided with water, blankets or clothing during the period of time that he was detained in the police station, the Commission accepts the explanation given by Officer A that at all times his intention was that AO would only be detained in the dock for a short period of time until the paramedics arrived to transport AO to Tweed Heads Hospital. In the circumstances, the Commission finds Officer A's decisions made on the night were reasonable.

Officer B

- 11.8 The Commission finds it difficult to accept Officer B's explanation for the need to administer the baton strike to AO's left forearm. As he himself said, he had been trained in the circumstances to tell the approaching person to say something like "back off". The reason he did not do so was because he

thought AO was beyond communication and was not even acknowledging his presence. This situation is in marked contrast to that which had occurred on Christmas Day, when the intoxicated person had immediately attacked police. At the same time, with the benefit of hindsight, Officer B's judgment that AO was unlikely to take any notice of him seems justified and his failure to warn AO of his intention to use the baton is excusable even though AO did not at that time, objectively speaking, present any threat.

- 11.9 So far as the baton strike to the left knee is concerned, given the number of police officers in the immediate vicinity at the time, the Commission is of the view that there were other options available that could have been used to bring AO to the ground by physical force, either alone or in conjunction with the other police officers. Even so, since physical force of much the same degree would have been necessary in either event, it cannot be said that the availability of another reasonable approach made the approach actually taken unreasonable. The appropriate conclusion is that Officer B's use of his baton was justified.
- 11.10 As already mentioned, audio of the mobile phone recording clearly records Officer B using the word "*cunt*" and Officer B's self-serving explanation that it was the way he said "*come on*" cannot be accepted. However, the Commission acknowledges that in submissions in response, Officer B conceded that he used the swear word when addressing AO and he was mistaken when giving his evidence. The Commission does not make any adverse finding about Officer B swearing in this context or his evidence.
- 11.11 The Commission finds that Officer B did not engage in misconduct and makes no recommendation that any action be taken in relation to this officer.

Officer C

- 11.12 The Commission is satisfied that Officer C was not involved in the use of the OC spray, the Taser or his baton. He was also not involved in any decision making regarding the use of the OC spray, the Taser or the baton by any of the other police officers.
- 11.13 The Commission finds that Officer C acted reasonably and in accordance with his responsibilities as a police officer. The Commission finds that Officer C did not engage in misconduct and there was nothing in his conduct that requires any further action.

Officer D

- 11.14 The Commission recognises that there were differing accounts from the civilian witnesses as to the level of aggression being displayed by AO towards the police officers. W3 gave evidence that AO "*marched up*" to Officer D and that there was a physical meeting at some stage with AO walking "*straight into that police officer.*" W3 acknowledged that it was a "*brief*" meeting.

- 11.15 Whilst Officer E gave evidence that Officer D performed a check drill on AO, it is clear to the Commission that this did not in fact occur. This view is supported by the fact Officer D denies it and there was no mention of the check drill in the COPS event.
- 11.16 The Commission accepts that AO may have made some movement towards Officer D but that it was not a directed swing, punch or act of aggression by AO towards Officer D although the officer interpreted it otherwise. Neither W1 nor W2 saw anything resembling an attempted punch. Furthermore, to have made such an attempt appears to be at odds with everything else done by AO. Even when he was, as it were, under "attack" (as perceived from his point of view) he never either threatened or attempted to strike any officer. However, in the end, it is not necessary for the Commission to determine precisely what happened in this regard since the Commission is of the view that, at worst, the use of the OC spray (twice) was an error of judgment affected by the events of the Christmas Day incident.
- 11.17 The Commission finds that Officer D did not engage in misconduct and there was nothing in his conduct that requires any further action.

Officer E

- 11.18 The conduct of Officer E is to be contrasted with that of Officers B, C and D. Whilst there are similarities in the actions of the police in *Murray*³² to those of the police in Operation Tambora (use of OC spray, use of batons, physical wrestle), there are also significant differences. In *Murray*, it was accepted on the evidence that the accused at one point attempted to take the gun out of the holster of one of the police officers, and had in fact at one point in time managed to get his hand on the gun and start pulling at it. A violent struggle ensued and that police officer managed to get the accused to the ground but the accused continued punching. At this point, the other police officer decided to use his extendable baton, striking the accused a number of times, aiming for his legs. However, he then dropped his baton, "*realising that it was useless*".
- 11.19 This conduct is to be contrasted with Officer E's use of the baton, in circumstances where it cannot be said that AO's struggle was violent or even aimed at the police. Officer E continued to use the baton on a number of occasions, notwithstanding that it seemed to have no or little effect. In contrast to the police officer involved in *Murray*, who realised that the use of the baton was "*useless*" and so adopted other means to attempt control of the prisoner, the Commission is satisfied on the evidence that Officer E did not even consider any other options once he determined that he would use the baton.
- 11.20 Officer E maintained throughout questioning that the degree of force he used, namely the use of the baton more than 19 times, was necessary. However, he was unable to explain why so many strikes were necessary, merely stating that this was his view. It should not need to be explained that the use of physical violence by a police officer on a citizen can only be

³² Ibid.

justified as a reasonable response to specific, identified circumstances. Officer E made no attempt to explain to AO (whose shouted protests indicated that he could be communicated with) why he was striking him. In the vernacular, it is obvious that Officer E's intention was to beat AO until he complied and, even when he was handcuffed, Officer E did not desist. No doubt he subjectively believed that he was entitled to do what he was doing but objectively he acted unreasonably and with grossly excessive force. The Commission does not accept that, when AO was on the ground being held one way or another by four police officers, each of whom were significantly bigger, Officer E actually thought that that he or any of the other officers were at risk of serious injury. It should have been obvious to him, as to any reasonable person in his position, the severity and repetition of the violence, would motivate AO to attempt one way or another to escape the beating and hence to struggle all the more. This does not seem to have occurred to Officer E.

- 11.21 As distinct from the use of a baton strike as a distraction or in self-defence or defence of another from the threat of immediate physical attack, either of which would have been justifiable, Officer E's blows were, at best, inflicted to subdue AO and prevent him from struggling. Given AO's state, these purposes were most unlikely to be served and were, at all events, an inappropriate use of excessive force.
- 11.22 Moreover, Officer E's evidence explaining his conduct differed markedly between the account he gave in private examination and that which he gave in public. His evidence in private examination was to the effect that the baton strikes were justified as a distraction to get AO's arms from under his torso as he was lying on his stomach. AO was never on his stomach, and certainly not when he was being hit by Officer E, as is clearly evident from the video, quite apart from the evidence of his fellow officers. His detailed evidence in this regard is so much at odds with the facts that it is impossible to accept it was a mere error of recollection brought about by the shocking character of what was happening. When confronted with a video, in his public examination, Officer E accepted that his evidence about AO being on his stomach was wrong, and he pointed to AO being on his side for a few seconds and his arm coming out after being struck five times. (This is not in fact what the video shows as having happened. Furthermore, this evidence was in marked contrast to his account of events in private examination.) Be that as it may, Officer E continued to justify the use of the baton strikes by asserting that in his opinion they were necessary "to get him restrained" although he was never able to explain how striking AO repeatedly with the baton might assist this process. He said that it would make it more difficult for AO to escape since "a number of blows to the thigh ... can make that limb immobile". Officer E said that, at no point, did he concern himself with a number of blows, let alone count them; he simply hit AO, "as many times as I deemed reasonable – to affect him to be restrained".
- 11.23 The Commission finds that Officer E's use of his baton represented a use of grossly excessive force for which there was no justification.
- 11.24 Even if the Commission were to accept that until AO was fully restrained, the use of baton was justified, there can be no justification for Officer E's

continued use (though he denied any recollection of this) even when AO was being put into the back of the police van. Further, no reasonable person in the same position as Officer E would believe that such force was proportionate to AO's actions.

- 11.25 Officer E's use of force was unreasonable, deliberate, grossly excessive and significantly beyond a mere error of judgment in the agony of the moment. The Commission finds that Officer E's conduct amounts to serious misconduct warranting serious consequences.

12. AFFECTED PERSONS

- 12.1 In Part 2 of this report the Commission set out the provisions of section 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to "*affected persons*".
- 12.2 The Commission is of the opinion that Officers A, B, C, D and E are "*affected*" persons within the meaning of section 133(2) of the LECC Act, being persons against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.
- 12.3 The Commission makes no adverse findings against Officers A, B, C and D.

13. RECOMMENDATIONS

- 13.1 The Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Officer E for the offence of assault occasioning actual bodily harm pursuant to s 59 of the *Crimes Act 1900 (NSW)*.
- 13.2 The Commission is of the opinion that consideration should be given to the taking of action against Officer E under s 181D of the *Police Act 1990* or, alternatively, to the taking of action against Officer E under s 173 of the *Police Act 1990*.
- 13.3 A copy of this report and the identities of the involved officers has been provided to the Commissioner of Police for consideration of appropriate action.
- 13.4 The Commission will assemble a brief of evidence for consideration by the Director of Public Prosecutions in accordance with paragraph 13.1.

ANNEXURE 1

OPERATION TAMBORA

Public Examination Decision – 16 March 2018

Introduction

1. On 6 February 2018, the Channel 9 program “A Current Affair” broadcast mobile phone footage showing four police officers apprehending a young naked male in Lateen Lane, Byron Bay in the early hours of 11 January 2018. The footage showed the officers using a significant degree of force including, in particular, one officer striking the male repeatedly with a police baton. Reporters had also interviewed various community representatives who expressed serious concerns with what they understood had occurred. The young male was later identified as having been holidaying with his parents in Byron Bay at the time. He was 16 years of age. It appears he had left the premises occupied by the family to meet some friends on 10 January but had not returned home.
2. AO (a pseudonym) was ultimately handcuffed, placed in a police vehicle and taken to Byron Bay Police Station where he was detained, still naked, in the holding dock. Sometime later Ambulance Officers arrived from Tweed Heads Hospital, sedated him and placed him in the ambulance for transport to the Hospital. He said he had taken “acid”. He was released into the care of his parents on the following morning. He had sustained widespread bruising, abrasions and a fractured rib.
3. Following the TV broadcast, the Commission received 17 complaints about the police conduct, which the complainants had seen either on the Channel 9 program or Facebook. Most of the complainants were locals; they included a former President of the Byron Bay Community Association and a local youth worker as well as AO’s father. Six complaints were made directly to the NSWPF.
4. Superintendent Wayne STARLING, Commander of the Tweed/Byron Local Area Command, raised a complaint on his own initiative, which was triaged and discussed at an extraordinary meeting on 8 February 2018. This complaint was added to the NSWPF complaints system c@tsi, with the recommendation that the police actions should be investigated.
5. On 13 February 2018 the Commissioners, following consideration of the matters referred to in ss 45 and 46 of the *Law Enforcement Conduct Commission Act 2016*, decided that the Commission should exercise its powers of investigation under Part 6 of the Act to investigate whether any NSWPF officer involved in the apprehension and arrest of a 16 year old male at Lateen Lane, Byron Bay on 11 January 2018 engaged in criminal conduct or serious police misconduct.
6. Two non-police witnesses and five police officers have been privately examined by the Chief Commissioner. The officers were legally represented but the evidence of each was taken in the absence of the

others and their lawyers. There were some potentially significant differences in the various accounts. There are a number of other witnesses from whom statements have been taken who have not yet given evidence. None of the witnesses have been cross-examined. The question therefore arises, as further examinations need to be conducted, whether and to what extent, they should be held in public. If in public, it should also be determined whether closing submissions should also be made in public. Prima facie, of course, if the evidence is publicly obtained, the submissions as to its significance should also be public.

7. The Chief Commissioner sought written submissions on behalf of the officers and also from the Commissioner of Police and the Police Association of NSW on the question. Submissions were made by Mr Rowles, Counsel Assisting and provided to the parties.

Relevant Legislation

8. The power of the Commission to conduct an examination in public is contained in section 63 of the Act, which provides –

Section 63 Public and Private Examinations

- (1) *An examination (or part of an examination) may, subject to subsection (2), be held in public or in private.*
- (2) *An examination (or part of an examination) may only be held in public if the Commission decides that it is appropriate.*

Note: See section 19 (2) (c) in relation to the making of a decision under this provision.

- (3) *Despite the Commission deciding to hold an examination (or part of an examination) in public, the examining Commissioner may decide to hear closing submissions or any other part of a hearing in private.*
- (4) *Subsection (3) extends to a closing submission by a person appearing before the examining Commissioner or an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.*
- (5) *Without limiting the factors that the Commission may take into account in determining whether or not to hold an examination (or part of an examination) in public, the Commission is to consider the following:*
 - (a) *the benefit of exposing to the public, and making it aware of, serious misconduct,*
 - (b) *the seriousness of the allegation or misconduct matter being investigated,*

- (c) *any risk of undue prejudice to a person's reputation (including by not holding the examination in public),*
- (d) *whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned,*
- (e) *whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation concerned to appear before the examining Commissioner or to otherwise assist the Commission's investigation.*

The decision to hold a public examination must be made by the Chief Commissioner and at least one of the other Commissioners.

Submissions

9. On behalf of Officer E, Mr Madden submitted that there should not be a public inquiry. In answer to the submission of Counsel Assisting that it is reasonable to assume that the local community has or will engage in speculation that risks unfair prejudice to the reputations of one or more police officers in the Byron Bay area, Mr Madden submitted that this was “insignificant compared to the damage that will be done to the reputations of the involved officers if a public hearing is conducted”, arguing that a private hearing would give the officers the opportunity to address unfounded innuendo. The submission that a private hearing would not answer this issue was said by Mr Madden (as we understood it) as not reflecting favourably on the ability of the Commission to adequately inform the public of findings based on evidence given in a private hearing. He pointed out that the identities of the police and the young person are known and contended that holding a public inquiry would do nothing to bring forward any other members of the public who may wish to give evidence about what they allegedly saw. A public announcement by the Commission that it is holding a private hearing either in Sydney or in the Byron Bay area would be sufficient, Mr Madden argued, for any members of the public who wish to give evidence to contact the Commission. Indeed, a private hearing is probably more likely to encourage members of the public to give evidence than would a public hearing since, as we understand the submission, they would be able to give evidence in private.
10. In answer to the submission of Counsel Assisting that “the Incident is well known throughout the local area of Byron Bay and the subject of much public discussion”, Mr Madden points out that no material has been produced that demonstrates this to be the case and, if it existed, it should be provided so that he could respond to it. The fact that the matter is already in the public domain does not, at all events, provide a basis for ordering a public hearing. Rather, he contended, the opposite was the case. As we understand it, the reason for this is that the greater the publicity, the greater the invasion of his client's privacy. Mr Madden submitted that the public interest in exposing the matter does not outweigh public interest in the privacy of his client to the extent that there should be a public hearing as opposed to a private hearing. He concluded with the point that all the circumstances of the Incident, weighed against

the considerations in Section 63(5) of the Act, support the submission that any further examination should be held in private. He contended that the integrity, good reputation of the NSWPF and further investigation of the incident, could well be attended to by the Commission publicly announcing that it would hold a private hearing and by Counsel Assisting delivering an opening address in public prior to a private hearing.

11. Mr G Willis, appearing for Officer D, also submitted that there should be no public examination of his client. He pointed out that the incident had already been sufficiently exposed in the public arena and argued that a public hearing would not add to the public exposure in any beneficial way. Furthermore, a public hearing would risk unfair prejudice to the reputation of his client, though he does not appear to be the officer who might have used excessive force. He has lived and worked in the Byron area for over 10 years and so far has not been publicly identified. His children attend school in a nearby community, where police are not liked. If publicly named, they may suffer some backlash. If criminal proceedings are ultimately brought, a fair trial would be prejudiced by the publicity of a public hearing at this stage.
12. On behalf of Officer C, his solicitor Mr Harris submitted that the officer ought not to be publicly examined; alternatively, if there were to be a public hearing, he ought not to be identified. On the basis of the evidence so far given by the officer, Mr Harris submitted that it is unlikely that the Commission would conclude that he had committed any serious misconduct, let alone a criminal offence, this being (he contended) a relevant consideration under para 63(5)(a) of the Act. Moreover, there was a risk of undue prejudice to his reputation, since media exposure would be unlikely to be fair, objective or accurate. The public interest in preserving his privacy, which has thus far been maintained, by not naming him would not be outweighed by the public interest in exposing the matter. In respect of the submission of Counsel Assisting to the effect that a public hearing would, in effect, provide Officer C an opportunity to give his version of events which would safeguard his reputation, Mr Harris submitted that his client did not wish to have this opportunity forced on him. He points out that Byron Bay is a small town with a relatively small permanent population, which (as we understand the point) would greatly magnify the damaging effects of public exposure of his involvement in the incident.
13. Officer B did not wish to be heard on this matter.
14. As to the Police Association of NSW, in fairness it should be pointed out that, for obvious reasons, it was unaware of the Commission's private examinations and the evidence obtained from the witnesses. However, it is aware of the context of the investigation, the location and type of incident and the number of officers involved. Given its position, it must also be aware of their identities. The Association submits that a proper regard to the factors in s63 of the Act should lead to the conclusion that any further examinations should be conducted in private and that the Commission can effectively discharge its duties and functions without resorting to public examinations. It contends that the better course would be to publicly publish a report when all evidence and submissions have been received and

assessed, and the Commission is better placed to formulate findings. In balancing the role, functions and duties of the Commission with the rights and welfare of those appearing before it, PANSW expressed “the very firm belief that any further examinations should be held in private”.

15. The Association stated, “We believe this course would be consistent with the position you and your two Commissioners articulated at our meeting with you on 18 July 2017 at your offices”. That meeting was convened as a mutual introduction of the Association’s executive team and the Commissioners and to discuss informally the general approach that the Commissioners were minded to take to the Commission’s responsibilities and, in particular, as to those matters that had been the source of particular contention between PANSW and the Police Integrity Commission. So far as conducting public hearings were concerned, the Commissioners (to summarise) indicated the approach that in the overwhelming majority of cases they were unnecessary and that they would not be held unless the public interest required it. Not surprisingly, this issue could only be discussed at a high level of abstraction since each case presents particular issues and the question of a public hearing for some or all of the witnesses requires individual consideration. It is enough to say that there is nothing in the reasoning that has led to the conclusion in the present case which is inconsistent with the approach disclosed to the Association.
16. The Commissioner of Police acknowledged the Commission’s power to hold a public hearing but submitted that public hearings should only be used in exceptional circumstances and the Commission could determine this matter without the need to move beyond private hearings. The Commissioner submitted that the object of the Act “is to promote the integrity and good reputation of the NSW Police Force, while recognising the primary responsibility to investigate misconduct rests with police” and that conducting independent private examinations is sufficient to promote public trust, so that the Commission “can be effective without the need to conduct a public hearing”, noting that it has already publicly announced that it is investigating the incident and observing that any ensuing criminal trial would be public. The Commissioner referred to the following observations by Andrew Tink AM in his *Review of Police Oversight* –

“Once an inquisitorial body commences a public hearing, it is almost inevitable that there will be significant reputational impact to so called ‘persons of interest’. It follows, in my view, that there should always be a compelling reason to embark on such a course. In the case of the new police oversight body, before doing so, the Commissioner’s Council should be satisfied that a matter cannot be determined by an examination of witnesses’ written statements, or by a private hearing.”

“Public hearings should also not become a tool for investigations of less serious conduct in a combined model.”
17. The Commissioner submitted that, although the conduct here in question is clearly serious and, if proven, could result in criminal charges and, almost certainly, disciplinary action, this did not mean that a public hearing is required. He contended that “a public hearing is akin to a trial” and the

process is “particularly stressful to those involved”. He mentioned that “the police officers involved in this incident have already demonstrated significant distress during the private hearings”. (In fact, only one did so and that was because, for personal reasons, recalling the incident itself caused distress, which was only brief.) The Commissioner referred to the experience of the NSWPF that officers called before Commissions of inquiry often bring claims for workers compensation and often suffer lifelong psychological impact. He added that the potential for reputational damage is “enormous” even if the officer is cleared of all wrongdoing. He referred to the welfare, safety and privacy concerns for the families of the officers called to give evidence, which are particularly acute in a small regional centre.

18. The Commissioner noted that the incident has been reported in the media, and is the subject of speculation in the local community, but argued that a public examination will not resolve the speculation or result in balanced media reporting. Rather, he argues, than instilling public confidence, prolonged media impacts on the ability to effectively police in a community with many challenges and much diversity and is likely to undermine community trust in police, contrary to the public interest.
19. If a public hearing is to be held, the Commissioner requested that arrangements be put in place to suppress the identity of officers giving evidence as a strategy to support officer and family welfare and conduct the hearing in Sydney rather than in Byron Bay.

Discussion

20. We agree with the Commissioner that a useful commencing point is the objects of the Act. Although the object referred to by him is, as it happens, listed first, there are a number of others, referring to the “independent detection, investigation and exposure of serious misconduct” and “[fostering] an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct...”: paras 3(a) and (g). It should go without saying that unless there is a substantial degree of public confidence in the work of the Commission, the object to which he refers cannot be effectively served. Although it is necessary, of course, to deal with the considerations referred to in s 63 of the Act they must be understood in the context of the Act as a whole, requiring attention to be given to the functions of the Commission in the ways by which the Act provides it is to or may undertake its tasks. It is worth noting also, we think, that although due attention should be given to the language of Mr Tink in his Report, the primary focus in this, as well as other areas of contention, must be the language of the Act itself.
21. In a sense, it is correct to say that, as it were, the starting position is that examinations should be held in private unless there are good reasons (described as “appropriate” in s 63(2)) to hold the examination in public. Although s 63(5) lists five relevant matters to be considered, these are expressly stated not to limit those which the Commission may take into account in determining whether or not to hold a public examination. Several of the specified factors require the consideration of the possible

advantages of a public hearing whilst others refer to possible disadvantages. Thus one of the potential advantages is seen as exposing to the public, and making it aware of, serious misconduct; another is that a public hearing might encourage persons with relevant information to come forward to assist the investigation. On the other side, are the risks of undue prejudice to a person's reputation and exposing a person's privacy. Although it is not specifically mentioned, one of the fundamental considerations relevant in deciding whether a public hearing is appropriate is the character of the functions of the Commission, in particular, ensuring that to the maximum extent practicable its processes and decisions are perceived by the public to be thoroughgoing, fair, and reasonable. It seems obvious that the public can only be assured of these matters to the extent that they are evidenced by things occurring in the public arena. In other words, if what is seen enhances public confidence in the work of the Commission, there will be a corresponding confidence in that part of the work of the Commission which must remain confidential. It does not follow from this consideration that every investigation, or even most investigations, conducted by the Commission should enter the public arena, at least in a way which identifies the police officers involved in one way or another. A public perception that the Commission is using its powers simply or mainly to provide fodder for the media could well destroy, or at least seriously undermine, public confidence in its procedures.

22. In this context, it is obvious that the Commission also must act in a way which is perceived by police officers as fairly taking into account their interests, not only to be fairly dealt with, but to privacy. Paragraph 63(5)(d) rightly refers to this privacy as, not personal but, rather, a public interest. Police often have to deal with people whose personal attitudes and private interests are not agreeable to or consistent with the proper performance by the officers of their duties. It is increasingly the case that, with the prevalence of mobile phones, the activities of police are recorded and, if they are in any way newsworthy or merely titillating, that record finds its way into the public arena by virtue of the Internet or broadcast on the media. This is not the occasion to consider whether this development is, on the whole, a positive or negative one but it cannot be denied that individual officers can feel exposed, possibly dangerously so, by this process. We readily accept that, merely because an incident has been recorded and broadcast widely over public media which involves police officers who might be identified, it does not follow that the public interest in the retention of officers' privacy should not be given full weight when considering whether a hearing should be private or public.
23. The Commissioner has referred to the stresses caused by giving evidence. We think it important to mention that, in fact, very few police have been required to give evidence in Commissions of Inquiry, somewhat more we should think in Coronial inquiries where the invariable practice is that they give their evidence in public and are liable to be cross-examined by the lawyers acting for various interested parties. In these cases, of course, someone (either an officer or a civilian) has been killed, so that the circumstances are themselves highly charged, not only for the police but also for the friends and relatives of the deceased. We do not think that the

negative welfare impacts that might arise for officers involved in the death of a civilian, or whose colleague has been killed, provide a useful comparator for those that might apply in cases like the present. Far more frequent is the necessity for police officers to give evidence in criminal trials, which must certainly occur in hundreds of cases in a year. In this context, they frequently have to undergo unpleasant cross examination which attacks their reliability, honesty and competence and which risks adverse comments from the Bench. Merely being a witness in criminal proceedings carries with it the inevitable consequence of public identification as a police officer, which might well have a more significant impact on that officer and his or her family if the court convenes in a relatively small community and the subject matter involves something that occurred in it which has attracted media attention. Although being publicly questioned in a hearing convened by the Commission can reasonably be expected to result in a degree of anxiety, in the context where it is part of an officer's duty frequently to have to give evidence in public, it is important not to overstate the emotional effects that might result, whilst not disregarding the potential relevance of this consideration in deciding whether, as it were, a public hearing is really necessary or desirable. Insofar as giving evidence is stressful, giving it in public must necessarily be only marginally worse than doing so in a private examination.

24. We now come to the particular factors referred to in s 63(5).
 - (a) *The benefit of exposing to the public, and making it aware of, serious misconduct.*
25. In a sense, as has been pointed out in the submissions, the broadcast of the incident on national television and also the internet has exposed the incident being investigated. However, of course, it is not self-evident that serious misconduct (either in ordinary parlance or within the meaning of the Act) has actually occurred, although the vision is certainly confronting and suggests excessive force was used, especially in a context where no serious crime had been committed and there was no question that the young man was or might have been armed. Use of force by police is often necessary, not only to safeguard members of the public from some particular individual but also for the officers' safety. Laypersons who witness this force may well be shocked by what they see and unfairly conclude that the officers have been unnecessarily violent.
26. The present case is quite different from that where, for example, a bribe is taken, money is stolen, information is corruptly conveyed to criminals, or officers commit perjury. Self-evidently, this conduct comprises serious wrongdoing and, although there may be extenuating circumstances to a greater or lesser degree, when clearly demonstrated the public will not have any difficulty in assessing its seriousness. In such a case, a report following private hearings might well suffice to satisfy this factor.
27. In this case, the explanations by the officers for their conduct, apparently questionable but possibly justifiable, lie at the very centre of the investigation. Whether those explanations are reliable or truthful can only

be determined after their evidence has been tested and contrasted with the evidence of lay witnesses whose reliability and truthfulness also must be tested. Each of the officers will be given the opportunity of cross-examining not only the other officers but also the lay witnesses. The Commission is also considering calling expert evidence on the use of force in the circumstances confronting the officers. That evidence also might well be the subject of cross-examination on their behalf.

28. If this evidence were to be given in a private hearing, the public will have no recourse but to accept the Commission's judgment on the central issue. Even were the transcript ultimately to be published with the Report, this must inevitably lack the persuasive (or otherwise) quality of observing the witnesses give their evidence. It is, of course, necessary to be realistic about this aspect. Even if the hearing were to be convened in Byron Bay, only relatively few members of that community could attend, so that the advantage of actual observance would be limited to many fewer individuals than would be likely to be interested in the outcome. At the same time, a public hearing would provide the media with an opportunity to observe proceedings and publish both the evidence and the way in which it was given. Though far from perfect, this at least provides some perspective apart from that of the presiding Commissioner.

(b) The seriousness of the allegation or misconduct matter being investigated.

29. It is not submitted, nor could it be, that the apparently excessive use of force in this case could not constitute serious misconduct within the meaning of the Act. It is fair to say, however, that it may well be that at least several of the officers do not, on one view of the evidence, appear to have used such a degree of force as to constitute serious misconduct. However, they are necessarily witnesses of the incident itself and therefore of the conduct which might well amount to serious misconduct. It follows that even if, in the result, it is only the conduct of one officer which constitutes serious misconduct and that, ultimately, the Commission decides to conduct a public hearing in respect of that officer's conduct, the evidence of the other officers must occur in that hearing. This submission, therefore, made on behalf of several of the officers that, because it is unlikely they will be found to have committed serious misconduct, their evidence should be given in private hearing does not, in the circumstances of this case, carry much weight.

(c) Any risk of undue prejudice to a person's reputation (including by not holding the examination in public).

30. There is, in our view, no risk of "undue prejudice" to the reputation of a police officer simply because that officer is identified as having used violence in the course of his or her duties. The public will understand that this is, regrettably, all too frequently a part of an officer's duty. An enquiry as to whether any particular act of violence is excessive such as to constitute either a criminal offence or serious misconduct, in our view, is unlikely to give rise to any "undue prejudice", since the public would well

understand that whether violence is excessive or not is a matter of opinion and it is reasonable, when the facts are uncertain, to make an enquiry about the issue. It may well be, as suggested in the submissions, that media reporting of the evidence will be unfair but such an eventuality might just as well attend the issue of a Report which includes a transcript of the evidence. At base, in the circumstances here, this factor boils down to one of privacy, which we address under the next factor.

31. We think it is also somewhat relevant to consider the position of other officers who were not involved in this incident but who might be mistakenly believed to be involved. This is unfair to them.

(d) *Whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

32. We have already discussed the importance of public perceptions of the work of the Commission and that confidence in the Commission's work will depend to a significant degree on what is publicly known about it. Public reports, of course, are a part of this information but also, in our view, is the accountability and transparency necessarily a concomitant of public hearings. We accept, of course, that it is nevertheless necessary to consider in any particular case whether public hearings should be conducted. It is not altogether clear whether factor 3(d) is a reference to the general public interest applicable to the question of conducting public hearings or to a particular public interest relevant to exposing misconduct. In this case we are of the opinion that there is a significant public interest in the latter sense, given public concern about the use of force by police officers in the course of their duties. We do not mean by this to suggest there is any significant public concern that excessive force is widely or often used, rather that there is a significant public interest in informing the public what considerations apply to police in these situations. As a practical matter such explanations are only useful if they can be applied to particular circumstances. It is hoped that a greater degree of understanding by the public of the ways in which police are trained to use force and their application of force in particular circumstances will give the public confidence in the integrity and reputation of the police where use of force is used which, on the face of it, appears to be excessive and an increased readiness to accept police explanations for the particular use of force where that is forthcoming.

33. Another element relevant under this head is that the use of force, especially where it appears to be excessive, excites a deal of public controversy both for and against the involved police. It is evident to the Commission that this has certainly occurred in the public responses to the television broadcast. Opinions of this kind are likely to be strongly held. Fair-minded members of the public are far more likely to accept a conclusion, whether upholding or criticising the use of force in this case, where there has been an open examination of the evidence, both from the police officers and lay witnesses. On the other hand, taking the evidence in private hearing may well give rise to suspicions, not easily dispelled, that the Commission is biased either in favour of police or against them. Such suspicions would

seriously affect the ability of the Commission to undertake its statutory functions.

34. As para 3(d) makes clear, however, these considerations favouring a public hearing must be weighed against the public interest in preserving the privacy of the persons concerned, here not only the police officers but also the lay witnesses. We have already mentioned that it is necessary to consider the question of privacy in the general context of the public accountability of police when they give evidence in criminal proceedings or coronial inquiries which derives from their necessarily public character. We note, for example, that had AO been charged with any criminal offence committed before or during the confrontation, the officers would have been required to give evidence in the ensuing proceedings. In one sense, it is happenstance that this did not occur. We point these matters out, not to minimise the public interest in maintaining privacy, but to explain that this public interest is qualified very frequently when police are called upon to do their duty.
35. In this case, the preservation of privacy has particular poignancy because of the relatively small communities in which the officers work and their families live. At the same time, we note that they have been in the area for many years and must be well-known as police without it being suggested that, at least thus far, they or their families have been subjected to any form of retribution.
36. Accordingly, the relationship between the two public interests referred to in the paragraph is a dynamic one and incapable of being the subject of a bright line analysis. Much can be said in favour of the preponderance of one over the other. In the end, as will appear, we consider that the public interest in exposing the matter is not outweighed by the public interest in preserving the privacy of the officers. This conclusion is reinforced by the steps which the Commission proposes to take to preserve their privacy despite the requirement that they give their evidence in public.

(d) Whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation concerned to appear before the examining Commissioner or to otherwise assist the Commission's investigation.
37. The incident at the centre of this enquiry occurred in a public space. The Commission has already identified a number of witnesses to what occurred. It has also obtained other information suggesting the strong likelihood of there being other witnesses who have not yet been identified. Whether the announcement of a public hearing is likely to encourage one or more of those persons to come forward must be somewhat speculative. We think it is fair to conclude that some witnesses are more likely to come forward if their evidence were to be taken publicly since that would give them some basis for thinking that the process is aboveboard and they would be fairly treated. It may be that some witnesses would be more likely to come forward if their evidence were to be taken privately. This matter is essentially imponderable but we think that an announcement of a public hearing would be somewhat more likely to encourage witnesses to come forward than would be the case if the hearings were to be private.

Available conditions

38. The Commission has available to it several modes of conducting a public hearing which nevertheless can preserve the privacy of witnesses. These include the use of pseudonyms, the prohibition of any visual or aural recordings in the hearing room except for those utilised by the Commission for its own purposes and, in this case, conducting the hearings in the Sydney premises of the Commission where security controls can readily be implemented in respect of those wishing to attend. Orders will also be made preventing the publication of any matter which might identify the witnesses.

Conclusion

39. Whether the Commission should proceed by way of public hearing has not been an easy or straightforward matter to determine and the Commissioners have given anxious consideration to the matters which have fairly been raised in the submissions to which we have referred in summary above. In the end, however, although the matter might be thought to be finely balanced, we consider that the factors favouring a public hearing significantly outweigh those pointing in the other direction. This conclusion is considerably strengthened by utilising the conditions which have been mentioned above.
40. Accordingly we have decided that the investigation should proceed by way of public hearing of the police and lay witnesses. It will be necessary to revisit this question when submissions are to be made and for the purposes of the Report. On each of these occasions the use of pseudonyms needs consideration.

The Hon M F Adams QC
Chief Commissioner

The Hon L Drake
Commissioner for Integrity

P. Saidi
Commissioner for Oversight

ANNEXURE 2

OPERATION TAMBORA

Schedule of Codenames

Codename	Witness
AO	Young male detained by police
PM1	Paramedic who treated AO at Byron Bay Police Station
PM2	Paramedic who assisted PM1 at Byron Bay Police Station
Officer A	NSWPF Sergeant, Custody Manager at Byron Bay Police Station on 11 January 2018.
Officer B	NSWPF Senior Constable
Officer C	NSWPF Senior Constable
Officer D	NSWPF Senior Constable
Officer E	NSWPF Senior Constable
W1	Civilian witness who was Night Manager at Nomads Backpackers Hostel on 11 January 2018.
W2	Civilian witness who witnessed incident from balcony overlooking Lateen Lane and whose partner filmed incident on mobile phone
W3	Civilian witness on holiday with family in Byron Bay who witnessed incident from balcony overlooking Lateen Lane.

**Operation Tambora
Report to Parliament Pursuant to Section 132
Law Enforcement Conduct Commission Act 2016
September 2018**

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