

Report to Parliament | September 2013

Operation Barmouth





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

Dear Mr President and Madam Speaker

In accordance with section 96(3) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Barmouth, being a Report in relation to a matter as to which the Commission has conducted a public hearing.

I draw your attention to section 103(2) of the *Police Integrity Commission Act 1996*, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully

The Hon Bruce James QC
Commissioner

September 2013

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EXECUTIVE SUMMARY

The Commission's Operation Barmouth arose out of events occurring in Ballina on the night of 14 January 2011 and the subsequent prosecution of Corey Matthew Barker for offences allegedly committed on that night.

BACKGROUND

Barker spent the early evening of 14 January 2011 at the home of Byron Nolan with Nolan, Tiffany Craig and Jake Hall. They were later joined by Sarah Kemp. At some point the group decided to walk to the Rous Hotel in Ballina along a route which included part of Tamar Street, Ballina.

Present in Tamar Street were Emma Crook and Jay Healey. Crook and Healey were arguing. They were both affected by alcohol and yelling and swearing at each other.

Crook and Healey were observed by two police officers, Senior Constable Kelly Haines and Constable Lee Walmsley. The police officers decided that they should intervene and subsequently that Crook and Healey should be arrested. Both Crook and Healey resisted being arrested.

The group of which Barker was a member heard Crook screaming. They then saw Crook, Healey and the two police officers. Barker and Nolan ran ahead of the other members of the group towards Crook, Healey and the two police officers.

Barker who had been holding a plastic soft drink bottle in his hand threw the bottle as he was running. There was a conflict in the evidence before the Commission as to what Barker's purpose was in throwing the bottle and whether he threw the bottle in the direction of police officers. The throwing of the bottle gave rise to one of the criminal charges subsequently brought against Barker, namely, a charge of throwing a missile at a police officer in the execution of his or her duty.

Two plain clothes police officers Senior Constable Gregory Ryan and Senior Constable David Hill were in a police car in the vicinity and observed officers Haines and Walmsley wrestling with Crook and Healey. Hill stopped the car and Ryan went on foot to assist Haines and Walmsley. Hill observed Barker and Nolan running towards the altercation. Hill tackled Barker, bringing him to the ground. A physical struggle ensued

but eventually Barker was restrained and handcuffed. Nolan was also restrained but a decision was made by police that he should be released. Crook and Healey had already been arrested and handcuffed.

A caged police truck operated by Constable Ryan Eckersley and Constable Luke Mewing arrived at the scene. Healey, Crook and Barker were conveyed by Eckersley and Mewing to Ballina Police Station in two trips. Haines, Walmsley, Ryan and Hill also went to Ballina Police Station.

Apart from the police officers already mentioned, police officers at Ballina Police Station included Sergeant Robert McCubben, who on the night of 14 Jan 2011 was the station sergeant and the custody manager, and Senior Constable Mark Woolven.

Parts of the Ballina Police Station which were referred to in evidence before the Commission included the charge room in which there were three perspex docks, the doorway leading from the charge room to a room described as the BAS room (the Breath Analysis System room), the BAS room itself and a corridor leading from the BAS room to the cells in the Ballina Police Station. Closed Circuit Television was installed and operating in the charge room and the BAS room.

After arriving at the police station Barker was placed in one of the perspex docks in the charge room. When asked his name, Barker falsely gave the name of his brother. Hill telephoned Barker's mother Angelique Sines who, with the assistance of a description of the appearance of the prisoner given by Hill, identified the prisoner as her son Corey and not his brother.

While Barker was in the dock he was approached by Mewing who showed him an object which Mewing had in his hand. There were issues at the Commission's hearing as to whether the object Mewing was showing Barker was a mobile phone and, if so, what Mewing's purpose was in showing the mobile phone to Barker.

Sines came to the police station and had a conversation with Barker while he was being held in the dock. There was an issue at the Commission's hearing as to whether, while Sines was having the conversation with Barker, a police officer or police officers taunted Barker by making gestures behind his mother's back.

Barker made a considerable amount of noise while he was in the dock, yelling and swearing and hitting the walls of the dock with his hands. McCubben, who was endeavouring to work at a desk in the charge room, decided that Barker should be taken from the dock to a cell. A number of police officers Hill, Walmsley, Mewing and Woolven assembled in the charge room outside the dock for the purpose of escorting Barker to a cell.

Barker was asked to turn around, that is, present his back to the front of the dock, so that when the door to the dock was opened he could be handcuffed with his hands behind his back. There was an issue at the Commission's hearing as to whether Barker complied with this direction on either or both of two occasions.

Barker was taken out of the dock by Hill, Hill placing his right hand on Barker's right arm and his left hand on Barker's left shoulder. Barker was not handcuffed before or after he was removed from the dock. Shortly after Barker was removed from the dock Barker's right arm was taken by Walmsley and Hill changed his grip so that he held only Barker's left arm.

Barker was led by Hill and Walmsley through the charge room to the doorway to the BAS room. Mewing and Woolven were following Barker, Hill and Walmsley. Eckersley was already in the BAS room. It was later alleged by police officers that, in passing through the doorway of the BAS room or just after entering the BAS room, Barker broke free from the grasp of Walmsley who had been holding his right arm and punched Hill in the nose with his right fist.

Barker was then forced by police officers against a wall of the BAS room and then to the floor. After a physical struggle Barker was handcuffed with his hands behind his back. Police officers Eckersley and Mewing used their feet in the struggle.

It was later alleged by police officers that, after he was handcuffed, Barker was asked to stand up so that he could be led to the cells but that he refused to comply. Barker was then dragged along the floor to the cells and placed in a cell.

Barker was charged with a number of offences based on aspects of his alleged conduct in Tamar Street, with an offence of giving a false name to a police officer and with an offence of assault. The charge of assault was based on the allegation that in

the police station Barker had broken free from the grasp of Walmsley and punched Hill on the nose with his right fist.

The criminal proceedings against Barker came on for hearing in the Local Court at Ballina before his Honour Magistrate David Heilpern on 7 July 2011. Barker was represented in these proceedings by a solicitor, Mr Vince Boss. On 7 July 2011 the police officers Haines and Hill gave evidence.

On 7 July 2011 the Magistrate was informed that there were problems with playing the CCTV footage of events occurring within the Ballina Police Station on 14 January 2011. The Magistrate directed that the CCTV tapes be sent to the NSW Police Force's Special Technical Investigation Branch and the proceedings were adjourned. The tapes were then submitted to the Special Technical Investigation Branch, which succeeded in eliminating the problems which had been encountered in playing the footage by transferring the information on the tapes into digital form.

It was not disputed in the subsequent hearings in the Local Court that the CCTV footage showed Barker and police officers Hill and Walmsley passing through the doorway into the BAS room and entering the BAS room and did not show any punch by Barker.

On 2 December 2011 at a further hearing in the Local Court evidence was given by the police officers Ryan, Hill, Eckersley, Walmsley and Mewing. The proceedings were adjourned part-heard.

On 3 February 2012 the police prosecutor formally withdrew the charge of assault against Barker.

The trial of Barker on the remaining charges concluded on 8 March 2012. Barker did not give evidence at any stage of the trial. At the conclusion of the hearing the Magistrate dismissed all the remaining charges, apart from the charge of giving a false name which he found had been established but which he dismissed under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Mr Boss made an application that the prosecution pay Barker's costs of the proceedings. On 5 July 2012 the Magistrate made an order for costs, publishing extensive reasons for his order.

In his judgment of 5 July 2012 the Magistrate said that he would be referring his judgment, which was critical of a number of the police officers, to the Police Integrity Commission. He also said that he was considering referring to the Supreme Court charges of contempt of court against some of the police officers who had given evidence in the proceedings, on the grounds that they had committed perjury in giving their evidence.

The Commission decided to conduct an investigation into whether there had been police misconduct in the arrest and detention of Corey Barker on 14 January 2011 and in the subsequent prosecution of Corey Barker. The investigation was given the name Operation Barmouth. After the Commission had announced that it would be conducting an investigation, the Magistrate decided not to proceed with initiating any Supreme Court proceedings for contempt.

HEARINGS OF THE COMMISSION

The Commission held private hearings and a public hearing in Operation Barmouth. Two private hearings were held on 15 November 2012 at which Mewing and Woolven gave evidence. The public hearing was held on 18, 19, 20, 21, 25, 26, 27 and 28 February 2013 and on 1 March 2013.

The scope and purpose of the public hearing was:

To investigate whether any officers of the NSW Police Force were involved in serious police misconduct or criminal activity in the arrest and detention of Corey Matthew Barker on 14 January 2011 at Ballina and in the subsequent prosecution of Corey Matthew Barker for offences alleged to have been committed by him on that date.

The persons who gave evidence at the public hearing were the civilian witnesses Barker, Crook, Healey, Nolan, Craig, Kemp, a person named Shaun Vidler, Sines and Boss and the police officers Haines, Walmsley, Hill, Ryan, Mewing, Eckersley and Woolven. McCubben also gave evidence at the public hearing but by the time of the public hearing he had been medically discharged from the NSW Police Force.

The Commission appointed Mr Stephen Rushton SC as Counsel Assisting the Commission.

The Commission authorised Barker and Sines and all of the police officers to be represented by legal practitioners at the public hearing. Legal practitioners had already been authorised to appear for Mewing and Woolven at the private hearings.

After the public hearing had concluded, written submissions were received by the Commission from Counsel Assisting and from the legal practitioners representing Haines, Walmsley, Ryan, Mewing, Eckersley, McCubben and Woolven. The legal practitioner who represented both of Barker and Sines informed the Commission in a brief submission that his clients adopted and supported the recommendations which had been made by Counsel Assisting in his written submissions. The Commission received a letter from the legal practitioner who had represented Hill at the public hearing in which the practitioner stated that he had been instructed by his client not to provide any response to Counsel Assisting's submissions.

A part of Counsel Assisting's submissions was headed "*Cross-contamination of evidence*" and contained criticisms of the provisions of the NSW Police Force handbook relating to the general question of whether police officers who have witnessed the same incident may collaborate in the preparation of their individual statements. It was considered by the Commission that Counsel Assisting's submissions should be served on the NSW Police Force so as to afford the NSW Police Force the opportunity of replying to Counsel Assisting's submissions on this matter. A copy of Counsel Assisting's submissions was served on the NSW Police Force and submissions in reply from the NSW Police Force were received by the Commission.

THE COMMISSION'S REPORT

This report is made pursuant to Part 8 of the *Police Integrity Commission Act 1996* (NSW) ("the *PIC Act*").

Section 16 of the *PIC Act* confers power on the Commission, *inter alia*, to make assessments and form opinions on the basis of its investigations as to whether police misconduct has or may have occurred and to make recommendations as to whether consideration should or should not be given to the prosecution of, or the taking of action under Part 9 of the *Police Act 1990* (NSW) ("the *Police Act*") against, particular persons.

Section 97 in Part 8 of the *PIC Act* provides that the Commission's report must include, in respect of each "affected" person, a statement as to whether or not the Commission is of the opinion that consideration should be given to the prosecution of the person for a specified criminal offence, or the taking of action against the person as a police officer under s 181D of the *Police Act* or the taking of reviewable action against the person under s 173 of the *Police Act*. 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 an investigation.

GENERAL APPROACH OF THE COMMISSION IN PREPARING THIS REPORT

In this report the Commission has largely, but not entirely, adopted the division of the matters investigated by the Commission which was used by Counsel Assisting in his submissions.

Although the Commission in this report deals, at least to some extent, with all parts of Counsel Assisting's submissions, the principal focus of the report is, as Counsel Assisting submitted it should be, on the alleged assault of Hill by Barker in the Ballina Police Station, the making of statements by police officers about the alleged assault, the possible use of excessive force by police officers against Barker after the alleged assault of Hill and the prosecution of Barker on the various charges, including the charge of assaulting Hill.

With respect to a number of the events which happened or were alleged to have happened on the night of 14 January 2011, there were conflicts in the oral evidence of the witnesses and especially conflicts between the evidence of police officers and the evidence of civilian witnesses.

As to events which happened or were alleged to have happened within the Ballina Police Station, most of what happened within the police station was recorded on CCTV footage by the cameras in the charge room or in the BAS room of the police station. In cases where the CCTV footage clearly shows what happened, the CCTV footage is decisive and resolves any conflicts in the oral evidence.

In this report the Commission does not seek to resolve some conflicts in the oral evidence which are not resolved by the CCTV footage, such as some conflicts in the evidence about what happened in Tamar Street. In some cases it is not necessary to

resolve the conflict in the evidence in order to determine whether a police officer engaged in serious police misconduct or criminal activity. In some cases the limited amount of evidence available or the Commission's assessment of the level of credibility of the witnesses prevents the conflict in the evidence being resolved.

ASSESSMENTS AND OPINIONS FORMED BY THE COMMISSION AS A RESULT OF ITS INVESTIGATION

THE TAMAR STREET INCIDENT

For the reasons given in its report the Commission has concluded that the arrest of both Crook and Healey for their conduct in Tamar Street on the night of 14 January 2011 was justified and that there was no police misconduct in the decision by police officers Walmsley and Haines to arrest Crook and Healey.

For the reasons given in its report, the Commission has concluded that it should not make any finding about whether the arrest of Barker for his alleged conduct in Tamar Street was justified and does not make any finding about whether excessive force was used by any police officer against Crook during her arrest in Tamar Street.

The Commission has concluded that it should not make any finding that the restraint and arrest of Barker in Tamar Street was the result of any observation by police officers that Barker was filming or about to film the arrest of Healey and Crook.

CERTAIN EVENTS WITHIN BALLINA POLICE STATION ON 14 JANUARY 2011

The Commission has concluded that, while Barker was in the dock in the Ballina Police Station, Mewing showed Barker a mobile telephone. The Commission has concluded that it should not make a finding that Mewing asked Barker for the passcode or PIN number of the mobile phone.

The Commission has concluded that it should not make a finding that, while Barker was in the dock, a police officer taunted Barker behind his mother's back.

THE DIRECTION TO TURN AROUND

The Commission has concluded that, after Barker was directed to turn around in the dock so that he could be handcuffed with his hands behind his back, Barker did on a first occasion attempt to comply with this direction but that on a second occasion

Barker did not fully turn so as to present his back and did not place his hands behind his back and remained in a turned position only for a very short time before resuming his original position. The Commission has concluded that on this second occasion Barker did not properly comply with Hill's direction.

THE ALLEGED ASSAULT OF HILL BY BARKER IN BALLINA POLICE STATION

A number of police officers in statements made in the prosecution of Barker or in evidence given in the Local Court in the criminal proceedings against Barker asserted that, as Barker, Hill and Walmsley passed through the doorway from the charge room to the BAS room, or just after they entered the BAS room, Barker broke or pulled free from the grip of Walmsley on Barker's right arm and punched Hill in the nose or face with his right fist.

The Commission has concluded that Barker did not, in the doorway to the BAS room or in the BAS room itself, break or pull free from the restraining grip of Walmsley on Barker's right arm.

The Commission has also concluded that Barker did not assault Hill as alleged and, in particular, did not punch, or even attempt to punch, Hill on the nose or face.

Consequently, the Commission has concluded that a number of the assertions made by police officers in their statements or in giving evidence in the Local Court were untrue, including the following:

- (i) the assertions by all of Hill, Walmsley and Mewing in their statements that Barker pulled or broke free from Walmsley's grip and punched Hill on the nose with a closed right fist;
- (ii) the assertions by Eckersley in his statement that Barker broke free from Walmsley's grip and punched Hill in the face;
- (iii) the assertions by Woolven in his statement that Barker broke free from the grip of police and began throwing punches, at least one of which connected with Hill's face;
- (iv) the assertions by McCubben in his statement that Barker broke free and, swinging his arms, attempted to punch Hill and Walmsley;

- (v) the assertions by Hill in giving evidence in the Ballina Local Court on 7 July 2011 that Barker pulled free from Walmsley and punched Hill on the nose;
- (vi) the assertion by Hill in giving evidence in the Ballina Local Court on 2 December 2011 that Barker punched him;
- (vii) the assertions by Walmsley in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown any CCTV footage, that Barker broke free from Walmsley's grip and, swinging his right arm, hit Hill on the nose;
- (viii) the assertions by Mewing in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown any CCTV footage, that Barker broke free from Walmsley and punched Hill on the nose with his right fist.

The Commission has also concluded that the assertion made by Hill in giving evidence at the public hearing of the Commission that he was hit by Barker was untrue.

The Commission has concluded that at the time of making his statement and at the time of giving evidence in the Ballina Local Court Hill had no actual, even if mistaken, recollection that he had observed Barker break free from Walmsley's grip and punch him (Hill) and knew that it was not true that Barker had broken free from Walmsley and punched him (Hill). The Commission has also concluded that at the time of giving evidence before the Commission Hill had no actual recollection of having being hit by Barker and knew that he had not been hit by Barker.

The Commission has concluded that at the time of making his statement and at the time of giving evidence in the Ballina Local Court each of Walmsley and Mewing had no actual, even if mistaken, recollection of having himself observed Barker break or pull free from Walmsley or of Barker punching Hill in the nose with a closed right fist; had taken from Hill's statement, to which each of them had had access, the assertions that Barker had broken or pulled free from Walmsley and punched Hill in the nose with a closed right fist; and knew that it was untrue, or did not believe that it was true, that Barker had broken or pulled free from Walmsley or that Barker had punched Hill in the nose with a closed right fist.

The Commission has concluded that at the time of making his statement Eckersley had no actual, even if mistaken, recollection of having himself observed Barker break free

from Walmsley or of Barker punching Hill to the face; had taken from Hill's statement, to which he had had access, the assertions that Barker had broken free from Walmsley and punched Hill in the face; and knew that it was untrue, or did not believe that it was true, that Barker had broken free from Walmsley or that Barker had punched Hill in the face.

The Commission has concluded that at the time of making his statement Woolven had no actual, even if mistaken, recollection of having himself observed Barker thrash his arms, break free from Walmsley and begin throwing punches or of having himself observed at least one of the punches thrown by Barker connect with Hill's face. The Commission concludes that Woolven had taken from Hill's statement, to which he had had access, the assertions that Barker broke free from Walmsley and began throwing punches, at least one of which connected with Hill's face, and knew that it was untrue, or did not believe that it was true, that Barker had broken free from police and had begun throwing punches, at least one of which connected with Hill's face.

The Commission has concluded that at the time of making his statement McCubben had no actual, even if mistaken, recollection of having himself observed Barker break free and, swinging his arms, attempt to punch Hill and Walmsley; had taken from Hill's statement, to which he had had access, or the facts sheet, the information in which had been supplied by Hill, the assertions that Barker had broken free and, swinging his arms, attempted to punch Hill and Walmsley; and knew that it was untrue, or did not believe that it was true, that Barker had broken free and, swinging his arms, attempted to punch Hill and Walmsley.

THE USE OF EXCESSIVE FORCE BY POLICE OFFICERS AGAINST BARKER

The Commission has concluded that, immediately after the time at which Barker allegedly assaulted Hill, Barker was pushed forwards by Hill, Walmsley and Eckersley and forced by them against a wall of the BAS room. Barker was then swung in a semi-circle into a machine in the BAS room and then on to the floor of the BAS room.

The Commission has concluded that Barker did not assault Hill, so that the degree of force used against Barker could not be justified by any assault committed by Barker. The Commission has concluded that the degree of force to which Barker was subjected was not reasonably required in order for the police to maintain full control of Barker as

an arrested person. The degree of force used by the police officers against Barker was excessive.

The Commission has concluded, for the reasons given in the report, that it should not form the opinion that Eckersley used excessive force in performing two actions with his right leg, while Barker was on the floor of the BAS room, resisting being handcuffed.

The Commission has also concluded, for the reasons given in the report, that it should not form the opinion that Mewing used excessive force in administering a knee strike to Barker, while Barker was on the floor of the BAS room, resisting being handcuffed.

The Commission has concluded that, after Barker was handcuffed while he was on the floor of the BAS room, no direction was given to him by police to stand up and, even if a direction had been given, Barker was afforded no opportunity to comply with the direction. Accordingly, Barker did not refuse to comply with a direction to stand up.

Barker was dragged to a cell in the police station by police officers holding the handcuffs on Barker's hands, head first, on his stomach, with his arms forced high above his head against the natural inclination of his arms. This method of taking Barker to a cell involved excessive force.

The Commission has concluded that Barker was kept handcuffed in a cell for a period of approximately an hour and forty minutes. The Commission has concluded that there was no justification for keeping Barker handcuffed in a cell for an hour and forty minutes. In particular, the Commission rejects the attempted justifications which were advanced, that Barker might commit self-harm in the cell, if he was not handcuffed, or that Barker, if not handcuffed, might be violent towards police when he was eventually let out of the cell.

MCCUBBEN'S CUSTODY RECORDS

On the night of 14 January 2011 McCubben was the custody manager for the Ballina Police Station. On that night Barker, Crook and Healey came into custody at the Ballina Police Station.

The Commission has concluded that McCubben did not comply with his obligation under s 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

(“LEPRA”) to give Barker orally and in writing a summary of the provisions of Part 9 of LEPRA.

The Commission has concluded that McCubben failed to comply with his obligations under s 131 of LEPRA, in that he did not open a custody record for Barker until more than an hour after Barker’s arrival at the Ballina Police Station and did not correctly record the names of the arresting police officers or the original grounds for Barker’s detention.

The Commission has concluded that McCubben failed to make any or any proper inspection of Barker while Barker was detained in the cell, handcuffed.

McCubben sought to rely on a number of matters as explaining his failure to comply with his obligations under LEPRA, including that on the night of 14 January 2011 he had to deal with three non-compliant prisoners (Barker, Crook and Healey), that he did not have assistance in performing his duties, that he had difficulty in operating the police station’s computer system, that he had little recent experience in performing the role of custody manager and that he had not received any training for performing the role of custody manager at Ballina Police Station.

The Commission accepts that the various factors sought to be relied on by McCubben existed. However, the Commission is of the opinion that, while these factors do to some extent extenuate McCubben’s failure to comply with the requirements of LEPRA, they do not completely excuse it.

CROSS-CONTAMINATION OF EVIDENCE

The Commission has found that all of the police officers Walmsley, Mewing, Eckersley, Woolven and McCubben, who in their statements had asserted that Barker had broken or pulled free and assaulted Hill, did not, at the time of making their statements, have a recollection, even if mistaken, of having observed Barker break or pull free and assault Hill or have a belief that it was true that Barker had broken or pulled free and assaulted Hill and had taken the assertions that Barker had broken or pulled free and assaulted Hill from Hill’s statement, to which they had had access.

Evidence was given at the public hearing of the Commission that it is a common practice in the NSW Police Force for a police officer to have access to another officer's statement before making his own statement.

In its submissions to the Commission the NSW Police Force referred to the guidance at present given to police officers for the making of statements, which is contained in the NSW Police Force handbook, in an article in the January 2000 edition of the *Police Issues and Practice Journal* entitled "*Police Statement: Corroboration or Collaboration*", which is available on the NSW Police Force intranet and in a brief preparation guide, also available on the NSW Police Force intranet. According to this guidance police officers are permitted, subject to a number of provisos, to collaborate in the making of statements.

In the present case the five police officers Walmsley, Mewing, Eckersley, Woolven and McCubben did not comply with a number of aspects of the guidance at present provided by the NSW Police Force to its officers, including the following:

- (i) None of the officers made any notes in his notebook or otherwise about what he had individually done, seen or heard regarding what had happened in the Ballina Police Station on the night of 14 January 2011. Consequently, none of the officers had any notes of his own to refresh his memory when he came to make his statement. There was a delay of between a number of weeks and more than six months after the incident before the police officers made their statements. The combination of an absence of any notes made by an officer and the delay in making his statement meant that it was likely that at the time of making his statement the police officer would have had no independent recollection, or only a very limited independent recollection, of whatever had happened in the Ballina Police Station on the night of 14 January 2011.
- (ii) The NSW Police Force handbook states that, if a police officer accesses contemporaneous notes of an incident from another police officer's notebook or is otherwise assisted by another police officer in making his statement, the first police officer should make reference to this fact in his statement. In the present case each of the five police officers had had access to, and had used, Hill's statement but none of them made any reference to this fact in his own statement.

(iii) The NSW Police Force handbook and the NSW Police Force brief preparation guide stress that a statement by an officer should be his own independent individual account of what he observed happen in an incident. In the present case the Commission has found that each of the police officers Walmsley, Mewing, Eckersley, Woolven and McCubben in making his statement adopted assertions by Hill about matters of which the officer did not have an independent recollection of his own at the time of making his statement.

In its report the Commission, with the assistance of the submissions it received from Counsel Assisting and the NSW Police Force, has considered the general question of whether collaboration by police officers in the preparation of statements should be permitted and, if so, subject to what conditions. As a result of this consideration the Commission has formed the following opinions.

If police officers who were present at the same incident confer with each other or if one police officer has access to another police officer's statement before making his own statement, there is a serious risk of cross-contamination of evidence occurring.

Notwithstanding the risks of cross-contamination of evidence, the Commission does not consider that there should be an absolute prohibition on police officers conferring or accessing another police officer's statement or notes. As pointed out in *R (on the application of Saunders and another) v Independent Police Complaints Commission and others* [2008] EWHC 2372 (Admin); [2009] 1 All ER 379, an English case to which the NSW Police Force referred in its submissions, there can be legitimate advantages, as well as disadvantages, in police being permitted to confer with each other or to access another officer's statement or notes. Conferring or accessing another officer's statement or notes may prompt a genuine recollection. Police officers, unlike most civilian witnesses, are exposed in the course of their duties to many incidents having some similarities and conferring with another officer or accessing another officer's material may assist an officer in distinguishing the particular incident from other incidents and may assist in prompting a genuine recollection of the particular incident.

The English cases, such as *Saunders* and cases referred in *Saunders*, lend support to a view that there should not be any absolute prohibition on police officers conferring or accessing each other's notes or statements. However, the only specific exception to a prohibition against this happening which has been explicitly recognised in the English

cases is that police officers may confer in the making of notes immediately after an event or interview in which both or all of the officers participated.

It may be that it should be permissible for police officers to consult extrinsic material to check on details such as times, dates or places. However, there will be cases where such particulars are material and contentious.

The Commission observes that the part of the NSW Police Force brief preparation guide which was referred to in the NSW Police Force submissions imposes strict conditions on a police officer referring to a document made by another person in preparing a statement. The brief preparation guide provides that a police officer may refer to a document made by another person, only if a number of conditions, which the Commission interprets as being cumulative, are satisfied, namely that the police officer needs to refresh his memory, has looked at the document made by another person when the events were fresh in the police officer's memory, and the police officer has found the document to be accurate at a time when the events were still fresh in the police officer's memory.

The guidance at present provided by the NSW Police Force to its officers in the NSW Police Force handbook and in the article in the *Police Issues and Practice Journal* stresses the importance of a police officer making his or her own comprehensive notes of what the police officer did or observed in an incident, soon after the incident occurred. If this guidance was followed, there would be few occasions on which an officer would have any need to refresh the officer's recollection from some other source.

If a police officer in making a statement confers with another police officer or accesses another police officer's notes or statement or accesses any other extrinsic material, the police officer should not include in the police officer's statement any matter of which the police officer does not, at the time of making the statement, have an actual recollection of having done or observed. The police officer should disclose in the officer's statement any sources other than the officer's own unaided recollection which the officer has used in the making of the statement.

CLOSED CIRCUIT TELEVISION IN POLICE STATIONS

On 14 January 2011 the Ballina Police Station was equipped with CCTV in the charge room and the BAS room.

Where an alleged event was clearly shown in the CCTV footage, the CCTV footage was conclusive in resolving any conflict in the oral evidence and in determining what had really happened.

If there had been no CCTV footage, the issue of whether Barker had assaulted Hill would have had to have been determined by any tribunal on the oral evidence of the witnesses. It is practically certain that a tribunal would have preferred the virtually unanimous evidence of half a dozen police officers to the evidence of an individual, Barker, who was affected by alcohol, who had engaged in violent and threatening conduct on 14 January 2011 and who, in any event, had only a very limited recollection of what had happened inside the police station.

As at 14 January 2011 Barker was subject to a suspended prison sentence for an earlier offence of assault. If he had been convicted of assaulting Hill, he would almost certainly have been sentenced to a term of imprisonment involving immediate actual custody.

A member of the public is particularly vulnerable inside a police station. If any dispute arises between a member of the public and police officers as to what happened inside a police station, there is likely to be a police version of what happened which will be presented in the evidence of a number of police officers, whereas the member of the public is unlikely to be able to call on any witness to support his or her version of what happened. Accordingly, CCTV within police stations is an important protection for members of the public.

CCTV in police stations can also be an important protection for police officers, protecting police officers against false accusations of misconduct by them inside a police station.

The need for independent visual evidence of some incident which may have occurred inside a police station may not become apparent until quite some time after the incident is said to have occurred. Accordingly, it is important that CCTV footage of police stations should be preserved and should not be subject to early destruction. There should be clear guidelines issued by the NSW Police Force to ensure this.

AFFECTED PERSONS

After taking into account relevant matters the Commission is of the opinion that the following persons are “*affected*” persons within the meaning of s 97(2) of the *Police Integrity Commission Act 1996* (NSW), being persons against whom, in the Commission’s opinion, substantial allegations have been made in the course of the investigation:

- (i) Senior Constable David Hill
- (ii) Constable Lee Walmsley
- (iii) Constable Ryan Eckersley
- (iv) Constable Luke Mewing
- (v) Senior Constable Mark Woolven
- (vi) Robert McCubben
- (vii) Senior Constable Gregory Ryan
- (viii) Senior Constable Kelly Haines.

SENIOR CONSTABLE DAVID HILL

For the reasons referred to in its report the Commission is of the opinion that Hill:

- (i) made untrue assertions in his statement that Barker pulled free from Walmsley’s grip and punched him (Hill) on the nose with a closed right fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker pull free from Walmsley’s grip and punch him (Hill) and knew that it was not true that Barker had pulled free from Walmsley and punched him (Hill);
- (ii) made untrue assertions in giving evidence in the Ballina Local Court on 7 July 2011 that Barker pulled free from Walmsley and punched him (Hill) on the nose and at the time of giving that evidence had no actual, even if

mistaken, recollection of having himself observed Barker pull free from Walmsley's grip and punch him (Hill) and knew that it was not true that Barker had pulled free from Walmsley and punched him (Hill);

- (iii) made untrue assertions in giving evidence in the Ballina Local Court on 2 December 2011 that Barker punched him (Hill) and at the time of giving that evidence had no actual, even if mistaken, recollection of Barker punching him (Hill) and knew that it was not true that Barker had punched him (Hill);
- (iv) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room and swinging him into a machine in the BAS room and then on to the floor; and
- (v) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

The Commission is of the opinion that all of the conduct by Hill referred to in sub-paragraphs (i) to (v) of the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Hill:

- (i) as to the conduct referred to in sub-paragraph (i) in the above paragraph - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act 1900* (NSW) ("the *Crimes Act*") and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*;
- (ii) as to the conduct referred to in sub-paragraph (ii) in the above paragraph - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*;
- (iii) as to the conduct referred to in sub-paragraph (iii) in the above paragraph - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and

- (iv) as to the conduct referred to in sub-paragraphs (iv) and (v) in the above paragraph - for the offence of assault under s 61 of the *Crimes Act*.

In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Hill under s 181D of the *Police Act* or, alternatively, to the taking of action against Hill under s 173 of the *Police Act*.

At the public hearing of the Commission Hill gave evidence that he was hit by Barker in the BAS room at Ballina Police Station. In respect of this evidence the Commission is of the opinion that consideration should be given to the prosecution of Hill for an offence under s 107(1) of the *PIC Act*.

CONSTABLE LEE WALMSLEY

For the reasons referred to in its report the Commission is of the opinion that Walmsley:

- (i) made untrue assertions in his statement that Barker pulled free from his grip and punched Hill on the nose with a closed right fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker pull free from his grip or of Barker punching Hill on the nose with a closed right fist and had taken from Hill's statement the assertions that Barker had pulled free from his grip and punched Hill on the nose with a closed right fist and knew that it was not true, or did not believe it was true, that Barker had pulled free from his grip or that Barker had punched Hill on the nose with a closed right fist;
- (ii) made untrue assertions in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from his grip and, swinging his right arm, hit Hill on the nose and at the time of giving this evidence had no actual, even if mistaken, recollection of having himself observed Barker break free from his grip or of Barker swinging his right arm and hitting Hill in the nose and knew that it was not true, or did not believe that it was true, that Barker had broken free from his grip or that Barker, swinging his right arm, had hit Hill on the nose;

- (iii) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room and swinging him into a machine in the BAS room and then on to the floor; and
- (iv) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

The Commission is of the opinion that all of the conduct by Walmsley referred to in sub-paragraphs (i) to (iv) in the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Walmsley:

- (i) as to the conduct referred to in sub-paragraph (i) in the above paragraph - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*;
- (ii) as to the conduct referred to in sub-paragraph (ii) in the above paragraph - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and
- (iii) as to the conduct referred to in sub-paragraphs (iii) and (iv) in the above paragraph - for the offence of assault under s 61 of the *Crimes Act*.

In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Walmsley under s 181D of the *Police Act* or, alternatively, to the taking of action against Walmsley under s 173 of the *Police Act*.

CONSTABLE RYAN ECKERSLEY

For the reasons referred to in its report the Commission is of the opinion that Eckersley:

- (i) made untrue assertions in his statement that Barker broke free from Walmsley's grip and punched Hill to the face and at the time of making his statement had no actual, even if mistaken, recollection of having himself

observed Barker break free from Walmsley or of Barker punching Hill to the face and had taken from Hill's statement the assertions that Barker had broken free from Walmsley's grip and punched Hill to the face and knew that it was not true, or did not believe it was true, that Barker had broken free from Walmsley's grip or that Barker had punched Hill to the face;

- (ii) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room; and
- (iii) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

The Commission is of the opinion that all of the conduct by Eckersley referred to in subparagraphs (i) to (iii) in the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Eckersley:

- (i) as to the conduct referred to in sub-paragraph (i) in the above paragraph - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*; and
- (ii) as to the conduct referred to in sub-paragraphs (ii) and (iii) in the above paragraph - for the offence of assault under s 61 of the *Crimes Act*.

In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Eckersley under s 181D of the *Police Act* or, alternatively, to the taking of action against Eckersley under s 173 of the *Police Act*.

CONSTABLE LUKE MEWING

For the reasons referred to in its report the Commission is of the opinion that Mewing:

- (i) made untrue assertions in his statement that Barker broke free of Walmsley and punched Hill in the nose with a right closed fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself

observed Barker break free of Walmsley or of Barker punching Hill in the nose with a right closed fist and had taken from Hill's statement the assertions that Barker had broken free of Walmsley and punched Hill in the nose with a right closed fist and knew that it was not true, or did not believe it was true, that Barker had broken free of Walmsley or that Barker had punched Hill in the nose with a right closed fist;

- (ii) made untrue assertions in giving evidence in Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from Walmsley and punched Hill on the nose with his right fist and at the time of giving this evidence had no actual, even if mistaken, recollection of having himself observed Barker break free from Walmsley or of Barker punching Hill in the nose with his right fist and knew that it was not true, or did not believe it was true, that Barker had broken free from Walmsley or that Barker had punched Hill in the nose with his right fist; and
- (iii) used more force than was reasonably necessary to exercise any function or power as a police officer in assisting in the dragging of Barker by the handcuffs along the floor of Ballina Police Station to a cell in the police station.

The Commission is of the opinion that all of the conduct by Mewing referred to in sub-paragraphs (i) to (iii) in the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Mewing:

- (i) as to the conduct referred to in sub-paragraph (i) in the above paragraph - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*;
- (ii) as to the conduct referred to in sub-paragraph (ii) in the above paragraph - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and

- (iii) as to the conduct referred to in sub-paragraph (iii) in the above paragraph - for the offence of assault under s 61 of the *Crimes Act*.

At the private hearing of the Commission on 15 November 2012 at which Mewing gave evidence a non-publication direction was made pursuant to s 52 of *PIC Act* prohibiting the publication of any evidence given during that hearing by anyone who was not an officer of the Commission. In evidence given at the public hearing of the Commission Mewing admitted that he had discussed with another person the evidence he had given at the private hearing of the Commission and had done so in contravention of the non-publication direction made at that hearing.

The Commission is of the opinion that consideration should be given to the prosecution of Mewing for an offence of making a publication in contravention of a direction given under s 52(1) of the *PIC Act* and hence in contravention of s 52(3) of the *PIC Act*.

In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Mewing under s 181D of the *Police Act* or, alternatively, to the taking of action against Mewing under s 173 of the *Police Act*.

SENIOR CONSTABLE MARK WOOLVEN

For the reasons referred to in its report the Commission is of the opinion that Woolven made untrue assertions in his statement that Barker broke free from the grip of police and began throwing punches, at least one of which connected with Hill's face, and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker break free from the grip of police and begin throwing punches, at least one of which connected with Hill's face. The Commission is further of the opinion that Woolven had taken from Hill's statement the assertions that Barker broke free from the grip of police and began throwing punches, at least one of which connected with Hill's face, and knew that it was not true, or did not believe it was true, that Barker had broken free from the grip of police and begun throwing punches, at least one of which connected with Hill's face.

The Commission is of the opinion that the conduct of Woolven referred to in the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Woolven for the offence of fabricating false evidence under

s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*.

In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Woolven under s 181D of the *Police Act* or, alternatively, to the taking of action against Woolven under s 173 of the *Police Act*.

ROBERT MCCUBBEN

For the reasons referred to in its report the Commission is of the opinion that McCubben:

- (i) made untrue assertions in his statement that Barker broke free and, swinging his arms, attempt to punch Hill and Walmsley and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker break free and swinging his arms attempt to punch Hill and Walmsley and had taken from Hill's statement or the facts sheet the assertions that Barker had broken free and swinging his arms attempted to punch Hill and Walmsley and knew that it was not true, or did not believe it was true, that Barker had broken free and swinging his arms attempted to punch Hill and Walmsley;
- (ii) failed to keep a proper custody record for the detention of Barker on the night of 14 January 2011; and
- (iii) failed to carry out any or any proper inspections of Barker while Barker was detained in a cell restrained by handcuffs for a period of more than one and a half hours.

The Commission is of the opinion that all of the conduct by McCubben referred to in sub-paragraphs (i) to (iii) in the above paragraph was police misconduct.

In all the circumstances the Commission is of the opinion that, as to the conduct by McCubben referred to in sub-paragraph (i) in the above paragraph, consideration should be given to the prosecution of McCubben for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*.

The Commission is not of the opinion that consideration should be given to the prosecution of McCubben for any criminal offence for the conduct referred to in subparagraphs (ii) and (iii) in the above paragraph.

As McCubben has been medically discharged from the NSW Police Force, paragraphs (c) and (d) of s 97(2) of the *PIC Act* no longer apply to him.

SENIOR CONSTABLE GREGORY RYAN

The Commission has not formed the opinion that Ryan engaged in police misconduct in respect of any of the matters investigated in Operation Barmouth.

The Commission is not of the opinion that consideration should be given to the prosecution of Ryan for any specified criminal offence.

The Commission is also not of the opinion that consideration should be given to the taking of action against Ryan under s 181D or s 173 of the *Police Act*.

SENIOR CONSTABLE KELLY HAINES

The Commission has not formed the opinion that Haines engaged in police misconduct in respect of any of the matters investigated in Operation Barmouth.

The Commission is not of the opinion that consideration should be given to the prosecution of Haines for any specified criminal offence.

The Commission is also not of the opinion that consideration should be given to the taking of action against Haines under s 181D or s 173 of the *Police Act*.

1. INTRODUCTION

- 1.1 The Commission's Operation Barmouth arose out of events occurring in Ballina on the night of 14 January 2011 and the subsequent prosecution of Corey Matthew Barker ("Barker") for offences allegedly committed on that night.
- 1.2 The following is a brief outline of some of the events occurring on the night of 14 January 2011 and some of the events occurring subsequently, about which there was no dispute in the Commission's investigation. Reference will be made to some matters about which there was conflicting evidence.
- 1.3 Barker spent the early evening of 14 January 2011 at the home of Byron Nolan ("Nolan") with Nolan, Tiffany Craig ("Craig") and Jake Hall.¹ They were later joined by Sarah Kemp ("Kemp").² At some point the group decided to walk to the Rous Hotel in Ballina along a route which included part of Tamar Street, Ballina.³
- 1.4 Present in Tamar Street Ballina were Emma Jay Crook ("Crook") and Jay Graham Healey ("Healey"), who were then in a relationship with each other. Crook and Healey were arguing. They were both affected by alcohol and yelling and swearing at each other.⁴
- 1.5 Crook and Healey were observed by two police officers, Senior Constable Kelly Haines ("Haines") and Probationary Constable Lee Walmsley ("Walmsley"). The police officers decided that they should intervene and subsequently that Crook and Healey should be arrested. Both Crook and Healey resisted being arrested.⁵

¹ PIC Transcript, Tiffany Craig, 18 February 2013, pp.77-78; PIC Transcript, Byron Nolan, 18 February 2013, p.112; PIC Transcript, Corey Barker, 19 February 2013, p.148

² PIC Transcript, Sarah Kemp, 18 February 2013, pp.98-99

³ PIC Transcript, Tiffany Craig, 18 February 2013, p.78; PIC Transcript, Byron Nolan, 18 February 2013, p.118; PIC Transcript, Corey Barker, 19 February 2013, p.149; PIC Transcript, Sarah Kemp, 18 February 2013, p.99

⁴ PIC Transcript, Emma Crook, 18 February 2013, pp.13-14 & p. 42; PIC Transcript, Jay Healey, 18 February 2013, pp.57-58

⁵ PIC Transcript, Senior Constable Kelly Haines, 25 February 2013, pp.575-576; PIC Transcript, Constable Lee Walmsley, 27 February 2013, p.767

- 1.6 The group of which Barker was a member heard Crook screaming. They then saw Crook, Healey and the two police officers.⁶ Barker and Nolan ran ahead of the other members of the group towards Crook, Healey and the two police officers.⁷
- 1.7 Barker who had been holding a plastic soft drink bottle in his hand threw the bottle.⁸ It was later asserted by Barker that he was discarding the drink bottle and that he did this to attract the attention of the police who he claimed were using excessive force in arresting Crook and to enable him to use his hand to get his mobile phone out of his pocket for the purpose of filming this alleged use of excessive force. Barker later claimed that these actions were an attempt by him to cause the police to cease using excessive force against Crook.⁹
- 1.8 There was a conflict in the evidence before the Commission as to where Barker threw the bottle and whether his purpose in throwing the bottle was the purpose alleged by him. The throwing of the bottle gave rise to one of the criminal charges subsequently brought against Barker.¹⁰
- 1.9 Two plain clothes police officers Senior Constable Gregory Ryan (“Ryan”) and Senior Constable David Hill (“Hill”), who were members of the Richmond Target Action group, were in a police car in the vicinity and observed officers Haines and Walmsley wrestling with Crook and Healey.¹¹ Hill stopped the car and Ryan went on foot to assist Haines and Walmsley.¹² Hill observed Barker and Nolan running towards the altercation.¹³ Hill tackled Barker, bringing him to the ground.¹⁴ A physical struggle ensued but eventually Barker was restrained and handcuffed.¹⁵ Nolan was also restrained but a decision was made by police that

⁶ PIC Transcript, Tiffany Craig, 18 February 2013, pp.78-79; PIC Transcript, Byron Nolan, 18 February 2013, p.118; PIC Transcript, Corey Barker, 19 February 2013, pp.149-150; PIC Transcript, Sarah Kemp, 18 February 2013, pp.100-103

⁷ PIC Transcript, Tiffany Craig, 18 February 2013, pp.78-79; PIC Transcript, Byron Nolan, 18 February 2013, pp.118-119; PIC Transcript, Corey Barker, 19 February 2013, p.150; PIC Transcript, Sarah Kemp, 18 February 2013, p.100

⁸ PIC Transcript, Corey Barker, 19 February 2013, p.154; PIC Transcript, Byron Nolan, 18 February 2013, p.119; PIC Transcript, Senior Constable David Hill, 27 February 2013, pp.817-818

⁹ PIC Transcript, Corey Barker, 19 February 2013, p.154, pp.272-272 & p.279

¹⁰ Exhibit 33

¹¹ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.680

¹² *ibid*

¹³ PIC Transcript, Senior Constable David Hill, 27 February 2013, pp.817-818

¹⁴ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.818; PIC Transcript, Corey Barker, 19 February 2013, p.154

¹⁵ PIC Transcript, Senior Constable David Hill, 27 February 2013, pp.818-819; PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.681; PIC Transcript, Corey Barker, 19 February 2013, p.155

he should be released.¹⁶ Crook and Healey had been arrested and handcuffed. Both Crook and Healey had been sprayed by police with capsicum spray.¹⁷

- 1.10 A caged police truck operated by Constable Ryan Eckersley (“Eckersley”) and Constable Luke Mewing (“Mewing”) arrived at the scene. Healey, Crook and Barker were conveyed by Eckersley and Mewing to Ballina Police Station in two trips. Haines, Walmsley, Ryan and Hill also went to Ballina Police Station.¹⁸
- 1.11 Apart from the police officers already mentioned, police officers at Ballina Police Station included Sergeant Robert McCubben (“McCubben”), who on the night of 14 Jan 2011 was the station sergeant and the custody manager, and Senior Constable Mark Woolven (“Woolven”).¹⁹
- 1.12 Parts of the Ballina Police Station which were referred to in evidence before the Commission included the charge room in which there were three perspex docks, the doorway leading from the charge room to a room described as the BAS room (the Breath Analysis System room), the BAS room itself and a corridor leading from the BAS room to the cells in the Ballina Police Station. Closed Circuit Television (“CCTV”) was installed and operating in the charge room and the BAS room.²⁰
- 1.13 It would seem that Healey was placed in one of the cells.²¹ He was charged with offences of resisting a police officer in the execution of the officer’s duty and of behaving in an offensive manner.²²
- 1.14 Crook spent some time in one of the docks in the charge room and was then in the fingerprint room in the police station, where there was a sink which was

¹⁶ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.817; PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, pp.680-681; PIC Transcript, Corey Barker, 19 February 2013, pp.154-155 & p.157; PIC Transcript, Byron Nolan, 18 February 2013, p.119 & p.122

¹⁷ PIC Transcript, Emma Crook, 18 February 2013, p.17 ; PIC Transcript, Jay Healey, 18 February 2013, pp.58-59; PIC Transcript, Senior Constable Kelly Haines, 25 February 2013, pp.575-576; PIC Transcript, Constable Lee Walmsley, 27 February 2013, p.767

¹⁸ PIC Transcript, Constable Luke Mewing, 20 February 2013, p.351; PIC Transcript, Constable Ryan Eckersley, 27 February 2013, p.720

¹⁹ PIC Transcript, Robert McCubben, 25 February 2013, p.473; PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.602

²⁰ Recordings from the CCTV cameras in the charge room and the BAS room in Ballina Police Station were tendered as Exhibits 1, 18, 19, 20, 69 & 70 at the public hearing

²¹ PIC Transcript, Jay Healey, 18 February 2013, pp.60-61

²² PIC Transcript, Jay Healey, 18 February 2013, p.66; Exhibit 10

used for washing the capsicum spray from her eyes.²³ She also was charged with offences of resisting a police officer in the execution of the officer's duty and of behaving in an offensive manner.²⁴

1.15 Healey and Crook each subsequently pleaded guilty to the offences with which they were charged.²⁵

1.16 After arriving at the police station Barker was placed in one of the perspex docks in the charge room.²⁶ When asked his name, Barker falsely gave the name of his brother.²⁷ Hill telephoned Barker's mother Angelique Sines ("Sines") who, with the assistance of a description of the appearance of the prisoner given by Hill, identified the prisoner as her son Corey and not his brother.²⁸ Sines came to the police station and had a conversation with Barker while he was being held in the dock.²⁹

1.17 There is no doubt that Barker made a considerable amount of noise while he was in the dock, yelling and swearing and hitting the walls of the dock with his hands.

1.18 McCubben, who was endeavouring to work at a desk in the charge room, decided that Barker should be taken from the dock to a cell.³⁰ A number of police officers Hill, Walmsley, Mewing and Woolven assembled in the charge room outside the dock for the purpose of escorting Barker to a cell.³¹

1.19 There was a conflict in the evidence before the Commission about what happened immediately before Barker was taken out of the dock. According to the version of the police officers, Barker was asked to turn around, that is, present his back to the front of the dock, so that when the door to the dock was

²³ PIC Transcript, Emma Crook, 18 February 2013, p.28

²⁴ PIC Transcript, Emma Crook, 18 February 2013, p.23; Exhibit 3

²⁵ PIC Transcript, Emma Crook, 18 February 2013, p.44; PIC Transcript, Jay Healey, 18 February 2013, p.66; Exhibits 3 & 10

²⁶ Exhibit 20

²⁷ PIC Transcript, Corey Barker, 19 February 2013, p.160

²⁸ PIC Transcript, Angelique Sines, 20 February 2013, p.326; PIC Transcript, Senior Constable David Hill, 27 February 2013, p.791

²⁹ Exhibit 19; PIC Transcript, Corey Barker, 19 February 2013, pp.160-161; PIC Transcript, Angelique Sines, 20 February 2013, pp.327-328

³⁰ PIC Transcript, Robert McCubben, 25 February 2013, p.479

³¹ Exhibit 18

opened he could be handcuffed from behind, and Barker refused to comply with this direction.

- 1.20 Barker was taken out of the dock by Hill, Hill placed his right hand on Barker's right arm and his left hand on Barker's left shoulder.³² Barker was then removed by Hill from the dock backwards.³³ Barker was not handcuffed before or after he was removed from the dock.³⁴
- 1.21 Shortly after Barker was removed from the dock Barker's right arm was taken by Walmsley and Hill changed his grip so that he held only Barker's left arm.³⁵
- 1.22 Barker was led by Hill and Walmsley through the charge room to the doorway to the BAS room. Mewing and Woolven were following Barker, Hill and Walmsley. Eckersley was already in the BAS room.³⁶ It was later alleged by police officers that, in passing through the doorway of the BAS room or just after entering the BAS room, Barker broke free from the grasp of Walmsley who had been holding his right arm and punched Hill in the nose with his right fist.
- 1.23 Barker was then forced by police officers against a wall of the BAS room and then to the floor and after a physical struggle was handcuffed with his handcuffs behind his back.³⁷ Police officers Eckersley and Mewing used their feet in the struggle.³⁸
- 1.24 It was later alleged by the police officers that, after he was handcuffed, Barker was asked to stand up so that he could be led to the cells but that he refused to comply. Barker was then dragged along the floor to the cells and placed in a cell.³⁹ He remained handcuffed in a cell for a period of about one hour and forty minutes.
- 1.25 Barker was charged with assaulting a police officer in the execution of his or her duty contrary to s 58 of the *Crimes Act 1900* (NSW) ("the *Crimes Act*"), resisting

³² Exhibit 18

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid*

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

a police officer in the execution of his or her duty also contrary to s 58 of the *Crimes Act*, throwing a missile at a police officer in the execution of his or her duty contrary to s 60(1) of the *Crimes Act*, hindering a police officer contrary to s 546C of the *Crimes Act*, behaving in an offensive manner contrary to s 4(1) of the *Summary Offences Act 1988* (NSW) and giving a false name to a police officer contrary to s 13(a) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Four of the charges were based on aspects of Barker's alleged behaviour in Tamar Street. The charge of assault and the charge of giving a false name were based on aspects of Barker's alleged conduct at the Ballina Police Station.⁴⁰ The informant for all the charges was Ryan.⁴¹ Ryan had not himself witnessed the events allegedly occurring in the doorway to the BAS room or in the BAS room.⁴²

1.26 McCubben as the station sergeant refused to grant bail and Barker was transported that night to Lismore.⁴³ The following morning he was granted bail in Lismore and released on bail.⁴⁴

1.27 The criminal proceedings against Barker came on for hearing in the Local Court before his Honour Magistrate David Heilpern on 7 July 2011. Barker was represented in these proceedings by a solicitor, Vince Boss ("Mr Boss" or "Boss"). On 7 July 2011 the police officers Haines and Hill gave evidence.⁴⁵

1.28 On 7 July 2011 the Magistrate was informed that there were problems with playing the CCTV footage of events occurring within the Ballina Police Station on 14 January 2011. The Magistrate directed that the CCTV tapes be sent to the NSWPF's Special Technical Investigation Branch ("the STIB") and the proceedings were adjourned. The tapes were then submitted to the STIB, which succeeded in eliminating the problems which had been encountered in playing the footage by transferring the information on the tapes into digital form.

1.29 It was not disputed in the subsequent hearings in the Local Court that the CCTV footage showing Barker and officers Hill and Walmsley passing through the

⁴⁰ Exhibit 33

⁴¹ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.660

⁴² *ibid*, p.657

⁴³ Exhibits 24, 35 & 49; PIC Transcript, Robert McCubben, 25 February 2013, pp.552-555

⁴⁴ Exhibit 24

⁴⁵ Exhibits 71 & 94

doorway into the BAS room and entering the BAS room did not show any punch by Barker.

- 1.30 On 2 December 2011 at a further hearing in the Local Court evidence was given by the police officers Ryan, Hill, Eckersley, Walmsley and Mewing.⁴⁶ The proceedings were adjourned part-heard.
- 1.31 On 3 February 2012 the police prosecutor formally withdrew the charge of assault against Barker.
- 1.32 On 8 March 2012 Ryan gave evidence in the prosecution case and Byron Nolan gave evidence in the defence case.⁴⁷ Barker did not himself give evidence. At the conclusion of the hearing on 8 March 2012 the Magistrate dismissed all the remaining charges, apart from the charge of giving a false name which he found had been established but which he dismissed under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 1.33 Boss made an application that the prosecution pay Barker's costs of the proceedings. On 5 July 2012 the Magistrate made an order for costs, publishing extensive reasons for his order.⁴⁸
- 1.34 In his judgment of 5 July 2012 the Magistrate said that he would be referring his judgment, which was critical of a number of the police officers, to the Police Integrity Commission ("the Commission"). He also said that he was considering referring to the Supreme Court charges of contempt of court against some of the police officers who had given evidence in the proceedings, on the grounds that they had committed perjury in giving their evidence.⁴⁹
- 1.35 The Commission decided to conduct an investigation into whether there had been police misconduct in the arrest and detention of Corey Barker on 14 January 2011 and in the subsequent prosecution of Corey Barker. The investigation was given the name Operation Barmouth. After the Commission had announced that it would be conducting an investigation, the Magistrate

⁴⁶ Exhibits 51, 84, 92, 93 & 95

⁴⁷ Exhibits 16 & 85

⁴⁸ Exhibit 97

⁴⁹ *ibid*

decided not to proceed with initiating any Supreme Court proceedings for contempt.

2. HEARINGS OF THE COMMISSION

2.1 The Commission held private hearings and a public hearing in Operation Barmouth. Two private hearings were held on 15 November 2012 at which Mewing and Woolven gave evidence. The public hearing was held on 18, 19, 20, 21, 25, 26, 27 and 28 February 2013 and on 1 March 2013.

2.2 The scope and purpose of the public hearing was:

To investigate whether any officers of the NSW Police Force were involved in serious police misconduct or criminal activity in the arrest and detention of Corey Matthew Barker on 14 January 2011 at Ballina and in the subsequent prosecution of Corey Matthew Barker for offences alleged to have been committed by him on that date.

2.3 Pursuant to s 12 of the *Police Integrity Commission Act 1996* (NSW) (“the *PIC Act*”) Mr Stephen Rushton of Senior Counsel was appointed as Counsel Assisting the Commission in Operation Barmouth.

2.4 The persons summoned to give evidence at the public hearing were the civilian witnesses Barker, Crook, Healey, Nolan, Craig, Kemp, a person named Shaun Vidler, Sines and Boss and the police officers Haines, Walmsley, Hill, Ryan, Mewing, Eckersley and Woolven. McCubben also gave evidence at the public hearing but by the time of the public hearing he had been medically discharged from the NSWPF. It will often be convenient in this report to refer to McCubben as being a police officer.

2.5 Authorisation was sought and granted by the Commission for the witnesses Barker and Sines and all of the police officers to be represented by Australian legal practitioners at the public hearing. Legal practitioners were authorised to appear for Mewing and Woolven at the private hearings.

2.6 After the public hearing had concluded, directions were given for the lodging of written submissions. Written submissions by Counsel Assisting were served on all legal practitioners who had represented witnesses at the public hearing. Submissions in reply to Counsel Assisting’s submissions were received from the legal practitioners representing Ryan, Haines, Eckersley, Walmsley, Woolven, McCubben and Mewing. The legal practitioner who represented both of Barker and Sines informed the Commission in a brief submission that his

clients adopted and supported the recommendations which had been made by Counsel Assisting in his written submissions. The Commission received a letter from the legal practitioner who had acted for Hill at the public hearing in which the practitioner stated that he had been instructed by his client not to provide any response to Counsel Assisting's submissions.

- 2.7 A part of Counsel Assisting's submissions was headed "*Cross-contamination of evidence*" and contained criticisms of the provisions of the NSWPF Handbook relating to whether police officers who have witnessed the same incident may collaborate in the preparation of their individual statements. It was considered by the Commission that Counsel Assisting's submissions should be served on the NSWPF so as to afford the NSWPF the opportunity of replying to Counsel Assisting's submissions on this matter. A copy of Counsel Assisting's submissions was served on the NSWPF and submissions in reply from the NSWPF were received by the Commission.
- 2.8 In preparing this report the Commission has taken into account all of the submissions it received.

3. REPORT UNDER THE *POLICE INTEGRITY COMMISSION ACT 1996* (NSW)

3.1 This report is made under the *PIC Act*. Part 8 of the *PIC Act* is headed “*Reports to Parliament*”. Division 1 of Part 8 is headed “*Reports by Commission*”. Section 96(2) in Division 1 is headed “*Report where public hearing*” and provides that “*the Commission must prepare reports in relation to matters as to which the Commission has conducted a public hearing.*”

3.2 Section 97 in Division 1 of Part 8 is headed “*Contents of reports to Parliament*” and provides as follows:

(1) The Commission is authorised to include in a report under section 96:

(a) statements as to any of its assessments, opinions and recommendations, and

(b) statements as to the Commission’s reasons for any of its assessments, 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) the prosecution of a person for a specified criminal offence,

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

(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 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.

(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 concerned.

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

3.3 Part 3 of the *PIC Act* is headed “*Functions of Commission*”. Division 1 of Part 3 is headed “*Functions generally*”. Section 16 in Division 1 of Part 3 is headed “*Provisions regarding assessments, opinions and recommendations*” and provides as follows:

(1) The Commission may:

(a) make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer:

- has or may have occurred, or
- is or may be occurring, or
- is or may be about to occur, or
- is likely to occur, and

(b) make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of action under Part 9 of the *Police Act 1990* or other disciplinary action against particular persons, and

(c) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.

(2) However, the Commission may not:

(a) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or

(b) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).

(3) An opinion that a person has engaged, is engaging or is about to engage:

(a) in police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer (whether or not specified conduct), or

(b) in specified conduct (being conduct that constitutes or involves or could constitute or involve police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer),

is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

(4) Nothing in this section prevents or affects the exercise of any function by the Commissioner that it considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the *Police Act 1990*.

3.4 Part 1 of the *PIC Act* is headed "*Preliminary*". Section 5 in Part 1 is headed "*Police misconduct*". Section 5(1) defines "*police misconduct*" as "*misconduct (by way of action or inaction or alleged action or inaction) of a police officer*":

(a) whether or not it also involves non-police participants, and

(b) whether or not it occurs while the police officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

3.5 A non-exclusive list of examples of "*police misconduct*" is given in s 5(2). Those examples are:

(a) police corruption,

(b) the commission of a criminal offence by a police officer,

(b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990*,

(c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,

(d) any other matters about which a complaint can be made under the *Police Act 1990*.

3.6 In making assessments and forming opinions within s 16 of the *PIC Act* the Commission applies the civil standard of proof, as explained by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour said, at p. 361:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has 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.

3.7 Part 13 of the *PIC Act* is headed “*Miscellaneous*”. Section 137A in Part 13 is headed “*Persons to be heard*” and provides as follows:

(1) Before including in a report any comment about a person that the Commission or the Inspector considers is adverse, the Commission or Inspector must, so far as practicable:

(a) inform that person of the substance of the grounds of the adverse comment, and

(b) give the person an opportunity to make submissions.

(2) The Commission is taken to have complied with this section if it has held a hearing under section 32 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.

(3) This section applies only to the following reports:

(a) a report by the Commission in relation to any matter that has been or is the subject of an investigation by the Commission,

(b) a report by the Inspector in relation to any complaint.

The Commission considers that it complied with s 137A of the *PIC Act*.

4. GENERAL APPROACH OF THE COMMISSION IN PREPARING THIS REPORT

4.1 Counsel Assisting divided his submissions into parts with headings, including the following:

- (i) "*The Tamar Street incident*". In this part of his submissions Counsel Assisting dealt with events which happened or which were alleged to have happened in Tamar Street Ballina, before Barker was taken to the Ballina Police Station.
- (ii) "*The events within Ballina Police Station on 14 and 15 January 2011*". In this part of his submissions Counsel Assisting dealt with some of the events that happened or were alleged to have happened within Ballina Police Station on the night of 14 and 15 January 2011.
- (iii) "*The direction to turn around*". In this part of his submissions Counsel Assisting dealt specifically with whether Barker had complied with a request made by Hill, while Barker was still in the dock in the charge room of the Ballina Police Station, to turn around, that is to present his back to the front of the dock so that he could be handcuffed with his hands behind his back.
- (iv) "*The alleged assault of Officer Hill within the BAS room of Ballina Police Station*". In this part of his submissions Counsel Assisting dealt specifically with the alleged assault of Hill by Barker.
- (v) "*The use of excessive force*". In this part of his submissions Counsel Assisting dealt with whether excessive force had been used by police officers against Barker, after the alleged assault of Hill by Barker.
- (vi) "*Officer McCubben's custody records*". In this part of his submissions Counsel Assisting dealt with the records relating to Barker's custody which were made by McCubben as custody manager.

(vii) "*Cross-contamination of evidence*". In this part of his submissions Counsel Assisting dealt with the use by police officers of sources other than their own recollection in the making of statements.

- 4.2 The utility of this division of the matters investigated by the Commission was not criticised in any of the other written submissions received by the Commission. The division is a convenient one and will largely, but not entirely, be adopted by the Commission in this report.
- 4.3 Although the Commission in this report will deal, at least to some extent, with all parts of Counsel Assisting's submissions, the principal focus of the report will be on the alleged assault of Hill by Barker in the Ballina Police Station, the making of statements by police officers about the alleged assault, the possible use of excessive force by police officers against Barker after the alleged assault of Hill and the subsequent prosecution of Barker on a number of charges, including the charge of assaulting Hill. These matters are clearly within the stated scope and purpose of the public hearing which includes investigating whether any police officer was involved in serious police misconduct or criminal activity in the detention of Barker on 14 January 2011 at Ballina and in the subsequent prosecution of Barker for offences alleged to have been committed by him on that date.
- 4.4 With respect to a number of the events which happened or were alleged to have happened on the night of 14 January 2011 there were conflicts in the oral evidence of the witnesses and especially conflicts between the evidence of the police officers and the evidence of the civilian witnesses.
- 4.5 As to events which happened or were alleged to have happened within the Ballina Police Station, most of what happened within the police station was recorded on CCTV footage by cameras situated in the charge room of the Ballina Police Station or in the adjoining BAS room. In cases where the CCTV footage clearly shows what happened, the CCTV footage is decisive and resolves any conflicts in the oral evidence.
- 4.6 In this report the Commission will not seek to resolve some conflicts in the oral evidence which are not resolved by the CCTV footage, such as evidence of events occurring in Tamar Street. In some cases it is not necessary to resolve

the conflict in the evidence in order to determine whether a police officer engaged in serious police misconduct or criminal activity. In some cases the limited amount of evidence available or the Commission's assessment of the level of credibility of the witnesses prevents the conflict in the evidence being resolved.

- 4.7 The Commission will now examine various parts of the events of the night of 14 January 2011, as identified by Counsel Assisting in his submissions.

5. THE TAMAR STREET INCIDENT

- 5.1 Evidence about the incident in Tamar Street was given at the public hearing by a number of civilian witnesses and a number of police officers.
- 5.2 The civilian witnesses who gave evidence were: Crook, Healey, Craig, Kemp, Nolan and Barker. Another civilian witness who witnessed the incident Jake Hall died before the public hearing. A civilian witness Shaun Vidler who had claimed to have been a witness to the incident gave evidence before the Commission that he had not in fact witnessed the incident.⁵⁰
- 5.3 The police officers who gave evidence before the Commission about the incident in Tamar Street were Haines, Walmsley, Ryan, Hill, Mewing and Eckersley.
- 5.4 The Commission will now summarise some of the evidence given by witnesses about the incident in Tamar Street.

ACCOUNTS BY CIVILIAN WITNESSES

CROOK

Evidence in examination by Counsel Assisting

- 5.5 On the night of 14 January 2011 Crook and her then boyfriend Healey became involved in an argument near the Tamar Village Shopping Centre.⁵¹ They had both been drinking.⁵² Crook agreed that she was moderately to well affected by alcohol.⁵³ In the argument Crook and Healey were speaking loudly to each other and swearing at each other.⁵⁴ Two police officers, one male and one female, turned up and asked Crook if she needed any help and she said no.⁵⁵ It is clear that the police officers who approached Crook and Healey were Haines and Walmsley.

⁵⁰ PIC Transcript, Shaun Vidler, 18 February 2013, pp.69-76

⁵¹ PIC Transcript, Emma Crook, 18 February 2013, pp.13-14

⁵² *ibid*, p.14

⁵³ *ibid*, p.42

⁵⁴ Crook, p.14

⁵⁵ *ibid*

5.6 Crook and Healey kept walking and the two police officers followed them in a police vehicle.⁵⁶ Either Crook or Healey told the police to “*fuck off*.”⁵⁷ Crook next observed that two of the police officers were “*on Jay*”, meaning that Healey was on the ground and the police officers were holding him down.⁵⁸ Her evidence continued:

I ran over, because he was yelling out about his back. I ran over and tried to move them off him...And then they got me on to the ground, and then it was just on from then. They were like throwing me. It was a bit of a blur.⁵⁹

5.7 Crook identified the police officer who was “*throwing*” her as being Haines.⁶⁰ The following question and answer then occurred:

Q. When you say “throwing me around”, what was she actually doing?

A. It is a bit of a blur, to be honest. I just remember getting thrown on to the ground and pushed around.⁶¹

5.8 Crook said that at the time of the incident she weighed only 41 kilograms.⁶²

5.9 At some point Crook was handcuffed. However, the handcuffs were too loose for her wrists and she slipped out of them and ran.⁶³ Following this, “*they (the police officers) tackled me on to the ground and sprayed me in the eyes with capsicum spray*.”⁶⁴ As a result of being sprayed in the eyes she was subsequently unable to see very well.⁶⁵

5.10 When asked whether she suffered any injuries on the night of 14 January 2011, Crook said “*I had a lot of bruises on my legs and scratches, like grazes, and my ears started bleeding*.”⁶⁶ Photographs of Crook taken by Healey the following day revealed bruises, grazes and scratches.⁶⁷ Crook gave evidence that the

⁵⁶ *ibid*

⁵⁷ *ibid*, pp.14-15

⁵⁸ *ibid*, p.15

⁵⁹ *ibid*

⁶⁰ Crook, p.16

⁶¹ *ibid*

⁶² *ibid*

⁶³ Crook, p.17

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ Exhibit 2

injuries shown in the photos had been received by her during the incident in Tamar Street.⁶⁸

5.11 Crook gave evidence that she was aware of the presence of other civilians around her at the time she was arrested, because she heard someone say “*It’s Emma and Jay*” but she did not recognise the voice.⁶⁹

5.12 Some time after 14 January 2011 Crook had a conversation with Barker, who told her that “*he had seen us getting thrown around and he thought it was wrong, so he tried to help.*”⁷⁰ Barker told Crook that “*he tried to get video of it (the incident at Tamar Street)*” and that he had “*skimmed*” a bottle across the ground “*to distract them (the police officers)*”.⁷¹

Evidence in examination by other legal representatives

5.13 In examination by Haines’s legal representative Crook agreed with the version of events which was put to her as follows:

Q...Do you agree that your first contact with the police - when that occurred, you were having a loud, heated argument involving swearing with your boyfriend?

A. Yes.

Q. Do you agree that the police first approached because they were concerned about your welfare?

A. Yes.

Q. Do you agree that, after speaking to police, you walked away, the police continued speaking to your boyfriend, and then he commenced to follow you; do you agree that happened?

A. Well, we were both walking, so he was just a little bit behind me.

Q. What I'm suggesting to you is you walked away and then he subsequently started to follow you and then the police followed you both; do you agree with that?

A. Yes.

⁶⁸ PIC Transcript, Emma Crook, 18 February 2013, p.23

⁶⁹ *ibid*, p.25

⁷⁰ *ibid*, p.37

⁷¹ *ibid*, pp.37-38

Q. At some point in time, your boyfriend went back to the police and told them to "fuck off"; do you agree with that?

A. Yes, as we were walking.

Q. And then the police became involved with your boyfriend?

A. Yes.

Q. And then you became involved as well; is that correct?

A. Yes.⁷²

5.14 Crook agreed that she had attempted to push Walmsley away when he was attempting to restrain Healey and that she was "*trying to push him (Walmsley) off with my hands.*"⁷³

5.15 Crook accepted that, because of her conduct on the night of 14 January 2011, she had been charged with the offences of resisting a police officer in the execution of their duty and of behaving in an offensive manner.⁷⁴

5.16 Crook wrote letters apologising for her behaviour on the night of 14 January 2011 to both Haines and Walmsley and to the Magistrate before whom the charges came.⁷⁵ She pleaded guilty to both charges and was dealt with under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁷⁶ She accepted that by pleading guilty she was admitting that she had in fact obstructed Haines in the execution of her duty.⁷⁷

5.17 The following questions and answers occurred in the examination of Crook by Haines's legal representative:

Q...Your evidence is, correct me if I'm wrong, you were picked up from the ground such that your feet were off the ground?

A. Yes.

Q. By Constable Haines, and then she dropped you back onto the ground.

⁷² ibid, p.41

⁷³ ibid, p.48

⁷⁴ ibid, p.23

⁷⁵ ibid, p.42, pp.44-45, p.49 & p.55

⁷⁶ ibid, p.44

⁷⁷ ibid

A. Yes.

Q. Did that happen or not?

A. Yes, it did.

Q. Did it happen more than once or not?

A. She didn't exactly pick me up and throw me on the ground, but I was pushed to the ground a fair few times.

Q. She didn't exactly pick you up and throw you to the ground?

A. More than once.

Q. More than once?

A. Yes.

Q. You say she did do that once?

A. Yes.

Q. And once only?

A. Yes.⁷⁸

HEALEY

5.18 Healey accepted that he was intoxicated on the night of 14 January 2011.⁷⁹ He and Crook were having a loud argument.⁸⁰ Healey gave the following account of what happened:

The police officers arrived and asked Emma if everything was all right. We said, "Yes". We said we were just going home. And they just kept following. I said, "We're going home". Emma said, "It's all right", and they followed again, and I just said, "Can you just fuck off." They got out of the car and arrested me.⁸¹

5.19 The two police officers in question were a male officer and a female officer.⁸² They were clearly Haines and Walmsley.

⁷⁸ *ibid*, pp.45-46

⁷⁹ PIC Transcript, Jay Healey, 18 February 2013, p.58

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid*

5.20 After the police officers got out of their car Healey was sprayed with capsicum spray, tackled to the ground and handcuffed.⁸³ Healey heard some voices in the vicinity and recognised one of these voices as Barker's.⁸⁴ He did not observe what was happening to Crook.⁸⁵

5.21 Healey was subsequently conveyed to the Ballina Police Station in a caged truck, charged with behaving in an offensive manner and resisting a police officer in the execution of his or her duty.⁸⁶ He pleaded guilty to each charge and received a fine for each offence.⁸⁷

CRAIG

5.22 In the early evening of 14 January 2011 Craig and a number of other persons were at Nolan's home in Ballina.⁸⁸ Those persons were: Nolan, Barker, Hall and Kemp. Alcohol was consumed at Nolan's home but it was her recollection that no one had a lot to drink.⁸⁹ Craig said she probably consumed a few "Cruisers"⁹⁰ (a mixed drink containing Vodka). The group left Nolan's home to go to the Rous Hotel in Ballina.⁹¹

5.23 Craig said that she is short sighted. On the night of 14 January 2011 she had forgotten to take her glasses with her.⁹² She said this was "*the only time I've even been without my glasses or my contacts.*"⁹³ Without her glasses she could "*still see but it's very hazy.*"⁹⁴

5.24 Craig gave the following evidence:

We were walking along and we heard like screaming and yelling and it was obvious that something was going on, someone was in danger, so the boys ran ahead and then me and Sarah (Kemp) were a bit behind them, and then we got over there. As I was walking - because the boys were

⁸³ ibid, pp.58-59

⁸⁴ ibid, p.59

⁸⁵ ibid

⁸⁶ ibid, p.66

⁸⁷ ibid

⁸⁸ PIC Transcript, Tiffany Craig, 18 February 2013, p.77

⁸⁹ ibid, pp.77-78

⁹⁰ ibid, p.78

⁹¹ ibid

⁹² ibid, p.79

⁹³ ibid

⁹⁴ ibid, p.89

jogging over. As we got over there, we came across the police arresting Emma and Jay. When I got over there, Byron and Corey were both on the ground with a police officer with them.⁹⁵

- 5.25 Craig was asked whether she had made any observations of the manner in which the police were dealing with Crook. She said that:

There was a few (police officers) - maybe more than four, five.. they were trying to arrest her and she was just screaming and they were really restraining her very violently: slamming her against the gutter. It was pretty intense.⁹⁶

- 5.26 Craig was asked what part of Crook's body was making contact with the gutter and replied:

"Everything...I just heard a slap against the gutter. Her head hit the gutter...There was male and a female. There was a few of them....they were all holding on to her."⁹⁷

- 5.27 Craig was then asked if she had observed anything in relation to a plastic drink bottle. She said:

I saw it glisten in the light. Just as Corey was running, it seemed to me as though he was just running and just chucked it as he was running....It was a 1.25 litre Lift bottle....at the end we picked it up, because the police said that Corey had thrown a glass bottle, a missile at them. We went - I think Jake went and got the bottle out of the bush and it was completely empty and it was plastic and we just showed them – it was a plastic bottle, it wasn't a glass bottle, it's over there.⁹⁸

- 5.28 Craig had been interviewed by Mr Boss. Notes of that interview dated 6 May 2011 record that she had thought that "...*the boys ran ahead and were going to film it (the incident involving Healey and Crook).*"⁹⁹ This note was shown to Craig when she was giving evidence before the Commission and she said that she then had no recollection of whether one or more of the males in the group were going to film the incident involving Healey and Crook.¹⁰⁰

⁹⁵ *ibid*, pp.78-79

⁹⁶ *ibid*, p.79

⁹⁷ *ibid*, pp.79-80

⁹⁸ *ibid*, pp.80-81

⁹⁹ Exhibit 14

¹⁰⁰ PIC Transcript, Tiffany Craig, 18 February 2013, p.85

KEMP

5.29 On the evening of 14 January 2011 Kemp, after finishing work, drove to Nolan's home and joined the group there.¹⁰¹ She recalled Craig drinking a Cruiser and the males drinking beer.¹⁰² She did not herself have any alcohol because she was driving that evening.¹⁰³ The group left Nolan's home to go to the Rous Hotel.¹⁰⁴

5.30 When the group arrived at Tamar Street, Kemp said the following occurred:

We could just hear this outrageous screaming and yelling and I was just like, "What is that noise?" So then we crossed the road.¹⁰⁵

5.31 Trees on the median strip in the middle of the road blocked her vision of where this screaming was coming from.¹⁰⁶

5.32 Kemp heard Barker say "*That's Squealy*", that is, Healey, then:

"...We all ran towards the direction of Emma and Jay and the boys were in front of us and Tiffany was behind me, so I was in the middle."¹⁰⁷

5.33 When asked what she observed, Kemp said that she observed Healey and Crook "*having a massive argument*" and "*I thought if we don't intervene, they're going to hurt each other.*"¹⁰⁸ Kemp said that Crook was "*kicking and screaming and he (Healey) was trying to calm her down.*"¹⁰⁹ Kemp continued:

And then as Corey was running over, as you know he had the Lift bottle in his hand, I was obviously behind him and I saw him throw the Lift bottle across his body and it landed in the bushes there at Tamar Street where there's a seat.¹¹⁰

¹⁰¹ PIC Transcript, Sarah Kemp, 18 February 2013, p.98

¹⁰² *ibid*, p.99

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*, p.100

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*, p.101

¹⁰⁹ *ibid*, p.111

¹¹⁰ *ibid*, p.101

5.34 Kemp gave evidence that she remembered seeing about 7 centimetres of liquid in the bottle.¹¹¹

5.35 Kemp continued:

As we all kind of arrived there, there was just a swarm of people just were at us from nowhere...There was people in just black polo shirts and there was police officers as well...So then the two police officers were trying to control Jay and Emma, and Emma was, at that stage, being, like, lifted around her stomach by a female police officer, just because Emma was, like, kicking and screaming and Jay was yelling back at her, so there was obviously people attending to Jay and people attending to Emma. I recall Emma then being sprayed - told that if she didn't calm down, she would be sprayed with capsicum spray, whatever it's called, and she kept yelling, so then she was sprayed. Then a female police officer restrained her and actually was sitting on her. This was happening about 2 metres in front of me. Then a male police officer grabbed Emma by the hair and lifted her up - I don't know if she had a ponytail, but [he] grabbed a clump of her hair and then smashed her head into the pavement, which I heard and saw it hit the side of the gutter.¹¹²

5.36 She formed the opinion from the way the persons in black polo shirts were acting that they were also police officers.¹¹³ It is clear that the persons in black polo shirts were Hill and Ryan.

5.37 Kemp said that she saw Jake Hall attempt to use his mobile phone to film the incident. However, she did not see Barker with a mobile phone.¹¹⁴

5.38 When asked about whether she had heard a police officer suggest that Barker had thrown a glass bottle in the direction of police, Kemp said that she had. The following question and answers occurred:

Q. Were you part of that discussion?

A. I saw it and I vouched that it wasn't a glass bottle, and that's when Jay proceeded to go and grab it out of the bushes and physically show them that it wasn't a glass bottle.

...

Q. Did somebody question the police as to what they were doing when this was only a plastic drink bottle?

¹¹¹ *ibid*

¹¹² *ibid*, pp.102-103

¹¹³ *ibid*, p.105

¹¹⁴ *ibid*, pp.106-107

A. Yeah, we all were; we were like, "Are you serious? It's a plastic Lift bottle. How is it a glass bottle", yes. So there was conversations going backwards and forwards that it wasn't a weapon and it wasn't a glass bottle, it was a plastic bottle, and it wasn't thrown at them.¹¹⁵

NOLAN

5.39 On the evening of 14 January 2011 Nolan was at his home in Ballina with a group of persons consisting of Barker, Hall, Craig and Kemp.¹¹⁶ He estimated that the group was at his house for about an hour before they decided to go to the Rous Hotel.¹¹⁷ He and Barker were drinking beer. He estimated that he had about five beers but could not give an estimate of how much Barker consumed.¹¹⁸ Nolan had given evidence in the Local Court on 8 March 2013 that on 14 January 2011 he had had about eight standard drinks and that he assumed Barker had drunk about the same amount.¹¹⁹

5.40 Nolan gave the following account of what he observed in Tamar Street on the evening of 14 January 2011:

I heard kind of a girl scream. Then we were looking around and then as soon as we saw - we could see some people up there, and as we got closer, to my knowledge, I saw the girl restrained on the ground, and what made us start running, I saw her get lifted, I thought, to about chest height and then dropped - it was at a distance, probably about 50 metres away I was seeing this, and I thought I saw her dropped from about - yeah, chest height on to the ground.¹²⁰

5.41 Nolan added:

There was a man in black clothing over her and I saw him pick her up and drop her. He picked her up about chest height...¹²¹

The person who had lifted the girl up was a man and was a "big guy".¹²²

5.42 Nolan gave the further following account:

¹¹⁵ *ibid*, p.107

¹¹⁶ PIC Transcript, Byron Nolan, 18 February 2013, p.117

¹¹⁷ *ibid*

¹¹⁸ *ibid*, pp.117-118

¹¹⁹ PIC Transcript, Byron Nolan, 19 February 2013, p.134; Exhibit 16 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Byron Nolan), pp.72-73

¹²⁰ PIC Transcript, Byron Nolan, 18 February 2013, p.118

¹²¹ *ibid*, p.119

¹²² PIC Transcript, Byron Nolan, 19 February 2013, p.137

Corey was beside me. Once we saw her get dropped, we started running towards the altercation. He had a Lift bottle in his hand. He discarded that to the median strip to the left and he produced his phone. He had his phone out about here. He was probably about a metre or two in front of me to the left, and then the next thing I know, we were on the ground a hell of a distance from where I last saw Corey - like, when we got tackled, we got tackled a fair way away. We were probably like 20 metres away from the people when I saw Corey have his phone out, and when we were lying on the ground, we were probably about 10 metres away. So it was a good - we got tackled really quickly. We were running and, before I knew it, I was on the ground handcuffed.¹²³

5.43 Barker removed the phone from his left pocket and held it at about the level of his face.¹²⁴ The phone was a pink phone.¹²⁵

5.44 Nolan looked at Barker and saw that Barker had his hands behind his back and that someone was on Barker's back. He said "*both of us had people on our back and we had people on our heads*".¹²⁶

5.45 Nolan kept saying to police that he had not done anything and eventually a voice he assumed was a police officer's said "*Let the black one go*".¹²⁷ Nolan is darker skinned than Barker. Nolan was released by the police.¹²⁸

5.46 Nolan gave evidence that Hall went and found the bottle that Barker had had.¹²⁹

BARKER

Examination by Counsel Assisting

5.47 On the evening of 14 January 2011 Barker was at Nolan's home.¹³⁰ While he was at Nolan's home Barker had "*six or seven beverages*", maybe two "*vodka cruisers*" and the rest beer.¹³¹ The group left Nolan's home and headed towards the Rous Hotel and reached Tamar Street.¹³²

¹²³ PIC Transcript, Byron Nolan, 18 February 2013, p.119

¹²⁴ *ibid*, p.120

¹²⁵ *ibid*

¹²⁶ *ibid*, pp.120-121

¹²⁷ *ibid*, p.122

¹²⁸ *ibid*

¹²⁹ *ibid*, p.124

¹³⁰ PIC Transcript, Corey Barker, 19 February 2013, p.148

¹³¹ *ibid*, pp.148-149

¹³² *ibid*, p.149

- 5.48 In Tamar Street he heard a “*loud noise from mainly a girl.*”¹³³ At this point he could not see anyone.¹³⁴
- 5.49 Nolan, Hall and Barker walked towards the noise.¹³⁵ Barker had a bottle in his hand, it was a 1.25 litre plastic Lift bottle with about “*an inch, an inch and a half*” of liquid in it.¹³⁶
- 5.50 Barker said the group proceeded until “*I could finally see something.*”¹³⁷ He saw a male lift Crook up and drop her down.¹³⁸ He said the male was “*T-bagging*” Crook.¹³⁹ Barker described Crook as being lifted up off the ground by the male to the height of his belly button and then dropped.¹⁴⁰
- 5.51 Barker saw and recognised Healey, who he knew at the time. He knew that Healey was in a relationship with Crook and therefore assumed the female with Healey was Crook.¹⁴¹
- 5.52 He recognised the two people with Crook and Healey as police officers and observed them to be in uniform.¹⁴²
- 5.53 Barker said:

...A bit of me wanted to keep, you know, to stay out of trouble, keep walking this way, but the scream coming from Emma quickly changed our minds, it was horrible, and that's when what do you do here? And then - I just seen it on movies and what not, a couple of YouTube films, and you bring a phone out around an officer and it's shocking how quick they stop doing what they're doing, or supposedly, and I've just gone, "Yeah, let's go," and we've started, me and Byron had started jogging towards them and I've yelled out, "Oi! Oi!", and just nothing, like, I can't even say if they acknowledged me with their head, and then kept going and she was, you know, still getting T-bagged, and I've yelled out, "Hey, stop!" And then still

¹³³ ibid

¹³⁴ ibid

¹³⁵ ibid

¹³⁶ ibid, pp.149-150

¹³⁷ ibid, p.150

¹³⁸ ibid

¹³⁹ ibid

¹⁴⁰ ibid, p.151

¹⁴¹ ibid, p.152

¹⁴² ibid, p.153

nothing and then that's when I've just thought, "Well, frig, you know, I might as well get my phone out now."¹⁴³

5.54 Barker was asked what he did with the bottle he had had in his hand. He said:

[I] discarded it to my left. Like, the officers were straight ahead that were running. No-one is an idiot, you know. Like, you throw something immediately in front of you that's in the direction of police and you have now thrown something at police, so I discarded it to my side definitely to get their attention also because my vocal attempts were doing nothing, and it needed to be stopped there and frigging then what was happening, but yeah...¹⁴⁴

5.55 He said that he did not see where the bottle landed but that he knew that there were no police officers in the direction in which he threw the bottle.¹⁴⁵

5.56 The police officers who had tackled Nolan and himself were plain clothes police officers.¹⁴⁶ He did not see those police officers coming at him before he was tackled and was hit "*from nowhere*".¹⁴⁷

5.57 After he was tackled he said "*Get off me.*" He recognised the trained force of "*an elbow in your shoulder blade and a knee in the middle of your back.*"¹⁴⁸ He looked towards Nolan and "*the way they were handling him was very professional.*"¹⁴⁹

5.58 He saw Ryan on Nolan's back. He kept telling the police officers to "*get off*" but:

..the more I kept hearing the simple words, "Stop resisting." And I'd take another blow and whether it be a knee to the head or a knee grinding my face down hard, every time I heard the words "Stop resisting", there would be more.¹⁵⁰

5.59 Nolan was allowed up but Barker himself was not let up.¹⁵¹ He remained on the ground handcuffed.¹⁵²

¹⁴³ ibid, p.152

¹⁴⁴ ibid, p.154

¹⁴⁵ ibid

¹⁴⁶ ibid

¹⁴⁷ ibid, p.155

¹⁴⁸ ibid

¹⁴⁹ ibid

¹⁵⁰ ibid, p.156

¹⁵¹ ibid, p.157

5.60 Barker had two police officers on top of him and Hill to his side.¹⁵³ He was put in a police vehicle.¹⁵⁴ He could not recall being transported to Ballina Police Station after the initial incident as “*it all becomes hazy from there.*”¹⁵⁵

Examination by other legal representatives

5.61 Barker gave evidence that when he first saw the police officers there was only one officer dealing with Crook who was the male uniformed officer.¹⁵⁶

5.62 Barker denied using any swear words as he approached the incident in Tamar Street involving Healey, Crook and the police officers.¹⁵⁷ He said that he had no recollection of having told Mr Boss before 7 July 2011 that someone in the group of which he was a member had yelled out to police “*Get off him, you cunts*”. Mr Boss in the Local Court on 7 July 2011 put to Haines that she had heard someone yell out “*Get off him, you cunts.*”¹⁵⁸

5.63 Barker admitted that he had two past convictions for offences of assault, including an assault on a civilian on 27 June 2010 and an assault on a police officer in the execution of his duty on 31 October 2009.¹⁵⁹ He accepted that on these two occasions he had been under the influence of alcohol, had perceived some provocation and had lost control of his temper.¹⁶⁰

5.64 Barker accepted that once he was tackled by police on the night of 14 January 2011 he had lost control of his temper.¹⁶¹

5.65 Barker said that at the time of giving evidence before the Commission he weighed 90 kilograms and was at least 10 kilograms lighter than he had been at the time of the incident.¹⁶²

¹⁵² *ibid*

¹⁵³ *ibid*

¹⁵⁴ *ibid*, p.158

¹⁵⁵ *ibid*, p.159

¹⁵⁶ *ibid*, pp.200-201

¹⁵⁷ *ibid*, pp.201-202

¹⁵⁸ *ibid*, pp.203-204

¹⁵⁹ *ibid*, p.204

¹⁶⁰ *ibid*, p.213

¹⁶¹ *ibid*, p.214

¹⁶² *ibid*, p.216

- 5.66 Barker accepted that on the night of 14 January 2011 he had come across police officers attempting to arrest two persons and that he had attempted to interfere with that arrest.¹⁶³
- 5.67 Barker said he was about 150 metres away when he first heard screaming and about 30 metres away when he first started running towards the incident.¹⁶⁴
- 5.68 He said there were two reasons for discarding the bottle of soft drink he was carrying in his hand: *“to get the stuff out of my hands so I could go to film what the officers were doing and also to distract.”*¹⁶⁵
- 5.69 He said that *“they’re (the police officers) going to look up and see where it came from, there was a camera on them [and the police officers] would cease what they were doing.”*¹⁶⁶ Barker said that he had *“skimmed”* the bottle along the road.¹⁶⁷
- 5.70 Barker said the phone that he was carrying had a passcode and it was necessary to use the passcode to activate the camera in the mobile phone. He was aware of the passcode but did not have an opportunity to put the passcode in the phone before he was tackled by the police. He agreed that he had not had the phone out very long before being tackled by the police.¹⁶⁸
- 5.71 Barker agreed that his actions in running towards the police in Tamar Street who were trying to deal with Healey and Crook was a *“pretty bad look”* and could easily have been interpreted by the police as an act of aggression.¹⁶⁹

¹⁶³ PIC Transcript, Corey Barker, 20 February 2013, pp.247-248

¹⁶⁴ *ibid*, p.263

¹⁶⁵ *ibid*, p.271

¹⁶⁶ *ibid*, p.272

¹⁶⁷ *ibid*, p.279

¹⁶⁸ *ibid*, p.273

¹⁶⁹ *ibid*, p.280

ACCOUNTS BY POLICE OFFICERS

HAINES

5.72 Haines was asked by Counsel Assisting to tell the Commission in her own words what had happened on the night of 14 January 2011 in Tamar Street. Haines said:

Constable Walmsley and I were performing a patrol along Tamar Street about 10.35pm.... We could see up the street. I saw a male and a female. They were in an argument. We drove up to those people. We stopped to make inquiries when the male said something like, "Here we go. What are you cunts looking at?" We got out of the car. The female was still yelling. I think she referred to him as a "druggo cunt". We knew there was a domestic argument occurring. I tried to make inquiries as to if we could assist or if there was anything they needed to report.

We were basically told, I can't remember the exact words, that they were fine, to go away, they just wanted to go home. I was satisfied at that time that the situation had calmed and I could leave them. However, by sitting back and watching them, I wasn't satisfied that the male was going to leave the female alone and I was concerned for her safety.

It appeared the more we stayed and observed the couple it enraged the male. He began to swear at us again. As we drove up closer the male yelled out, "I dare youse to get out," or something like that, "from the car." He swore. It was public. There was - it was around the pub tip-out time. We had to get out to talk to this fellow. He was behaving offensively in public. He continued swearing. The girl had walked off. We tried to effect an arrest.

The male struggled, let go, tried to run, we tried to grab him, bring him to the ground. Then the girlfriend came back and ran at us and I believed jumped on Constable Walmsley's back trying to get her boyfriend free. Then we had our hands full with two people.

We continued struggling and wrestling. We couldn't control the male's hands. We were trying to handcuff him. I kicked the female to get her out of the way. She was hindering our arrest. She didn't give up and continued wrestling. The male was wrestling. I issued a short burst of OC spray and then I started hearing a crowd on the footpath yelling out things like, "Get off them, you cunts." "Get off them." "Leave them alone." I heard there was more than one voice. I knew we were in trouble with more people that weren't yelling out in our favour and then

I heard the thud of an item land on the roadway next to me and I thought, "We're going to be jumped. We're going to lose this." And then along came Senior Constables Ryan and Hill and helped with the female to some degree.

Q. Did both of them do that or just one?

A. I can only recall Senior Constable Ryan at that stage. We were able to restrain the male which I now know to be Jay Healey. I had to still hang on to the female until I could handcuff her. By then, to my recollection, I think Constable Walmsley had the male restrained and I had then cuffed the female. We had them restrained and then to my right I could see Constable Hill next to who I now know to be - and didn't at the time - Corey Barker who was yelling the whole time and yelling out to the crowd, with his head up looking at the crowd on the footpath, "Let's king-shot these cunts." And still yelling at the crowd. He yelled the whole time. I couldn't hear anything else going on.

Other officers attended to help. We had our two restrained, Constable Walmsley and I had our prisoners restrained. Constable Hill had someone restrained. I couldn't see anything else beyond that.¹⁷⁰

5.73 Haines effected an arrest of Crook and Walmsley effected an arrest of Healey.¹⁷¹ Haines said that Ryan assisted in the arrest of Crook.¹⁷²

5.74 Haines did not recall Ryan "*wrestling or physically manoeuvring Crook.*"¹⁷³ Haines did not see Ryan pick Crook up and drop her to the ground.¹⁷⁴

5.75 Haines observed Barker face down with his hands behind his back with Hill next to him.¹⁷⁵

5.76 In her lengthy account of what happened on the night of 14 January 2011 Haines had said that she heard the thud of an item land on the roadway next to her. She said that the thud "*didn't sound like glass.*"¹⁷⁶ She agreed that the item sounded like plastic.¹⁷⁷ She was not aware of why, when one of the offences with which Barker was charged was throwing a missile at a police officer, no police officer had recovered the object which Barker had thrown.¹⁷⁸

5.77 In her statement made on 28 April 2011 Haines had said that she heard an object hit the ground to her left but said nothing about how close the object was

¹⁷⁰ PIC Transcript, Senior Constable Kelly Haines, 25 February 2013, pp.575-576

¹⁷¹ *ibid*, p.576

¹⁷² *ibid*, p.582

¹⁷³ *ibid*

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*, pp.576-577

¹⁷⁶ PIC Transcript, Senior Constable Kelly Haines, 26 February 2013, p.586

¹⁷⁷ *ibid*

¹⁷⁸ *ibid*, pp.586-587

to her.¹⁷⁹ She said she could not judge how close the bottle was to her by sound alone.¹⁸⁰

5.78 Haines also said in her statement of 28 April 2011 that Ryan had left her when she was still wrestling with Crook. Haines observed Ryan join Hill and they were wrestling with Barker and Nolan.¹⁸¹

5.79 Haines's statement also recorded that Barker was struggling on the ground with Hill and was yelling abuse loudly at the onlookers, inciting them.¹⁸²

5.80 When Haines gave evidence in the Local Court she said that she heard the thud next to her "*that sounded fairly close, probably within a metre*".¹⁸³ She said in her evidence before the Commission that the object landed to the left of her on the roadway and "*there was not much bitumen between me and the garden bed*" to the left of her.¹⁸⁴

5.81 In examination by her own legal representative Haines said that the allegation made by Crook in her evidence that Haines had lifted her and dropped her was not true.¹⁸⁵

WALMSLEY

5.82 In examination by Counsel Assisting Walmsley confirmed that he had been involved in the arrest of Crook and Healey.¹⁸⁶ He said that he had not observed any police officer picking up and dropping Crook and he did not engage in such an activity himself.¹⁸⁷

5.83 When examined by his own legal representative he said it had been his impression that there was a domestic argument between Crook and Healey,

¹⁷⁹ PIC Transcript, Senior Constable Kelly Haines, 26 February 2013, p.588; Exhibit 65

¹⁸⁰ PIC Transcript, Senior Constable Kelly Haines, 26 February 2013, p.589

¹⁸¹ Exhibit 65

¹⁸² Exhibit 65

¹⁸³ Exhibit 71 (Transcript of *R v Corey Barker*, 7 July 2011, Witness: Senior Constable Kelly Haines), p.20

¹⁸⁴ PIC Transcript, Senior Constable Kelly Haines, 26 February 2013, p.591

¹⁸⁵ *ibid*, p.595

¹⁸⁶ PIC Transcript, Constable Lee Walmsley, 27 February 2013, p.767

¹⁸⁷ *ibid*, pp.772-773

and that Crook was “*in trouble*”.¹⁸⁸ Walmsley said that he and Haines had acted to protect Crook.¹⁸⁹

5.84 Haines and Walmsley had an initial conversation with Crook and Healey and after that conversation they got back into the police vehicle and prepared to leave.¹⁹⁰ However, the behaviour of Crook and Healey became worse and a decision was made to arrest Healey.¹⁹¹

5.85 Crook had tried to stop Haines and Walmsley from arresting Healey.¹⁹² At one stage Crook was on Walmsley’s back¹⁹³

5.86 Walmsley gave the following evidence about the group which included Barker:

I saw a group of young people coming towards myself and Senior Constable Haines. There was two people out in front of that group, which I now know to be Corey Barker and Byron Nolan. They were yelling and screaming, they were running towards me, and I thought I was going to be assaulted.

Q. As it turns out, other police officers were available and they intervened and you weren't assaulted?

A. Luckily, yes.¹⁹⁴

RYAN

5.87 When asked by Counsel Assisting at the public hearing to tell the Commission what had occurred in Tamar Street on the evening of 14 January 2011 Ryan said:

I was working with Senior Constable Hill. At that point in time, I was attached to a unit called the Richmond Target Action Group. We'd been tasked to Ballina to deal with a number of breaking offences that were occurring in the area. Around 10.40, myself and Senior Constable Hill were driving north on Grant Street. As we've come to the roundabout of Grant and Tamar Street, I looked down to the eastern end of Tamar Street and I could see a fight of some description happening down there. Now, at that point in time, I wasn't aware that it was actually even the police. I've told Senior Constable Hill to turn right. As we've turned right around the

¹⁸⁸ Ibid, p.778

¹⁸⁹ Ibid

¹⁹⁰ Ibid, p.779

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid, p.780

roundabout then I've realised that it was in fact the police, who was Senior Constable Haines and Constable Walmsley, were in a violent struggle with a male and female.

This was happening outside the Tamar Shopping Village. We've driven down towards where it was happening. Yeah, that was on the northern side of the road, so there's a dividing strip between Tamar Street, and on the other side, which is the southern side of the road, is where this scuffle was happening. We've driven down to a point where we were opposite to where this scuffle was happening. I've got out of the car. I started to run across the road over the median strip towards Haines and Walmsley and the other male and female they were wrestling with. Within about two metres of getting to them, I've heard a whistle go directly past my head and I've seen a bottle skid along the ground within close proximity to Haines and Walmsley and the other two that were wrestling on the ground.

I've turned around and by this stage I've noticed that Senior Constable Hill was in a wrestle with Mr Barker and there was also a second male, that I know as Byron Nolan, to be intervening between Hill and Barker.¹⁹⁵

5.88 In his statement prepared for the prosecution of Barker and dated 18 January 2011 Ryan said that he saw a large bottle travel past his head and hit the ground where Walmsley and Haines were.¹⁹⁶

5.89 In evidence before the Local Court on 8 March 2012 Ryan estimated that the bottle was only half full. The bottle had landed within a metre of where Walmsley and Haines were standing¹⁹⁷

5.90 Ryan's account continued:

So I've turned around, gone back to Senior Constable Hill and Barker and Nolan. I've pulled Nolan off Hill and Barker. I've taken him down to the ground, where I've directed him to put his hands behind his back and not move, which he complied with. I then went over to assist Senior Constable Hill, who was struggling with Mr Barker. However, we've managed to overpower him and get his hands behind his back.

At that point in time, I've removed my handcuffs and placed them on Mr Barker. Senior Constable Hill said to me, "Are you right with him?" I said, "Yep." He then went over to assist Constables Haines and Walmsley.

...

I stayed there with Mr Barker, who was still carrying on. He was yelling, "Let me go, you fucking cunts." Then he was trying to incite Mr Nolan, because I was also directing Mr Nolan to stay where he was. He was

¹⁹⁵ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.680

¹⁹⁶ Exhibit 43

¹⁹⁷ Exhibit 85 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Senior Constable Gregory Ryan), p.3

saying to Byron, "Byron, don't listen to this cunt. Get up. Fucking smash him. Split these" - words to those effects.¹⁹⁸

- 5.91 Barker continued to try and get up off the ground and Ryan placed his knee on the back of Barker's shoulder to forcibly hold Barker on the ground. Barker continued to yell and incite Nolan to get up and assault Ryan.¹⁹⁹
- 5.92 After Hill went to the assistance of Haines and Walmsley, Crook and Healey were restrained and handcuffed. Ryan did not observe what sort of assistance Hill gave in the arrest of Crook or Healey. He was fully occupied holding Barker on the ground and directing Nolan to stay where he was.²⁰⁰
- 5.93 With regard to the charge against Barker of throwing a missile, he saw that the missile was a 1.25 litre drink bottle. He did not take possession of the bottle as an exhibit.²⁰¹ He accepted that he had made a mistake in not taking possession of the bottle or at least photographing it. He asserted that he was too busy dealing with Barker to do so.²⁰²
- 5.94 He said that evidence that the bottle was skimmed along the ground by Barker was false.²⁰³
- 5.95 He had not observed Barker with a mobile phone in Tamar Street. It had come to his attention that Barker might have been using a mobile phone to film the arrest of Crook and Healey, only during the subsequent Local Court proceedings against Barker.²⁰⁴
- 5.96 Ryan gave evidence to the Ballina Local Court on 8 March 2012 that he had observed Walmsley and Crook in a "wrestle" but he had not observed Walmsley pick up Crook and throw her to the ground.²⁰⁵

¹⁹⁸ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, pp.680-681

¹⁹⁹ *ibid*, p.681

²⁰⁰ *ibid*

²⁰¹ *ibid*, p.682

²⁰² *ibid*

²⁰³ *ibid*, p.695

²⁰⁴ *ibid*, p.691

²⁰⁵ Exhibit 85 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Senior Constable Gregory Ryan), p.11

HILL

- 5.97 In examination by Counsel Assisting Hill said he saw Barker throw a bottle, that he had tackled Barker to the ground and that he had searched Barker in Tamar Street after he had been arrested. Hill said that when he searched Barker he did not find any mobile phone on him.²⁰⁶
- 5.98 In examination by his own legal representative Hill gave more evidence about the incident in Tamar Street. He said he had seen Barker and Nolan in the front of a small group, the group was running towards Haines and Walmsley and then Barker stopped to throw a bottle.²⁰⁷ Hill saw the bottle almost hit Ryan and land only “a couple of feet” away from Haines.²⁰⁸
- 5.99 Hill said that Ryan reacted to the landing of the bottle. Ryan turned towards Nolan and tackled Nolan to the ground.²⁰⁹
- 5.100 Barker continued to run towards Haines and Walmsley. The following questions and answers occurred:
- Q. Did you believe he presented a threat to those two police officers, to either them personally or to the performance of their duties?
- A. I have no doubts that he was a threat to them.
- Q. That's the reason you tackled him?
- A. Yes, it is.²¹⁰
- 5.101 After he was tackled, Barker tried to push up off the ground, he yelled and swore at Hill and he attempted to incite other persons to assault the police.²¹¹
- 5.102 At the time of the incident Barker was a much bigger man than he was at the time of the Commission’s public hearing. In Tamar Street Hill had needed Ryan’s assistance to subdue Barker.²¹²

²⁰⁶ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.805

²⁰⁷ *ibid*, pp.817-818

²⁰⁸ *ibid*, p.817

²⁰⁹ *ibid*

²¹⁰ *ibid*, p.818

²¹¹ *ibid*

MEWING

5.103 Mewing gave evidence that on the evening of 14 January 2011 he went with Eckersley in a caged NSWPF vehicle to Tamar Street. He and Eckersley transported Healey, Crook and Barker to Ballina Police Station.²¹³

ECKERSLEY

5.104 Eckersley gave evidence that on the evening of 14 January 2011 he and Mewing, in response to a call for assistance on the police radio, travelled in a caged NSWPF vehicle to Tamar Street.²¹⁴

5.105 Eckersley observed 3 persons handcuffed on the ground: Crook, Healey and Barker. He and Mewing transported those three persons in two trips to Ballina Police Station.²¹⁵

SUBMISSIONS

SUBMISSIONS BY COUNSEL ASSISTING

5.106 Counsel Assisting said that it could not be “*gainsaid*” that the behaviour of Healey and Crook on the 14 January 2011 had been such as to warrant their being arrested. Counsel referred particularly to evidence by Crook herself and the police officers Haines and Ryan.

5.107 However, it was submitted that there might not have been a proper basis for arresting Barker for throwing a missile at the police. Counsel referred to undisputed evidence that the bottle was a plastic, and not a glass, bottle and to evidence by Barker that he had discarded the bottle to his side and had not thrown the bottle in the direction of Haines or Walmsley. As was recognised by Counsel, there was contrary evidence from Haines and Ryan. Counsel submitted that “*it is unnecessary to reach a final conclusion as to what Mr Barker did or did not do which led to his arrest*”, with the possible exception that the Commission might have to determine whether the conduct of the police

²¹² *ibid*, p.819

²¹³ PIC Transcript, Constable Luke Mewing, 20 February 2013, p.351

²¹⁴ PIC Transcript, Constable Ryan Eckersley, 20 February 2013, p.720

²¹⁵ *ibid*

officers towards Barker had been motivated by a desire to prevent Barker from using his mobile phone to film the arrests of Healey and Crook.

5.108 Counsel also submitted that it would be unnecessary for the Commission to determine whether any police officer used excessive force in arresting Crook.

5.109 Counsel submitted that what occurred in Tamar Street provided an important background to later events. However, it was submitted what was of real significance to the Commission's investigation was the alleged assault of Hill by Barker in the Ballina Police Station and the conduct of police officers towards Barker in the Ballina Police Station before and after the alleged assault.

SUBMISSIONS BY OTHER LEGAL REPRESENTATIVES

5.110 The most extensive other submissions about the incident in Tamar Street which were received by the Commission were the submissions made on behalf of Haines by her legal representative.

5.111 It was submitted that the only witness who alleged there had been misconduct by Haines was Crook. At the public hearing Haines's legal representative had objected to this evidence being given, on the ground that it did not relate to matters falling within the stated scope and purpose of the hearing. However, the Commission allowed the evidence to be given on the basis that it formed a background to later events clearly falling within the stated scope and purpose of the public hearing.

5.112 Haines's legal representative submitted that there were a number of factors diminishing the significance that could properly be given to Crook's evidence. She had been affected by her consumption of alcohol on 14 January 2011. She pleaded guilty to the two charges which were brought against her and sent a letter of apology to the police officers Haines and Walmsley and to the Magistrate who was to sentence her. There was no evidence of her making any complaint until she was contacted by one of the Commission's investigators in the course of Operation Barmouth. She said in her evidence in chief that some of the events on the night of 14 January 2011 were "*a bit of a blur*" and it was submitted that in later evidence she had retreated to some extent from the evidence she had given in examination by Counsel Assisting.

- 5.113 It was submitted that Haines had given evidence disputing Crook's evidence about the use of force by Haines in the arrest of Crook and Haines had not been further questioned by Counsel Assisting on her evidence. It was submitted that the evidence given by Haines at the public hearing was consistent with statements she had made and with the evidence she had given in the Local Court.
- 5.114 It was submitted that Haines's evidence was supported by Ryan's evidence.
- 5.115 Haines's legal representative pointed to parts of the evidence given by other civilian witnesses in which those witnesses attributed the force they said had been used against Crook to a male police officer and not a female police officer.
- 5.116 It was submitted that, although Crook had sustained some injuries in the nature of bruising and scratches, those injuries were not consistent with the alleged severity of the physical force applied to Crook.
- 5.117 Haines's legal representative submitted that the Commission should not merely decline to make a finding that Haines had engaged in police misconduct towards Crook but should make a positive finding to the effect that Haines had not engaged in such police misconduct.
- 5.118 Walmsley's legal representative submitted that Haines and Walmsley had encountered a domestic dispute between Crook and Healey, that attempts by the police officers to defuse the situation by talking had failed and that when they attempted to arrest Healey, Healey had violently resisted and Crook had jumped on Walmsley's back trying to pull him away from Healey. The group of people including Barker had run towards the police officers in a way that Walmsley interpreted as threatening. Barker had threatened violence against the police officers and encouraged others in the group to attack the police officers.
- 5.119 Ryan's legal representative pointed out that Counsel Assisting had not asked any questions of Ryan suggesting any police misconduct by Ryan in Tamar Street and Counsel Assisting had not in his submissions recommended that consideration be given to prosecuting Ryan for any offence or taking any disciplinary action against him.

ASSESSMENT

- 5.120 In their evidence to the Commission both Crook and Healey conceded that, at the time they were approached by Haines and Walmsley on Tamar Street on 14 January 2011, they were both affected by alcohol and had been engaged in a loud argument with each other. Haines and Walmsley enquired whether Crook required assistance and she responded that she did not. Haines and Walmsley continued to follow Crook and Healey and Healey in his evidence admitted that he had then used offensive language towards the police officers, telling them at one point to “*fuck off*”. Crook admitted that when Haines and Walmsley were subsequently attempting to arrest Healey she had physically interfered with Walmsley by attempting to “*push him off*” Healey.
- 5.121 This evidence of Crook and Healey was confirmed by the evidence to the Commission of Ryan, Haines and Walmsley.
- 5.122 Both Healey and Crook entered pleas of guilty to the offences with which they had been charged as a result of their actions on the night of 14 January 2011. Crook also wrote a letter apologising for her actions to Haines, Walmsley and the Magistrate who was to sentence her. The Commission considers that the actions of Healey in entering a plea of guilty and the actions of Crook in entering a plea of guilty and writing the letters apologising for her actions constitute an acknowledgement by both Crook and Healey that they had engaged in conduct in Tamar Street on the night of 14 January 2011 sufficient to justify their arrest.
- 5.123 As already noted in this report, Counsel Assisting submitted that it could not be “*gainsaid*” that the behaviour of Crook and Healey on the night of 14 January 2011 warranted their arrest. The Commission accepts this submission. On the basis of the evidence referred to, including the admissions made by Crook and Healey, the Commission concludes that it should find that there was no police misconduct in the decision by Walmsley and Haines to arrest Crook and Healey.
- 5.124 As detailed in the evidence already referred to in this chapter, Barker was tackled and then arrested by Hill. Hill asserted that he had taken this action because he had believed that Barker had posed a threat to Walmsley and Haines. Hill’s perception of the threat posed by Barker arose as a result of Hill

observing Barker running towards where Haines, Walmsley and Ryan were effecting an arrest of Crook and Healey and throwing a bottle in the direction of those police officers.

5.125 It was common ground in the evidence before the Commission that the bottle thrown by Barker was a 1.25 litre plastic, and not a glass, bottle. It was also common ground that Barker, on observing a wrestle between Haines and Walmsley and Crook and Healey approached that group and, whilst approaching that group, had parted with the bottle. However, there was considerable inconsistency in the other evidence before the Commission about the bottle and the manner in which it was parted with by Barker.

5.126 According to the evidence of civilian witnesses the bottle was “empty”, contained 7 centimetres of liquid or contained only “*an inch, an inch and a half of liquid*”. The evidence of civilian witnesses was that Barker had thrown the bottle “*across his body*” so that it “*landed in the bushes*” or that Barker had discarded or “*skimmed*” the bottle “*to the median strip to the left*”. No civilian witness gave evidence that the bottle had been thrown in the direction of the police officers. In his evidence Barker specifically denied that he had thrown it in the direction of the police officers.

5.127 This evidence was in conflict with the evidence of Hill, Haines and Ryan. According to Ryan the bottle thrown by Barker was “*half full*”. Ryan said that he had heard and seen the bottle “*whistle*” past his head and skid along the ground in close proximity to where Haines and Walmsley were located. In evidence to the Ballina Local Court Haines said that she had heard the “*thud*” of the bottle landing next to her. Haines said that from that sound she estimated the bottle to have landed “*fairly close (to her), probably within a metre*”. In her evidence to the Commission Haines said that the bottle had landed on the roadway to her left and that there was not much bitumen roadway between where she was and the garden bed to her left. Hill gave evidence that he had observed Barker stop to throw the bottle and that the bottle had almost hit Ryan and landed “*a couple of feet*” from Haines.

5.128 For reasons relating to the credibility of Hill, which will become apparent later in this report, the Commission is of the opinion that it should exercise caution when relying on any evidence of Hill which is contrary to the interests of Barker.

- 5.129 It was submitted by Counsel Assisting that, subject to one possible exception, it would be unnecessary for the Commission to make any finding about what Barker may have done leading up to his arrest by Hill on the night of 14 January 2011. The Commission accepts this submission. Given the conflicts in the evidence which have been identified, the Commission considers that it should not attempt to make any finding about the manner in which Barker parted with the 1.25 litre bottle he had been carrying. The Commission concludes that it should not attempt to make a finding about whether or not the arrest of Barker was justified and declines to do so.
- 5.130 The exception referred to by Counsel Assisting was the possibility that the conduct of police officers towards Barker might have been motivated by a desire to prevent Barker from using his mobile phone to film the arrests of Crook and Healey.
- 5.131 In evidence to the Commission Barker said that he was tackled immediately after taking the mobile phone from his pocket and that he had not had enough time to enter the passcode required to unlock the phone.
- 5.132 Given the small period of time which elapsed between the taking of the mobile phone from Barker's pocket and Barker being tackled by Hill, the Commission considers that it is improbable that any use or apprehended use by Barker of the mobile phone caused police officers to tackle Barker. Accordingly, the Commission has concluded that it should not make a finding that the restraint and arrest of Barker at Tamar Street was the result of any observation by police officers that Barker was filming, or about to film, the arrest of Crook and Healey.
- 5.133 There was also a conflict in the evidence about whether or not a police officer, or police officers, had used excessive force against Crook in the course of arresting her on 14 January 2011.
- 5.134 Crook gave evidence to the Commission that she had been "*thrown on to the ground and pushed around*" during the course of her arrest. She said she was not picked up and thrown to the ground but rather pushed to the ground. This had occurred at least once. Crook identified the police officer who applied this force against her as Haines.

- 5.135 Healey gave evidence that he did not observe what was happening to Crook during her arrest.
- 5.136 Craig's evidence was that she had observed police restraining Crook "very *violently*" which involved the "*slamming*" of her head against the gutter. Craig identified the police involved in restraining Crook as being a group of officers, which included a male officer and a female officer.
- 5.137 Kemp gave evidence that she had observed both a male and a female officer restraining Crook. She had then observed a male officer grab Crook by the hair and he then "*smashed her head into the pavement*".
- 5.138 Nolan gave evidence that a male officer had picked Crook up to chest height and dropped her. He said the male officer was a "*big man*" who was wearing black clothing (and not uniform).
- 5.139 Barker gave evidence that a male officer was "*T-bagging*" Crook. This meant he was lifting Crook up to the level of his belly button and dropping her down on an angle. This officer was male and was in uniform.
- 5.140 The versions given by the civilian witnesses were contradicted by evidence from some of the police officers.
- 5.141 In his evidence to the Commission Walmsley denied that he had picked up and dropped Crook to the ground. He said that he had not observed any other police officer engage in such an activity in Tamar Street.
- 5.142 In her evidence Haines denied that she had lifted Crook above her chest and dropped her to the ground. She said that she was responsible for effecting the arrest of Crook whilst Walmsley was responsible for effecting the arrest of Healey.
- 5.143 Ryan gave evidence to the Ballina Local Court that he had not observed Walmsley pick up and throw Crook to the ground.
- 5.144 The only injuries to Crook shown in the photographs of her taken by Healey were bruises, grazes and scratches.

- 5.145 Given Crook's own evidence, that she had physically interfered with Walmsley when he was attempting to effect an arrest of Healey, which was supported by the evidence of Walmsley and Haines, the Commission considers that it would have been necessary for some degree of force to be exercised against Crook by police officers in order to effect the arrest of both Crook and Healey.
- 5.146 As identified above, there are conflicts in the evidence concerning the use of force against Crook, including, critically, conflicts in the evidence about which police officer or officers it was who had applied force to Crook and the degree of force which was applied. In particular, the Commission notes that the nature of the injuries suffered by Crook as shown in the photographs taken by Healey is difficult to reconcile with the parts of the evidence of the civilian witnesses asserting that a significant degree of physical violence had been exerted against Crook, for example, the slamming or smashing of her head against the gutter.
- 5.147 It was submitted by Counsel Assisting that it was unnecessary for the purposes of the investigation for the Commission to determine whether or not any police officer applied excessive force against Crook during the course of arresting her. The Commission agrees that the question of whether or not excessive force was used by a police officer against Crook during her arrest is not a question that is required to be determined in the Commission's investigation and the Commission concludes that it should not seek to determine it.
- 5.148 The evidence of what occurred in Tamar Street which has been examined in some detail in this part of the Commission's report provides a background to the events which occurred later in the night of 14 January 2011 and which are examined in subsequent parts of this report.

6. SOME EVENTS WITHIN BALLINA POLICE STATION ON 14 JANUARY 2011

- 6.1 In the part of his submissions with the heading “*The events within Ballina Police Station on 14 and 15 January 2011*” Counsel Assisting dealt fully with only some of the events which were asserted by some witness or other to have occurred within Ballina Police Station on the night of 14 January 2011 and referred in only a summary, introductory way to other events, which were considered in much greater detail in later parts of Counsel’s submissions and which the Commission will address in later parts of this report.
- 6.2 Counsel Assisting noted in his submissions that most of the events which occurred within the Ballina Police Station on the night of 14 January 2011 were recorded in the CCTV footage produced by the cameras in the charge room and the BAS room of the Ballina Police Station.
- 6.3 The CCTV footage shows that the following events occurred at the following times.
- 6.4 At 23:06:07 Barker was brought into the charge room by Mewing and Eckersley and placed in a holding cell in the dock. His handcuffs were removed.²¹⁶
- 6.5 Until he was taken from the dock at 23:59:15, Barker behaved in an agitated manner. He constantly banged the perspex sheeting at the front of the dock.²¹⁷ There is much other evidence, apart from the CCTV footage, that Barker was yelling and abusive while he was in the dock.
- 6.6 At 23:13:20 Barker was searched within the dock by Hill and Ryan.²¹⁸ A property docket signed by McCubben indicates that the only items of property removed from Barker during the search were an earring and a tongue ring.²¹⁹

²¹⁶ Exhibit 20

²¹⁷ Exhibits 19, 20 & 69

²¹⁸ Exhibit 20

²¹⁹ Exhibit 32

- 6.7 At 23:19:00 Mewing approached Barker with an object in his hand. After apparently speaking to Barker about the object, Mewing placed it on the counter in the charge room.²²⁰
- 6.8 At 23:46:59 Barker's mother Sines entered the charge room. She stood outside the dock and spoke to her son, who remained in the dock. For much of the time that Sines was speaking with Barker, Barker remained sitting in the dock. However, at certain points Barker stood up and banged on the perspex door of the dock. At 23:56:47 Sines was approached by McCubben. Sines left the charge room at 23:56:55.²²¹
- 6.9 Apart from the above matters, which were clearly shown in the CCTV footage of the charge room and were undisputed, Counsel Assisting referred in his submissions to other matters which were the subject of at least some dispute. None of these matters appear to the Commission to be of critical importance but the Commission will nevertheless address them.

THE MOBILE PHONE

- 6.10 As already stated, at 23:19:00 Mewing approached Barker while Barker was in the dock. The CCTV footage depicts Mewing showing something in his hand to Barker.²²²
- 6.11 In his evidence before the Commission Barker said that what Mewing was showing him was the mobile phone Barker had had that night and that Mewing asked him more than once "*What's the code to this phone?*"²²³ Barker gave evidence that he said to Mewing "*It's pink, it's a girl's phone. It is my little sister's phone, I do not know the code.*"²²⁴ Barker then saw Mewing put the phone on the counter in the charge room.²²⁵
- 6.12 Barker gave further evidence that two or three days afterwards he and his mother went to Ballina Police Station and recovered his sister's mobile phone.²²⁶

²²⁰ Exhibit 20

²²¹ Exhibit 19

²²² *ibid*

²²³ PIC Transcript, Corey Barker, 19 February 2013, p.167

²²⁴ *ibid*

²²⁵ *ibid*

²²⁶ *ibid*, p.190

Sines in her evidence to the Commission said that at some time after 15 January 2011 Barker regained possession of the mobile phone.²²⁷

6.13 At a private hearing of the Commission the CCTV footage depicting Mewing showing an object to Barker was played while Mewing was giving evidence. Mewing said in evidence that "*it appeared*" that he was showing Barker a mobile phone and, although he did not recall, it was possible that some other police officer had asked him to obtain the passcode to the phone.²²⁸

6.14 In his evidence at the public hearing Mewing agreed that in a conversation with an acquaintance at some time after the private hearing on 15 November 2012 he had told that person that on 14 January 2011 he had been told by a senior police officer to ask Barker for the "*PIN number*" for his mobile phone.²²⁹ Ultimately in his evidence he agreed that what he had said in the conversation was what had actually happened on 14 January 2011.²³⁰ Mewing said that the senior officer who had given him the direction was either Hill or Ryan but he could not remember which one of them it was.²³¹

6.15 Ryan gave evidence before the Commission that on the night of 14 January 2011 he had not seen Barker with a mobile phone, that he had not been aware that a mobile phone was at the police station and that he had not asked Mewing to obtain the passcode for a mobile phone.²³²

6.16 Hill gave evidence that he had not at any time seen a mobile phone at the scene in Tamar Street.²³³

6.17 Hill gave the following evidence about what had happened in relation to the phone in the Ballina Police Station:

There was a pink phone sitting on the charge room counter. I said to him (Mewing), "Luke, find out who owns the phone". At no time did I think Corey Barker owned that phone. I actually believed it was the blonde girl's (Crook's).

²²⁷ PIC Transcript, Angelique Sines, 20 February 2013, pp.334-336

²²⁸ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), pp.11-12

²²⁹ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.371

²³⁰ *ibid*, p.372

²³¹ *ibid*, pp.372-373

²³² PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.691

²³³ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.805

...

Luke walked back to the counter and said, "I don't know whose it is," threw it on the counter and walked out of the charge room. At that point I didn't know whose it was. I didn't know it was Corey Barker's. It was left on the charge room counter.²³⁴

- 6.18 Eckersley gave evidence before the Commission that he had no recollection of anything being said in the charge room about a mobile phone.²³⁵
- 6.19 Walmsley gave evidence before the Commission that he did not hear any mention of a mobile phone belonging to Barker on the night of 14 January 2011.²³⁶
- 6.20 At a private hearing the CCTV footage depicting Mewing showing something in his hand to Barker was played to Woolven and Woolven eventually agreed that the object being held by Mewing appeared to be a mobile phone.²³⁷ However, Woolven said that he had no recollection of Barker's mobile phone being mentioned on the night of 14 January 2011.²³⁸
- 6.21 McCubben said he had no recollection of anything in relation to a mobile phone on the night of 14 January 2011.²³⁹

ASSESSMENT

- 6.22 On the basis of the evidence the Commission has referred to and particularly the evidence of Barker, Mewing and Hill and the evidence of the CCTV footage, the Commission concludes that Mewing did show an object to Barker while Barker was in the dock, that that object was a mobile phone and that the mobile phone was the phone belonging to Barker's sister.
- 6.23 In his submissions Counsel Assisting suggested that it was at least possible on the evidence that the mobile phone was shown to Barker by Mewing simply for the purpose of ascertaining who was the owner of the phone and Counsel

²³⁴ *ibid*, p.806

²³⁵ PIC Transcript, Constable Ryan Eckersley, 27 February 2013, p.730 & p.744

²³⁶ PIC Transcript, Constable Lee Walmsley, 27 February 2013, pp.767-768

²³⁷ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), p.17; PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.730

²³⁸ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.730

²³⁹ PIC Transcript, Robert McCubben, 25 February 2013, p.550

Assisting submitted that the Commission should not be satisfied to the requisite standard that the mobile phone was shown by Mewing to Barker for the purpose of ascertaining the passcode or PIN number for the mobile phone or that the mobile phone was connected with the way in which Barker was treated by police inside the Ballina Police Station.

- 6.24 In the state of the evidence and having regard to Counsel Assisting's submissions, the Commission concludes that it should not make a finding that Mewing asked Barker for the passcode or PIN number of the mobile phone. Barker's own evidence that he lost possession of the mobile phone when he was tackled in Tamar Street so that the phone was not in his possession when he was searched at the police station, would account for the phone not being included in his property docket.

MATTERS RELATING TO BARKER'S MOTHER

THE TERMS OF A TELEPHONE CONVERSATION BETWEEN HILL AND SINES

- 6.25 At the police station Barker, when asked his name, untruthfully gave the name of his brother. Hill made searches on the NSWPF Computerised Operational Policing System ("COPS") and obtained a contact number for Barker's mother, Sines. Hill telephoned the number and had a conversation with Sines.²⁴⁰
- 6.26 Sines gave evidence that the male person who spoke to her said that she needed to come and identify her son and that, unless she got to the police station within twenty minutes, police would take the person they had in custody to Grafton. Sines understood the reference to Grafton to be a reference to Grafton gaol. She went very quickly to Ballina police station.²⁴¹
- 6.27 At the police station she identified the person being held by the police as Barker and not his brother.²⁴²
- 6.28 In his evidence Hill agreed that he had spoken on the telephone to Sines but denied that he had said that, unless she got to Ballina Police Station within twenty minutes, the person being held would be sent to Grafton. He said that

²⁴⁰ PIC Transcript, Senior Constable David Hill, 27 February 2013, pp.790-791

²⁴¹ PIC Transcript, Angelique Sines, 20 February 2013, p.326

²⁴² *ibid*, p.327

the only place the person being held would have been sent would have been Lismore.²⁴³ Barker was in fact sent to Lismore later that night.

- 6.29 The Commission considers it possible that something was said by Hill to Sines by way of an inducement to Sines to come to the police station promptly. However, in the state of the evidence and taking into account the Commission's assessment of the credibility of the two witnesses, the Commission has concluded that it should not make a finding that Hill made a threat that the person being held at Ballina Police Station would be sent to Grafton gaol unless Sines came to the police station promptly.

WHETHER BARKER ABUSED HIS MOTHER WHILE SHE WAS AT THE POLICE STATION AND WHETHER, WHILE HIS MOTHER WAS AT THE POLICE STATION, POLICE OFFICERS IN THE CHARGE ROOM TAUNTED BARKER BEHIND HIS MOTHER'S BACK

- 6.30 As already stated, Barker's mother had a conversation with him after she arrived at the police station. During the conversation Barker was in the dock in the charge room and his mother was standing in the charge room outside but near the dock, facing her son.
- 6.31 In his evidence before the Commission Barker denied having been abusive to his mother during the conversation.²⁴⁴ He said that his mother asked him what he had done for him to be at the police station.²⁴⁵ He said that his mother "was *being good, really good, trying to help me.*"²⁴⁶ However, he accepted that he remained angry, that he continued to swear and yell and that at one point he hit the perspex wall of the dock.²⁴⁷
- 6.32 Barker said in his evidence that he remembered police officers "*taunting behind my mother's back.*"²⁴⁸ He remembered a police officer who was behind his mother's back making a gesture which he interpreted as the officer pretending to squeeze his mother's buttocks.²⁴⁹ He said to his mother "*Mum, look at what*

²⁴³ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.791

²⁴⁴ PIC Transcript, Corey Barker, 19 February 2013, p.161

²⁴⁵ *ibid*

²⁴⁶ PIC Transcript, Corey Barker, 20 February 2013, p.250

²⁴⁷ *ibid*

²⁴⁸ PIC Transcript, Corey Barker, 19 February 2013, p.161

²⁴⁹ *ibid*

*they're doing behind your back.*²⁵⁰ This gesture was repeated and Barker “*lost it again*” and started punching the perspex wall of the dock.²⁵¹ Barker could not remember who it was who was making these gestures but remembered it was a male.²⁵²

6.33 Barker’s mother Sines said that Barker was swearing while they were talking but she denied that he was abusive towards her. She gave the following evidence:

He would look over my shoulder, and that's when he would get angry. He explained to me that they were behind me taunting him, and that's what he said, he said, "Mum, they're taunting me."²⁵³

6.34 At one point the CCTV footage shows Barker’s mother turning around and looking behind her.²⁵⁴

6.35 In his statement of 19 January 2011 Hill said that, after he took Barker’s mother to the charge room, she attempted to speak with Barker. However, Barker continued to punch the dock and scream aggressively at his mother.²⁵⁵

6.36 In his evidence to the Ballina Local Court on 7 July 2011 Hill said that Barker was yelling and screaming, while his mother was in the charge room. Initially Barker was screaming about the police harassing him in Tamar Street. Ultimately he was swearing at his mother and threatening her. Hill did not remember Barker saying “*Mum, they’re laughing at me*” or words to that effect.²⁵⁶

6.37 In his evidence before the Commission Hill said that Barker’s mother tried to help the police calm Barker but was unsuccessful.²⁵⁷ He denied that any police officer taunted or laughed at Barker.²⁵⁸

²⁵⁰ *ibid*

²⁵¹ *ibid*

²⁵² *ibid*, p.164

²⁵³ PIC Transcript, Angelique Sines, 20 February 2013, p.328

²⁵⁴ Exhibit 19

²⁵⁵ Exhibit 44

²⁵⁶ Exhibit 94 (*R v Corey Barker*, Transcript of Proceedings, 7 July 2011, Witness: Senior Constable David Hill), pp.35-37

²⁵⁷ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.791

²⁵⁸ *ibid*, p.809

- 6.38 In his statement of 11 July 2011 Woolven said that he heard Barker’s mother repeatedly saying “*Cory, why are you behaving like this, stop it*”. However, Barker continued to yell and scream “*and his mother was unable to stop him behaving in a poor manner*”. Sines was eventually led from the charge room because of her inability to control or calm her son.²⁵⁹
- 6.39 In evidence before the Commission Woolven denied that he had laughed at or taunted Barker behind his mother’s back. However, he said that Barker might have said “*Mum, they’re laughing at me*” or “*Mum, they’re taunting me*”.²⁶⁰
- 6.40 Woolven gave evidence that he was not continuously in the charge room. He said “*I may have walked in, walked out. I’m not sure.*”²⁶¹
- 6.41 None of the other police officers gave evidence about these matters at the public hearing of the Commission. Ryan gave evidence in the Ballina Local Court that he did not remember any police officer “*making suggestive comments*” behind Sines’s back but he was in the charge room for only a short period of time.²⁶²

ASSESSMENT

- 6.42 The CCTV footage shows that at times while his mother was in the charge room Barker got to his feet and behaved in an agitated manner. It is undisputed that at times he was yelling and screaming abuse and threats. The Commission concludes that it should not make a finding that none of the abuse and threats were directed at his mother.
- 6.43 It is possible that some police officer was deliberately doing something behind Barker’s mother’s back to cause Barker to lose self-control. However, if anything was being done behind Barker’s mother’s back, it was not captured on any CCTV footage. In the absence of any CCTV footage, the Commission does not consider that it should, on the basis of Barker’s evidence, supported to a limited degree by his mother’s evidence, and the CCTV footage of Barker’s

²⁵⁹ Exhibit 48

²⁶⁰ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.641

²⁶¹ *ibid*, p.638

²⁶² Exhibit 85 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Senior Constable Greg RYAN), p.26

mother looking behind her, make a finding that a police officer was taunting Barker behind his mother's back.

- 6.44 Other parts of Counsel Assisting's submissions under the heading *The events within the Ballina Police Station on 14 and 15 January 2011* are more appropriately dealt with in later parts of this report.

7. THE DIRECTION TO TURN AROUND

7.1 There was an issue at the hearing about whether, while he was in the dock, Barker complied with directions given to him by Hill that he should turn around so as to present his back to the front of the dock, so that he could be handcuffed from behind before being removed from the dock.

EVIDENCE

7.2 Barker gave evidence before the Commission that, before he was taken from the dock, one of the police officers, he could not remember which, said “*turn around so we can handcuff you*” and that he did turn around as directed.²⁶³

7.3 This part of the events of the night of 14 January 2011 is shown in the CCTV footage. The footage shows that:

(i) at 23:59:23 Barker turned around so as to present his back to the front of the dock, placing his hands behind his back;

(ii) at 23:59:25 Barker turned back to his original position;

(iii) at 23:59:30 Barker turned again, but only partially so that his right shoulder was directed to the front of the dock. Barker almost immediately turned back to his original position; and

(iv) at 23:59:33 Barker was taken from the dock.²⁶⁴

7.4 It is necessary to examine the accounts of this matter provided at different times by each of the police officers.

7.5 In paragraph 11 of this statement of 19 January 2011 Hill said:

11. A short time later I approached the dock where the accused was with Senior Constable WOOLVEN, Constable ECKERSLEY, Constable MEWING and Constable WALMSLEY. I said, “Corey, turn around and put your hands behind your back. We’re moving you to the back cells”. The accused replied, “Get fucked cunt, I’m gonna punch you in the fucking

²⁶³ PIC Transcript, Corey Barker, 19 February 2013, p.168

²⁶⁴ Exhibit 18

head when I get a chance. I'll king hit you cunt". I repeated my directions towards the accused twice more however he wouldn't comply. I opened the door of the dock and took hold of the left side of the accused. Constable WALMSLEY took hold of the accused's right arm and the accused was removed from the dock.²⁶⁵

7.6 Hill gave the following evidence in the Ballina Local Court on 7 July 2011:

...I initially tried to get him to turn around and put his hands behind his back so he could be handcuffed, he wouldn't do that. He was still in the dock at that point. I told him a few times to do it, eventually he wouldn't do it so I took hold of one arm and pulled him out...²⁶⁶

7.7 In his evidence at the public hearing Hill said that he adhered to the evidence he had given in the Local Court. It was put to Hill that the CCTV footage seemed to show Barker turning. Hill replied:

Mr Rushton, yes, he does, and then as I go to open the door, he turns back around, and I tell him a further time to turn around so I can handcuff him; he does and then he turns back around again. At that point, as he went to turn back around for the third term, I've taken the opportunity to open the door and pull him straight out.²⁶⁷

7.8 In his statement of 19 April 2011 Mewing said in paragraph 7:

7. At the request of Sergeant McCUBBEN, BARKER was to be removed from the dock and placed into a cell at the rear of the Police Station. I approached the dock with Senior Constable HILL, WOOLVEN, Constable ECKERSLEY and WALMSLEY.

Senior Constable HILL said, "Corey, turn around and put your hands behind your back. We're moving you to the back cells".

BARKER said, "Get fucked cunt, I'm gonna punch you in the fucking head when I get a chance. I'll king hit you cunt".²⁶⁸

7.9 It is to be observed that parts of this paragraph in Mewing's statement, including the punctuation used, are strikingly similar to parts of paragraph 11 of Hill's statement. The Commission will be returning to the subject of the similarity of the parts of the two statements later in this report.

7.10 In his evidence before the Ballina Local Court on 2 December 2011 Mewing said:

²⁶⁵ Exhibit 44

²⁶⁶ Exhibit 94 (*R v Corey Barker*, Transcript of Proceedings, 7 July 2011, Witness: Senior Constable David Hill), p.27

²⁶⁷ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.785

²⁶⁸ Exhibit 46

Q. Do you recall any conversation that took place from any police officer towards Mr Barker or any conversation Mr Barker had to any police officer at that point?

A. Yes.

Q. Please tell the Court?

A. Senior Constable Hill told Mr Barker to turn around and place his hands behind his back, Mr Barker--

Q. And what happened?

A. Mr Barker told him to get.

HIS HONOUR

Q. You can say it?

A. "Get fucked cunt, I'm going to punch you in the head, I'll king hit you cunt." to those effects.

PROSECUTOR

Q. Was that said whilst Mr Barker was in the dock with the door closed?

A. Yes.

Q. After that point was there any exchange from Senior Constable Hill towards Mr Barker?

A. He was given more directions.

Q. What were they?

A: To tum around.

Q. And what did Mr Barker do?

A. He refused.

Q. And what happened then?

A. Senior Constable Hill opened the door and took hold of him with Constable Walmsley assisting.²⁶⁹

²⁶⁹ Exhibit 51 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Luke Mewing), pp.85-86

- 7.11 In his evidence at the private hearing Mewing initially said that Barker had refused to turn around.²⁷⁰ However, after being shown the CCTV footage of the incident Mewing modified the evidence he had previously given. He agreed with a suggestion made to him that in the CCTV footage it looked as though Barker was complying with the direction he had been given by Hill.²⁷¹ Mewing accepted that, in endeavouring to convey to the Magistrate, when he was giving evidence in the Ballina Local Court, that Barker had disobeyed the direction given by Hill, he had “*obviously made a mistake*”.²⁷² He asserted that what he had said in his statement was what he thought had happened at the time he made the statement.²⁷³
- 7.12 When he gave evidence at the public hearing Mewing was taken to what he had said in his statement and the evidence he had given at the private hearing, including his evidence that it looked from the CCTV footage that Barker had complied with the direction to turn around so that he could be handcuffed.²⁷⁴ Mewing then said to Counsel Assisting that, in agreeing with the suggestion put to him at the private hearing by Counsel Assisting, that it looked from the CCTV footage as though Barker was complying, “*I feel I was just agreeing with you*” and he had not actually believed that what was suggested to him by Counsel Assisting was the truth.²⁷⁵
- 7.13 Mewing was questioned about the evidence he had given at the private hearing that in endeavouring to convey to the Magistrate in the Local Court that Barker had disobeyed the direction he had “*obviously made a mistake*”.²⁷⁶ When pressed by Counsel Assisting to identify the mistake he had made, Mewing said “*I presume that he didn’t refuse to turn around*”.²⁷⁷
- 7.14 Mewing was questioned further by Counsel Assisting about the CCTV footage. The following questions and answers occurred:

Q...You've seen the tape, have you not?

²⁷⁰ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.13

²⁷¹ *ibid*, p.26

²⁷² *ibid*, p.27

²⁷³ *ibid*

²⁷⁴ PIC Transcript, Constable Luke Mewing, 21 February 2013, pp.377-380

²⁷⁵ *ibid*, pp.382-383

²⁷⁶ *ibid*

²⁷⁷ *ibid*, p.387

A. Yes, I have.

Q. It shows Mr Barker turning around with his arms down towards his back on two occasions, does it not?

A. Yes, it does.

Q. It would suggest, would it not, that he was making himself available to Officer Hill to be handcuffed?

A. Yes, it does look that way.

Q. And that was what you were referring to by the reference to a mistake. You were telling us, were you not, on 15 November, that you had mistakenly told the Ballina magistrate that Corey Barker had disobeyed the direction?

A. Yes, I presume so, yes.

Q. It is not a matter of presuming?

A. Yes.

Q. That's the fact, isn't it?

A. Yes.²⁷⁸

7.15 Mewing gave further evidence:

Q. Now, do you agree with me, sir, that having viewed the video, it doesn't appear as though Mr Barker refused anything? Do you agree with that?

A. No, I don't agree.

Q. What is it in the video that you say demonstrates, if anything, that Mr Barker refused to do what he was asked to do?

A. He turns back around.

THE COMMISSIONER: Q. Are you saying that he turned around but then turned back again?

A. He's moved away. He's faced and then he's moved again.

MR RUSHTON: Q. And then he moved back again, didn't he?

A. I believe so from the footage.

²⁷⁸ *ibid*, p.388

Q. Yes. He was, as you understand it, looking at the video today, endeavouring to do what Constable Hill had asked him to do?

A. From the video it appears that way.

Q. Yes.

A. But at the time I made my statement, I believed that he was just playing games.

Q. Well, listen, I have made my position very clear. Forget about what you put in your statement. I'll come to that in due course. But if you look at the video today, it suggests very much, doesn't it, that Mr Barker was doing what he was asked to do?

A. Yes, but I'm just trying to clarify.

Q. Don't worry about clarifying. Just listen to the question. It appears from the video that Mr Barker was doing what he had been asked to do?

A. Yes, it does.

Q. The substance of which was to make his hands available to slap the cuffs on?

A. Yes.

Q. And if that be the fact that that's what he was doing - if that be the fact - then what you told the magistrate was just simply wrong?

A. Well, I didn't agree until I saw the footage.

Q. No, I accept that, because you hadn't seen the footage at that point, but having seen the footage now, it suggests, doesn't it, that what you told the magistrate was just wrong?

A. That's possible.

Q. Well, it is not possible; it is the fact, is it not?

A. It appears that way.²⁷⁹

7.16 In examination by Mewing's own legal representative the following questions and answers occurred:

Q. In effect, Corey Barker was told to turn around and put his hands behind his back; is that correct?

²⁷⁹ *ibid*, pp.390-391

A. Yes, he was.

Q. When that sort of direction is given, do police officers consider compliance to have been effected if the person who's given the direction immediately turns around again?

A. No.²⁸⁰

7.17 Parts of paragraphs 17 and 18 of Walmsley's statement of 22 March 2011 were in the following terms:

17. Senior Constables HILL and WOOLVEN and Constables MEWING and ECKERSLEY and I entered the charge room to move Corey BARKER.

Senior Constable HILL said, "Corey, turn around and put your hands behind your back. We're moving you to the back cells."

Corey BARKER said, "Get fucked cunt. I'm gunna punch you in the fucking head when I get a chance. I'll king hit you cunt."

18. After a number of requests to turn around Senior Constable HILL opened the door to the dock and I took hold of the right side of Corey BARKER whilst Senior Constable HILL took hold of the left side....²⁸¹

7.18 As in the case of Mewing's statement, there are parts of Walmsley's statement which are strikingly similar to the corresponding parts of Hill's statement.

7.19 In his statement Walmsley did not expressly say that Barker did not comply with the directions to turn around but it is clearly implicit in the statement that Barker did not comply with the requests.

7.20 In his evidence at the Ballina Local Court on 2 December 2011 Walmsley said:

From there I've been informed by Senior Constable Hill that the custody manager, Sergeant McCubbin has required Mr Barker to be moved to one of the back cells in the police station. From there we've gone into the charge room, where Senior Constable Hill has said to Mr Barker, turn around, put your hands behind your back, we're going to move you down to the rear cells. I think Mr Barker has said, words to the effect of, fuck off, I'm going to punch you in the head if I get a chance and has refused to do as he was told. From there Senior Constable Hill has opened the door to the dock, I've taken hold of Mr Barker's right side, if you take - if that's a good word to describe it, so his right arm and upper arm. Senior Constable

²⁸⁰ *ibid*, p.459

²⁸¹ Exhibit 45

Hill has taken hold of his left side and we commenced to walk him out of the charge room.²⁸²

7.21 At the public hearing Walmsley was not asked any questions and did not give any evidence on this matter.

7.22 Part of paragraph 7 of Woolven's statement of 11 July 2011 was in the following terms:

7. A short time later I had a conversation with Senior Constable Hill, Constable Eckersley and Sergeant McCubben. As a result of this conversation we all walked into the charge room where our intention was to remove the male prisoner from the Perspex holding dock down into the cells, away from the front station area. Senior Constable Hill directed the male prisoner to turn around and place his hands behind his back on a number of occasions however Senior Constable Hill was only met with abuse and threats. The dock door was opened where Senior Constable Hill and Constable Walmsley grabbed a hold of the male prisoner where they had hold of one arm each where they began walking the male prisoner down towards the Cells...²⁸³

7.23 Woolven was interviewed in an internal NSWPF investigation on 31 May 2012. A record of the questions asked and the answers given in the interview was prepared and signed by Woolven. The following question and answer appeared in the signed record of the interview:

Q. In paragraph 7 of your statement you stated Senior Constable HILL directed the male prisoner to turn around. Do you recall the conversation?

A. I recall HILL saying "turn around" to the prisoner. He turned around with his back to HILL and WALMSLEY. The perspex door was opened and WALMSLEY and HILL grabbed a hold of the prisoner by the arms as in my statement. I was standing somewhere in close vicinity as the charge room is only small.²⁸⁴

7.24 At the private hearing on 15 November 2012 Woolven was shown the CCTV footage of the incident. The following questions and answers occurred:

MR RUSHTON: Pausing there. Did you see, on two occasions, the prisoner putting his back towards Hill and putting his arms behind his back?

A. Yes.

²⁸² Exhibit 93 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Lee Walmsley), pp.51-

52

²⁸³ Exhibit 48

²⁸⁴ Exhibit 80

Q. He appeared, do you agree, to be offering up his arms to be handcuffed?

A. That's what he kept on saying, yes.

THE COMMISSIONER: Q. That's what he appeared to be doing?

A. Yes.

MR RUSHTON: Q. Yes.

A. No, he kept on turning around, and Hill was saying, "Turn around. Turn your back to me", and that's when he kept on turning around, but face up. I mean, prior to that, it was as he was about to open up the door, he kept on turning around and that's when Hill was saying, "No, turn your back."

Q. Which he did?

A. But he kept on turning around. When someone says, "Turn your back to me", you turn your back and you stay.²⁸⁵

7.25 Woolven stated during the private hearing that, until the private hearing, he had not seen the CCTV footage depicting Barker being taken from the dock.²⁸⁶ He asserted the footage confirmed his recollection, in that it showed Barker "*keep[ing] on turning back round*".²⁸⁷ When it was put to Woolven by Counsel Assisting that the evidence he had just given about Barker's actions was not contained in his statement, where he had said that Hill "*was only met with abuse and threats*", he said "*it might have been a technicality, but that's what – that's what my statement says*".²⁸⁸

7.26 In evidence at the public hearing Woolven was questioned about what the CCTV footage showed:

Q. Can I suggest to you that that shows that he did what he was told to do, that is, to turn around to make his arms available?

A. I don't - I disagree. I believe that he was asked a number of times to turn around. He fronted up, he turned back, he fronted up, turned back and then he was eventually - put his back to the - to the dock.²⁸⁹

²⁸⁵ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), pp.37-38

²⁸⁶ *ibid*, p.39

²⁸⁷ *ibid*

²⁸⁸ *ibid*

²⁸⁹ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.634

7.27 The answer Woolven had given in the interview in the internal NSWPF inquiry, that Barker had turned around with his back to Hill and Walmsley, was put to him by Counsel Assisting. The following questions and answers occurred:

Q. That's what you've said. What were you intending to convey?

A. He eventually turned around with his back.

Q. He eventually turned around and did exactly what he was asked to do.

A. Technicality. I - there's no dramas there. I know that he did.

THE COMMISSIONER: Q. Hill, you say, asked him to turn around and you go on to say, "He turned around"?

A. Yes.

Q. Well --

A. Maybe that should have been - or it could have been - it would have been "he eventually turned around". I didn't type this. Sergeant Dyrmaier did.

MR RUSHTON: Q. You signed it.

A. Yes, I signed it.

Q. What does it matter whether it was typed by you or typed by the officer who was interviewing you?

A. I could have just flicked over it.

Q. You've told us it was just a mere technicality.

A. Well, I didn't use the specific - one specific word.

Q. You agree, don't you, that whether it was eventually or immediately, Mr Barker turned around and with his back to Hill and Walmsley?

A. Yes, eventually he turned around.

THE COMMISSIONER: Q. It's not the case, is it, that Constable Hill was only met with abuse and threats?

A. Yes.

Q. You say that's right, do you?

A. Yes.

Q. In this interview, you're recorded as saying that Barker turned around; that's something other than abuse or threats, isn't it?

A. Well, the statement I made, Commissioner, I made in July and then this is an interview in May - or May the following year, I think.²⁹⁰

7.28 In paragraph 6 of his statement of 16 May 2011 Eckersley said:

6. A short time later I was approached by Senior Constable HILL and asked to assist him in moving the accused from the dock to the rear cell. I followed Senior Constable HILL to the charge room. Also present was Constable MEWING, Senior Constable WOOLVEN and Constable WALMSLEY. Senior Constable HILL approached the dock door and said "turn around Corey, we're going to move you to the cells so I'm going to hand cuff you." The accused said "fuck you cunt, I'll fucking king hit you when I get the chance!" Senior Constable HILL again told the accused to turn around and place his hands behind his back and again he refused.²⁹¹

7.29 In his evidence in the Ballina Local Court on 2 December 2011 Eckersley said:

I was standing in the room adjacent to the charge room, in front of where the accused came through. I could hear Constable Hill, Senior Constable Hill telling Corey to turn around, we're going to take you to the - to the cell, we need to handcuff you. Corey was saying, "Fuck you, I'm not going to do it. I'm going to fucking king hit you when I get the chance. Fuck you." So Senior Constable Hill opened the door, removed Corey from the dock...²⁹²

7.30 During his evidence in the Ballina Local Court the following questions and answers occurred:

HIS HONOUR

Q. Listen carefully to the question if you would sir. What you're being asked is, is it your evidence that Corey Barker did not turn around at all?

A. I - I couldn't see him in - in the dock from where I was standing, out in the adjacent room.

BOSS

Q. But haven't you just given evidence to the fact that you did see him in the dock?

²⁹⁰ *ibid*, pp.635-636

²⁹¹ Exhibit 47

²⁹² Exhibit 92 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Ryan Eckersley), p.27

A. I saw him in the dock before and I could hear him saying, "Fuck you, I'm not going to do it, I'm not going to do it." And then Senior Constable Hill turned around and grabbed - grabbed him out.²⁹³

7.31 In his evidence before the Commission Eckersley said:

...Senior Constable Hill's told Corey to turn around so he could be handcuffed as we were going to take him to the cells. Corey said to Senior Constable Hill, "Fuck you, I'll fucking king hit you when I get the chance", and he's refused to turn around and to be handcuffed.²⁹⁴

7.32 Later in his evidence he was asked whether he adhered to what he had said in paragraph 6 of his statement:

Q. Do you maintain that that is correct?

A. Well, I maintain he didn't obey the direction by standing with his hands behind his back so he could be handcuffed. He turned around briefly with his back to Hill and then back towards Hill.

Q. And he turned around again, didn't he?

A. He started to turn around when they opened the door, yes.

Q. Well, is it truthful to say that he refused?

A. Yes, I believe so.²⁹⁵

7.33 Eckersley gave evidence that from where he was standing at the door of the BAS room he could see into the charge room and could hear what Hill said to Barker and what Barker said in response.²⁹⁶

7.34 Paragraph 12 of McCubben's statement dated 11 August 2011 was in the following terms:

12. A short time later Senior Constable Hill and Woolven and Constables Eckersley, Mewing and Warmsley came into the chargerroom. I went back to working on the computer at the chargerroom desk. Across the desk I could see Senior Constable Hill go to the dock. I could see and hear that the accused was refusing to be handcuffed. I then saw Senior Constable

²⁹³ *ibid*, pp.31-32

²⁹⁴ PIC Transcript, Constable Ryan Eckersley, 27 February 2013, p.721

²⁹⁵ *ibid*, p.726

²⁹⁶ *ibid*, p.745

and Constable Warmsley grab the arms of the accused. They then started to march the accused towards the cells...²⁹⁷

7.35 At the public hearing McCubben was asked by Counsel Assisting to give an account in his own words of what had happened in Ballina Police Station on the night of 14 January 2011, from the time that Barker was brought into custody. In his account McCubben said that there were three “*angry and aggressive and intoxicated people in custody*” (that is, Barker, Crook and Healey) and that he had problems getting any work done due to the noise level in the charge room.²⁹⁸ His account continued:

At some stage I've made a decision to separate him (Barker) and put him down the back, and I've made the request to the arresting officer, and that would be Senior Constable Hill.

I don't know if I made that request directly, but I let it - somehow, someone told him, or I might have even told him, "He needs to be moved. I can't get stuff done."

He was punching the dock pretty badly; I think even head-butting it.

They rounded up a few police to move him. I think at the time of moving - I can't recall exactly, but I think I would have been behind the computer. The video of the charge room should verify that. He's been moved. It's my recollection that there was going to be a fight. There were a number of police in the charge room, and it's my recollection that at that point the door was opened and Walmsley and Hill sort of rushed and grabbed him.²⁹⁹

7.36 He was questioned about the part of his account where he said it was his recollection that there “*was going to be a fight*”. McCubben said:

Well, I don't remember the exact words, but I think Senior Constable Hill was speaking to Barker, asking him to do something or telling him what was going to happen, and he was being non-compliant, or that's my recall. I can't specifically remember what the request was, but I thought there was going to be a blue.³⁰⁰

7.37 McCubben was questioned about the sentence in his statement in which he said “*I could see and hear that the accused was refusing to be handcuffed*”. He was asked whether he had an independent recollection of that matter and he said that he did not at the time of giving evidence at the Commission have any

²⁹⁷ Exhibit 49

²⁹⁸ PIC Transcript, Robert McCubben, 25 February 2013, p.479

²⁹⁹ *ibid*

³⁰⁰ *ibid*, p.480

recollection and did not know whether he had had an independent recollection at the time of making his statement.³⁰¹

SUBMISSIONS

- 7.38 Counsel Assisting submitted that the Commission should find that, contrary to much of the evidence of the police officers, Barker, in response to a direction from Hill, did turn around and make himself available to be handcuffed. It was pointed out that the CCTV footage showed that Barker was pulled out of the dock backwards. Counsel Assisting submitted that a number of the police officers had “*coloured their accounts so as to reflect unfavourably on Mr Barker*”.
- 7.39 As already recorded in this report, the Commission did not receive any submissions from Hill. Haines and Ryan were not present in the charge room and consequently no submission on the present matter was made on behalf of either of them.
- 7.40 No submission relevant to the present matter was made on behalf of Eckersley.
- 7.41 It was submitted on behalf of Mewing that, while the CCTV footage showed Barker turning around, it also showed him immediately turning back to face the police officers. It was submitted that, as a matter of common sense, what was shown in the CCTV footage did not amount to compliance with Hill’s direction and that the Commission should find that Barker was “*playing games*”.
- 7.42 It was submitted on behalf of Walmsley that the CCTV footage showed that, although Barker twice presented his back to the police, he, on each occasion, “*turned to face police while they were trying to handcuff him*”.
- 7.43 It was submitted on behalf of Woolven that the CCTV footage showed Barker turning back, after initially turning. It was submitted that what was shown in the footage was consistent with the evidence of Woolven and other police officers that Barker had not properly obeyed the directions he was given.

³⁰¹ *ibid*, pp.483-484

- 7.44 The submissions made on behalf of McCubben were largely directed to opposing any finding by the Commission that the account McCubben had given had not been based on McCubben's own unaided recollection.

ASSESSMENT

- 7.45 It is clear that Hill directed Barker while he was in the dock to turn around so that he could be handcuffed with his hands behind his back. Evidence to that effect was given by Hill and Barker in his evidence agreed that such a direction had been given.
- 7.46 Barker asserted in his evidence that he did turn around, as he was directed. As already stated, the CCTV footage shows that Barker turned on two occasions.
- 7.47 Consequently, some of the evidence given by police officers about this matter was clearly untrue. For example, Woolven's assertion in his statement that, when Hill directed Barker to turn around, Hill "*was only met with abuse and threats*" was untrue.
- 7.48 In the light of the CCTV footage some of the police officers modified their accounts and suggested, not that Barker had failed to turn around at all, but whether in turning around and then resuming his original position he was genuinely complying with Hill's direction or whether he was "*playing games*".
- 7.49 The Commission has viewed the relevant CCTV footage a number of times. The Commission has formed the opinion that on the first occasion Barker fully turned so as to present his back to the front of the dock, with his hands placed behind his back, presenting an opportunity to be handcuffed. The Commission concludes that on that occasion it should find that Barker attempted to comply with the direction given by Hill. On the second occasion, however, Barker did not fully turn so as to present his back and did not place his hands behind his back and he remained in a turned position only for a very short time before resuming his original position. The Commission concludes that on this occasion Barker did not properly comply with Hill's direction.

8. THE ALLEGED ASSAULT OF HILL WITHIN THE BAS ROOM OF BALLINA POLICE STATION

8.1 It will assist the examination of the questions to be resolved in this part of the report and some subsequent parts of the report to set out chronologically events which occurred in the criminal proceedings against Barker and the steps by which the prosecution evidence on the charge of assault was obtained and given in court.

8.2 On 15 January 2011 Barker was charged with the following offences:

- (i) assaulting a police officer in the execution of his or her duty, in contravention of s 58 of the *Crimes Act 1900* (NSW) (“the *Crimes Act*”);
- (ii) resisting a police officer in the execution of his or her duty, in contravention of s 58 of the *Crimes Act*;
- (iii) throwing a missile at a police officer in the execution of his or her duty, in contravention of s 60(1) of the *Crimes Act*;
- (iv) hindering a police officer in the execution of his or her duty, in contravention of s 546C of the *Crimes Act*;
- (v) behaving in an offensive manner, in contravention of s 4(1) of the *Summary Offences Act 1988* (NSW); and
- (vi) giving a false name to a police officer, in contravention of s 13(a) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).³⁰²

8.3 Charge (i) was based on an allegation that Barker punched Hill inside the Ballina Police Station. Charges (ii) to (v) were based on aspects of Barker’s alleged behaviour in Tamar Street. Charge (vi) was based on Barker’s giving the name of his brother, and not his own name, to police officers at Ballina Police Station.

³⁰² Exhibit 33

- 8.4 In this part of its report the Commission will quote or summarise a number of parts of the statements made by the police officers and a number of parts of the evidence given by the police officers and other witnesses in the Ballina Local Court and before the Commission. It will be convenient to include, not only parts of the statements and parts of the evidence directly relating to the alleged assault, but also some parts of the statements and of the evidence relating to events occurring in the Ballina Police Station after the alleged assault. These parts of the statements and of the evidence will be relevant to questions considered by the Commission in subsequent parts of this report. In quoting parts of the statements of police officers the Commission will not seek to correct what appear to be spelling, typographical or grammatical errors. Parts of the statement which appear in bold print are in bold print in the original statements.

THE STATEMENTS OF RYAN, HILL, WALMSLEY, MEWING, HAINES AND ECKERSLEY

- 8.5 The first statement to be made by any police officer in the criminal proceedings against Barker was a statement made by Ryan on 18 January 2011. Although he had been in Ballina Police Station at the time of the alleged assault and was the informant on the charge of assault, Ryan had been in another part of the Ballina Police Station at the time of the alleged assault and hence was not a witness to the alleged assault. The only reference in Ryan's statement to the alleged assault was in paragraph 8 in which he said that, while he was processing the paperwork for the charging of Barker for the offences alleged to have been committed in Tamar Street, Hill had informed him that he had been assaulted by Barker.³⁰³
- 8.6 On 19 January 2011 Hill and Ryan went to Ballina Police Station for the purpose of obtaining and viewing the tapes on which was recorded the CCTV surveillance of parts of the Ballina Police Station on the evening of 14 January 2011. Hill and Ryan obtained the tapes but found that the tapes could not successfully be played.
- 8.7 The next statement to be made by a police officer was a statement made by Hill on 19 January 2011. In parts of this statement Hill said the following:

³⁰³ Exhibit 43

11. ...Constable WALMSLEY took hold of the accused's right arm and the accused was removed from the dock.

12. The accused was walked through a doorway towards the cells when he tensed his arms and pulled free of Constable WALMSLEY grip. The accused punched me with a closed right fist to my nose and I turned away as I saw the punch coming. I jammed the accused against a wall and tried to get control of him however he tried to throw further punches at me and he was throwing his arms around trying to break free. I wrestled the accused to the ground where numerous police assisted me in restraining his arms to the rear. The accused tried to hold his arms up underneath his body however police overpowered him and I handcuffed the accused to the rear. I yelled at the accused, "Now you're getting charged with assaulting police also." The accused refused to stand up or walk and he was carried by numerous police to the back cell where he was placed on his side and locked inside.

13. As a result of the assault I had some soreness to my nose however there was no visible injury. I notified Senior Constable RYAN of what occurred and provided him with the details. About 20 minutes later the accused's handcuffs were removed and he was left in the cell for the remainder of the charging process. I continued with other duties.³⁰⁴

In paragraph 14 of his statement Hill said:

14. On the 19th of January 2011 Senior Constable RYAN and I went to Ballina Police Station where I had a conversation with Sergeant JACKA. I removed the video tapes which relate to this incident on the 14th January 2011. I attempted to review the assault incident however the relating tape was damaged and wouldn't play back. I made further checks with the CCTV system in the charge room and it was not operating properly. I notified Sergeant JACKA of this and booked the video tape into the Ballina exhibit book. Due to the damage to the tape I am unable to produce a video copy of the assault incident.³⁰⁵

8.8 On 21 March 2011 Ryan sent an email to all of Walmsley, Eckersley, Mewing, Haines and Woolven in the following terms:

People,

I need statements from you re the arrest of Corey BARKER. He is the fella that threw the bottle then carried on one friday night in ballina when Kelly and Lee were arresting two persons from a domestic in Tamar Street. Barker then carried on back at the police station and assaulted Hilly.

I have attached Hilly's and my statement for your reference. Can you please complete asap and send up to TAG office Lismore.³⁰⁶

³⁰⁴ Exhibit 44

³⁰⁵ ibid

³⁰⁶ Exhibit 98

Attached to the email were copies of the word processing files containing the statements of Hill and Ryan. The only difference between the copies of the statements in the word processing files and the signed copies of those statements which became exhibits at the public hearing was that in paragraph 7 of Ryan's statement a series of question marks was replaced by the name "Marshall".

- 8.9 The next statement to be made was a statement made by Walmsley, which was dated 22 March 2011 but was signed by Walmsley on 28 March 2011. Parts of this statement were as follows:

18. After a number of requests to turn around Senior Constable HILL opened the door to the dock and I took hold of the right side of Corey BARKER whilst Senior Constable HILL took hold of the left side. Senior Constable HILL and I walked Corey BARKER through a doorway on the northern side of the charge room to take BARKER to the cells. As we passed through the doorway I felt Corey BARKER tense his right arm and pull free from my grip. BARKER then swung his right closed fist towards Senior Constable HILL striking him in the nose. Senior Constable HILL and I drove BARKER up against the western wall of the small room next to the charge room in an attempt to regain control over him. Corey BARKER continued to struggle and threw further punches at Senior Constable HILL. I am not sure if these punches made contact with Senior Constable HILL due to my obscured view. BARKER was flailing his arms attempting to break free of police control.

19. Senior Constable HILL managed to take Corey BARKER to the ground where Senior Constable WOOLVEN, Constables MEWING, ECKERSLEY and I put weight on Corey BARKER to assist Senior Constable HILL to get BARKER's arms to the rear of his body. Corey BARKER continued to resist police and fail to comply as he refused to free his arms and held them under his body to prevent being handcuffed. Police overpowered Corey BARKER and he was handcuffed to the rear of his body. Corey BARKER then refused to stand and walk to the rear cells and had to be physically dragged by the police involved. BARKER was put onto the floor in the recovery position and locked inside the rear cell.

Senior Constable HILL said, "Now you're getting charged with assaulting police also."³⁰⁷

- 8.10 Mewing made a statement on 19 April 2011, parts of which were as follows:

8. After a number of directions Senior Constable HILL opened the dock door and took hold of BARKER with Constable WALMSLEY assisting. BARKER was walked through a doorway towards the cells where he tensed up and broke free of Constable WALMSLEY. BARKER punched Senior Constable HILL in the face, striking him in the nose with a right closed fist. BARKER was forced against the wall by Senior Constable HILL and Constable WALMSLEY in an attempt to gain control of him. BARKER

³⁰⁷ Exhibit 45

continued to throw punches at Senior Constable HILL and break free from being restrained against the wall. I assisted in taking BARKER to the ground and grabbing his arms from underneath his body so he could be handcuffed to the rear.

Senior Constable HILL said, "Now you're getting charged with assaulting police also".

9. BARKER refused to stand up or walk to the cells and was assisted by all police involved in restraining him. BARKER was placed on his side in the cell and locked inside.³⁰⁸

8.11 In a statement made by her on 28 April 2011 Haines said that, after she returned to the Ballina Police Station on 14 January 2011, she was occupied in the process of charging Crook. She became aware that Barker had been involved in an incident with other police officers but she herself had not witnessed the incident.³⁰⁹

8.12 In a statement made by him on 10 May 2011 Eckersley said:

7. Senior Constable HILL opened the dock door and took hold of the accused left arm. He was lead out of the dock where Constable WALMSLEY took hold of his right arm. I was standing in front of the accused in a room adjacent to the charge room. As the accused was walked toward where I was standing he broke free from Constable WALMSLEY's grip and punched Senior Constable HILL to the face. I rushed in to take hold of the accused arm. As I did Senior Constable HILL swung him around and jammed him against the wall before taking him to the ground. I assisted in restraining the accused left arm as he attempted to hold both arms under his body before Senior Constable HILL handcuffed him to the rear. After being handcuffed the accused refused to stand up and walk to the cell so he was carried to the rear cell by the police present.³¹⁰

THE HEARING AT THE BALLINA LOCAL COURT ON 7 JULY 2011

8.13 The summary trial of the various charges against Barker came on for hearing in the Local Court at Ballina on 7 July 2011. On 7 July 2011 Haines and Hill gave evidence. Haines gave evidence about the offences allegedly committed in Tamar Street but, consistently with her statement of 28 April 2011, gave no evidence about the alleged assault.³¹¹

³⁰⁸ Exhibit 46

³⁰⁹ Exhibit 65

³¹⁰ Exhibit 47

³¹¹ Exhibit 71 (*R v Corey Barker*, Transcript of Proceedings, 7 July 2011, Witness: Senior Constable Kelly Haines)

8.14 Hill gave evidence about the alleged assault. He said that while Barker was in the dock in the charge room he was yelling and screaming so loudly that police were unable to conduct a conversation with persons at the front counter of the police station. In these circumstances McCubben directed Hill to move Barker from the dock to the cells at the back of the police station. Hill collected a number of police officers to assist him in conveying Barker from the dock to the cells.³¹²

8.15 The following question and answer occurred:

Q. Subsequently you say that in that conveying from the dock area or the cell, the holding cell in the police station to another cell, he punched you in the face, is that correct?

A. That's correct. I initially tried to get him to turn around and put his hands behind his back so he could be handcuffed, he wouldn't do that. He was still in the dock at that point. I told him a few times to do it, eventually he wouldn't do it so I took hold of one arm and pulled him out. Constable Walmsley took hold of the other arm, the other police were around us and standing behind us. Started walking him towards the cells out the back and as we passed through the doorway, he - he kind of flexed his arm against me and he pulled his right arm free from Constable Walmsley and he threw a punch at me.³¹³

8.16 Hill was asked by the police prosecutor why Barker had not been handcuffed when he was taken from the dock and he replied:

Well that's what we were trying to do initially. When he came out of the dock, took hold of his arms and at that point he wasn't resisting, he was walking with us. So we just started walking, as soon as we got through the door it was maybe a few feet away. That's when he started to try and throw punches.³¹⁴

8.17 Hill's evidence continued:

...There was a wrestle. I jammed him straight away against a wall when he tried to punch me - when he punched me in the nose. I've jammed him against the wall and all the other police have come in behind me. He's trying to throw punches over his shoulder at me, we've had to force him down to the ground. At that point, I was just on one arm trying to hold it up behind his back. There were other police on his legs, on his head holding him down. We got him handcuffed. At that point I tried to get him to put his

³¹² Exhibit 94 (*R v Corey Barker*, Transcript of Proceedings, 7 July 2011, Witness: Senior Constable David Hill), p.26

³¹³ *ibid*, p.27

³¹⁴ *ibid*, pp.27-28

legs underneath him and walk to the cells, he wouldn't do that, so we had to pick him up and carry him down to the cells.³¹⁵

8.18 Hill was questioned by the police prosecutor about the assertion in his statement that he had attempted to play the video tapes of what had happened in the police station on 14 January 2011 but had discovered that the tapes “*wouldn't play back*”. He said he had reported the defect in the tapes to the station supervisor at Ballina Police Station. Hill said that he had not known of the malfunctioning of the recording system until he attempted on 19 January 2011 to play the video tapes.³¹⁶ He asserted that either he or the station supervisor had made a written note that the surveillance tapes were faulty.³¹⁷

8.19 At this stage in the proceedings the Magistrate directed Ryan, who was in Court, to go to the nearby police station and get the CCTV tapes register and also the note which Hill said had been made that the tapes were faulty.

8.20 After his evidence in chief had concluded, Hill was cross-examined by Barker's solicitor Mr Boss.

8.21 In cross-examination Hill gave further evidence about the alleged assault on him by Barker. He said:

...As we stepped through the doorway into the next room leading to the corridor that goes to the cells, that's when he's got his arm free and punched me in the nose.³¹⁸

8.22 Hill said that the incident had happened, not in the charge room, but in “*the next room as we went through the doorway, that's when Constable Walmsley's lost his grip on his arm.*”³¹⁹

8.23 Hill gave further evidence that:

He didn't protest, he come out of the dock and we started walking him down the hallway. As soon as we went through the doorway he's punched me and after that he was just fighting and throwing punches and kicking his legs about. He wasn't protesting verbally at all.

³¹⁵ ibid

³¹⁶ ibid

³¹⁷ ibid, p.29

³¹⁸ ibid, p.40

³¹⁹ ibid

...

After he punched me in the face...the fight happened in a small area, there was four or five police. He was kicking and throwing punches. At one point he was half jammed up against the filing cabinets on the left, that's where I first pinned him against the wall and the filing cabinet and then when we've eventually got him down to the ground, he was half pinned against the legs of the BAS machine table and the chair that was there.³²⁰

- 8.24 When asked whether he had punched Barker, Hill said "*I punched him when he was throwing punches at me and I was trying to get him down to the ground.*"³²¹
- 8.25 Hill said that after Barker was on the floor and had been handcuffed, he had told Barker to get up.³²²
- 8.26 Hill gave evidence that after Barker had been placed in the back cells he was left handcuffed there and "*about 15 minutes later we went back down there and we removed the handcuffs*".³²³
- 8.27 Hill was cross-examined about the contents of the tapes register book which had just been obtained by Ryan from the police station. He accepted that there was no mention in the book of the tapes having failed or of the tapes having been damaged.³²⁴ In response to questions asked by the Magistrate Hill agreed that the tapes were meant to be an independent version of what had happened and he expressed the hope that the tapes would "*work*", because, he said, they would show exactly what had happened.³²⁵
- 8.28 The tapes were produced to the Court and became an exhibit. The Magistrate told the Court that he had spent a considerable amount of time out of court attempting to play the tapes but had experienced difficulties. The Magistrate later informed the court:

...It seems to me that the situation is this. This case is going to rise or could very simply rise or fall on what's on that tape, in this sense. That if the tape shows - I'm not suggesting it will - the defendant punching out at the Senior Constable as his evidence is and then the scuffle following, well that's going to - and un-handcuffed as he's walking through that room -

³²⁰ *ibid*, p.41

³²¹ *ibid*, p.42

³²² *ibid*

³²³ *ibid*

³²⁴ *ibid*, p.43

³²⁵ *ibid*, p.44

that's going to make the Constable's evidence irresistible I would have thought in terms of guilt.

On the other hand, if it shows that he was handcuffed as he went through that room and was punched, then that's going to make the prosecution case very difficult to prove. Especially seeing as I understand it, the throwing of the missile rises and falls completely on this officer's evidence and that was the reason for the initial arrest.³²⁶

8.29 After discussion between the Magistrate, the police prosecutor and Mr Boss and some unsuccessful attempts to play the tapes in court, it was agreed that the proceedings should be adjourned and that the tapes should be sent to the State Technical Investigations Branch ("the STIB") of the NSWPF to ascertain whether the STIB could put the information recorded on the tapes in a form which would permit it to be viewed by the Court. Accordingly, the proceedings were adjourned and the tapes were sent by Ryan to the STIB.

EMAIL COMMUNICATIONS BETWEEN RYAN AND OTHER POLICE OFFICERS

8.30 On 8 July 2011 Ryan sent an email to McCubben in the following terms:

Sarg,

I require a urgent statement from you regarding the custody of Corey BARKER who Hilly and I charged at Ballina on the 14/01/2011. You were the custody manager on the night. see custody management record U-43578758

This matter was set for hearing at ballina on the 07/07/11 and there major issues raised by the defence and magistrate about the CCTV footage and custody records of BARKER on the 14/01/2011. In short the issues were that the CCTV footage was not able to be played in court due to the tape quality of the VHS tapes used at Ballina. I have had to sent VHS tapes to STIB to be copied over to DVD format. There have been allegations that police wiped the tapes

The second issue was his custody record. There is no mention of his aggressive behaviour in the dock or hitting and kicking the dock, nothing about the assault on Hilly when he was transferred to the cells down the back etc etc etc.

There has also been allegations made that police assaulted the accused whilst handcuffed and being walked to the holding cells down the back.

So basically i need a urgent statement from you outling all custody procedures and actions of the accused on the night. I'm sure you will remember this fella as he was carrying on so much punching and hitting the dock we had to close all the doors in the charge room to hear each

³²⁶ *ibid*, pp.45-46

informed Eckersley, Hill, Mewing, Walmsley, Woolven and McCubben of the date fixed for the further hearing. In the email Ryan said “*Sgt MCCUBBEN and S/Cst WOOLVEN fellas still waiting on statements getting beyond a joke now.*”

8.35 On 10 August 2011 McCubben sent an email to Ryan advising him that he had just returned from a period of leave and would get his statement to Ryan by the end of the week.³³⁰

8.36 On 11 August 2011 Ryan sent an email to the police prosecutor in which he said:

In respect of the Barker matter. I have requested statements from Mark Woolven and Robert Mccubben, Custody Manager on the night of the incident. Mccubben may have some issues with his 2 page custody records considering all that occurred whilst Barker was in the dock. However that will be for him to explain in the box. Mccubben statements should cover that he directed S/Cst Hill to take Barker from the dock to the holding cells down the back. Woolvens statement will cover what happened during the assault upon Hill.

8.37 Also on 11 August 2011 McCubben sent Ryan an email in the following terms:

The statement is all but done.

Do you know where the filed custody records are for Barker? They have been removed from the folder at Ballina. I could not find them with the brief. Have the originals been handed up to the court? as I cannot find a copy anywhere.

Do you need me to hand up any documents re: custody or bail?³³¹

8.38 On 12 August 2011 Ryan sent an email to McCubben in which he said that the only place he could think of that the custody records might be was in the court folder.³³²

8.39 Later that day McCubben sent a further email to Ryan in which he said:

I have been right through the court papers. They are not there. It would be my guess they have been removed as part of that complaint you were talking about.

³³⁰ Exhibit 60

³³¹ ibid

³³² ibid

Do we have a time stamped for the assault in the charge room on the video? Noone has mentioned times although I place it somewhere between 11.30pm and 11.45pm.³³³

8.40 Ryan responded to McCubben by an email on 13 August 2011, saying:

Be safe bet to put the assault time as between 1145 - 1155 as thats what the indictment reflects.

Ballina charge room CCTV is way off in times each camera has a different time recorded and none are actually correct.³³⁴

THE STATEMENTS OF WOOLVEN AND MCCUBBEN

8.41 Woolven made a statement which bears the date 11 July 2011. Passages in the emails by Ryan which have just been quoted indicate that Ryan had not, up to 30 July 2011 and even 11 August 2011, received any statement from Woolven and the Commission considers it likely that Woolven's statement was made at some time after the date which it bears.

8.42 Paragraph 7 of Woolven's statement was in the following terms:

7. A. short time later I had a conversation with Senior Constable Hill, Constable Eckersley and Sergeant McCubben. As a result of this conversation we all walked into the charge room where our intention was to remove the male prisoner from the perspex holding dock down into the cells, away from the front station area. Senior Constable Hill directed the male prisoner to turn around and place his hands behind his back on a number of occasions however Senior Constable Hill was only met with abuse and threats. The dock door was opened where Senior Constable Hill and Constable Walmsley grabbed a hold of the male prisoner where they had hold of one arm each where they began walking the male prisoner down towards the Cells. Also present at this time was Constable Eckersley and Constable Mewing. I waited behind as they led the prisoner out towards the cells. As the prisoner was led through the doorway, the male prisoner began struggling and thrashing his arms. The male prisoner was able to break free from the grip police had of him where he began throwing punches. I saw at least one of these punches connect with the face of Senior Constable Hill. The male prisoner was wrestled to the ground by the police standing nearby. The male prisoner continued struggling and yelling whilst police attempted to restrain the prisoner. The male prisoner was then led out, carried out to the cells where he was placed into.³³⁵

³³³ ibid

³³⁴ ibid

³³⁵ Exhibit 48

8.43 McCubben made a statement which was dated 11 August 2011. In the statement he said that Barker's conduct in screaming and yelling and punching and kicking the door of the dock was affecting McCubben's ability to concentrate on the performance of his duties. McCubben had a conversation with Hill and Hill, Woolven, Eckersley, Mewing and Walmsley entered the charge room.³³⁶ In an earlier part of this report the Commission has already referred to a part of McCubben's statement in which he asserted that he could see and hear Barker, while he was still in the dock, refusing to be handcuffed.

8.44 McCubben's statement continued:

12...I then saw Senior Constable and Constable Warmsley grab the arms of the accused. They then started to march the accused towards the cells. When near the doorway on the northern wall of the chargeroom I saw the accused break free and swinging his arms attempting to punch Senior Constable Hill and Constable Warmsley.

13. The accused was wrestled to the ground by Senior Constable Hill and Constable Warmsley. The accused was still struggling violently and yelling, 'fucken cunts'. Constables Mewing and Eckersley assisted in restraining the accused and assisted in the removal of the accused to the cell block.

14. I then attended to custody entries for the three persons. I completed custody entry U43578758 for accused. Many of the fields of the accused's custody record were not able to be completed due to the accused refusing to answer and being uncooperative.

I now produce a copy of Custody Record U43578758 in the name of Corey Barker.

15. About 1.30am on the 15th January the accused was refused bail and escorted to Lismore Corrective Services.³³⁷

THE HEARING AT THE BALLINA LOCAL COURT ON 2 DECEMBER 2011

8.45 On 2 December 2012 the trial in the Ballina Local Court resumed. On the resumption the police prosecutor informed the court that the CCTV tapes had been copied into a digital format by the STIB and that Mr Boss had viewed the CCTV footage on the DVD produced by the STIB. A number of witnesses then gave evidence.

Ryan

³³⁶ Exhibit 49

³³⁷ *ibid*

8.46 The first witness on 2 December 2012 was Ryan. During his evidence the CCTV footage in digital form was played. Ryan said that the footage in digital form had been shown to Eckersley, because Eckersley wished to know whether what he remembered of the incident was correct, and had also been shown to Hill for the same reason, particularly to enable Hill to check whether Barker had been handcuffed when he came out of the dock.³³⁸

Hill

8.47 Hill was then recalled to give further evidence. The CCTV footage was played and Hill was asked further questions by the police prosecutor. He was reminded by the prosecutor of the evidence he had given on 7 July 2011 that he had been struck on the nose by Barker.³³⁹ He was asked whether, having seen the CCTV footage, he had any comment and he replied: "*The footage doesn't show the punch but I still remember being punched by him.*"³⁴⁰

8.48 Hill conceded that the CCTV footage appeared to show that Barker's right arm was still being held by Walmsley as Barker, Walmsley and Hill entered the BAS room. He was asked whether he adhered to the evidence he had given on 7 July 2011 that he had been hit by Barker's right hand. He replied:

It could have been either arm. Based on the footage it could have been his left arm. All I remember is seeing his fist come across and I've pulled my face away to the left to avoid and it scuffed the front of my nose, hit my nose, and at that point I've jammed him up against the wall.

Q. So that hit to the nose you say occurred prior to Mr Barker being placed against the wall, is that correct?

A. That's right.³⁴¹

8.49 Hill conceded that the CCTV footage appeared to show him having hold of Barker's left arm as Barker was escorted through the doorway into the BAS room.³⁴²

³³⁸ Exhibit 84 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Senior Constable Gregory Ryan), p.10

³³⁹ Exhibit 95 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Senior Constable David Hill), p.13

³⁴⁰ *ibid*

³⁴¹ *ibid*

³⁴² *ibid*

8.50 When asked when it was that he said he had been struck by Barker, Hill said:

It was when, we've kind of had to go through the doorway diagonally because the three of us didn't fit through the doorway. It appeared to lose control of him on the other side and he's moved around. At that point I was struck. I put him straight against the wall and then swung him around down towards the ground.³⁴³

8.51 Hill was cross-examined by Mr Boss.

8.52 In cross-examination Hill accepted that, when he had given evidence on 7 July 2011, he had said several times that Barker had broken free with his right arm and that it was Barker's right arm which had been used to strike him. He accepted that in the CCTV footage "*the right arm is still behind his back*" but "*you can't see where his left arm is there.*"³⁴⁴

8.53 Hill said that the fact that Barker had gone through the doorway diagonally would explain why in the CCTV footage Barker's body appears partly turned.³⁴⁵

8.54 After the conclusion of Hill's evidence the Magistrate made the observation that, if the only evidence of the alleged assault was that given by Hill, then the prosecution would have problems.³⁴⁶

Eckersley

8.55 The next witness to give evidence on 2 December 2011 was Eckersley. Eckersley gave evidence that on 14 January 2011 he had been asked by Hill to assist in moving Barker from the dock to one of the rear cells.³⁴⁷

8.56 Eckersley then gave the following evidence:

...Senior Constable Hill removed Corey from the dock, started leading him through the doorway. Constable Walmsley took hold of Corey's right arm, Senior Constable Hill had him on his left arm. As he's come through the door, I've seen him swing around at Constable Hill, Senior Constable Hill. I've jumped in to help grab hold of him when Senior Constable Hill's pushed him up against the wall and then taken him to the ground. As he's

³⁴³ *ibid*, pp.13-14

³⁴⁴ *ibid*, p.14

³⁴⁵ *ibid*

³⁴⁶ *ibid*, p.24

³⁴⁷ Exhibit 92 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Ryan Eckersley), p.27

on the ground I saw his hand, his arm out. I've tried to secure his hand with my foot. I've missed his foot(as said) and I've hit Senior Constable Hill and as he's – Senior Constable Hill said, "That's my fucking hand," so I've dropped down, grabbed hold of Corey's arm then and secured it whilst Senior Constable Hill had – took hold of the other arm and was trying to get in a position to handcuff him which we eventually did.³⁴⁸

8.57 Eckersley said:

I thought he (Barker) threw [a] punch at Senior Constable Hill and looked like hit him in the face and that's when we've pushed him up against the wall and taken to the ground.³⁴⁹

8.58 Eckersley said that "*at the time, I saw him swing around with his right arm*".³⁵⁰ Prior to Barker swinging around with his right arm, his right arm had been held by Walmsley.³⁵¹

8.59 In cross-examination the following question and answer occurred:

Q. So did you actually see Mr Barker throw a punch or are you saying that because that was what was in the facts sheet that you read?

A. No, at the time I saw Corey swing around at Senior Constable—

Q. And definitely with the right arm swinging around?

A. --Hill. That's what I thought at the time.³⁵²

Walmsley

8.60 The next person to give evidence on 2 December 2011 was Walmsley. When he commenced giving evidence, Walmsley had not yet seen the CCTV footage.

8.61 Walmsley gave evidence that, after returning to the Ballina Police Station on 14 January 2011, he had undertaken the process of charging Crook and Healey.³⁵³ He was then told by Hill that McCubben required Barker to be moved from the dock to one of the back cells in the police station and Walmsley went into the charge room. Walmsley's evidence continued:

³⁴⁸ *ibid*, pp.27-28

³⁴⁹ *ibid*, p.28

³⁵⁰ *ibid*

³⁵¹ *ibid*

³⁵² *ibid*, p.30

³⁵³ Exhibit 93 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Lee Walmsley), p.51

... Senior Constable Hill has opened the door to the dock, I've taken hold of Mr Barker's right side... Senior Constable Hill has taken hold of his left side and we commenced to walk him out of the charge room...from there we've gone to walk through a doorway on the northern side of the charge room which leads to a small room in between those rooms. So we've gone to there, we've attempted to go through it, I felt Mr Barker's arm tense, his muscles tense, he's broken - moved his arm broken free from my grip and swung his right arm and...hit Senior Constable Hill in the nose... from there I managed somehow tried to take hold of his arm again and Senior Constable Hill and I pushed him or drove him into a wall to take control of him. From there he's somehow been taken to the ground back on the other side of the doorway and from there it was a matter - Mr. Barker was holding his arms under his body and we were trying to get his arms back out from underneath his body so he could be handcuffed at the rear... he was brought under and his hands were handcuffed at the rear... He refused to stand up, refused to walk out of that room and then he was - finally he was dragged out of the charge room, out of that room into - into the dock, into the cell sorry.³⁵⁴

8.62 After an adjournment Walmsley was shown in the courtroom the CCTV footage of the incident. Having viewed the CCTV footage, he was asked when it was that he said that Barker had struck Hill on the nose. He replied:

It would be when we passed through the doorway, the first doorway there. I brushed up against the wall and I felt Mr Barker tense and he broke free from my grip and it was then.³⁵⁵

He asserted that he had felt Barker's arm move from his grip.³⁵⁶

8.63 Walmsley gave evidence that Barker had struck Hill prior to Barker being pushed up against the wall in the BAS room.³⁵⁷ The following questions and answers occurred:

Q...Are you saying that Mr Barker struck Senior Constable Hill prior to that moment (Barker being pushed up against the wall in the BAS room)?

A. I believe so yes, because from there he goes on to the wall, so yes.

...

Q. What's your opinion in regards to what you can see (in the CCTV footage)?

A. I tend to believe that the assault happened before then.

³⁵⁴ *ibid*, pp.51-52

³⁵⁵ *ibid*, p.55

³⁵⁶ *ibid*

³⁵⁷ *ibid*

Q. So that--

A. And then I've regained control of that arm, or to some extent, yes.³⁵⁸

8.64 Walmsley then gave evidence that he believed the assault had taken place prior to him, Hill and Barker reaching the door to the BAS room.³⁵⁹ He accepted that there was no indication in the CCTV footage of Barker swinging his right arm before they got to the door to the BAS room and that the CCTV footage showed that, as he came into the BAS room, he was holding Barker's right arm with both of his own hands.³⁶⁰

8.65 In cross-examination Walmsley was referred to the part of his statement in which he had said that he felt Barker tense his right arm and pull free from Walmsley's grip "*as we passed through the doorway to the BAS room*".³⁶¹ Walmsley said that, after seeing the footage, it was obvious that Barker had pulled free from his grip before entering the BAS room. He said that he had changed his mind (and his evidence) "*because (in the CCTV footage) you cannot see any punch in the BAS room*".³⁶²

8.66 In further cross-examination the following question and answer occurred:

Q. In regards to when you have come through the door, it's the case that Mr Barker has not struck Mr Hill at all, has he?

A. That's what the - that's what the footage shows, yes.³⁶³

8.67 Walmsley was asked how many punches he thought Barker had thrown at Hill and he answered "*there was the initial one, I believe there was a couple after that but I don't know if they connected or not*".³⁶⁴

8.68 Walmsley was asked by the Magistrate whether he was saying that two separate assaults by Barker on Hill had occurred.³⁶⁵ Walmsley said that the initial assault by Barker had not occurred in the BAS room. Before he had come

³⁵⁸ *ibid*, p.56

³⁵⁹ *ibid*, p.56 & pp.58-59

³⁶⁰ *ibid*, p.59

³⁶¹ *ibid*, pp.60-61

³⁶² *ibid*, p.61

³⁶³ *ibid*, p.72

³⁶⁴ *ibid*, p.75

³⁶⁵ *ibid*

to court that day his recollection had been that the assault had taken place in the BAS room.³⁶⁶

Mewing

8.69 The last person to give evidence on 2 December 2011 was Mewing. When he commenced giving evidence Mewing had not yet seen the CCTV footage.

8.70 After giving evidence about Hill directing Barker to turn around in the dock and Barker refusing, Mewing gave the following evidence:

Senior Constable Hill opened the door and took hold of him with Constable Walmsley assisting...They have walked him out to take him down to the cells, as they've – as they've walked through where the old BAS room used to be he has broken free of Constable Walmsley and he has punched Senior Constable Hill in the nose with the right fist.³⁶⁷

8.71 Mewing said that it was in the doorway to the BAS room that Barker had struggled and broken free from Walmsley.³⁶⁸

8.72 Mewing said that immediately after Barker had struggled free from the grip of the police he had punched Hill in the face.³⁶⁹ When asked “*What did you actually see?*” Mewing said “*His (Barker’s) fist go up into his (Hill’s) face.*”³⁷⁰ It was Barker’s right fist.³⁷¹ Mewing said that he could see Barker’s fist actually come in contact with Hill, even though there were people (Hill, Walmsley and Barker) in front of Mewing.³⁷²

8.73 Later in his evidence Mewing repeated the evidence he had already given that he had seen Barker punch Hill with a closed right fist to Hill’s nose.³⁷³

8.74 Mewing said that, after Barker had struck Hill, a number of police officers overpowered Barker and forced him to the floor. Mewing said that “*I helped with his hands being released from under his body so he could be handcuffed*”.³⁷⁴

³⁶⁶ *ibid*, p.77

³⁶⁷ Exhibit 51 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Luke Mewing), p.86

³⁶⁸ *ibid*

³⁶⁹ *ibid*, p.87

³⁷⁰ *ibid*

³⁷¹ *ibid*, p.88

³⁷² *ibid*

³⁷³ *ibid*, p.89

- 8.75 A cross-examination of Mewing by Mr Boss then commenced.
- 8.76 During the cross-examination Mewing was asked by the Magistrate whether he said that the assault had taken place in the doorway to the BAS room or the BAS room itself. Mewing said that the assault had taken place in the BAS room.³⁷⁵
- 8.77 At this stage of the proceedings the CCTV footage was played to Mewing.
- 8.78 After Mewing had viewed the CCTV footage he was asked whether he had seen a punch in the footage and he replied “no”.³⁷⁶ When referred to his previous evidence that the assault had taken place in the BAS room, Mewing said that the assault had taken place as they were coming through the doorway.³⁷⁷
- 8.79 A little later in his evidence he was asked:

Q. Did the assault take place at that point [when] they are in the BAS room or previous when they were walking through the doorway?

A. I don't recall now.³⁷⁸

At this point Mewing said that he had become confused.³⁷⁹

- 8.80 Mewing maintained that when Barker was forced against the wall by Hill Barker had continued to throw punches at Hill and Barker was “*thrashing about*”.³⁸⁰

Woolven

- 8.81 Woolven was at the Ballina Local Court ready to give evidence on 2 December 2011 but the proceedings were adjourned before he could be called as a witness.³⁸¹

³⁷⁴ *ibid*, p.90

³⁷⁵ *ibid*, p.94

³⁷⁶ *ibid*, p.96

³⁷⁷ *ibid*, pp.96-97

³⁷⁸ *ibid*, p.98

³⁷⁹ *ibid*

³⁸⁰ *ibid*, pp.98-99

THE WITHDRAWAL OF THE ASSAULT CHARGE

- 8.82 On 6 December 2011 the police prosecutor drafted a memorandum in which he noted that during the course of the hearing on 2 December 2011 the CCTV footage of the incident had been played. The prosecutor noted that the CCTV footage showed that at the time of the alleged assault Barker's right arm was being held by Walmsley and his left arm was being held by Hill. The prosecutor noted that the CCTV footage "*does show the defendant slightly twisting his body in the direction (of Hill) but at this point both the defendant's arms seem to be held by police*"³⁸².
- 8.83 The prosecutor further noted that the police witnesses who gave evidence on 2 December 2011 had maintained in their evidence that there had been an assault by Barker on Hill. The police witnesses had given conflicting evidence about where in the Ballina Police Station the assault had taken place.³⁸³
- 8.84 The police prosecutor stated in his memorandum that because of the conflicts in the evidence of the police witnesses and because the CCTV footage did not show any assault as alleged by the police witnesses, there was no reasonable prospect of a conviction and, accordingly, the police prosecutor recommended that the charge of assault be withdrawn.³⁸⁴
- 8.85 The police prosecutor forwarded his memorandum to Ryan as the informant on the charge, for his comments. In a handwritten notation on the memorandum Ryan indicated that he agreed with the issues raised by the police prosecutor and with the recommendation that the charge be withdrawn. Ryan also indicated that he had spoken to Hill who had also agreed with the issues raised by the police prosecutor.³⁸⁵
- 8.86 On 3 February 2012 the charge of assault was formally withdrawn.

³⁸¹ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.612

³⁸² Exhibit 90

³⁸³ *ibid*

³⁸⁴ *ibid*

³⁸⁵ *ibid*

THE HEARING AT THE BALLINA LOCAL COURT ON 8 MARCH 2012

- 8.87 On 8 March 2012 the only witness to give evidence in the prosecution case was Ryan. Ryan's evidence was almost entirely confined to the charges based on the events which had allegedly occurred in Tamar Street.³⁸⁶ Ryan confirmed that he had not been present when Hill had allegedly been assaulted.³⁸⁷ Ryan agreed that CCTV footage showed Barker as being still handcuffed one hour and forty minutes after the alleged assault.³⁸⁸
- 8.88 After Ryan had finished giving evidence, the police prosecutor closed the prosecution case.
- 8.89 At the close of the prosecution case Mr Boss submitted that, on the evidence which had been given in the prosecution case, the remaining charges should be dismissed. After considerable argument the Magistrate held that Hill was an unreliable witness to whose evidence no weight could be given and, in the light of that finding, dismissed the charge against Barker of throwing a missile at a police officer in the execution of his duty, which the Magistrate considered depended on the evidence of Hill. However, the Magistrate declined to dismiss the other remaining charges.
- 8.90 After this ruling by the Magistrate, Nolan was called as a witness in the defence case. He gave evidence which was limited to the events in Tamar Street.³⁸⁹ Barker was not called to give evidence in his defence case.
- 8.91 After all the evidence had been given and the Magistrate had heard submissions, the Magistrate delivered a judgment. The Magistrate held that Hill's evidence was so defective that he could not be satisfied to the requisite standard that in Tamar Street Hill had been acting in the execution of his duty as a police officer and, accordingly, the Magistrate dismissed the charges of resisting a police officer in the execution of his duty and hindering a police officer in the execution of his duty. The charge of offensive behaviour, which had been a back-up charge to the charge of throwing a missile, was also dismissed. The Magistrate found that the charge of giving a false name had

³⁸⁶ Exhibit 85 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Senior Constable Gregory Ryan)

³⁸⁷ *ibid*, p.14

³⁸⁸ *ibid*, p.24

³⁸⁹ Exhibit 16 (*R v Corey Barker*, Transcript of Proceedings, 8 March 2012, Witness: Byron Nolan)

been established but dismissed the charge pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

8.92 Mr Boss then made an application that the prosecution pay Barker's costs of the proceedings. This application was stood over to be argued on a subsequent date.

THE MAGISTRATE'S RESERVED JUDGMENT OF 8 JULY 2012

8.93 On 5 July 2012 the Magistrate delivered a reserved judgment on the costs application.³⁹⁰ The evidence before the Commission does not disclose when the application had been argued.

8.94 In his judgment the Magistrate observed that the central factual issue in the proceedings had been whether, while Barker was being moved from the dock to the cells, he had assaulted Hill.³⁹¹

8.95 The Magistrate then summarised the evidence which had been given on 7 July 2011 by the prosecution witnesses Haines and Hill.³⁹²

8.96 The Magistrate observed that Hill had given his evidence on 7 July 2011 in the belief that there was no working videotaped footage of the incident. The Magistrate stated that after the first hearing day the tapes had been sent to the STIB and had successfully been "*resurrected*". In the Magistrate's view, it was quite clear from the CCTV footage that Barker had at no time broken free of the grip of Hill and Walmsley and had at no time punched Hill in the nose.³⁹³

8.97 The Magistrate considered that there were only two possible explanations of the evidence Hill had given, either that he had been lying or that he had been mistaken. The Magistrate concluded that Hill had been lying in the evidence he had given.³⁹⁴

³⁹⁰ Exhibit 97

³⁹¹ *ibid*

³⁹² *ibid*

³⁹³ *ibid*

³⁹⁴ *ibid*

- 8.98 The Magistrate then proceeded to criticise the evidence which had been given by Eckersley, Walmsley and Mewing.³⁹⁵
- 8.99 The Magistrate considered that a suggestion which had been made in some of the evidence given by police officers after they had become aware of what the footage showed, that an assault had occurred but that it had occurred before Barker, Hill and Walmsley had entered the BAS room, was “*debunked*” by examination of the CCTV footage of events in the charge room and the CCTV footage of events in the BAS room, which the Magistrate said could be seen to be directly continuous.³⁹⁶
- 8.100 The Magistrate made an order that the prosecution pay Barker’s costs of the criminal proceedings on the basis that the investigation into the alleged offence of assault had been conducted in an unreasonable or improper manner or that the proceedings had been initiated without reasonable cause. (*Criminal Procedure Act 1986* (NSW) ss 213, 214(1)(a) and 214(1)(b)) The Magistrate said that, at the request of Mr Boss, he would refer his judgment to the Commission.³⁹⁷
- 8.101 The Magistrate said in his judgment that the giving of perjured evidence is a form of contempt in the face of the Court. His Honour considered that the evidence given by the police officers that Barker had broken free of the grip of police officers and had punched Hill might be perjured evidence. His Honour observed that he would have power himself to deal with charges of contempt but he considered it preferable that any proceedings for contempt should be heard in the Supreme Court. He accordingly directed that each of the police officers Hill, Eckersley and Walmsley be served with a copy of his judgment and with a notice to the effect that he was considering referring an allegation of contempt of court to the Supreme Court.³⁹⁸
- 8.102 The Magistrate concluded his judgment by adjourning the proceedings to 9 August 2012.³⁹⁹

³⁹⁵ *ibid*

³⁹⁶ *ibid*

³⁹⁷ *ibid*

³⁹⁸ *ibid*

³⁹⁹ *ibid*

8.103 On 9 August 2012 the Magistrate stated in Court that, as the Commission had indicated that it would be undertaking an investigation, he would not proceed with initiating the proposed contempt proceedings in the Supreme Court.

EVIDENCE GIVEN AT PRIVATE HEARINGS OF THE COMMISSION

8.104 Two witnesses Mewing and Woolven gave evidence at private hearings of the Commission on 15 November 2012.

Mewing

8.105 At the private hearing Mewing gave evidence that Barker was walked out of the dock and into the BAS room, where he broke free of the grip of one of the police officers who he believed was Walmsley.⁴⁰⁰

8.106 Mewing gave further evidence:

And then it was alleged that he hit Senior Constable Hill in the nose. Senior Constable Hill yelled something out to that effect.⁴⁰¹

8.107 When asked whether he had seen Barker hit Hill, Mewing replied “*I believed I did.*”⁴⁰² Mewing said that Hill had said “*something along the lines that he (Hill) was hit in the nose or assaulted.*”⁴⁰³ He agreed that, because Hill had yelled out that he had been hit, he had assumed that Hill had been hit.⁴⁰⁴

8.108 Mewing gave further evidence “*I just thought from my memory that it (Barker punching Hill) did happen but obviously it possibly didn’t happen*”, which he then changed to, “*it probably didn’t happen.*”⁴⁰⁵

8.109 Mewing said that “*at some point I believed he broke free from Walmsley.*”⁴⁰⁶ He then said that he believed that Barker had broken free “*a bit.*”⁴⁰⁷ He accepted

⁴⁰⁰ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.14

⁴⁰¹ *ibid*

⁴⁰² *ibid*, p.15

⁴⁰³ *ibid*

⁴⁰⁴ *ibid*, p.16

⁴⁰⁵ *ibid*, p.15

⁴⁰⁶ *ibid*, p.28

⁴⁰⁷ *ibid*, p.29

that in the CCTV footage it did not appear that Barker had broken free; Walmsley appeared to still have hold of Barker's right arm.⁴⁰⁸

8.110 The following questions and answers occurred:

Q. Can I suggest one very, very good reason - that is, you really had no recollection of this assault occurring at all?

A. I had a recollection but it wasn't that good.

Q. Do you now concede that you were wrong?

A. Yes, I was.

Q. You acknowledge that in fact Barker didn't assault Constable Hill?

A. Yes, that's correct.⁴⁰⁹

Woolven

8.111 Woolven gave evidence that his recollection was that police officers who he thought were Walmsley and Hill had lost their grip on Barker's arms as the three of them were trying to get through the doorway from the charge room to the BAS room.⁴¹⁰ Woolven then gave evidence that "*there was like a wrestle in the BAS room*" in which Walmsley, Hill, Mewing and Eckersley participated and he observed Walmsley and Hill on top of Barker on the floor.⁴¹¹

8.112 Woolven agreed that he had not in the evidence he had so far given at the private hearing repeated the assertion made in his statement that Barker, having broken free from the grip of the police, had begun throwing punches.⁴¹² When asked "*Did you or did you not see Corey Barker throw a punch?*" he replied "*I cannot recall seeing a punch being thrown, no*".⁴¹³

8.113 Woolven was asked by Counsel Assisting why the assertion that he had seen a punch thrown by Barker connect with the face of Hill had been included in his

⁴⁰⁸ *ibid*, pp.28-29

⁴⁰⁹ *ibid*, p.31

⁴¹⁰ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), p.27

⁴¹¹ *ibid*, pp.27-28

⁴¹² *ibid*, p.33

⁴¹³ *ibid*, p.34

statement. Woolven replied “*I remember seeing hands going everywhere. I just naturally believed that it was Corey Barker hitting Hill to the face*”.⁴¹⁴ The following questions and answers then occurred:

Q. Does it come down to this then, that you saw arms going everywhere and you made an assumption that Senior Constable Hill had been struck?

A. That's probably correct.

Q. Right. You didn't actually see it, did you?

A. No.⁴¹⁵

EVIDENCE AT THE PUBLIC HEARING

8.114 At the public hearing the CCTV footage showing events in the charge room, in the doorway between the charge room and the BAS room and in the BAS room, was tendered, admitted as an exhibit and played in the hearing room.⁴¹⁶

8.115 Evidence was given at the public hearing by a number of witnesses.

Barker

8.116 At the commencement of Barker's examination he was asked by Counsel Assisting “*Did you punch Officer Hill on the evening of 14 January at Ballina Police Station?*” Barker replied “*No*”.⁴¹⁷

8.117 After being asked questions about earlier events on the night of 14 January 2011, Barker was asked by Counsel Assisting to tell the Commission what had happened when he arrived at Ballina Police Station. He replied “*I can't really remember...it all becomes hazy from there...it starts getting a bit thin from there.*”⁴¹⁸ He recalled being agitated while he was in the dock.⁴¹⁹ He recalled giving a false name and he recalled, as referred to earlier in this report, his meeting and conversation with his mother.⁴²⁰ He recalled Mewing showing him

⁴¹⁴ *ibid*, p.35

⁴¹⁵ *ibid*

⁴¹⁶ Exhibits 1, 18, 19, 20, 69 & 70

⁴¹⁷ PIC Transcript, Corey Barker, 19 February 2013, p.148

⁴¹⁸ *ibid*, p.159

⁴¹⁹ *ibid*, p.160

⁴²⁰ *ibid*, pp.160-161

the mobile phone and asking him questions about it and the direction given to him while he was still in the dock to turn around and his response to that direction.⁴²¹ However, when asked to tell the Commission as best he could what had happened in the BAS room he said that he could not recall any of that incident.⁴²² He did recall being dragged to the cells because “*my hands were behind my back...they were dragging me opposite the way that my arms go and they were up over my head.*”⁴²³

8.118 Barker was questioned about the part of the CCTV footage which shows his body turning to his left as he came through the doorway into the BAS room. He said that the police officers “*shoved me through the door*” and that he turned around so that he could at least see the physical attack he anticipated was coming.⁴²⁴ He said that going through the doorway to the BAS room he had himself turned his head but that his body had been twisted by the police officers.⁴²⁵ He agreed that he had transferred weight to his right foot in an effort to resist being moved in the direction of the cells.⁴²⁶

8.119 Barker gave further evidence about being dragged to the cells head first by the arms, with his hands being pulled back over his head.⁴²⁷ He denied that any police officer had asked him to stand up, before he was dragged.⁴²⁸ He was put in a cell handcuffed and he was still handcuffed when he was taken from the cell to go to Lismore.⁴²⁹

Crook

8.120 Crook gave evidence that after being conveyed to the Ballina Police Station she was taken to the fingerprint room where there was a sink, which was used for washing the capsicum spray from her eyes.⁴³⁰ Whilst she was in the fingerprint room she heard a loud noise. She opened the door of the fingerprint room and

⁴²¹ *ibid*, pp.167-168

⁴²² *ibid*, pp.168-169

⁴²³ *ibid*, p.169

⁴²⁴ *ibid*, p.172

⁴²⁵ PIC Transcript, Corey Barker, 20 February 2013, pp.293-294

⁴²⁶ *ibid*, pp.294-295

⁴²⁷ PIC Transcript, Corey Barker, 19 February 2013, pp.172-173

⁴²⁸ *ibid*, p.174

⁴²⁹ *ibid*

⁴³⁰ PIC Transcript, Emma Crook, 18 February 2013, p.28

saw Barker with four police officers holding him down and blood coming from his head. She went back into the fingerprint room and shut the door.⁴³¹

Healey

8.121 Healey gave evidence that after he had been conveyed to the Ballina Police Station he was placed in a cell.⁴³² He said that while he was in the cell Barker was escorted past him by police officers.⁴³³ However, this evidence is unlikely to be correct because there is much other evidence that, upon arrival at the Ballina Police Station, Barker was immediately placed in the dock in the charge room and that he remained in the dock until he was removed from the dock to be taken to a cell.

Hill

8.122 Hill was referred by Counsel Assisting to the assertion made in his statement of 19 January 2011 that Barker had punched him with a closed right fist to his nose. He was then asked by Counsel Assisting whether there was anything in his statement he wished to change. Hill replied:

At the time of making my statement, I believed it was correct. When I viewed the footage during the hearing in December 2012 (*semble* 2011), I realised that I'd made a mistake about which hand and that the footage did not show the punch that I remember.⁴³⁴

8.123 Hill was asked by Counsel Assisting whether his present position was that the punch did or did not occur. Hill replied "*I still remember being hit by him*".⁴³⁵

8.124 Hill said that he had come to realise that he had made a mistake in recounting what had happened in the BAS room. When asked by Counsel Assisting to identify the mistake he said he had made, Hill said:

I'm mistaken in saying that he used his right hand to hit me and that's after seeing the footage...I remember being hit. I had a sore nose after the incident, I remember checking my nose to see if it was bleeding, it wasn't,

⁴³¹ *ibid*, p.36

⁴³² PIC Transcript, Jay Healey, 18 February 2013, p.62

⁴³³ *ibid*, p.61

⁴³⁴ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.783

⁴³⁵ *ibid*

and I remember having a conversation with other police officers in the foyer of the station in relation to that injury.⁴³⁶

8.125 Hill gave further evidence:

When I wrote my statement and when I originally gave my evidence, I thought he'd got his right hand free from Constable Walmsley.⁴³⁷

8.126 When asked by Counsel Assisting what his present position was as to which hand Barker had used to punch him Hill said "*When I viewed the footage in the courtroom, I thought that it might have been his left hand*".⁴³⁸

8.127 Hill accepted that the CCTV footage did not show Barker striking him on the nose with his left hand.⁴³⁹ Hill said:

My memory of it, Mr Rushton, is that I still remember being punched, and that's why I reacted and did what I did. However, it doesn't show on the footage at all that that happened.⁴⁴⁰

8.128 Counsel Assisting put to Hill that no punch was shown on the CCTV footage because there had not been any punch. Hill replied:

I can only disagree with that because I have a memory of it happening and that's why I wrote my statement the way I did.⁴⁴¹

8.129 Hill was asked by Counsel Assisting whether he could offer any explanation of why no punch was shown on the CCTV footage and he replied "*I don't know - whether the angle of the footage didn't capture it, I'm not sure*".⁴⁴²

8.130 After the relevant CCTV footage was played Hill said "*by the looks of that footage, it doesn't look like I've lost control of his arm*" and "*I can see Officer Walmsley never lost control of his right arm. I've got that wrong when I wrote my statement*".⁴⁴³

⁴³⁶ ibid, p.784

⁴³⁷ ibid

⁴³⁸ ibid

⁴³⁹ ibid

⁴⁴⁰ ibid

⁴⁴¹ ibid, p.785

⁴⁴² ibid

⁴⁴³ ibid, p.786

8.131 Hill gave further evidence:

There was definitely resistance there (on the part of Barker) and I didn't have control of his left arm, but I don't think I fully let go of it at any time, just based on the footage.⁴⁴⁴

8.132 When asked by Counsel Assisting how, if Hill had not let go of Barker's left arm, Barker could have punched Hill with his left hand Hill said "*I can't tell you how he did that. It's how I remembered it happening*".⁴⁴⁵ Hill agreed that it would have been improbable for Barker to have punched Hill with either his left hand or his right hand.⁴⁴⁶

8.133 Hill said that after Barker was put in a cell some of the police officers walked into the foyer of the Ballina Police Station. His evidence continued:

I was holding my nose. At that point I made a comment that he'd hit me. Constable Mewing made a comment back to me saying "Yeah, Hilly, I saw him crack ya."

...

I looked at Lee (Walmsley) and said, "Did he get arm free from you?" Lee's words to me were, "I'm sorry."⁴⁴⁷

8.134 Hill was questioned by Counsel Assisting about the assertion in his statement of 19 January 2011 that, after Barker had been forced against the wall of the BAS room, he had tried to throw further punches at Hill. Hill agreed that "*there's nothing on the footage to suggest that. However, he was resisting me*".⁴⁴⁸

8.135 Counsel Assisting then referred Hill to portions of his evidence in the Ballina Local Court on 7 July 2011 in which he had asserted that Barker had broken free from the grip of Walmsley, that Barker after breaking free from Walmsley's grip had assaulted Hill and that after that alleged assault Barker had been jammed into the BAS room wall, where Barker had continued to throw punches at Hill. It was put to Hill by Counsel Assisting that all that evidence was false

⁴⁴⁴ ibid

⁴⁴⁵ ibid, p.786

⁴⁴⁶ ibid

⁴⁴⁷ ibid, pp.788-789

⁴⁴⁸ ibid, p.790

and that Hill had known at the time he gave the evidence that it was false. Hill rejected those suggestions.⁴⁴⁹

- 8.136 In examination by his own legal representative Hill gave evidence that he and Ryan had attended Ballina Police Station on 19 January 2011 to view the CCTV footage and to book it in the exhibit book. He said that his purpose in wishing to view the CCTV footage was “*to make sure that what I remembered on the night that I’ve put in my statement was what happened*”.⁴⁵⁰
- 8.137 Hill said that, had he seen the CCTV footage prior to making his statement, the footage would have raised a “*reasonable doubt*” and he would have spoken to a police prosecutor about whether the criminal proceedings against Barker should continue.⁴⁵¹
- 8.138 Hill asserted that in January 2011 he had had a conversation with Ryan about sending the damaged CCTV tapes to the STIB “*to get fixed*”. Hill said that it was his understanding that Ryan would arrange for this to occur. Hill said that a couple of months later he had had a conversation with Ryan, who had told him that the tapes had not been sent to the STIB and that “*most likely Barker would plead and they weren’t going to send them (the tapes) down*”.⁴⁵²
- 8.139 Hill said that he and Ryan had watched the digital CCTV footage which had been received from the STIB and had had a conversation about the footage not showing the alleged punch by Barker. Hill asserted that he had said to Ryan “*Well, there’s nothing I can do about it, that’s how I remembered it happening*” and that he had said to Ryan that “*no one is more shocked than me*” that the CCTV footage did not show the punch.⁴⁵³
- 8.140 In further questioning by his own legal representative Hill said that he could have attended Ballina Police Station on his own and gained access to the

⁴⁴⁹ *ibid*, pp.794-795

⁴⁵⁰ *ibid*, p.822

⁴⁵¹ *ibid*, p.823

⁴⁵² *ibid*, pp.823-824

⁴⁵³ *ibid*, p.824

CCTV tapes, in the same manner that he and Ryan together had done in January 2011.⁴⁵⁴

Walmsley

8.141 At the beginning of his evidence Walmsley was asked by Counsel Assisting whether he wanted to say anything about the accuracy of his statement of March 2011. Walmsley said that he would concede that he had made errors in the statement.⁴⁵⁵ When asked by Counsel Assisting where in his statement he had made errors Walmsley said:

I believe in my statement I said that I saw Mr Barker hit Senior Constable Hill in the face. Upon seeing the footage of this matter, I believe that I've made an error in that.⁴⁵⁶

8.142 The examination of Walmsley continued:

Q. When you say "made an error", are you endeavouring to tell the Commission that in fact you didn't see Mr Barker punch or strike Officer Hill in the nose?

A. At the time that's what I thought I saw.⁴⁵⁷

8.143 Walmsley accepted that the CCTV footage did not show any punch thrown by Barker at Hill.⁴⁵⁸

8.144 Walmsley said that there was nothing else in the statement that he wanted to correct.⁴⁵⁹

8.145 Walmsley was referred by Counsel Assisting to the part of his statement in which he had said that as they were passing through the doorway to the BAS room, he had felt Barker tense his right arm and pull free from Walmsley's grip.⁴⁶⁰ Walmsley accepted that in the CCTV footage he could not see Barker pulling free from his grip.⁴⁶¹

⁴⁵⁴ PIC Transcript, Senior Constable David Hill, 28 February 2013, p.829

⁴⁵⁵ PIC Transcript, Constable Lee Walmsley, 27 February 2013, p.754

⁴⁵⁶ *ibid*, p.755

⁴⁵⁷ *ibid*

⁴⁵⁸ *ibid*, p.756

⁴⁵⁹ *ibid*, p.755

⁴⁶⁰ *ibid*, p.756

⁴⁶¹ *ibid*

- 8.146 Walmsley was referred by Counsel Assisting to a further part of his statement in which he had said that Barker, after being driven against the wall of the BAS room, had continued to struggle and had thrown further punches at Hill. Walmsley conceded that he could not see in the CCTV footage any further throwing of punches by Barker at Hill.⁴⁶²
- 8.147 Counsel Assisting referred to a further part of Walmsley's statement in which he had said that Barker was "*flailing his arms*" in an attempt to break free of police control. Walmsley accepted that he could not in the CCTV footage see Barker "*flailing his arms*" and that he had been wrong when he included that assertion in his statement.⁴⁶³
- 8.148 Walmsley denied that he had known, at the time of making his statement, that Barker had not struck Hill or that Barker had not thrown any further punches or that there had been no "*flailing of arms*" by Barker.⁴⁶⁴
- 8.149 Walmsley was questioned by Counsel Assisting about evidence he had given in the Ballina Local Court that the assault by Barker on Hill had taken place prior to Barker, Hill and Walmsley entering the BAS room. He denied that he had made up this allegation about where the alleged assault had occurred, because he had recognised from seeing the CCTV footage that he had been "*caught out*".⁴⁶⁵
- 8.150 Walmsley was referred to a part of his evidence in the Ballina Local Court where he had said that after the initial punch "*I believe there was a couple after that but I don't know if they connected or not*". He said that he had given this evidence in the Ballina Local Court after he had seen the CCTV footage but, notwithstanding that he had seen the CCTV footage, he had proceeded to give the evidence on the basis that it was what he recalled having happened.⁴⁶⁶

⁴⁶² *ibid*, p.757

⁴⁶³ *ibid*, p.758

⁴⁶⁴ *ibid*

⁴⁶⁵ *ibid*, p.761

⁴⁶⁶ *ibid*, p.763

8.151 Walmsley was referred to a part of his evidence in the Ballina Local Court in which he had said that he believed that there had been two assaults, the initial assault occurring before the BAS room. Counsel Assisting put to Walmsley that it was clear from the CCTV footage that there had been no assault at all and Walmsley agreed.⁴⁶⁷

Mewing

8.152 Counsel Assisting suggested to Mewing that the assertion in his statement that “*Barker punched Senior Constable Hill in the face, striking him in the nose with a right-closed fist*” was wrong. Mewing replied “*No, that’s what I believed I saw*”.⁴⁶⁸ Mewing also said that evidence he had given in the Ballina Local Court to the same effect as what he had said in his statement was what he believed he had seen.⁴⁶⁹

8.153 Mewing denied that the evidence he had given in the Ballina Local Court about the alleged assault on Hill by Barker was fabricated.⁴⁷⁰ Mewing was then questioned about the evidence he had given at the private hearing about the alleged assault. He said that the evidence he had given at the private hearing that the CCTV footage did not show any assault was truthful evidence.⁴⁷¹ Mewing also conceded that the evidence he had given at the private hearing that the alleged assault had not in fact happened was also truthful evidence.⁴⁷²

8.154 The following questions and answers occurred in the examination of Mewing:

Q...You accept, don't you, that the CCTV footage does not show Mr Barker assaulting Officer Hill?

A. Yes.

Q. And you accept that in fact Mr Barker did not assault Officer Hill?

A. Yes, I do now.

Q. Yes. That's not what you said in your statement, is it?

⁴⁶⁷ *ibid*, p.764

⁴⁶⁸ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.404

⁴⁶⁹ *ibid*

⁴⁷⁰ *ibid*, p.409

⁴⁷¹ *ibid*, p.410

⁴⁷² *ibid*

A. No.

Q. And it's not what you told the Ballina Local Court on 2 December, is it?

A. No.⁴⁷³

8.155 A long passage of Mewing's evidence in the Ballina Local Court was read by Counsel Assisting, including Mewing's evidence that he had seen Barker's fist actually come in contact with Hill.⁴⁷⁴ It was put to Mewing that this evidence he had given in the Ballina Local Court was wrong and he replied "*I guess so*".⁴⁷⁵ However, when asked whether he knew that the evidence was wrong at the time he gave it, he said "*I believed at the time what I saw*".⁴⁷⁶

8.156 Counsel Assisting asked Mewing to give consideration to the matters Counsel was about to mention. The evidence continued:

Q. First, you claimed in your statement that you had seen this young Aboriginal man, Corey Barker, assault a police officer; correct?

A. Yes.

Q. That's wrong, isn't it?

A. Yes.

Q. You agreed with me previously?

A. Yes. Yes.

Q. Second, you gave evidence in the Ballina Local Court that you had seen this young Aboriginal man, Corey Barker, assault a police officer - you gave that evidence, didn't you?

A. Yes.

Q. And that was wrong too, wasn't it?

A. Yes.

Q. Third, you've now acknowledged, as you did on 15 November last year, that this young Aboriginal man, Corey Barker, did not assault Officer Hill; correct?

⁴⁷³ *ibid*, pp.411-412

⁴⁷⁴ *ibid*, pp.412-414

⁴⁷⁵ *ibid*, p.414

⁴⁷⁶ *ibid*, pp.414-415

A. Yes.⁴⁷⁷

8.157 In examination by his own legal representative Mewing said that he did not believe that he had intentionally misled the Ballina Local Court or the Commission but accepted that he had got some things wrong.⁴⁷⁸

Eckersley

8.158 Eckersley gave the following evidence about the alleged assault:

He (Barker) was then removed from the dock by Senior Constable Hill and Walmsley and they've walked - started walking back towards where I was in the BAS, old BAS room, and that's when I've seen Corey lunge back at Senior Constable Hill, and at the time that's when I thought there was a punch thrown.⁴⁷⁹

8.159 Eckersley was questioned about the evidence he had given that he thought that a punch had been thrown by Barker. The following questions and answers occurred:

Q. Do you now accept that there was no punch thrown in the BAS room by Mr Barker?

A. It is not clearly depicted on the footage, no, when I thought it happened, no.

Q. When you say, "It is not clearly depicted on the footage", can I put to you that it is not shown on the footage at all?

A. Not at that stage, no.

Q. Not at any stage, can I suggest?

A. Not clearly, no.

THE COMMISSIONER: Q. Not shown at all?

A. No.

MR RUSHTON: Q. No. Do you accept now, as you sit in the witness box today, that when you asserted that a punch was thrown by Mr Barker, you simply got it wrong?

⁴⁷⁷ *ibid*, p.423

⁴⁷⁸ *ibid*, pp.464-465

⁴⁷⁹ PIC Transcript, Constable Ryan Eckersley, 27 February 2013, p.721

A. Yes, that's what I believed happened at the time, but from the footage, it's not clearly shown. It's not shown.

Q. When you say "it's not clearly shown"--

A. Not shown.

Q. It's not shown at all, is it?

A. No.

Q. Do you accept now that when you asserted in your statement - and I'll come to it in a moment - that a punch had been thrown by Mr Barker and it made contact with Constable Hill's face, you were simply wrong?

A. Yes, at the time that's what I believed happened. I had no reason to doubt that it happened at that time.

Q. You've said that over and over again, but I'm asking you a very simple question: do you accept now, as you sit in the witness box, that your statement that Mr Barker punched Senior Constable Hill to the face is wrong?

A. Yes.⁴⁸⁰

8.160 In examination by his own legal representative Eckersley said, at the time of the incident, he had thought that Barker had broken free of Walmsley's grip and that what he had put in his statement was what he thought had happened.⁴⁸¹

8.161 Eckersley gave evidence that soon after the incident Hill had said that he had "*got hit*".⁴⁸²

Woolven

8.162 Woolven gave evidence that when the door of the dock was opened Hill and Walmsley grabbed hold of Barker and the three of them made their way towards the BAS room.⁴⁸³ Woolven said in his evidence that he himself was off to one side and as the three men were entering the BAS room he was behind them.

⁴⁸⁰ *ibid*, pp.722-723

⁴⁸¹ *ibid*, pp.745-746

⁴⁸² *ibid*, p.746

⁴⁸³ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.603

Barker, Hill and Walmsley all went through the doorway to the BAS room at the same time.⁴⁸⁴ Woolven's evidence continued:

...it appeared to me that the control of the prisoner was lost and then a wrestle and a scuffle ensued.⁴⁸⁵

8.163 Woolven was questioned about what he had said in his statement. In his statement he had asserted that as Barker was led through the doorway to the BAS room Barker began struggling and thrashing his arms. Woolven said "*I saw him become unrestrained*".⁴⁸⁶ When asked whether he had seen Barker "*thrashing his arms*", Woolven said "*I suppose not*".⁴⁸⁷ He said that by the expression "*thrashing his arms*" he had meant "*kind of manoeuvring his arms away from being held*".⁴⁸⁸ He believed "*control was lost... that's kind of broken free*".⁴⁸⁹

8.164 Woolven was asked about the assertion in his statement that "*he (Barker) began throwing punches*". He said "*I did not see a punch at that stage*".⁴⁹⁰ He had included the assertion that Barker began throwing punches in his statement, not because he had observed that happening, but because, after reading the facts sheet, he believed that that had occurred.⁴⁹¹ At the time he made his statement he had had no independent recollection of having seen Barker throw punches.⁴⁹²

8.165 Woolven gave further evidence:

Q. You accept, do you, that at no time did you see him throwing punches?

A. That's correct.

Q. And at no time did you see at least one of those punches connect with Senior Constable Hill's face?

⁴⁸⁴ ibid

⁴⁸⁵ ibid

⁴⁸⁶ ibid, p.604

⁴⁸⁷ ibid

⁴⁸⁸ ibid

⁴⁸⁹ ibid

⁴⁹⁰ ibid, pp.604-605

⁴⁹¹ ibid, p.605

⁴⁹² ibid, pp.605-606

A. That's correct.⁴⁹³

- 8.166 In a telephone conversation on 13 September 2012 which was lawfully intercepted by the Commission Woolven told the other party to the conversation that "*I didn't actually see the old mate hitting him*".⁴⁹⁴ He was asked by Counsel Assisting whether he was referring to the fact that he had not seen Barker hit Hill and he replied "Yes".⁴⁹⁵ Woolven confirmed that in the telephone conversation he was acknowledging that he had not seen Barker hit Hill.⁴⁹⁶
- 8.167 In examination by counsel for Mewing Woolven said that two police officers are in full control of a person if they are on either side of him.⁴⁹⁷ However, "*when you fall behind you've lost control*".⁴⁹⁸ He asserted that there had been a loss of control when "*there was a shift in body weight by Barker and Walmsley had fallen off the right arm of Barker*".⁴⁹⁹ Woolven agreed with a suggestion that it was difficult for the three adult males to pass side by side through the doorway into the BAS room.⁵⁰⁰
- 8.168 In examination by his own legal representative Woolven said that at the time he had made his statement it was his recollection that he had seen Barker assault Hill.⁵⁰¹ Woolven gave evidence that during the course of the incident someone may have said "*I got hit*".⁵⁰²

McCubben

- 8.169 Near the beginning of his examination by Counsel Assisting the following questions and answers occurred:

Q. I'll go to the incident in due course. I'm asking you a very straightforward question. At any time on 14 January 2011 did you see Corey Barker assault Officer Hill?

⁴⁹³ *ibid*, p.608

⁴⁹⁴ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.613; Exhibits 76 & 77

⁴⁹⁵ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.613

⁴⁹⁶ *ibid*, p.614

⁴⁹⁷ *ibid*, p.648

⁴⁹⁸ *ibid*

⁴⁹⁹ *ibid*

⁵⁰⁰ *ibid*

⁵⁰¹ *ibid*, p.651

⁵⁰² *ibid*

A. Not directly, no.

Q. Well, indirectly?

A. As I recall, I recall a swinging arm near Constable Hill.

Q. I see. But you didn't see Mr Barker assault Officer Hill, did you?

A. No.⁵⁰³

8.170 McCubben said it was his recollection that “*he (Barker) broke free and was swinging – swinging his right arm in the vicinity of Constable Hill’s head*”.⁵⁰⁴

8.171 Later in his evidence McCubben was asked to tell the Commission what had happened in Ballina Police Station on 14 January 2011, from the time Barker was brought into custody. McCubben gave evidence about the conduct of Barker, Crook and Healey at the police station and his decision to transfer Barker to a cell in the police station. His evidence continued:

...The door was opened and Walmsley and Hill sort of rushed and grabbed him. They've turned after a few paces - and this is my recollection, and I know it's faulty, but it's my recollection that something happened prior to the frame of the doorway to the charge room - sorry, the BAS room. I can't remember whether I followed, constantly watched them. There's a possibility I looked back to the computer. Next thing I remember is a commotion. I looked to my right and that's when I've thought that I've seen the right arm of Barker coming near Senior Constable Hill. Now, that's incorrect I know—⁵⁰⁵

8.172 A little later in his evidence he was asked what he was intending to convey by his evidence that his recollection was incorrect. He replied:

The night that the video footage was released, I was completely unaware of what had transpired, but it showed footage of them doing a lap around the BAS room, and I was completely dumbfounded. I had no recollection of that whatsoever. I also know that I thought where they were lying on top of him was actually he was more in the charge room than in the BAS room, and so I knew at that point that my recollection was totally, totally wrong.

Q. Well, can I suggest this to you: you must have realised that your recollection was totally, totally wrong because you couldn't see him swinging his arms around in the way that you had suggested in your statement?

⁵⁰³ PIC Transcript, Robert McCubben, 25 February 2013, pp.473-474

⁵⁰⁴ *ibid*, p.474

⁵⁰⁵ *ibid*, p.479

A. That would be correct too.⁵⁰⁶

8.173 McCubben said that he had always thought that Hill had been on the right hand side of Barker (and not, as shown in the CCTV footage and as attested to by a number of witnesses, on the left hand side holding Barker's left arm).⁵⁰⁷

8.174 When McCubben was asked again by Counsel Assisting about his recollection of 14 January 2011 the following question and answer occurred:

Q. As you sit in the witness box today, do you recall seeing the accused break free and swing his arms, attempting to punch Senior Constable Hill and Constable Walmsley?

A. Well, it's my recollection - no, it's too muddled. I - no - I - no.⁵⁰⁸

8.175 McCubben gave evidence that it was his recollection that the assault had taken place in the charge room and not the BAS room of the Ballina Police Station.⁵⁰⁹

8.176 In examination by his own legal representative McCubben agreed that his recollection of events happening on 14 January 2011 was not very clear, indeed, he did not have much recollection at all of anything that occurred on that night.⁵¹⁰

8.177 McCubben said that, at the time of preparing his statement, he had seen Hill's statement and "*would have thought that to be a more accurate record of what actually happened at the time*".⁵¹¹

SUBMISSIONS

SUBMISSIONS BY COUNSEL ASSISTING

8.178 It was submitted that the CCTV footage showed what had actually occurred (and had not occurred) and did not show any assault by Barker on Hill. It was submitted that no witness before the Commission had in his evidence

⁵⁰⁶ ibid, p.480

⁵⁰⁷ ibid, p.484

⁵⁰⁸ ibid, pp.484-485

⁵⁰⁹ ibid, p.506

⁵¹⁰ ibid, p.563

⁵¹¹ ibid, p.485

suggested that the CCTV footage showed an assault by Barker on Hill. In these circumstances it was submitted that the Commission would be satisfied to the requisite standard that Barker had not assaulted Hill.

8.179 In the rest of his submissions Counsel Assisting referred to and commented on the evidence of individual witnesses about the alleged assault.

Barker

8.180 Counsel referred to evidence by Barker about his lack of recollection of what had occurred within the BAS room. It was suggested by Counsel Assisting that Barker's lack of recollection was understandable in the light of the conduct by the police officers to which he had been subjected in the BAS room.

8.181 Counsel Assisting did not in his submissions refer to the first substantive question he had asked Barker at the public hearing, namely "*Did you punch Officer Hill on the evening of 14 January 2011 at the Ballina Police Station?*" and Barker's answer to that question: "*no*". However, the Commission does not consider that it should disregard this evidence.

Hill

8.182 Counsel Assisting referred to paragraph 12 of Hill's statement of 19 January 2011. Counsel Assisting submitted that what could be seen in the CCTV footage was entirely inconsistent with the version of events given in Hill's statement. The CCTV footage showed that there was no punch with a closed right fist to Hill's nose, Hill did not turn away as he saw a punch coming, Barker did not attempt to throw further punches at Hill and Barker did not throw his arms around trying to break free.

8.183 Counsel Assisting referred to and criticised the evidence about the alleged assault given by Hill in the Ballina Local Court on 7 July 2011 and 2 December 2011 and the evidence given by Hill before the Commission.

8.184 Counsel Assisting submitted that the Commission would be satisfied to the requisite standard that Hill had fabricated the claim that he had been assaulted by Barker. All the other police officers who had initially claimed to have witnessed the assault had ultimately acknowledged that they were mistaken.

Walmsley

- 8.185 Counsel Assisting referred to paragraph 18 of Walmsley's statement, to evidence given by Walmsley in the Ballina Local Court on 2 December 2011 and to his evidence given before the Commission.
- 8.186 It was submitted that when giving evidence in the Ballina Local Court Walmsley had persisted in asserting that Barker had assaulted Hill, even after he had been shown the CCTV footage. In his evidence before the Commission Walmsley had made certain concessions but he had been reluctant to accept, not merely that matters he had sworn had happened were not shown in the CCTV footage but also that they had not in fact happened.
- 8.187 Counsel Assisting submitted that the Commission should be satisfied to the requisite standard that Walmsley fabricated assertions in his statement about the alleged assault and that Walmsley subsequently gave knowingly false evidence in the Ballina Local Court about the alleged assault.

Eckersley

- 8.188 Counsel Assisting referred to paragraph 7 in Eckersley's statement of 10 May 2011, to Eckersley's evidence given in the Ballina Local Court on 2 December 2011 and to his evidence before the Commission.
- 8.189 It was submitted that in his evidence before the Commission Eckersley had exhibited considerable prevarication, particularly in being reluctant to concede, not just that the alleged assault was "*not clearly shown*" in the CCTV footage, but that the alleged assault was not shown at all in the CCTV footage. It was submitted by Counsel Assisting that the Commission would be satisfied to the requisite standard that Eckersley had not observed Barker assault Hill by punching him in the face and that the assertions in his statement and the evidence given by him in the Ballina Local Court that Barker had punched Hill in the face were fabricated.

Mewing

8.190 Counsel Assisting referred to paragraph 8 of Mewing's statement of 19 April 2011, to the evidence given by Mewing in the Ballina Local Court on 2 December 2011, to the evidence given by him at the private hearing on 15 November 2012 and to the evidence given by him at the public hearing.

8.191 It was submitted by Counsel Assisting that the Commission would be satisfied to the requisite standard that paragraph 8 of Mewing's statement was fabricated and that the evidence Mewing had given in the Ballina Local Court about the alleged assault was knowingly false.

Woolven

8.192 Counsel Assisting referred to paragraph 7 of Woolven's statement bearing the date 11 July 2011, to the evidence given by him at the private hearing on 15 November 2012 and to the evidence given by him at the public hearing.

8.193 It was submitted by Counsel Assisting that Woolven had been "*a particularly unimpressive witness*" at the public hearing. A number of parts of his evidence were referred to in support of this submission. Counsel referred to the evidence which had been adduced at the public hearing of the intercepted telephone conversation to which Woolven had been a party.

8.194 Counsel Assisting submitting that the Commission should be satisfied to the requisite standard that the assertions in paragraph 7 of Woolven's statement about the alleged assault were fabricated. It was submitted that the fact that Woolven had not actually given evidence in the Ballina Local Court was of little importance.

McCubben

8.195 Counsel Assisting referred to paragraph 12 of McCubben's statement of 11 August 2011 and to his evidence before the Commission at the public hearing.

8.196 Counsel Assisting referred particularly to McCubben's evidence about how poor his own recollection of the incident was and to his evidence that at the time of preparing his statement he had seen Hill's statement and he "*would have thought that to be a more accurate record of what actually happened at the time*".

8.197 It was submitted that the Commission would be satisfied that McCubben's description in his statement of what had occurred after Barker was removed from the dock and until he was brought to the ground in the BAS room was fabricated. It was submitted that, not himself having an independent recollection, he had adopted what Hill had said in Hill's statement.

SUBMISSIONS BY LEGAL REPRESENTATIVES OF THE POLICE OFFICERS

8.198 In none of the submissions on behalf of the police officers, with the exception of the submissions on behalf of Mewing, was it submitted that the Commission should not find that the alleged assault of Hill by Barker did not occur. Such submissions as were made were directed to whether a police officer had made an unequivocal assertion that an assault had occurred and, if the Commission found that such an assertion had been made, whether the Commission should find that the assertion had been made knowing it was untrue or not believing that it was true. Reference was made to the evidence of individual police officers that, at the time of making his statement or at the time of giving evidence, he had believed that what he asserted about the alleged assault was true.

8.199 It was submitted on behalf of Mewing that the Commission could not be satisfied, on the basis of the CCTV footage, that the alleged assault by Barker on Hill had not occurred. It was submitted that the CCTV footage was not of a sufficiently quality to permit such a finding to be made and that the CCTV footage might not have captured all of the events that had happened within the Ballina Police Station. It was submitted that in these circumstances it would be "*unfair to characterise the footage as exonerating Mr Barker*". It was submitted that there clearly had been a confrontation between Barker and the police officers and that it was Barker who had initiated the confrontation by turning on the police officers. Reference was also made by Mewing's counsel to the

complaints made by Hill soon after the confrontation that he had been assaulted by Barker.

ASSESSMENT

8.200 As stated in the Commission's summary of the submissions of Counsel Assisting, Counsel Assisting submitted that the CCTV footage showed conclusively what had actually occurred (and what had not occurred) and did not show any assault by Barker on Hill.

8.201 The weight which could properly be given to Barker's denial that he punched Hill would be diminished by Barker's own evidence about how limited his recollection of events inside the Ballina Police Station was and by other factors affecting his credibility, including his consumption of alcohol earlier that evening and his obviously highly charged emotional state after his arrest. However, notwithstanding these factors and notwithstanding that Counsel Assisting did not refer to Barker's denial in this part of his submissions, the Commission does not consider that it should disregard or give no weight at all to Barker's evidence. There is no necessary inconsistency between a witness having only a limited recollection of events but being sure that he did not engage in some particular action, in this case punching Hill.

8.202 As already noted, a submission was made on behalf of Mewing that the Commission could not be satisfied, on the basis of the CCTV footage, that the alleged assault by Barker on Hill had not occurred. In support of this submission, it was said that the CCTV footage was not of a sufficient quality to permit such a finding to be made and that the footage from the cameras in the charge room and the BAS room might not have recorded all the events which had occurred in those rooms.

8.203 It is appropriate to note some qualifications about the CCTV footage.

8.204 The time stamps on the CCTV footage showing events in the charge room and the time stamps on the CCTV footage showing events in the BAS room were not synchronised with each other and neither set of times was accurate. It seems likely that the time stamps for only one of the rooms was adjusted for daylight saving.

- 8.205 Notwithstanding what the Magistrate said in his judgment of 5 July 2012, it is to be accepted that the CCTV footage from the camera in the BAS room showing events in the doorway to the BAS room and in the BAS room itself is not quite directly continuous with the CCTV footage from the camera in the charge room showing events in the charge room. The footage of events in the charge room ends with Barker being walked by Hill and Walmsley in the charge room towards the doorway into the BAS room but not having reached the doorway. However, the short break in continuity is not material. It is clear, on the overwhelming preponderance of the evidence, that any assault occurred in the doorway to the BAS room or in the BAS room itself, immediately before Barker was forced by police against the BAS room wall.
- 8.206 It is also to be accepted that, when an event is shown in the CCTV footage, the footage does not always clearly show all that was happening, as when vision of a particular person is obscured by the bodies of other persons closer to the camera.
- 8.207 The Commission has viewed a number of times all the relevant CCTV footage in the digital form prepared by the STIB. As a result of those viewings and after taking into account the submissions by Mewing's legal representative and the qualifications about the footage which the Commission has just stated, the Commission has formed the opinion that the footage is of a fair quality and clearly shows *inter alia* the matters set out in the following chronology. The references to times in the chronology are references to the times shown on the CCTV footage for the room in which the matters occurred. The references to seconds in some of the times stated in the chronology may in some cases be approximate, it sometimes being difficult from observation of the CCTV footage to be precise to the last second about when an event should be taken to have occurred or commenced.
- 8.208 The CCTV footage from the camera in the charge room shows Barker being removed from the dock at 23:59:35. Hill opened the door to the dock and Barker turned so as to present his back to Hill, as the door was being opened. Hill took

hold of Barker's right arm, placing his left hand on Barker's left shoulder, and pulled Barker out of the dock.⁵¹²

8.209 At 23:59:42 Walmsley took hold of Barker's right arm, Hill having taken hold of some part of Barker's left arm. The three men Barker, Hill and Walmsley then proceeded out of view of the camera in the charge room in the direction of the door to the BAS room.⁵¹³

8.210 At a time which must have been earlier than, but only shortly prior to, Barker being removed from the dock, the CCTV footage from the camera in the BAS room shows Walmsley and Mewing proceeding through the doorway into the charge room. Eckersley then entered the BAS room and remained standing in the BAS room, looking through the open doorway to the charge room.⁵¹⁴

8.211 At 23:04:36 the CCTV footage from the camera in the BAS room shows Eckersley take a step back from the doorway to the charge room. The first person to emerge through the doorway was Barker, followed by Walmsley and Hill who were holding Barker. Barker is shown facing into the BAS room with his right arm, which was the arm nearer to the camera, clearly being held. At 23:04:38, after he had entered into the BAS room, Barker's body turned so that his back was more directed towards the camera and he was more side on to the doorway to the BAS room. Walmsley is shown clearly holding on to Barker's right arm with his right hand and he appears also to be holding on to Barker's right arm with his left hand. It is not possible to see Barker's left arm, which is obscured.⁵¹⁵

8.212 Also at 23:04:38 Barker's body rotated somewhat further to his left and he appeared to brace himself with his right foot against being pushed further into the BAS room.⁵¹⁶

⁵¹² Exhibit 18

⁵¹³ *ibid*

⁵¹⁴ *ibid*

⁵¹⁵ *ibid*

⁵¹⁶ *ibid*

- 8.213 At 23:04:39, while Barker's right arm was clearly still being held by Walmsley, Eckersley, who had been watching at close range, also took hold of Barker and Hill, Walmsley and Eckersley pushed Barker into the wall of the BAS room.⁵¹⁷
- 8.214 Between 23:04:41 and 23:04:44 Barker was swung in an anticlockwise semi-circle into a machine in the BAS room and then on to the floor.⁵¹⁸
- 8.215 At 23:04:46 and again at 23:04:48 Eckersley directed his right foot towards where Barker was on the floor.⁵¹⁹
- 8.216 At 23:04:51 Mewing directed his foot towards Barker.⁵²⁰
- 8.217 At 23:04:55 Barker's head can be seen on the floor of the BAS room, face down. Hill and Mewing were on top of Barker's body, whilst Eckersley and Walmsley were kneeling close by.
- 8.218 At 23:05:15 Walmsley handed Hill a set of handcuffs.
- 8.219 At 23:05:26 Eckersley pushed one of Barker's hands up to be handcuffed. The hand was taken by Hill. Barker was handcuffed, with his hands behind his back.
- 8.220 Between 23:05:41 and 23:06:04 Hill, Eckersley, Walmsley and Mewing, with some assistance initially from Woolven, dragged Barker by the handcuffs from the BAS room into the corridor leading to the cells.
- 8.221 The CCTV footage clearly shows the following critical matters:
- (i) at all times up until when Barker was forced into the BAS room wall his right arm was being held by Walmsley;

⁵¹⁷ ibid

⁵¹⁸ ibid

⁵¹⁹ ibid

⁵²⁰ ibid

- (ii) at no time up until when Barker was forced into the BAS room wall, or subsequently, did he break free from the grip of the police officers;
- (iii) at no time up until when Barker was forced into the BAS room wall, or subsequently, did Barker throw or attempt to throw any punches or flail his arms;
- (iv) at no time was Hill struck by any punch by Barker.

8.222 All the police officers, including Hill, who, in their statements had asserted that Barker had assaulted Hill, subsequently made concessions, after having viewed the CCTV footage, that the footage did not show any punch by Barker.

8.223 Hill conceded in his evidence in the Ballina Local Court on 2 December 2011 that the CCTV footage did not show any punch by Barker and that the footage appeared to show that, as they were entering the BAS room, Walmsley continued to have hold of Barker's right arm and he, Hill, appeared to continue to have hold of Barker's left arm.

8.224 In his evidence at the public hearing Hill conceded that the CCTV footage did not show the punch which he claimed to remember and that the CCTV footage showed that Walmsley had not lost control of Barker's right arm and that it did not "*look like*" he, Hill, had lost control of Barker's left arm and that the CCTV footage did not show that Barker tried to throw any further punches.

8.225 Walmsley in his evidence in the Ballina Local Court on 2 December 2011 conceded that the CCTV footage showed that, as they entered the BAS room, Walmsley was holding Barker's right arm with both his hands and that he could not see in the CCTV footage any punch being thrown in the BAS room.

8.226 In his evidence at the public hearing Walmsley conceded that the CCTV footage did not show Barker punch Hill or Barker pulling free from Walmsley's grip or Barker throwing further punches or Barker flailing his arms.

- 8.227 In the Commission's opinion no weight can be given to Walmsley's attempted explanations of how an assault could have occurred without it being shown in the CCTV footage, for example, that the assault might have occurred before he, Hill and Barker passed through the doorway into the BAS room or that there might have been two separate assaults by Barker or that Walmsley might have temporarily lost control of Barker's right arm and subsequently regained control. These attempted explanations are inconsistent with the accounts given by Walmsley, before he had seen the CCTV footage, in his statement and in his early evidence in the Ballina Local Court on 2 December 2011.
- 8.228 Mewing in his evidence at the Ballina Local Court on 2 December 2011 conceded that the CCTV footage did not show any punch.
- 8.229 In his evidence at the private hearing Mewing said that he had made an assumption that Barker had hit Hill, because Hill had said that he had been hit. He conceded that the CCTV footage appeared to show that Walmsley continued to hold on to Barker's right arm. He ultimately conceded that in fact Barker had not assaulted Hill.
- 8.230 At the public hearing Mewing conceded that the CCTV footage did not show any assault and that no assault had in fact occurred.
- 8.231 In his evidence in the Ballina Local Court on 2 December 2011 Eckersley, who had had the advantage of having viewed the CCTV footage before he gave any evidence, said that he "*thought*" that Barker had thrown a punch which hit Hill in the face.
- 8.232 At the public hearing Eckersley, after considerable prevarication, conceded that the CCTV footage did not show any punch and ultimately conceded that the assertion he had made in his statement that Barker had punched Hill was wrong.
- 8.233 Ryan, who had not been present at the time of the alleged assault but had viewed the CCTV footage, said in his email of 30 July 2011 that there was "*no clear evidence*" in the footage of Barker punching Hill. In his evidence before the Commission Ryan said that he could not see anything in the CCTV footage to suggest that Barker had punched Hill.

- 8.234 In his evidence at the private hearing Woolven said it was his recollection that Walmsley and Hill had lost their grips on Barker's arms. He asserted that he remembered hands going everywhere. However, he said that he had not actually seen Hill struck by Barker.
- 8.235 In his evidence at the public hearing Woolven said that it appeared to him that Walmsley and Hill had lost control of Barker and, in this sense, Barker had "*kind of broken free*" from Walmsley and Hill. Woolven conceded that he had not seen Barker punch Hill. He had no actual recollection of Barker throwing further punches. He had included in his statement an assertion that Barker had thrown further punches, after reading an assertion to that effect in the facts sheet.
- 8.236 In his evidence at the public hearing McCubben conceded that he had not seen Barker assault Hill and that he had no recollection of Barker breaking free or swinging his arms.
- 8.237 Notwithstanding his concessions about what the CCTV footage showed and did not show, Hill continued to maintain in his evidence before the Commission that he still remembered being punched by Barker. However, this evidence by Hill cannot be given any credence. Confronted with the irrefutable evidence of the CCTV footage that Walmsley had continued to hold Barker's right arm and that it was not true, as Hill had alleged in his statement and in his evidence at the Ballina Local Court on 7 July 2011, that Barker had pulled his right arm free from Walmsley and punched Hill in the nose with his right hand, Hill changed his account and suggested, quite implausibly, that Barker might have punched him with his left hand.
- 8.238 Hill's lack of credibility, which will be examined more fully later in this report, prevents any weight being given to Hill's self-serving evidence that he made an immediate complaint that he had been hit and announced that Barker would be charged with assaulting police and that soon afterwards he informed Ryan of the alleged assault.
- 8.239 No other police officer gave evidence at the public hearing that Barker had punched Hill.

- 8.240 The only submission the Commission received that the Commission should not find that Barker did not assault Hill was the submission from Mewing's legal representative which has already been considered. As already stated earlier in this report, the Commission received a letter from Hill's legal representative informing the Commission that the legal representative had been instructed not to make any submissions on Hill's behalf in response to Counsel Assisting's submissions.
- 8.241 The Commission concludes that Barker did not, in the doorway to the BAS room or in the BAS room itself, break or pull free from the restraining grip of Walmsley on Barker's right arm.
- 8.242 The Commission concludes that Barker did not assault Hill in the Ballina Police Station on the night of 14 January 2011 and, in particular, did not punch, or even attempt to punch, Hill on the nose or face.
- 8.243 In a subsequent part of this report the Commission will give further consideration to the statements and evidence of the police officers about the alleged assault of Hill by Barker.

9. THE USE OF EXCESSIVE FORCE

- 9.1 The part of Counsel Assisting's submissions headed "*the use of excessive force*" related to events occurring from and including Barker being forced against the BAS room wall (that is, immediately after Hill was allegedly punched by Barker) up to and including the detention of Barker in a cell at the Ballina Police Station. The Commission will deal with the same events in this part of its report. It is convenient to refer to these events compendiously as "the subsequent events in the Ballina Police Station". The subsequent events in the Ballina Police Station include the forcing of Barker against the wall and then to the floor of the BAS room, the handcuffing of Barker while he was on the floor of the BAS room, the taking of Barker to a cell in the Ballina Police Station and the holding of Barker in the cell.
- 9.2 In the part of its report dealing with the alleged assault of Hill the Commission quoted or summarised, in addition to the parts of the statements which related to the alleged assault, the parts of the statements of the police officers which related to the subsequent events in the Ballina Police Station. In the same part of its report the Commission also quoted or summarised some of the evidence of the police officers in the Ballina Local Court or at hearings of the Commission which related to the subsequent events in the Ballina Police Station. The Commission will not in this part of its report repeat what it said in that earlier part of its report. It is, however, necessary to quote or summarise some other evidence by the police officers which has not already been referred to.

EVIDENCE

HILL

- 9.3 In his evidence in the Ballina Local Court on 2 December 2011 the following question and answer occurred:

Q. So we're quite clear that his attempted punch was what caused you to push him into the wall, to pin him against the wall?

A. That's why I put him up against the wall yes.⁵²¹

⁵²¹ Exhibit 95 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Senior Constable David Hill), p.16

9.4 In his evidence before the Commission Hill gave the following evidence in relation to Barker being forced against the wall in the BAS room:

...I believe at the time that I reacted to being hit, and that's why I pushed Corey Barker against the wall.⁵²²

9.5 Hill gave the following further evidence about events after Barker was handcuffed:

I was talking to him at the time, telling him to put his feet underneath him. There's a period there where we back up off him and I was telling him the whole time that we were going to lift him up and to put his legs up underneath him.

Q. You're not suggesting, are you that he got a real opportunity to stand up?

A. I'm suggesting that I was telling him to do it and then when we tried to lift him up off the ground, he was just a dead weight. And then the second time, as we've lifted him, he kept his legs just dead on the floor and at that point we've started dragging him. I probably should have given him more time.⁵²³

9.6 Hill was examined about the removal of the handcuffs from Barker:

Q. ...You then go on to say in paragraph 13 (of Hill's statement):

About 20 minutes later the accused's handcuffs were removed.

That's simply wrong, isn't it?

A. I haven't checked the footage, Mr Rushton, the times. However, I thought it was only 20 minutes when I was writing the statement. I went in, told Senior Constable Ryan what happened. He made a few notes on a piece of paper. I sat down and started doing some of my own police work from the night, and then I remembered that he was handcuffed and I went out to check on him, he was still handcuffed, and the handcuffs were removed; he'd calmed down at that point.

Q. Who do you say removed them?

A. I'm saying I removed the handcuffs from him.

Q. If it be the fact that they weren't removed for a period of approximately one hour and 40 minutes, you must be mistaken; do you agree?

⁵²² PIC Transcript, Senior Constable David Hill, 27 February 2013, p.783

⁵²³ *ibid*, pp.787-788

A. I remember going up there and removing them before coming back up with Senior Constable Ryan and fingerprinting the accused - Corey Barker.

Q. It was shortly before he was fingerprinted that they were removed, is that what you say?

A. I can't tell you if it was shortly before, I don't remember the exact timings, but this happened just after 12. By 2am I was doing another job on River Street at Ballina.

Q. Was he taken into the fingerprint room with handcuffs on or without handcuffs?

A. Without handcuffs, to the best of my knowledge.

Q. If the video does show that he was taken into the fingerprint room with handcuffs, you're mistaken about that too, aren't you?

A. I would be.⁵²⁴

9.7 Hill conceded that Barker had been dragged to the cell and had not been picked up and carried, as he had asserted in his evidence in the Ballina Local Court on 7 July 2011.⁵²⁵

9.8 In examination by his own legal representative Hill said:

Q. After he was put in the cell after the scuffle in the BAS room, you left the handcuffs on him?

A. Yes, I did.

Q. Is it fair to say that it wasn't going to be a safe proposition at that time to be attempting to take handcuffs off Corey Barker?

A. It's exactly why I didn't take them off. I didn't want anyone else getting assaulted while we moved out of the room.⁵²⁶

EVIDENCE BY ECKERSLEY

9.9 In the Ballina Local Court Eckersley gave evidence about a conversation he had had with the police prosecutor, after he had viewed the CCTV footage. His evidence in response to questions asked by the police prosecutor was as follows:

⁵²⁴ *ibid*, p.789

⁵²⁵ *ibid*, p.796

⁵²⁶ *ibid*, p.820

Q. When you returned did I ask you to comment on what you had seen?

A. You did.

Q. And what did you say?

A. I said it looks like I tried to kick him in the head.

Q. Now did you--

A. No, definitely.

Q. —kick him in the head? What were you doing?

A. I was trying to secure his hand with my foot because the table was right there. I missed Corey's hand and I hit Senior Constable Hill's hand, stood on his hand.

Q. Why were you trying to place your foot on, you believed, Mr Barker's hand?

A. To stop it - to stop him from getting them up under him so we could handcuff him.⁵²⁷

9.10 Eckersley gave the following further evidence about the two actions of his leg shown in the CCTV footage:

Q...So there was definitely two actions there, wasn't there?

A. Yes.

Q. And the first action of your leg was in a different direction to where the second--

A. It appears that I kicked him in the head, or tried to kick him in the head.

Q. Well not only appears to, but it is, isn't it?

A. Sorry?

Q. Your first action, that is that striking action, is in a different direction to where the hand was?

A. There was two hands on the floor, that's what I said. I tried to get his hand with the first one. I missed, so I went back and that's when I hit Senior Constable Hill's hand that I thought was Corey's.⁵²⁸

⁵²⁷ Exhibit 92 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Ryan Eckersley, p.29
⁵²⁸ *ibid*, p.38

9.11 Eckersley was asked whether Barker, having been handcuffed, was given the opportunity to walk to the cells. Eckersley replied that Barker “*was told to stand up and he refused to stand up*”.⁵²⁹

9.12 Later Eckersley gave evidence “*Well he did refuse to get up but from the footage it appears he wasn’t given enough chance to get up, I agree with that*”.⁵³⁰

9.13 In his evidence before the Commission Eckersley gave the following account of what had happened after he thought a punch had been thrown at Hill:

He (Barker) was pushed up against the wall. I've gone in to try to help restrain him there, but I didn't get to him because just Constable Walmsley sort of knocked me out of the way and then Corey got taken to the ground. I've come over then and saw a couple of hands on the ground, so I've tried to secure his hand with my foot so he couldn't get it up under himself so he could be handcuffed. I've missed Corey's hand and, on the second attempt, I've got Senior Constable Hill's hand. Hill's yelled out, "Fuck, that's my hand", so then I've got down on the ground, reached in, got hold of Corey's arm and took hold of it then before he was handcuffed.

He was then handcuffed by Senior Constable Hill to the rear, and someone said at that stage for him to get up, and it's since clear, like from seeing the footage, he wasn't given - or he could have been given more time to get up before we dragged him to the back cell.⁵³¹

9.14 Eckersley was shown the CCTV footage in which movements of his right leg were depicted. He was asked “*Do you agree that it appeared as though you kicked him in the head area?*” and he replied “*It could be interpreted that way, yes.*”⁵³² Eckersley said that what he was doing was trying to stand on a hand which he thought was Barker’s to prevent Barker moving the hand under his body.⁵³³

9.15 Eckersley was then asked whether he appeared in the CCTV footage to be stomping on something and he replied “*I stood on Senior Constable Hill’s hand*”.⁵³⁴

⁵²⁹ *ibid*, p.40

⁵³⁰ *ibid*, p.42

⁵³¹ PIC Transcript, Constable Ryan Eckersley, 27 February 2013, pp.721-722

⁵³² *ibid*, p.725

⁵³³ *ibid*, pp.725-726

⁵³⁴ *ibid*, p.725

9.16 The following evidence was given about Barker getting up after he had been handcuffed.

Q... Do you say he was asked to get up, do you?

A. I remember that being said, yes.

Q. How was he going to get up from that position with handcuffs behind his back, with his hands cuffed behind his back?

A. There are certain ways to do it. You ask the prisoner to pull their knees up to their stomach and roll them over and then sit them up before standing them up.

Q. He doesn't seem to have been given that opportunity at all, do you agree?

A. No, I agree with that.⁵³⁵

9.17 Eckersley said that he had never previously seen a prisoner handled in the way Barker was handled, by being dragged to a cell with his arms behind his back in handcuffs.⁵³⁶

9.18 In response to questions asked by Mewing's counsel Eckersley said that a method which could be used to enable a prisoner in Barker's circumstances to stand up would be to "*roll them to their side, let them pull their knees up to their chest, help them roll, sit on their butt and then pull the leg up and stand up.*"⁵³⁷ Eckersley said that this was a method that he had been taught at the police academy.⁵³⁸

9.19 In response to questions from his own legal representative Eckersley said he did not believe that it was a fair description of what he had done with his foot to describe it as "*lashing forward*".⁵³⁹ Eckersley denied that he had been trying to kick Barker's hand out or that he had stomped on Barker.⁵⁴⁰ He said that what he had been trying to do was to secure Barker's hand with his foot.⁵⁴¹

⁵³⁵ *ibid*, p.727

⁵³⁶ *ibid*

⁵³⁷ *ibid*, p.739

⁵³⁸ *ibid*

⁵³⁹ *ibid*, p.748

⁵⁴⁰ *ibid*, pp.748-749

⁵⁴¹ *ibid*

MEWING

9.20 In the Ballina Local Court on 2 December 2011 Mewing, after he had viewed the CCTV footage, was asked about a movement of his leg which was referred to as a “*leg extension*”. Mewing denied that he had kicked Barker.⁵⁴² Mewing said that the movement of his leg was a “*knee strike*” administered for “*pain compliance*” so that Barker would release his hands from under his body.⁵⁴³ Mewing admitted that, before the knee strike was administered, no direction had been given to Barker to remove his hands from under his body and, even if a direction had been given, no time had been allowed to Barker to comply with the direction.⁵⁴⁴

9.21 Mewing said that he did not recall who had given Barker the direction to stand up before he was dragged to the cell. He then said that he did not recall whether any direction for Barker to stand up had been given.⁵⁴⁵

9.22 The following further evidence was given:

Q...They've just finished handcuffing him straight away, at 23.05.40...?

A. Yes

Q. They've dragged him immediately away, correct?

A. Yes.

Q. So he hasn't been given any time to comply with any direction to stand up, has he?

A. Looks that way.⁵⁴⁶

9.23 At the private hearing Mewing was questioned about the part of the CCTV footage in which he is shown moving his foot. It was put to him by Counsel Assisting that he appeared to be kicking Barker. Mewing replied that he was applying a “*knee strike*” for “*pain compliance*” so that Barker would move his hands out.⁵⁴⁷

⁵⁴² Exhibit 51 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Luke Mewing), p.100

⁵⁴³ *ibid*, p.101

⁵⁴⁴ *ibid*, p.102

⁵⁴⁵ *ibid*, p.106

⁵⁴⁶ *ibid*, pp.107-108

⁵⁴⁷ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.32

9.24 It was put to Mewing by Counsel Assisting that Barker had not been given any opportunity to get up. The following question and answer occurred.

Q. How does one get up off a flat surface with two or three policemen sitting on you with your hands handcuffed behind your back? Would you mind telling us?

A. I'm not sure. You probably can't get up.⁵⁴⁸

9.25 It was put to Mewing by Counsel Assisting that the CCTV footage showed that, even if Mewing was given a direction to stand up, he was not given any time to comply with the direction. Mewing replied "*It looks like that way, yes*".⁵⁴⁹

9.26 The following question and answer occurred in Mewing's evidence at the public hearing:

Q...You've said he didn't assault Hill. Do you have any understanding, then, as to why Mr Barker was slammed into the wall of the BAS room?

A. No, I don't.⁵⁵⁰

9.27 As to Mewing's knee strike, Mewing conceded that he had not told Barker, before he applied the knee strike, that he wanted Barker to take his hands from underneath him.⁵⁵¹

9.28 Mewing agreed that Barker would have been unable to get up from the ground with his arms handcuffed behind his back with police officers on top of him.⁵⁵² Mewing agreed that the way Barker was taken to the cells looked "*brutal*".⁵⁵³ He had never seen another prisoner handled that way.⁵⁵⁴

9.29 In examination by his own counsel Mewing said that administering a knee strike was a "*weaponless control technique*" taught at the police academy.⁵⁵⁵ The knee strike administered by him to Barker was an attempt to get Barker's hand out from underneath him.⁵⁵⁶ Mewing considered that it had been justifiable.⁵⁵⁷

⁵⁴⁸ *ibid*, p.35

⁵⁴⁹ *ibid*, pp.36-37

⁵⁵⁰ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.416

⁵⁵¹ *ibid*, p.419

⁵⁵² *ibid*, p.421

⁵⁵³ *ibid*, p.422

⁵⁵⁴ *ibid*

⁵⁵⁵ *ibid*, p.462

⁵⁵⁶ *ibid*, p.465

WOOLVEN

- 9.30 In his evidence at the private hearing Woolven agreed that the CCTV footage showed Barker, after being handcuffed, being dragged with his hands behind his back. He was examined about the assertion in his statement that Barker was “*led out, carried out*”. He asserted that police had “*carried*” Barker.⁵⁵⁸ He agreed that the way in which Barker was dragged would have been extremely painful.⁵⁵⁹
- 9.31 Woolven was questioned about Barker having been placed in the cell with his hands handcuffed. Woolven was asked: “*Can you think of any reason why a prisoner would be kept in cuffs if he wasn’t regarded as a danger to himself once he was placed in a cell?*” The only reason Woolven could suggest was “*missing keys*”, that is, that the keys to the handcuffs were missing.⁵⁶⁰
- 9.32 Woolven did not agree that Barker posed no threat to himself. He said “*I think he was pretty wild, he could have posed a threat to himself*”.⁵⁶¹ Woolven said that Barker was upset and angry.⁵⁶²
- 9.33 Counsel Assisting asked “*I accept that he was angry and he was abusive and he was banging on the perspex door of the dock, but there was really nothing that you observed, was there, that indicated that he was going to self-harm, for example?*” Woolven answered “*no*”.⁵⁶³
- 9.34 Woolven agreed that, if Barker had not been handcuffed in the dock, there would have been no proper basis for leaving him in handcuffs in the cell.⁵⁶⁴
- 9.35 The following question and answer occurred in the examination:

Q. Do you agree, officer, and as an officer of many years experience and training within the NSW Police Force, that if Corey Barker was left in the cells with his arms handcuffed behind his back for over one and a half hours, that’s something that just shouldn’t have happened?

⁵⁵⁷ *ibid*, p.463

⁵⁵⁸ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), p.48

⁵⁵⁹ *ibid*

⁵⁶⁰ *ibid*, p.21

⁵⁶¹ *ibid*

⁵⁶² *ibid*

⁵⁶³ *ibid*, p.22

⁵⁶⁴ *ibid*

A. Yeah, probably it shouldn't have happened.⁵⁶⁵

9.36 In his evidence at the public hearing Woolven agreed that the CCTV footage appeared to show Eckersley “*stomping*” with his foot.⁵⁶⁶ Woolven said that it was not “*the best practice*” for a police officer to use his feet, because there is a possibility that a prisoner who is kicked or stomped on will get hurt but sometimes a police officer has got to adapt to the circumstances.⁵⁶⁷

9.37 Woolven said that Barker had “*ended up*” against the BAS room wall because “*he (Barker) was not in full control and to regain that full control all the bodies went forward in one motion.*”⁵⁶⁸

MCCUBBEN

9.38 In his evidence at the public hearing McCubben said that, after he had thought that he had seen Barker’s right arm coming near Hill, “*I recall the police then piled on top of him and then he was taken to the...cell block*”.⁵⁶⁹

9.39 McCubben agreed that it is not in accordance with proper police procedure to leave a prisoner in handcuffs within a cell, unless it is absolutely essential.⁵⁷⁰ However, he said that if a prisoner is likely to injure himself, if he were not handcuffed, it would be essential that he remain handcuffed.⁵⁷¹

9.40 On the night of 14 January 2011 McCubben refused to grant bail to Barker. One of his reasons for refusing bail, as recorded in a bail document, was “*incapacitation by intoxication*”.⁵⁷² When it was suggested to McCubben by Counsel Assisting that, if somebody is incapacitated by intoxication, they should not be left in a cell with their hands handcuffed behind their back, McCubben suggested a distinction between a person being physically incapacitated and being mentally incapacitated.⁵⁷³ He suggested that a person might be mentally

⁵⁶⁵ *ibid*, p.23

⁵⁶⁶ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.615

⁵⁶⁷ *ibid*, p.616

⁵⁶⁸ *ibid*, p.647

⁵⁶⁹ PIC Transcript, Robert McCubben, 25 February 2013, p.480

⁵⁷⁰ *ibid*, p.510

⁵⁷¹ *ibid*

⁵⁷² PIC Transcript, Robert McCubben, 25 February 2013, p.514; Exhibit 35

⁵⁷³ PIC Transcript, Robert McCubben, 25 February 2013, p.514

incapacitated by alcohol to the point where, if he was admitted to conditional bail, he would have difficulty understanding his bail conditions.⁵⁷⁴

- 9.41 McCubben's attention was directed to an entry made by him as custody manager in the custody record for Barker, that Barker was "*well affected by alcohol*".⁵⁷⁵ It was put to McCubben that a prisoner who is well affected by alcohol should not be placed in a cell with his arms handcuffed behind his back. McCubben replied "*Well, I guess not, no*".⁵⁷⁶
- 9.42 McCubben conceded that, if Barker had not only been left in the cell with his arms handcuffed behind his back but the handcuffs had not been removed for an hour and forty minutes, that would have been "*highly irregular*".⁵⁷⁷
- 9.43 McCubben said in his evidence that while Barker had been in the dock in the charge room he had been punching the dock extremely hard. McCubben was asked by Counsel Assisting: *Are you endeavouring to convey to this Commission, are you, that it may have been appropriate to keep this heavily intoxicated - indeed, incapacitated by intoxication - prisoner in handcuffs in a cell because he might have hurt his hand by punching something?* McCubben gave various answers to this question including "*I don't know*", that it would be a possibility and that he was not suggesting anything.⁵⁷⁸
- 9.44 McCubben agreed that Barker had been dragged to the cells with handcuffs applied and his hands behind his back.⁵⁷⁹ The following questions and answers occurred:

Q. Have you seen prisoners dragged that way, handcuffs behind their back with their arms being pushed up towards their head?

A. Not specifically. But as I said, I've seen them dragged in every - I've seen them almost pulled every which way.

Q. Have you seen them pulled that way?

A. Oh, no, not specifically.⁵⁸⁰

⁵⁷⁴ *ibid*

⁵⁷⁵ *ibid*, p.516

⁵⁷⁶ *ibid*

⁵⁷⁷ *ibid*

⁵⁷⁸ *ibid*, pp.517-518

⁵⁷⁹ *ibid*, p.534

RYAN

9.45 Ryan was not involved in the subsequent events in the Ballina Police Station. However, he gave some evidence relevant to those events.

9.46 In his evidence before the Commission Ryan accepted that Barker was kept in handcuffs for an hour and forty minutes. Ryan said he did not know why Barker had been kept in handcuffs for as long as an hour and forty minutes. He said that, if there had been regular inspections on the night of 14 January 2011, the fact that Barker remained handcuffed should have been noticed and, having been noticed, the handcuffs should have been removed.⁵⁸¹

9.47 Ryan gave the following evidence:

Q. On what you observed, there was no good reason, was there - sorry, on what you understood from that evening, there was no good reason, was there, why he should have been kept in handcuffs in the cell?

A. Well, I wouldn't say there's no good reason. He was an aggressive, violent prisoner who made threats to police throughout the night and continued with his behaviour the whole time whilst I was dealing with him at the police station.

Q. Yes.

A. But whether or not that justifies having cuffs on him for that period of time, I'm not sure.

Q. Whether he's violent or not, by the time you put him in a cell and lock the door, he's not going to hurt anyone, is he?

A. No.

Q. There was no good reason, I suggest to you, why he was kept in custody (handcuffs) at all, once he had been moved into that area, that is, into the cell.

A. Yes.

Q. Do you agree?

A. Yes.⁵⁸²

⁵⁸⁰ *ibid*, p.535

⁵⁸¹ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.689

⁵⁸² *ibid*, pp.689-690

9.48 During the examination of Ryan by the legal representative for McCubben the following question and answer occurred:

Q...Would you have had any concerns when opening the door if he was violent and was not handcuffed?

A. Yes, I would have made a judgment as to what he was like when I went down to speak with him. Usually it is the case, if I've had any involvement with a violent prisoner, that I'll actually ask them whether they're going to continue with their behaviour, and in fact when we went and spoke to Mr Barker down in the holding cells right at the end of the proceeding to fingerprint him, I asked him that question and he was compliant to say that he was going to comply with any of our directions.⁵⁸³

SUBMISSIONS

SUBMISSIONS BY COUNSEL ASSISTING

9.49 Counsel Assisting submitted that, if Barker did not assault Hill, then the conduct of the police officers towards Barker after the alleged assault was alleged to have occurred was unjustified. Even if there was some temporary partial loss of control of Barker by the police officers, which was not conceded by Counsel Assisting, their conduct would still have been unjustified. It was submitted that the injuries to his head which Barker undoubtedly suffered on 14 January 2011 and which were visible in photographs taken by his mother on 15 January 2011 had been sustained by him as a result of the police conduct in the BAS room.

9.50 It was submitted by Counsel Assisting that, after Barker had been handcuffed while on the floor of the BAS room, he had not been given any opportunity to stand up but had been dragged face down along the floor with his handcuffed arms extended, in a manner which would have been acutely painful.

9.51 It was further submitted that Barker had been left in a cell at the Ballina Police Station for an hour and forty minutes, intoxicated and with his arms handcuffed behind his back. Counsel Assisting contended that the Commission should find that there had been no inspections or no regular inspections of Barker while he was in the cell and that the conduct of the police officers in leaving Barker in the cell, handcuffed, for an hour and forty minutes had been intended by at least some of the police officers to punish Barker for his behaviour at the Ballina Police Station.

⁵⁸³ PIC Transcript, Senior Constable Gregory Ryan, 27 February 2013, p.711

- 9.52 Counsel Assisting submitted that the Commission should reject the justifications advanced by some of the police officers for keeping Barker handcuffed in the cell.
- 9.53 Counsel Assisting submitted that excessive force had been exerted by police officers against Barker while he was in the BAS room, in the dragging of Barker to the cell and the detaining of Barker in the cell in handcuffs.

SUBMISSIONS BY OTHER LEGAL REPRESENTATIVES

- 9.54 Walmsley's legal representative referred in her submissions to the lack of evidence from Barker himself about what had happened in the BAS room and subsequently. It was submitted that in the limited state of the evidence the Commission would be unable to attribute any of the injuries which Barker undoubtedly sustained at some time on the night of the 14 January 2011 to what had occurred in the BAS room.
- 9.55 Walmsley's legal representative offered a possible explanation of why the police officers appeared in the CCTV footage to have forced Barker against the wall of the BAS room. The explanation offered was that Hill, Walmsley and Barker, all of whom were big men, could not fit side by side through the doorway to the BAS room; that Walmsley partly lost his balance and fell forward while trying to maintain his grip on Barker; that Barker pulled away from Walmsley and turned towards Hill; and that Barker's movement was interpreted by the police officers as Barker resisting the attempts by the police officers to move him forward and as Barker turning towards Hill in preparation to assault Hill. Eckersley, perceiving a situation where Barker was not being fully controlled and was dangerous, stepped in and grabbed Barker. *"From there the momentum of the four men is towards the wall"*. It was submitted that in the progress to the wall it was impossible to determine who was pushing, who was pulling and who was simply getting dragged along.
- 9.56 It was submitted on behalf of Eckersley that the turning of Barker's body towards Hill, as shown in the CCTV footage, gave rise to a belief on the part of Eckersley that Barker had broken free of Walmsley's grip and led to Eckersley intervening by himself taking hold of Barker. Eckersley believed from his observations of Barker that night that Barker was aggressive, abusive and threatening.

- 9.57 It was further submitted that the issue of whether Eckersley had kicked or stomped on Barker had arisen only after the CCTV footage had been viewed. It was noted by Eckersley's legal representative that Barker had never given any evidence of being kicked by Eckersley or of an attempt by Eckersley to kick him. It was submitted that what the footage showed was that, in accordance with Eckersley's oral evidence, he twice attempted to use his foot to restrain Barker's left hand by keeping it on the floor beside him. Eckersley's legal representative submitted that the Commission should accept Eckersley's evidence that his first attempt to secure Barker's hand had missed Barker's hand and that when he made his second attempt he trod on Hill's hand, thinking it was Barker's. It was further submitted that the Commission should accept Eckersley's evidence about what he said he was not doing with his foot, such as kicking or stomping.
- 9.58 It was submitted on behalf of Mewing that in determining whether the police officers had used excessive force on Barker in the BAS room the Commission should take into account Barker's propensity for violence as shown by his criminal history, his conduct on the night of 14 January 2011 and his demeanour that night as recorded in the CCTV footage.
- 9.59 It was submitted that Mewing had given evidence that the knee strike he applied to Barker was a technique of controlling an offender which he had been taught at the police academy. Mewing's counsel referred to the absence of any expert evidence before the Commission about the training of police officers in the use of knee strikes and submitted that, in the absence of such expert evidence, it would be a denial of procedural fairness to find that Mewing had acted improperly.
- 9.60 Counsel submitted that on the night of 14 January 2011 police were attempting to control a detainee who was aggressive and affected by alcohol. It was not necessary for the police officers to wait until Barker had perpetrated some act of violence against a police officer before they were entitled to subdue Barker.
- 9.61 It was submitted on behalf of McCubben that it did not necessarily follow that, because the CCTV footage showed McCubben following Barker and the other police officers on the way to the cell, McCubben must have known that Barker was handcuffed. It was also submitted that McCubben might not have noticed that Barker was handcuffed when he subsequently made an inspection, especially if Barker was lying on his back at the time of the inspection.

- 9.62 It was submitted that it was not established that Barker had been kept handcuffed in the cell for an hour and forty minutes. It was possible that the handcuffs had been removed from Barker when he was placed in the cell and that he was handcuffed again at the time he was taken out of the cell.
- 9.63 It had been submitted by Counsel Assisting that Barker's intoxication was a reason for not keeping him in a cell with handcuffs on. McCubben had noted in the custody record that Barker was well affected by alcohol and McCubben in his evidence gave as a reason for having refused bail that Barker would not have had the capacity to understand the bail undertaking and any conditions of the granting of bail. However, it was submitted on behalf of McCubben that there can be a distinction between mental incapacity and physical incapacity and that a person who has suffered little physical impairment from the consumption of alcohol may have his powers of reasoning, judging and exercising self-control seriously impaired.
- 9.64 McCubben's legal representative referred to what she submitted were possible justifications for keeping Barker handcuffed in the cell.
- 9.65 It was submitted that a justification for keeping Barker handcuffed in his cell would have been to prevent self-harm to Barker. McCubben's legal representative referred to the evidence of Barker punching the dock, including evidence given by McCubben that he was surprised that Barker in punching the dock had not broken his wrist. If Barker had not been handcuffed, he might have injured his hand, wrist or arm by punching the walls of the cell.
- 9.66 It was further submitted that a justification for keeping Barker handcuffed in the cell was the risk of Barker engaging in violence when the door of the cell was opened, if he was not handcuffed.
- 9.67 McCubben's legal representative submitted that, even if the Commission found that Barker had been kept in the cell handcuffed for approximately an hour and forty minutes and that there had been no justification for this having happened, the Commission would nevertheless reject the explanation advanced by Counsel Assisting that the police officers were determined to punish Barker for what they regarded as his misconduct inside the Ballina Police Station.

9.68 No submission of any significance was made on the present subject by the legal representatives for Woolven or Ryan.

ASSESSMENT

9.69 As stated previously in this report, the CCTV footage from the camera in the BAS room shows at 23:04:39 Barker being pushed forwards by police officers Hill, Walmsley and Eckersley and between 23:04:41 and 23:04:44 being swung by Hill and Walmsley in an anti-clockwise semi-circle into a machine in the BAS room and then on to the floor. In the process Barker's body was forced against a bin and a chair in a corner of the BAS room. The machine in the BAS room was visibly displaced by the impact of Barker's body. The police treatment of Barker can fairly be described as violent.

9.70 The CCTV footage also clearly shows which police officers participated in the pushing and swinging of Barker. Hill and Walmsley who had been holding Barker's arms and continued to hold him, participated fully.

9.71 Eckersley in his evidence before the Commission asserted that Barker had been pushed against the wall before he had sought to intervene and that when Barker was against the wall he (Eckersley) "*didn't get to him (Barker)*", because Walmsley knocked Eckersley out of the way. However, in his statement Eckersley said that he had rushed in to take hold of Barker's arm as Hill swung Barker and jammed him against the BAS room wall. In his evidence in the Ballina Local Court Eckersley said that he had jumped in to help grab hold of Barker, when Hill pushed Barker up against the wall. The CCTV footage shows that Eckersley took a step forward, reached out and took hold of Barker with his left arm and then his right arm, before Barker struck the wall, and that Eckersley participated in forcing Barker against the wall.

9.72 In his statement Woolven merely said that Barker was wrestled to the ground by the police. The CCTV footage shows that, as Barker struck the bin in the corner of the BAS room, Woolven stretched out his arms, took hold of Barker with both hands and assisted in driving Barker to the floor.

9.73 It was submitted by Walmsley's legal representative that what might appear in the CCTV footage to have been a deliberate forcing of Barker against the wall was in fact the unintended consequence of the police officers overbalancing as

they entered the BAS room and losing full control of Barker. The Commission rejects this submission. It is contradicted by what is clearly shown in the CCTV footage and it is not in accordance with the evidence of the police officers that Barker was “*jammed*”, “*forced*” or “*driven*” against the wall and that this happened immediately after, and because of, the alleged assault.

- 9.74 Hill said in his statement that Barker punched him in the nose and Hill then “*jammed*” Barker against the wall. Hill gave evidence both in the Ballina Local Court and before the Commission that he pushed Barker against the wall because he believed Barker had punched him.
- 9.75 In his statement Walmsley said that Barker punched Hill in the nose and that he and Hill then “*drove*” Barker against the wall. In his statement Mewing said that Barker punched Hill in the nose and that Barker was then “*forced*” against the wall by Hill and Walmsley. In his statement Eckersley said that he rushed in to take hold of Barker’s arm after Barker punched Hill in the face, and, as he did so, Hill “*jammed*” Barker against the wall.
- 9.76 The Commission has concluded that Barker did not assault Hill. If Barker did not assault Hill, there was no justification for the degree of force to which Barker was subjected.
- 9.77 Any loss of control of Barker by the police officers was only partial. Both of Barker’s arms continued to be held at all times by police officers. The degree of force to which Barker was subjected was not reasonably required in order for the police to regain or maintain full control of Barker as an arrested person. The degree of force used was excessive.
- 9.78 Photographs which were taken of Barker by Sines on the following day show facial injuries. It is probable that these injuries were sustained by Barker on the night of 14 January 2011. However, while it is possible that the injuries were sustained by Barker in the BAS room of the Ballina Police Station, it is also possible that they were sustained in the violent struggle in Tamar Street. In these circumstances the Commission does not consider that it could conclude that the injuries were sustained in the BAS room.
- 9.79 The CCTV footage of the BAS room shows that, while Barker was on the floor of the BAS room but before he was successfully handcuffed, Eckersley, who was standing to the side of Barker and of Hill and Walmsley who were partly on

top of Barker, engaged in two actions with his right leg and foot. The two actions were only a couple of seconds apart. The first action appeared to be a kicking action and the second action appeared to be a stomping action.

- 9.80 There is no doubt that Eckersley's actions with his leg and foot, as shown in the CCTV footage, appear to exhibit an excessive use of force. It can be inferred that this was the opinion formed by the police prosecutor in the Local Court, who considered that he should show the CCTV footage to Eckersley before Eckersley gave evidence in the Local Court. Eckersley himself in his evidence in the Local Court conceded that it looked from the footage that he had tried to kick Barker in the head. In his evidence before the Commission Eckersley conceded that the CCTV footage was open to the interpretation that he had kicked Barker in the head.
- 9.81 However, both in the Ballina Local Court and before the Commission Eckersley denied that he had kicked or attempted to kick Barker in the head as the police officers were attempting to handcuff Barker. He said that he saw a hand on the floor which he thought was Barker's; that he tried to secure the hand so that Barker could not get the hand underneath him and thus avoid being handcuffed; that he used his right foot for this purpose; that the first movement of his foot missed the hand; and that the second movement of his foot struck Hill's hand and not Barker's.
- 9.82 The Commission has concluded that it should not form the opinion that Eckersley used excessive force in the two actions of his leg. The Commission accepts that Barker was resisting being handcuffed. Although the CCTV footage clearly shows the two actions of Eckersley's leg, it does not clearly show what his foot was directed to or what, if anything, his foot struck. There is some evidence from Hill, which the Commission is disposed to accept, that Eckersley did tread on Hill's hand. There is no evidence from Barker that he was kicked or stomped on, although an absence of evidence from him, if he was kicked or stomped on, would not be surprising. The Commission notes that Counsel Assisting did not make any submission about Eckersley's actions with his leg.
- 9.83 The CCTV footage also shows that, while Barker was on the floor before being handcuffed, Mewing performed an action with his leg in the direction of Barker. The action was performed once only, with a straight leg and with less force than

Eckersley's actions with his leg. Mewing's action was described in the evidence as a "*knee extension*" or "*knee strike*".

- 9.84 Mewing gave evidence that the knee strike was administered by him so that Barker would react to the pain from the strike by releasing his hands from under his body, enabling Barker to be handcuffed. Mewing said that the administering of a knee strike was a technique he had been taught at the police academy.
- 9.85 The Commission has concluded that it should not form the opinion that Mewing used excessive force in administering the knee strike. Barker was resisting being handcuffed. The amount of force applied in the knee strike was only moderate. The Commission accepts that Mewing had been taught the technique at the police academy. There was no evidence before the Commission about the circumstances in which police officers are instructed that it is permissible to use the technique. No submission about the knee strike was made by Counsel Assisting.
- 9.86 In his statement Hill said that Barker, after being handcuffed, refused to stand up and walk to a cell and was carried by police to a cell.
- 9.87 In each of their statements Walmsley, Mewing and Eckersley also said that Barker, after being handcuffed, refused to stand up and walk. Walmsley said that Barker was "*dragged*" to a cell. Mewing said that Barker was "*assisted*" to a cell. Eckersley said that Barker was "*carried*" to a cell.
- 9.88 In his evidence in the Ballina Local Court on 7 July 2011 Hill said that he had tried to get Barker to put his legs underneath him and walk to a cell but Barker would not do that, so that police had to pick Barker up and carry him to a cell.
- 9.89 Walmsley in his evidence in the Ballina Local Court on 2 December 2011 said that Barker refused to stand up and walk and was dragged to a cell. In his evidence in the Ballina Local Court Eckersley said that Barker was told to stand up and refused to stand up.
- 9.90 Hill in his evidence before the Commission repeated that he had told Barker to put his feet underneath him and said that police had twice tried to lift Barker off the ground but that Barker had made himself a dead weight. Police had then started dragging Barker.

- 9.91 The CCTV footage for the BAS room shows that, as soon as Barker was handcuffed on the floor with his hands behind his back, he was immediately dragged away towards the cells by Hill, Eckersley, Walmsley and Mewing, with some assistance initially from Woolven. Some of the police officers, having viewed the CCTV footage, made some concessions. Mewing conceded in his evidence in the Ballina Local Court that Barker had been dragged away immediately after he had been handcuffed and had not been given time to comply with any direction he might have been given to stand up. Eckersley conceded that the CCTV footage appeared to show that Barker was not given enough time, or could have been given more time, to stand up, before police dragged him to the cell.
- 9.92 The Commission concludes that no direction was given to Barker to stand up and walk or to put his feet underneath him. Even if a direction was given, Barker was afforded no time or opportunity to comply with the direction. Consequently, there was no refusal by Barker to comply with a direction. Barker was not lifted from the floor even on one occasion.
- 9.93 The CCTV footage clearly shows that Barker was dragged to the cell. He was not picked up and carried. In his evidence before the Commission Hill conceded that Barker had not been picked up and carried, as Hill had previously asserted.
- 9.94 Barker was dragged to the cells by police officers holding the handcuffs on Barker's hands, head first, on his stomach, with his arms forced high above his head against the natural inclination of his arms. This method of taking Barker to the cell would have been acutely painful and was brutal.
- 9.95 Barker was put in the cell, handcuffed. Hill asserted in his statement that Barker's handcuffs were removed about twenty minutes later. In his evidence in the Ballina Local Court on 7 July 2011 Hill said that the handcuffs were removed about fifteen minutes later. In his evidence before the Commission Hill said that he had not checked the CCTV footage but had thought, at the time of making his statement, that Barker remained handcuffed for only twenty minutes. He said that it was he who had removed Barker's handcuffs.
- 9.96 The continuous CCTV footage from the camera in the BAS room shows the following. At 23:05:48 the police officers commenced dragging Barker to the cell. There is no further appearance by either Hill or Ryan until 00:41:12, that is

at approximately nineteen minutes to one o'clock in the morning of 15 January 2011. At 00:41:12 Hill and Ryan are shown walking down the corridor to the cell. At 00:41:40 Ryan re-appeared alone and left the BAS room through the door to the charge room. At 00:41:57 Ryan came through the doorway into the BAS room and proceeded down the corridor to the cell. At 00:43:12 Barker was led out of the cell by police officers, with his hands handcuffed behind his back. The police officers and Barker turned in the direction of the fingerprint room in the police station.

- 9.97 The CCTV footage establishes that Hill, who insisted in his evidence that it was he who had removed the handcuffs, could not have removed the handcuffs fifteen to twenty minutes after Barker was handcuffed but only after Barker had been handcuffed for approximately one hour and forty minutes.
- 9.98 It was suggested in a submission that the handcuffs might have been removed and then re-applied just before Barker was let out of the cell. However, it is unlikely that, if the handcuffs had been removed, Barker would have been re-handcuffed with his hands behind his back, if he was about to be taken to the fingerprint room to be fingerprinted.
- 9.99 The Commission concludes that Barker was detained in a cell, with his hands handcuffed behind his back, for approximately one hour and forty minutes.
- 9.100 A number of justifications were sought to be advanced for keeping Barker handcuffed for an hour and forty minutes.
- 9.101 It was suggested that it was necessary to keep Barker handcuffed to prevent the risk of self-harm. It is to be accepted that Barker was in a highly charged emotional state and while he was in the dock had beaten on the walls and door of the dock with his hands. However, he had not injured himself while he was in the dock.
- 9.102 The custody record kept by McCubben does not contain any indication that police officers had concerns that Barker might self-harm. In answer to the questions in the custody record form "*Has the person made threats of self injury in custody?*" "*Does the person appear irrational or mentally disturbed?*" and

“Does the person display any sign of self-harm?” McCubben entered the reply “No” on the form.⁵⁸⁴

- 9.103 Other police conduct towards Barker on the night of 14 January 2011 does not suggest that the police officers entertained any fear that Barker might engage in self-harm unless he was handcuffed. Police did not handcuff him when he was in the dock and did not handcuff him when he was removed from the dock.
- 9.104 It was suggested that it was necessary to keep Barker handcuffed because of the risk that Barker, if not handcuffed, might be violent towards police when he was eventually let out of the cell. However, Ryan who was one of the officers who made this suggestion, eventually accepted that there was really no good reason to keep Barker in handcuffs in the cell. Ryan said that Barker had been compliant when he was taken out of the cell.
- 9.105 An additional reason for not keeping Barker handcuffed while he was in the cell was that Barker was affected by alcohol. The Commission does not accept the distinction which was attempted to be drawn by McCubben’s legal representative between physical incapacity and mental incapacity from the consumption of alcohol.
- 9.106 The Commission concludes that there was no justification for keeping Barker handcuffed in the cell for approximately an hour and forty minutes. The Commission does not, however, consider that it could conclude that police deliberately kept Barker handcuffed in the cell for so long in order to punish Barker for his conduct.
- 9.107 In the next part of its report the Commission will examine McCubben’s custody record and his performance as custody manager on the night of 14 January 2011.

⁵⁸⁴ Exhibit 61

10. MCCUBBEN'S CUSTODY RECORDS

10.1 On the night of 14 January 2011 McCubben was the custody manager for the Ballina Police Station. On that night Barker, Crook and Healey came into custody at the Ballina Police Station. In this report the Commission will examine only the custody of Barker.

10.2 As custody manager McCubben was required to comply with the obligations imposed on a custody manager by Division 3 of Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA") and in particular ss 122 and 131 of LEPRA.

10.3 Section 122(1) of LEPRA provides:

(1) As soon as practicable after a person who is detained under this Part (a *detained person*) comes into custody at a police station or other place of detention, the custody manager for the person must orally and in writing:

(a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and

(b) give the person a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application.

10.4 Section 131 of LEPRA provides in part as follows:

(1) The custody manager for a *detained person* must open a custody record in the form prescribed by the regulations for the person.

(2) The custody manager must record the following particulars in the custody record for the person:

(a) the date and time:

(i) the person arrived at the police station or other place where the custody manager is located, and

(ii) the person came into the custody manager's custody,

(b) the name and rank of the arresting officer and any accompanying officers,

(c) the grounds for the person's detention,

.....

Sub-section (3) of s 131 provides that the custody manager is responsible for the accuracy and completeness of a custody record.

Sub-section (4) of s 131 provides that the recording of any matter referred to in s 131 must be made contemporaneously with the matter recorded in so far as it is practicable to do so.

10.5 Section 112 of LEPRA provides that regulations may be made under the Act modifying the application of Part 9 of the Act to, among others, “*aboriginal persons*”. Barker is an aboriginal person.

10.6 Clause 24 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) provides that in the Regulation “*a vulnerable person*” is a reference to a person falling within one or more of a number of categories, including persons who are “*aboriginal persons*”.

10.7 Clause 25 of the Regulation imposes an obligation on a custody manager for a detained person who is a vulnerable person to assist that person in exercising his rights under Part 9 of LEPRA. Clause 33 of the Regulation imposes an obligation on a custody manager, if a detained person is an aboriginal person, to inform the person that a representative of the *Aboriginal Legal Service* will be notified of the detention of the person and to notify such a representative accordingly.

THE CUSTODY RECORD

10.8 The custody record which McCubben opened for Barker on the night of 14 January 2011 became an exhibit at the public hearing.⁵⁸⁵ The custody record was a printed form which was generated from information contained in the NSWPF COPS database. This information was entered by McCubben into the database on the night of 14 January 2011. Some of the information entered by McCubben carried a corresponding time and date stamp which was automatically applied by the computer and recorded the actual time that the particular entry was made.

⁵⁸⁵ Exhibit 36; A version of Barker’s Custody Record which was certified as being correct by McCubben on 17 August 2011 was also tendered as Exhibit 61

- 10.9 On page 1 of the custody record Barker's time of arrival at the Ballina Police Station was entered by McCubben as being 23:10 on 14 January 2011, which was, at least approximately, correct. However, alongside the printed word "entered" on the form the time "00:13 15/01/11" was recorded. This information was a time stamp automatically applied by the NSWPF's computing system and indicated that the custody record was opened more than an hour after Barker's arrival at the Ballina Police Station.⁵⁸⁶
- 10.10 Alongside the printed words "ATSI status - Aboriginal" the letter "Y" (signifying yes) was entered.⁵⁸⁷
- 10.11 Alongside the printed words "Next of Kin" McCubben entered "Refused to give next of kin details".⁵⁸⁸ In his evidence before the Commission McCubben conceded that, at the time Barker's custody record was opened, he would have been aware that Barker's mother had attended the Ballina Police Station that night.⁵⁸⁹
- 10.12 On page 3 of the custody record next to the words "Inspection Frequency" the information "30 mins" is recorded.⁵⁹⁰ McCubben gave evidence before the Commission that this recorded a judgment made by him on the night of 14 January 2011 about how frequently Barker should be inspected while he was in custody.⁵⁹¹
- 10.13 Page 3 of the custody record contained a section with the heading "Detainee inspection/Assessment record". This section recorded two sets of entries. Each set of entries contained information under the headings "Time Created" "Location" "Inspecting Officer" and "Frequency of Inspection" and a comment by the inspecting officer. The information under the heading "Time Created" in each set of entries was a time stamp automatically applied by the computer system and recorded the actual time each entry was made. In the first set of entries the "Time Created" was shown as "00:23 15/01/2011" and the "Inspecting Officer" was shown as McCubben. The comment made by

⁵⁸⁶ Exhibit 61; PIC Transcript, Robert McCubben, 25 February 2013, p.545 & pp.567-568

⁵⁸⁷ Exhibit 61

⁵⁸⁸ *ibid*

⁵⁸⁹ PIC Transcript, Robert McCubben, 25 February 2013, pp.570-571

⁵⁹⁰ Exhibit 61

⁵⁹¹ PIC Transcript, Robert McCubben, 25 February 2013, pp.529-530

McCubben for this set of entries was “*in ok, female given toilet break in front public toilet*”.⁵⁹² In the second set of entries the “*Time Created*” was shown as “01:00 15/01/2011” and the “*Inspecting Officer*” was shown as McCubben. The comment made by McCubben for this set of entries was “*all checked, nil complaints*”.⁵⁹³

10.14 In the custody record the arresting police officers were stated to be Walmsley and Haines, whereas in fact the police officers who arrested Barker were Hill and Ryan.⁵⁹⁴

10.15 In the custody record the original grounds for the detention of Barker were stated as “*assault police*”, whereas the original grounds for the detention of Barker were the offences allegedly committed by him in Tamar Street, which did not include any offence of assault.⁵⁹⁵

EVIDENCE

10.16 In his evidence before the Commission Barker said that no one at the Ballina Police Station had explained to him his rights and he could not recall whether anyone had given him a caution.⁵⁹⁶ He remembered something being said about “*Aboriginal Legal Aid*”.⁵⁹⁷

10.17 In his evidence before the Commission McCubben said that he could not recall whether Barker had been cautioned or given a summary of the provisions of Part 9 of LEPR, as required by s 122 of LEPR.⁵⁹⁸

10.18 McCubben said that he had no recollection of having formed a view on the night of 14 January 2011 that Barker was an aboriginal person. He did not know how the entry in the custody record that Barker was an aboriginal person had come to be made.⁵⁹⁹ He did not recall whether he had made enquiries about whether a legal representative from the *Aboriginal Legal Service* had been called but said it was his normal practice to do so. If he had made inquiries, it should have

⁵⁹² Exhibit 61

⁵⁹³ *ibid*

⁵⁹⁴ *ibid*

⁵⁹⁵ *ibid*

⁵⁹⁶ PIC Transcript, Corey Barker, 19 February 2013, p.159

⁵⁹⁷ *ibid*, p.160

⁵⁹⁸ PIC Transcript, Robert McCubben, 25 February 2013, pp.522-525

⁵⁹⁹ *ibid*, p.527

been recorded in the custody record. If it was not recorded in the custody record (and it was not so recorded) then it was “*quite possible it didn’t take place*”.⁶⁰⁰

10.19 McCubben did not recall making any inspection of Barker while Barker was detained in a cell and did not know whether he had made any inspection.⁶⁰¹ McCubben agreed that the entries under the heading “*Detainee inspection/Assessment record*” in the custody records for all three detainees Barker, Crook and Healey were identical, down to the comment “*female given toilet break in front public toilet*”.⁶⁰²

10.20 McCubben agreed in his evidence that he did not start creating a custody record for Barker until 12.13 am on 15 January 2011 and that the entries in the custody record for the arresting police officers for Barker and the original grounds for his detention were wrong.⁶⁰³

10.21 McCubben conceded that the custody records he had made on the night of 14 January 2011 were a “*mess*” and “*inaccurate*”.⁶⁰⁴

10.22 McCubben advanced a number of matters as excusing his failure to keep a proper custody record for Barker and the other detainees.

10.23 He said that the night of 14 January 2011 was “*busy*” and “*absolutely chaotic*”.⁶⁰⁵ He said that he was overwhelmed on the night and had to deal with “*three non-compliant prisoners*”, which caused him to become stressed and experience difficulty in performing his duties.⁶⁰⁶ He said:

I recall not being able to concentrate that night. I could not focus on what I was doing. The screaming and the noise in the dock area was extraordinary.⁶⁰⁷

10.24 McCubben said that at times a custody manager would be assisted by someone performing the role of a “*custody assist*” who would assist the custody manager in the keeping of custody records and the inspection of prisoners. McCubben

⁶⁰⁰ PIC Transcript, Robert McCubben, 25 February 2013, p.529; Exhibit 61

⁶⁰¹ PIC Transcript, Robert McCubben, 25 February 2013, p.511

⁶⁰² *ibid*, p.546

⁶⁰³ *ibid*, pp.545-548

⁶⁰⁴ *ibid*, p. 546 & p.548

⁶⁰⁵ *ibid*, pp.503-504

⁶⁰⁶ *ibid*, p.544

⁶⁰⁷ *ibid*, p.505

said that there was no custody assist at the Ballina Police Station on the night of 14 January 2011, although Woolven had been present at the police station to provide him with support.⁶⁰⁸

10.25 McCubben said that he had difficulty in operating the computer system used at the Ballina Police Station for recording entries in the custody records for detainees.⁶⁰⁹

10.26 In response to questions from his own legal representative McCubben said that he went to Ballina Police Station in 2010 and had last performed the role of custody manager more than 10 years previously. He said that he had not received any training for performing the role of custody manager at Ballina Police Station.⁶¹⁰

SUBMISSIONS

10.27 It was submitted by Counsel Assisting that the custody records kept by McCubben were inadequate to the point of being a “*disgrace*” and that the various matters sought to be relied on by McCubben did not excuse the inadequacy of his records.

10.28 In submissions made on McCubben’s behalf it was not disputed that McCubben had failed to properly carry out his responsibilities as custody manager on the night of 14 January 2011.

10.29 However, it was submitted that the various matters McCubben had referred to in his evidence provided a reasonable and sufficient explanation for his failure.

ASSESSMENT

10.30 As to whether McCubben complied with his obligations under s 122 of LEPR, the Commission is prepared to accept that McCubben may have cautioned Barker but the Commission has concluded that McCubben did not comply with his obligation to give Barker orally and in writing a summary of the provisions of Part 9 of LEPR.

⁶⁰⁸ *ibid*, pp.521-522

⁶⁰⁹ *ibid*, p.504

⁶¹⁰ *ibid*, p.564

- 10.31 The Commission concludes that McCubben failed to comply with his obligations under s 131 of LEPR, in that he did not open a custody record for Barker until more than an hour after Barker's arrival at the Ballina Police Station and did not correctly record the names of the arresting police officers or the original grounds for Barker's detention.
- 10.32 The defects in McCubben's custody record make it difficult to determine what happened during Barker's detention and whether Barker was afforded the rights conferred on him by LEPR as a detained person who was a "*vulnerable person*".
- 10.33 The CCTV footage shows that as Barker was dragged to the cell McCubben followed the police officers and Barker down the corridor and into the cell. Accordingly, the Commission is satisfied that McCubben knew that Barker was handcuffed when he was placed in the cell. The Commission concludes that McCubben failed to make any or any proper inspection of Barker while Barker was detained in the cell handcuffed.
- 10.34 The Commission is prepared to accept that the various matters sought to be relied on by McCubben as explaining his failure to comply with Division 3 of Part 9 of LEPR did in fact exist. However, the Commission is of the opinion that, while these matters do to some extent extenuate his failure, they do not completely excuse it.

11. EMAIL COMMUNICATIONS BETWEEN RYAN AND OTHER POLICE OFFICERS

- 11.1 The terms of email communications between Ryan and other police officers in July and August 2011 were set out earlier in this report.
- 11.2 At the public hearing Ryan was questioned by Counsel Assisting about these email communications.
- 11.3 Ryan was asked whether by sending his emails he had assisted any other police officer in the making of his statement. Ryan said that he had merely identified for other officers areas which he wished those officers to deal with in their statements.⁶¹¹
- 11.4 Ryan was questioned about the concluding part of the email of 8 July 2011 in which he suggested to McCubben that McCubben give Ryan or Hill a call “*if you have any questions*”. He explained the reference to Hill by saying that both he and Hill worked in the same office and had knowledge of the investigation and were both putting together the brief of evidence.⁶¹² Ryan said that the questions he had in mind related to whether McCubben did not understand something in the email or to whether McCubben might not be able to complete his statement. It was not an invitation from him to McCubben to discuss evidence in the matter.⁶¹³
- 11.5 Ryan was questioned about his having told McCubben in the email of 13 August 2011 what time McCubben should put in his statement as being the time when the alleged assault had occurred. Ryan said that the time he had supplied to McCubben was the time alleged in the indictment, which McCubben could have accessed himself on the COPS database. He also said that McCubben was a sergeant, that is an officer of superior rank, who had asked Ryan a question and Ryan had answered the question.⁶¹⁴
- 11.6 Ryan gave evidence that he had not thought that, at the time of sending the email of 30 July 2011 to Eckersley, Walmsley, Mewing, Woolven and Hill, that

⁶¹¹ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.670

⁶¹² *ibid*, p.693

⁶¹³ *ibid*, p.694

⁶¹⁴ *ibid*, p.670

he was doing anything wrong.⁶¹⁵ He gave evidence that he considered that it had been appropriate for him to convey the information in the email to the recipients of the email, namely, what issues had been raised by Barker's solicitor.⁶¹⁶

11.7 Ryan denied that it had been his intention in sending the email of 30 July 2011 to afford the police officers an opportunity of arriving at an explanation for the discrepancy between their statements and what could be seen in the CCTV footage.⁶¹⁷

11.8 Ryan's evidence continued:

Q. Putting your intention to one side for the moment, do you agree there was a risk created by your conduct (sending the email of 30 July 2011) that what these officers would say on oath might be influenced by what you were telling them here?

A. Yes.

Q. Indeed, it was even more serious, was it not, in the case of Officer Hill, because he was in the course of giving his evidence.

A. Yes.⁶¹⁸

11.9 In examination by his own legal representative Ryan was asked whether he could imagine how a witness who had given evidence or whose statement had been served on the defence would be able to vary his evidence as a result of Ryan's email. Ryan replied "no".⁶¹⁹ However, in further examination by Counsel Assisting Ryan was questioned about differences between the statement Eckersley had made and the evidence he had given in the Ballina Local Court on the 2 December 2011.⁶²⁰

11.10 McCubben gave evidence before the Commission about the email communications between Ryan and himself.

⁶¹⁵ *ibid*, p.675

⁶¹⁶ *ibid*, p.672

⁶¹⁷ *ibid*, p.673

⁶¹⁸ *ibid*, pp.679-680

⁶¹⁹ PIC Transcript, Senior Constable Gregory Ryan, 27 February 2013, p.705

⁶²⁰ *ibid*, p.707

- 11.11 McCubben denied that Ryan had, as the officer in charge, told McCubben about events in the prosecution of Barker or had told him what matters should be included in the statement to be made by him.⁶²¹
- 11.12 McCubben accepted that it would have been irregular for him to have contacted Hill and discussed with Hill the evidence Hill would give or the evidence McCubben would give.⁶²²
- 11.13 McCubben was referred by Counsel Assisting to Ryan's email to McCubben of 8 July 2011. McCubben said he had no recollection of the email.⁶²³ McCubben agreed that in the email Ryan had told him that he should in his statement deal with the direction he had given Hill to take Barker from the dock and also with the subsequent (alleged) assault on Hill by Barker.⁶²⁴
- 11.14 In his email of 12 August 2011 McCubben had asked Ryan whether there was a time stamped for the assault on the video (CCTV footage) and had said that he would place the time of the assault as somewhere between 11.30 pm and 11.45 pm.⁶²⁵ McCubben agreed that in his email in reply Ryan was telling McCubben: "*despite your estimate of somewhere between 11.30pm and 11.45pm, you shouldn't put that in, you should put 11.45 to 11.55*".⁶²⁶ McCubben agreed that Ryan was telling McCubben to put something in McCubben's statement which did not accord with his recollection.⁶²⁷
- 11.15 Counsel Assisting submitted that cross-contamination of evidence had resulted from the emails sent by Ryan in July and August of 2011.
- 11.16 In Ryan's email to McCubben of 8 July 2011 Ryan identified issues that had been raised by Barker's solicitor and the court and identified matters which McCubben would need to cover in his statement. It was submitted that it was inappropriate for Ryan to request McCubben to cover matters in his statement of which he might not have any recollection. It was accepted by Counsel Assisting that it might be possibly be said in defence of Ryan that he was doing

⁶²¹ PIC Transcript, Robert McCubben, 25 February 2013, pp.485-487

⁶²² *ibid*, p.491

⁶²³ *ibid*, p.496

⁶²⁴ *ibid*, p.500

⁶²⁵ Exhibit 60

⁶²⁶ PIC Transcript, Robert McCubben, 25 February 2013, p.508

⁶²⁷ *ibid*

no more than identifying relevant subject matters to be dealt with in a statement by McCubben, which, at the time the email was sent, was urgently required.

11.17 Ryan's email of 30 July 2011 was sent to the police prosecutor, Hill, Eckersley, Walmsley, Mewing and Woolven. The only person to whom the email was sent who had given any evidence was Hill, who was part heard as a witness. In the email Ryan advised the persons to whom it was sent that the matter of Barker was proceeding, the likely manner in which Barker's legal representative would run the defence and that "*there is no clear evidence of Barker punching Hill (on the CCTV footage)*". It was submitted by Counsel Assisting that Ryan had agreed in his evidence that by sending this email he had created a risk that what the recipients who had not yet made statements would say in their statements and what all the recipients might say in evidence in court might be influenced by what was disclosed in the email.

11.18 It was submitted by Ryan's legal representative that in his email of 8 July 2011 to McCubben Ryan was doing no more than directing McCubben's attention to subject matters which McCubben should address in the statement he was to make and that he was not "*coaching*" McCubben to include matters in his statement which were outside his knowledge and recollection.

ASSESSMENT

11.19 There could be no objection to Ryan as the officer in charge of the prosecution of Barker communicating with police officers who had been tardy in supplying statements and seeking to expedite the making of their statements. Nor could there be any objection to Ryan telling police officers of the subjects which they should cover in their statements, provided he did not tell the officers what they should say on those subjects or encourage the officers to provide some account of a subject even if the officers had no recollection of the subject. The Commission does not consider that there was any improper conduct by Ryan in these respects.

11.20 The Commission accepts Ryan's evidence that the concluding words in his email of 8 July 2011 were not intended to be an invitation to McCubben to discuss his evidence with Hill or Ryan.

- 11.21 In his email of 30 July 2011 Ryan informed all the police officers who were prospective witnesses (apart from McCubben) of matters which had been raised by Barker's solicitor Mr Boss, after viewing the digital CCTV footage, that there was "*no clear evidence in the footage*" of Barker punching Hill and that Eckersley could be seen "*lashing forward*" with his boot.
- 11.22 In his evidence Ryan accepted that there was a risk that telling the prospective witnesses these things might influence what evidence the witnesses would give.
- 11.23 Notwithstanding this admission by Ryan, the Commission does not consider that it was improper for Ryan to communicate to the NSWPF witnesses what he had been told by the defendant's solicitor about how the defence case would be run and what would be the principal issues at the trial. Ryan was not communicating to the police officers what was or should be the evidence of any witness on these matters. Nor does the Commission consider that it was improper for Ryan to inform the witnesses that there was no (clear) evidence of the alleged assault in the CCTV footage but the CCTV footage did show a forceful action by Eckersley with his boot.
- 11.24 It was submitted that Hill, who had not completed his evidence and who was under cross-examination, should not have been told what the defendant's solicitor had said. There is some force in this submission. However, the Commission notes that Hill had already in his evidence on 7 July 2011 committed himself to a version of events.
- 11.25 The Commission considers that Ryan should not have suggested to McCubben what time McCubben should put in his statement as being the time of the alleged assault. However, the time suggested by Ryan, which was the time alleged in the indictment, would have readily been discoverable by McCubben.
- 11.26 The Commission concludes that it should not make any finding of police misconduct against Ryan.

12. FURTHER CONSIDERATION OF THE EVIDENCE OF THE POLICE OFFICERS ABOUT THE ALLEGED ASSAULT IN BALLINA POLICE STATION

- 12.1 In the part of this report dealing with the alleged assault of Hill within the BAS room in the Ballina Police Station the Commission concluded that on the night of 14 January 2011 Barker did not in the doorway to the BAS room in the Ballina Police Station or in the BAS room itself break or pull free from the restraining grip of Walmsley on his right arm and did not assault Hill and, in particular, did not punch or attempt to punch Hill on the nose or face.
- 12.2 It follows from the Commission's conclusions that a number of assertions made by the police officers in their statements or in giving evidence in the Ballina Local Court were untrue, including at least the following:
- (i) the assertions by all of Hill, Walmsley and Mewing in their statements that Barker pulled or broke free from Walmsley's grip and punched Hill on the nose with a closed right fist;
 - (ii) the assertions by Eckersley in his statement that Barker broke free from Walmsley's grip and punched Hill in the face;
 - (iii) the assertions by Woolven in his statement that Barker broke free from the grip of police and began throwing punches, at least one of which connected with Hill's face;
 - (iv) the assertions by McCubben in his statement that Barker broke free and, swinging his arms, attempted to punch Hill and Walmsley;
 - (v) the assertions by Hill in giving evidence in the Ballina Local Court on 7 July 2011 that Barker pulled free from Walmsley and punched Hill on the nose;
 - (vi) the assertion by Hill in giving evidence in the Ballina Local Court on 2 December 2011 that Barker punched him;

(vii) the assertions by Walmsley in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from Walmsley's grip and, swinging his right arm, hit Hill on the nose;

(viii) the assertions by Mewing in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from Walmsley and punched Hill on the nose with his right fist; and

(ix) the assertion by Hill in giving evidence at the public hearing of the Commission that he was hit by Barker.

12.3 That the police officers in their statements and in their evidence made these similar assertions, which were untrue, gives rise to the questions whether at the time a police officer made his statement or gave his evidence he himself had an actual, even though mistaken, recollection of having himself observed Barker break or pull free and assault Hill or whether he had taken the assertions that Barker had pulled or broken free and assaulted Hill from a source other than his own recollection and, in particular, Hill's statement and whether, at the time of making his statement or giving his evidence, he believed it was true that Barker had pulled or broken free and assaulted Hill.

12.4 These questions are relevant to whether there was police misconduct by an officer in making the assertions in his statement or evidence and whether the officer might have committed a criminal offence in making the assertions in his statement or evidence. They are also relevant to the general subject of cross-contamination of the evidence of witnesses, to which Counsel Assisting devoted a separate part of his submissions and which will be addressed by the Commission later in this report.

12.5 Much of the evidence relevant to these questions has already been referred to. However, it is necessary to refer to some further evidence, especially evidence about the extent to which a police officer in preparing his statement referred to sources other than his own unaided memory, for example the statement which Hill had made, the court facts sheet in the prosecution of Barker and the COPS event entry for the incident. None of the police officers,

except Woolven, referred in his statement to having relied on any extrinsic source in making the statement.

EVIDENCE

12.6 Ryan gave evidence at the public hearing that he had prepared the facts sheet on the night of 14 January 2011, that he had obtained the information in the facts sheet relating to the assault charge solely from Hill on the night of 14 January 2011 and directly after the incident occurred and that he had faithfully recorded what Hill had told him.⁶²⁸

12.7 The part of the facts sheet relating to the charge of assault was in the following terms:

The accused was later escorted from the dock to a holding cell. Whilst police were escorting him into the holding cell door the accused has broken free from Senior Constable HILL and Constable WALMSLEY and turned and punched Senior Constable HILL in the face. Senior Constable HILL has then taken the accused to the ground and other police have assisted in restraining the accused as he violently resisted thrashing his arms and resisting being handcuffed.⁶²⁹

12.8 This part of the facts sheet contained the assertion that Barker broke free "*whilst police were escorting him into the holding cell door*". Ryan said in his evidence before the Commission that this was an error, that he had not noticed the error before and that his understanding had always been that the incident had taken place in the BAS room.⁶³⁰

12.9 The COPS event entry relating to the alleged assault was also created by Ryan and was in the same terms as the facts sheet.⁶³¹

12.10 It seems likely that the COPS event entry was the first of the two documents to be created by Ryan (it bears the date 14 January 2011) and that the facts sheet, which bears the date 15 January 2011, was created for the purpose of Barker's appearance in Lismore Local Court on 15 January 2011. However, it is immaterial which of the two documents was prepared first.

⁶²⁸ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, pp.657-658

⁶²⁹ Exhibit 33

⁶³⁰ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.659

⁶³¹ Exhibit 34

12.11 The first police officer to make a statement dealing with the alleged assault was Hill. There is no suggestion that Hill in giving his account of the alleged assault in his statement relied on any extrinsic source.

EVIDENCE IN THE BALLINA LOCAL COURT ON 2 DECEMBER 2011

Walmsley

12.12 Walmsley gave evidence in the Ballina Local Court on 2 December 2011 that he had prepared his statement “*purely off my own memory*”.⁶³² He did not have any contemporaneous notes.⁶³³ He had access to the facts sheet and the COPS event entry “*but did not read them*”.⁶³⁴ He agreed he made his statement “*eight weeks after*” the incident (in fact, somewhat longer than eight weeks after the incident) but “*things were fresh in (his) mind*”.⁶³⁵

12.13 Walmsley said that he had discussed Barker’s matter with Hill but only in relation to the CCTV footage “*now working*”.⁶³⁶

12.14 In further cross examination by Mr Boss the following questions and answers occurred:

Q. In drafting your statement have you seen anyone else's statement or any other document produced by any other officer in connection to this matter?

A. I don't believe so, no.

Q. I don't believe so, are you 100% sure about that or you cannot recollect?

A. Well I can't recall, it was made on 28 March, I don't believe I did but.⁶³⁷

Eckersley

12.15 In his evidence in the Ballina Local Court Eckersley said that he had refreshed his memory from the facts sheet and the COPS event entry.⁶³⁸

⁶³² Exhibit 93 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Lee Walmsley), p.59

⁶³³ *ibid*

⁶³⁴ *ibid*, pp.59-60

⁶³⁵ *ibid*, p.60

⁶³⁶ *ibid*, p.81

⁶³⁷ *ibid*

⁶³⁸ Exhibit 92 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Ryan Eckersley), p.30

Mewing

12.16 In the Ballina Local Court Mewing gave the following evidence:

Q. And perhaps you could assist the Court in informing the Court how the statement was made, was it made from your memory or was it made from other material given to you by other parties?

A. The facts sheet and my memory.

Q. Did you have an independent memory, independent recollection of the events?

A. Yes.

Q. Is that still vivid in your mind?

A. Yes.

Q. Today?

A. Yes.⁶³⁹

12.17 Mewing said that he had used parts of the facts sheet in making his statement but denied that he had used the facts sheet to fill in “*blanks*”, that is, parts he was unsure of.⁶⁴⁰

12.18 Mewing gave evidence that he remembered Barker saying the words attributed to him in Mewing’s statement “*Get fucked cunt, I’m gonna punch you in the head when I get the chance. I will king hit you cunt*”⁶⁴¹

12.19 Mewing’s attention was drawn by Mr Boss to the fact that exactly the same words appeared in Walmsley’s statement.⁶⁴² Mewing admitted that he could not remember word for word what Barker had said but denied that he had looked at anyone else’s material, apart from the facts sheet.⁶⁴³

⁶³⁹ Exhibit 51 (*R v Corey Barker*, Transcript of Proceedings, 2 December 2011, Witness: Constable Luke Mewing), p.89

⁶⁴⁰ *ibid*, p.91

⁶⁴¹ *ibid*

⁶⁴² *ibid*, p.92

⁶⁴³ *ibid*

EVIDENCE AT PRIVATE HEARINGS OF THE COMMISSION

Mewing

12.20 When Mewing gave evidence at the private hearing his attention was directed to the evidence he had given in the Ballina Local Court that he had relied on the facts sheet and his memory in making his statement. Mewing said “*I’d like to add...I had a look at Senior Constable Hill’s statement as well, to refresh my memory*”.⁶⁴⁴ He said that Hill had emailed Hill’s statement to him.⁶⁴⁵ Mewing received Hill’s statement before he made his own statement.⁶⁴⁶

12.21 Mewing gave evidence that he had not told the Magistrate in the Ballina Local Court that he had looked at Hill’s statement, because “*I had a lot of stress on my mind from other stuff*”.⁶⁴⁷ Mewing denied that he had not told the Magistrate because he did not want to convey the impression that he and Hill had put their heads together and he denied that Hill had sent him a copy of Hill’s statement so that Hill and he would give consistent accounts.⁶⁴⁸

12.22 The following evidence occurred:

Q. How did you actually use this statement of Hill’s? Did you just read it and then type up your own statement?

A. Yes, I read it and then I made mine.

Q. Did you type things in Senior Constable Hill’s statement from his statement into yours?

A. Yes.

Q. So that when he, for example, referred to a conversation, you would look at it and type what he had said about the conversation into your statement?

A. Yes, I did.

Q. Did you actually type it or did you just copy and paste it?

⁶⁴⁴ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.19

⁶⁴⁵ *ibid*

⁶⁴⁶ *ibid*

⁶⁴⁷ *ibid*, p.20

⁶⁴⁸ *ibid*

A. I believe I typed it.⁶⁴⁹

- 12.23 When asked whether the evidence he had given in the Ballina Local Court on 2 December 2011 that the events of 14 January 2011 were still “*vivid*” in his mind was truthful evidence, Mewing replied “*I believe so*”.⁶⁵⁰
- 12.24 Both Walmsley in paragraph 17 of his statement and Mewing in paragraph 7 of his statement had attributed the same words to Hill as having been spoken by Hill to Barker, namely “*Corey, turn around and put your hands behind your back. We’re moving you to the back cells*”. Mewing said that the explanation for these parts of the two statements being identical was “*I’ve used Senior Constable Hill’s (statement) to record my recollection of the conversation*”.⁶⁵¹ Hill had, in fact, asserted in his statement that he had said exactly the same words as appeared in the statements of Mewing and Walmsley.⁶⁵² Mewing was asked by Counsel Assisting: “*You did not, did you, when you gave evidence in the Ballina Local Court have a recollection of those precise words being used - did you?*” and he answered “*Possibly. I don’t think so, no, probably not*”.⁶⁵³
- 12.25 Mewing’s attention was drawn to the fact that in paragraph 7 of his statement and paragraph 17 of Walmsley’s statement he and Walmsley had attributed exactly the same words to Barker, namely “*Get fucked cunt. I’m gonna punch you in the fucking head when I get a chance. I’ll king hit you cunt*”, except that Walmsley had used the word “*gunna*” and not “*gonna*”.⁶⁵⁴ Mewing said that this was a part of Hill’s statement which he had used in making his own statement.⁶⁵⁵ The precise words in paragraph 7 of Mewing’s statement also appeared in Hill’s statement.⁶⁵⁶
- 12.26 Mewing was questioned about the part of his statement in which he had asserted that Hill said “*now you’re getting charged with assaulting police also*”.⁶⁵⁷ Mewing said that he did not, at the time of giving evidence at the

⁶⁴⁹ *ibid*, p.21

⁶⁵⁰ *ibid*, p.22

⁶⁵¹ *ibid*, pp.23-24

⁶⁵² Exhibit 44

⁶⁵³ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.24

⁶⁵⁴ *ibid*

⁶⁵⁵ *ibid*

⁶⁵⁶ Exhibit 44

⁶⁵⁷ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), pp.30-31

private hearing, have an independent recollection of Hill saying those words and that he had not had an independent recollection of Hill saying those words at the time of making his statement.⁶⁵⁸ He said “*I used his (Hill’s) statement to help me with my memory*”.⁶⁵⁹

12.27 Counsel Assisting put to Mewing that he had no recollection at all of the assault. Mewing replied “*I had a recollection but it wasn’t that good*” and he conceded that Barker had not in fact assaulted Hill.⁶⁶⁰

12.28 The following question and answer occurred in the examination:

Q. And isn't this really the case, that you, Hill and at least Walmsley got your heads together and endeavoured to put together statements which were the same?

A. I didn't sit down and speak to them with it. I just got a copy given to me.⁶⁶¹

12.29 Mewing admitted that the evidence he had given in the Ballina Local Court that in making his statement he had not looked at anyone else’s material, apart from the facts sheet, was mistaken evidence.⁶⁶²

Woolven

12.30 In his evidence at the private hearing Woolven accepted that he had made no notes of the incident in his police notebook and that he had made his statement approximately six months after the incident.⁶⁶³ In fact, it is likely that Woolven made his statement approximately seven months after the incident. In the internal NSWPF inquiry conducted in mid 2012 Woolven told one of the police officers conducting the inquiry that in making his statement he needed to have his memory refreshed because “*there were some aspects that I could not remember*”.⁶⁶⁴

⁶⁵⁸ *ibid*, p.31

⁶⁵⁹ *ibid*

⁶⁶⁰ *ibid*

⁶⁶¹ *ibid*, p.39

⁶⁶² *ibid*, p.40

⁶⁶³ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), pp.28-29

⁶⁶⁴ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), p.30; Exhibit 80

- 12.31 In his statement Woolven said that in making the statement he had refreshed his memory from the COPS event entry, the facts sheet and the custody records.⁶⁶⁵ Woolven gave evidence that whatever was in his statement either reflected his memory or had been taken from the COPS event entry, the facts sheet or the custody records.⁶⁶⁶
- 12.32 Woolven's attention was then directed by Counsel Assisting to some assertions in his statement which were not contained in the COPS event entry, the facts sheets or the custody records. In his statement Woolven had said that Barker, after breaking free, began throwing punches, that is, more than one punch. Woolven accepted that this assertion was not contained in any of the documents from which he said he had refreshed his recollection.⁶⁶⁷
- 12.33 Woolven said that he had seen "*arms going everywhere*" and it was probably correct that he had made an assumption that Hill had been struck. He had not actually seen Hill being struck by any punch.⁶⁶⁸
- 12.34 Woolven said that he did not remember seeing anyone else's statement in this matter. However, he admitted that in the past he had looked at the statements of other police officers.⁶⁶⁹
- 12.35 The following question and answer occurred:

Q. Do you think it is likely, in this particular matter, that you had a look at one or more of the statements of other officers before you signed off on yours?

A. No, because I don't ever see Walmsley, Hill, Ryan, I don't ever see them, so I don't ever really talk to them.⁶⁷⁰

EVIDENCE AT THE PUBLIC HEARING

Hill

- 12.36 In Hill's evidence at the public hearing of the Commission the following question and answer occurred:

⁶⁶⁵ Exhibit 48

⁶⁶⁶ Exhibit 82 (Transcript of Private Hearing, 15 November 2012, Witness: Senior Constable Mark Woolven), p.31

⁶⁶⁷ *ibid*, p.35

⁶⁶⁸ *ibid*

⁶⁶⁹ *ibid*, p.36

⁶⁷⁰ *ibid*

Q. I think your evidence is that you didn't circulate your statement to them (Mewing and Walmsley)?

A. I don't believe I did, no. I gave it to Senior Constable Ryan.⁶⁷¹

Walmsley

12.37 Walmsley denied that at the time of making his statement he knew that Barker had not struck Hill, that Barker had not thrown any further punches or that there had been no flailing of arms by Barker.⁶⁷²

12.38 Walmsley said in his evidence that he could not be sure what material he had used in the preparation of his statement. He believed that he had had access to Hill's statement. He believed that Hill's statement might have been sent to him by Ryan but he had no actual recollection of that. He could not remember reading Hill's statement.⁶⁷³

12.39 Walmsley was questioned about similarities between parts of his statement, Hill's statement and Mewing's statement, including parts of his statement "*which were word perfect and punctuation perfect*" with corresponding parts of Hill's statement. He agreed that the similarities in the statements suggested that he had used Hill's statement or Mewing's statement in preparing his own statement.⁶⁷⁴ The following questions and answers occurred:

Q. You just transferred material out of another officer's statement and put it in here?

A. I can't be sure of what I did, but I have used it.

Q. It has to be the case, doesn't it, when it is word perfect and punctuation perfect?

A. I don't know, to be honest.

Q. Is that a serious answer?

A. I would imagine so.

⁶⁷¹ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.805

⁶⁷² PIC Transcript, Constable Lee Walmsley, 27 February 2013, p.758

⁶⁷³ *ibid*, pp.758-759

⁶⁷⁴ *ibid*, p.759

Q. Yes.

A. I must have used it.

Q. And you must have used it by taking material out of another officer's statement and putting it in your own?

A. I would assume so, yes.

Q. Well, you know so, don't you?

A. Well, that's what has happened, yes.

Q. It can't be coincidental?

A. I don't think so.⁶⁷⁵

12.40 Walmsley was examined about evidence he had given in the Ballina Local Court that he had made his statement "*purely off my own memory*". His evidence continued:

Q...Can I suggest to you that at the time you gave that evidence, you knew that you had had access to the statement or statements of other officers?

A. At the time I don't believe I was aware of that. Since - sorry.

Q. Finish, please.

A. It was since I came down here that I became aware of it.

Q. How did you become aware of it since you came down here?

A. I've heard the evidence that there was an email sent around and then I became aware of that, that I was the recipient of the email.

Q. You became aware too, didn't you, of the very odd similarities between your statement, Officer Hill's statement and Officer's Mewing's statement?

A. Yes, I did.

Q. Can I suggest to you that you knew at the time that you had used the statement of at least one officer to prepare your own - that is, at the time you gave this evidence?

A. No, at the time I don't believe that's the case.

⁶⁷⁵ ibid

Q...Why didn't you tell the magistrate on that day that you had access to the statement of either or both Officer Hill and Officer Mewing?

A. I was under the impression that I didn't know at that stage.

Q. You were endeavouring to create the impression, I suggest, that you were giving evidence as a consequence of an independent recollection of the events?

A. Yes, that's correct.

Q. And that was untrue?

A. Well, as I know now, yes.

Q. I suggest you knew it at the time?

A. No, I did not.⁶⁷⁶

12.41 Walmsley accepted that at some time before giving evidence in the Ballina Local Court he had discussed with other police officers that the CCTV footage did not clearly show any assault occurring.⁶⁷⁷

12.42 Walmsley did not recall providing his statement to Mewing and could not imagine that he would have done so.⁶⁷⁸

Eckersley

12.43 Eckersley was asked what, if anything, he had used to make his statement and he replied "*the facts sheet and the COPS event*".⁶⁷⁹ The following question and answer then occurred:

Q. Were you given access to the statement of any other police officer?

A. Well, I remember getting sent an email from Senior Constable Ryan requesting a statement, and then some time later I got a second email as a hurry-up re my statement, and I remember that at some stage there was a - I think there was a statement, either his or Hill's or both, attached to that email.⁶⁸⁰

⁶⁷⁶ *ibid*, pp.761-762

⁶⁷⁷ *ibid*, p.767

⁶⁷⁸ *ibid*, p.778

⁶⁷⁹ PIC Transcript, Constable Ryan Eckersley, 27 February 2013, p.724

⁶⁸⁰ *ibid*

- 12.44 Eckersley said that he could not remember reading any statements attached to the email but said that he would have read them.⁶⁸¹ However, he denied that he had used statements by the other officers to refresh his memory.⁶⁸²
- 12.45 In examination by his own legal representative Eckersley asserted that at the time of making his statement he had an independent recollection of what had happened, separate from what he had read in the COPS entry and the facts sheet.⁶⁸³ He gave evidence that, soon after the incident, Hill had said “*he got hit*” or something similar.⁶⁸⁴ Eckersley said that when he made his statement he did not feel that it was inconsistent with his recollection.⁶⁸⁵

Mewing

- 12.46 In his evidence at the public hearing Mewing was asked about the effect of part of the evidence he had given in the Ballina Local Court. The following questions and answers occurred:

Q. Do you agree that the effect of the evidence you gave at the Ballina Local Court on 2 November 2012 was, firstly, that you had a vivid memory of the events of 14 January?

A. Yes, I said that.

Q. And, secondly, the effect of your evidence was that to prepare your statement, you had relied upon your memory and the facts sheet?

A. Yes.

Q. And, thirdly, the effect of your evidence was that you had not looked at the statements of any other police officer for the purpose of preparing your statement?

A. Yes.⁶⁸⁶

- 12.47 As had happened at the private hearing, Mewing was questioned about the assertion in paragraph 7 of his statement that Hill, when directing Barker to turn around, had said “*Corey, turn around and put your hands behind your*

⁶⁸¹ *ibid*, p.725

⁶⁸² *ibid*, p.724

⁶⁸³ *ibid*, p.746

⁶⁸⁴ *ibid*

⁶⁸⁵ *ibid*, p.747

⁶⁸⁶ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.397

back. We're moving you to the back cells." Mewing agreed that what was in his statement about what had been said was precisely the same as what was in the statements of Hill and Walmsley. He conceded that what he had asserted Hill had said was not contained in the facts sheet.⁶⁸⁷

12.48 As had happened at the private hearing, Counsel Assisting drew Mewing's attention to the further assertion contained in paragraph 7 of his statement, namely, that Barker had responded to Hill's direction by saying "*Get fucked cunt, I'm gonna punch you in the fucking head when I get a chance. I'll king hit you cunt*". Mewing agreed that, apart from one slight difference in punctuation, what was in his statement was the same as what was in the statement of Walmsley. Mewing also agreed that his assertion in his statement about what Barker had said in response to Hill's direction was the same as what was in Hill's statement and these parts of the two statements were "*punctuation perfect*" identical. Mewing conceded that this part of his statement was also not in the facts sheet.⁶⁸⁸

12.49 Mewing was questioned about the assertion in paragraph 8 of his statement that Hill had said "*Now you're getting charged with assaulting police also*". Mewing conceded that what he had said in his statement was precisely the same in wording and punctuation as what had been said on the same matter by Walmsley and Hill in their statements and that what he had asserted was not contained in the facts sheet.⁶⁸⁹

12.50 Mewing agreed that his account of what had happened after Barker had been handcuffed was not contained in the facts sheet.⁶⁹⁰ Both Mewing in his statement and Hill in his statement had said that Barker "*refused*" to "*stand up*" or "*walk*". Mewing's evidence continued:

Q. What's your explanation for the remarkable similarity between parts of your statement and parts of the statement of Officer Hill?

A. I've used his.

Q. You've used his statement?

⁶⁸⁷ *ibid*, pp.398-399

⁶⁸⁸ *ibid*, pp.399-400

⁶⁸⁹ *ibid*, pp.400-401

⁶⁹⁰ *ibid*, p.401

A. Yes.

Q...What is your explanation, if any, for the remarkable similarity between parts of your statement and the statement of Officer Walmsley?

A. I've obviously used his too.

Q. How did you get access to the statement of Officer Hill?

A. It was emailed to me.

...

Q...Was it the practice, as you understood it, within the Richmond local area command for officers to share their statements in connection with the prosecution of criminal offences?

A. I'm not aware that it is a practice, but statements are emailed and sent to officers that are involved in certain matters.

Q. What, as you understand it, is the purpose of that occurring?

A. To help refresh your memory.

Q. I see. This happens, does it, to help you refresh your memory before you have yourself prepared a statement?

A. Yes.

Q. And that is what happened here, is it, that Officer Hill sent you his statement dated 19 January 2011 so that you could prepare your statement of 19 April 2011?

A. Yes.

Q. How did he send it to you, do you recall?

A. Via my work email.⁶⁹¹

12.51 Mewing said that Walmsley's statement had been emailed to him by Walmsley.⁶⁹² In examination by the legal representative for Walmsley Mewing conceded that it was possible that the email attaching a copy of Walmsley's statement may have been sent to him by someone other than Walmsley, for example, Ryan.⁶⁹³

⁶⁹¹ *ibid*, pp.401-402

⁶⁹² *ibid*, p.402

⁶⁹³ *ibid*, pp.454-455

12.52 Mewing gave evidence that at the time of making his statement and at the time of giving evidence in the Ballina Local Court he had believed that on 14 January 2011 he had seen Barker punch Hill on the nose with a closed right fist.⁶⁹⁴

12.53 Mewing agreed that his evidence in the Ballina Local Court that, in preparing his statement, he had not looked at anyone else's material apart from the facts sheet was wrong.⁶⁹⁵

12.54 Mewing was asked why he had not told the Local Court Magistrate that he had used Hill's statement in preparing his statement and he replied that, at the time of preparing his statement, he was under a lot of stress and not thinking straight.⁶⁹⁶

12.55 Mewing's evidence continued:

Q. Looking at your statement, no one would have a clue, unless they carefully examined one document against another, that you may have used the statement of another officer; correct?

A. Yes.

Q. And in fact you concealed that fact from the Ballina Local Court, didn't you?

A. Yes, I did.

...

Q. You didn't tell the Ballina Local Court that you had used Officer Walmsley's statement in the way you have said you used it today, did you?

A. No, I didn't.

Q. You told the Ballina Local Court that your memory was vivid; correct?

A. Yes.

Q. And you told the Ballina Local Court that you had used the facts sheet and your memory; correct?

A. Yes.

⁶⁹⁴ *ibid*, p.404

⁶⁹⁵ *ibid*, pp.402-403

⁶⁹⁶ *ibid*, p.404

Q. And you were endeavouring to convey the impression to the Ballina Local Court, weren't you, that you had an independent recollection of what had occurred on the evening of 14 November 2011; correct?

A. Yes, it appears that way.

Q. Well, it more than appears that way; do you agree that that's the fact?

A. Yes.

Q. The fact is that you did not have an independent recollection, did you, of the events which occurred on 14 January 2011?

A. Not 100 per cent.

Q. Can I suggest to you, not any per cent?

A. I had some.⁶⁹⁷

12.56 In a lawfully intercepted telephone conversation with another person on 12 September 2012 Mewing told that person that, although he had seen the statement by Hill when he made his own statement, he had not said anything about that whilst giving evidence in the Ballina Local Court.⁶⁹⁸ Mewing agreed that as at 12 September 2012 he had realised that that was something which he had not disclosed to the Magistrate but should have disclosed.⁶⁹⁹

Woolven

12.57 Woolven gave evidence that he had made his statement from memory and from refreshing his memory from the facts sheet and the COPS event entry.⁷⁰⁰ He said that at the time of making his statement he had believed its contents to be true.⁷⁰¹

12.58 Woolven was questioned about the assertion in his statement that Barker began throwing punches. The following questions and answers occurred:

Q. Did you or did you not make the statement in your statement that "he began throwing punches" because that was something you observed?

⁶⁹⁷ *ibid*, pp.407-409

⁶⁹⁸ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.445; Exhibits 57 and 58

⁶⁹⁹ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.445

⁷⁰⁰ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.605

⁷⁰¹ *ibid*

A. No, not something I observed.

Q. If it wasn't something you observed, why did you put it in your statement?

A. Because I believed that had occurred after reading the facts sheet.

Q. You're saying you believed it occurred having read the facts sheet, but at the time you made your statement you had no independent recollection of having seen that?

A. That's correct.

Q. If you had no independent recollection of having seen it, why did you put it in your statement?

A. I was of the belief that it had occurred.

Q. Does it come down to this - that you believed it had occurred purely and simply because it was contained in the facts sheet?

A. Yes.

Q. But at the time that you made your statement, as I understand what you're saying, you didn't actually recall whether or not that had occurred?

A. That's correct.

Q. I ask you again - why, in those circumstances, did you put it in your statement?

A. Because that's what I believed had occurred.⁷⁰²

12.59 It was put to Woolven that the assertions in his statement that Barker began throwing punches and that at least one of those punches had connected with Hill's face were not included in the facts sheet or the COPS event entry. Woolven said "*I've used the incorrect terminology*" and did not advance any other explanation.⁷⁰³ He accepted that at no time had he seen Barker throwing punches or a punch thrown by Barker connect with Hill's face. However, he denied that he had fabricated these assertions.⁷⁰⁴

⁷⁰² ibid, pp.605-606

⁷⁰³ ibid, pp.607-608

⁷⁰⁴ ibid, p.607

12.60 In a lawfully intercepted telephone call Woolven had said that he had prepared a statement "*but I wasn't prepared to give that evidence in court.*"⁷⁰⁵ However, he agreed with Counsel Assisting that he had in fact been prepared to give evidence in court in accordance with his statement.⁷⁰⁶

McCubben

12.61 McCubben gave evidence that his statement which was dated 11 August 2011 and signed 18 August 2011 was prepared by him around the time it was signed. McCubben said that in making his statement he had relied, apart from his memory, on Hill's statement, the facts sheet and the custody records.⁷⁰⁷

12.62 McCubben agreed that there was no reference in his statement to the fact that he had used Hill's statement in preparing his statement. He did not think that in a statement made by him he had ever made reference to another officer's statement.⁷⁰⁸

12.63 McCubben said he could not remember what specific use he had made of Hill's statement but said that in general when looking at another officer's statement "*I just look for specific detail and then, if it ties in with what I'm thinking or what my recollection is, I'll then write the statement*".⁷⁰⁹

12.64 McCubben's evidence continued:

Q. Do you know whether, when you prepared your statement and signed it on 17 August 2011, you actually recalled seeing the accused break free and swinging his arms attempting to punch these officers, or was that something you think you obtained from Officer Hill's statement?

A. My recollection is - my recollection that's in here is that he broke free and there was a wrestle. I don't think I saw all of it but when I've seen Constable Hill's statement, I would have thought that to be a more accurate record of what actually happened at the time. I'm only - does that make sense?

...

Q. Before you saw Officer Hill's statement, you recall seeing a wrestle; correct? I think that's what --

⁷⁰⁵ Exhibits 88 and 89

⁷⁰⁶ PIC Transcript, Senior Constable Mark Woolven, 26 February 2013, p.631

⁷⁰⁷ PIC Transcript, Robert McCubben, 25 February 2013, p.476

⁷⁰⁸ *ibid*, p.482

⁷⁰⁹ *ibid*, p.483

A. Yes, yes, definitely, I saw a wrestle, and an arm moving, his right arm moving.

Q. But after you saw Constable Hill's statement, you thought that it was more accurate to say that he had broken free and was swinging his arms attempting to punch Officer Hill and Officer Walmsley?

A. I can't say that categorically, but it makes sense definitely.⁷¹⁰

12.65 In examination by his own legal representative McCubben said that he thought he had received Hill's statement via an email sent by Hill but that he might be wrong in his recollection that it had been Hill who had sent him the statement.⁷¹¹

SUBMISSIONS

SUBMISSIONS BY COUNSEL ASSISTING

12.66 Counsel Assisting's submissions on the questions being considered in this part of the Commission's report are to be found in the part of Counsel's submissions headed "*The alleged assault of Officer Hill within the BAS room of the Ballina Police Station*" and the part of Counsel's submissions headed "*Cross-contamination of evidence*".

12.67 Counsel Assisting submitted that Hill had in his statement and later in his evidence made the assertions that Barker had pulled free from Walmsley's grip and punched him, knowing that they were untrue. In one or other or both of these parts of Counsel Assisting's submissions Counsel referred to parts of the evidence of police officers Walmsley, Eckersley, Mewing, Woolven and McCubben and submitted that each of these officers, at the time of making his statement, had no independent recollection of his own of having observed Barker break or pull free and assault Hill, had taken from Hill's statement the assertions that Barker had pulled or broken free and assaulted Hill and had "*fabricated*" those assertions in his own statement, that is made those assertions knowing they were untrue or not believing they were true. Those police officers who subsequently gave evidence in Court to the same effect knew at the time of giving the evidence that the evidence was untrue or did not believe at the time of giving the evidence that it was true.

⁷¹⁰ *ibid*, p.485

⁷¹¹ *ibid*, pp.566-567

SUBMISSIONS BY OTHER LEGAL REPRESENTATIVES

Walmsley

- 12.68 Attention was drawn by Walmsley's legal representative to the fact that Walmsley had given evidence that at the time of making his statement and at the time of giving evidence in the Ballina Local Court he had believed that what he was asserting was true.
- 12.69 It was submitted that this belief was compounded by the circulating of the police officers' statements. The submission was made that the fact that Walmsley had later come to accept that what he had said earlier was mistaken did not establish that at the time of his earlier statement or evidence he knew that what he was asserting was untrue.

Eckersley

- 12.70 It was submitted that the Commission should not conclude that Eckersley had relied on Hill's statement in making his own statement. It was submitted that Eckersley's assertion that Barker had assaulted Hill was based on Eckersley's awareness of the violent threatening conduct of Barker in the Ballina Police Station, the movement of Barker's body towards Hill which was confirmed by the CCTV footage, his use of the COPS entry and facts sheet in the making of his statement and Hill's comment immediately afterwards, heard by Eckersley, that Barker had assaulted Hill. Attention was drawn by Eckersley's legal representative to the fact that in Eckersley's statement, unlike Hill's statement, it was not asserted that Barker had thrown more than one punch.
- 12.71 In his evidence before the Commission Eckersley had denied having made a knowingly false assertion in his statement or having given knowingly false evidence in the Ballina Local Court.

Mewing

- 12.72 It was submitted on behalf of Mewing that what was described as a confrontation had clearly occurred between Barker and the police officers and that the confrontation had commenced when Barker turned towards a police officer. It was submitted that a belief on the part of the other police officers that

Hill had been assaulted by Barker was consistent with several pieces of evidence, including the making of an immediate complaint by Hill and subsequent assertions by Hill maintaining that he had been assaulted.

Woolven

12.73 It was submitted on behalf of Woolven that in order for the Commission to find that Woolven fabricated the contents of his statement it would be necessary to exclude the possibility that he was merely mistaken, given the “*violent, rapid and confusing circumstances of the events*”, or that he was inaccurate in his recollection, and these possibilities could not be excluded.

12.74 It was submitted that Woolven gave evidence before the Commission that at the time of making his statement he had had a genuine belief that the contents of the statement were, to the best of his recollection, true.

McCubben

12.75 In response to a submission made by Counsel Assisting that McCubben had used Hill’s statement in making his own statement so that his statement would be consistent with Hill’s statement, McCubben’s legal representative drew attention to differences between McCubben’s statement and Hill’s statement, in particular the fact that McCubben had not included in his statement an assertion that he had observed Barker actually strike Hill. In support of this submission it was noted that some of the terminology used by McCubben in his own statement was consistent with the facts sheet and not the statement by Hill.

12.76 McCubben’s legal representative referred to McCubben’s evidence that he did not have a recollection of whether he had used Hill’s statement and, if he had, of how he had used Hill’s statement. It was submitted that, in the light of this evidence, the Commission should not conclude that McCubben had used Hill’s statement in an improper manner. It was submitted that the Commission should accept that it was McCubben’s normal practice to prepare his statements only in accordance with his recollection and that the Commission should find that McCubben’s statement of 11 August 2011 represented his best recollection of events on 14 January 2011 and was not a fabrication.

ASSESSMENT

HILL

- 12.77 Hill asserted in his statement that Barker pulled free from Walmsley's grip and punched Hill on the nose with a closed right fist.
- 12.78 Hill's statement is dated 19 January 2011, that is only five days after the incident. There is no suggestion in the evidence before the Commission that the statement was made otherwise than on the date which it bears. Accordingly, the Commission regards the statement as having been made at a time when the events which happened on 14 January 2011 would have been fresh in Hill's recollection. Hill would surely have known at the time of making his statement whether it was true that Barker had on 14 January 2011 pulled free from Walmsley and punched Hill on Hill's nose with a closed right fist.
- 12.79 On 7 July 2011 Hill gave evidence in the Ballina Local Court about the alleged assault which was in accordance with what he had said in his statement. In his evidence at the public hearing of the Commission Hill continued to maintain that he had been hit by Barker.
- 12.80 The Commission has concluded that Barker did not pull free from Walmsley's grip and that Barker did not punch Hill whether on the nose with closed right fist or at all.
- 12.81 Hill gave evidence that other police officers had said things which would be consistent with his account. However, this evidence was not supported by any evidence from those other officers. Examples are Hill's evidence that Mewing said to Hill that he had seen Barker "*crack ya*"; Hill's evidence that Walmsley afterwards apologised to Hill for not having held on to Barker's arm; and Hill's evidence of having had conversations with Ryan, after January 2011 but before July 2011, about sending the defective tapes to the STIB.
- 12.82 The Commission accepts that on the night of 14 January 2011 Hill made prompt complaints to other police officers of having been assaulted by Barker. The Commission also accepts that Hill and Ryan went to the Ballina Police Station on 19 January 2011 for the purpose of obtaining and viewing the CCTV surveillance tapes. It was submitted, at least implicitly, on behalf of Hill

that his actions in going to the Ballina Police Station on 19 January 2011 for that purpose showed that he honestly believed that he had been assaulted and was confident that his belief would be confirmed by the tapes.

12.83 However, in assessing the evidence of Hill's complaints and the evidence about Hill's visit to the Ballina Police Station on 19 January 2011, the Commission takes into account the view it has formed of Hill's general credibility. Apart from making the false assertions that Barker had pulled free from Walmsley's grip and punched Hill, Hill made a number of other assertions which the Commission is satisfied were untrue, including that after the initial punch Barker threw further punches, that after being handcuffed Barker refused to stand up, that Hill lifted Barker twice and that Barker was taken to the cell by being picked up and carried. The Commission also takes into account what it regards as Hill's opportunistic change of his evidence from asserting that he had been punched with Barker's right hand to asserting that he had been punched with Barker's left hand. The Commission considers that Hill is a witness of little credibility.

12.84 The Commission concludes that at the time of making his statement and at the time of giving evidence in the Ballina Local Court Hill had no actual, even if mistaken, recollection that he had observed Barker break free from Walmsley's grip and punch Hill and knew that it was not true that Barker had broken free from Walmsley and punched Hill. The Commission also concludes that at the time of giving evidence before the Commission Hill had no actual recollection of having being hit by Barker and knew that he had not been hit by Barker.

WALMSLEY AND MEWING

12.85 These two police officers can conveniently be considered together. Each asserted in his statement that Barker had broken or pulled free from Walmsley and had punched Hill on the nose with a closed right fist. Each repeated these assertions in the evidence he gave in the Ballina Local Court, before being shown the CCTV footage. The Commission has found that these assertions were untrue.

12.86 Each of Walmsley and Mewing was in a good position, or at least claimed to have been in a good position, to observe what was happening in the BAS

room. Walmsley was the person from whose restraining grip on Barker's right arm it was asserted that Barker had broken free. Mewing gave evidence in the Ballina Local Court that he had been able to see Barker's fist actually come into contact with Hill's face, even though Hill, Walmsley and Barker were in front of him.

- 12.87 Each of Walmsley and Mewing made assertions about the alleged assault going beyond a bare assertion that Barker had punched Hill. Walmsley said in his statement that he felt Barker tense his right arm and pull free from Walmsley's grip and then swing his right closed fist towards Hill striking Hill in the nose. Mewing asserted that Barker had tensed up and broken free of Walmsley and then punched Hill in the face, striking Hill in the nose with a closed right fist.
- 12.88 Neither Walmsley nor Mewing made any contemporaneous record of what happened on 14 January 2011. There was a delay of more than two months before Walmsley made his statement and a delay of more than three months before Mewing made his statement.
- 12.89 On 21 March 2011, before either Walmsley or Mewing had made his statement, each received from Ryan a copy of Hill's statement. There is no doubt that Mewing received a copy of Hill's statement, even though he mistakenly thought that the copy of the statement he had received had been sent by Hill.
- 12.90 In his statement Hill had said that Barker had pulled free from Walmsley and punched Hill on the nose with a closed right fist. Each of Walmsley and Mewing made the same assertion in their statements, in identical or almost identical, words.
- 12.91 There were other similarities between Hill's statement and the statements of Walmsley and Mewing. Each of Walmsley and Mewing made assertions in identical, or almost identical, terms to assertions made by Hill in his statement about the request Hill said he had made to Barker to turn around, while Barker was in the dock; about Barker's response to that request; and about Hill saying to Barker after the alleged assault "*now you're getting charged with assaulting police also*". Each of Walmsley and Mewing in his statement made

the same untrue assertion as Hill had made in his statement that Barker, after being handcuffed, “*refused*” to stand up.

- 12.92 Each of Walmsley and Mewing did not initially disclose that he had used Hill’s statement in making his own statement but later admitted having done so.
- 12.93 Walmsley gave evidence in the Ballina Local Court that he had made his statement purely from his own memory. However, when some of the similarities between the statements of Hill, Mewing and himself were drawn to his attention, he accepted that he had used Hill’s statement or Mewing’s statement in making his own statement. Walmsley claimed, implausibly, that he had not been aware at the time of giving evidence in the Ballina Local Court that he had used Hill’s statement in making his own statement.
- 12.94 Mewing initially gave evidence in the Ballina Local Court that he had made his statement from his memory and the facts sheet, that he had a “*vivid*” independent recollection and that he had not used any other police officer’s statement. However, when similarities between the statements of Hill, Walmsley and himself were drawn to this attention, he admitted that he had used parts of Hill’s statement in making his own statement.
- 12.95 The Commission concludes that it should find that each of Walmsley and Mewing were conscious of, but initially desired to conceal, the extent to which each of them in making his statement had adopted Hill’s statement.
- 12.96 Each of Walmsley and Mewing was a witness of limited credibility. Apart from the untrue assertions already referred to, each made other untrue assertions. Walmsley made the untrue assertions that Barker, having been jammed against the wall of the BAS room, threw further punches at Hill and that he had made his statement purely from his own memory. Mewing made the untrue assertions that Barker had continued to throw further punches at Hill and that in preparing his statement he had relied only on his memory and the facts sheet and had not looked at the statement of any other police officer.
- 12.97 The Commission concludes that at the time of making his statement and at the time of giving evidence in the Ballina Local Court each of Walmsley and Mewing had no actual, even if mistaken, recollection of having himself observed Barker break or pull free from Walmsley or of Barker punching Hill in the nose with a closed right fist and had taken from Hill’s statement the

assertions that Barker had broken or pulled free from Walmsley and punched Hill in the nose with a closed right fist and knew that it was untrue, or did not believe that it was true, that Barker had broken or pulled free from Walmsley or that Barker had punched Hill in the nose with a closed right fist.

ECKERSLEY

- 12.98 There are a number of similarities between Eckersley and Walmsley and Mewing. Eckersley made the same assertions in his statement, as Hill, Walmsley and Mewing did, that Barker had broken free from Walmsley and had punched Hill in the face. These assertions were untrue.
- 12.99 Unlike Walmsley and Mewing, Eckersley was shown the CCTV footage before he gave any evidence in the Ballina Local Court and the evidence he subsequently gave in the court was less forthright than what he had said in his statement. He said in his evidence in the Ballina Local Court that he “*thought*” Barker had thrown a punch and it “*looked like*” the punch had hit Hill in the face.
- 12.100 Eckersley was in a good position to observe whether Barker broke free from Walmsley’s grip and whether Barker punched Hill. The CCTV footage shows Eckersley standing alone in the BAS room near the doorway. Eckersley then walked backwards in the BAS room as Barker, Walmsley and Hill entered through the doorway. Eckersley remained within one or two metres of Barker, Walmsley and Hill and was watching them at the time when any breaking free or punching would have occurred. As Barker’s body turned, his right arm and shoulder were turned directly towards Eckersley.
- 12.101 Like Walmsley and Mewing, Eckersley did not make any contemporaneous record of the events of 14 January 2011. In Eckersley’s case there was a delay of almost four months before he made his statement.
- 12.102 Like Walmsley and Mewing, Eckersley on 21 March 2011 received from Ryan a copy of Hill’s statement, before he made his own statement.
- 12.103 In his evidence in the Ballina Local Court Eckersley said that in making his statement he had relied only on the facts sheet and his own memory. In his evidence before the Commission Eckersley denied having used Hill’s statement in making his own statement.

- 12.104 It is true that in some respects Eckersley's statement was not as close to Hill's statement as Walmsley's and Mewing's statements were. The assertions made by Eckersley in his statement about the request he said was made by Hill to Barker to turn around, while Barker was in the dock, and the response by Barker to that request were in somewhat different language from that used by Hill, Walmsley and Mewing and Eckersley did not include in his statement any announcement by Hill that Barker would now be charged with assaulting a police officer.
- 12.105 However, the Commission concludes that it should find that Eckersley did, at least to some extent, adopt Hill's statement in making his own statement. The critical assertions that Barker broke or pulled free from Walmsley's grip and punched Hill, which were untrue, are similar in the statements of all of Hill, Walmsley, Mewing and Eckersley. Some other assertions were made by Eckersley in his statement which were the same as assertions which had been made by Hill in his statement and which the Commission is satisfied were untrue. For example, Eckersley asserted, as Hill had, that Barker, after being handcuffed, "*refused*" to stand up and was "*carried*" by police to a cell. The Commission has found that Barker did not "*refuse*" to stand up and was dragged, not "*carried*", to a cell.
- 12.106 The Commission concludes that at the time of making his statement Eckersley had no actual, even if mistaken, recollection of having himself observed Barker break free from Walmsley or of Barker punching Hill to the face and had taken from Hill's statement the assertions that Barker had broken free from Walmsley and punched Hill in the face and knew that it was untrue, or did not believe that it was true, that Barker had broken free from Walmsley or that Barker had punched Hill in the face.

WOOLVEN

- 12.107 In his statement Woolven said that in making the statement he had refreshed his memory from the COPS event entry, the facts sheet and the custody records. Woolven said in his statement that Barker was thrashing his arms, that he broke free and that he began throwing punches and that Woolven saw at least one of those punches connect with Hill's face.

- 12.108 Woolven had seen the CCTV footage before he gave evidence at the private hearing. In his evidence at the private hearing Woolven acknowledged that he had not, at the private hearing, given evidence that Barker broke free or began throwing punches. He said in his evidence at the private hearing that he did not recall Barker throwing a punch. He said that on 14 January 2011 he had seen arms going everywhere and, on that basis, had assumed that Hill had been struck by Barker.
- 12.109 At the public hearing, when asked whether he had seen Barker thrashing his arms, Woolven said “*I suppose not*” and said that what he had meant by saying that Barker was thrashing his arms was that Barker was “*manoeuvring*” his arms. Woolven said that he had included in his statement the assertion that Barker began throwing punches, because he had read the assertion in the facts sheet; at the time of making his statement he had no independent recollection of it having happened. He accepted that he had not seen any punch connect with Hill’s face.
- 12.110 In his evidence at the public hearing Woolven also accepted that in an intercepted telephone conversation on 13 September 2012 he had told an acquaintance that he had not in fact seen Barker hit Hill.
- 12.111 Like Walmsley, Mewing and Eckersley, Woolven did not make any contemporaneous record of the events of 14 January 2011. Before he made his own statement he had on 21 March 2011 received a copy of Hill’s statement. The date which Woolven’s statement bears was 11 July 2011, which was six months after the incident. As indicated earlier in this report, the Commission considers it likely, on the basis of the emails sent by Ryan, that Woolven’s statement was in fact been made later than the date which it bears.
- 12.112 The Commission concludes that at the time of making his statement Woolven had no actual, even if mistaken, recollection of having himself observed Barker thrash his arms, break free from Walmsley and begin throwing punches or of having himself observed at least one of the punches thrown by Barker connect with Hill’s face. The Commission concludes that Woolven had taken from Hill’s statement the assertions that Barker broke free from the grip of Walmsley and began throwing punches at least one of which connected with Hill’s face and knew that it was untrue, or did not believe that it was true,

that Barker had broken free from the grip of police and began throwing punches at least one of which connected with Hill's face.

MCCUBBEN

- 12.113 In his statement McCubben said that he saw Barker break free and, swinging his arms, attempt to punch Hill and Walmsley. In his evidence at the public hearing McCubben said that all he saw was a "*wrestle*" and "*arms moving*".
- 12.114 McCubben gave evidence at the public hearing that in making his statement he had used Hill's statement, the facts sheet and the custody records he had himself made as custody manager.
- 12.115 McCubben was not one of the persons to whom Hill's statement had been sent by Ryan on 21 March 2011. However, it is clear that at some stage before making his own statement McCubben did receive a copy of Hill's statement.
- 12.116 The custody records made by McCubben on 14 January 2011 will be discussed in another part of this report. It is sufficient to say here that the records were brief and made no mention of an alleged assault. McCubben did not make any other contemporaneous record of the events of 14 January 2011.
- 12.117 McCubben's statement was made in August 2011, seven months after the incident.
- 12.118 McCubben gave evidence before the Commission which showed that he had sought information from other police officers for the purpose of making his statement. He asked Ryan what time he should put in his statement as being the time at which the assault occurred.
- 12.119 At the time of preparing his own statement McCubben thought that Hill's statement, which he had obtained, would be a "*more accurate record*" (than his own recollection) of what had actually happened on 14 January 2011.
- 12.120 McCubben's own recollection of the incident at the time of giving evidence at the public hearing was poor. He said that he had no recollection of having seen Barker break free or, swinging his arms, attempt to punch Hill or

Walmsley. To the extent to which he did have a recollection, his recollection was seriously faulty. He thought that the alleged assault had taken place in the charge room and not the BAS room and that Hill had been on the right hand side, and not the left hand side, of Barker.

- 12.121 The Commission concludes that at the time of making his statement McCubben had no actual, even if mistaken, recollection of having himself observed Barker break free and, swinging his arms, attempt to punch Hill and Walmsley and had taken from Hill's statement or the facts sheet the assertions that Barker had broken free and, swinging his arms, attempted to punch Hill and Walmsley and knew that it was untrue, or did not believe that it was true, that Barker had broken free and, swinging his arms, attempted to punch Hill and Walmsley.

13. CROSS-CONTAMINATION OF EVIDENCE

- 13.1 In part 8 of this report the Commission found that on the night of 14 January 2011 at the Ballina Police Station Barker did not break or pull free from the grip of a police officer and did not assault Hill.
- 13.2 In part 12 of this report the Commission found that all of the police officers Walmsley, Mewing, Eckersley, Woolven and McCubben who in their statements had asserted that Barker had broken or pulled free and assaulted Hill did not, at the time of making their statements, have a recollection of having observed Barker break or pull free and assault Hill or have a belief that it was true that Barker had broken or pulled free and assaulted Hill and had taken the assertions that Barker had broken or pulled free and assaulted Hill from Hill's statement to which they had had access.
- 13.3 In the part of his submissions headed "*Cross-contamination of evidence*" Counsel Assisting made criticisms of the practice which, according to evidence given in the Commission's investigation and particularly evidence by Ryan, is often followed by police officers of using a statement made by another police officer in the making of their own statements. Counsel Assisting also made criticisms of some of the instructions and guidance for the making of statements provided by the NSWPF to its officers.
- 13.4 In this part of his submissions Counsel Assisting used the expression "cross-contamination of evidence" to refer to the contents of a statement made by a police officer being affected by the police officer's knowledge of the contents of a statement or other document made by a fellow officer.
- 13.5 Evidence by the police officers about the extent to which in the present case they used sources other than their own unaided recollection in making their statements has already been quoted or summarised earlier in this report. Apart from this evidence, a number of police officers gave evidence of what they said was a common practice of police officers of accessing another police officer's statement before making their own statement.
- 13.6 When giving evidence at the private hearing Mewing, when asked what was his understanding of why he had been emailed a copy of Hill's statement, said

*"It's practice to have a look at other people's statements prior to making yours".*⁷¹² Mewing said he was aware of the practice *"from my training"* and *"from the college you're allowed to look to help you as long as you reference where you've got your information from".*⁷¹³

13.7 In Hill's evidence at the public hearing the following questions and answers occurred concerning the circulation of statements already made to other police officers who have yet to make their statements:

A. Mr Rushton, it has been common practice in every police station I've ever worked in.

Q. Is that subject to the caveat that if it's done, the police officer must make note in his or her statement that they've used the material in that way?

A. That's correct.⁷¹⁴

13.8 At the public hearing Ryan was asked a number of questions by Counsel Assisting about the use by a police officer of another officer's statement in making his own statement.

13.9 When asked whether Hill's statement had been sent to other police officers Ryan replied: *"It could have been. It is a practice that is used in the police".*⁷¹⁵ The evidence continued:

Q. It is a practice of using one officer's statement to create your own?

A. Well, it's used as an aide-memoire to create somebody else's statement, based on what's in another officer's statement.⁷¹⁶

13.10 Ryan agreed that *"it's...a basic rule of good policing, so far as possible...to ensure that there is no cross-contamination of evidence"*. Ryan explained cross-contamination of evidence as meaning *"if you've got witnesses to an incident that – do what you can to make sure they don't talk about it with each other prior to providing their statements"*. However, Ryan said that he was referring only to civilian witnesses and that there is a distinction between

⁷¹² Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.19

⁷¹³ *ibid*, pp.19-20

⁷¹⁴ PIC Transcript, Senior Constable David Hill, 27 February 2013, p.805

⁷¹⁵ PIC Transcript, Senior Constable Gregory Ryan, 26 February 2013, p.662

⁷¹⁶ *ibid*

police witnesses and civilian witnesses. When asked what the difference is Ryan answered “*The difference is that undoubtedly [sic] in the circumstances as a police officer, that it's unavoidable for police to be separated when they're investigating incidents which rely, when they're giving evidence, on their own behalf, to where if you're dealing with civilians, you can ask them - or you do your best to separate them so their evidence isn't contaminated by talking to the other witness.*”⁷¹⁷ The early parts of this answer as recorded in the transcript are difficult to understand but Ryan would appear to the Commission to have been saying, contrary to what might be thought to be the literal meaning of the words he used, that it is impracticable for police witnesses to be kept separate from each other. This would appear to have been Counsel Assisting's understanding of Ryan's answer because Counsel Assisting began his next question with the following words: “*I can understand why it might be a little bit difficult for police officers to fully distance themselves from each other in respect of evidence they might give in a prosecution.*”⁷¹⁸

13.11 Ryan referred to the NSWPF handbook as stating that “*it is an accepted practice within the police service to make reference to someone else's statement or in fact be supplied with a copy of their statement*”, subject to the qualification that the person making the statement “*makes reference to (the fact) they've reviewed that piece of information*”.⁷¹⁹

13.12 Ryan agreed that in the present case none of the police officers who had made a statement had referred in his statement to having used another police officer's statement in making his statement. Ryan said that this requirement had been “*overlooked*” by the police making the statements.⁷²⁰ However, Ryan did not see it as being his responsibility as the officer in charge of the prosecution to ensure that other officers referred in their statements to any material from other officers that they had used.⁷²¹

⁷¹⁷ *ibid*, p.663

⁷¹⁸ *ibid*

⁷¹⁹ *ibid*, p.664

⁷²⁰ *ibid*

⁷²¹ *ibid*, pp.664-665

13.13 Ryan said it was common practice for police officers to have access to each other's statements, not just at Ballina Police Station, but generally in New South Wales.⁷²²

13.14 Ryan said that his personal practice was to use another police officer's statement only "*for time, date, place, names and locations*".⁷²³ Ryan said that he would not regard it as "*cross-contamination*" of evidence for a police officer to be provided with another police officer's statement to use as a "*refreshment*" to "*reference times, dates, places...names*".⁷²⁴

13.15 Ryan's evidence continued:

Q. Do you agree..., officer, that it is a fundamental principle of good policing that you don't permit cross-contamination of evidence whether it is a police officer giving it or a civilian?

A. No, I don't agree with that.

Q. Why don't you agree?

A. Well, I agree that that is the case with civilian witnesses. However, in relation to police, it's not the case.⁷²⁵

13.16 Ryan considered that civilian witnesses are "*a completely different kettle of fish*" from police officers. Civilian witnesses, unlike police officers, are "*not connected in any way*".⁷²⁶

13.17 However, Ryan agreed with a suggestion made by Counsel Assisting "*that once a police officer is given another police officer's statement for the purpose of preparing his own or her own there's cross-contamination*".⁷²⁷

⁷²² ibid, p.664

⁷²³ ibid, p.665

⁷²⁴ ibid, p.667

⁷²⁵ ibid

⁷²⁶ ibid, p.668

⁷²⁷ ibid, pp.665-666

SUBMISSIONS

SUBMISSIONS BY COUNSEL ASSISTING

13.18 It was submitted by Counsel Assisting that the evidence given by Ryan about the permissibility of police officers accessing the statements of other police officers in the preparation of their own statements, and the instructions and guidance given to police officers by the NSWPF regarding the preparation of statements, were contrary to legal principle.

13.19 Counsel Assisting referred to a part of the NSWPF handbook which is in the following terms:

Corroboration and collaboration between police in the preparation of their individual statements and access to another officer's notes are accepted practices, provided each statement is that officer's own individual account of the incident. No statement between police officers or any other witness should be identical, as it is expected each witness will give their own independent version of the incident and in their own words. Be prepared to withstand scrutiny under cross-examination in court as a credible and reliable witness and to rebut any suggestion that your statement and evidence may be tainted, inaccurate or untruthful. If you do require someone to refresh your memory, you access contemporaneous notes of the incident from another officer's notebook or you are assisted in preparing your statement, you should make reference to this fact in your statement. Never sign a statement on behalf of another police officer, including any other witness. Avoid using PC word processing as a means of duplicating and preparing several statements, varied or otherwise, if each statement is not their own individual account of the incident...⁷²⁸

13.20 In his submissions Counsel Assisting made a number of criticisms of this part of the NSWPF handbook.

13.21 It was submitted that, once a police officer has collaborated with another police officer in the preparation of his statement, the first officers' statement is no longer his individual account of the incident.

13.22 Counsel Assisting referred to the instruction in the NSWPF handbook that "*no statement between police officers...should be identical*". Counsel Assisting submitted that this instruction was not a safeguard which would protect the integrity of evidence but rather an instruction to conceal any collaboration that might have occurred between police officers in the preparation of their statements.

⁷²⁸ Exhibit 91

- 13.23 It was further submitted that the passage in the NSWPF handbook instructing police officers to be prepared to “*withstand scrutiny*” when giving evidence in court and to “*rebut any suggestion that your statement and evidence may be tainted*” was also an instruction to conceal any collaboration that may have occurred in the preparation of statements of police officers.
- 13.24 Counsel Assisting referred to the decision of the Court of Appeal of England and Wales in *R v Momodou* [2005] EWCA Crim 177; [2005] 1 WLR 3442, which was cited with approval in *Majinski v Western Australia* [2013] WASCA 10. Counsel quoted the following passage in paragraph 61 of the judgment of Judge LJ, who delivered the judgment of the Court in *Momodou*:
- There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see *R. v Richardson* [1971] 2 QB 484; *R. v Anf* The Times, 22 June 1993; *R. v Skinner* (1993) 99 Cr App R 212 and *R. v Shaw* [2002] EWCA Crim 3004. The witness should give his or her own evidence, so far as practicable, uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule produces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so.
- 13.25 Counsel Assisting submitted that, contrary to the evidence of Ryan, the principles referred to in *Momodou* apply equally to civilian and police witnesses. It was submitted these principles should not be confused with the permissible practice of police officers conferring together in the making of notes in their notebooks immediately after an event as an aid to memory, as was discussed in the English case of *R v Bass* [1953] 1 QB 680.
- 13.26 It was submitted by Counsel Assisting that referencing any use of another officer’s statement as discussed in the NSWPF handbook would be of limited utility, as it would indicate that one or more of the police witnesses did not have an independent recollection of events. It was submitted that the omission of referencing in a police officer’s statement, where another officer’s statement has in fact been used, would give rise to a false impression that the first police officer has an independent recollection of the incident, when he or she did not.

13.27 Counsel Assisting submitted that, in any event, whatever the merits of the guidance provided in the NSWPF handbook, what had occurred in the present case fell outside anything permitted by the NSWPF handbook.

SUBMISSIONS BY OTHER LEGAL REPRESENTATIVES

13.28 The only relevant submissions made by the legal representatives of the police officers were submissions made by Mewing's counsel.

13.29 Counsel for Mewing accepted that there was a problem with the way in which the police officers had made their statements. Counsel said that it was impossible to know how much of an account in a statement was the independent recollection of the maker of the statement. Counsel referred to the evidence before the Commission that collaboration in the preparation of statements is permitted by the NSWPF and submitted "... *this is an antiquated approach to the preparation of police statements, and Operation Barmouth has highlighted the potential for this procedure to undermine confidence in the administration of criminal justice. It creates a corruption risk, as well as having potential to undermine confidence in the administration of criminal justice. It is a systemic issue worthy of the Commission's attention.*"

SUBMISSIONS ON BEHALF OF THE NSWPF

13.30 In its submissions the NSWPF responded to the submissions by Counsel Assisting that the guidance provided by the NSWPF handbook for the preparation of statements was contrary to legal principle. The submissions by the NSWPF had been prepared after consultation with the NSWPF Prosecutions Command and the Office of General Counsel of the NSWPF. While defending the guidance provided in the NSWPF handbook, the NSWPF stated that the NSWPF is committed to reviewing the NSWPF handbook in the near future.

13.31 Submissions made by the NSWPF included that:

- (i) the traditional rule is that evidence can be given only orally from the witness box and from memory alone. The advantage of evidence being given in this way is that a tribunal can be satisfied that the evidence it is receiving from a witness has not been contaminated by the thoughts and perceptions of others;

- (ii) a statement made by a prospective witness is simply a report of what the witness will be able to recount to the tribunal;
- (iii) collaboration taking the form of a police officer reading the statement of a fellow officer before making his or her own statement is acceptable, if it is done solely for the purpose of refreshing memory and with the intention of giving honestly independent evidence. Such collaboration is to be distinguished from collusion between police officers for the purpose of concocting evidence so that the evidence of one officer would appear to be consistent with the evidence of other officers; and
- (iv) the decision of the High Court in *Hoch v The Queen* (1988) 165 CLR 1515 is relevant. It was conceded that *Hoch* related to the admissibility of what was described at common law as “*similar fact evidence*”. However, it was submitted that the principles stated in *Hoch* apply more generally.

13.32 It was accepted that in cases where collaboration, as distinct from collusion, has occurred, there could still be a reduction in the probative value of the evidence, as collaboration could cause an imperfect recollection of one officer to be displaced by a suggestion in the statement or evidence of another officer.

13.33 It was contended that the judgment in *Momodou* seemed to suggest “*that police should maintain almost monastic isolation when drafting statements*”.

13.34 The NSWPF submission referred to the judgment of Underhill J in the English case of *R (on the application of Saunders and another) v Independent Police Complaints Commission and others* [2008] EWHC 2372 (Admin); [2009] 1 All ER 379 and particularly the following parts of the judgment:

- (i) at 386 (12) where Underhill J quoted part of the judgment of Byrne J, giving the judgment of the English Court of Criminal Appeal in *R v Bass* [1953] 1 QB 680 at 686, as follows:

This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper, when

two persons have been present at an interview with a third person, than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.⁷²⁹

- (ii) also at 386 (12) a quotation from the judgment of Farquharson LJ in *R v Skinner* (1993) 99 Cr App Rep 212 at 216:

It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory⁷³⁰

- (iii) paragraphs 15 and 16 of the judgment of Underhill J, which are in the following terms:

[15] It is important to recognise that an 'uncontaminated' first account of an incident will by no means necessarily be more accurate than an account produced after discussion between the persons principally involved. On the contrary such discussion-or reference to contemporary records for such matters as timings-will often quite genuinely remind an officer of something which he had forgotten or misstated in his first account or help him to make sense of recollections which were confused. Memory of any complex event involves elements of reconstruction, and a purist insistence that only 'actual' memory is valid would be misconceived.

[16] It does not follow from the acknowledgment of the risks inherent in the practice of permitting officers to confer, and in particular to collaborate in writing up their notes, that there should be a general prohibition on the practice; " A ban on 'mere' conferring not only would be difficult to enforce in practice but would in many cases have serious operational disadvantages: prompt exchange of information between officers in the immediate aftermath of an incident is often essential. That objection might not apply to collaboration in the production of notes; but, as already observed, there are advantages as well as disadvantages in officers pooling their recollections, and the theoretically optimal practice of their doing so only after they have produced an uncontaminated first account may be both cumbersome in practice and of limited real value (particularly in a case where there has already been a degree of conferring in the immediate aftermath of the incident). It is important to recognise that the extent and seriousness of the risk to the quality of officers' evidence caused by conferring or collaboration will vary greatly from case to case.⁷³¹

- 13.35 The NSWPF's submission also included an excerpt from the UK *Metropolitan Police Officers Instruction Book*, which was referred to in *Saunders* at 387-388 (14). The excerpt was in the following terms:

⁷²⁹ *R (Saunders) v Independent Police Complaints Commission* [2009] 1 All ER 379, p.386

⁷³⁰ *ibid*

⁷³¹ *ibid*, pp.388-389

In any case in which consultation takes place a note to that effect should be added...If one officer has no recollection of a point observed or a remark remembered by his colleague, he should, of course, not incorporate such matter in his book. A note, whether made in consultation with a colleague or otherwise,⁷³² must reflect only genuine personal observation and recollection.

- 13.36 It was accepted that the passages in *Saunders* which have been quoted dealt primarily with the making of notes by police officers rather than the making of statements but it was submitted that they were also applicable to the making of statements.
- 13.37 The submission by the NSWPF then quoted an extract from the NSWPF handbook, which includes the part of the NSWPF handbook which Counsel Assisting had quoted in his submissions:

Preparing Police Statements

The importance of taking accurate and comprehensive notes in your notebook regarding what you individually did, saw, heard and know about an incident at the time or soon after for the purpose of preparing a statement in the brief of evidence is stressed in the 'Giving Evidence' video training package. Your notes will refresh your memory in recalling the incident and in giving evidence in proceedings before the court. The training package touches upon the risks and pitfalls associated with inadequate note taking. Refer to Procedures for the Evidence Act regarding "Using statements and other notes when giving evidence" on the Law intranet site.

Corroboration and collaboration between police in the preparation of their individual statements and access to another officer's notes are accepted practices, provided each statement is that officer's own individual account of the incident. No statement between police officers or any other witness should be identical, as it is expected each witness will give their own independent version of the incident and in their own words. Be prepared to withstand scrutiny under cross-examination in court as a credible and reliable witness and to rebut any suggestion that your statement and evidence may be tainted, inaccurate or untruthful. If you do require someone to refresh your memory, you access contemporaneous notes of the incident from another officer's notebook or you are assisted in preparing your statement, you should make reference to this fact in your statement. Never sign a statement on behalf of another police officer, including any other witness. Avoid using PC word processing as a means of duplicating and preparing several statements, varied or otherwise, if each statement is not their own individual account of the incident. Refer to the January 2000 edition of the Police Issues & Practice Journal regarding "*Police Statement: Corroboration or Collaboration*".

- 13.38 The submission quoted part of the article in the January 2000 edition of the *Police Issues and Practice Journal* entitled "*Police Statement: Corroboration*

⁷³² *ibid*, p.388

or *Collaboration*", which is available on the NSWPF intranet. The part of the article quoted was as follows:

Are you ever justified in discussing your evidence with another witness? The answer may be yes. If you have no recollection of the matter, and no notes of your own, it may be necessary for you to ask someone else to refresh your memory. Our memory is a funny thing and it may be and it may take only a short conversation for your memory to return. But one may ask, where is your notebook entry? Clearly then, to best make a statement concerning your evidence you should have your own contemporaneous notebook entry.

If you do require someone to refresh your memory it is appropriate that you make reference to this fact in your statement. Sure, your evidence may be open to questions concerning its reliability and the possibility that your evidence has been tainted as described above. You will have to accept this criticism.

- 13.39 The submission also referred to the brief preparation guide available on the NSWPF intranet which provides that a statement is an officer's "*individual account*" and that a police officer should only refer to a document made by another person where the officer needs to refresh memory, has looked at the document at a time when the events were fresh in that officer's memory and the officer found the document to be accurate at a time when the events were still fresh in the officer's memory.
- 13.40 It was submitted that, when regard was had to these parts of the NSWPF handbook, the *Police Issues and Practice Journal* article and the NSWPF brief preparation guide it could be seen that Counsel Assisting had highlighted one part of the instructions given by the NSWPF to its officers, without referring to others.
- 13.41 It was submitted that the current practice of requiring referencing where collaboration has occurred leads to disclosure, and not concealment, of the fact that collaboration has occurred in the making of a statement.
- 13.42 It was submitted that a blanket policy prohibiting any collaboration between any police officers would be impractical and, in any event, would be unlikely to prevent police officers, who were so minded, colluding to concoct a false version of events.

ASSESSMENT

- 13.43 In the present case the five police officers Walmsley, Mewing, Eckersley, Woolven and McCubben did not comply with a number of aspects of the guidance at present provided by the NSWPF to its officers.
- 13.44 None of the officers made any notes in his notebook or otherwise about what he had individually done, seen or heard regarding what had happened in the Ballina Police Station on the night of 14 January 2011. Consequently, none of the officers had any notes of his own to refresh his memory when he came to make his statement.
- 13.45 There was a delay of between a number of weeks and more than six months after the incident before the police officers made their statements. The combination of an absence of any notes made by an officer and the delay in making his statement meant that it was likely that at the time of making his statement the police officer would have had no independent recollection or only a very limited independent recollection of whatever had happened in the Ballina Police Station on the night of 14 January 2011.
- 13.46 The NSWPF handbook accepts the practice of collaboration between police officers in the making of their individual statements but subject to certain provisos, including that, if a police officer accesses contemporaneous notes of an incident from another police officer's notebook or is otherwise assisted by another police officer in making his statement, the first police officer should make reference to this fact in his statement. In the present case each of the five police officers had access to, and had used, Hill's statement but none of them made any reference to this fact in his statement.
- 13.47 The NSWPF handbook and the NSWPF brief preparation guide stress that a statement by an officer should be his own independent individual account of what he observed happen in an incident. In the present case the Commission has found that each of Walmsley, Mewing, Eckersley, Woolven and McCubben in making his statement adopted assertions by Hill about matters of which the officer did not have an independent recollection of his own at the time of making his statement.
- 13.48 In each of the respects to which the Commission has referred, each of the police officers failed to comply with the guidance given by the NSWPF to its

officers. However, as the NSWPF handbook sanctions, albeit with provisos, collaboration between police officers in the preparation of their individual statements, the Commission does not consider that there was any impropriety by the individual officers in the mere accessing of Hill's statement before making their own statements.

- 13.49 The general question of whether collaboration between police officers in the preparation of statements about the same incident should be permitted and, if so, subject to what conditions, is outside the stated scope and purpose of the Commission's hearing. However, it is a matter arising. The matter was raised by Counsel Assisting in his submissions and the Commission has received submissions from the NSWPF responding to Counsel Assisting's submissions. In its submissions the NSWPF informed the Commission that the NSWPF is committed to reviewing the NSWPF handbook in the near future. Expressions of opinion by the Commission about collaboration by police officers in the making of statements may assist the NSWPF in conducting that review. Furthermore, the Commission under its Act has the broad general function of preventing misconduct by police officers. In all the circumstances the Commission will consider the matters raised by Counsel Assisting's submissions.
- 13.50 There is no doubt that, if collaboration between prospective witnesses, whether or not they are police officers, occurs, there is a serious risk that one or more of the witnesses will consciously or unconsciously tailor his or her evidence in the light of what another witness has said. This risk is described more fully in passages in the judgments in *Momodou* and *Saunders* to which the Commission will refer a little later in this part of its report.
- 13.51 Because of this risk if collaboration occurs, there is a general principle that discussions between witnesses should not take place and that the statements and proofs of one witness should not be disclosed to any other witness. The question which arises is whether this general principle should apply equally to witnesses who are police officers or whether police officers should, at least to some extent, be exempted from the operation of the principle.
- 13.52 As appears from the Commission's summary of Counsel Assisting's submissions, Counsel Assisting referred to and relied on the English case of *Momodou*. The Commission has already quoted in its summary of Counsel

Assisting's submissions the part of the judgment of Judge LJ in *Momodou* on which Counsel Assisting relied.

- 13.53 The Commission considers that *Momodou* is only of limited assistance in considering the present question. In *Momodou* a violent disturbance involving arson had occurred at an immigration detention centre in the United Kingdom, which was run by staff of an entity known as "*Group 4*". The staff were known as detention custody officers. The detention custody officers were not police officers.
- 13.54 *Momodou* and a co-accused Limani were prosecuted as having played prominent parts in the incident at the detention centre. At the trial *Momodou* and Limani were found guilty. They subsequently appealed against their convictions to the Court of Appeal.
- 13.55 On the appeal the appellants complained that, after the incident at the detention centre and before the trial, some of the detention custody officers who later gave evidence at the trial had participated in three courses of group sessions, namely:
- (i) sessions described as trauma debriefing;
 - (ii) sessions described as witness training; and
 - (iii) sessions described as cognition therapy.
- 13.56 The course of witness training included the detention centre officers receiving a case study which bore similarities to the events which had actually occurred at the detention centre. The detention centre officers were invited to read the case study and in preparation for the witness training sessions imagine that they were involved in the events described in the case study. It was claimed, in defence of detention centre officers undertaking the witness training course, that the course was intended to familiarise them as prospective witnesses with court processes and procedures so that giving evidence at the trial would not be so intimidating an experience for them.
- 13.57 It was in this context that Judge LJ said at paragraph 61, part of which was quoted in Counsel Assisting's submissions:

There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

13.58 *Majinski*, the case referred to by Counsel Assisting in which *Momodou* was cited, was a decision of the Western Australian Court of Appeal. *Majinski* was a case of alleged coaching or training of a prosecution witness, in that case a child complainant who was the alleged victim of sexual offences. It was alleged that the prosecutor had engaged in coaching the complainant before he was cross-examined. The leading judgment in the Court of Criminal Appeal was delivered by Martin CJ who in paragraph 29 of the judgment quoted part of paragraph 61 of the judgment of Judge LJ in *Momodou*. In the opinion of the Commission, *Majinski* is of little assistance in considering the present question.

13.59 The case principally relied on by the NSWPF in its submissions was *Saunders*. The basic facts in *Saunders* were summarised in the headnote to the report of the case as follows:

The Independent Police Complaints Commission was investigating the circumstances of two unrelated incidents in which young men had been shot dead by police officers. Both were classed as "death or serious injury

matters” under the Police Reform Act 2002. Consistently with police general practice, the Association of Chief Police Officers (ACPO) manual provided that officers involved in incidents in which a firearm had been discharged could collaborate in the writing up of their notes. In both cases the officers most centrally involved in the incidents were permitted to confer with one another, in accordance with ACPO guidance. In each case a member of the family considered that the investigation had not been properly conducted and brought proceedings for judicial review.

- 13.60 In support of the applications for judicial review the applicants relied on the provisions of English legislation, including legislation incorporating the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which have no New South Wales or Australian equivalents and to which it is unnecessary to refer.
- 13.61 One contention advanced on behalf of the applicants was that the Independent Police Complaints Commission had the power, which it should have exercised, to issue instructions to chief officers of police forces prohibiting police officers conferring after an incident involving death or serious injury and prohibiting police officers from collaborating in the writing of their first accounts of an incident.
- 13.62 The claims of the applicants in *Saunders* were generally dismissed.
- 13.63 Parts of the judgment of Underhill J in *Saunders* have already been quoted in the Commission’s summary of the NSWPF’s submissions but there is utility in the Commission collecting in one place the parts of Underhill J’s judgment which appear to the Commission to be particularly relevant. These parts are as follows:

12. There has never been any prohibition in English law, or as a matter of police practice, on police officers who have been involved together in an incident speaking to one another about their involvement before they give their first account. Not only may they confer in the immediate aftermath - as would be entirely natural and may often be necessary for operational reasons - but they may collaborate in the writing up of the first accounts themselves. In *R v. Bass* [1953] 1 QB 681 the Court of Criminal Appeal (presided over by Lord Goddard CJ) was concerned with a case in which police officers who had produced near-identical accounts of their interview of a suspect had been cross-examined on the basis that they had collaborated in the production of those accounts and had denied doing so. Byrne J, giving the judgment of the Court, said this (at p. 686):

This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering

why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

Although those observations were made in the particular context of preparing notes of an interview (which might be thought to be something of a special case) they have since been understood to be of general application - see, for example, *R v Skinner* (1994) 99 Cr. App. R. 212, where Farquharson LJ said (at p. 216):

It has certainly been permissible, since Lord Goddard's time, for officers to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating, as an aid to memory. That is shown by [*R v Bass*].

Initially it seemed that counsel for the Police Federation was proposing to argue that those authorities gave officers a positive legal right to confer before giving their first accounts; but that is plainly wrong, and in the event no such argument was advanced.

13. The acceptance of this practice - which was referred to before me comprehensively as "conferring", although it might in fact be more useful to distinguish between "mere" conferring and actual collaboration in the production of notes or statements - obviously has the potential to impact on the value of evidence which an officer may subsequently have to give about an incident. That evidence will often depend very heavily on the officer's first account, to which he will be allowed to refer in giving his evidence. However much an officer who has conferred with colleagues may strive to record only what he has seen or heard for himself, there is a real risk that his recollection will have been "contaminated" by what he has been told; and he may in perfect good faith incorporate elements in his own account which have in fact derived from other witnesses, or subconsciously suppress elements which seem to him inconsistent with their accounts. That is a matter of common sense and common experience, but it is confirmed by psychological studies (helpfully reviewed and summarised in the recent paper published by the Research Board of the British Psychological Society entitled *Guidelines on Memory and the Law*: see in particular section 6.ii). There is also the risk that, quite apart from such innocent contamination, officers collaborating in producing their notes or statements may be tempted deliberately to produce an account which does not accurately reflect the individual recollections of each. Such collusion may involve no more than the smoothing out of minor inconsistencies which the officers fear may lead to the evidence being regarded as unreliable (though the unsophisticated belief that inconsistencies always diminish the credibility of evidence is in fact wrong); but it may sometimes involve substantial distortion or fabrication. Collusion of the latter kind is no doubt rare, but it is a very serious matter when it occurs. (I should add that although the distinction which I have drawn between innocent contamination and deliberate collusion is conceptually clear, its application may of course be a lot less clear in particular cases.) Similar risks of contamination are of course well-recognised in other contexts: see e.g. *R v Richardson* [1971] 2 QB 484 (at p. 490 B-C - witnesses not to be shown each others' statements before giving evidence); *R (Green) v. Police Complaints Authority* [2004] 1 WLR 725 ([2004] UKHL 6) (risk of "trimming" if complainants see other witnesses'

statements - esp. per Lord Rodger at para. 71, pp. 747-8); and *R v Momodou* [2005] 1 WLR 3442 ([2005] EWCA Crim 177) (witness coaching- see esp. para. 61, p. 3453).

14. The risk of evidence being contaminated by conferring is sought to be guarded against, at least to some extent, in the instructions and training given to police officers. I was referred to an article at [1985] Crim LR 781 by Anthony Heaton-Armstrong (a distinguished member of the criminal bar) entitled *Police Officers' Notebooks*, in which he quotes the following passage from the 1976 edition of *The Metropolitan Police Officers' Instruction Book*:

Notes must be made at the time of the occurrence or as soon after as practicable ... when two or more officers are present at an occurrence the details of which can be easily remembered, notes should where practicable be written by each officer separately and independently without consultation. When, however, in more complex and more lengthy cases two or more officers witness the same incident or are present at the same interview or interrogation, there is no objection to these officers conferring together when preparing their notes so that their notes may be as full and comprehensive as possible. In any case in which consultation takes place notes to that effect may be added ... if one officer has no recollection of a point observed or a remark remembered by his colleague he should, of course, not incorporate such matter in his book. A note, whether made in consultation with a colleague or otherwise must reflect only genuine personal observation and recollection [emphasis added].

The passages which I have italicised clearly recognise the desirability of first accounts being made without conferring, where that is practicable, and the importance of guarding against contamination where it is thought necessary to collaborate. I was told that the Metropolitan Police Instruction Book is no longer in use and has not been replaced by any equivalent document, and I am not sure that the passage in all its aspects reflects current guidance, let alone practice; but I was told that training in both the Metropolitan Police and the Kent Police continues to emphasise that even where conferring occurs an officer's notes should only contain facts which he has witnessed for himself and that if officers have collaborated that fact should be stated.

15. It is important to recognise that an "uncontaminated" first account of an incident will by no means necessarily be more accurate than an account produced after discussion between the persons principally involved. On the contrary, such discussion - or reference to contemporary records for such matters as timings - will often quite genuinely remind an officer of something which he had forgotten or mis-stated in his first account or help him to make sense of recollections which were confused. Memory of any complex event involves elements of reconstruction, and a purist insistence that only "actual" memory is valid would be misconceived. The definitive evidence which an officer wishes to give may entirely properly contain revisions or amplifications of his first account. But in theory, and subject to operational requirements, that would not be an argument for not attempting to record first accounts before any such discussion has taken place, so that in cases where a real dispute emerges as to the precise sequence of events the extent and significance of any subsequent revisions in the witness's account can be assessed.

16. It does not follow from the acknowledgment of the risks inherent in the practice of permitting officers to confer, and in particular to collaborate in

writing up their notes, that there should be a general prohibition on the practice; and in any event the latter practice has, as I have shown, the endorsement of the Court of Appeal. A ban on "mere" conferring not only would be difficult to enforce in practice but would in many cases have serious operational disadvantages: prompt exchange of information between officers in the immediate aftermath of an incident is often essential. That objection might not apply to collaboration in the production of notes; but, as already observed, there are advantages as well as disadvantages in officers pooling their recollections, and the theoretically optimal practice of their doing so only after they have produced an uncontaminated first account may be both cumbersome in practice and of limited real value (particularly in a case where there has already been a degree of conferring in the immediate aftermath of the incident). It is important to recognise that the extent and seriousness of the risk to the quality of officers' evidence caused by conferring or collaboration will vary greatly from case to case. The advantages of a blanket prohibition on collaboration in the production of notes might very well involve disproportionate disadvantages. However, that leaves open the more limited question of whether there should be a prohibition on conferring and/or collaboration in particular classes of case -such as DSI matters - where the risk of contamination of evidence is thought to be particularly high, or particularly serious in its consequences, or where the maintenance of public confidence in the process carries special weight; and it is essentially that question which provides the context for the issues in this case.

13.64 The Commission was not referred by either Counsel Assisting or the NSWPF to any Australian case. There is some Australian authority about the admissibility in evidence of police evidence which might have been affected by cross-contamination.

13.65 In *Heanes v Herangi* [2007] WASC 175; (2007) 175 A Crim R 175, a single judge decision of Johnson J of the Western Australian Supreme Court, which is noted in *Cross on Evidence* Australian Edition [1255] at page 1119, it was argued on an appeal to the Supreme Court of Western Australia that a Magistrate had erred in accepting and relying upon the evidence of two police officers, when one of the police officers had used the witness statement of the other police officer as a template for her own witness statement. It was held, dismissing the appeal, that there was no basis on which to exclude the witness statements from evidence.

13.66 At 188(52) Johnson J said

I am not aware of any authority for the proposition that the mere fact of discussion or collaboration renders a witness' evidence inadmissible or provides a justification for excluding the evidence in the exercise of the judge's discretion.

Johnson J distinguished *Hoch v The Queen* (1988) 165 CLR 292, a case which the NSWPF referred to in its submissions, as a case on the admissibility of similar fact evidence, where a possibility of joint concoction by two or more witnesses destroys the probative value of the evidence which is a condition precedent to its admissibility.

13.67 In paragraph 50 of his judgment Johnson J said:

I accept the proposition that, when assessing the credibility of a witness, it is relevant to consider whether the evidence of the witness is an independent and uncontaminated recollection. However, it does not automatically follow that evidence from a witness who has discussed the event with another is inadmissible or should be the subject of a discretionary exclusion. It would be naïve to suggest that witnesses do not discuss with others events which are significant or important to them. Witnesses make complaints to others who might question them and to police officers who participate in obtaining a statement from the witness. With respect to police officers, in many cases it will be necessary to discuss the circumstances of an incident with a fellow officer in order to determine the extent of the available evidence and whether charges should be laid. There are a multitude of circumstances with the potential to affect a witness's account of a particular event. If the absence of discussion with another were the criteria for admissibility there would be little available evidence.

13.68 In *R v McPhail* (Supreme Court of NSW, Court of Criminal Appeal, 15 December 1988) three police officers had made statements fifty five days after the arrest of the appellant. Counsel appearing for the appellant at the trial obtained an admission from one of the police officers that his statement was “*strikingly similar*” to that of another officer. Counsel sought to pursue this line of cross-examination with the other police officers but this was not permitted by the trial judge. Counsel then sought to tender the three statements so that the jury could see for themselves the remarkable similarity between the three statements but the tender was rejected.

13.69 The Court of Criminal Appeal held that the trial judge had erred in rejecting the tender. Lee CJ at CL who delivered the principal judgment in the Court of Criminal Appeal said at page 28:

If the jury had a doubt that 55 days after the event when the meeting took place the officers had no recollection of the accused's part in the riot, or that they relied upon each other for information or that they had relied upon a statement prepared by one of them and copied by them, rather than upon recollection – this could have assisted the accused's case.

OPINIONS OF THE COMMISSION

- 13.70 If police officers who were present at the same incident confer with each other or if one police officer has access to another police officer's statement before making his own statement, there is a serious risk of contamination of evidence occurring. The risks of contamination of evidence are described in paragraph 61 of the judgment of Judge LJ in *Momodou* and in paragraph 13 of the judgment of Underhill J in *Saunders*.
- 13.71 Even if cross-contamination of evidence has actually occurred, the evidence of a police officer will not be automatically excluded from the evidence at a criminal trial and will not usually be subject to exclusion in the exercise of the trial judge's discretion. However, the police officer will be liable to be cross-examined at the trial about the extent to which his evidence has been contaminated and the effect of the cross-examination may be to deprive the police officer's evidence of any probative value.
- 13.72 Notwithstanding the risks of cross-contamination of evidence, the Commission does not consider that there should be an absolute prohibition on police officers conferring or accessing another police officer's statement or notes. As pointed out in *Saunders*, there can be legitimate advantages, as well as disadvantages, in police being permitted to confer with each other or to access another officer's statement or notes. Conferring or accessing another officer's statement or notes may prompt a genuine recollection. Police officers, unlike most civilian witnesses, are exposed in the course of their duties to many incidents having some similarities and conferring with another officer or accessing another officer's material may assist an officer in distinguishing the particular incident from other incidents and may assist in prompting a genuine recollection of the particular incident. Civilian witnesses, particularly civilian witnesses who know each other, do frequently discuss some incident they have both or all witnessed.
- 13.73 There would be practical difficulties in enforcing a general prohibition on police officers conferring or accessing each other's notes or statements, especially where police officers are serving in the same police station or in the same command.

- 13.74 The English cases to which the Commission has referred would lend support to a view that there should not be any absolute prohibition on police officers conferring or accessing each other's notes or statements. However, the only exception to a prohibition against this happening which has been explicitly recognised in the English cases is that police officers may confer in the making of notes immediately after an event or interview in which both or all of the officers participated.
- 13.75 It may be that it should be permissible for police officers to consult extrinsic material to check on details such as times, dates or places. However, there will be cases where such particulars are material and contentious.
- 13.76 The Commission observes that the part of the NSWPF brief preparation guide which was referred to in the NSWPF submissions imposes severe restrictions on a police officer referring to a document made by another person in making a statement. The brief preparation guide provides that a police officer may refer to a document made by another person, only if certain conditions, which the Commission interprets as being cumulative, are satisfied, namely that the police officer needs to refresh his memory, has looked at the document made by another person when the events were fresh in the police officer's memory, and the police officer has found the document to be accurate at a time when the events were still fresh in the police officer's memory.
- 13.77 The guidance at present provided by the NSWPF to its officers in the NSWPF handbook and in the article in the *Police Issues and Practice Journal* stress the importance of a police officer making his or her own comprehensive notes of what the police officer did or observed in the incident, soon after the incident occurred. If this guidance was followed, there would be few occasions on which an officer would have any need to refresh the officer's recollection from some other source.
- 13.78 If a police officer in making a statement confers with another police officer or accesses another police officer's notes or statement or accesses any other extrinsic material, the police officer should not include in the police officer's statement any matter of which the police officer does not, at the time of making the statement, have an actual recollection of having done or observed and the police officer should disclose in the officer's statement any sources other than the officer's own unaided recollection which the officer has used in

the making of the statement. In the present case these safeguards were not observed by police officers.

14. CLOSED CIRCUIT TELEVISION IN POLICE STATIONS

- 14.1 On 14 January 2011 the Ballina Police Station was equipped with CCTV in the charge room and the BAS room. The VHS tapes on which the surveillance of those parts of the Ballina Police Station was recorded did not function properly. However, the information on the tapes was successfully transferred into a digital form, which could be successfully played.
- 14.2 Where an alleged event was clearly shown in the CCTV footage, the CCTV footage was conclusive in resolving any conflict in the oral evidence and in determining what had really happened.
- 14.3 If there had been no CCTV footage, the issue of whether Barker had assaulted Hill would have had to have been determined by any tribunal on the oral evidence of the witnesses. It is practically certain that a tribunal would have preferred the virtually unanimous evidence of half a dozen police officers to the evidence of an individual, Barker, who was affected by alcohol, who had engaged in violent and threatening conduct on 14 January 2011 and who, in any event, had only a very limited recollection of what had happened inside the police station.
- 14.4 As at 14 January 2011 Barker was subject to a suspended prison sentence for an earlier offence of assault. If he had been convicted of assaulting Hill, he would almost certainly have been sentenced to a term of imprisonment involving immediate actual custody.
- 14.5 A member of the public is particularly vulnerable inside a police station. If any dispute arises between a member of the public and police officers as to what happened inside a police station, there is likely to be a police version of what happened which will be presented in the evidence of a number of police officers, whereas the member of the public is unlikely to be able to call on any witness to support his or her version of what happened. Accordingly, CCTV within police stations is an important protection for members of the public.
- 14.6 CCTV in police stations can also be an important protection for police officers, protecting police officers against false accusations of misconduct by them inside a police station.

14.7 The need for independent visual evidence of some incident which may have occurred inside a police station may not become apparent until quite some time after the incident is said to have occurred. Accordingly, it is important that CCTV footage of police stations should be preserved and should not be subject to early destruction. There should be clear guidelines issued by the NSWPF to ensure this.

15. AFFECTED PERSONS

15.1 In part 3 of this report the Commission set out the provisions of s 97 of the *Police Integrity Commission Act 1996* (NSW) (“the *PIC Act*”) dealing with the contents of reports by the Commission to Parliament. It is convenient in the present part of the report to repeat the provisions of subsections (2), (3) and (4) of s 97:

(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) the prosecution of a person for a specified criminal offence,

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

(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 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.

(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 concerned.

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

15.2 In deciding whether the Commission should form an opinion that consideration should be given to the prosecution of a person for a criminal offence or that consideration should be given to the taking of action against a police officer under s 181D or s 173 of the *Police Act 1990* (NSW) (“the *Police Act*”), it is necessary for the Commission to take into account some other provisions of the *PIC Act*.

15.3 The effect of ss 40(2), 40(3), 40(4) and 41 of the *PIC Act* is that, if evidence is given by a witness at a hearing of the Commission after a declaration has been made by the Commissioner under s 41, the evidence given by the witness will not be admissible in evidence against the witness in any civil or

criminal proceedings, but may be used by the Commissioner of Police in deciding whether to make an order under s 173 or s 181D of the *Police Act* and may be used in proceedings for an offence against the *PIC Act*. All of the police officers who gave evidence at a hearing of the Commission gave their evidence after a declaration under s 41 had been made in their favour.

- 15.4 Section 181D of the *Police Act* provides that the Commissioner of Police may, by order in writing, remove a police officer from the NSWPF if the Commissioner of Police does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct. Section 173 of the *Police Act* provides that the Commissioner of Police may take either "*non-reviewable action*" or "*reviewable action*" with respect to a police officer's misconduct or unsatisfactory performance.
- 15.5 In deciding whether the Commission should form an opinion that consideration should be given to the taking of action against a police officer under s 181D or s 173 of the *Police Act*, the Commission also has regard to the definition of police misconduct in s 5 of the *PIC Act*.
- 15.6 In deciding in the present investigation whether it should form any opinion within s 97(2) of the *PIC Act*, the Commission has regard to the assessments it has made and the opinions it has formed, as stated in earlier parts of this report.
- 15.7 After taking into account relevant matters the Commission is of the opinion that the following persons are "*affected*" persons within the meaning of s 97(2) of the *PIC Act*, being persons against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation:
- (i) Senior Constable David Hill
 - (ii) Constable Lee Walmsley
 - (iii) Constable Ryan Eckersley
 - (iv) Constable Luke Mewing

(v) Senior Constable Mark Woolven

(vi) Robert McCubben

(vii) Senior Constable Gregory Ryan

(viii) Senior Constable Kelly Haines

SUBMISSIONS

THE SUBMISSIONS OF COUNSEL ASSISTING

15.8 It was submitted by Counsel Assisting that the Commission should find that police misconduct had or might have occurred in:

(i) the making of statements by Hill, Walmsley, Eckersley, Mewing, Woolven and McCubben which contained assertions that Barker had assaulted Hill, when, to the knowledge of the makers of those statements, no assault had occurred;

(ii) the giving of false evidence before the Ballina Local Court by Hill, Walmsley, Mewing and Eckersley that Barker had assaulted Hill;

(iii) the use of excessive force against Barker by Hill, Walmsley, Mewing and Eckersley;

(iv) the preparation of grossly deficient custody records by the custody manager McCubben; and

(v) the permitting of Barker to remain handcuffed in a cell for a period exceeding one and a half hours. McCubben, as custody manager, permitted this to occur or, alternatively, failed to carry out regular inspections of Barker which would have revealed to him that this had occurred.

15.9 It was submitted by Counsel Assisting that the Commission should form the following opinions under s 97(2)(a) of the *PIC Act*.

- (i) that consideration should be given to the prosecution of Hill, Walmsley, Mewing, Eckersley, Woolven and McCubben for the offence of fabricating false evidence in contravention of s 317(b) of the *Crimes Act 1900* (NSW) (“the *Crimes Act*”) for making the knowingly false assertion in their statements that Barker had assaulted Hill;
- (ii) that consideration should be given to the prosecution of Hill, Walmsley, Mewing, Eckersley, Woolven and McCubben for the offence of perverting the course of justice in contravention of s 319 of the *Crimes Act* for making the knowingly false assertion in their statements that Barker had assaulted Hill and that consideration should be given to the prosecution of Hill, Walmsley, Mewing and Eckersley for the same offence for making the knowingly false assertion in their evidence in the Local Court that Barker had assaulted Hill;
- (iii) that consideration should be given to the prosecution of Hill, Walmsley, Mewing, Eckersley, Woolven and McCubben for the offence of conspiring to pervert the course of justice;
- (iv) that consideration should be given to prosecuting Hill, Walmsley, Mewing and Eckersley for the offence of perjury in contravention of s 327 of the *Crimes Act* for giving knowingly false evidence in the Local Court that Barker had assaulted Hill;
- (v) that consideration should be given to prosecuting Hill, Walmsley, Mewing and Eckersley for the offence of perjury with intent to procure a conviction in contravention of s 328 of the *Crimes Act* for giving knowingly false evidence in the Local Court that Barker had assaulted Hill;
- (vi) that consideration should be given to the prosecution of Hill, Walmsley, Mewing and Eckersley for the offence of assault occasioning actual bodily harm in contravention of s 59 of the *Crimes Act* or, alternatively, for the offence of common assault in contravention of s 61 of the *Crimes Act*;
- (vii) that consideration should be given to the prosecution of Mewing for the offence under s 52(3) of the *PIC Act* of publishing evidence given by him

before the Commission in contravention of a direction given by the Commission; and

(viii) that consideration should be given to the prosecution of Hill for the offence under s 107(1) of the *PIC Act* of giving evidence before the Commission which is knowingly false or misleading in a material particular.

15.10 It was submitted by Counsel Assisting that the Commission should form the opinions under ss 97(2)(c) and 97(2)(d) of the *PIC Act* that consideration should be given to the taking of action against Hill, Walmsley, Eckersley, Mewing and Woolven under s 181D of the *Police Act* or, alternatively, under s 173 of the *Police Act* .

SUBMISSIONS BY THE OTHER LEGAL REPRESENTATIVES

15.11 A number of the legal representatives for the police officers made submissions having relevance to what opinions the Commission should form under s 97(2) of the *PIC Act*. Almost all of those submissions have already been considered in earlier parts of this report. Some submissions made on behalf of police officers, which have not already been considered, will be referred to specifically later in this part of the Commission's report.

THE OFFENCES REFERRED TO IN COUNSEL ASSISTING'S SUBMISSIONS

PUBLIC JUSTICE OFFENCES

15.12 Section 317 of the *Crimes Act* provides:

A person who, with intent to mislead any judicial tribunal in any judicial proceeding:

(a) ..., or

(b) fabricates false evidence (other than by perjury or suborning perjury), or

(c) ...,

is liable to imprisonment for 10 years.

15.13 The making of a statement by a prospective witness can amount to the fabricating of “*evidence*” within s 317(b).⁷³³ Conduct can amount to the commission of an offence under s 317(b), whether or not the evidence is ever tendered before a judicial tribunal in a judicial proceeding.⁷³⁴

15.14 Section 319 of the *Crimes Act* provides:

A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.

15.15 In Part 7 of the *Crimes Act*, which includes s 319, a reference to perverting the course of justice is a reference to obstructing, preventing, perverting or defeating the course of justice or the administration of the law (*Crimes Act* s 312).

15.16 The making of a false assertion in a statement intended to be used in the prosecution of a person for a criminal offence, where the assertion is material to proof of the offence alleged, and where the maker of the statement knows that the assertion is false or does not believe that the assertion is true, is conduct that has a tendency to pervert the course of justice.

15.17 Persons may be prosecuted for having been parties to a conspiracy to pervert the course of justice, that is for having been parties to a conspiracy to commit an offence under s 319 of the *Crimes Act*.

15.18 Section 327(1) of the *Crimes Act* provides:

Any person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years.

15.19 In a prosecution for perjury it is necessary to prove that the accused person knew that the statement was false or did not believe it to be true. An honest mistake, inadvertence, carelessness or a misunderstanding leading to a statement which is objectively untrue is not sufficient.⁷³⁵

⁷³³ *Director of Public Prosecutions v Aydogan* (2006) 67 NSWLR 727, p.733

⁷³⁴ *ibid*, p.734

⁷³⁵ *R v Liristis* (2004) 146 A Crim R 547 at 570 (Kirby JJ); *Mackenzie v The Queen* (1996) 90 A Crim R 468 at 488 (Gaudron, Gummow and Kirby JJ)

15.20 In order for there to be a conviction on a charge of perjury there must be evidence proving the falsity of the statement by at least two witnesses or by one witness whose evidence is corroborated.⁷³⁶

15.21 Section 328 of the *Crimes Act* provides:

Any person who commits perjury intending to procure the conviction or acquittal of any person of any serious indictable offence is liable to imprisonment for 14 years.

15.22 The additional element of this aggravated form of perjury is that the person intends to procure the conviction or acquittal of any person of a “*serious indictable offence*”. An “*indictable offence*” is simply an offence that may be prosecuted on indictment (*Criminal Procedure Act 1986* (NSW) s 3). A “*serious indictable offence*” is an indictable offence that is punishable by imprisonment for life or for a term of five years or more (*Crimes Act* s 4). An offence of assaulting a police officer in the execution of his duty is punishable by imprisonment for a term of five years and is accordingly a “*serious indictable offence*”.

OFFENCES OF ASSAULT

15.23 Section 59(1) of the *Crimes Act* provides:

Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years.

15.24 Section 61 of the *Crimes Act* provides:

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

15.25 A person committing what would otherwise be a criminal assault is not liable if the application of force was legally justified. Sections 230 and 231 of the *Law Enforcement (Powers and Responsibilities) Act 2007* (NSW), which apply to police officers, provide:

230 Use of force generally by police officers

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping

⁷³⁶ *R v Muldoon* (1870) 9 SCR(NSW) 116

the police officer, to use such force as is reasonably necessary to exercise the function.

231 Use of force in making an arrest

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.

OFFENCES UNDER THE *PIC ACT*

15.26 Section 52 of the *PIC Act* provides:

The Commission may direct that:

- (a) any evidence given before the Commission

.....

must not be published except in such manner, and to such persons, as the Commission specifies.

- (2) ...

- (3) A person must not make a publication in contravention of a direction given under this section.

15.27 Section 107(1) of the *PIC Act* provides:

A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence

MATTERS RELEVANT TO A NUMBER OF THE AFFECTED PERSONS

15.28 The false assertion made by a number of the police officers that Barker pulled or broke free from the restraining grip of Walmsley on Barker's right arm was closely connected to the false assertion made by those police officers that Barker punched Hill and, indeed, formed an integral part of the alleged assault. It was asserted that Barker used his right arm, after he had freed his right arm from the grip of Walmsley, to punch Hill.

15.29 While the Commission is of the opinion that a number of the police officers made identical or virtually identical false assertions about the alleged assault, the Commission is of the opinion that there is not sufficient evidence of the formation of a conspiracy between the police officers to warrant consideration

of the prosecution of any of the police officers for the offence of conspiring to pervert the course of justice.

- 15.30 The requirement that, in order for there to be a conviction for perjury, there must be evidence which proves the falsity of the accused's statement by at least two witnesses or by one witness who is corroborated, is capable of being satisfied in the present case by the evidence of Barker, corroborated by the CCTV footage. The evidence of those police officers who have admitted that there was no assault may also be available in the prosecution of other officers.
- 15.31 The injuries which the Commission is satisfied Barker sustained on the night of 14 January 2011 would be capable of amounting to actual bodily harm. However, as previously stated in this report, the Commission considers that there is insufficient evidence to establish that the injuries which Barker sustained were sustained by him in the BAS room of the Ballina Police Station and not in Tamar Street. Consequently, the Commission is of the opinion that consideration should not be given to the prosecution of any of the police officers for the offence of assault occasioning actual bodily harm.
- 15.32 The Commission has found that none of the police officers Hill, Walmsley, Mewing, Eckersley, Woolven and McCubben had, at the time of making his statement, an actual recollection of having himself observed Barker break or pull free from the grip of a police officer and assault Hill. Consequently, the inclusion in each of the police officers' statements of assertions that Barker broke or pulled free from the grip of a police officer and assaulted Hill was serious police misconduct, whether or not it amounted to the commission of a criminal offence.

THE AFFECTED PERSONS

SENIOR CONSTABLE DAVID HILL

- 15.33 For the reasons already referred to in this report the Commission is of the opinion that Hill:
- (i) made untrue assertions in his statement that Barker pulled free from Walmsley's grip and punched him (Hill) on the nose with a closed right fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker pull free from

Walmsley's grip and punch him (Hill) and knew that it was not true that Barker had pulled free from Walmsley and punched him (Hill);

(ii) made untrue assertions in giving evidence in the Ballina Local Court on 7 July 2011 that Barker pulled free from Walmsley and punched him (Hill) on the nose and at the time of giving that evidence had no actual, even if mistaken, recollection of having himself observed Barker pull free from Walmsley's grip and punch him (Hill) and knew that it was not true that Barker had pulled free from Walmsley and punched him (Hill);

(iii) made untrue assertions in giving evidence in the Ballina Local Court on 2 December 2011 that Barker punched him (Hill) and at the time of giving that evidence had no actual, even if mistaken, recollection of Barker punching him (Hill) and knew that it was not true that Barker had punched him (Hill);

(iv) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room and swinging him into a machine in the BAS room and then on to the floor; and

(v) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

15.34 The Commission is of the opinion that all of the conduct by Hill referred to in sub-paragraphs (i) to (v) of paragraph 15.33 was police misconduct.

15.35 In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Hill:

(i) as to the conduct referred to in sub-paragraph (i) in paragraph 15.33 - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*;

(ii) as to the conduct referred to in sub-paragraph (ii) in paragraph 15.33 - for the offence of perjury with intent to procure conviction under s 328 of

the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*;

(iii) as to the conduct referred to in sub-paragraph (iii) in paragraph 15.33 - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and

(iv) as to the conduct referred to in sub-paragraphs (iv) and (v) in paragraph 15.33 - for the offence of assault under s 61 of the *Crimes Act*.

15.36 In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Hill under s 181D of the *Police Act* or, alternatively, to the taking of action against Hill under s 173 of the *Police Act*.

15.37 At the public hearing of the Commission Hill gave evidence that he was hit by Barker in the BAS room at Ballina Police Station. In respect of this evidence the Commission is of the opinion that consideration should be given to the prosecution of Hill for an offence under s 107(1) of the *PIC Act*.

CONSTABLE LEE WALMSLEY

15.38 For the reasons already referred to in this report the Commission is of the opinion that Walmsley:

(i) made untrue assertions in his statement that Barker pulled free from his grip and punched Hill on the nose with a closed right fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker pull free from his grip or of Barker punching Hill on the nose with a closed right fist and had taken from Hill's statement the assertions that Barker had pulled free from his grip and punched Hill on the nose with a closed right fist and knew that it was not true, or did not believe it was true, that Barker had pulled free from his grip or that Barker had punched Hill on the nose with a closed right fist;

(ii) made untrue assertions in giving evidence in the Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from his grip and, swinging his right arm, hit Hill on the nose and at the time of giving this evidence had no actual, even if mistaken, recollection of having himself observed Barker break free from his grip or of Barker swinging his right arm and hitting Hill in the nose and knew that it was not true, or did not believe that it was true, that Barker had broken free from his grip or that Barker, swinging his right arm, had hit Hill on the nose;

(iii) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room and swinging him into a machine in the BAS room and then on to the floor; and

(iv) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

15.39 The Commission is of the opinion that all of the conduct by Walmsley referred to in sub-paragraphs (i) to (iv) of paragraph 15.38 was police misconduct.

15.40 In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Walmsley:

(i) as to the conduct referred to in sub-paragraph (i) in paragraph 15.38 - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*,

(ii) as to the conduct referred to in sub-paragraph (ii) in paragraph 15.38 - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and

(iii) as to the conduct referred to in sub-paragraphs (iii) and (iv) in paragraph 15.38 - for the offence of assault under s 61 of the *Crimes Act*.

15.41 In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Walmsley under s 181D of the *Police Act* or, alternatively, to the taking of action against Walmsley under s 173 of the *Police Act*.

CONSTABLE RYAN ECKERSLEY

15.42 For the reasons already referred to in this report the Commission is of the opinion that Eckersley:

- (i) made untrue assertions in his statement that Barker broke free from Walmsley's grip and punched Hill to the face and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker break free from Walmsley or of Barker punching Hill to the face and had taken from Hill's statement the assertions that Barker had broken free from Walmsley's grip and punched Hill to the face and knew that it was not true, or did not believe it was true, that Barker had broken free from Walmsley's grip or that Barker had punched Hill to the face;
- (ii) used more force than was reasonably necessary to exercise any function or power as a police officer in pushing Barker into the wall of the BAS room; and
- (iii) used more force than was reasonably necessary to exercise any function or power as a police officer in dragging Barker by the handcuffs along the floor of the Ballina Police Station to a cell in the police station.

15.43 The Commission is of the opinion that all of the conduct by Eckersley referred to in subparagraphs (i) to (iii) of paragraph 15.42 was police misconduct.

15.44 In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Eckersley:

- (i) as to the conduct referred to in sub-paragraph (i) in paragraph 15.42 - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*; and

(ii) as to the conduct referred to in sub-paragraphs (ii) and (iii) in paragraph 15.42 - for the offence of assault under s 61 of the *Crimes Act*.

15.45 Eckersley gave evidence in the Ballina Local Court on 2 December 2011, after he had viewed the CCTV footage. On 2 December 2011 he gave evidence that he “*thought*” he had observed Barker break free from the grip of Walmsley and punch Hill in the face. The Commission does not consider that it should form the opinion that the giving of such evidence constituted police misconduct or that consideration should be given to the prosecution of Eckersley for any criminal offence for giving such evidence.

15.46 In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Eckersley under s 181D of the *Police Act* or, alternatively, to the taking of action against Eckersley under s 173 of the *Police Act*.

CONSTABLE LUKE MEWING

15.47 For the reasons already referred to in this report the Commission is of the opinion that Mewing:

(i) made untrue assertions in his statement that Barker broke free of Walmsley and punched Hill in the nose with a right closed fist and at the time of making his statement had no actual, even if mistaken, recollection of having himself observed Barker break free of Walmsley or of Barker punching Hill in the nose with a right closed fist and had taken from Hill’s statement the assertions that Barker had broken free of Walmsley and punched Hill in the nose with a right closed fist and knew that it was not true, or did not believe it was true, that Barker had broken free of Walmsley or that Barker had punched Hill in the nose with a right closed fist;

(ii) made untrue assertions in giving evidence in Ballina Local Court on 2 December 2011, before he was shown the CCTV footage, that Barker broke free from Walmsley and punched Hill on the nose with his right fist and at the time of giving this evidence had no actual, even if mistaken, recollection of having himself observed Barker break free from

Walmsley or of Barker punching Hill in the nose with his right fist and knew that it was not true, or did not believe it was true, that Barker had broken free from Walmsley or that Barker had punched Hill in the nose with his right fist; and

(iii) used more force than was reasonably necessary to exercise any function or power as a police officer in assisting in the dragging of Barker by the handcuffs along the floor of Ballina Police Station to a cell in the police station.

15.48 The Commission is of the opinion that all of the conduct by Mewing referred to in sub-paragraphs (i) to (iii) of paragraph 15.47 was police misconduct.

15.49 In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Mewing:

(i) as to the conduct referred to in sub-paragraph (i) in paragraph 15.47 - for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*;

(ii) as to the conduct referred to in sub-paragraph (ii) in paragraph 15.47 - for the offence of perjury with intent to procure conviction under s 328 of the *Crimes Act* or, alternatively, for the offence of perjury under s 327 of the *Crimes Act*; and

(iii) as to the conduct referred to in sub-paragraph (iii) in paragraph 15.47 - for the offence of assault under s 61 of the *Crimes Act*.

15.50 At the private hearing of the Commission on 15 November 2012 at which Mewing gave evidence a non-publication direction was made pursuant to s 52 of the *PIC Act* prohibiting the publication of any evidence given during that hearing by anyone who was not an officer of the Commission.⁷³⁷ In evidence given at the public hearing of the Commission Mewing admitted that he had discussed with another person the evidence he had given at the private hearing of the Commission and had done so in contravention of the non-

⁷³⁷ Exhibit 56 (Transcript of Private Hearing, 15 November 2012, Witness: Constable Luke Mewing), p.2

publication direction made at that hearing.⁷³⁸ Counsel Assisting submitted that the Commission should form the opinion that consideration should be given to the prosecution of Mewing for the offence of making a publication of his evidence in contravention of a direction given under s 52(1) of the *PIC Act* and hence in contravention of s 52(3) of the *PIC Act*.

- 15.51 In his submissions to the Commission Mewing's Counsel acknowledged that Mewing had contravened a direction given under s 52 of the *PIC Act* but submitted that, in discussing the evidence with the other person, Mewing was seeking "*support and solace during a very difficult time in his personal life*" rather than seeking to injure or damage an investigation of the Commission. It was submitted that in these circumstances the Commission should exercise a discretion not to recommend that consideration be given to the prosecution of Mewing for an offence under s 52(3) of the *PIC Act*.
- 15.52 It is the general approach of the Commission that where there is sufficient evidence to establish a *prima facie* case that a person has committed a specific criminal offence then, except in limited circumstances which the Commission is satisfied do not exist in the present case, the Commission will recommend that consideration should be given to the prosecution of the person for that offence. The Commission does not have regard to other matters, such as public policy considerations, in deciding whether or not to make such a recommendation. In the Commission's opinion these are matters properly to be considered by the relevant prosecutorial authority.
- 15.53 The Commission considers that the matters referred to by Mewing's Counsel are matters which should be reserved for the consideration of the prosecutorial authority. Accordingly, in all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Mewing for an offence of making a publication in contravention of a direction given under s 52(1) of the *PIC Act* and hence in contravention of s 52(3) of the *PIC Act*.
- 15.54 In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Mewing under s 181D of the

⁷³⁸ PIC Transcript, Constable Luke Mewing, 21 February 2013, p.367, pp.370-371 & pp.453-454

Police Act or, alternatively, to the taking of action against Mewing under s 173 of the *Police Act*.

SENIOR CONSTABLE MARK WOOLVEN

15.55 For the reasons already referred to in this report the Commission is of the opinion that Woolven made untrue assertions in his statement that Barker broke free from the grip of police and began throwing punches, at least one of which connected with Hill's face, and at the time of making his statement he had no actual, even if mistaken, recollection of having himself observed Barker break free from the grip of police and begin throwing punches, at least one of which connected with Hill's face. The Commission is further of the opinion that Woolven had taken from Hill's statement the assertions that Barker broke free from the grip of police and began throwing punches at least one of which connected with Hill's face and knew that it was not true, or did not believe it was true, that Barker had broken free from the grip of police and began throwing punches, at least one of which connected with Hill's face.

15.56 The Commission is of the opinion that the conduct of Woolven referred to in paragraph 15.55 was police misconduct.

15.57 In all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of Woolven for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*.

15.58 In all the circumstances the Commission is of the opinion that consideration should be given to the taking of action against Woolven under s 181D of the *Police Act* or, alternatively, to the taking of action against Woolven under s 173 of the *Police Act*.

ROBERT MCCUBBEN

15.59 For the reasons already referred to in this report the Commission is of the opinion that McCubben:

- (i) made untrue assertions in his statement that Barker broke free and, swinging his arms, attempt to punch Hill and Walmsley and at the time

of making his statement McCubben had no actual, even if mistaken, recollection of having himself observed Barker break free and swinging his arms attempt to punch Hill and Walmsley and had taken from Hill's statement or the facts sheet the assertions that Barker had broken free and swinging his arms attempted to punch Hill and Walmsley and knew that it was not true, or did not believe it was true, that Barker had broken free and swinging his arms attempted to punch Hill and Walmsley;

(ii) failed to keep a proper custody record for the detention of Barker on the night of 14 January 2011; and

(iii) failed to carry out any or any proper inspections of Barker while Barker was detained in a cell restrained by handcuffs for a period of more than one and a half hours.

15.60 At the time of the Commission's public hearing McCubben had been medically discharged from the NSWPF. It was submitted by McCubben's legal representative that, accordingly, the Commission did not need to form an opinion as to whether or not McCubben had engaged in police misconduct.

15.61 Part of the definition of "*police misconduct*" set out in s 5(3) of the *PIC Act* clearly provides that the Commission can investigate conduct of a person which is alleged to be police misconduct, even though that person has ceased to be a police officer. Accordingly, this submission of McCubben's legal representative is rejected.

15.62 The Commission is of the opinion that all of the conduct by McCubben referred to in sub-paragraphs (i) to (iii) of paragraph 15.59 was police misconduct.

15.63 In all the circumstances the Commission is of the opinion that, as to the conduct by McCubben referred to in sub-paragraph (i) in paragraph 15.59, consideration should be given to the prosecution of McCubben for the offence of fabricating false evidence under s 317(b) of the *Crimes Act* and further, or alternatively, for the offence of perverting the course of justice under s 319 of the *Crimes Act*.

15.64 The Commission is not of the opinion that consideration should be given to the prosecution of McCubben for any criminal offence for the conduct referred to in sub-paragraphs (ii) and (iii) of paragraph 15.59.

15.65 As McCubben has been medically discharged from the NSWPF, paragraphs (c) and (d) of s 97(2) of the *PIC Act* no longer apply to him.

SENIOR CONSTABLE GREGORY RYAN

15.66 The Commission has not formed the opinion that Ryan engaged in police misconduct in respect of any of the matters investigated in Operation Barmouth.

15.67 The Commission is not of the opinion that consideration should be given to the prosecution of Ryan for any specified criminal offence.

15.68 The Commission is also not of the opinion that consideration should be given to the taking of action against Ryan under s 181D of the *Police Act* or s 173 of that Act.

SENIOR CONSTABLE KELLY HAINES

15.69 The Commission has not formed the opinion that Haines engaged in police misconduct in respect of any of the matters investigated in Operation Barmouth.

15.70 The Commission is not of the opinion that consideration should be given to the prosecution of Haines for any specified criminal offence.

15.71 The Commission is also not of the opinion that consideration should be given to the taking of action against Haines under s 181D of the *Police Act* or s 173 of that Act.

APPENDIX 1 – THE ROLE AND FUNCTIONS OF THE POLICE INTEGRITY COMMISSION

The Commission was established under the *Police Integrity Commission Act 1996* ('the *PIC Act*') on the recommendation of the Royal Commission into the New South Wales Police Service. The principal functions of the Commission, at the time of its commencement, were set out in s 13(1) of the *PIC Act*, as follows:

- (a) to prevent police misconduct,
- (b) to detect or investigate, or manage other agencies in the detection or investigation of, police misconduct,
- (c) (repealed)
- (d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.

In January 2007 the *PIC Act* was amended to provide for a system of investigation, referral and oversight of complaints against certain members of the NSW Police Force who are not police officers. Sections 5A and 13A were inserted into the *PIC Act*. Section 5A defines corrupt conduct of administrative officers as any conduct of an administrative officer that is corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*. Section 13A sets out the functions of the Commission in relation to administrative officers as follows:

- (a) to prevent corrupt conduct of administrative officers,
- (b) to detect or investigate, or oversee other agencies in the detection or investigation of, corrupt conduct of administrative officers.

As far as practicable, the Commission is required to turn its attention principally to serious corrupt conduct of administrative officers (s 13A(2)).

In July 2008 the *PIC Act* was further amended to extend the Commission's jurisdiction to include the detection, investigation and prevention of misconduct of officers of the New South Wales Crime Commission. Sections 5B and 13B were inserted into the *PIC Act*.

In 2012 further amendments were made to the *PIC Act* which included a consolidation of the Commission's various functions under a single heading, and the introduction of the umbrella term '*officer misconduct*'. Accordingly s 13 was amended to read:

13 Principal functions

- (1) The principal functions of the Commission are as follows:
 - (a) to prevent officer misconduct,
 - (b) to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct,
 - (c) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.
- (2) The Commission is, as far as practicable, required to turn its attention principally to serious officer misconduct.
- (3) The reference in this section to managing other agencies in the detection or investigation of officer misconduct is a reference to the provision by the Commission of detailed guidance in the planning and execution of such detection or investigation.
- (4) The reference in this section to overseeing other agencies in the detection or investigation of officer misconduct is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it.
- (5) In managing or overseeing other agencies for the purposes of this section, the Commission does not have a power of control or direction, and any such management or oversight is to be achieved by agreement. However, it is the duty of members of the NSW Police Force and Crime Commission officers to co-operate with the Commission in the exercise of its management and oversight functions and any other functions of the Commission.
- (6) However, nothing in subsection (2), (3), (4) or (5):
 - (a) affects the capacity of the Commission to exercise any of the functions referred to in subsection (1), or
 - (b) provides a ground for any appeal or other legal or administrative challenge to the exercise by the Commission of any of those functions.

Sections 13A – 13C were repealed.

"*Officer misconduct*" is defined in the *PIC Act* as follows:

officer misconduct means police misconduct, corrupt conduct of an administrative officer or misconduct of a Crime Commission officer.

INVESTIGATIONS

In matters where the Commission determines to carry out an investigation (whether or not in the nature of a preliminary investigation), it has a wide range of powers at its disposal in order to acquire information. For example, the Commission may:

- require public officials and public authorities to produce statements of information (s 25);
- require any person (whether or not a public official or public authority) to produce documents or other things (s 26);
- enter public premises (s 29);
- obtain search warrants (s 45);
- obtain warrants under the *Telecommunications (Interception and Access) Act 1979*;
- obtain warrants under the *Surveillance Devices Act 2007*; and
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private (s 38).

REPORTS TO PARLIAMENT

WHEN DOES THE COMMISSION SUBMIT A REPORT TO PARLIAMENT REGARDING AN INVESTIGATION?

In circumstances where the Commission has conducted a public hearing for the purposes of an investigation, the Commission must prepare a report to Parliament in respect of the matter to which the public hearing related (s 96(2)). The Commission may also prepare a report to Parliament in relation to any other matter that has been, or is, the subject of an investigation (s 96(1)). A report to Parliament must be furnished to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred (s 96(3), (4) and (5)).

COMPONENTS OF A REPORT TO PARLIAMENT REGARDING AN INVESTIGATION

A report to Parliament in relation to an investigation will generally contain a number of components. Under s 97(1) of the *PIC Act* the Commission is authorised to include statements as to any of its assessments, opinions and recommendations, and the reasons for any of its assessments, opinions and recommendations. The Commission must then, in respect of each “*affected*” person, make a statement as to whether or not consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences and, in the case of police officers, certain other forms of disciplinary action (s 97(2)). 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 concerned*” (s 97(3)).

THE COMMISSION’S APPROACH TO THE ASSESSMENT OF INFORMATION AND EVIDENCE

In forming the assessments, opinions and recommendations referred to above, the Commission may not make a finding or form an opinion that a specified person is guilty of, or has committed, is committing, or is about to commit a criminal or disciplinary offence (s 16(2)(a)). The Commission may form opinions as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (s 16(1)(a)). However it is important to bear in mind that the Commission is an investigative agency, it is not a court or tribunal in the sense that it may determine whether a person has committed a criminal or disciplinary offence.

Accordingly the *PIC Act* deems permissible opinions concerning police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer not to be findings or opinions that the person is guilty of or has committed, or is committing or is about to commit a criminal offence (s 16(3)). That said, the Commission recognises that such an opinion may in some circumstances take on the appearance of a finding of a court or tribunal. The Commission’s approach is, as far as possible, to avoid the expression of opinions that may be characterised as findings by a court.

The standard of proof applied by the Commission to the formation of an opinion as to whether a person has engaged in police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer is the balance of probabilities. Such an opinion will be reached having regard to the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336; that is, the more serious the matters under consideration, the more stringent will be the requisite degree of satisfaction.

RECOMMENDATIONS AND OPINIONS THAT CONSIDERATION BE GIVEN TO THE PROSECUTION OF A PERSON FOR A CRIMINAL OR DISCIPLINARY OFFENCE

If, in the Commission's opinion, the available evidence is sufficient to establish a *prima facie* case in respect of a criminal or disciplinary offence then, except in one very limited circumstance discussed below, it is the Commission's approach to recommend that consideration should be given to the prosecution of a person for a specified criminal or disciplinary offence.⁷³⁹ Such a recommendation will be made to the relevant prosecutorial authority, for example, the New South Wales Director of Public Prosecutions. The Commission will not have regard to considerations, such as whether there is a reasonable prospect of conviction, or public policy considerations when deciding whether to make such a recommendation. These, and other discretionary considerations, are appropriately matters for the relevant prosecutorial authority. That said, the Commission may express opinions as to the veracity of evidence received from individual witnesses.

The circumstances in which the Commission may, in the exercise of its discretion, decline to furnish or defer furnishing a brief of evidence to the relevant prosecutorial authority are:

- where it is considered that to do so is likely to be counterproductive to the Commission's pursuit of its principal statutory functions; or
- where the relevant person has already been considered for or has been prosecuted in relation to the same, or substantially the same, subject matter and evidence, and it would be unnecessary or duplicitous for the

⁷³⁹ The power of the Commissioner of Police to refer a departmental charge against a police officer for hearing by the Police Tribunal was repealed on 8 March 1999. Since that date, the powers and obligations of the Commission to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (s 16(1)(b), 97(2)(b)) have no effective application to police officers. This is so even for police misconduct that occurred before this date. Those powers and obligations may however have application to other public officials.

Commission to make a recommendation that consideration should be given to additional prosecutions.

STATEMENTS REGARDING “AFFECTED PERSONS”

Section 97(2) of the *PIC Act* requires that 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) the prosecution of a person for a specified criminal offence,
- (b) the taking of action against the person for a specified disciplinary offence,
- (c) the taking of action (including the making of an order under s 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 or otherwise terminating the services of the police officer,
- (d) the taking of reviewable action within the meaning of s 173 of the *Police Act 1990* against the person as a police officer.

OTHER TYPES OF RECOMMENDATIONS AND OPINIONS

If the Commission considers it appropriate in the circumstances, a report to Parliament may also include recommendations for the taking of other action. Such recommendations may, for example, relate to the need for law reform or for changes to policies and procedures affecting the way in which police, Crime Commission officers, or other persons carry out their respective duties and responsibilities.

APPENDIX 2 – LIST OF WITNESSES

Witness	Date of Evidence (* denotes private hearing)
Corey Barker	19 February 2013
	20 February 2013
	1 March 2013
Vincent Boss	1 March 2013
Tiffany Craig	18 February 2013
Emma Crook	18 February 2013
Constable Ryan Eckersley	27 February 2013
Senior Constable Kelly Haines	25 February 2013
	26 February 2013
Jay Healey	18 February 2013
Senior Constable David Hill	27 February 2013
	28 February 2013
Sarah Kemp	18 February 2013
Robert McCubben	25 February 2013
Constable Luke Mewing	15 November 2012*
	20 February 2013
	21 February 2013
Byron Nolan	18 February 2013
	19 February 2013
Senior Constable Gregory Ryan	26 February 2013
	27 February 2013
Angelique Sines	20 February 2013
Shaun Vidler	18 February 2013
Constable Lee Walmsley	27 February 2013
Senior Constable Mark Woolven	15 November 2012*
	26 February 2013



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