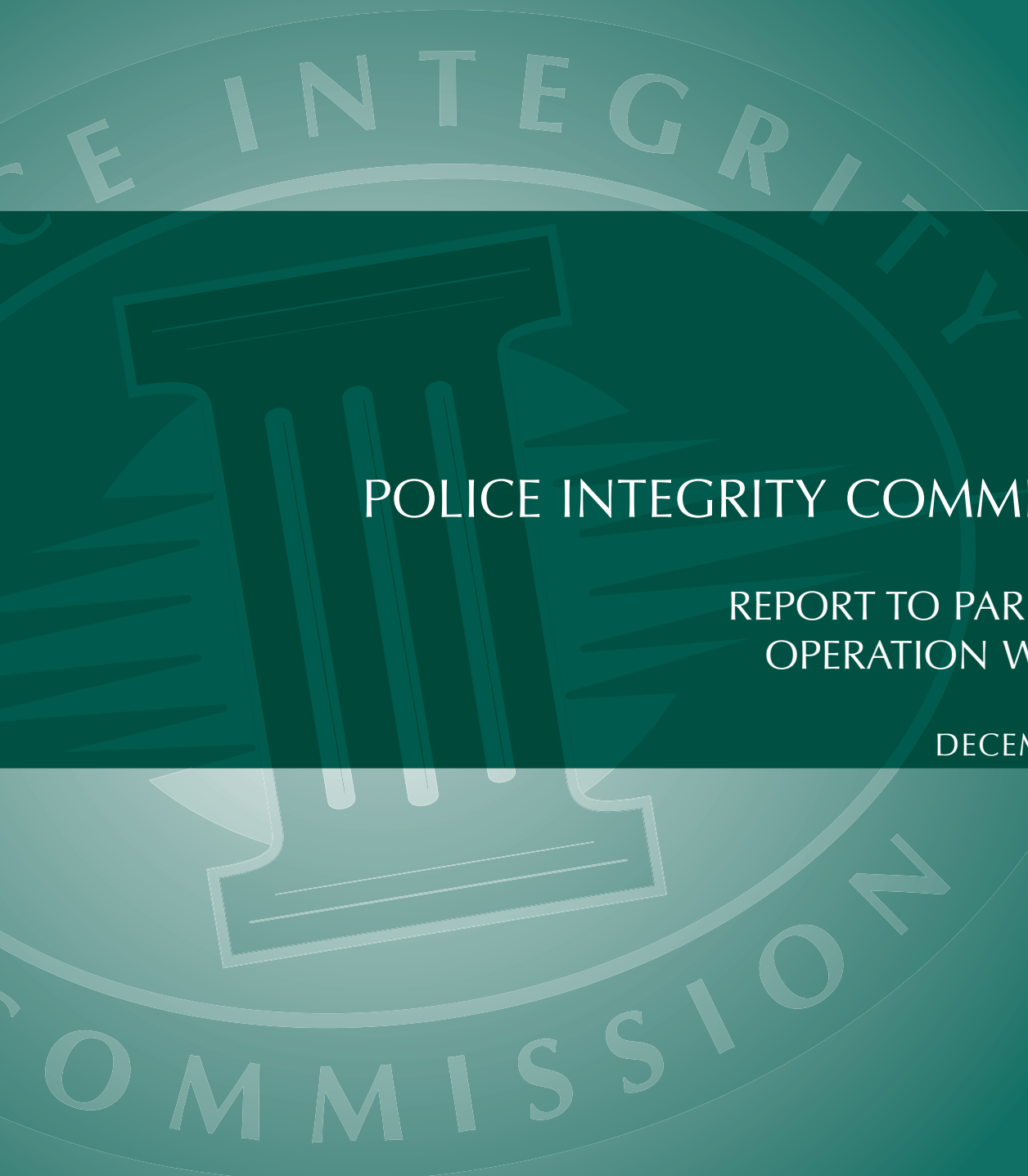


POLICE INTEGRITY COMMISSION

REPORT TO PARLIAMENT
OPERATION WHISTLER

DECEMBER 2005

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ISBN 1 74003 140 7
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President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon John Aquilina MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Madam President and Mr Speaker

In accordance with section 96(2) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Whistler, 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



T P Griffin
Commissioner

December 2005

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TABLE OF CONTENTS

Executive Summary ..... **i**
The Evidence i
Affected Persons xii
Procedural Matters xiv
1. Introduction **1**
The Witnesses 2
This Report 10
2. The Injuries Received by Hathaway **13**
How the Injuries were Sustained 15
Jackson Caused Hathaway's Injuries 23
3. Management of Critical Incidents **27**
Hathaway's Arrest - A Critical Incident 30
Briggs Failed to Treat Incident as Critical Incident 40
Murphy Failed to Treat Incident as Critical Incident 45
4. Further Review of Murphy's Actions **59**
No Record of Jackson's Admissions 59
Destruction of the Crime Scene 61
Information Provided to Bradshaw 64
The Situation Report (Exhibit 18) 68
5. The Conduct of the Other Officers **73**
Constable Julie Philpott 73
Probationary Constable Amanda Deissel 74
Senior Constable Melinda Jennings 76
Former Inspector Timothy O'Neill 80
Sergeant Christopher Kelly 83
6. The Finding of the Knife **87**
7. The Prosecution of Hathaway **93**
8. The Arrest of WH-1 ..... **103**
The Evidence of WH-1 and WH-2 104
The Police Version of Events 106
The Court Proceedings 111
9. Affected Persons **117**
Detective Senior Constable Timothy Scott Briggs 120
Probationary Constable Amanda Rae Deissel 121
Senior Constable Fiona Maree Duncan 121
Senior Constable Christopher John Jackson 122
Senior Constable Melinda Maree Jennings 124
Sergeant Christopher John Kelly 125
Sergeant Virginia Anne Morgan 125
Inspector Thomas Patrick Murphy 126

Former Inspector Timothy Joseph O'Neill 127
Constable Julie Therese Philpott 128
10. Procedural Matters 131
Police Prosecutors 131
Critical Incident Guidelines 135
Statement and Note Taking 138
Appendices 141

EXECUTIVE SUMMARY

Operation Whistler was an investigation by the Police Integrity Commission into allegations of use of excessive force by some NSW Police officers attached to the Southern Region of NSW Police. The investigation focussed on the events surrounding the arrest of Allan Frederick Hathaway (Hathaway) in Wagga Wagga, NSW, on 6 February 2003 by Senior Constable Christopher John Jackson (Jackson) and other police. In addition the events surrounding the arrest of another person, WH-1, on 16 February 2002 in Wagga Wagga by Jackson were also investigated.

The Commission's investigation commenced in mid 2004 after information was referred to the Commission by Magistrate W. Pierce. Magistrate Pierce presided over the Wagga Wagga Local Court proceedings brought against Hathaway as a result of the incident on 6 February 2003. Hathaway had been charged with a number of offences. He pleaded guilty to charges relating to the use of an unregistered and uninsured vehicle, driving whilst disqualified and to one charge of resisting arrest. He was found not guilty of offences of possessing a weapon to avoid apprehension, breaking and entering a building, assaulting police and resisting arrest.

In his decision Magistrate Pierce was critical of NSW Police. He said that certain officers had given untruthful evidence, that Hathaway could not have received the injuries he did in the manner which was described by police in evidence, and that a knife found at the scene was almost certainly planted there by a NSW Police officer.

After initial inquiries into the Hathaway matter the Commission's investigation was widened to include the investigation of other incidents where there were allegations of the use of excessive force by NSW Police officers in the Southern Region. This Report concerns only one of those matters in addition to the Hathaway matter (the WH-1 matter).

In February 2005 a public hearing commenced. Evidence was heard over eight days. The first three days of the public hearing, 21-23 February 2005, were held in Wagga Wagga. Subsequently the evidence was completed in Sydney. This was the first time that the Commission has held hearings outside Sydney. Twenty-one witnesses gave evidence. In addition to Jackson and Hathaway, 12 serving NSW Police officers, one former officer and six civilian witnesses gave evidence. Two of the civilian witnesses gave evidence in private hearings.

THE EVIDENCE

THE INJURIES RECEIVED BY HATHAWAY

Hathaway was arrested following a pursuit by NSW Police in a house at 79 Kincaid Street, Wagga Wagga (the Property). On that day Hathaway was seen by police officers to leave a store in Wagga Wagga and drive away in an unregistered vehicle. Police commenced pursuit of Hathaway and, after he fled from the vehicle,

continued the pursuit on foot. In an attempt to hide from police Hathaway entered the Property and hid in a bedroom.

Jackson was the officer who located Hathaway in the bedroom of the Property. He was alone at the time. A struggle ensued between them which resulted in a single bed in the room being overturned. In evidence Jackson admitted to using Oleoresin Capsicum Defensive Spray (OC spray) and his police baton during the struggle in his attempt to arrest Hathaway. He admitted to striking Hathaway three times with the baton but denied ever striking him on his head.

As a result of the events of 6 February 2003 Hathaway suffered severe injuries to his face including a laceration over his right cheek, an extremely comminuted fracture of his right maxilla and a fractured mandible. In addition he suffered a fractured right ulna (arm), a fractured finger on his right hand, bruising to the middle of his back and multiple minor lacerations to his feet. He was transferred from Wagga Wagga to Albury Base Hospital and underwent surgery to his face. He spent several weeks in hospital as a result of his injuries. He requires ongoing treatment for his injuries.

Hathaway's evidence was that he was hiding under the bed when Jackson found him. He said that Jackson threatened to shoot him and demanded that he get out from under the bed. When Hathaway didn't respond Jackson lifted the bed off him. Hathaway said Jackson sprayed him with OC spray before commencing hitting him with the baton to his arms, face and legs.

Inspector Murphy (Murphy) was the Duty Officer on duty for that day with responsibility for operational matters. He went to the Property after being told of the incident by Inspector O'Neill (O'Neill), the Duty Officer on duty at Wagga Wagga Police Station. O'Neill telephoned Murphy after observing Hathaway on Hathaway's arrival at the Police Station. Murphy said that on his arrival at the Property he had a conversation with Jackson during which Jackson admitted to him that the injuries to Hathaway had been caused during the altercation with the bed, by Jackson pushing the bed onto Hathaway.

In his notebook, his court statement, his interview with a "Critical Incident Review Team" the day after the incident occurred, and his evidence to the Local Court Jackson gave differing versions of what took place in the bedroom. The gist of his evidence was, however, that he was unable to explain how Hathaway's injuries had occurred.

In his evidence before the Commission Jackson initially said he was unable to answer questions directed at the link between Hathaway's injuries and his conduct. Later he put forward two possibilities. The first being that the injuries had been caused by Jackson lifting the bed off himself and throwing it towards Hathaway, and the second being that Hathaway had already incurred the injuries before entering the house. Jackson conceded that it was possible that a baton strike had broken Hathaway's arm. Ultimately he conceded that he had admitted to Murphy that Hathaway's facial injuries were caused when he pushed the bed towards Hathaway.

The Commission is of the opinion that Hathaway's injuries, with the exception of the lacerations to his hands and feet, were caused by Jackson. Specifically that the injuries were caused by blows from Jackson's baton and that the use of force by Jackson was excessive. The Commission is also of the opinion that there is no credible evidence that suggests that Hathaway did, or said, anything in the bedroom to justify the injuries that were inflicted upon him.

MANAGEMENT OF CRITICAL INCIDENTS

Hathaway's Arrest – A Critical Incident

In July 2002, NSW Police issued *"Guidelines for the management and investigation of critical incidents"* (the Guidelines), the purpose of which was to provide guidance for police officers in dealing with the investigation and review of critical incidents. The Guidelines set out in detail how critical incidents are to be managed and the roles and responsibilities of each of the officers attending the scene.

The definition of Critical Incidents as set out in the Guidelines includes incidents involving serious injury arising from the use of police issue appointments, or from a police operation, which can include any operation intended to apprehend a person or contain or restrain a person. The Guidelines define *"serious injury"* as one that would normally require emergency admission to hospital and significant medical treatment. The opening section of the Guidelines states that the Guidelines are not a replacement for *"the application of sound common sense and good judgement expected of experienced police officers"*.

The Commission is of the opinion that the scene that confronted the police officers who attended the Property should have put those officers on notice that this was, or was likely to soon become, a critical incident requiring, as a consequence of the Guidelines and common sense, steps to be taken to preserve the scene. Instead Murphy, without waiting for a full assessment of Hathaway's condition, made the decision not to declare the incident a critical incident. His explanation for not declaring a critical incident was that such a declaration required an *"emergency admission"* to hospital.

A critical incident was not declared until sometime during the afternoon of 6 February 2003**.** By that time, a number of events had taken place that made a thorough, vigorous, and independent investigation of what had occurred within the bedroom at the Property impossible. Murphy and Detective Senior Constable Briggs were the senior officers at the scene and made the decisions that prevented a proper investigation of the incident.

Briggs Failed to treat the Incident as a Critical Incident

Detective Senior Constable Briggs (Briggs) was the officer in charge of the investigation into the events of 6 February 2003. He was the most senior officer to first arrive at the scene or *"First Officer at the Scene"* as defined in the Guidelines. Briggs maintained, in evidence, that he took no part in deciding whether to declare a critical incident.

Even if Briggs was not alerted to the possibility that the incident was a critical incident he should have recognised that the incident was a serious incident or crime scene and acted accordingly. He took none of the steps required of the first officer at the scene of a serious incident, including preserving the scene.

Briggs was unable to give an explanation as to why he failed to take any appropriate action except to say that he failed to appreciate the seriousness of the situation. He agreed that there was no time pressure to clean up the scene but that he accepted without question Murphy's decision to have the bedroom cleaned by commercial cleaners as a matter of urgency.

Murphy Failed to Treat the Incident as a Critical Incident

The evidence gives rise to the compelling inference that Murphy did not immediately declare the matter to be a critical incident because he was more concerned to conceal misconduct on the part of Jackson. None of the decisions and actions by Murphy on that day are consistent with proper policing, appropriate investigation of crime and in particular the investigation of an incident where a fellow police officer may have overstepped the line.

Murphy sought to explain his actions as an error of judgment. However in the Commission's opinion there are particular matters that are inconsistent with a mere error of judgment. This is especially so when those matters are viewed in the context of Murphy's knowledge that Jackson had admitted to him that Hathaway's injuries had been caused by Jackson, and that Hathaway had been taken to hospital for treatment.

Murphy failed to call the matter a critical incident. Significantly Murphy spoke to the Local Area Commander, Superintendent Bradshaw (Bradshaw) twice by telephone during the day in relation to the incident but, despite his belief that the matter had the potential to become a critical incident, he informed Bradshaw initially that the matter was not a critical incident and later that the situation had not changed. Bradshaw was not present for any of the events in question because he was absent from Wagga Wagga on that day, attending to duties in Junee.

If Murphy had treated the matter as a critical incident he would have been required to fulfill the role of Duty Officer in attendance at the scene. It could be said that because the situation was not identified as a critical incident then Murphy was under no obligation to fulfil these duties, however, it should be noted that the duties as detailed in the Guidelines reflect the first principles of sound policing when dealing with any crime or incident scene. As an experienced officer Murphy should have been well aware of both the principles and what was required of him.

Murphy's failure to apply those principles had the following results: the scene was not secured; the involved officers were able to speak to each other and to other witnesses; and they did not immediately and independently record their observations in their notebooks.

The only action taken by Murphy to record the scene was to organise for Senior Constable McAlister (McAlister), Probationary Constable Deissel (Deissel) and Constable Philpott (Philpott) to photograph the scene. None of those officers was trained in forensic photography.

FURTHER REVIEW OF MURPHY'S ACTIONS

No Record of Jackson's admissions

Murphy gave evidence that Jackson admitted to him that Hathaway's injuries were caused by Jackson during the altercation with the bed. Jackson also ultimately conceded to the Commission that he had told Murphy that the injuries were caused by him pushing the bed onto Hathaway. Despite this Murphy made no reference to Jackson's admission in either his notebook or his duty book. His duty book does make reference to the fact that another officer Constable Holmes (Holmes) had apparently observed Hathaway to have facial injuries when he entered the Property.

Murphy was interviewed on 17 February 2003 by the Critical Incident Investigation Team. At no time during the interview did he make any mention of the fact that Jackson had admitted to him that he had caused Hathaway's injuries.

Destruction of the Crime Scene

Within less than one hour after arriving at the Property, Murphy had organised for professional cleaners to attend for the purpose of cleaning the blood from the bedroom. Soon after commencing the cleaning they located a knife in the bedroom. Cleaning was stopped while further photographs could be taken and the knife was bagged and taken to the Police Station. Cleaning then recommenced.

Murphy's decision to have the bedroom cleaned and the speed at which the decision was implemented meant that the crime scene was destroyed. The effect of this decision was to effectively conceal Jackson's conduct by preventing a thorough investigation of the events.

In evidence to the Commission Murphy initially denied that he had approached the cleaning of the bedroom as a matter of urgency. However when his attention was drawn to his interview with the Critical Incident Investigation Team, in which he had stated that the cleaning was organised as a matter of urgency, he agreed that he had treated the cleaning as urgent. His explanation was that this was the first time he had been involved in an incident where blood had been spilt in a house as a direct result of police intervention and where the owners had no relationship to the incident or the person, and he was concerned about damage to the carpet. He denied that he was attempting to cover up Jackson's actions.

Information Provided to Bradshaw

There are a number of entries in both Murphy's notebook and duty book that suggest that critical decisions were endorsed by Bradshaw during the course of the day or, at the very least, that Bradshaw was kept fully informed.

Bradshaw said that in the first conversation he had with Murphy on 6 February 2003 although Hathaway's injuries were discussed Murphy did not convey that the injuries were serious. Bradshaw could not recall Murphy mentioning anything to him about the injuries arising from the use of a police baton, or as the result of application of force, by a police officer.

In the second conversation that day between Bradshaw and Murphy, Murphy informed Bradshaw that there had been no change in relation to the injuries and that the matter was not a critical incident. Murphy did not inform Bradshaw that Hathaway had been taken to hospital.

In that second conversation Murphy sought Bradshaw's endorsement to have the house cleaned. Although Bradshaw had been informed that there was blood in the bedroom the impression he gained was that the blood was from hands or footprints. When Bradshaw was shown the photographs of the blood in the bedroom he said that the photographs depicted a far more serious situation than had been his understanding at the time and that, had he been aware of the seriousness of the situation, he would not have endorsed the cleaning of the bedroom.

Murphy did not inform Bradshaw that the knife was discovered and consequently Bradshaw did not become aware of that development until his return to Wagga Wagga late in the afternoon of 6 February 2003. Although Bradshaw could recall a third conversation with Murphy during the afternoon in which they discussed that the injuries were now serious and that a critical incident team would be instigated, he said that no mention was made of the knife.

Murphy totally rejected Bradshaw's evidence that he, Bradshaw, had not found out about the knife until his return to Wagga Wagga in the late afternoon. Murphy said he had informed Bradshaw about the knife during the second telephone call. When it was pointed out to Murphy that the second telephone call was prior to the discovery of the knife Murphy claimed he must have spoken to Bradshaw later in the afternoon.

The Situation Report (Exhibit 18)

The Situation Report prepared by Murphy at 2.00 p.m. on 6 February 2003 is the piece of evidence that most strongly supports a finding that Murphy's conduct was directed to concealing possible misconduct on the part of Jackson. In the light of the Situation Report it is difficult to accept Murphy's evidence that his decisions on the day were attributable to a bad, or poor, decision and nothing else.

The Situation Report purports to address the *"Issue"* of the *"Arrest of Allan Frederick Hathaway ... - injuries sustained during arrest"*. However it makes no

reference to Murphy's knowledge that Jackson had admitted causing significant injuries to Hathaway. At the end under the heading *"Comment"* the Report states that inquiries from police involved in the pursuit revealed that Hathaway was seen with facial injuries prior to entering the Property. Significantly the Report makes no mention of the cleaning of the Property.

Murphy's evidence to the Commission about the Situation Report was unconvincing. He agreed that he had failed to disclose Jackson's admission but rejected the suggestion that he had done this in an attempt to cover Jackson's possible misconduct. Murphy did not agree that the entry in the Report was misleading, and said he had just forgotten to put the information into the Report and that there was nothing sinister in the omission. Given all the circumstances and Jackson's admission to Murphy, the Commission does not accept Murphy's explanation for the omission.

THE CONDUCT OF THE OTHER OFFICERS

The Commission is of the opinion that there is insufficient evidence to form an opinion that police misconduct occurred in relation to any of the other officers in relation to their actions, or inaction, on 6 February 2003. Unlike Briggs and Murphy, none of these officers assumed, or were required to assume, roles pursuant to the Guidelines.

The officers who were present at the Property, together with Jennings and O'Neill, should have realised that they were potentially dealing with a critical incident, and that certain action and inaction by Briggs and Murphy was inappropriate. It is recognised, however, that junior officers do not have responsibility for making decisions such as calling a critical incident and therefore those officers were entitled to rely on their senior officers to make the appropriate decisions.

However, the failure of a number of the officers, in particular Philpott, Deissel and Jennings, to properly record the incident in accordance with NSW Police procedure and the manner in which they gave evidence before the Commission is deserving of comment.

O'Neill, of all the involved officers appears, at an early stage, to have at least realised the seriousness of the situation, including the fact that Hathaway's injuries might have been caused by a police officer, and the possibility that the matter would become a critical incident. Although Murphy and O'Neill were both rostered as duty officers on that day it was Murphy's responsibility to make all the operational decisions, and O'Neill did not interfere with Murphy's decisions or put any pressure on him to declare the incident a critical incident.

O'Neill did not criticise Murphy's handling of the incident. He did concede however that had he been in the situation where he saw both the crime scene and Hathaway's injuries he would not have made the decision to have the Property cleaned.

Sergeant Christopher Kelly (Kelly) came forward in the second week of the hearing. He was the shift supervisor rostered on duty on 6 February 2003. Prior to his coming forward the Commission was unaware of his involvement in the incident.

Kelly's motivation appears to have been loyalty to Murphy, whom he regards as a friend. Kelly was prepared to endorse decisions taken by Murphy even where Murphy had acknowledged that his decisions were flawed. Some of Kelly's evidence was illogical and the Commission is of the opinion that it is possible that he had no first-hand knowledge of any of the significant matters in respect of which he gave evidence.

THE FINDING OF THE KNIFE

The Commission is satisfied that Hathaway did not arm himself with a knife following his entry to the Property. Hathaway strongly denied, in evidence both before the Local Court, and before the Commission, that he had taken a knife into the bedroom. There is evidence that corroborates Hathaway's denial.

The owner of the Property gave evidence about his use, cleaning and placement of the knife in a kitchen drawer that morning. Hathaway's account of his movements through the Property did not involve moving towards the area in the kitchen where the owner said he had placed the knife in the drawer. There is no evidence to support the suggestion by the police that Hathaway took the knife from the kitchen drawer to the bedroom.

The officers who took photographs of the scene found no blood in the kitchen apart from one spot of blood on the front of the microwave which is situated on the opposite side of the kitchen to the drawer in which the knife was placed. Jackson gave evidence that he thought the drawers in the kitchen were opened, but not ransacked, however there is no other evidence to support the claim that the drawers and cupboards were disturbed in any way.

No fingerprints, blood or DNA were found on the knife, to link the knife to Hathaway. On that day he had injuries to his hands and feet from which he was bleeding, and he was sweating profusely. The photographs clearly show that on that day Hathaway was leaving blood smears where he walked and on objects he touched. In the circumstances it is very unusual that there was no biological trace to link Hathaway to the knife.

The Commission is of the opinion that one of the officers who attended at the Property on 6 February 2003 planted the knife in the bedroom. Both Murphy and Bradshaw all but conceded this. Because the Guidelines were not followed there were a number of officers who, in the course of the day, were in a position to plant the knife in the bedroom. The evidence, however, falls short of satisfying the Commission as to the identity of the particular officer. It is of concern that those involved in the prosecution of Hathaway thought it was appropriate to persist with the charges related to the knife in addition to the other charges.

THE PROSECUTION OF HATHAWAY

The prosecution of Hathaway in the Wagga Wagga Local Court commenced in December 2003. After two days of evidence the proceedings were adjourned until March 2004. The first day of the proceedings was spent dealing with the failure by NSW Police to produce the Critical Incident Investigation File in answer to a subpoena, served by Hathaway's representative. Although NSW Police resisted production of the Critical Incident Investigation File the magistrate found there was an overwhelming case for Hathaway's representative to have access to it.

The File contained information about Hathaway's injuries, medical reports and the custody records, none of which were included in the NSW Police brief of evidence against Hathaway.

The NSW Police prosecution of Hathaway reveals a number of features that suggest that the prosecution may have been conducted otherwise than in accordance with the prosecutor's duty to assist the Court in determining the truth. The matters of concern are as follows:

(a) NSW Police did not produce the documents the subject of the subpoena. Had they wanted to claim privilege it would have been appropriate to have provided the documents in a sealed envelope and then presented their arguments.

(b) The view was apparently taken by the prosecutor, Sergeant Morgan (Morgan) that documents forming part of the Critical Incident Investigation were *"privileged"* under Part 8A of the *Police Act 1990* and such privilege over-rode any duty of disclosure to Hathaway.

(c) NSW Police considered it unnecessary to supply to Hathaway, as part of the prosecution brief, medical evidence that had been obtained during the Critical Incident Investigation even though that evidence supported Hathaway's case that he had been assaulted by Jackson.

(d) The evidence that indicated there was no forensic link between Hathaway and the knife was not supplied to Hathaway as part of the prosecution brief.

(e) Between 11 December 2003 and the recommencement of the proceedings on 22 March 2004, no basic inquiries were carried out by Morgan to test the veracity of the prosecution case and, in particular, whether it was appropriate to proceed in relation to those charges that were being defended.

It was not Morgan's decision to resist the subpoena but rather the decision of the subpoena section of NSW Police in Sydney. However she was of the belief that the documents contained in the Critical Incident Investigation File were not admissible because they were part of an internal police investigation. Because of her belief about admissibility she did not take any steps to satisfy herself as to whether the material the subject of the subpoena was relevant.

During the Commission's hearing Counsel for the NSW Police Commissioner objected, on a number of grounds, to the questioning of Morgan in relation to her

failure to make inquiries as to the contents of the Critical Incident Investigation File. The basis of the objections was the application of Part 8A of the *Police Act 1990* and specifically section 170 of the *Police Act 1990,* and the relationship between a Critical Incident Investigation and an Internal Affairs Investigation.

The Commission is of the opinion that the position adopted by Morgan, and Counsel for the NSW Police Commissioner, during the hearing is misconceived. Part 8A of the *Police Act 1990* concerns complaints, not Critical Incident Investigations, and while a Critical Incident Investigation might lead to a complaint and an Internal Affairs Investigation, that was not the case in this matter. At the time of the Local Court hearing there had been no complaint by Hathaway about the conduct of the police.

The Critical Incident Investigation File contained a medical report by a doctor at Wagga Wagga Base Hospital, which was consistent with Hathaway's version of what occurred in the bedroom. It is difficult to understand how NSW Police could have come to the view that it was unnecessary to supply that report as part of the prosecution brief.

The forensic report indicating that there was no DNA, fingerprints or blood found on the knife to link it to Hathaway was not served as part of the brief of evidence. It was clearly proper and desirable that that evidence was included in the brief.

Between December 2003, when the Local Court proceedings were adjourned, and March 2004, Morgan failed to make rudimentary inquiries in relation to issues that had arisen. She denied that the reason she had not made any inquiries was because she was a close friend of Jackson.

Morgan conceded in evidence that it was part of her duties as a Police Prosecutor to satisfy herself that there was sufficient admissible evidence to connect a defendant to a crime before proceeding with a prosecution. She was aware that there was no forensic evidence to link Hathaway to the knife but still maintained that the case against him was not weak.

THE ARREST OF WH-1 ON 16 FEBRUARY 2002

WH-1 and WH-2 were students who, on the evening of 16 February 2002, went to Romano's Hotel, Wagga Wagga, after attending a university function. They left the hotel at 2.15 a.m. and, as a result of a *"student prank"* removed their clothes as they walked down the street. They were seen by Inspector O'Neill who was in a police car. WH-1 said that as soon as they saw O'Neill they put their clothes back on. O'Neill stopped the car to talk to them, but WH-1 and WH-2 ran off. O'Neill chased them and he was joined by Senior Constable Duncan (Duncan) and Jackson. WH-2 managed to elude the police. WH-1 however was caught by Jackson.

WH-1 gave evidence that Jackson struck him numerous times with his police baton, on his arms, shoulder, neck and his head. He was arrested and taken to the Police Station where he was charged with wilful and obscene exposure contrary to section 5

of the *Summary Offences Act 1988* and resisting arrest contrary to section 58 of the *Crimes Act 1900.*

A number of the relevant facts were in dispute, at the Commission's hearing, namely the path taken by WH-2 when he ran from police, whether WH-1 resisted arrest in such a way as to justify the use of force by Jackson, and whether Duncan and O'Neill observed WH-1 resisting arrest. It is not in dispute that Jackson used his baton against WH-1 and injured him.

According to the evidence of WH-2 neither Duncan nor O'Neill was in a position to observe WH-1's arrest. However there is a discrepancy between the evidence of WH-1 and WH-2 as to the path they each took when they fled from O'Neill. If WH-1's evidence is accepted then it is possible that the police officers were in a position to observe his arrest. Therefore it is inappropriate to make a finding that the officers could not have observed the arrest.

THE POLICE VERSION OF EVENTS

The evidence of Jackson, O'Neill and Duncan in relation to this incident was not compelling. Although both Duncan and O'Neill said they observed Jackson effecting the arrest, neither made their presence known to him, nor came to his assistance. Jackson's evidence in relation to whether he was alone at the time of the arrest was inconsistent with his statement.

Only Jackson appears to have made his statement contemporaneously with the events. Neither Duncan nor Jackson made any notation about the incident in their notebooks and Duncan's statement was made some months after the incident.

O'Neill denied that WH-1 had made a complaint to him about Jackson's use of the baton but said he knew that WH-1 was unhappy with the way he had been treated.

THE COURT PROCEEDINGS

It is apparent that there was never any question that WH-1 would plead guilty to the offence of wilful and obscene exposure but he made it known from the start that he was determined to defend the "resist arrest" charge. Eventually that charge was withdrawn. The result was recorded in a police letter to WH-1's solicitor which stated that the resisting arrest charge had been withdrawn after an undertaking was given to O'Neill that WH-1 would not make a complaint about Jackson and particularly his use of his baton during the arrest.

O'Neill's evidence about the withdrawal of the charge was unsatisfactory. He claimed that authority had been given to the prosecutor to withdraw the charge before he had any knowledge that that would occur. The Commission is of the opinion that Jackson's evidence as to why the charge was withdrawn was more unsatisfactory than O'Neill's evidence. Jackson said that he had involved himself in the "deal" to save the Court time and because it allowed him to travel to Sydney on

police work that would earn him extra money in the form of several days' worth of travel allowance.

Duncan's evidence, that the charge was withdrawn, because the police did not want to give evidence, may be closer to the truth. However O'Neill denied that that was the reason for withdrawing the charge.

AFFECTED PERSONS

In the Commission's opinion the following persons are affected persons because substantial allegations have been made against them:

- Briggs, Timothy Scott, Detective Senior Constable
- Deissel, Amanda Rae, Probationary Constable
- Duncan, Fiona Maree, Senior Constable
- Jackson, Christopher John, Senior Constable
- Jennings, Melinda Maree, Senior Constable
- Kelly, Christopher John, Sergeant
- Morgan, Virginia Anne, Sergeant
- Murphy, Thomas Patrick, Inspector
- O'Neill, Timothy Joseph, Former Inspector
- Philpott, Julie Therese, Constable

With the exception of O'Neill all the above affected persons are serving NSW Police officers. All gave their evidence after a declaration had been made under section 41 of the Act. The effect of that declaration is that evidence they gave cannot be used against them in civil or criminal proceedings except in relation to offences against the *Police Integrity Commission Act 1996* (the Act).

Briggs - The Commission is of the opinion that Briggs engaged in police misconduct in relation to his involvement in the incident as the officer in charge of the Hathaway investigation or, more relevantly, the first officer at the scene of a serious incident, and in relation to the evidence he gave in the Wagga Wagga Local Court: subsection 16(1)(a) of the Act. The Commission is **not** of the opinion that consideration **should** be given to the prosecution of Briggs for a specified criminal offence. However the Commission is of the opinion that consideration **should** be given to the taking of action against Briggs pursuant to subsection 97(2)(d) of the Act.

Deissel - The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Deissel pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Deissel: subsection 97(4) of the Act.

Duncan - The Commission is not in a position to form an opinion as to whether Duncan engaged in police misconduct in relation to her involvement in the arrest and prosecution of WH-1: subsection 16(1)(a) of the Act. The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Duncan pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act.

Jackson - The Commission is of the opinion that Jackson engaged in police misconduct in relation to his involvement in the Hathaway incident and in relation to the evidence he gave to the Wagga Wagga Local Court and to the Commission: subsection 16(1)(a) of the Act. The Commission is also of the opinion that consideration **should** be given to the prosecution of Jackson for the specified criminal offence of assault occasioning actual bodily harm contrary to section 59 of the *Crimes Act 1900*. In addition the Commission is of the opinion that consideration **should** be given to the prosecution of Jackson for two offences pursuant to section 107 of the *Police Integrity Commission Act 1996*, for giving false and misleading evidence to the Commission.

The Commission is of the opinion that consideration **should** be given to the taking of action against Jackson pursuant to subsection 97(2)(c) of the Act. If such action is not taken then the Commission is of the opinion that consideration should be given to the taking of reviewable action against Jackson pursuant to subsection 97(2)(d) of the Act.

In relation to the arrest of WH-1 the Commission is not in a position to form an opinion as to whether Jackson engaged in police misconduct in relation to the arrest and prosecution of WH-1: subsection 16(1)(a) of the Act. The Commission is **not** of the opinion that, in relation to this incident, consideration **should** be given to the taking of action against Jackson pursuant to section 97(2)(a),(b),(c) or (d) of the Act.

Jennings - The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Jennings pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Jennings: subsection 97(4) of the Act.

Kelly - The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Kelly pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Kelly: subsection 97(4) of the Act.

Morgan - The Commission is not of the opinion that Morgan engaged in police misconduct in relation to her involvement in the prosecution of Hathaway: subsection 16(1)(a) of the Act. The Commission is **not** of the opinion that consideration **should** be given to the prosecution of Morgan for a specified criminal offence or for the taking of action against her pursuant to subsection 97(2)(b)(c) or (d) of the Act.

Murphy - The Commission is of the opinion that Murphy engaged in police misconduct in relation to his handling of the Hathaway incident: subsection 16(1)(a)

of the Act. The Commission is of the opinion that consideration **should** be given to the prosecution of Murphy for the specified criminal offence of perverting the course of justice pursuant to section 319 of the *Crimes Act 1900*. The Commission is also of the opinion that consideration **should** be given to the taking of action against Murphy pursuant to subsection 97(2)(c) or (d) of the Act.

O'Neill was a serving officer at the time of both the Hathaway and the WH-1 incidents. In relation to the Hathaway incident the Commission is of the opinion that he did not engage in police misconduct. The Commission is not in a position to form an opinion as to whether O'Neill engaged in police misconduct in relation to his involvement in the arrest and prosecution of WH-1: subsection 16(1)(a) of the Act. The Commission is **not** of the opinion that consideration **should** be given to the prosecution of O'Neill for a specified criminal offence. O'Neill is no longer a serving NSW Police officer so the question of taking action pursuant to subsections 97(2)(b)(c) and (d) of the Act does not arise.

Philpott - The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Philpott pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Philpott: subsection 97(4) of the Act.

PROCEDURAL MATTERS

POLICE PROSECUTORS

The primary duty of police prosecutors is to the Court. They must act with fairness and impartiality in assisting the Court to attempt to ascertain the truth. The training of police prosecutors by NSW Police emphasises the basic principle that a legal practitioner's primary duty is to the Court, and that this is to be embraced by all police prosecutors, notwithstanding that they are not members of the legal profession.

The NSW Police prosecution of Hathaway was unsatisfactory in several respects. A number of recommendations for improvement in relation to particular issues have been made.

Full Disclosure of All Relevant Material to Defence

Certain relevant documents were omitted from the NSW Police brief of evidence against Hathaway. In particular an expert medical certificate written by a doctor at Wagga Wagga Base Hospital and describing Hathaway's injuries as being consistent with Hathaway's version of what occurred within the bedroom was not included.

It is important that all briefs of evidence delivered to prosecutors and defendants contain full disclosure of all material to which a defendant is entitled. The Commission is aware that issues relating to the duty of disclosure of all relevant materials are well canvassed in the training materials for NSW Police prosecutors

and that adherence to the Office of the Director of Public Prosecutions (ODPP) Prosecution Guidelines is a requirement of NSW Police Prosecutors Standard Operating Procedures. The Commission is of the opinion that NSW Police should give consideration to whether, in the Prosecutor's Training Program, there is sufficient emphasis on the requirement that prosecutors understand the duty of disclosure and the need to adhere to the ODPP Prosecution Guidelines.

Further, the Commission is of the opinion that NSW Police should give consideration to whether there is a need for prosecutors to be better educated on the policies and/or obligations surrounding access to documents relating to internal investigations if they are caught by a subpoena. In particular, whether there is sufficient attention given in the training program to the different nature of documents resulting from a Critical Incident Investigation, as opposed to documents resulting from an Internal Affairs Investigation arising as a result of a complaint made under Part 8A of the *Police Act 1990*.

Sufficiency of Prosecution Briefs

Despite the fact there was little or no direct evidence connecting Hathaway to the knife, NSW Police continued the prosecution of charges relating to the knife. From her evidence it is apparent that Sergeant Morgan, the police prosecutor, never gave serious consideration to the adequacy of the brief against Hathaway.

Trainee police prosecutors are taught that identifying charges that should be withdrawn, is an important task. In addition the NSW Police Prosecutor's Standard Operating Procedures state that, to ensure high standards of briefs are maintained, police prosecutors are to inform their Local Area Commander and the informant of perceived deficiencies in briefs.

NSW Police currently has a system for reviewing briefs of evidence. According to the NSW Police Brief Preparation Guide, October 2004, all briefs are to be reviewed by a Brief Handling Manager. The Brief Preparation Guide provides a ten step process for the review of briefs by a Brief Handling Manager. There is no evidence that the Hathaway brief was reviewed by a Brief Handling Manager. Notwithstanding that there may have been a prima facie case in relation to the knife offences, had the Hathaway brief been reviewed by a Brief Handling Manager and the ten step review process followed, it is probable that doubts would have been raised at an earlier time as to whether there was sufficient evidence to prosecute those offences.

Conflict of Interest

The existence of a friendship between Morgan and Jackson gives rise to questions as to Morgan's objectivity in the Hathaway prosecution. Although Morgan admitted that she and her husband, who is also a member of NSW Police, were close friends of Jackson and his wife, she denied that she had spoken to Jackson in detail about the incident.

The NSW Police Prosecutors Training Program places perhaps less emphasis on conflicts of interest than might be expected. Nevertheless it is categorically stated that conflicts of interest have the potential to seriously undermine the professional credibility of individual police officers and NSW Police and that any conflicts of interest must be disclosed to a senior officer. The Training Program also states that, except in relation to police prosecutors stationed in the country, there should be no occasion where a police prosecutor has a personal or command relationship with a police informant or a witness in a case they are running. Where such a conflict arises arrangements are to be made for the case to be allocated to another police prosecutor or for the Director of Public Prosecutions to take over the case.

Notwithstanding that Morgan was stationed in the country this was clearly a case where the senior manager should have been notified with a view to allocating the case to a different prosecutor. Morgan gave evidence that the re-allocation of the case would have been difficult because there were not enough police prosecutors. However there is no suggestion she ever brought the possibility of a conflict of interest to the attention of her superiors as was her professional obligation.

The Commission recommends that consideration be given to placing greater emphasis on the identification and resolution of potential conflict situations in the Prosecutors Training Course. The Commission acknowledges the difficulties in having appropriate support on hand in country areas, so that in the event of a conflict arising alternative arrangements can be made to ensure police prosecutors fulfil their duties without bias or the appearance of bias.

CRITICAL INCIDENT GUIDELINES

The NSW Police Guidelines for the management and investigation of Critical Incidents (Guidelines) provide *"... guidance for police officers and other people dealing with the timely and professional investigation and review of critical incidents"*. It is clearly stated that the Guidelines are not intended *"...to be a replacement for the application of sound common sense and good judgement expected of experienced police officers"*.

The Guidelines set out in detail the roles and responsibilities of key officers in relation to a number of specifically defined critical incidents, for example death or serious injury arising from the use of police issue appointments and death or serious injury arising from a police operation. In the Hathaway incident the relevant officers failed to carry out the roles required of them.

It is possible that there were a number of reasons for that failure however clarification of two matters in particular should lead to an improvement in the response of all police officers, regardless of rank, to similar situations in the future. The first is clarification of the definition of *"serious injury"* and the second is the clarification of whose decision it is to call an incident a critical incident.

"Serious Injury"

The Guidelines give *"as a guide"* the following as the definition of a *"serious injury"* giving rise to a critical incident:

> … a serious injury is one that would normally require emergency admission to a hospital and significant medical treatment

The senior officers involved in this incident, Briggs, Murphy and O'Neill all gave evidence that the incident did not fall into the definition of a critical incident because the injuries to Hathaway were not, in their opinion, serious enough. They were prepared to argue that because Hathaway's injuries did not require his *"emergency admission"* to hospital the injuries were not serious enough to call the incident a critical incident.

While it is true that the full extent of Hathaway's injuries could not be recognised without x-ray or similar investigations together with expert medical opinion, it could not realistically be in dispute that the actual injuries Hathaway suffered that day were *"serious"* or that they should have been obvious to the officers who saw him.

It is not unknown for people with a serious illness or injury to be treated at hospital without being admitted and then sent home to await surgery or further treatment. It is also true that an injury can be serious even though the person suffering the injury has not lost consciousness or is still able to walk and talk. With this in mind the Commission recommends that NSW Police gives consideration to clarifying the definition of *"serious injury*" in the Guidelines. While not being prescriptive it may be that a definition that excludes the requirement for *"emergency admission to a hospital"* and instead includes a requirement that the injury requires "significant medical treatment" is more appropriate.

The Decision to Call a Critical Incident

In the Hathaway incident neither of the senior officers at the scene was prepared to make the decision to call the matter a critical incident.

The Commission has previously commented, in its Report to Parliament on Operation Saigon in June 2001, on the need to avoid the risk of confusion and uncertainty where procedures allow a choice of options in circumstances where a swift and decisive response is needed. At the time of that Report, June 2001, NSW Police was in the process of reviewing its guidelines for procedures with respect to certain categories of deaths and serious injuries. The Commission was of the view that the draft policy in existence at that time was unsatisfactory because it provided for some overlap, or duplication, of functions between officers. The Commission stated that it was preferable for clear and specific responsibilities to be accorded to individual officers.

It is acknowledged that the current Guidelines do allocate specific tasks to specific officers at the scene of a critical incident. However the Commission is of the opinion that there is still some overlap of responsibility and that this has the potential to cause uncertainty. The Guidelines need to be clear as to whose responsibility it is to call

the critical incident so that the decision is made as early as possible and the appropriate actions taken, for example, the preservation of the scene.

In the Hathaway matter Briggs was the First Officer at the Scene and therefore, according to the Guidelines, was required to notify the Duty Operation Inspector, VKG Sydney, that a critical incident had occurred. Briggs however did not see that decision as his responsibility and deferred to Murphy, the Duty Officer and his senior officer. The Guidelines also state that the Duty Officer is to assume command of the scene until relieved by the Local Area Commander or Senior Investigator.

Although in the Hathaway incident the junior officers were not required to make a decision as to whether the incident was a critical incident because there were more senior officers present, it is still incumbent on every police officer to recognise when an incident is a critical incident. The First Officer at the Scene is defined as *"the most senior officer who first arrives at the scene whatever their rank"*. In some instances this could be a relatively junior police officer.

The Commission recommends that NSW Police should consider the implications of Guidelines requiring all officers to make such a decision when in practice only senior officers ever make such decision. It is not an effective risk management strategy for NSW Police to adopt Guidelines contingent upon the ability to officers to exercise discretionary judgments if officers have not been adequately prepared and empowered to do so.

Forensic Testing of Police Batons

One of the categories of critical incident is death or serious injury resulting from the use of police issue appointments. One of the duties required of the Duty Officer at such an incident is, where the incident involves the discharge of a police firearm, to instruct all police present when the incident occurred to stay at the scene until their firearm has been examined by the Forensic Ballistics Unit. The Guidelines provide a similar requirement in the circumstance of death or serious injury arising from a police operation. Despite the fact that the category of critical incident uses the term "police issue appointments" the Guidelines make no specific mention of the actions to be taken when a police baton, or any other police issue appointment, has been used and caused injury.

Consequently although Hathaway's injuries resulted from the use of Jackson's police issue baton, Jackson's baton was not forensically tested. The Commission suggests that NSW Police reviews the Critical Incident Guidelines and gives consideration to including a requirement that police issue appointments are secured for forensic testing following a critical incident where any appointments have been used, or are suspected of having been used.

STATEMENT AND NOTE TAKING

The evidence revealed that, in relation to the arrests of both Hathaway and WH-1, a number of involved officers had not applied standard practice in relation to note-taking and the preparation of statements. Of further concern is that the evidence

revealed that such practices were not limited to the more junior of the officers concerned, but also included considerably more experienced senior officers.

The deficiencies identified by the Commission included:

- the failure to properly and completely record significant details relating to serious incidents;
- collaboration amongst officers in the preparation of notebook entries and court statements;
- incomplete, and thereby potentially misleading, statements and duty book entries;
- the failure to prepare statements contemporaneously with the relevant incidents or events;
- inconsistencies between the event details recorded in notebook entries and subsequent statements prepared in relation to those same events; and
- the apparently deliberate failure to record information in notebooks and/or statements which was potentially adverse to another officer.

In relation to Critical Incidents, the requirement for officers to immediately and independently record observations in their notebook is an essential part of the Guidelines.

The Commission has commented previously on these issues. In its Report to Parliament on Operations Copper, Triton and Nickel in June 2000 the Commission commented on the undesirability of practices similar to those identified in Whistler. Recommendations were made in that Report aimed at improving practices within NSW Police.

The Commission acknowledges and commends recent NSW Police initiatives in this area such as the Brief Improvement Project, and, in particular, the Brief Preparation Guide. In the Commission's opinion the latter document clearly addresses some of the issues identified in Operation Whistler.

While acknowledging that NSW Police has made improvements, the evidence uncovered in this Operation suggests that NSW Police should assess whether more needs to be done in this area to ensure that officers remain mindful of their basic responsibility to make, as a matter of course, comprehensive independent notes in respect of all relevant incidents to which they are a party or a witness.

Of concern is that the issues which became evident in Operation Whistler may be indicative of the persistence of a culture amongst some members of NSW Police that encourages the "closing of ranks" to protect a fellow officer, and the command, from the repercussions of that officer's improper, or even illegal, actions. To the extent that such a culture persists its elimination of this mentality remains an ongoing challenge for NSW Police.

1. INTRODUCTION

1.1 On 24 March 2004, after a five day hearing, the matter of *Police v Allan Frederick Hathaway* was finalised in the Wagga Wagga Local Court. Magistrate W. Pierce presided over the proceedings, which concerned a number of charges against Allan Hathaway (Hathaway) arising out of an incident that occurred in Wagga Wagga, NSW on 6 February 2003. Hathaway suffered serious injuries during the incident.

1.2 Hathaway pleaded guilty to charges relating to the use of an unregistered and uninsured vehicle, driving whilst disqualified and to one charge of resisting arrest. He was found not guilty of the offences of possessing a weapon to avoid apprehension, breaking and entering a building, assaulting police and resisting arrest.

1.3 In his decision on 24 March 2004 Magistrate Pierce was critical of NSW Police.[1] He said that certain officers had given untruthful evidence, that it was not possible for Hathaway to have received the injuries he did in the manner described in evidence, and that a knife found at the scene was almost certainly planted there by a NSW Police officer. At the conclusion of the hearing Magistrate Pierce referred the matter to the Commission.

1.4 The Commission commenced inquiries, and on 24 August 2004 the matter was declared an investigation under the codename Operation Whistler. Following further inquiries the scope of the investigation was broadened to include the investigation of other incidents where there were allegations of the use of excessive force by NSW Police officers from the Southern Region.

1.5 A public hearing commenced in Wagga Wagga on 21 February 2005 and continued until 23 February 2005. The hearing was then adjourned to Sydney and resumed on 7 March 2005 and concluded on 11 March 2005.

1.6 The scope and purpose of the hearing was:[2]

> To investigate the circumstances relating to the apprehension and detention of Allan Frederick Hathaway on 6 February 2003 and the subsequent prosecution; and
>
> To investigate incidents where it is alleged that there has been improper or excessive use of force by police attached to the Southern Region of New South Wales Police.

1.7 The investigation inquired into two incidents of the alleged use of excessive force by Senior Constable Christopher John Jackson (Jackson). The first related to the Hathaway incident and that investigation inquired into the mechanism of Hathaway's injuries, the finding of the knife following Hathaway's arrest, the management of the incident and the subsequent

[1] Part of Exhibit 44, barcodes 6586446-6584454
[2] PIC Transcript, 21 February 2005, p. 1, Exhibit 1

investigation. In addition to evidence of the use of excessive force, evidence was uncovered of poor decision making, a failure to follow correct procedure both in the failure to preserve the scene and the application of the NSW Police "*Guidelines for the Management and Investigation of Critical Incidents*".[3]

1.8 The second incident related to the alleged use of excessive force by Jackson in relation to the arrest, in February 2002, of a person codenamed WH-1. On the night in question WH-1 and his friend, WH-2, walked naked down a main street in Wagga Wagga as a "student prank". They were seen by Inspector Timothy O'Neill and then chased by Inspector O'Neill, Jackson and Senior Constable Fiona Duncan when they attempted to flee. WH-2 was not caught, however, WH-1 was arrested by Jackson, who hit him numerous times on his arms, head and neck with his police baton. WH-1 suffered extensive bruising as a result of the baton strikes. He was charged with wilful and obscene exposure and resisting arrest. He later pleaded guilty to the charge of wilful and obscene exposure. The charge of resisting arrest was withdrawn after WH-1 agreed not to make a complaint against Jackson for the use of excessive force.

1.9 In relation to this second incident the Commission's investigation inquired into the circumstances of the arrest of WH-1 and the withdrawal of the charge of resisting arrest. The evidence in relation to this incident was ultimately inconclusive due to an inconsistency in the evidence of WH-1 and WH-2 in one important respect, and the lack of recall of the details by the involved officers.

THE WITNESSES

1.10 Nineteen witnesses gave evidence during the public hearing. Of these, 13 were serving NSW Police officers and one was a former officer. The other five witnesses were civilians. Two further witnesses, WH-1 and WH-2, gave evidence at private hearings and edited versions of the transcripts of those hearings were later tendered as exhibits in the public hearing.[4] A short profile of each witness follows.

THE MAIN PARTICIPANTS

Allan Frederick Hathaway

1.11 Hathaway was arrested by NSW Police on 6 February 2003 in a house owned by Mr and Mrs Gaffney at 79 Kincaid Street Wagga Wagga (the Property). Hathaway had entered the Property and attempted to hide from police while being pursued.

[3] PIC Exhibit 54
[4] PIC Exhibits 42 & 43

1.12 As a result of the events of that day, including his arrest, Hathaway suffered the following injuries: laceration over his right cheek; an extremely comminuted fracture of his right maxilla; a fractured mandible; a fractured right ulna; a fractured finger on his right hand; bruising to the middle of his back and multiple minor lacerations to his feet. He underwent surgery to his face and spent several weeks in hospital as a result of this injuries.

Senior Constable Christopher John Jackson

1.13 Senior Constable Jackson joined NSW Police in 1995. He attained the rank of Senior Constable in June 2003. At the time of the incidents examined by the Commission he held the rank of Constable. He has been stationed at Wagga Wagga Police Station, performing general duties, since 1999.

1.14 On the morning of 6 February 2003 Jackson was on bicycle patrol in Wagga Wagga with Constable Philpott. They heard the details of the pursuit of Hathaway over the police radio and rode to the area, Jackson riding faster than Constable Philpott and getting to the area before her. Mr Ken Smith, a neighbour, alerted Jackson to the fact that there was blood in his rear yard and outside toilet.

1.15 Jackson passed through Mr Smith's Property and followed a trail of blood to the [Gaffney] Property. He initially climbed a ladder onto the roof. Jackson then entered the Property and discovered Hathaway hiding in the bedroom. A struggle ensued which resulted in a single bed in the room being turned on its side. In his evidence to the Local Court Jackson admitted spraying Hathaway with Oleoresin Capsicum Defensive Spray (OC spray) and hitting Hathaway with his police baton, although he only admitted to striking him three times and denied striking him on the head.[5]

1.16 Jackson was also the arresting officer of WH-1 on 16 February 2002. WH-1 alleged that Jackson used his baton to hit him numerous times. WH-1 was charged with wilful and obscene exposure and resisting arrest. When the matter came to court an agreement was reached between WH-1 and the police that the resisting arrest charge would be dropped in return for WH-1 agreeing not to pursue a complaint against Jackson in relation to the excessive use of his baton.

Detective Senior Constable Timothy Scott Briggs

1.17 Detective Senior Constable Briggs (Briggs) was the informant in the Hathaway matter. In that capacity he was responsible for gathering the evidence and compiling the brief of evidence against Hathaway.

1.18 Briggs joined NSW Police in 1989. He has been stationed at Wagga Wagga since 1999, initially performing general duties but since June 2001 he has

[5] PIC Exhibit 44

performed criminal investigation. He has been a designated detective since 1999.

1.19 On 6 February 2003 it was Briggs who initiated the pursuit of Hathaway after recognising that he was driving an unregistered vehicle. When Hathaway fled from his vehicle Briggs commenced following him on foot, but did not continue because he did not want to leave the police vehicle unguarded. He returned to his vehicle and continued to drive around in search of Hathaway. When he heard over the police radio that Hathaway had been located he proceeded to the Property. Briggs was in the bedroom when Hathaway was arrested but did not physically assist with the arrest. Briggs attempted to arrange for Crime Scene officers to attend the location and then left the Property. He returned after being notified that a knife had been located.

Inspector Thomas Patrick Murphy

1.20 Inspector Murphy (Murphy) joined NSW Police in 1979 and has held the rank of Inspector since 1999. He has held the position of Duty Officer at Wagga Wagga since late 1999.

1.21 Murphy attended the Property after receiving a telephone call from Inspector O'Neill who was the Duty Officer at Wagga Wagga Police Station that day and had seen Hathaway's injuries at the Police Station. Murphy himself did not see Hathaway before he attended the Property.

1.22 Once at the scene Murphy, after being informed that the Crime Scene team was not able to attend for some hours, arranged for photographs to be taken and for commercial cleaners to clean the Property. When a knife was located in the bedroom he stopped the cleaning and arranged for further photographs to be taken, including photographs of the knife. The cleaning was then recommenced.

THE POLICE WITNESSES

Superintendent Stephen Bradshaw

1.23 At the time of the incidents investigated in Operation Whistler, and when he gave evidence to the Commission, Superintendent Bradshaw (Bradshaw) was the Local Area Commander at Wagga Wagga. He joined NSW Police in 1970, gained the rank of Superintendent in 1998 and was the Local Area Commander at Wagga Wagga from 1998 until 2005.

1.24 Bradshaw gave evidence to the following effect. On 6 February 2003 he was in Junee attending to police business. Although Inspector Murphy contacted him to advise him of the incident Murphy did not, as is explained in detail later in the Report,[6] convey to Bradshaw all the details of the incident, or the seriousness of the incident. For example the amount of blood in the room, the

[6] See paragraphs 4.17-4.30

extent of Hathaway's injuries and the fact that a knife was located at the scene were all matters that Bradshaw was not aware of at the time the decision was made to clean the crime scene.

Constable Gregory James Cox

1.25 Constable Cox (Cox) joined NSW Police in 2001 and has been stationed at Wagga Wagga performing general duties since then. On the morning of 6 February 2003 Cox was in a police vehicle with Senior Constable McAlister. They heard details of the pursuit of Hathaway over the police radio and drove to the area.

1.26 They saw Hathaway when he was on foot and Cox left the vehicle and commenced a foot pursuit. Cox actually caught Hathaway and a struggle ensued. Cox gave evidence that Hathaway kicked him in the groin. Cox said he grabbed Hathaway's shirt but Hathaway managed to wriggle out of the shirt and run away. Cox then lost sight of Hathaway.

1.27 A civilian later directed Cox to the Property. By the time Cox arrived there Hathaway was in the caged police truck. Cox returned to where the shirt had been discarded and retrieved it before returning to the Police Station.

Probationary Constable Amanda Rae Deissel

1.28 Constable Deissel (Deissel) is a Probationary Constable who joined NSW Police in 1998. She has been stationed as Wagga Wagga since then performing general duties. On the morning of 6 February 2003 she was in the Wagga Wagga Police Station and heard of the pursuit of Hathaway over the police radio. She left the Police Station with two other officers and commenced searching the surrounding area. When she heard further messages over the radio she proceeded to the Property. On arrival she entered the bedroom and assisted in handcuffing Hathaway.

1.29 She later assisted with photographing the scene and waited at the Property for the commercial cleaners to arrive. Murphy gave evidence that he had appointed Deissel to maintain a log of the crime scene to record the movements of people coming and going from the scene.[7] Deissel, however, denied in evidence that she had been so instructed and said that there was no attempt made to secure the scene and that she had not been instructed to keep a log of peoples' movements, nor had she kept such a log. She said further that had she been instructed to keep a crime scene log she would have done so.[8]

[7] PIC Transcript, TP Murphy, 23 February 2005, pp. 318-319
[8] PIC Transcript, AR Deissel, 8 March 2005, pp. 420-421

Senior Constable Fiona Maree Duncan

1.30 Senior Constable Duncan (Duncan) joined NSW Police in 1990 and achieved the rank of Senior Constable in 2002. She has been stationed at Wagga Wagga since 2001, performing criminal investigation since 2004. At the time of the arrest of WH-1 she was performing general duties.

1.31 In the early hours of the morning of 16 February 2002 Duncan was on duty at Wagga Wagga Police Station when she heard the radio call from Inspector O'Neill in relation to the pursuit of WH-1 and WH-2. She left the Police Station and commenced chasing WH-2. She was not involved in the arrest of WH-1 although she gave evidence that she observed it.

Senior Constable Raymond Vincent Holmes

1.32 Senior Constable Holmes (Holmes) has been a NSW Police officer since 1989. He attained the rank of Senior Constable in 1995 and has been stationed at Wagga Wagga as a member of the Highway Patrol since 2001.

1.33 On 6 February 2003 he was on duty in the Highway Patrol Office when he heard the radio call about the pursuit of Hathaway. He attended the vicinity and after speaking to a neighbour was directed to the back of the neighbour's premises where he saw blood in the rear yard and outside toilet. He spoke to the occupants of 81 Kincaid Street who said they had seen someone run beside their house. He saw Jackson on the roof of the Property and alerted him to the fact that Hathaway had just run through the area.

1.34 Holmes then returned to his vehicle and was about to leave the area when he heard Constable Philpott's call over the police radio. He then drove to the Property and was directed into the bedroom by the neighbour. Once there he and Jackson struggled with Hathaway to get him to the ground. He then assisted in the arrest of Hathaway. In evidence to the Commission he denied that he observed Hathaway to have facial injuries during the pursuit, and prior to Hathaway entering the Property.[9]

Senior Constable Melinda Maree Jennings

1.35 Senior Constable Jennings (Jennings) joined NSW Police in 1990. She attained the rank of Senior Constable in 1997. She has been stationed in Wagga Wagga since 1992 and while there has performed a number of different roles. On the day of Hathaway's arrest she was the custody officer. She did not attend the Property.

1.36 On Hathaway's arrival at the Police Station Jennings completed the Custody Management Record. She recorded his injuries on the custody records and called an ambulance.

[9] PIC Transcript, RV Holmes, 23 February 2005, p. 380

Sergeant Christopher John Kelly

1.37 Sergeant Kelly (Kelly) joined NSW Police in 1987. He attained the rank of Sergeant in 2001 and has been stationed at Wagga Wagga performing general duties since 2001. On 6 February 2003 he was the Station Supervisor.

1.38 Kelly said he became aware of the pursuit of Hathaway from the calls over the police radio. He attended the Property. By the time he arrived Hathaway had already been arrested and taken to the Police Station. Kelly spoke with Inspector Murphy and inspected the scene. Despite the fact he saw the blood in the bedroom, he gave evidence that he did not consider it to be a crime scene but rather a *"point of arrest*". He said he concurred with Murphy's decision to clean the house as quickly as possible. He did not make a statement or any notes about his involvement in the incident.[10]

Senior Constable Dion Guy McAlister

1.39 Senior Constable McAlister (McAlister) joined NSW Police in 1991. He achieved the rank of Senior Constable in 1996. Since 2000 he has been stationed at Wagga Wagga performing general duties.

1.40 McAlister's evidence was that on the morning of 6 February 2003 he was in a police vehicle with Cox when they heard the pursuit of Hathaway being called over the radio. McAlister saw Hathaway climbing a fence and Cox left the vehicle to pursue Hathaway on foot. For a short period McAlister also pursued Hathaway on foot before returning to his vehicle. After hearing the calls over the police radio from officers at the Property, McAlister entered the Property and the bedroom. He assisted with the arrest of Hathaway.

1.41 McAlister took photographs of the scene after being requested to do so by Murphy. He gave evidence that although he is not a forensically trained photographer he has received some training in photography through a field intelligence officer's course.[11]

1.42 McAlister took photographs everywhere he could see blood present. He did not take any photographs of the kitchen area apart from a photograph of the spot of blood on the microwave oven. After taking the photographs McAlister returned to the Police Station. When the knife was located McAlister returned to the Property and took photographs of the knife.

Sergeant Virginia Anne Morgan

1.43 Sergeant Morgan (Morgan) was the police prosecutor in the Hathaway matter. She has served two separate periods of employment with NSW Police. Morgan originally joined in 1990 and served until 1997. During this period, in 1993, she completed the police prosecutor's course. Morgan rejoined

[10] PIC Transcript, CJ Kelly, 11 March 2003, pp. 793-798
[11] PIC Transcript, DG McAlister, 21 February 2003, p. 40

NSW Police in 2001 and, after a refresher course, has continued to work as a police prosecutor based at Wagga Wagga. She achieved the rank of Sergeant in 2003.

Former Inspector Timothy Joseph O'Neill

1.44 Former Inspector O'Neill (O'Neill) resigned from NSW Police in February 2005. O'Neill joined NSW Police in 1979 and attained the rank of Inspector in 2000. From March 2000 until his resignation in 2005 he was a Duty Officer at Wagga Wagga.

1.45 On 6 February 2003 O'Neill was the Duty Officer rostered on duty at the Police Station. He saw Hathaway's injuries when he was brought into the Police Station and instructed Jennings to call the ambulance. He also telephoned Murphy, who was attending to police duties away from the Police Station, to advise him about the incident and suggest that he attend the scene.

1.46 O'Neill was also involved in the incident in relation to WH-1 and WH-2. On the night of 16 February 2002 he was in a police vehicle when he saw WH-1 and WH-2 walking naked along the street. WH-1 and WH-2 put their clothes on as soon as they saw the police vehicle. O'Neill motioned for them to come over to the car however WH-1 and WH-2 ran off. O'Neill commenced pursuit of WH-2 and gave a call over the police radio for assistance. Duncan and Jackson responded to his call for assistance.

Constable Julie Theresa Philpott

1.47 Constable Philpott (Philpott) joined NSW Police in 1999. She has been stationed at Wagga Wagga performing general duties since that time.

1.48 On 6 February 2003 Philpott was a member of the bicycle patrol and on duty with Jackson. When they heard of the pursuit of Hathaway over the police radio they rode to the area in which he was being chased. Jackson rode ahead of her. After patrolling the area for some time Philpott was informed by Ken Smith, a neighbour, that something was going on at the Property. She entered the Property and followed the noise to the bedroom.

1.49 Philpott's evidence was that she did not see the scuffle between Jackson and Hathaway and did not see Jackson using his baton against Hathaway. She assisted Jackson to arrest Hathaway and used her police radio to alert other police officers that they had located Hathaway. She also used her radio to broadcast their location and request that a caged vehicle come to the scene.

1.50 Once Hathaway was handcuffed she, with Jackson, escorted Hathaway out of the premises and into the police caged vehicle. Later she and Deissel assisted McAlister to take photographs of the scene.

THE CIVILIAN WITNESSES

Mr Craig Anthony Elphick

1.51 Mr Elphick is an employee of the New South Wales Ambulance Service and stationed at Wagga Wagga. On 6 February 2003 he, with another officer, responded to a call to attend the Police Station. Once there he attended to Hathaway. On the day he gave evidence to the Commission Mr Elphick had no independent recollection of attending to Hathaway at the Police Station.

Mr Gary Patrick Gaffney

1.52 Mr Gaffney and his wife are the owners and occupiers of the Property at 79 Kincaid Street Wagga Wagga into which Hathaway ran to hide. On 6 February 2003 Mr Gaffney was at work when he received a telephone call from a police officer informing him that there had been an incident at his home and requesting that he return home to inspect the situation.

1.53 Mr Gaffney returned to the Property. After inspecting the house and particularly the bedroom he was asked whether he was agreeable to having a commercial cleaner brought in to clean the house. Mr Gaffney agreed and then left and returned to work.[12]

1.54 After a short period he was again contacted by police and asked to return to the Property. When he returned he was taken into the bedroom and shown the knife that had been located by the cleaner. After identifying the knife as belonging to him, he returned to work.[13]

Mr Simon Michael Mansfield

1.55 Mr Mansfield is a commercial cleaner who operates a carpet cleaning business with his father in Wagga Wagga. On 6 February 2003 he was contacted by a police officer and asked to quote on a cleaning job where *"there was blood to be cleaned up*". This was the first time that his business had been asked to do police work. Mansfield said that he attended the house, had a look at the situation, agreed on a price with the police officer and then commenced cleaning.[14]

1.56 Soon after he commenced cleaning the bedroom Mansfield discovered the knife. He immediately stopped cleaning and notified the police officer. He waited while the police took some photographs and removed the knife and then completed the cleaning.[15]

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[12] PIC Transcript, GP Gaffney, 22 February 2005, pp. 218-220
[13] PIC Transcript, GP Gaffney, 22 February 2005, pp. 221-222
[14] PIC Transcript, SM Mansfield, 21 February 2005, pp. 100-102
[15] PIC Transcript, SM Mansfield, 21 February 2005, pp. 106-109

Mr Kenneth William Smith

1.57 On 6 February 2003 Mr Smith was living in a house that was next door to the Property. On that day, after hearing police sirens and speaking to a police officer, Mr Smith looked in his back yard and saw that the door of the outside toilet, which was usually closed, was ajar. He investigated and discovered fresh blood in the toilet. After notifying the police of his find he returned to the front of his house and saw Jackson on the roof of the Property. A short time later he heard noises coming from inside the Property and ran, with Philpott into the house and to the bedroom where he saw Hathaway covered in blood, and Jackson. He gave evidence that he left the room soon after because he thought the officers had the situation under control.[16]

WH-1 and WH-2

1.58 On 16 February 2002 Jackson arrested WH-1. The arrest took place after WH-1 and WH-2 removed their clothes and walked in the street as a "student prank". They had been drinking alcohol during the evening and were both affected to some degree by alcohol. When sighted by police they both ran away but Jackson caught WH-1. During the arrest Jackson used his baton to strike WH-1 a number of times around the neck, arms and, according to WH-1, his head. WH-1 suffered numerous bruises as a result of Jackson's use of the baton.

1.59 WH-1 gave evidence that he was going to make a complaint about Jackson's use of the baton however he agreed not to make the complaint after NSW Police agreed to drop the charge of resisting arrest. WH-2 managed to escape and was not arrested.

1.60 WH-1 and WH-2 gave their evidence in private hearings. Edited transcripts of those hearings were later tendered as exhibits in the public hearing.[17]

THIS REPORT

1.61 In this Report, prepared and furnished pursuant to section 96 of the *Police Integrity Commission Act 1996* (the Act), the Commission examines the evidence heard during the public hearing. Evidence from the two private hearings at which WH-1 and WH-2 gave evidence is also discussed where it is relevant to matters considered in the public hearing.

1.62 The Report contains the Commission's assessments and opinions and expresses a view as to whether or not police misconduct has occurred in relation to each incident examined. The Report also contains the Commission's recommendations in respect of those individuals who come within the definition of "affected person" pursuant to subsection 97(3) of the Act.

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[16] PIC Transcript, KW Smith, 22 February 2005, pp. 228-232
[17] PIC Exhibits 42 & 43

1.63 Generally, persons are referred to in this Report, after the first mention of their name, by surname only. This was done in the interests of economy and no discourtesy is intended.

2. THE INJURIES RECEIVED BY HATHAWAY

2.1 Hathaway was arrested at approximately 11.16 a.m. on 6 February 2003. He arrived at Wagga Wagga Police Station at 11.20 a.m. At 12.06 p.m. he was admitted to the Emergency Department at Wagga Wagga Base Hospital.[18] On following day, 7 February 2003, he was transferred to Albury Base Hospital for specialist treatment not available at Wagga Wagga. He was a patient at Albury Base Hospital until 20 February 2003. While there, he was under the care of a specialist oral and maxillofacial surgeon, Dr Hennessy.

2.2 Hathaway was first seen at Wagga Wagga Base Hospital by the Emergency Physician, Dr O'Donagh, who recorded the details of his examination in the hospital records. On 27 February 2003 Dr Kuswanto, a doctor at Wagga Wagga Base Hospital provided a statement[19] to NSW Police in relation to the injuries Hathaway suffered. Dr Kuswanto began her statement by saying that she was responding to a request to *"interpret notes made in relation to the examination of Allan Frederick Hathaway ... on 6th February 2003 ... I carried out a careful inspection of those records"*. She then reported the following:[20]

> … He had a 2cm horizontal laceration on his right cheek, a decreased sensation of the second division of the fifth cranial nerve, right periorbital haematoma. His right eardrum and canal are normal. He had tenderness over right jaw, mild tenderness over his neck, swollen bilateral knees, and contusion to middle of his back, tenderness over right and left arms and hands. His chest was clear and his abdomen was soft and non-tender. He had multiple lacerations to feet.
>
> X-rays showed extensive facial injuries including fracture of right lateral and anterior wall of antrum, depressed fracture of right maxilla, and fracture of mandible; fracture of right ulnar and 4th metacarpal bones. X-ray of cervical spine/ chest/ left arm/ both knees are normal.
>
> CT scan of facial bones revealed an extremely comminuted fracture of the right maxilla with infractions present in the lateral and anterior walls of the maxillary antrum; extensive surgical emphysema within the subcutaneous tissues anterior to this and extending into the orbits ?blow out fracture.

2.3 Dr Kuswanto provided the following summary of Hathaway's injuries:[21]

1. 2cm laceration over right cheek
2. Extremely comminuted fracture of right maxilla.
3. Fracture mandible.
4. Fracture right neck of ulna.
5. Fracture right 4th metacarpal.
6. Contusion to middle of back.
7. Multiple minor lacerations to feet.

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[18] PIC Exhibits 22, 26 & 52
[19] Expert Certificate, Section 177 Evidence Act 1995
[20] PIC Exhibit 33
[21] PIC Exhibit 33

2.4 Dr Kuswanto concluded the statement by expressing the opinion that the injuries were *"... consistent with the stated mechanism of injury"* which had earlier been identified by her as, inter alia, the use of *"batons"*.[22]

2.5 Dr Hennessy, the specialist oral and maxillofacial surgeon who treated Hathaway at Albury Base Hospital recorded the following observations and opinion in relation to Hathaway's injuries and treatment:[23]

> … When I saw him he complained of anaesthesia (numbness) of the right cheek, the right half of the nose and the right half of the upper lip and the upper teeth. He also complained of diplopia (double vision).
>
> He appeared a sad man with loss of the right malar eminence (the elegant convexity of the cheekbone) and he had a sutured right cheek laceration. There was anaesthesia over the distribution of the right infraorbital nerve (numbness as described above) and diplopia on testing as he had claimed.
>
> CTs (computerised x-rays) showed a comminuted (many pieces) right zygomatico orbito maxillary fracture (a fracture of the cheekbone, the associated portions of the upper jaw and the eye socket).
>
> The patient was given all the usual warnings regarding the possibility of blindness, ectropion, the need for a second procedure, infection, removal of plates and screws and mesh, permanent left infraorbital nerve numbness, diplopia and altered facial contour.
>
> Mr Hathaway was taken to theatre on 9 February 2003 and through right temporal (scalp) and blepharoplasty (lower eyelid) approaches the fractures were reduced (placed in their normal position) and the reduction maintained with one six hole titanium micro plate and screws in the infraorbital rim (the strong bony strut beneath the eye). The orbital floor (the paper-thin bone beneath the eye) was explored but the fragments were in good position and did not need any internal fixation.

2.6 Dr Hennessy expressed the following opinion as to the cause of Hathaway's injury:[24]

> An injury such as he sustained is a very typical injury from a low velocity blunt trauma such as a fall, a punch, a kick or a low velocity industrial accident. To perhaps more colloquially explain, this is a typical sort of injury seen from a clash of heads playing football or a blow to the face from a fist during an episode of interpersonal violence.

2.7 In his evidence before the Commission on 11 March 2005, Hathaway gave an outline of the (then) current status of his injuries and likely on-going treatment. He said:[25]

> Q: Can I ask you this: you left hospital after six weeks. Have you had any ongoing treatment in respect of your injuries?
>
> A: Yeah, I had a – yeah, I have. I am just waiting to undergo surgery again, which is to get the plates taken out of me face, out of me face. I have to have a bone graft from me hip to put some bone back in me face and some plates relodged back in me face. I'm having a lot of trouble with me jaw where the plates are.

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[22] PIC Exhibit 33
[23] PIC Exhibit 7
[24] PIC Exhibit 7
[25] PIC Transcript, AF Hathaway, 11 March 2005, p. 821

Q: I see.
A: And I'm going trouble with me eye. I've only had another eye test done the other day where they've found nerve damage to my right eye which I can't see through.

Q: You are losing vision, are you?
A: Yeah.

Q: In your right eye?
A: Yeah.

2.8 The Commission is satisfied that the injuries sustained by Hathaway on 6 February 2003 were very serious. Those injuries were also consistent with the evidence of Hathaway as to how they were incurred. Indeed, for the reasons that follow, the Commission is of the opinion that Jackson caused the injuries suffered by Hathaway to his face and right arm. This was ultimately the subject of an admission by Jackson.[26] The only live issue is whether the injuries were caused by Jackson's use of his baton or were caused, perhaps even accidentally, by Jackson causing part of a bed to strike Hathaway in the face.

HOW THE INJURIES WERE SUSTAINED

A POLICE PURSUIT

2.9 There is little controversy surrounding the events leading up to Hathaway's arrest at the Property. On the morning of 6 February 2003, Briggs saw Hathaway get into a vehicle that appeared to be unregistered, and drive away from the *"Cashies"* store. Briggs initiated a vehicle pursuit of Hathaway and confirmed via police radio that the vehicle was unregistered.[27]

2.10 After a short pursuit Hathaway fled the vehicle on foot. During the foot chase, Hathaway jumped over a number of fences, some of which were made of uncapped corrugated iron, and as a result he sustained cuts to his hands and feet. One officer, Cox, caught Hathaway at one point but Hathaway was able to break free. Eventually Hathaway entered the Property and hid under a single bed in a bedroom. Mr and Mrs Gaffney owned the Property. The bedroom was that of one of their children.

THE EVIDENCE OF HATHAWAY

2.11 Hathaway gave the following account of what happened in the bedroom:[28]

Q: What could you see?
A: I seen Constable Jackson come in the room. He had a look in the door. There was a door on the other side of the room, which was that side [indicating]. He had a look in there, he had a look in the cupboards behind the door. Then he crouched down on the bed - beside the bed where I was laying. The words he said to me was, "Get out from under the bed or else it's two bullets in your head," which I

[26] See paragraph 2.27
[27] PIC Transcript, TS Briggs, 22 February 2005, pp. 235-236
[28] PIC Transcript, AF Hathaway, 11 March 2005, pp. 815-817

didn't, I laid there. And I still laid there and he grabbed the bed and flipped the bed off me, pulled the bed off me. I then stood up, not saying anything, and he sprayed me with capsicum spray. Then before I knew it, I was being belted with the baton.

…

Q: All right.

A: And then I seen him grab his baton and I put my arm up like that (indicating).

Q: I think you're showing your right arm up towards your face?
A: And before I knew it I was struck a couple of times on the arm, which then broke me arm and it fell down by my side.

Q: Yep?
A: And then he kept taking swipes at me face, which smashed me face. I could feel blood and that running down me face and everything everywhere. And after that I walked out from behind the bed, the end of the bed, and he started belting me around the legs and he said, "Get on the ground." I said, "I can't get on the ground. I can't bend my knees." Then some other police officers come in there and while I was still standing I was thrown on the ground. My arms were under my chest like that (indicating) because I was holding my arm because it was broken.

Q: Let me ask you this, if we can go back a step: how many times do you think he struck you on your right arm?
A: On the arm? Oh, about two or three times.

Q: How many times do you think he struck you on your head?
A: On my head? I was struck – well, I – after – I know he struck me in the face once, but after that I just – I lost it. As soon as I got belted in the head, that was it. I know I was hit more than once in the head.

Q: What part of your head were you hit on, do you think?
A: Smashed up the side of the face (indicating).

Q: I think you are indicating there …
A: On the right hand side.

Q: … up your right cheek and towards your right eye?
A: Yes.

THE EVIDENCE OF MURPHY

2.12 Murphy's evidence supports the fact that Hathaway's injuries (excluding those to his hands and feet) were caused by Jackson. Murphy was the Duty Officer on duty on 6 February 2003. He had responsibility for all operational matters on that day. O'Neill was also a Duty Officer and on duty at the Police Station on that day. His responsibilities did not include operational matters.

2.13 Murphy said that he first heard of the incident when O'Neill telephoned him and told him to go to the scene. O'Neill had heard of the incident over the police radio and seen Hathaway on his arrival at the Police Station. Murphy

said that in that first telephone call O'Neill did not make any reference to Hathaway's injuries.[29]

2.14 Murphy agreed that following his arrival at the Property, he had a further telephone discussion with O'Neill during which O'Neill expressed concern in relation to Hathaway's condition. O'Neill had observed Hathaway whilst he was in the charge room after Hathaway had been taken to the Police Station. Murphy gave the following evidence:[30]

> Q: We'll come to the substance of the conversation in a moment, but did that concern, as you understood it, relate to Mr Hathaway's state?
> A: That's correct.
>
> Q: Would you mind telling us the substance of the conversation that you had with Inspector O'Neill?
> A: To my recollection, I'd spoken to O'Neill. I've ascertained or tried to ascertain what the condition of the person was. He said, "He's got a nasty cut to his face" – I think they may have been the words – "and he's got some bruising to his arms and a possible broken nose." I think I said, "Based on what I've been told down here, the injury to the face has been caused during a struggle with Constable Jackson and a bed being pushed back onto him by Jackson, and the bruising on the arms was the result of baton strikes by Jackson."
>
> Q: Without going to the wrongs or rights of it, that would have suggested to you, on what you understood, that the injuries that Hathaway had suffered were suffered at the hands of the police?
> A: That's correct.

2.15 Later Murphy gave the following evidence:[31]

> Q: Just taking you back to that, is it your evidence that Jackson in fact told you that this man had suffered an injury by reason of the fact that Jackson had pushed the bed into his face?
> A: That's correct, yes.
>
> Q: That's what Jackson told you?
> A: That's what my recollection is that Jackson told me at the scene.
>
> Q: Ant that's why, indeed, you agreed this morning with the proposition that you were of the belief, seeing the injuries, whether they had been in fact rightly or wrongly caused, that they had been caused by the police officer?
> A: That's correct.
>
> Commissioner:
> Q: Did Mr Jackson demonstrate what you called the "check drill"? Was it the "check drill"?
> A: It's referred to as a check drill. I've got a distinct recollection that Jackson said that, "He's come up to the bed, holding the bed, pushing it towards me." Jackson's palms have then gone like that, as though to push the bed and the person out of his immediate space. That is when the bed has gone up and struck the person in the cheek.

[29] PIC Transcript, TP Murphy, 23 February 2005, pp. 308-310
[30] PIC Transcript, TP Murphy, 23 February 2005, pp. 312-313
[31] PIC Transcript, TP Murphy, 23 February 2005, pp. 347-348

2.16 Whilst the Commission accepts that Jackson may have said the words attributed to him by Murphy, for the reasons set out below the Commission does not accept that the injuries to Hathaway's face were caused by the bed being pushed back on to him.

THE EVIDENCE OF JACKSON

2.17 Jackson's account of what occurred in the bedroom changed over time. His first account is contained in his police notebook. Whilst his notebook entry recorded that he observed facial injuries, there is no mention in the notebook of how the injuries were incurred. The relevant part of the notebook entry is as follows:[32]

> … Went over and looked under bed saw bare feet. Room was dark. On my hands and knees POI [person of interest] picked bed up and dumped it on me trying to pin me under it. I kicked bed off me and POI and bed hit wall. I got to my feet, saying "Police you are under arrest. Get on the ground'. POI refused and picked up bed and tried to hit me with it. I pushed bed back yelling 'police you are under arrest. Get on the ground." POI refused and picked up bed and tried to hit me with it. I pushed bed back yelling, "Police you are under arrest get on the ground." POI growled/yelled and pushed bed onto me hitting my shins causing pain. POI kept pushing bed into me. I got forced back as POI was bracing his back against wall and pushing with his legs. I was losing balance and falling back. POI would then try to put bed on me. I would push the offender against the wall. This happened a couple more times and I took out the OC and yelled get on ground. POI pushed bed and violent confrontation was occurring. POI was sprayed with burst OC did not affect POI kept pushing the bed. POI was bleeding from face and I could see injuries. I sprayed POI again and said "get on the ground." Spray did not affect POI kept pushing bed at me. I kept spraying POI and can went empty. I was being affected by OC and POI kept fighting. I drew baton and POI pushed bed onto me again. To protect myself from being assaulted and overpowered I struck the defendant on arm (L) then (R). Def did not stop pushing bed. Was being badly affected by O/C poi kept fighting hard trying to grab me. I kept saying "get on the ground." I came around the end of the bed and POI picked up corner and tried to hit me. I pushed on the bed and stepped around and hit POI on leg. Didn't see which one. OC was bad and POI was not affected by strikes or O/C I retreated. I had lost portable in struggle. I blocked bedroom door and POI shaped up and said, "Put the cunt down, have a go!" I said, "Get on the ground." Baton raised POI stepped back and moved to right looking at floor. He would come forward and I would yell get on the ground and raise baton. I heard other police yelling "Jacko where R u." …

2.18 The statement prepared by Jackson dated 6 February 2003 is generally consistent with the notebook entry in relation to the events in the bedroom. The statement does include some detail not included in the notes, for example, that Jackson became tangled in the blankets. However as with the notebook entry, whilst acknowledging that he had seen the accused *"... bleeding from the nose and face"*, Jackson failed to put forward any information that might have suggested that the injuries to Hathaway

[32] PIC Exhibit 11, barcodes 6517489-6517491

(excluding those to his hands and feet) had been incurred whilst he, Jackson, was in the room.[33]

2.19 Late on the afternoon of 6 February 2003 the extent of Hathaway's injuries became known. After contact with the Regional Commander's office the Regional Commander, Assistant Commissioner Collins declared the incident to be a critical incident[34] and the critical incident protocols were put into place. On 7 February 2003, Jackson was interviewed by the Critical Incident Review Team. The account given by Jackson during this interview was broadly consistent with his notes and statement although he claimed that the only blood he observed was blood running from Hathaway's nose. The relevant questions and answers are as follows:[35]

> Q75: Did you notice any lacerations on his body?
> A: No, not ….. no.
>
> Q76: Is it, from your observations, then, the only place you could see blood was ….. from his body, was from his nose? Is that correct?
> A: Yeah, it was running out of his nose.

2.20 Significantly, in that interview, Jackson denied any knowledge of how Hathaway had sustained his injuries. The relevant questions and answers were as follows:[36]

> Q115: Are you aware of the injuries that Allan Hathoway [sic] sustained?
> A: No, I've only been given second hand information.
>
> Q116: Mmm.
> A I've, I'm aware that he has some fractures but I don't know where or when or how.

2.21 Jackson gave evidence in the criminal proceedings before Magistrate Pierce in the Wagga Wagga Local Court on 11 December 2003. Whilst Jackson was prepared to acknowledge that he had struck Hathaway on the legs and arms with his baton, he denied having struck Hathaway on the head. His evidence, before the Local Court, was as follows:[37]

> Q: You struck him to the legs?
> A: Yes.
>
> Q: You struck him to the arm?
> A: Yes.
>
> Q: You struck him to the head?
> A: No.
>
> Q: Well why stop at the legs and arms, constable?
> A: Well in our training the head is an advised non-strike area. It is an advised non-strike area because it can cause serious injury or a fatal injury, so we're taught not to do that.

[33] PIC Exhibit 10
[34] PIC Exhibit 33
[35] PIC Exhibit 53, barcode 6544203
[36] PIC Exhibit 53, barcodes 6544207-6544209
[37] PIC Exhibit 44, barcode 6586218

2.22 The thrust of Jackson's evidence, before the Local Court, was that he was unable to explain the injuries suffered by Hathaway and, in particular, the fractures that Hathaway suffered. His evidence included the following:[38]

> Q: And you hit his arms with such force that you broke his arm?
> A: I don't know what his injuries were to his arms.
>
> Q: So which arms did you hit with the baton?
> A: His left and right.
>
> Q: How many times?
> A: Once to the left; once to the right.
>
> Q: So only one blow to each arm?
> A: Yes.
>
> Q: Not three blows to his right arm?
> A: No.
>
> Q: Did you at any time in your dealings with Mr Hathaway on that day notice that he had a deformity in his arm?
> A: No.
>
> Q: If I suggest to you that when he was treated later on at the hospital, that he was identified as having a broken forearm, right forearm in three places. Can you shed any light, constable, as to how it may have come about, that injury?
> A: No.
>
> Q: I suggest to you, constable, that he suffered a broken jaw at the top of his jaw, and a depressed fracture of the cheek bone. You can't offer any explanation as to how he got those?
> A: No.

2.23 While only admitting to hitting Hathaway with his baton once to the legs and once to each arm Jackson did concede that, he had struck Hathaway *"... as hard as I could to protect myself from being injured and overpowered"*.[39]

2.24 Magistrate Pierce was critical of the evidence given by Jackson about how Hathaway's injuries were sustained. He said:[40]

> … it was not possible for the defendant to have acquired the injuries to the face and arm from the two strikes of the baton that were spoken of, leaving aside the ones to the knees, which are in the lower body, of course.
>
> That fact alone would make Constable Jackson's version of events unbelievable, without more it would be enough to warrant a dismissal of the charges.
>
> …
>
> I do not need to say much more about Constable Jackson, other than what appears obliquely from what I said say about the other officers, because it is so obvious that he was being untruthful about what happened in the bedroom ...

2.25 In his evidence before the Commission, Jackson initially claimed an inability to answer questions directed to the possible link between Hathaway's injuries

[38] PIC Exhibit 44, barcode 6586219
[39] PIC Exhibit 44, barcode 6586222
[40] PIC Exhibit 44, barcode 6586446-6586447

and his, Jackson's, conduct within the bedroom. His evidence was as follows:[41]

> Q: I want you to assume for the moment that that was how he presented when he was delivered by Wagga police to Wagga Base Hospital on 6 February 2003 – just assume that for the moment. I want to ask you a question and I want you to bear in mind that it is a very serious matter to give false or misleading evidence here, the result of which, if you do, can lead to a lengthy gaol term; do you understand that?
> A: Yes, I was made aware of that at the start.
>
> Q: In your considered opinion, did any of the injuries which we see on that photograph result from anything you did to Mr Hathaway on 6 February 2003?
> A: No, I can't answer that.
>
> Q: What do you mean you can't answer that?
> A: Well, what – you just have to rephrase the question.

2.26 Later Jackson put forward two possibilities, namely, that the facial injuries had been caused by Jackson lifting the bed off himself and throwing it back towards Hathaway or, alternatively, the injuries had been suffered by Hathaway before he entered the Property. He also conceded for the first time that it was possible that a baton strike had broken Hathaway's arm. This was the first time Jackson had conceded that there might be a link between Hathaway's injuries and his actions. His evidence was:[42]

> Q: Dealing with his face for the moment, you have agreed with me that he appears to have presented with significant trauma to the right side of this face?
> A: Yes
>
> Q: Officer, is there anything that you did on 6 February 2003 which could have caused Mr Hathaway to present to the hospital in that way?
> A: That is very broad, so I will have to answer yes.
>
> Q: Why is it broad, would you mind telling us?
> A: Well, you haven't specified what action has caused that injury, so I can't really be specific.
>
> Q: Just a moment. That is because to date, in all the interviews you have and the evidence you have given, you haven't indicated that there was a possible connection. You now say that there might be. What is it?
> A: Well, when I was in the room and the bed first got thrown onto me, I couldn't see the defendant at that time. I lifted the bed off me and threw it back. Now, I don't know whether those injuries were caused at that stage or the defendant had the injuries before he went into the room, so that's why I have to answer yes to your question, because it is so broad.
>
> Q: So you put forward two possibilities, do you? One is that when you threw the bed off you, which you say was placed upon you by Mr Hathaway …
> A: Yes
>
> Q: … it caused those injuries to his face?
> A: Well, I can't be sure about that, but that is a possibility.
>
> Q: But that is one possibility that you put forward?

[41] PIC Transcript, CJ Jackson, 21 February 2005, pp. 84-85
[42] PIC Transcript, CJ Jackson, 21 February 2005, pp. 85-86

A: Yes

Q: And the other possibility that you put forward is that he had that injury when he entered the house?
A: Yes

Q: Are there any other possibilities that you want to tell us about before we proceed?
A: No

Q: Is this your position, that you are prepared to deny on your oath that you, in any way, inflicted those injuries upon Mr Hathaway unless it was accidentally by thrusting the bed off yourself?
A: Yes

Q: … is there anything you did on 6 February 2003 which you think might have caused the break to the arm?
A: Yes

Q: What was that?
A: I hit him on the arm with a baton.

Q: You hit him on both arms, didn't you?
A: Yes, but we're talking about the arm with three breaks.

Q: How many times did you hit him?
A: Once.

Q: And you think it is possible that one stroke by you may have broken his arm in three places?
A: No, I'm not a doctor. I can't answer what that would do to an arm, but there is a possibility that if you hit someone with a baton on the arm, that it will break.

2.27 Ultimately, Jackson conceded that he had admitted to Murphy that Hathaway's facial injuries had been caused when he pushed the bed towards Hathaway. The evidence was as follows:[43]

Q: Did you become aware that, in substance, Inspector Murphy's position is that you admitted to him that the damage caused to Mr Hathaway's face had been caused by you pushing the bed into his face?
A: No.

Q: You were not aware of that?
A: No.

Q: I'll just refer you to some evidence and get your comments. At T312, he said:

> A: … "Based on what I've been told down here, the injury to the face has been caused during a struggle with Constable Jackson and a bed being pushed back onto him by Jackson, and the bruising on the arms was the result of baton strikes by Jackson."

And he claims that that was something you told him?
A: Yes.

Q: And that's true, isn't it?
A: Yes.

[43] PIC Transcript, CJ Jackson, 11 March 2005, pp. 762-763

JACKSON CAUSED HATHAWAY'S INJURIES

2.28 The Commission is satisfied that Hathaway's injuries, (with the exception of the lacerations to his hands and feet), were caused by Jackson. The only issues that require determination are whether the injuries were, as claimed by Hathaway, caused by baton strikes and, if so, whether the use of such force by Jackson was excessive.

2.29 The Commission is satisfied that Hathaway's injuries were caused by baton blows. Hathaway's claims of how his injuries were caused are consistent with the medical evidence. The evidence given by Hathaway generally, in relation to what occurred within the bedroom is consistent with the photographic evidence as to the position of the bed,[44] and the significant amount of blood at head height, as shown in the photographs.[45] The Commission is satisfied that the bed was lifted off Hathaway as described by Hathaway, and the bed was not thrown onto Jackson, as alleged by Jackson. In coming to these conclusions the Commission had regard to the following matters:

(a) The mattress and the slats to the bed remained in place, which is inconsistent with it having been turned in mid-air, flipped over, or rotated as claimed by Jackson.[46]

(b) Measurements taken by the Commission indicate that the bed weighed 74.5kgs and yet Jackson claimed that he was able, from the position of lying on his side underneath the bed, to lift the bed plus Hathaway and flip, spin, or fully rotate, and throw it. (It is noted that Jackson's evidence about he how was lying under the bed on his side was inconsistent and that he also said he was lying on his back under the bed).[47]

(c) The video and transcript taken during the Commission's hearing at Wagga Wagga, wherein Jackson demonstrated his movements, show that Jackson's version of events is inherently unlikely.[48]

(d) Jackson first described the movement of the bed in the Local Court proceedings before Magistrate Pierce, on 11 December 2003. His evidence given on that day is consistent with Hathaway's description of what occurred to the bed, and inconsistent with Jackson's own later evidence before the Commission. In his evidence before Magistrate Pierce, Jackson said he kicked the bed straight up off him so that it landed on its side.[49] Similarly in his notebook entry Jackson recorded, *"I kicked bed off me and POI and bed hit wall. I got to my feet …"*.[50]

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44 PIC Exhibit 4, barcode 6573021, & PIC Exhibit 63
45 PIC Exhibit 4, barcode 6573015, & PIC Exhibit 64
46 PIC Transcript, CJ Jackson, 21 February 2005, pp. 114-119
47 PIC Transcript, CJ Jackson, 21 February 2005, pp. 114-119
48 PIC Exhibits 13 & 14
49 PIC Exhibit 44, barcode 6586211
50 PIC Exhibit 11, barcode 6517489

(e) It is unlikely that Hathaway, given his small stature and the weight of the bed, would have been able to lift the bed and throw it onto Jackson, as claimed by Jackson.

2.30 Jackson's explanation of this inconsistency was not capable of belief. His evidence to the Commission was as follows (emphasis added):[51]

> Q: Well, you said nothing this afternoon about kicking it. You said you got onto your haunches with it above your head and you threw it off you and flipped it over. Here you say,
>
> *"Just kicked it straight up off me towards the wall".*
>
> Now, that, do you agree, is utterly inconsistent with the evidence you gave this afternoon?
> A: No, I don't agree.
>
> Q: Did you just kick it straight up off you towards the wall?
> A: That's the direction the bed went, yes.
>
> Q: If that's the direction the bed went and you had kicked it, it could not have landed the way you said it landed this afternoon, could it?
> A: No, because when the Court hearing was taking place, we didn't have a lovely little model to demonstrate exactly.
>
> Q: It's the lovely little model, as you call it, that makes the difference between the evidence you gave …
> A: It makes it easier to show you, yes.
>
> Q: I see. That is your explanation, is it …
> A: Yes.
>
> Q: … the existence of the lovely little model?
> A: Yes. It would have been good to have that model in the first court hearing.
>
> Q: This afternoon of course – I'm not sure this has anything to do with the model – you said you used your hands …
> A: And feet.
>
> Q: You didn't say anything about kicking it at all?
> A: Hands and feet to create a bit of space so I could stand up and throw it off me.
>
> Q: I thought you said you'd got onto your haunches and lifted both man and bed in the air and flipped the bed over at least 270 degrees or 280 degrees?
> A: Yes.
>
> Q: You didn't say anything about just kicking it straight up towards the wall?
> A: No I didn't, but the question that was asked and what you just read appears different to the question that you asked me about this bed.
>
> Q: I accept that, but do you accept that, putting the benefit of the model to one side, if you in fact had just kicked it straight up off you towards the wall, it could not have landed the way you said it landed this afternoon?
> A: Well that's not how it happened.
>
> **Q: No, but do you accept that if indeed the way it happened was that you just kicked it straight up off you towards the wall …**

[51] PIC Transcript, CJ Jackson, 21 February 2005, pp.147-148

A: Oh, stand alone? No, it couldn't have happened like that.

Q: It couldn't, could it?
A No.

Q: Indeed, what would have happened is the legs rather than facing the door would have faced the wall?
A: Yes, the mattress would have been on my side.

2.31 The Commission is also satisfied that the force used by Jackson was excessive. There is no credible evidence that suggests Hathaway did, or said, anything within the bedroom that could possibly justify the injuries that were inflicted upon him. Jackson was not a witness of truth. The Commission is of the opinion that in all material respects, his evidence was entirely unsatisfactory and incapable of belief.

3. MANAGEMENT OF CRITICAL INCIDENTS

3.1 In July 2002, NSW Police issued *"Guidelines for the management and investigation of critical incidents"* ("the Guidelines").[52] The purpose of the Guidelines is stated as being:

> To provide guidance for police officers and other people dealing with the timely and professional investigation and review of critical incidents.

3.2 The definition of a "critical incident" relevantly includes serious injury resulting from the use of police issue appointments, or serious injury arising from a police operation.[53] Potential scenarios, which encompass the concept of "police operation", include any police operation calculated to apprehend a person/s, and an operation to contain or restrain persons.[54]

3.3 The Guidelines also include the following, as a guide to defining the term "*serious injury*":[55]

> As a guide, a serious injury is one that would normally require emergency admission to a hospital and significant medical treatment.

3.4 The first section of the Guidelines, which contains the purpose, concludes with the following statement:[56]

> It is not intended that these guidelines are to be a replacement for the application of sound common sense and good judgement expected of experienced police officers. …

This is particularly relevant to the events of 6 February 2003. None of the involved officers applied *"sound common sense and good judgement"* to the situation they were presented with on that day. As is set out in detail below, a number of the officers attempted to justify the initial failure to identify the incident as a critical incident, by raising the distinction between being taken to hospital for treatment, and "emergency admission" to hospital.

3.5 All of the police who attended the Property on 6 February 2003 were experienced officers. Although Deissel was a Probationary Constable at the time of the incident she had been a NSW Police officer since 1998, so had more experience than a typical Probationary Constable.

3.6 It is clear that those involved in the drafting of the Guidelines were cognisant of the fact that, by its very nature, a "critical incident" is likely to put police conduct under a spotlight, and that therefore the management and investigation of each incident must be the subject of an independent investigation that would withstand scrutiny. The Guidelines state:[57]

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52 PIC Exhibit 54
53 PIC Exhibit 54, barcode 6171460
54 PIC Exhibit 54, barcode 6171493
55 PIC Exhibit 54, barcode 6171460
56 PIC Exhibit 54, barcode 6171460
57 PIC Exhibit 54, barcode 6171460

> The types of incidents covered by these guidelines are invariably of great interest to the community and can involve much public controversy and scrutiny. The community is entitled to know that NSW Police has investigated all critical incidents professionally, with integrity and that the decisions made and processes used are appropriate and reasonable.
>
> For this reason, **these incidents will always be investigated as soon as they occur by specialised teams**. These teams are called Critical Incident Investigation Teams (CIIT). Further, the investigation itself is subject to review by a senior officer independent of the investigation team. Further detail is provided in the 'Roles and Responsibilities' Section of these guidelines.
>
> It follows that as a police officer involved in a critical incident you should expect your role and conduct during the incident to attract a high level of scrutiny, not only by other NSW Police, but also by external stakeholders, such as the, Police Integrity Commission, NSW Ombudsman, the NSW Coroner, or the media. (emphasis added)

3.7 Critical incidents in NSW are coordinated centrally by the Duty Operations Inspector, VKG, Sydney (DOI). The First Officer at the Scene (see description in paragraph 3.8 below) must notify the DOI of the incident, and the DOI will then initiate the mandatory call out procedures.

3.8 The respective roles of the various officers, in managing and investigating all critical incidents, but particularly those arising from death or serious injury resulting from the use of police issue appointments, as set out in the Guidelines, are as follows:

(a) **Region Commander**: Each Region Commander is responsible for the management and investigation of all critical incidents that occur within his/her Region. After being informed of the incident, the DOI will contact the Region Commander who is then required to form a Critical Incident Investigation Team (CIIT). The composition of the CIIT is set out in the Guidelines. The Region Commander is also required to appoint a senior officer to act as the Review Officer.[58]

(b) **Review Officer**: The role of this officer is to ensure that a high quality comprehensive investigation is conducted and to ensure that the investigation process has integrity, and can withstand independent scrutiny.[59]

(c) **Local Area Commander**: The role of the Local Area Commander is primarily to manage the incident scene. One particular role of the Local Area Commander is to ensure that the actions of the First Officer at the Scene, the Incident Location Guard and the Duty Officer have been completed.[60]

(d) **First Officer at the Scene**: the First Officer at the Scene of a critical incident is defined as the *"most senior officer, who first arrives at the incident, whatever their rank"*. The First Officer at the Scene has a number of important functions which include:[61]

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[58] PIC Exhibit 54, barcode 6171461
[59] PIC Exhibit 54, barcode 6171461
[60] PIC Exhibit 54, barcode 6171462
[61] PIC Exhibit 54, barcodes 6171479 & 6171493

(i) advising the DOI, VKG Sydney, that a critical incident has occurred and describing its circumstances;

(ii) preserving the scene for fingerprinting, photographing etc.;

(iii) relocating witnesses and police directly involved from the immediate area;

(iv) appointing an officer to secure the scene (Incident Location Guard);

(v) commencing a notebook record documenting involved officers, witnesses and deceased/seriously injured. Recording all actions and directions given including time, date, place, name.

(e) The **Incident Location Guard** has the role of securing and preserving the incident scene. The duties are "*consistent with the preservation of a crime scene"*. That officer must:[62]

(i) secure the scene of the incident;

(ii) maintain the security of the scene;

(iii) prevent entry by unauthorised persons;

(iv) record details of persons entering or attempting to enter the scene in his or her notebook including the time and reason for entry;

(v) identify and record the details of any officer removed from the scene and the reason;

(vi) assist the Crime Scene Investigators by ensuring that they are not disturbed unnecessarily by unauthorised persons seeking entry to the location.

(f) **Duty Officer**: a Duty Officer from the Local Area Command where the incident occurred is required to attend the scene of the incident and assume command of the scene until relieved by the Local Area Commander or Senior Investigator. The Duty Officer's duties include:[63]

(i) attending the scene, notifying the DOI on arrival and on taking command;

(ii) obtaining a briefing from the First Officer at the Scene and ensuring appropriate action has been taken to address the requirements of that officer. Assigning responsibility for completing any outstanding actions;

(iii) ensuring the scene has been secured and an Incident Location Guard is present;

[62] PIC Exhibit 54, barcodes 6171479 & 6171494
[63] PIC Exhibit 54, barcodes 6171480-6171481 & 6171495

(iv) keeping the involved officers separated, but not isolated, including officers from external agencies;

(v) ensuring the involved officers do not speak to each other, or to other witnesses;

(vi) requesting involved officers to immediately, and independently, record observations in their notebook;

(vii) commencing a running sheet, noting relevant information, including decisions made and directions given;

(viii) briefing the Senior CIIT Investigator and Review Officer upon their arrival, handing over the running sheet, and having the official police notebook signed to that effect.

(g) **Senior Critical Incident Investigator (SCII)**: the SCII leads a team in the investigation of all critical incidents. The Senior Investigator's primarily role is to ensure that critical incidents are rigorously and thoroughly investigated. The duties include:[64]

(i) attending scene and advising DOI on arrival;

(ii) obtaining a verbal briefing from the officer previously in charge and taking possession of the running sheet;

(iii) ensuring the actions required of the First Officer at Scene, the Location Guard and the Duty Officer have been completed;

(iv) initiating inquiries with the involved officers;

(v) taking possession of police records relating to the incident including, but not limited to, COPS[65] reports, radio tape transcripts, staff rosters, CIDS[66] documentation, prisoner records etc. as soon as possible;

(vi) preparing a briefing note for Region Commander, Commander SCIA and NSW Police Executive.

HATHAWAY'S ARREST - A CRITICAL INCIDENT

3.9 A number of witnesses, in attempting to explain their actions, endeavoured to suggest to the Commission that the injuries sustained by Hathaway did not justify, or justify immediately, treating the incident as a critical incident. The Commission rejects these explanations based on the following evidence.

3.10 The Guidelines provide "*as a guide*" that a "*serious injury*" is one that would normally require emergency admission to a hospital and significant medical treatment.[67] On any view, it must have been apparent to all those present at the Property, before the removal of Hathaway to Wagga Wagga Police Station, and to those who observed him within Wagga Wagga Police Station

[64] PIC Exhibit 54, barcodes 6171482-6171483 & 6171497
[65] Computerised Operational Policing System
[66] Computer Incident Dispatch System
[67] PIC Exhibit 54, barcode 6171460

that his injuries were such that they might come within the definition of "*serious injury*" as set out in the Guidelines.

3.11 In addition the scene that confronted those in attendance at the Property should have been sufficient to put each officer on notice that this was, or was likely to shortly become, a critical incident requiring (not only as a consequence of the Guidelines but as a matter of simple common sense), that steps be taken immediately to preserve the scene for investigation by a Critical Incident Investigation Team. Both Hathaway's injuries and the amount of blood at the scene, should have been clear indications of the seriousness of the incident.

3.12 The custody records prepared by Jennings indicate that Hathaway was arrested at 11.14 a.m. He arrived at the Police Station at 11.20 a.m., the ambulance was called at 11.20 a.m., arrived at 11.29 a.m., and left at 11.45 a.m. Hathaway was taken to hospital at 11.51 a.m. under police escort.[68] The officers who formed the police escort were Probationary Constable Guy Noye and Constable Scott Shipway.[69]

3.13 The hospital records indicate that Hathaway was admitted through the Emergency Department of Wagga Wagga Base Hospital at approximately 12.06 p.m.[70] He was seen by the doctor at 12.30 p.m. who ordered X-rays and other tests. At some stage later that afternoon, or evening, Dr Hennessy was contacted at Albury Base Hospital and arrangements were made for Hathaway to be transferred there for surgery and treatment. Hathaway was transferred to Albury Base Hospital on the following day, 7 February 2003. His surgery was performed on 9 February 2003.

3.14 By way of example, McAlister gave evidence to the effect that he was *"shocked"* by the amount of blood in the bedroom, he assumed that based purely on the amount of blood within the bedroom it would become a critical incident, and that he considered, at least as a possibility, after speaking to O'Neill at Wagga Wagga Police Station, that Hathaway may have been assaulted by a police officer.[71] He gave the following evidence:[72]

> Q: Can I suggest to you that it must have occurred to you as a possibility – I'm not suggesting for one moment you formed a concluded view, but it must, I suggest, have occurred to you as a possibility that Mr Hathaway had been bashed by a police officer?
>
> A: I formed – I guess you could say that possibility occurred to me after I had spoken with Mr O'Neill at the station, but at that stage when I saw that blood I thought it was from an injury from going over one of the fences.
>
> Q: Is it fair to say, though, that at that point in time you were of the opinion that this was an incident where it was appropriate that it be deemed a critical incident?

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68 PIC Exhibit 22, barcode 6546318
69 PIC Exhibit 26, barcode 6544316
70 PIC Exhibit 52
71 PIC Transcript, DG McAlister, 21 February 2005, pp. 41-43
72 PIC Transcript, DG McAlister, 21 February 2005, p. 43

A: Yes, probably. Yes, purely for the amount of blood I would think something like that ought to be investigated, yes.

Q: Can I suggest this: it occurred to you purely from the amount of blood within the room that it was one of those situations where to avoid criticism the police were really duty-bound to have it investigated by a critical incident team?

A: I assumed it would become a critical incident just based on the amount of blood there. Whether or not it involved any police misconduct, I assumed that because of the amount of blood – being sensational in blood, I assumed that it would – that it would draw some sort of an investigation, yes.

Q: Did you speak to any officer at the premises about whether or not this should be declared a critical incident?

A: Whether it should be declared one or not?

Q: Or called a critical incident?

A: No, I don't think so.

3.15 Even Jackson was prepared to acknowledge that the amount of blood, at least upon Hathaway, was substantial. He said Hathaway *"... looked like someone had dipped him in paint"*.[73] Jackson claimed, however, that at the time it did not occur to him that this might be a critical incident because he was more concerned with the possibility that he might have contracted Hepatitis C. He was prepared to acknowledge, however, that in hindsight it was a critical incident. His evidence was as follows:[74]

Q: Do you remember anyone discussing at the premises whether in fact this was a critical incident?

A: No.

Q: Looking back in hindsight, now when you know that you don't have Hep C, do you think that it was a critical incident?

A: Yes.

Q: And it should have been declared as such immediately, should it not? I'm not being critical necessarily of you …

A: That's not my decision to make.

Q: But you must have an opinion on it as an officer, and a reasonably senior one at that? It stood out to everyone, did it not, that what had occurred at the premises was a critical incident?

A: Yes.

Q: And it should have been declared a critical incident immediately, should it not?

A: Looking at the information presented now, yes.

3.16 When asked whether, when she observed Hathaway in the bedroom, he appeared to be in pain, Philpott said that, he was *"mumbling"* and saying something about his knee. When it was put to her that he was complaining about his knee she agreed. She also said there was *" ... a lot of blood on his face"*. Nevertheless, Philpott maintained that it did not occur to her until she

[73] PIC Transcript, CJ Jackson, 21 February 2005, p. 120

[74] PIC Transcript, CJ Jackson, 21 February 2005, pp. 141-142

arrived back at the Police Station after 1.00 p.m. that the incident was going to be a critical incident.[75]

3.17 Briggs initially sought to down play the extent of Hathaway's injuries. He gave the following evidence:[76]

> Q: Would it be fair to say he was bleeding profusely?
> A: Well, again, it's everyone's interpretation, I suppose.
>
> Q: I don't want to put words in your mouth; if you don't agree he was bleeding profusely, perhaps you can tell us what you observed.
> A: There was blood coming obviously from his head, or I could see blood on his head. As to – as to – yeah. As to whether it was profusely or not, I really can't say. He was bleeding is the best I can do.
>
> Q: In what sort of quantities? One can have a scratch and bleed a little or …
> A: I appreciate that. Like I said, sir, at that stage I wasn't really focussing on exactly – it may have been profusely. Look, I really …
>
> Q: I know as you walked through the door you may not have been concentrating on his state, but looking back on it now as to what you recall …
> A: Right.
>
> Q: … was he bleeding profusely?
> A: I suppose to a degree.
>
> Q: To a degree? All right. Did he appear to be injured?
> A: Well, I sort of formed the opinion that he was obviously injured in some capacity because of the blood.
>
> Q: Did you form any view at that point as to how serious any injury he might have might be?
> A: He was standing there. I didn't foresee any injury, obviously apart from the fact that he was bleeding. I didn't automatically think seriousness of injuries.

3.18 Later Briggs acknowledged that he observed the injuries to be serious ones which would more than likely require medical attention. Indeed, his own notebook records that Hathaway was *"bleeding profusely"*.[77] He gave the following evidence:[78]

> Q: Were you able to observe at that point in time whether he had any significant injuries?
> A: I saw he had a laceration to his – originally I said I think it was his left cheek. It was actually his right cheek.
>
> Q: It was a fairly serious one, was it not?
> A: Yes, it was severe, I would agree with that.
>
> Q: It was an injury, was it not, that was likely to require medical attention?
> A: More than likely.
>
> Q: It was obvious to you, wasn't it?
> A: It was more than likely, yeah.

[75] PIC Transcript, JT Philpott, 22 February 2005, pp. 196-197
[76] PIC Transcript, TS Briggs, 22 February 2005, pp. 240-241
[77] PIC Exhibit 15; PIC Transcript, TS Briggs, 23 February 2005, p. 298
[78] PIC Transcript, TS Briggs, 22 February 2005, pp. 243-244

> Q: It was obvious to you, officer, wasn't it?
> A: That it was going to require medical attention?
>
> Q: Medical attention.
> A: Basically, yes, yes.

3.19 Briggs later agreed that he had noticed a great deal of blood at the scene which suggested to him that Hathaway had "*... lost a great deal of blood"*. He claimed, however, that at some point he had been informed by Deissel that one of the officers who had been involved in the pursuit had seen blood coming from Hathaway's head before he entered the Property. The information conveyed to Briggs was that Holmes had observed the bleeding prior to Hathaway entering the Property.[79] Holmes denied that he had made any such observation or that he had made such a claim to Deissel or any other officer.[80]

3.20 Briggs claimed, however, that what he observed did not cause him to believe that there was a good chance that the matter would be declared a critical incident. This was because he understood that a pre-condition of a critical incident was *"... a major injury as a result of police arrest ..."*. In his opinion, at the time of the incident Hathaway did not have a *"major injury"*. Rather he had a *"laceration"*.[81]

3.21 Magistrate Pierce made the following comments about Briggs' evidence of Hathaway's injuries:[82]

> His observations of the blood are extraordinary. This man had been smashed to a pulp, there was blood everywhere, there was a bloodbath, it was apparent to everyone, except somebody who was deliberately trying not to see that which was obvious, or is lying about it.

3.22 Murphy did not personally observe Hathaway's injuries. Nevertheless, when he attended the scene, he had a telephone conversation with O'Neill who expressed concern to him in relation to Hathaway's physical condition. Murphy gave the following evidence in relation to the substance of this conversation:[83]

> Q: Would you mind telling us the substance of the conversation that you had with Inspector O'Neill?
> A: To my recollection, I'd spoken to O'Neill. I have ascertained or tried to ascertain what the condition of the person was. He said, "He's got a nasty cut to his face" – I think they may have been the words – "and he's got some bruising to his arms and a possible broken nose". I think I said, "Based on what I've been told down here, the injury to the face has been caused during a struggle with Constable Jackson and a bed being pushed back onto him by Jackson, and the bruising on the arms was the result of baton strikes by Jackson".

[79] PIC Transcript, TS Briggs, 22 February 2005, pp. 245-246
[80] PIC Transcript, RV Holmes, 23 February 2005, p. 380
[81] PIC Transcript, TS Briggs, 22 February 2005, pp. 247-248
[82] PIC Exhibit 44, barcode 6586447
[83] PIC Transcript, TP Murphy, 23 February 2005, pp. 312-313

Q: Without going to the wrongs or rights of it, that would have suggested to you, on what you understood, that the injuries that Hathaway had suffered were suffered at the hands of the police?
A: That's correct.

Q: That meant, did it not, that if the other criteria for a critical incident were met, this was a matter where a critical incident had to be declared?
A: Depends on the seriousness of the injuries.

Q: But you must have recognised at that point in time that there was at least the potential that it would become a critical incident?
A: That was in the back of my mind, yes, but at that stage the assessment of the injuries did not meet the criteria of a critical incident.

3.23 Murphy then gave an unconvincing explanation of the need for an *"emergency"* admission to hospital before a critical incident could be declared. His evidence was as follows:[84]

Q: You walked into the room, no doubt, and saw the amount of blood there?
A: Yes I did.

Q: Did that cause you any concern?
A: It did.

Q: Did that suggest to you that the injuries may be quite substantial?
A: It did.

Q: Did it suggest to you that the person who had received the injuries which had resulted in the blood being all over the room may well have required hospital attention?
A: It did.

Q: Would you mind telling us why you didn't immediately seek to have this declared as a critical incident?
A: My assessment at the time was the injuries were not serious through my assessment, as in serious injuries requiring emergency admission to hospital.

Q: I thought you agreed with me one moment ago that it might well be the case, based on what you saw, that the person required admission to hospital?
A: Is that emergency admission? I'm not sure.

Q: Oh, I see. Are you saying that one may only be required to declare a critical incident where one is received by what you described as an emergency admission rather than an admission of some other sort?
A: No, I'm not saying that. My interpretation of time may have been poor. It may have been a poor decision.

Q: What interpretation, officer?
A: The interpretation of the injuries from what I had been told and what I gleaned may have been poor.

3.24 Murphy was prepared to acknowledge, however, that in hindsight he might have made a different decision. He said:[85]

[84] PIC Transcript, TP Murphy, 23 February 2005, pp. 315-316
[85] PIC Transcript, TP Murphy, 23 February 2005, p. 317

> Q: And you say on your oath, do you, that that wasn't sufficient to cause you to either declare a critical incident or form the view that it was at least likely that one would have to be declared?
> A: My view would be, in hindsight, that I didn't consider it at the time. It was an – in hindsight, I should have waited until a more proper assessment as to the condition of the person was made.

3.25 When asked what it was that prevented him from declaring the matter a critical incident Murphy claimed that before an incident would be treated as a critical incident, the injuries had to be *"life threatening"*, even though he was aware that the Guidelines did not so provide. He said:[86]

> Q: What, then, was your opinion as to the sort of injuries which were required before an incident could be declared critical?
> A: Normal ones that I would consider would be life-threatening, life-threatening injuries.
>
> Q: Life-threatening injuries?
> A: Yes.
>
> Q: The guidelines pursuant to which you are bound and were at the time don't limit critical incidents to life-threatening injuries, do they?
> A: No they don't.

3.26 On 6 February 2003, O'Neill was rostered as Duty Officer.[87] His duties, as recorded in his duty book, involved work around the station.[88] O'Neill recorded in his duty book that he observed the prisoner Hathaway in the charge room. He then recorded the following: *"numerous injuries, then arrange ambulance and Insp Murphy to scene"*. O'Neill gave the following evidence about his observations that day as to the extent of Hathaway's injuries:[89]

> Q: Doing the best you can, can you tell us what you saw when you first observed Hathaway within the charge room?
> A: He had a cut to his face, I can't remember what side, and he had a lot of blood on his face. He was complaining about a sore arm. That's about really all I can say at this stage, sir.
>
> Q: He appeared to be seriously injured, did he not?
> A: He appeared to be injured, sir. I couldn't say whether it was seriously.
>
> Q: You were quite shocked at his injuries, weren't you?
> A: Yeah, I couldn't understand how he'd got them at that stage, no.
>
> Q: You were quite shocked, weren't you?
> A: Yeah, I was fairly shocked about it, yes.
>
> Q: It entered your mind, did it not, at that early stage of the day, that perhaps he had been assaulted by a police officer?
> A: During an arrest, yes, that's what I thought, yes.
>
> Q: You regarded the injuries as being sufficiently serious to warrant the attendance of an ambulance, didn't you?
> A: Sir, that's a standard practice. Any person that comes in with injuries like that, you would get an ambulance, whether he's bleeding – if he's bleeding you would get an ambulance in to see him.

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[86] PIC Transcript, TP Murphy, 23 February 2005, p. 317
[87] PIC Exhibit 55
[88] PIC Exhibit 35
[89] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 599-600

Q: But the injuries were such, might I suggest, you thought there was at least some prospect he might have to go to hospital?
A: Oh, yes, of course.

Q: I don't want to put words in your mouth but you were pretty upset about what you'd seen, weren't you?
A: I wasn't upset about it. As you said, I was shocked about it. I did make some comment about it.

Q: Can I suggest this to you: you were at least of the view that if those injuries had been sustained at the hands of a police officer, it shouldn't have occurred?
A: No, that's not what my view was, sir. My view was that if the injuries were sustained at the hands of a police officer and it wasn't justified, then someone might be in trouble.

Q: In fact, did you make a comment to that effect to somebody in the charge room?
A: I did, yes.

Q: Who was that?
A: Offhand, sir, it was one of the females – possibly Melinda Jennings.

Q: She was a person who was the Custody Manager on the day, wasn't she?
A: To the best of my recollection at this stage, sir, yes.

Q: What did you say to her?
A: After I told her to get an ambulance, I just said to her, "I hope this is justified, otherwise someone could hit the dock."

3.27 Deissel was present in the bedroom at the Property and assisted with the arrest of Hathaway. Once he was arrested she walked out of the house behind Jackson and Philpott who were escorting Hathaway to the police truck. Her evidence as to what she had observed of Hathaway's injuries was unsatisfactory. She said:[90]

Q: What were you able to observe, if anything, in relation to his injuries?
A: Just that there was a lot of blood in the room and that he was quite sweaty, and he did have blood on him, but I can't remember where.

Q: Would it be fair to say that he was covered in blood?
A: I wouldn't say covered in blood, but he did have blood on him, yes. The room was covered in blood.

Q: Did you have an opportunity to observe his face?
A: No, I don't think I did.

Q: Were you within the room when he was brought up onto his feet?
A: Yes.

Q: Did you accompany him out to the caged vehicle?
A: I walked behind two officers out to the caged vehicle.

Q: Are you saying that at no time were you able to observe his face?
A: No.

Q: What parts of his body could you observe?
A: His torso, because he didn't have a shirt on; his legs; and his arms.

Q: Was there any blood on his torso?
A: I think there was, but I can't be 100 per cent sure.

[90] PIC Transcript, AR Deissel, 8 March 2005, pp. 403-404

3.28 The Magistrate described Deissel as *"...a woman who I suspect might be a little more honest that some of the others. She had a vague manner."* He also said: [91]

> This officer, Constable Deissel, cannot recall the defendant asking to wash his eyes. We know that he did ask to wash his eyes. Her evidence also therefore is not very reliable at all.

3.29 The evidence of the Custody Manager, Jennings, was equally unsatisfactory. Jennings, like all police officers, is trained to record and remember relevant details. In her evidence, however, she denied having any memory of Hathaway's specific injuries and endeavoured to avoid acknowledging that Hathaway had serious facial injuries. Her evidence included the following:[92]

> Q: What injuries did you observe which caused you to telephone the ambulance?
> A: I can't remember what the specific injuries. I just know I called the ambulance to come and see Mr Hathaway.
>
> Q: Do you recall that he had bruising around his right eye?
> A: No, I can't recall that.
>
> Q: That he had blood dripping from his cheek?
> A: I can't recall that.
>
> Q: He had a cut to his right cheek?
> A: I can't recall that either.
>
> Q: He had pains to his right knuckles?
> A: I can't recall that.
>
> Q: He had an abrasive burn or skin off one of his big toes?
> A: Yes, I can remember injuries to his feet.
>
> Q: What were they? Tell us what injuries you remember?
> A: I just remember some of them being rounded and you could see the flesh part on the foot.
>
> Q: Did they appear to you to be serious?
> A: Depends what you classify as serious.
>
> Q: Are you having some difficulty with that, are you?
> A: No, no, there were burns on his feet. They looked like burns on his feet.
>
> Q: Did they appear to be serious burns?
> A: They were burns.
>
> Q: Did they appear to be serious burns?
> A: They needed treatment, or they needed to be bandaged or bandaids put on them.

3.30 Jennings' evidence was at odds with the entries made by her in the Custody Management Records on 6 February 2003.[93] In those records, each time Jennings listed Hathaway's injuries she commenced the list with recording the injuries to his face.[94] The evidence she gave as to her recollection of what she observed is also inconsistent with the fact that she said this was the first

[91] PIC Exhibit 44, barcode 6586451
[92] PIC Transcript, MM Jennings, 8 March 2005, p. 441
[93] PIC Exhibits 22 & 26
[94] PIC Exhibit 22, barcodes, 6546317 and 6546318, PIC Exhibit 26, barcode 6544313

occasion upon which a person, for whom she had responsibility as Custody Manager, had arrived at the Police Station with injuries.[95] It is unlikely that she would forget such an event.

COMMON SENSE, GOOD JUDGMENT AND BASIC POLICING

3.31 The Commission is of the opinion that each of the involved officers knew, or ought to have known, from what they observed on 6 February 2003 that the incident was, or was likely soon to become, a critical incident. As already stated in paragraph 3.4 above, the Guidelines clearly state that they are not intended as a replacement for *"the application of sound common sense and good judgement expected of experienced police officers*".[96]

3.32 Each of the officers involved in the incident, from Probationary Constable to Inspector, were entitled to notify their superior officers that, in their opinion, the incident ought to be treated as a critical incident. This was recognised by O'Neill in the following evidence:[97]

> Q: Can I ask you this: having regard to your understanding of the critical incident guidelines, whose call was it to initiate the protocol to have this matter treated as a critical incident?
> A: It's a recommendation from any junior officer to the commander to notify it as a critical incident. Anyone can tell the commander, "I think we've got a critical incident on our hands". It's then up to the commander to discuss it with the region commander. In that case, that would be Terry Collins, if he wasn't on leave. It is up to the Assistant Commissioner to call a critical incident team out, to notify that team or get someone else to do it, obviously.
>
> Q: When you talk about the commander, you are referring to Bradshaw?
> A: Local area commander, yes.

3.33 A critical incident was not declared until sometime during the afternoon of 6 February 2003**.** By that time, a number of events had taken place that made a thorough, vigorous, and independent investigation of what had occurred within the bedroom at the Property impossible. Briggs and Murphy were the senior officers at the scene and made the decisions that prevented a proper investigation of the incident.

3.34 Once the critical incident was declared the appropriate protocols were put into place. A Critical Incident Review Team was formed and immediately commenced investigating the incident. At the conclusion of the investigation a report was produced.[98] The report addressed two issues: firstly whether Jackson used excessive force in the arrest of Hathaway and secondly the management of the crime scene. The report made no mention of the finding of a knife in the bedroom.

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[95] PIC Transcript, MM Jennings, 8 March 2005, p. 438
[96] PIC Exhibit 54, barcode 6171460
[97] PIC Transcript, TJ O'Neill, 10 March 2005, p. 645
[98] PIC Exhibit 70C

3.35 In relation to the first issue the report recommended that no action should be taken against Jackson because the investigation found that the circumstances of the arrest justified his actions. It is noted that although the report lists Hathaway's injuries in detail, including the injuries to his face, it does not give any explanation for the injuries to his face. The report states that there was an altercation with the bed and that Jackson used both OC Spray and his baton to Hathaway's legs and arms. There is however no mention of Jackson using the baton on Hathaway's face. The report explains the excessive amount of blood on Hathaway at his arrest as being the result of injuries to his hands and feet caused by jumping fences during the pursuit.

3.36 In relation to the second issue the report recommended that Murphy should be spoken to in relation to his role at the scene of potential critical incidents and in relation to crime scene preservation. The reports states that given the amount of blood on Hathaway, and at the scene, the cleaning of the scene should have been delayed until proper examination by Crime Scene officers could take place. A guard should have been placed at the scene at least until the nature of Hathaway's injuries could be verified. The report continued:[99]

> The evidence obtained from the crime scene such as DNA, Fingerprints and appropriate photographs may have assisted in corroborating or disproving the version of events supplied by Constable Jackson. There is no independent examination or viewing of the crime scene which may become an issue should this matter proceed civilly.

3.37 The Commission has written to NSW Police and asked that aspects of the Critical Incident Investigation Report be reviewed.

BRIGGS FAILED TO TREAT INCIDENT AS CRITICAL INCIDENT

3.38 Briggs, a Detective Senior Constable, agreed that he was the officer in charge of the investigation into the events of 6 February 2003. His evidence was as follows:[100]

> Q: You were the officer in charge of the investigation were you not, that following what occurred on 6 February 2003?
> A: Well, basically, yes. I initiated the original pursuit and had carriage of the matter.
>
> Q: You were the officer in charge?
> A: Yes.

3.39 There is no doubt that Briggs was the *"First Officer at the Scene"* as described in the Critical Incident Guidelines. According to the Guidelines,[101] the *"First Officer at the Scene"* is the most senior officer who first arrives at the incident. The scene that was presented to Briggs on his arrival at the Property should have alerted him at the very least to the possibility that the incident was a critical incident. Briggs, however, sought to maintain that he

[99] PIC Exhibit 70C, barcode 6544177
[100] PIC Transcript, TS Briggs, 22 February 2005, p. 235
[101] PIC Exhibit 54, barcodes 6171479, 6171493

played no part in deciding whether the incident was a critical incident. His evidence was as follows:[102]

> A: Basically, I think there was some – there was some decisions being made by the duty officer as far as whether or not it constituted a critical incident, and ultimately it was declared one.
>
> Q: Weren't you involved in that?
> A: I'm sorry?
>
> Q: Weren't you involved in that decision making?
> A: No.
>
> Q: Despite the fact that you were the officer in charge?
> A: I was – I was the officer in charge of the pursuit. As far as – anything else, that goes up a level.
>
> Q: Officer, you agreed with me when we started you were the officer in charge of the investigation?
> A: Right. What I'm saying is …
>
> Q: Are you seriously saying you played no part at all in deciding whether this was a critical incident?
> A: I played no part at all. It was not my decision.
>
> Q: What do you mean it was not your decision?
> A: It was not my decision.
>
> Q: Isn't it the fact that any officer, it doesn't matter how junior they are, may seek to put in place the critical incident protocol?
> A: That's correct.
>
> Q: You could have done it at any time during the day?
> A: If I considered it to be a critical incident.
>
> Q: You're saying on your oath at no time of the day did you consider it to be so?
> A: The first I knew it was going to be a critical incident was later on that afternoon.

3.40 Quite apart from the Guidelines, and in the absence of a critical incident, preservation of the scene is a matter of basic good policing, indeed, a matter of common sense. Even if Briggs did not form the view that the incident was a critical incident he should have recognised that the incident was a serious incident, or crime scene, and acted accordingly.

3.41 The NSW Police Handbook emphasises the importance of preserving crime / incident scenes. The Handbook allocates duties to the "*First officer at scene*" the first of which is to preserve the scene. Other duties include defining the scene with police crime scene tape, detailing a constable to guard the scene and prevent entry to people without a specified task and notifying a crime scene investigator.

3.42 Briggs agreed that preservation of the scene was fundamental to good policing. In relation to his failure to preserve the scene, he gave the following evidence:[103]

[102] PIC Transcript, TS Briggs, 22 February 2005, pp. 249-250
[103] PIC Transcript, TS Briggs, 22 February 2005, p. 250

Q: What steps did you take to secure the crime scene?
A: Well, basically, we were out the front. I organised – as in secured it itself?

Q: Yes.
A: Probably little, if any.

Q: None; isn't that right?
A: Yeah, I'd agree with that.

3.43 He was unable to offer any rational explanation as to why he failed to take any appropriate action. His evidence was as follows:[104]

Q: Would you agree with the proposition, officer, that it is fundamental to good policing that crime scenes be secured?
A: I'd agree with that.

Q: And can you offer any explanation to the Commission at all as to why you didn't take any step in that direction at all on 6 February 2003?
A: Basically because I – I just didn't realise obviously the injuries that were occasioned to Mr Hathaway or the manner in which they came about.

Q: But isn't that the very reason why the crime scene should have been secured?
A: Well, again, it was only dealing with what I thought were assault police matters.

Q: Perhaps consider this as an explanation, that one of the reasons why you didn't secure the crime scene is that you had a reasonable suspicion that one of your fellow officers had bashed Mr Hathaway?
A: No, that's not correct.

Q: Can you think of any reason consistent with commonsense why you didn't do so?
A: I simply didn't realise the complexity of it.

Q: What was complex about it?
A: I simply didn't appreciate.

Q: What was it you didn't appreciate?
A: Obviously I relied on information provided to me prior to Mr Hathaway being detected, and I falsely assumed other things had occurred, which obviously there's – is the reason why we're here.

Q: Right. What were the things that you relied on before you got there, I think you were referring to?
A: Basically, the fact that I'd received information from – as I said, that he was bleeding from the head.

Q: I don't quite understand that. You hear third hand that he's bleeding from the head. You walk into a room and there's blood all over the place and you don't secure it.
A: Right.

Q: I mean did the fact that he was bleeding from the head explain all the blood you saw in the room against the walls, on the floor, over every conceivable piece of furniture in there?
A: Which is why I went and called for the crime scene to attend via the police radio.

[104] PIC Transcript, TS Briggs, 22 February 2005, pp. 251-252

Q: That must have been because it dawned on you at that stage that you had a crime scene; isn't that right?
A: I suppose that's correct, yes.

Q: And you failed utterly to secure it; isn't that right?
A: I was basically at the front of the house monitoring what was going on, there was no people going in or out.

3.44 Despite the fact that as first officer at the scene he should have appointed an officer to secure the scene, Briggs did not appoint a guard or record who was going in and out of the Property. He agreed that he failed to take this step claiming, again, that he did not realise the *"seriousness of the situation at the time"*. His evidence about this was as follows:[105]

Q: One of the steps you're required to take when securing a crime scene, I suggest, is to have an officer appointed as a guard; isn't that right?
A: There's meant to be inner and outer perimeters.

Q: You're supposed to appoint a guard, are you not?
A: Yes, yes.

Q: One of the functions of that guard is to log every person who goes in and goes out?
A: That's correct.

Q: You didn't do that, did you?
A: No, I didn't.

Q: Why not?
A: Again, I didn't realise …

Q: What didn't you realise?
A: I didn't realise the complexity of the whole thing.

3.45 Both Briggs and Murphy said that attempts had been made to contact the Crime Scene Investigation team but they were attending a fatal accident at Coleambally and would be delayed for some hours.[106] The Commission is of the opinion that it defies credibility that two senior officers would consider that such a delay justified their conduct in failing to preserve the scene.

3.46 Briggs agreed that there was no time pressure upon him and that although he could have waited for the Crime Scene Investigation team, he did what he *"... thought was best at the time"* and organised for untrained officers to obtain photographic equipment and then to walk around the scene taking photographs. Briggs claimed that *"... in the country it's normal procedure"* or *"... not unusual ..."* for untrained officers to take photographs at crime scenes.[107] He was, however, unable to offer any convincing reason why the matter assumed such a degree of urgency. He gave the following evidence in response to questions from the Commissioner:[108]

Commissioner:
Q: Why was it so urgent detective? Mr Rushton has asked you a couple of times in various ways but what was on your mind that prevented you just waiting until the appropriate people were available?

[105] PIC Transcript, TS Briggs, 22 February 2005, pp. 252-253
[106] PIC Transcript, TS Briggs, 22 February 2005, p. 254
[107] PIC Transcript, TS Briggs, 22 February 2005, pp. 254-255
[108] PIC Transcript, TS Briggs, 22 February 2005, p. 256

A: Sir, I didn't have any timeframes for the crime scene police. It was around this time Mr Murphy attended the scene. I figured I'd, like I said, do what I thought was right at the time.

Q: If it had been a critical incident, supposing you had got over your barrier or someone's barrier earlier, would the crime scene police then have been waited for regardless of how long it was going to be?
A: If – yes.

3.47 The decision to bring in commercial cleaners to have the bedroom cleaned as a matter of urgency was made by Murphy. Murphy was Briggs' senior officer and Briggs said that he accepted Murphy's decision without question. Briggs' evidence in relation to the decision to bring in commercial cleaners was as follows:[109]

Q: Why was there this urgency?
A: I suppose that comes down to Mr Murphy.

Q: And what does that mean?
A: It was his decision. I had no idea that the cleaners had even been organised until he mentioned it – not organised, but were intended to arrive.

Q: But you knew, as the officer in charge, before the cleaners went and carried out their work that it was going to happen, didn't you?
A: Yes.

Q: So there you had a situation where you hadn't appointed a guard to log who was going in and going out; isn't that right?
A: Yes.

Q: You hadn't secured the crime scene in any way?
A: I suppose that would be correct, yes.

Q: And you had acquiesced in a procedure which was going to destroy the crime scene; isn't that right?
A: Basically it was Mr Murphy's decision.

3.48 When asked whether he agreed with the decision Briggs said *"I didn't really think about it …"*. He did acknowledge before the Commission, however, that as a result of the decision the crime scene was destroyed.[110]

3.49 Briggs agreed that at the time Murphy made the decision to call in commercial cleaners to the Property, he had been made aware by Murphy that O'Neill had some concerns about the injuries suffered by Hathaway.[111] He also agreed that in the conversation he had with Murphy in relation to the decision to call in commercial cleaners, Murphy conveyed the impression that the cleaning had to be done as a matter of urgency. Briggs could not remember the exact conversation but said that he thought Murphy wanted the cleaning done quickly due to practical considerations about the state of the bedroom rather than anything sinister.[112]

[109] PIC Transcript, TS Briggs, 22 February 2005, p. 258
[110] PIC Transcript, TS Briggs, 22 February 2005, p. 260
[111] PIC Transcript, TS Briggs, 22 February 2005, p. 267
[112] PIC Transcript, TS Briggs, 22 February 2005, pp. 283-285

3.50 The Commission is satisfied that what occurred on 6 February 2003 at the Property amounted to an attempt, at least by Murphy, to *"cover up"* or conceal possible misconduct on the part of Jackson. Briggs agreed that the evidence was capable of giving rise to this inference. His evidence was as follows:[113]

> Q: You're an experienced police officer, and I won't keep you much longer this afternoon, but I want to get your comment on one thing. Do you agree with this proposition, that the circumstances of this particular matter – that is where you have an alleged offender such as Mr Hathaway who is injured and is admitted to hospital; the crime scene is not secured; and where in fact I think you have acknowledged the crime scene is in effect destroyed – are capable of conveying a fairly sinister connotation to members of the public?
> A: Do I agree with that?
>
> Q: Yes.
> A: Yes, it does, I agree with that.
>
> Q: Do you agree on one view – and I'm not putting the view that this is the case – it very much suggests a cover-up?
> A: Your suggesting …
>
> Q: No.
> A: … that's the way it looks.
>
> Q: Yes.
> A: Yes, yes.

3.51 The Commission is of the opinion, as discussed below, that Murphy took active steps to conceal or cover-up possible misconduct by Jackson. On one view of the evidence, it could be considered that Briggs actively participated, or agreed, with Murphy to conceal Jackson's role in the incident. In the circumstances, however, having regard to the appropriate standard of proof, the Commission will not express an opinion that Briggs actively participated with Murphy to conceal Jackson's misconduct.

3.52 Briggs did not challenge Murphy's decisions despite knowing that those decisions would have the effect of making it difficult, if not impossible, to have the incident properly, vigorously and impartially investigated. The evidence is insufficient to conclude that Briggs acted deliberately, nevertheless, conduct of that type by a senior officer is, in the Commission's view, police misconduct.

MURPHY FAILED TO TREAT INCIDENT AS CRITICAL INCIDENT

3.53 As suggested above, Murphy's failure to immediately treat the arrest of Hathaway as a critical incident and to thereafter take positive steps designed and intended to cover for Jackson is extremely serious. The evidence gives rise to a compelling inference that Murphy did not immediately declare the matter to be a critical incident because he intended to, and did in fact, endeavour to conceal misconduct on the part of a junior officer in his command.

[113] PIC Transcript, TS Briggs, 22 February 2005, p. 283

3.54 That inference is certainly available to explain the actions taken by Murphy on 6 February 2003. None of the decisions made by Murphy, or the actions taken by him on that day, are consistent with proper policing, appropriate investigation of crime and, in particular, investigation of an incident where a fellow police officer may have overstepped the line. O'Neill gave the following evidence when it was put to him that the inference could be drawn that there was deliberate cover-up:[114]

> Q: Can you see why reasonable members of the public might draw that inference from the facts as they have emerged on that day? Not that you were involved necessarily, but that certain officers, or officers generally, were involved in that sort of conduct?
> A: I can see where people who didn't know those officers involved, particularly Tom Murphy, might drawn an inference, but, look, that's not Tom Murphy. Tom – that's my opinion.
>
> Q: Okay.
> A: I concede your point.
>
> Q: Well, it's a pretty good point, isn't it?
> A: I concede your point, that someone looking at it from the outside not knowing the personalities involved – in particular, Inspector Murphy – could come to that inference. I say that anyone that knows Inspector Murphy would know that that's not Tom Murphy.

3.55 The following are particular matters which, in the Commission's opinion, are inconsistent with a mere error of judgment by Murphy. Each of these matters must be viewed in the context of Murphy's knowledge, firstly, that Jackson admitted to him that the injuries to Hathaway had been caused by Jackson, and, secondly, that Hathaway had been taken to hospital for treatment. The only available inference is that Murphy, as an experienced officer with over 20 years experience in policing, knew that a critical incident should have been declared immediately and would be declared in due course. Despite that he was prepared to have the process delayed for as long as possible so that he could endeavour to cover up possible misconduct on the part of another officer in his command.

3.56 On 6 February 2003 Murphy was one of two Duty Officers rostered on duty. He gave evidence that it was usual practice for one Duty Officer to be in charge of all operational matters and the other to work on *"... any portfolio or outstanding tasks they may have"*. On that day Murphy was in charge of all operational matters.[115] The custody records show that Hathaway was taken to the Police Station at 11.20 a.m. and that the ambulance was called immediately at 11.20 a.m.[116] Murphy recorded in his notebook[117] that he received a telephone call from O'Neill at 11.30 a.m. during which O'Neill indicated *"person arrested injured*".

3.57 Murphy's evidence was that on the morning of 6 February 2003 he was attending to duties away from the Police Station and was contacted by O'Neill and asked to attend the Property. Murphy said that in that first

[114] PIC Transcript, TJ O'Neill, 10 March 2005, pp. 660-661
[115] PIC Transcript, TP Murphy, 23 February 2005, p. 308
[116] PIC Exhibits 22 & 26
[117] PIC Exhibit 17B

telephone call O'Neill did not mention that Hathaway was injured. He said that it was not unusual for an inspector to be asked to attend because *"We're encouraged to attend all matters"*. Murphy said he attended the scene and it was only after he had spoken to Briggs and other officers, and had a look at the scene, that he had a further conversation with O'Neill and the fact that Hathaway was injured was mentioned. Initially Murphy said that even in the second telephone call O'Neill did not express concern about the injuries.[118]

3.58 Murphy later acknowledged that during the second telephone discussion O'Neill did express some concern as to Hathaway's condition. Murphy also acknowledged that O'Neill's concern, together with the admissions made to him by Jackson, that Hathaway's injuries resulted from the struggle with the bed, meant that the matter at least had the potential to become a critical incident. He claimed, however, that *" ... at that stage the assessment of the injuries did not meet the criteria of a critical incident"*.[119] Murphy maintained that he did not have the matter declared a critical incident because his assessment was that *"... the injuries were not serious ... as in serious injuries requiring emergency admission to hospital"*. In hindsight, he conceded that may have been *" ... a poor decision"*.[120]

3.59 It became apparent during the course of Murphy's evidence that he was unable to explain the decision not to call a critical incident on any rational basis consistent with his duties as either an experienced senior officer or as Duty Officer. During the course of the morning of 6 February 2003, he had two telephone discussions with the Local Area Commander, Superintendent Bradshaw, which will be dealt with in more detail later. However, it is significant to note that despite Murphy's evidence that he believed the matter might possibly become a critical incident, he admitted informing Superintendent Bradshaw at 11.34 a.m. that the matter was not a critical incident. His evidence was as follows:[121]

> Q: He [Bradshaw] went on to say that there was some discussion as to whether this was a critical incident and you expressed a view to him that it wasn't?
>
> A: That's correct. I made a decision that it was not a critical incident, and, as I have said and admitted in this Commission, I made an error in judgment and a poor decision. My reasoning then for speaking with Mr Bradshaw was I now faced a situation that I had not encountered before.
>
> Q: Officer, you have said a number of times that you made an error in judgment and a poor decision, and I will come back to that in due course, but we are all aware of the fact that you made certain decisions during the course of the day. I mean, that is not seriously in issue. Do you understand that?
>
> A: I do, but it appears to me my decisions are being put to me that they were made for a corrupt or a cover-up reason and that is certainly not the case.

[118] PIC Transcript, TP Murphy, 23 February 2005, pp. 310-311
[119] PIC Transcript, TP Murphy, 23 February 2005, pp. 312-313
[120] PIC Transcript, TP Murphy, 23 February 2005, pp. 315-316
[121] PIC Transcript, TP Murphy, 10 March 2005, pp. 705-707

Q: Well, they are, and I will continue. Did you tell him at that point in time – that is, 11.34 – that it was not a critical incident, or did you tell him that it was not at that stage a critical incident but might become one?
A: My recollection is I had made a decision and I told him that I did not believe it was a critical incident and I needed his assistance in another dilemma that I was facing.

Q: That statement to him at that time, as early in the morning as 11.34, was, to use the most neutral expression that comes to mind, utterly reckless, was it not?
A: No, it was a decision that I had made.

Q: How could you reasonably inform Superintendent Bradshaw at 11.34 a.m. that this was not a critical incident?
A: From the information I had gleaned at the scene and speaking to the police involved I came to that decision.

Q: But on what basis?
A: On what I just said: the police I spoke to at the scene, the information I had gleaned from those.

Q: Let's go through it. You were aware that this man had been taken away with injuries?
A: That's correct.

Q: You had spoken to O'Neill and he had conveyed to you at least the impression that he was upset at the extent of the injuries?
A: That's correct.

Q: At some time I think during the course of that morning you became aware that an ambulance had attended?
A: That's correct.

…

Q: Certainly by 11.34 you knew that he had left the scene with injuries and, can I suggest, you also knew that Inspector O'Neill was somewhat upset at the extent of the injuries that Hathaway had received?
A: That's correct.

Q: Well how, in those circumstances, would you possibly have informed, on reasonable grounds, your superior officer Superintendent Bradshaw that it was not a critical incident?
A: My assessment as I said – in my opinion, it did not meet a critical incident criteria.

Q Why not?
A Because the injuries were not serious that required emergency admission to hospital.

Q How did you know that?
A Because I would have expected the police or the ambulance would have attended and taken him straight to the hospital from Kincaid Street.

3.60 In his second conversation with Superintendent Bradshaw, at 12.31 p.m., Murphy agreed that he told Superintendent Bradshaw that *"nothing had*

changed" and that it was not a critical incident. His evidence was as follows:[122]

Q: Well, he [Bradshaw] says that you told him that there was no change in the situation and it was not a critical incident?
A: That could well have been the case and I would have – I would agree with that.

Q: Well, how would you possibly have reasonably held that view at 12.31?
A: That's – sorry, that it?

Q At 12.31
A: That it wasn't a critical incident?

Q: Yes, and that nothing had changed.
A: Well, I believe at that stage nothing had changed. I had not received any update in regard to his – to Hathaway's injuries or anything else.

Q: Are you saying at that point in time you were unaware of the fact that he had been taken to Wagga Base Hospital under police escort?
A: I may have told Bradshaw that or I may not have.

Q: Don't worry about what you may or may not have told him. Were you or were you not aware at 12.31 that Hathaway had been taken to Wagga Base Hospital under police escort?
A: I can't recall whether I was aware or not.

Q: When do you think you first became aware?
A: Sir, I'd have to look back at previous evidence and previous interviews and transcripts. I can't recall the exact time.

Q: Do you agree, sir, that if in fact Hathaway had been admitted to hospital at 12.30, you at least should have known at some time prior to 12.30 he'd been taken to hospital?
A: That's correct.

Q: What inquiries did you put in place during the course of that morning to find out what his condition was?
A: I have a recollection that I contacted the station.

Q: Who do you think you might have spoken to?
A: Like, I was under the impression I spoke to Inspector O'Neill – whether that's correct or not – and at that stage I believe I was informed that he was being assessed by the ambulance officers and whether I was told then that he was going to the hospital or not, I cannot recall.

Q: Might this be the position – that you had already decided in your own mind that this was not a critical incident and, therefore, the seriousness or non-serious nature of the injuries to Hathaway became completely irrelevant?
A: I wouldn't say completely irrelevant, but it wasn't foremost in my mind once I decided it wasn't a critical incident.

Q: Yes. Do you agree with me that if you told your Superintendent, Superintendent Bradshaw, at 12.31 that there was no change to the situation and that it was not a critical incident, that, in the circumstances of this particular matter, was utterly reckless?
A: I disagree "utterly reckless".

[122] PIC Transcript, TP Murphy, 10 March 2005, pp. 711-713

> Q: Don't you think it was incumbent upon you, before expressing a view that there had been no change, to find out whether in fact there had been?
> A: I might have used the words "I have been informed there has been no change". I admitted I erred. I should have got a comprehensive briefing from everybody and then relayed that to Superintendent Bradshaw.
>
> Q: See, he had travelled to the hospital at 11.51, 40 minutes before you had your conversation with Bradshaw.
> A: That may …
>
> Q: How could you possibly in those circumstances convey to your superior officer that there had been no change in the circumstances without making proper inquiries?
> A: To my knowledge, the circumstances hadn't changed.
>
> Q: And your knowledge was based upon, can I suggest, a complete failure to find out?
> A: I will agree with that.
>
> Q: And a complete failure to find out, I suggest, because you had decided that this was not going to be a critical incident come what may?
> A: That's correct. Not come what may. In my decision-making process, I deemed it not a critical incident.

3.61 If Murphy had treated the matter as a critical incident he would have been required to fulfill the role of Duty Officer in attendance at the scene. It could be said that because the situation was not identified as a critical incident then Murphy was under no obligation to fulfil these duties, however, it should be noted that the duties as detailed in the Guidelines reflect the first principles of sound policing when dealing with any crime or incident scene. As an experienced officer Murphy should have been well aware of both the principles and what was required of him. The NSW Police Handbook does not allocate specific roles to a Duty Officer at a crime or incident scene, however the Handbook makes it clear that preservation of a crime or incident scene is most important and that it is the responsibility of not only the first officer at the scene but also the senior investigating officer and the scene coordinator to ensure preservation of the scene.

3.62 The only step taken by Murphy to record the scene was to organise for McAlister, Deissel and Philpott to take photographs of the blood in the house. Although McAlister had received some training in photography through a field intelligence officer's course he had no training in forensic photography. Neither of the other officers had any training in forensics.

3.63 Murphy's evidence that he secured the scene and appointed Deissel to maintain a crime scene log is rejected because it is inconsistent with the evidence of other officers and the observable facts. His evidence was as follows:[123]

> Q: You clearly acknowledged then that you had a crime scene on your hands?
> A: Yes sir.

[123] PIC Transcript, TP Murphy, 23 February 2005, pp. 318-319

Q: What steps, if any, did you take to secure it?
A: My recollection is that it was secured. The police were moved out. Apart from when I went in there for an inspection, they were kept out. My recollection is that Constable Deissel maintained a crime scene log.

Q: What practices and procedures are you required to adopt in relation to the securing of a crime scene?
A: It's to secure it to prevent unauthorised access or contamination.

Q: What steps do you say you took to ensure that that happened?
A: The police were moved out.

Q: Where were they moved out to?
A: To a courtyard area where the only open door to the premises was, or the only unlocked door to the premises was.

Q: Is it your evidence that you instructed Officer Deissel to keep a log of who was coming in and who was going out?
A: That's my recollection.

Q: Are you aware that she didn't keep such a log?
A: No, I'm not.

Q: Isn't this the fact, officer, that no steps were taken to secure the crime scene?
A: I strongly disagree with that.

3.64 Murphy claimed to be unaware that Deissel had not kept a log of who was coming and going from the scene. He continued to deny, even after being informed of Briggs' evidence (see 3.66 below), that no steps were taken to secure the scene and claimed that simply having the police officers standing near the only open door to the premises prevented any unauthorised entry. Despite that, he then gave evidence that both the owner of the house and the cleaner were allowed to enter.[124]

3.65 Deissel claimed that she could not recall being instructed to keep a crime scene log but said that if she had been so instructed by Murphy, she would have done so. Her evidence was as follows:[125]

Q: What steps were taken to secure the crime scene, officer?
A: As far as I'm aware, none were.

Q: Were you instructed by Inspector Murphy to keep a log of the persons entering and leaving the premises?
A: I don't remember getting instructed to do that.

…

A: If I had been instructed to do a crime scene log, I would have made a crime scene log.

3.66 Briggs, the officer in charge of the Hathaway investigation agreed that he had not taken any steps to secure the crime scene. He gave the following evidence:[126]

Q: What steps did you take to secure the crime scene?

[124] PIC Transcript, TP Murphy, 23 February 2005, pp. 319-320
[125] PIC Transcript, AR Deissel, 8 March 2005, p. 421
[126] PIC Transcript, TS Briggs, 22 February 2005, p. 250

A: Well, basically, we were out the front. I organised – as in secured it itself?

Q: Yes.
A: Probably little, if any.

Q: None; isn't that right?
A: Yeah, I'd agree with that.

3.67 In addition to the evidence of Briggs and Deissel, and the fact that both the owner of the house (Mr Gaffney) and the cleaner were allowed to enter,[127] other officers also apparently also entered the scene at will. For example McAlister gave evidence that he went back into the bedroom after Hathaway had been arrested and taken away. He said that the curtain had been withdrawn and consequently the room was lighter than it had been at the time of the arrest and he could see the blood.[128]

3.68 No attempt was made to ensure the officers did not discuss the incident with each other or that they made independent notes and statements. Each of McAlister,[129] Philpott,[130] and Briggs[131] acknowledged that they had discussions with Jackson seeking to find out what had happened within the bedroom. Indeed, it was the evidence of Murphy[132] that Briggs, Philpott and Deissel had been present when Jackson admitted that the injury to Hathaway's face, had been caused by Jackson pushing the bed into Hathaway's face although all three officers gave evidence that they couldn't recall being present during such a conversation.

3.69 According to Philpott, the officers were told by Inspector Murphy to wait at the front of the Property. Philpott said that she, Jackson and Deissel talked amongst themselves about what had happened in the bedroom.[133] McAlister,[134] Briggs[135] and Deissel[136] also gave evidence to like effect. None of these officers, however, made any reference in their notebooks or statements to any explanation offered by Jackson about the incident.

3.70 Philpott claimed that she had no recollection of Jackson discussing how Hathaway became covered in blood or how the bedroom became covered in blood.[137] She later said that she assumed that the injuries had been caused by Jackson.[138]

3.71 McAlister claimed that upon inquiring in relation to *"all the blood"*, he was informed by Jackson that he and Hathaway had been fighting over the bed

[127] PIC Transcript, TP Murphy, 23 February 2005, p. 320; PIC Exhibit 4, photograph 6573009
[128] PIC Transcript, DG McAlister, 21 February 2005, p. 41
[129] PIC Transcript, DG McAlister, 21 February 2005, p. 67
[130] PIC Transcript, JT Philpott, 22 February 2005, pp. 199-200
[131] PIC Transcript, TS Briggs, 10 March 2005, pp. 728-730
[132] PIC Transcript, TP Murphy, 23 February 2005, pp. 364-365
[133] PIC Transcript, JT Philpott, 22 February 2005, pp. 198-199
[134] PIC Transcript, DG McAlister, 21 February 2005, pp. 67-70
[135] PIC Transcript, TS Briggs, 10 March 2005, pp. 727-730
[136] PIC Transcript, AR Deissel, 8 March 2005, pp. 408-410
[137] PIC Transcript, JT Philpott, 22 February 2005, pp. 200-201
[138] PIC Transcript, JT Philpott, 9 March 2005, p. 550

and the blood *" ... was from when I put him down' or 'we went down' or something like that"*.[139]

3.72 Briggs said that at sometime during the morning Jackson gave him an explanation of what had taken place. However he could not recall being told that the injuries to Hathaway's face had been caused during a struggle between Jackson and Hathaway over the bed or that the bruising on Hathaway's arms was a result of baton strikes by Jackson. Briggs did not believe that Jackson told him anything about the facial injury.[140]

3.73 Although Deissel said that there had been a discussion between herself, Jackson, Philpott, Briggs, Holmes and a civilian witness, Mr Smith about what had happened, after Hathaway had been taken away, she claimed there was no discussion as to how it was that Hathaway came to have an injured face. She also said that she was not curious to find out how it was that Hathaway had lost a significant amount of blood.[141] Deissel's evidence about how the injuries were caused was as follows:[142]

> Q: … Now did you have an understanding when you were there on 6 February that at least certain of the injuries which Hathaway was suffering at the time had been caused by a police officer?
> A: It was my understanding from what I had been told – I wasn't in the room at the time – that most of the injuries were caused from the bed being thrown: that's all I know.
>
> Q: Most of the injuries occurred by a bed being thrown?
> A: A bed being thrown at Senior Constable Jackson.
>
> Q: Yes.
> A: Senior Constable Jackson pushing the bed off him so he didn't get injured.
>
> Q: In fact, wasn't this the case, officer, that Jackson said, in your presence, to Murphy that he had pushed the bed in Hathaway's face?
> A: I can't recall that being said.

3.74 The evidence suggests that certain officers either failed to record the relevant information or completed notebooks in the presence of others. This particular problem was not limited to the more junior officers. One matter, which is covered in more detail later, is the failure of Murphy to record in either his notebook or duty book that Jackson had admitted causing the injuries. The poor quality of the notes and statements prepared by a number of the officers involved is demonstrated by reference to the notes and statements of Jackson[143] and Philpott.[144]

3.75 At approximately 12.40 p.m., the commercial cleaners hired to clean the bedroom where the incident had taken place discovered a knife amongst the bedclothes in the bedroom. Upon discovery of the knife Murphy contacted

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[139] PIC Transcript, DG McAlister, 21 February 2005, p. 68
[140] PIC Transcript, TS Briggs, 10 March 2005, pp. 728-730
[141] PIC Transcript, AR Deissel, 8 March 2005, pp. 408-409
[142] PIC Transcript, AR Deissel, 8 March 2005, p. 411
[143] PIC Exhibits 10 & 11
[144] PIC Exhibits 31B & 56

Briggs, who returned to the Property with McAlister and Jackson. McAlister took further photographs.[145] The knife was later recorded in the Exhibit Book at the Police Station by Jackson at 1.30 p.m.[146]

3.76 Jackson gave evidence that he was shocked when he found out that a knife had been discovered at the Property. His response when asked about the conversation during which Briggs informed him about the knife was as follows:[147]

> I remember it [the conversation] being in the hallway near the meal room in the LAC on level 4. I remember it very, very clearly, because when he told me I was shocked, and I was just thankful that I was in one piece because when he told me about the knife, I realised the gravity of the situation. I knew that it could have been a lot worse for me, I could have been killed, I could have been injured, and he said "You're the luckiest man in the world." I remember those words.

3.77 Jackson also said that he finished both his notes and statement after he returned from the Property with the knife.[148] However, despite giving evidence that the news of the knife shocked him, Jackson made no reference to the knife in either his notes or his statement, although his notes did make reference to Hathaway *"... searching ground looking around ..."*.[149] In this regard he gave the following evidence:[150]

> Q: And you make absolutely no reference to the knife in either your notes or your statement. Now, what's your explanation for that?
> A: I've just left it out.
>
> Q: That's not a very satisfactory answer, I suggest. Why?
> A: I was more worried at that stage about having Hepatitis C. I wasn't really thinking that clearly.

And:[151]

> Q: When in relation to the preparation of your statement, sir – I remind you again you are on oath – did you …?
> A: I'm aware of that.
>
> Q: … learn about the knife at the premises?
> A: It would have been before 1.30.
>
> Q: Yes. And you hadn't finished completion of your statement at 1.30 had you?
> A: No, I don't – I can't be sure, but – no, because I finished my statement before I went home and my shift was 6.00 p.m. so, no, I hadn't finished my statement before I got the knife.
>
> Q: You hadn't finished your notes, either, had you?
> A: No. I was doing them as I had time.
>
> Q: Doing the best you can, would you mind telling the Commission why it is that the discovery of this hugely sensational object – that is, a

[145] PIC Transcript, TS Briggs, 22 February 2005, p. 273
[146] PIC Exhibit 9
[147] PIC Transcript, CJ Jackson, 21 February 2005, pp. 133-134
[148] PIC Transcript, CJ Jackson, 21 February 2005, p. 136
[149] PIC Exhibit 11
[150] PIC Transcript, CJ Jackson, 21 February 2005, p. 136
[151] PIC Transcript, CJ Jackson, 21 February 2005, pp. 139-140

concealed weapon where you had had to effect this arrest – did not find its way either into your statement or your notes?
A: I obviously erred.

Q: I beg your pardon?
A: I've made an error, then. I should have made another statement in relation to the seizing of the exhibit, but at that stage I didn't think about it and I should have.

Q: Can I suggest to you as one possibility – I only put it as high as a possibility at the moment – that you were concerned that what had happened in those premises when you effected the arrest of Mr Hathaway might be the subject of police investigation and the finding of the knife just might not stand up to proper scrutiny? What do you say about that?
A: Sorry, can you say that again, thanks?

Q: What do you say to the suggestion that you left out the reference to the knife in both your statement and your notes because you were concerned that if the matter was investigated internally by the police, it might be suggested that in fact the knife had been planted there?
A: No, that is not correct.

3.78 There is insufficient evidence to satisfy the Commission that Jackson constructed his notes and statement in such a way as would enable him to distance himself from the knife if that became necessary. However, the Commission does have considerable concerns in relation to the fact that Jackson, and other officers, failed to properly record what they saw and heard on 6 February 2003. There appears to have been no effort made by them to ensure that their records were accurate and independently made.

3.79 This latter point was highlighted in the evidence of Philpott. She did not complete her notes until the afternoon of 6 February 2003 when she and Jackson attended the Wagga Wagga Base Hospital for Hepatitis C testing. Philpott admitted that Jackson was *"nearby"* while she was preparing her notes. She gave the following evidence:[152]

Q: Think carefully now: did Officer Jackson give you any assistance in what you put in your notebook?
A: No.

Q: You are absolutely sure about that?
A: I'm not 100 per cent sure, but I'm pretty sure I wrote them myself.

Q: It is not uncommon, is it, for officers to sit down and discuss an incident in which they have been involved and collectively do the notes?
A: Yeah, that's correct.

Q: In fact, it is very common?
A: Yes.

Q: This particular incident, I would suggest, was no different, was it?
A: No.

Q: It is highly likely is it not that you both sat down and worked out what it was that was going to be put in your notebook?

[152] PIC Transcript, JT Philpott, 22 February 2005, pp. 190-191

> A: I had discussed the matter straight after the incident with Constable Jackson, but I hadn't discussed it with him while I was writing those notes.

3.80 One of the matters which Philpott did record in her notebook was her observation that *"Hathaway moved around the room looking towards the floor"*.[153] She admitted that she had been aware at the time she completed her notes that a knife had been found in the bedroom. She maintained, however, that there had been no discussion between her and Jackson to the effect that Hathaway had been looking around the floor for the knife.[154]

3.81 The Magistrate's assessment of the evidence given by Philpott in the Local Court was as follows:[155]

> …Constable Phillpott had an honest manner, however there are deficiencies in her evidence which make her evidence unreliable.
>
> …
>
> Constable Philpott claims that the defendant used his right hand to lean on the wall. Now I trust I will be forgiven for using the vernacular, like hell he did. His right arm was broken in three places, that was a lie.

3.82 Philpott commenced her statement on 6 February 2003 prior to commencing her notebook entry, but did not complete the statement until 7 February 2003. Curiously the statement made no reference to the fact that she observed Hathaway looking around the floor. She gave the following evidence:[156]

> Q: At the time you prepared your statement, you had not prepared any notes?
> A: That's correct.
>
> Q: I think, as you have already indicated to us, your notes were prepared certainly within the vicinity of Constable Jackson and others?
> A: Yes.
>
> Q: You know, don't you, that the reference to Mr Hathaway looking around the floor doesn't find its way into your statement, does it?
> A: No.
>
> Q: Indeed the first time it finds any reference at all is in the notes that you prepared in the presence of Jackson?
> A: Yes.
>
> Q: What's the explanation for that, Officer?
> A: That it's in my notes and not in my statement?
>
> Q: Yes.
> A: I didn't think it was important to put in my statement.
>
> Q: Then why was it important to put it in your notes?
> A: I mustn't have recalled it when I was doing my statement.
>
> Q: You mustn't have recalled it when you did your statement?
> A: Because I started my statement first and then I did my notes in my notebook afterwards.

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153 PIC Exhibit 31B
154 PIC Transcript, JT Philpott, 22 February 2005, p. 192
155 PIC Exhibit 44, barcode 6586449
156 PIC Transcript, JT Philpott, 22 February 2005, pp. 209-210

Q: What do you say to the suggestion that you put that assertion in your notes because Jackson told you to?
A: No, he didn't. I did those notes myself.

Q: Why didn't you, when you did the following paragraphs 13 and 14 of your statement, make reference to Mr Hathaway looking around the floor for something?
A: I don't know.

Q: Is it because you were a little concerned that if you signed off on a statement which linked your evidence to the knife there might be a problem?
A: No. I just forgot to put it in there.

3.83 Collaborative note-taking and statement preparation was common practice in the Wagga Wagga Local Area Command. Both Jennings and Duncan gave evidence of such practice.[157]

3.84 The NSW Police Handbook and Brief Preparation Guide both provide guidance for police officers as to acceptable practice in the making of statements and taking of notes. Those documents clearly state that each statement must be an individual's account of what took place. Collaboration between officers is only acceptable where each officer is able to give an individual account of an incident. The Handbook states that if it is necessary for an officer to refer to another officer's statement or notes to refresh the memory and assist in the preparation of a statement, reference to this fact should be made in the officer's statement.

3.85 The Commission has previously had cause to report in relation to the undesirability of collaboration between officers in the preparation of notes and statements. In relation to a critical incident, the requirement for officers to immediately and independently record observations in their notebook is part of the Guidelines. Common sense would suggest that collaborative note-taking or statement making has the potential to seriously undermine any investigation or prosecution and, just as importantly, public confidence in the independence, impartiality and thoroughness of the investigation procedure. The Brief Preparation Guide clearly acknowledges that problem.

[157] PIC Transcript, MM Jennings, 8 March 2005, pp. 482-483; PIC Transcript, FM Duncan, 8 March 2005, pp. 498-501

4. FURTHER REVIEW OF MURPHY'S ACTIONS

4.1 It is of particular significance that Murphy took no steps to ensure that appropriate protocols were followed. Apart from the failure to call the matter a critical incident and to deal with it appropriately, there are four matters which, in the Commission's opinion, lead to the conclusion that Murphy actively sought to conceal from his superiors, and any subsequent Critical Incident Investigation, possible misconduct on the part of Jackson. Each of these matters is dealt with below. In combination they demonstrate that Murphy involved himself in serious police misconduct. The four matters are:

(i) The failure to make any reference in either his notebook or duty book to admissions made by Jackson.

(ii) The destruction of the crime scene.

(iii) The failure to fully report the events as they unfolded to the Local Area Commander, Superintendent Bradshaw.

(iv) The supply of a misleading Situation Report to the Region Commander, Southern Region, Assistant Commissioner Collins and the Local Area Commander, Wagga Wagga, Superintendent Bradshaw at 2.00 p.m. on 6 February 2003.[158]

NO RECORD OF JACKSON'S ADMISSIONS

4.2 Murphy gave evidence that Jackson admitted to him that Hathaway's injuries were caused by Jackson during the altercation with the bed. His evidence was:[159]

> Q: Just taking you back to that, is it your evidence that Jackson in fact told you that this man had suffered an injury by reason of the fact that Jackson had pushed the bed into his face?
> A: That's correct, yes.
>
> Q: That's what Jackson told you?
> A: That's what my recollection is that Jackson told me at the scene.

4.3 Jackson also ultimately conceded that he had told Murphy, at the scene of the incident, that the injuries had been caused by him pushing the bed onto Hathaway.[160]

4.4 Despite this Murphy made no reference in his notebook to the fact that Jackson admitted to him that he caused the injuries to Hathaway.[161] The only reference to Hathaway's injuries is in the note of the telephone call from O'Neill requesting Murphy to go to the Property where the following is recorded, *"Person arrested injured"*. There is also a reference to blood in the bedroom and on the floor, wall, bed, bed linen and boogie board.

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158 PIC Exhibit 18
159 PIC Transcript, TP Murphy, 23 February 2005, p. 347
160 PIC Transcript, CJ Jackson, 11 March 2005, pp. 762-763
161 PIC Exhibit 17B

4.5 Murphy's duty book entry also makes no reference to Jackson's admission. Rather it suggests that Holmes had observed Hathaway entering the Property with facial injuries. The entry is as follows:[162]

> … Info from Ray Holmes facial injuries observed during foot pursuit. Injuries not considered serious at this stage – ambos summoned to Wagga PS LAC – Supt Bradshaw inf. authorise the contacting of cleaners to clean up the blood in residents home. …

4.6 By entering the details in this way Murphy deliberately down played the situation, both the injuries suffered and how they came about. Holmes, in evidence denied that he had observed Hathaway to have an injured face prior to him entering the Property, and denied that he had ever told either O'Neill or Murphy that he had seen Hathaway enter the Property with an injured face.[163] Whatever his motive, the effect of Murphy's actions was to convey the misleading impression that the injuries to Hathaway were self-inflicted and had occurred before he came into contact with any police officer within the Property. This was despite the fact that Murphy knew that Jackson had caused the injuries to Hathaway because Jackson had told him this was what had happened.

4.7 Murphy was interviewed on 17 February 2003 by the Critical Incident Investigation Team. During the course of the interview, the following exchanges occurred:[164]

> Q9: All right. Did you speak to Constable Jackson about what had occurred?
> A: I believe I did and my recollection of that conversation is that he'd, somehow they'd been alerted by this person Ken that there was blood in a rear toilet at his place. There then followed, my understanding, is Jackson's then followed this blood trail to the house where he's noticed damage to a back door. He has then entered the premises and conducted a search and my understanding and recollection from the conversation with him that he located him under a bed. He's called on his [sic] to come out, then the person's pushed the bed up and pushed it towards Jackson. Jackson's said, He's then had a wrestle with the guy. They resorted to the use of OC spray I, first. No effect, then sprayed again. I believe there was no, Jackson said there was no effect again, then he's resorted to the next tactical option which is the use of the baton.
>
> Q10: Did Constable Jackson outline to you what had occurred in this struggle?
> A: Just that he'd, the OC spray had no effect on him.
>
> …
>
> Q15: And at what time was it that you actually found out the injuries that Allan Hathaway had sustained?
> A: I'd have to refer to the time on the Sit Rep because I believe it probably would have been about half an hour to 45 minutes prior to that.
>
> Q16: Right, OK. I'm going to show you a copy of that Sit Rep.

[162] PIC Exhibit 19
[163] PIC Transcript, RV Holmes, 23 February 2005, p. 380
[164] PIC Exhibit 57

> A: OK. Sit Rep's time, 1400 hours on the 6th of 2 our [sic], probably would have been around 1.00 p.m. we got notification from the hospital that what they perceived the injuries to be, as a result of that I spoke to Superintendent Bradshaw and then I contacted Inspector Lockton at South Region and I'll, I'll just refer to me duty, of that time. I've gone to the Kincaid address with Senior Constable McAlister who I believe is the person that took the photographs of the scene and whilst there as previous I spoke to Detective Briggs and Constable Jackson and Deissel and I also spoke to Constable Philpott who was there. And I was also informed by a Senior Constable Holmes, from the highway patrol, that during the full pursuit of the offender, he observed facial injuries to the person Hathaway prior to him going into the house where he was arrested by Jackson. And then, I haven't got the time but to the best of my knowledge it would have been around at about 1 to 1.15 p.m.
>
> Q17: And that's when you were back at the police station?
> A: That's when I was back at the police station when I believe contact had been made by, with the hospital who made that contact, but I was informed by Inspector O'Neill of what the hospital perceived the injuries may have been.

4.8 At no time during the course of this interview did Murphy make any mention of the fact that Jackson had admitted that he had caused Hathaway's injuries. The effect of this omission was to mislead the Critical Incident Investigation Team by creating the false impression that Hathaway's injuries may have been sustained prior to Hathaway entering the Property.

DESTRUCTION OF THE CRIME SCENE

4.9 Murphy's notebook indicates that he arrived at the Property at 11.40 a.m. Within a very short time he had organised professional cleaners, Simon Mansfield and his father, to attend the Property for the purpose of cleaning the blood from the bedroom. They arrived at 12.25 p.m. At 12.40 p.m., Mr Mansfield located the knife under bed linen between the upturned bed and the wall. The cleaning of the bedroom then stopped. Jackson, Briggs and McAlister attended the scene and McAlister took further photographs. The knife was then bagged, taken back to the Police Station and recorded in the Exhibit Book.[165] It would appear that the cleaning then recommenced. According to Murphy's notes, Superintendent Bradshaw, who had already been briefed some time between 11.40 a.m. and 12.25 p.m., was contacted again, at 12.55 p.m., and *"updated"*. The notes then record *"cleaners recommenced"*.[166]

4.10 It is important to note again that over this period of time the custody records[167] indicate that Hathaway had arrived at Wagga Wagga Police Station (11.20 a.m.), an ambulance was called (11.20 a.m.), the ambulance arrived (11.29 a.m.), the ambulance departed (11.45 a.m.) and Hathaway was taken

[165] PIC Exhibit 9
[166] PIC Exhibit 17B
[167] PIC Exhibit 22

by police escort to Wagga Wagga Base Hospital (11.51 a.m.) where he was triaged at 12.06 p.m.[168] and seen by the doctor at 12.30 p.m.

4.11 Murphy's decision to have the crime scene cleaned and the speed at which the decision was implemented meant that the crime scene was destroyed before any investigation could take place. The effect of his decision was to effectively conceal Jackson's conduct by preventing a thorough investigation of the events.

4.12 Photographs were taken of the areas within the Property where blood was present and noticed, however the officers who took the photographs, McAlister, Philpott and Deissel, had no training in forensic photography. It was acknowledged by some of the officers, including Philpott,[169] Murphy[170] and O'Neill[171] that a proper forensic examination of the crime scene may have revealed matters that would have greatly assisted the investigation.

4.13 Murphy initially denied that he had approached the cleaning of the bedroom as a matter of urgency.[172] However, his attention was drawn to his interview with the Critical Incident Investigation Team on 17 February 2003 which recorded, inter alia, the following:[173]

> … As a result of that we arranged for the crime scene to be photographed, a further brief of evidence was going to be prepared by Detective Briggs during this, and then arranged for professional cleaners to come and clean the person's house as a matter of urgency. …

4.14 In relation to this issue, Murphy gave the following evidence:[174]

> Q: If the answer you've just given to the court is true, what you said to the officer two years ago was obviously false?
> A: I would say that the answer I've given to this court is incorrect and the answer I gave there, bearing in mind it was a couple of days after the actual incident, is correct.
>
> Q: So it was the case that you were treating the cleaning as a matter of urgency?
> A: Yes.
>
> Q: Why?
> A: Because I'd been through my decision process and I came to that decision.
>
> Q: That didn't make it urgent, officer. Why did you treat it as an urgent matter?
> A: Because I had been through my decision-making process, I considered the matter at that stage did not reach a critical incident, so I authorised the cleaning.
>
> Q: It wasn't as though the Gaffneys were at home, were they? Mr Gaffney was at work. You had all day to clean up the mess?

[168] PIC Exhibit 52
[169] PIC Transcript, JT Philpott, 22 February 2005, pp. 206-207
[170] PIC Transcript, TP Murphy, 23 February 2005, pp. 324-325
[171] PIC Transcript, TJ O'Neill, 10 March 2005, p. 663
[172] PIC Transcript, TP Murphy, 23 February 2005, p. 323
[173] PIC Exhibit 57
[174] PIC Transcript, TP Murphy, 23 February 2005, pp. 324-325

A: I was concerned about the amount of damage the blood would have done to the carpet.

Q: Why do you think that was a concern for the police?
A: Because this is the first time that I had been involved in an incident in a house where blood had been spilt as a direct result of police intervention. Therefore as the owners of those premises have no direct or indirect relationship to the incident or the person there, I felt duty bound.

Q: How often in your years of experience have you been in a situation where commercial cleaners have been called in before a crime scene has been properly examined to clean up the area?
A: This is the first instance I'd been involved in one.

Q: In 25 years of policing?
A: That's correct.

Q: And it just happened to be an incident where officers, your officers, were involved?
A: That's correct.

Q: Don't you think that's a little extraordinary?
A: No.

Q: What do you say to the suggestion that the only urgency in the matter was to get the evidence out of the way as quickly as possible so one of your officers wasn't pinged for it?
A: I totally reject that. We had it photographed. I would love for the Commission to go down and do a Luminol test through the house now to show that every piece of blood that comes up in that Luminol test is captured in those images.

Q: What are you trying to convey by that answer?
A: It appears to me that the inference is being made that I've authorised the clean-up to try and hide or negate some type of evidence that may have been present.

Q: What other rational explanation is there? In 25 years of policing you've never come across it. You realised it was possibly a critical incident, the man might go to hospital and at some stage one would be declared, and then as a matter of urgency you clean it up. What other rational inference is there?
A: I made a bad decision.

4.15 It is the Commission's opinion that Murphy's failure to ensure that the crime scene was secured and the hasty steps then taken by him to have it cleaned up are not capable of explanation by reference to a mere *"bad decision"*. The result of Murphy's actions was to limit the evidence that might have been obtained by the Critical Incident Investigation team. By the time they became involved late on 6 February 2003, the crime scene had disappeared. That this was Murphy's motivation is also supported by two further matters.

4.16 These two matters, Murphy's failure to provide all relevant information to Superintendent Bradshaw whilst making critical decisions during the course of the day and the contents of the Situation Report[175] prepared by Murphy around 2.00 p.m. on 6 February 2003 are discussed in detail below.

[175] PIC Exhibit 18

INFORMATION PROVIDED TO BRADSHAW

4.17 There are a number of entries in both Murphy's notebook and duty book suggesting that critical decisions were endorsed by Bradshaw during the course of the day or, at the very least, that Bradshaw was kept fully informed.

4.18 Bradshaw was a careful and compelling witness. The Commission is of the opinion that the evidence he gave in relation to what was, and what was not, conveyed to him by Murphy during their two telephone discussions on 6 February 2003 is substantially correct. Bradshaw's evidence in relation to the information provided to him by Murphy, and the decisions made in reliance on that information, is summarised in the following paragraphs.

4.19 Bradshaw said that in his first conversation with Murphy at 11.34 a.m. on 6 February 2003, Murphy described Hathaway's injuries as being *"... cuts to hands and feet and a cut somewhere else"* but did not convey that the injuries were serious. There was discussion between them about whether the injuries were such as to amount to a critical incident. However, as a consequence of both Murphy's description of the injuries and the fact that Murphy expressed an opinion that they were not serious, Bradshaw concluded that the injuries did not get to the critical incident level. It was Bradshaw's understanding from the information conveyed to him by Murphy that the injuries had been incurred by Hathaway during the pursuit jumping fences. Although Murphy informed him that both OC spray and a baton had been used by an officer, Bradshaw's recollection was that Murphy did not mention anything about an injury as the result of the use of a baton, or as the result of any other application of force by a police officer.[176]

4.20 Murphy did not inform Bradshaw that an ambulance had been called to review Hathaway's injuries or that he, Murphy, had had discussions with O'Neill who, on seeing the offender for the first time, arranged for the ambulance to be called and expressed concern to Murphy about the injuries which Hathaway had sustained. Bradshaw confirmed that had he become aware that O'Neill was concerned as to the extent of the injuries and had arranged for an ambulance to attend, he would have taken a more cautious approach to the question of whether there might be a critical incident.[177]

4.21 During a second telephone discussion with Murphy, at 12.31 p.m., Murphy informed Bradshaw there was no change in relation to the injuries *"... which still meant it was not a critical incident investigation team matter"*. Bradshaw concluded, from the information provided by Murphy, that not only was this not a critical incident at the time, but that it was not going to become one. In addition, Murphy did not inform Bradshaw that Hathaway had been taken to hospital. In this regard, Bradshaw gave the following evidence:[178]

[176] PIC Transcript, S Bradshaw, 10 March 2005, pp. 670-671
[177] PIC Transcript, S Bradshaw, 10 March 2005, pp. 672-674
[178] PIC Transcript, S Bradshaw, 10 March 2005, pp. 674-675

Q: He didn't tell you, did he, that Mr Hathaway had been taken to hospital?
A: I have no independent recollection of being told that at that time.

Q: Had he told you that, you would not have accepted, would you, his representation to you that it wasn't a critical incident?
A: That's correct.

Q: It must follow then, must it not, that he did not disclose to you that Mr Hathaway had been taken to hospital?
A: I believe that's correct.

Q: There is no doubt in your mind, is there, officer, that that was a critical piece of information that he should have conveyed to you at that time?
A: If he was aware of it, yes.

Q: It is the fact, is it not, that he should not have represented to you that it was not a critical incident without first taking the step of ascertaining whether or not Mr Hathaway had been admitted to hospital?
A: In that context, yes.

4.22 Bradshaw gave evidence that during the conversation with Murphy at 12.31 p.m., he was also informed that there was blood on the bedroom carpet. The impression he gained was that the blood on the carpet *"... was from footprints or hands"*. It was Bradshaw's impression that Murphy was seeking his *"endorsement"* to have the blood cleaned up from the bedroom carpet.[179] Upon being shown a number of photographs depicting blood in the bedroom,[180] Bradshaw gave the following evidence:[181]

Q: Did Inspector Murphy at any time disclose to you during the course of the morning that there had been blood spatters or blood drops on the bed?
A: Not to my independent recollection, no.

Q: Officer, I won't beat around the bush: what you have just seen in those photographs was a far more serious situation than was conveyed to you by Inspector Murphy; isn't that right?
A: More serious than my understanding at the time, yes.

Q: Far more serious?
A: Well, "far", yes.

Q: Had you been apprised of the sort of information that is contained in those photographs, can we safely assume that you would never have endorsed the cleaning up of the bedroom?
A: Yes.

4.23 Murphy did not inform Bradshaw that a knife had been discovered within the bedroom by the cleaners and consequentially Bradshaw did not become aware of the knife until his return to Wagga Wagga from Junee late in the afternoon of 6 February 2003. His best recollection was that it was some time after 5.30 p.m.[182]

4.24 It is not surprising that Murphy did not inform Bradshaw of the knife during his conversation at 12.31 p.m. According to Murphy's own notes, the knife

[179] PIC Transcript, S Bradshaw, 10 March 2005, pp. 674-675
[180] PIC Exhibit 4
[181] PIC Transcript, S Bradshaw, 10 March 2005, p. 678
[182] PIC Transcript, S Bradshaw, 10 March 2005, pp. 694-695

was not found until 12.40 p.m.[183] However, Bradshaw recalled a further, or third, conversation with Murphy later in the afternoon (certainly after 1.00 p.m.) where they discussed the fact that the injuries were now known to be serious and that a critical incident team would be instigated through the region.[184] No mention of any knife was made during that conversation.

4.25 Murphy's notebook records as follows: *"Bradshaw contacted 12.55 p.m. & updated, cleaners recommenced"*.[185] However none of the telephone records disclose that there was any telephone discussion between Bradshaw and Murphy at or around 12.55 p.m. This includes the records for Murphy's mobile telephone, on which he made the two previous calls to Bradshaw.[186]

4.26 It is unlikely that Murphy did make such a telephone call. Bradshaw confirmed that he would have acted differently had he been informed by Murphy of the existence of the knife. In this regard, he gave the following evidence:[187]

> Q: Had you been made aware around 12.55 or shortly thereafter, that a knife had been discovered in the bedroom where there was blood, you would have told him, would you not, to immediately cease any cleaning activities?
> A: Yes I would have.
>
> Q: And the fact that you didn't do that suggests very much, doesn't it, officer, that you weren't told?
> A: It does, and that is my best recollection.

4.27 According to Murphy:

(a) his contact with Bradshaw that day was via mobile phone[188] thereby confirming that there was no discussion with Bradshaw at 12.55 p.m. concerning the knife. Call charge records do not show such a call;[189]

(b) during the conversation at 11.34 a.m. he, Murphy, expressed the view that this was not a critical incident;[190]

(c) he disagreed that he made no mention of blood on the walls and other items within the bedroom. Rather, he said he would have described what he had seen; and

(d) he conveyed to Bradshaw that Jackson used his baton but may not have conveyed to him the admission made by Jackson that the injury to Hathaway's face had been caused by the bed. In this regard, he gave the following evidence:[191]

> Q: Superintendent Bradshaw has given evidence to the effect that, at least following his discussion with you at 11.34, he was under the

[183] PIC Exhibit 17B
[184] PIC Transcript, S Bradshaw, 10 March 2005, pp. 682-683
[185] PIC Exhibit 17B
[186] PIC Exhibit 39
[187] PIC Transcript, S Bradshaw, 10 March 2005, pp. 696-697
[188] PIC Transcript, TP Murphy, 10 March 2005, p. 715
[189] PIC Exhibit 39
[190] PIC Transcript, TP Murphy, 10 March 2005, p. 705
[191] PIC Transcript, TP Murphy, 10 March 2005, pp. 710-711

impression that the injuries had been obtained by Mr Hathaway as a consequence of jumping fences, and the like?

A: I am positive that I conveyed to him that Constable Jackson had admitted to me that he was struck with a baton. Whether I relayed it to him in that conversation that the bed actually struck his face I cannot be sure, but I am positive I spoke to him in relation to the baton strikes.

Q: He certainly says that you never conveyed to him any admission made by Jackson that the injury to the face had been caused by the bed?

A: That could well be the case, sir.

Q: If it is the case, it was a fairly serious omission on your part, was it not?

A: That's correct, that's if that admission by Jackson had been prior to me speaking with Bradshaw, and I can't recall.

Q: It had to be, didn't it because before you spoke to Bradshaw you had to find out what had gone on?

A: Yes, but I don't know. I had a number of conversations with Jackson before he left.

Q: I see.

A: It could have well been. I'm not denying that it was before.

Q: I will put it a little wider, sir: the tenor of his evidence is that you did not inform him at any time during that day that Jackson had admitted to you that the injuries to the face had been caused by the bed?

A: That could well be the case. I don't deny or confirm that.

Q: Well, that's a fairly serious omission too, isn't it?

A: That's correct.

4.28 Murphy agreed that during the second conversation at 12.31 p.m., he had informed Bradshaw that there was no change in the situation and it was not a critical incident. This was despite the fact that Hathaway had been admitted to Wagga Wagga Base Hospital by 12.30 p.m. Murphy agreed that even if at the time of his conversation with Bradshaw he did not know that Hathaway had been admitted to hospital he at least should have known that Hathaway had been taken to hospital.[192]

4.29 Murphy *"totally"* rejected Bradshaw's evidence that he, Bradshaw, had not found out about the knife until he returned to Wagga Wagga from Junee about 5.30 p.m. He said:[193]

> I totally reject that. My recollection is that the crux of the second phone call was that the knife was mentioned.
>
> And[194]
>
> My recollection is in the last phone call that I had with Bradshaw the knife was mentioned. I'm confused about the time.

4.30 The second telephone conversation between Bradshaw and Murphy occurred at 12.31 p.m. According to Murphy's own notebook, the knife was not found until 12.40 p.m.[195] Ultimately Murphy agreed that he could not have

[192] PIC Transcript, TP Murphy, 10 March 2005, pp. 711-712
[193] PIC Transcript, TP Murphy, 10 March 2005, p. 714
[194] PIC Transcript, TP Murphy, 10 March 2005, p. 715
[195] PIC Exhibit 17B

discussed the knife with Bradshaw during either conversation on 6 February 2003, at 11.34 a.m. or at 12.31 p.m. He then claimed he must have spoken with Bradshaw later that afternoon. He agreed that his evidence to the effect that he spoke to Bradshaw whilst he, Murphy, was at the Property was incorrect.[196]

THE SITUATION REPORT (EXHIBIT 18)

4.31 The Situation Report prepared by Murphy at 2.00 p.m. on 6 February 2003 is the piece of evidence that most strongly supports a finding that Murphy's conduct was directed to concealing possible misconduct on the part of Jackson. On a number of occasions Murphy stated that he made a bad or poor decision in having the scene cleaned and not calling the critical incident earlier.[197] In the light of the Situation Report it is difficult to accept that evidence.

4.32 The Situation Report purports to address the *"Issue"* of the *"Arrest of Allan Frederick Hathaway ... - injuries sustained during arrest"*. However it makes no reference to Murphy's knowledge that Jackson had admitted causing significant injuries to Hathaway. Indeed, the description of what occurred within the bedroom conveys a clear impression that Jackson's behaviour in the bedroom was appropriate. After describing the chase and discovery of Hathaway under the bed the Situation Report includes the following:[198]

> … A violent struggle ensued between the pair, with HATHAWAY throwing a number of punches at Constable JACKSON. Constable JACKSON has utilised his OC spray in a bid to contain HATHAWAY without effect. **Fearing for his personal safety, and in a bid to protect himself**, [he] has resorted to the use of his expandable baton, striking him in a number of **approved strike areas.** At this point other police arrived at the scene, along with a member of the public, with HATHAWAY still refusing to comply to [sic] police directions to give up. Ultimately Police have moved in, forcibly took him to the ground, and he was handcuffed. (emphasis added)

4.33 Under the heading *"Comment"* the following is recorded:

> Initial inquiries from police involved in the foot pursuit of HATHAWAY revealed that he was seen with **the facial injuries** prior to entering the Kincaid Street address.
>
> Superintendent Bradshaw fully appraised, WW10 Inspector Murphy in attendance. (emphasis added)

4.34 On its face, the Situation Report clearly demonstrates an intention to deflect attention, and investigation, from Jackson. Murphy knew that Jackson had caused the injuries yet instead of reporting Jackson's admission, he chose to mislead his superiors by suggesting, in effect, that the injuries had been self-inflicted by Hathaway before he entered the Property.

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[196] PIC Transcript, TP Murphy, 10 March 2005, pp. 717-718
[197] PIC Transcript, TP Murphy, 23 February 2005, pp. 315-316, 325; 10 March 2005, p. 719
[198] PIC Exhibit 18

4.35 Murphy's evidence in relation to his drafting of the Situation Report was particularly unconvincing. It included the following:[199]

> Q: At the time you sent this report – I am sorry, I should have just said a "critical incident" – you knew that each of the parties to whom you forwarded it, including Assistant Commissioner Collins, would rely on its accuracy?
> A: That's correct.
>
> Q: They would make decisions based upon it?
> A: That's correct.
>
> Q: And therefore you would be very, very careful to ensure that as best you could recollect what had happened on the day, it was absolutely 100 per cent accurate?
> A: To the best of my recollection, yes.
>
> Q: Would you mind telling us why, then, officer, there is absolutely no reference to the fact that you had been told that the injuries had been caused by Jackson pushing the bed into the face of Mr Hathaway?
> A: I have got there:
>
> *"Fearing for his personal safety, and in a bid to protect himself has resorted to the use of his expandable baton, striking him in a number of approved strike areas."*
>
> Q: Yes. What do we gain from that, apart from the fact that that demonstrates that you failed to disclose that he had told you that the injuries to his face had been caused by him pushing the bed into Mr Hathaway's face? Isn't that right?
> A: That's right, and I do agree I neglected to put that in.
>
> Q: What do you say to the suggestion that you were endeavouring to cover for Officer Jackson?
> A: I totally reject that.
>
> Q: What do you say to the proposition that you were endeavouring to convey the impression to your superiors that, indeed, Hathaway had these injuries before he entered the house and that none of your officers had anything to do with it?
> A: I've never aligned myself to that way of thinking at all.
>
> Q: Look at the second page:
>
> *"Comment: initial inquiries from police involved in the foot pursuit of Hathaway revealed that he was seen with the facial injuries prior to entering the Kincaid Street address."*
> A: That's correct.
>
> Q: This was a deliberate endeavour by you, sir, was it not, to try to cover what Jackson had done at the property?
> A: No, it was not.
>
> Q: Where do you make reference to one of the things you had been told, that is, that somebody had seen him with the facial injuries before he went into the house, but make no mention of the fact that Jackson had admitted to you that he had caused the facial injuries?
> A: That's correct, and that is a comment, and initial inquiries were that he had been seen with facial injuries.
>
> Q: Would you agree with me, looking at that document now, that that comment is grossly misleading?
> A: No, it is not.

[199] PIC Transcript, TP Murphy, 23 February 2005, pp. 357-359

Q: Do you agree with me that you failed to disclose the complete picture to your superior officers?
A: No I do not.

Q: Did you think it was relevant for your senior officers to know that one of the officers within the Wagga Wagga police station or the local area command had admitted to you that he had caused the injuries to Mr Hathaway's face?
A: That should have been put in, yes.

Q: What explanation would you like to offer to the Commission for why you failed to do so?
A: I forgot. There was no sinister thing from it.

Q: Do you agree with this proposition, though, that a fair reading of the document, in light of the facts as we now know them, leads to a reasonable inference that you were endeavouring to cover for Constable Jackson?
A: No I wouldn't agree with that.

Q: Indeed, I suggest to you, officer, that this particular document, your sit rep of 1400 hours on 6 February 2003, highlights what you were doing throughout the day: that is concealing and covering for one of your fellow officers?
A: I totally reject that.

4.36 Murphy's explanation for omitting to refer to Jackson's name, as included in the above excerpt of his evidence, was that he forgot and that there was nothing sinister in the omission.[200] Given all the circumstances, and in particular Jackson's admission to Murphy, the Commission does not accept Murphy's explanation.

4.37 It is also significant that the Situation Report makes no reference to cleaning up the crime scene. If, as claimed by Murphy, he genuinely believed at the time that the cleaning was appropriate, one would expect him to have mentioned it in the Situation Report. This is especially so given the fact that Murphy himself said that this was the first time that he had been involved in an incident where *"... blood had been spilt as a direct result of police intervention"* and *"... the owners of the premises had no direct or indirect relationship to the incident or the person ..."*.[201]

4.38 Bradshaw, one of the intended recipients of Murphy's Situation Report,[202] agreed that the Report omitted both very important information (the cleaning of the crime scene) and vital information (Jackson's admission in relation to the injury).[203] Bradshaw also agreed that, as a result of the omissions the Report was *"misleading"* and that one reasonable inference that could be drawn from the document was that Murphy was endeavouring to cover for Jackson. His evidence was as follows:[204]

Commissioner

[200] PIC Transcript, TP Murphy, 23 February 2005, p. 359
[201] PIC Transcript, TP Murphy, 23 February 2005, pp. 324-325
[202] PIC Exhibit 18
[203] PIC Transcript, S Bradshaw, 10 March 2005, p. 688
[204] PIC Transcript, S Bradshaw, 10 March 2005, pp. 690-691

Q: Isn't it the position, though, that the document on page 2 says – I don't have it in front of me – but "the facial injuries" is the comment. Isn't it the word "the facial injuries"?
A: It does say that, sir.

Q: Do I understand you to be saying that Murphy could say there were some facial injuries if he had that information …?
A: Yes.

Q: … but isn't it difficult for him to use the words "the facial injuries" and exclude the comment about Jackson and the bed without forming a conclusion that he wasn't providing the full story?
A: I would agree with that proposition, sir.

And later:[205]

Q: Part of the critical incident review was going to, as you understood it, involve an examination of whether there had been any form of police misconduct?
A: Yes.

Q: It would include, no doubt, examining the question of whether excessive force had been applied to Mr Hathaway?
A: Yes.

Q: In those circumstances, doesn't that document, on its face, suggest to you that its author was endeavouring to cover for Jackson?
A: That is an assumption that could be formed.

Q: And it is a reasonable one, isn't it?
A: It is a reasonable – one of the assumptions that could be formed, yes.

Commissioner:
Q: Do you have any other reason that you can think of why the document would have been cast in that way apart from covering for an officer or apparently covering for Jackson?
A: The only other reason, sir, that I could speculate would be that Murphy forgot to put it in.

Q: But you are not putting that forward seriously, are you?
A: That is the only other reason I can speculate, sir.

4.39 Simple forgetfulness cannot explain the omissions from the Situation Report. Murphy is an experienced police officer who has held a senior position of responsibility for number of years. It is just not feasible that someone in his position would "forget" such important details in relation to an incident that must have stood out as being out of the ordinary. Murphy himself said that this was the first time in his years of policing that he had been involved in such an incident. In these circumstances it is difficult to resist the inference that the Situation Report provides compelling evidence confirming that Murphy's actions and omissions on that day were designed to minimise the seriousness of the incident.

[205] PIC Transcript, S Bradshaw, 10 March 2005, p. 691

5. THE CONDUCT OF THE OTHER OFFICERS

5.1 The Commission is of the opinion that there is insufficient evidence to form an opinion that police misconduct occurred in relation to any of the other officers in relation to their actions, or inaction, on 6 February 2003, or that it would be appropriate, in the circumstances, to express an opinion that consideration should be given to the prosecution of any one or more of them for any criminal offence. Unlike Briggs and Murphy, none of these officers assumed or were required to assume roles pursuant to the Critical Incident Guidelines.

5.2 The officers who were present at the Property, together with Jennings and O'Neill, should have realised that they were potentially dealing with a critical incident, and that certain action and inaction by Briggs and Murphy was inappropriate. It is recognised, however, that junior officers do not have responsibility for making decisions such as calling a critical incident and therefore those officers were entitled to rely on their senior officers to make the appropriate decisions.

5.3 However the failure of a number of officers, in particular Philpott, Deissel and Jennings, to properly record the incident in accordance with NSW Police procedure, and the manner in which they gave evidence before the Commission, is deserving of comment.

CONSTABLE JULIE PHILPOTT

5.4 Philpott, as Jackson's partner on the day, was second on the scene after Jackson. She gave evidence that while in the bedroom she didn't observe any injuries to Hathaway's face although she did observe a large amount of blood on him and in the room. She initially said that while waiting at the Property after Hathaway's arrest she had a conversation with Jackson but could not recall any discussion about how Hathaway came to be covered in blood.[206]

5.5 On the second occasion that she gave evidence to the Commission Philpott changed her evidence and agreed that by the time her conversation with Jackson had concluded she was of the view that the injuries Hathaway had suffered, with the exception of those to his feet, were suffered within the bedroom. Despite having come to this conclusion, she failed to make any mention in her notebook of her conversation with Jackson. Although she agreed that this was an oversight on her part she did not agree that her failure to include a reference to the conversation in her notebook was an attempt to cover for Jackson's actions.[207]

5.6 Philpott said she completed her notebook entry during the afternoon of 6 February 2003 while at the hospital in the company of Jackson. Philpott

[206] PIC Transcript, JT Philpott, 22 February 2005, pp. 196-201
[207] PIC Transcript, JT Philpott, 9 March 2005, pp. 555-558

admitted to having had a conversation with Jackson about her notebook entry although she denied that he gave her any assistance as to her entry, or that she showed him the entry once it was completed. Philpott's notebook entry made reference to Hathaway moving around the room looking at the floor. Philpott denied that the reference to Hathaway's actions was linked to the finding of the knife and that there was discussion between herself and Jackson as to whether Hathaway could have been looking around for the knife.[208]

5.7 Philpott said she began drafting her statement as soon as she returned to the Police Station after Hathaway's arrest and by the time she attended the hospital in the company of Jackson in the afternoon her statement was almost complete, although she said that she did not complete it until the following day.[209] Her statement does not make any reference to Hathaway looking around the floor. Philpott said she did not include a reference in the statement to Hathaway looking around the floor because she didn't recall him doing that at the time she completed her statement and didn't consider it important to include in her statement. Philpott denied that the reference was in her notebook and not her statement because she prepared her notebook entry while in the presence of Jackson or that Jackson told her to put the comment into her notebook.[210]

PROBATIONARY CONSTABLE AMANDA DEISSEL

5.8 According to her evidence Deissel assisted in the pursuit of Hathaway and attended the Property after hearing Philpott's voice over the radio shouting at Hathaway to get on to the ground. She said she was shown into the Property by the neighbour, Mr Smith. When she entered the bedroom Jackson and Philpott and Holmes were there, struggling to arrest Hathaway. She assisted in the arrest putting her knee into his back to assist with handcuffing. Once Hathaway had been arrested and handcuffed he was escorted to the police vehicle by Philpott and Jackson. She followed behind.[211]

5.9 Deissel gave evidence that Hathaway had blood on him and that the room was covered in blood. Despite this she could not recall where the blood was on Hathaway, although she later said he was covered in blood. She also said that she didn't have an opportunity to observe his face. This was despite the fact she was present in the bedroom when he was brought to his feet and taken out to the police vehicle.[212]

5.10 Deissel said that after Hathaway had been taken away she and the other officers had *"... general conversation about what had happened ..."* while standing outside the Property. Her evidence was, however, that the conversation did not include discussion about how Hathaway came to have an injured face. She said her understanding was that the injuries had been

[208] PIC Transcript, JT Philpott, 22 February 2005, pp. 189-193; PIC Exhibit 31B
[209] Although Philpott gave evidence that she completed her statement on 7 February 2003, it is dated 6 February 2003, the day she commenced drafting it.
[210] PIC Transcript, JT Philpott, 22 February 2005, pp. 208-211; PIC Exhibit 56
[211] PIC Transcript, AR Deissel, 8 March 2005, pp. 402-403
[212] PIC Transcript, AR Deissel, 8 March 2005, pp. 403-405, 429

caused by the bed being thrown at Jackson and she could not recall Murphy saying that Jackson had said that he pushed the bed into Hathaway's face.[213]

5.11 Deissel did not make an entry in her notebook[214] about the conversation she had had with the police officers after Hathaway was arrested. She gave the following reason for this omission:[215]

> … Later on that day, Inspector Murphy told me it was going to be a critical incident and the procedures for a critical incident are that you will be interviewed by an investigation team pretty much immediately after and anything that I would have seen or observed would have been caught in those interviews, and that's what I would have relied on.

5.12 Although the incident did of course become a critical incident on the afternoon of 6 February 2003, Deissel was not interviewed in relation to her involvement until 17 February 2003. She agreed that she should have made a more complete entry in relation to the incident in her notebook at the time of the incident. She subsequently made a statement in May 2003, signing it on 16 May 2003.[216] She said that at the time she made her statement she did not have access to her interview with the critical incident investigation team and only had her notes and her memory to assist her. Deissel could not provide a reason as to why she delayed in preparing her statement except to say that she probably waited until it was required for the brief. She agreed that it is good police practice to prepare statements and notes as close to the events as possible especially in circumstances where a critical incident investigation team has been called in.[217]

5.13 In her statement[218] Deissel included reference to Hathaway *"... scanning the room as if trying to find a way to run out of the room"*. When questioned about this at the Commission Deissel confirmed that she saw Hathaway doing this. Previously in her evidence Deissel had said that she didn't observe any injuries to Hathaway's face because she wasn't able to see his face. When asked about this apparent discrepancy she said that although she saw his *"... eyes were moving quickly around the room ..."* she could not recall seeing any injuries to his face. She also did not recall seeing any blood on his face although she had seen blood on his body. Deissel did not change her evidence even when reminded that Jackson's evidence had been that Hathaway's face looked as though it had been dipped in paint.[219]

5.14 Deissel agreed that it was unusual to clean up the crime scene in the manner in which it was done, but said she didn't believe it was a *"cover-up"*. She said that while some one who didn't know might think that, she did not *"... believe there was even a cover-up"*.[220] In relation to the finding of the knife she agreed that it was unusual that no DNA was found on the knife but said

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213 PIC Transcript, AR Deissel, 8 March 2005, pp. 408-412
214 PIC Exhibit 66
215 PIC Transcript, AR Deissel, 8 March 2005, p. 412
216 PIC Exhibit 67
217 PIC Transcript, AR Deissel, 8 March 2005, pp. 412-418
218 PIC Exhibit 67
219 PIC Transcript, AR Deissel, 8 March 2005, pp. 418-419
220 PIC Transcript, AR Deissel, 8 March 2005, pp. 425-426

that it didn't occur to her as a possibility that someone had planted the knife because *"I just don't believe that anyone from Wagga would do that"*.[221]

SENIOR CONSTABLE MELINDA JENNINGS

5.15 Jennings joined NSW Police in 1990 so by 6 February 2003 she had 13 years of policing experience. When she gave her evidence to the Commission she had 15 years experience. She was the custody officer on duty at Wagga Wagga Police Station when Hathaway was brought there after his arrest. She processed Hathaway on his arrival, completing the custody records, and later performed police guard duties at the hospital until he was formally released from custody later that evening. Jennings was also the custody officer on duty on 28 March 2003 when Hathaway was again arrested and charged with the offences relating to 6 February 2003. She gave evidence that she had performed custody officer duties for a number of years, commencing in 1993.[222]

5.16 Jennings was an unimpressive witness. She claimed to have difficulty recalling events, she did not appear to know what her responsibilities and duties were, and she professed to not know who her supervisors were on the day Hathaway was arrested, and what her responsibilities were in relation to reporting to her supervisor. In giving evidence she was prepared to make only very limited concessions and appeared at times to be deliberately avoiding answering the questions. Her answers were often obtuse and she had to be reminded on more than one occasion to answer the questions posed to her, truthfully and fully.[223]

5.17 Despite the manner in which she gave her evidence the custody records appear to show that on the day of Hathaway's arrest she performed her role as custody sergeant competently, completing the appropriate forms required after an arrest, noting Hathaway's injuries, calling an ambulance and organising for him to go to hospital.

5.18 Jennings initially professed to have no understanding of critical incident procedures and said that at the time of Hathaway's arrest she had never been involved in a critical incident. She also said that training in relation to critical incident procedures was not part of her basic training.[224] Later she said that while at the time of the Hathaway arrest it would not have occurred to her that the incident was a critical incident because she had had no experience of such incidents, since that time she has had some more experience and if she was confronted with the same situation *"... next week ..."* she would recognise it as a critical incident.[225]

[221] PIC Transcript, AR Deissel, 8 March 2005, p. 433
[222] PIC Transcript, MM Jennings, 8 March 2005, pp. 436-437 & 467
[223] PIC Transcript, MM Jennings, 8 March 2005, pp. 442 & 457
[224] PIC Transcript, MM Jennings, 8 March 2005, pp. 445-446
[225] PIC Transcript, MM Jennings, 8 March 2005, p. 463

5.19 Jennings gave evidence that Hathaway's presentation at the Police Station on 6 February 2003 was the first time in her experience that an arrested person had arrived at the Police Station injured as a result of the arrest.[226] When completing the custody records on the day of his arrest she recorded his injuries as she observed them, including the injuries to his face and arm.[227] However, when giving evidence she was unable to recall his injuries, except those to his feet and the fact that he was suffering from having been sprayed with OC spray. She would not concede that he was *"seriously injured"* and would only allow that he was injured. When eventually asked to describe the injuries in her own words she gave the following evidence:[228]

> Q: … Perhaps you could tell us how you describe the injuries?
> A: Maybe a 5. Out of, for example, 1 to 10, I would put it about 5.
>
> Q: Is 10 death?
> A: I beg your pardon.
>
> Q: Is 10 death?
> A: Deaf?
>
> Q: Death, D-E-A-T-H?
> A: Yes
>
> Q: So he was at least midway between life and death as you observed him; is that right?
> A: That's right.
>
> Q: Pretty serious?
> A: There's different levels of seriousness. That's why I thought I'd use the 0 to 10 as a better measure. Do you understand?
>
> Q: No
> A: Okay. They were a concern enough for me to call – I have said it before. They were a concern enough for me to call the ambulance. I wouldn't – I wouldn't have stated that it was life-threatening, but, yeah. The point is I have varying degrees of seriousness, that's all, so that's why I was trying to give you an option from 1 to, like 10, for example.
>
> Q: Well, within all the degrees that you have in your head, does he at least fall into one of the degrees of seriousness?
> A: Probably the lower form of it.

5.20 Jennings' evidence was that on Hathaway's arrival at the Police Station she formed the opinion that he would have to go to hospital, but she could not recall on what basis she formed this opinion. She could also not recall the injuries to his face or arm but could remember that he was unable to sign any documents. She did think however that he required urgent medical attention.[229]

5.21 Jennings did not make any inquiries of Hathaway, or of any of the police officers, as to what had happened or how he came to have the injuries. She

[226] PIC Transcript, MM Jennings, 8 March 2005, p. 438
[227] PIC Exhibit 22
[228] PIC Transcript, MM Jennings, 8 March 2005, p. 458
[229] PIC Transcript, MM Jennings, 8 March 2005, pp. 439-444

said that she did not consider it part of her duties as a custody officer to ask how the injuries had occurred. She gave the following evidence:[230]

> Q: Are you saying that when a person presents with serious injuries, it is not part of that process for a competent police officer to ask how it happened?
> A: I believe I am competent and I processed him in the right manner. I did – I think my first – from my memory, my first priority would have been to get the ambulance there, and whether I discussed things after that I'm not sure.
>
> Q: Is it or is it not part of the process of competent policing for a custody officer who observes that a person in custody is injured to ask of that person how it happened?
> A: No
>
> Q: It is not part of those duties, is it?
> A: Not necessarily; no.
>
> Q: What does "not necessarily" mean, madam?
> A: No, the answer is no.

5.22 Jennings was not interviewed as part of the critical incident investigation in 2003 but she was interviewed when NSW Police commenced an internal investigation in 2004. The NSW Police investigation did not continue when the Commission took over the investigation in late 2004. In her interview in October 2004, approximately five months before she gave evidence to the Commission, Jennings described Hathaway's injuries as including facial injuries. When asked to explain why she could remember the facial injuries in October 2004 but not at the time she gave evidence to the Commission she said that at the interview with NSW Police she had access to the custody records and was able to refresh her memory. She said that at the time she gave evidence to the Commission, in March 2005, she had no independent recollection of Hathaway's facial injuries although she could recall the injuries to his feet.[231]

5.23 Jennings did concede that she at least realised that it was a possibility that Hathaway had suffered some of his injuries as a result of application of force by a police officer. She had no recollection however of O'Neill being agitated about Hathaway's condition and could not remember O'Neill directing her to call the ambulance. She also could not recall O'Neill's comments when he saw Hathaway, *"I hope this is justified. Otherwise, somebody will hit the dock"*. In fact she had no recollection of having any dealings with O'Neill in relation to the Hathaway incident although she didn't deny that he might have come into the custody area and expressed concern when Hathaway was there.[232]

5.24 Jennings made no record in her notebook about the Hathaway incident. She said that at the time she didn't consider it important enough however she said that she now knew that she should have made a record of the incident, and if faced with similar circumstances, she would make an entry in her notebook.

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[230] PIC Transcript, MM Jennings, 8 March 2005, pp. 453-454
[231] PIC Transcript, MM Jennings, 8 March 2005, pp. 450-452
[232] PIC Transcript, MM Jennings, 8 March 2005, pp. 449, 455-456

She did not concede however that it was necessary to record comments such as O'Neill's, as reported above, in her notebook.[233]

5.25 Jennings' statement about this matter was made on 1 May 2003 and relates to the events of 28 March 2003 when Hathaway was rearrested and charged.[234] Recorded at paragraph seven of her statement is a conversation between Briggs and Hathaway at the time of the arrest, in which Hathaway allegedly said that he couldn't remember much about the incident (on 6 February 2003) because he was taking valium at the time. The terms of the conversation are identical to that recorded in Briggs' notebook[235] and statement. Although she made no notes of the conversation she was able to record it in precise terms in her statement made some six weeks after the alleged conversation.

5.26 Jennings said she was not able to remember, when giving evidence to the Commission, the precise terms of the conversation. She agreed that she had used Briggs' statement and that of the other arresting officer *"... as a source"* for her statement. She denied that she had copied from the other statements and said that she did remember the conversation and had used the other statements to refresh her memory and *"get her statement right"*. Although she conceded that it was important for witnesses to give independent versions of events and that drawing up statements in the way she had, with no independent sources to refer to, could lead to a miscarriage of justice she would not concede that there was a problem with her statement. She also gave evidence that it was acceptable to use other officers' statements for the purpose of preparing her statements, and that this practice was common amongst officers at Wagga Wagga.[236]

5.27 Although she stated that she had independent recollection of this conversation and included it in her statement, earlier in her evidence she had said that on 6 February 2003 when Hathaway presented to her there was nothing she observed that would have led her to believe that he was under the influence of any drugs. She also said that she would have asked him questions about taking drugs and alcohol and entered his responses on to the computer record.[237] The custody record[238] shows that Hathaway stated that he was taking panadeine forte, ventalin and serepax at the time of his arrest. There is no record of him mentioning taking valium.

5.28 Jennings made no reference in her statement to her dealings with Hathaway on 6 February 2003. This was despite the fact that, by 1 May 2003, she knew that Hathaway was alleging that he had been assaulted. The reasons she gave for not including such information were that it was a formatting problem and that she didn't think it was important. She denied that she was acting to

[233] PIC Transcript, MM Jennings, 8 March 2005, pp. 459-460
[234] PIC Exhibit 23
[235] PIC Exhibit 24
[236] PIC Transcript, MM Jennings, 8 March 2005, pp. 484-487
[237] PIC Transcript, MM Jennings, 8 March 2005, p. 444
[238] PIC Exhibit 26

protect Jackson by not including the information about Hathaway's injuries in her statement.[239]

5.29 Jennings denied that she was a particular friend of Jackson. She said that although she did see him outside work from time to time and they did talk, she could not remember discussing the incident with him. She said she had never asked him what happened in the bedroom at the Property nor was she curious to know.[240]

FORMER INSPECTOR TIMOTHY O'NEILL

5.30 O'Neill, of all the involved officers appears, at an early stage, to have at least realised the seriousness of the situation, including the fact that Hathaway's injuries were serious, fact that he might have been injured by a police officer and the possibility that the matter would become a critical incident. It was Murphy's responsibility on the day to make all the decisions in relation to operational matters and although O'Neill recognised the seriousness of the situation he did not attempt to interfere with Murphy's decision making or put any pressure on him to declare the incident a critical incident. O'Neill did not attend the Property and did not view the scene, nor was it his responsibility on the day to do so.

5.31 At the time he gave evidence O'Neill was no longer a serving NSW Police officer, having retired in March 2005. Prior to retiring, O'Neill held the rank of Inspector and the position of Duty Officer at Wagga Wagga. On 6 February 2005 he was rostered on duty along with Murphy. He was present at the Police Station when Hathaway was brought in, and after seeing him, rang Murphy and arranged for him to attend the scene.[241]

5.32 Unlike the other officers involved in this matter O'Neill was prepared to acknowledge that from an early stage, in fact when he first saw Hathaway on Hathaway's arrival at the Police Station, he was concerned about Hathaway's condition and thought that it was a possibility that he might have been assaulted by a police officer. His evidence was as follows:[242]

> Q: He appeared to be seriously injured, did he not?
> A: He appeared to be injured, sir. I couldn't say whether it was seriously.
>
> Q: You were quite shocked at his injuries, weren't you?
> A: Yeah, I couldn't understand how he'd got them at that stage, no.
>
> Q: It entered your mind, did it not, at that early stage of the day, that perhaps he had been assaulted by a police officer?
> A: During an arrest, yes, that's what I thought, yes.

[239] PIC Transcript, MM Jennings, 8 March 2005, pp. 487-489
[240] PIC Transcript, MM Jennings, 8 March 2005, pp. 492-494
[241] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 597-598
[242] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 599-600

5.33 O'Neill's concern was demonstrated by the comment he made to Jennings after he saw Hathaway and told her to get the ambulance. He said:[243]

> I hope this is justified, otherwise someone will hit the dock.

This comment was misrepresented around the Police Station and some weeks after the incident O'Neill had a conversation with Jackson about it. O'Neill said that he explained his comment to Jackson as follows:[244]

> I just said to him that what I had said was that if this isn't justified, then the officer responsible may hit the dock, and he accepted that, because the story was being word of mouth and blown out of proportion as things happen when you get a group of people passing story to story.

5.34 O'Neill said that after he saw Hathaway he did think that the matter may become a critical incident but at that stage, before Hathaway had been admitted to hospital the incident had not fallen within the critical incident guidelines.[245]

5.35 Despite his concerns, and his recognition of the seriousness of the incident, it was not O'Neill's responsibility on the day to make the decisions about the matter. He left those to Murphy whose responsibility it was. O'Neill was not prepared to criticise Murphy saying that he, O'Neill, did not attend the scene and did not know what *"... factors were playing on Tom Murphy's mind at the time"*.[246] O'Neill also said that he believed Murphy was *"... a competent officer*..." and that he *"... would do the right thing"*.[247]

5.36 Murphy's evidence was that in the first telephone call, when O'Neill informed him of the incident and the need for him to attend the scene, there was no discussion about Hathaway, and O'Neill did not express concern about Hathaway's physical state. He said that after he attended the scene he had a further conversation with O'Neill and it was in that second call that O'Neill mentioned that Hathaway was injured although Murphy did not remember O'Neill expressing concerns about the injuries or the situation.[248]

5.37 Initially O'Neill told the Commission that he couldn't remember if he had mentioned Hathaway's injuries in his first telephone call to Murphy.[249] O'Neill's duty book records that he had two telephone conversations with Murphy on that day however the details of the conversations are not recorded.[250] O'Neill could not remember the details of the conversations however he agreed that he told Murphy that he had sent Hathaway to hospital and that he had concerns about the situation, including the fact that the injuries may have been caused by one of the Wagga Wagga police officers.[251]

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[243] PIC Transcript, TJ O'Neill, 9 March 2005, p. 600
[244] PIC Transcript, TJ O'Neill, 10 March 2005, p. 651
[245] PIC Transcript, TJ O'Neill, 9 March 2005, p. 601
[246] PIC Transcript, TJ O'Neill, 9 March 2005, p. 606
[247] PIC Transcript, TJ O'Neill, 9 March 2005, p. 610
[248] PIC Transcript, TP Murphy, 23 February 2005, pp. 309-311
[249] PIC Transcript, TJ O'Neill, 9 March 2005, p. 601
[250] PIC Exhibit 35
[251] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 606-607

5.38 On the second day of his evidence, however, O'Neill said that in his first telephone call to Murphy he did express concern about the extent of Hathaway's injuries and suggested he attend the scene.[252] Murphy's notebook confirms that the injuries were at least mentioned in that call. The entry relating to the first telephone conversation with O'Neill is as follows:[253]

> @ 1130 hrs phone call from O'Neill re incid at 79 Kincaid St. Person arrested injured

5.39 O'Neill said that Murphy did not discuss the decision to call in commercial cleaners with him and he did not know that this decision had been made until Murphy returned to the office sometime in the afternoon, but before 2.30 p.m. when O'Neill finished duty for the day. Although he did not criticise Murphy's decision he did say that if he had been in the situation where he had seen Hathaway's injuries and the scene he would not have made the decision to clean the Property thereby destroying the scene. O'Neill knew that some officers had taken photographs of the scene because the Crime Scene officers were unable to attend, and said that this was not an uncommon experience in the country.[254]

5.40 On his second day before the Commission O'Neill gave further evidence about the cleaning of the scene. He said that he did not realise the amount of blood that was present at the scene until he saw the photographs during the Commission's hearing, and that Murphy had not spoken to him in detail about the amount of blood. O'Neill also said that because it was Murphy's responsibility to make the decisions there was no reason for him to inform O'Neill in detail about the scene. O'Neill defended Murphy's decision to clean the scene and said that he believed Murphy to be experienced and able to make appropriate decisions. He did not criticise Murphy and said that he had no doubts about Murphy's integrity, but he did finally concede as follows, when asked if he would have taken the same approach:[255]

> Well, no, sir. Look, I'm a different man to Tom Murphy and I'm very much paranoid about the way these things can come back and bite you, and I would have kept the crime scene there.

5.41 Although O'Neill said that when he first saw Hathaway he thought it was possible that the matter might become a critical incident he defended the decision to delay giving the matter that formal status. He said that there were two limbs to calling a critical incident. The first was admission to hospital and the second was the presence of serious injuries. Murphy's duty book records that at some time in the afternoon he had a conversation with O'Neill and Acting Inspector Venables, and that they considered that the matter was not a critical incident at that stage.[256] Although the exact time of that conversation is unknown it is clear that it was after 12.30 p.m., the time Hathaway was admitted to hospital. O'Neill said that he was in contact with the officers, who had gone to the hospital with Hathaway, and that he rang the

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[252] PIC Transcript, TJ O'Neill, 10 March 2005, p. 648
[253] PIC Exhibit 17B
[254] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 605-606
[255] PIC Transcript, TJ O'Neill, 10 March 2005, pp. 660-665
[256] PIC Exhibit 19

hospital himself at some stage, but he was not able to say whether they knew, during the discussion, if Hathaway had been admitted to hospital. However he defended the decision not to declare the matter a critical incident by saying that even if they did know Hathaway had been admitted to hospital they did not, at that stage, know the extent of the injuries. He denied that the reason for the delay in declaring the critical incident was to allow time for the crime scene to be cleaned, thus preventing a full investigation.[257]

SERGEANT CHRISTOPHER KELLY

5.42 Until the second week of the Commission's public hearing Kelly's *"role"* in the Hathaway incident was unknown to the Commission. No witness placed him at the scene. He did not come forward to provide relevant information to the Critical Incident Investigation Team in February 2003, nor did he provide a statement, interview or take any notes in relation to the incident. Kelly came forward of his own volition to give evidence during the second week of the Commission's hearing.

5.43 Kelly's motivation appears to have been loyalty to Murphy, whom he regards as a friend.[258] The tenor of Kelly's evidence was that the steps taken by Murphy were proper, reasonable and, possibly, endorsed by Kelly. No other witness sought to align themselves with Murphy in this way. Kelly was prepared to endorse decisions taken by Murphy even where Murphy had acknowledged that his decisions were flawed.

5.44 Kelly was the shift supervisor rostered on duty on 6 February 2003. In that position he was responsible for the activities of his shift, including checking the roster to ensure people had turned up for work, adopting records of interviews, and attending crime scenes. O'Neill gave the following evidence about Kelly's role:[259]

> A: If he [Kelly] was working he would have been the shift supervisor.
>
> Q: Right. What does that mean?
> A: Well, he's responsible for the activities of his shift.
>
> Q: Right. Does that mean that he can move out of the station and go and check on what the officers are doing?
> A: Oh, most certainly, yeah. He's not the inside supervisor, he is the shift supervisor with responsibility for controlling what happens on the shift.
>
> Q: So it would be quite appropriate for him at some point in the day to go and just check up on what his officers were doing?
> A: Most certainly. I'd be surprised if he didn't.

5.45 Kelly's evidence about his role and observations on 6 February 2003 is summarised in the following paragraphs. Some of Kelly's evidence was illogical and inherently unlikely. It is possible that he had no first-hand knowledge of any of the significant matters in respect of which he gave

[257] PIC Transcript, TJ O'Neill, 10 March 2005, pp. 654-660
[258] PIC Transcript, CJ Kelly, 11 March 2005, p. 811
[259] PIC Transcript, TJ O'Neill, 10 March 2005, p. 647

evidence. The Commission is of the opinion that his evidence was entirely coloured by loyalty to Murphy.

5.46 Kelly claimed that as shift supervisor on 6 February 2003 he had monitored on the radio that there was a *"... situation ..."* consisting of a *"... traffic stop ..."* and *"... a foot pursuit afterwards"*. As a result, he made his way to the vicinity and was told that someone had been apprehended at the Property so he went there. When he arrived, Murphy was there and Hathaway had been taken away. Kelly made no notes and did not provide a statement. However, he claimed that when he spoke to him, Murphy, *"... went through a process that I describe as decisions made out loud. He went through a process of, I suppose, thinking out loud and I was able to stand with him and he bounced ideas off me and that's how the conversation went"*.[260]

5.47 Kelly said that he did not consider the Property to be a crime scene. Rather, *"It was a matter of a place of arrest"*.[261]

5.48 He *"agreed"* with Murphy's decision to clean up the scene. In this regard, he gave the following evidence:[262]

> Q: Let's go back to your discussion with Murphy when he's talking aloud in the driveway and exposing his thought processes to you. What did he say and what did you say?
>
> A: When you say talking aloud, it was just talking, I suppose, in confidence to me, side by side. He said words similar to, "What I'm thinking of doing is" – just give me a moment. I want to get it into chronology, so I'm trying to think. Okay. What he's trying – what he was saying to me was words similar to – words similar to …
>
> Q: Are you having some difficulty there? Did you make some notes of this?
>
> A: Sorry, sir, the only reason I am is I'm a bit nervous and I want to make sure I get it right. I don't want to paraphrase someone if …
>
> Q: Be very careful, please.
>
> A: Okay. Words similar to, "The crime scene is three hours away. They are at Griffith or Hay," or something like that. "They will be some time getting here. What I was thinking of doing was getting it photographed," because McAlister was there, "record it and get the cleaners in." So words similar to that. I think he might have even said, "What do you think?", or may have gestured to me what I thought, what my thoughts were, and I agreed, just through the experience of having to wait for someone – for example, crime scene – that would have been three hours or more away, you know, you have got blood, you've got capsicum spray, you know, I wouldn't like to be in a place that – like, my home or someone else's, your duty of care to those people who owned the house – it looked like a child's room to me, or it wasn't – can you see what I'm saying? I really thought that was justified.

5.49 Kelly said he was at the Police Station when a decision was made for the ambulance to be called[263] however that evidence cannot be correct.

[260] PIC Transcript, CJ Kelly, 11 March 2005, pp. 793-794
[261] PIC Transcript, CJ Kelly, 11 March 2005, p. 796
[262] PIC Transcript, CJ Kelly, 11 March 2005, pp. 797-798
[263] PIC Transcript, CJ Kelly, 11 March 2005, p. 799

Hathaway had already been removed from the Property by the time that Kelly arrived there.[264] Hathaway was arrested at 11.15 a.m. and was back at the station by 11.20 a.m. at which time the ambulance was immediately called. In response to that discrepancy, Kelly said:[265]

> Given those circumstances you have just given me now, it may be the case that when I went into the charge room someone said, "The ambos are on their way", or "The ambos are coming." It may have been – with respect, it was a couple of years ago – that when I've walked in they were already there, but what I'm trying to say is as a supervisor I had to make sure treatment was going to be given to someone who requires it.

5.50 Despite evidence that would tend to disprove his, Kelly maintained that he either made the call to the Ambulance Service, knew they were on their way, or they were at the Police Station when he arrived back from the Property.[266] That evidence cannot be right either. The evidence is that the call to the Ambulance Service was placed at 11.20 a.m., being the time at which Hathaway was taken into custody, the ambulance arrived at 11.27 a.m., Hathaway was seen at 11.28 a.m., and the ambulance left at 11.45 a.m.[267] However, Murphy did not arrive at the Property until 11.40 a.m.[268] That left a time of approximately five minutes during which Kelly claimed to have inspected the Property and had the conversation where Murphy *"... was thinking out loud and I was able to stand with him and he bounced ideas off me ..."*.[269] In this regard, he gave the following evidence:[270]

> Q: According to Inspector Murphy, he doesn't arrive at 79 Kincaid Street until 11.40. Now, on your evidence, he was there when you got there.
> A: Yes, that's right.
>
> Q: And he did a number of things with you. He showed you various things and you had a discussion?
> A: That's right.
>
> Q: That means that you had five minutes for all that to happen and to get back to the station before the ambulance left? Are you saying on your oath that that happened?
> A: Yes, I'm being as honest as I can remember on that event. And, like I say, all I can think of is maybe someone is out with their times, but at the end of the day I was there and did certain things. I wasn't there very long, but after discussion, my responsibility is now back at the station, and I went back to the station. It's only four or five blocks away.

5.51 Kelly told the Commission that he had recently seen photographs of Hathaway's injuries in the newspaper. In his opinion the injuries he observed were the type of injuries he had seen *"... quite often from the Friday/Saturday night pub brawl or the domestic situation, and you do bleed a lot from the head. What I'm trying to say is my view then was that it wasn't a critical incident"*. For the injuries to give rise to a critical incident, they

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264 PIC Transcript, CJ Kelly, 11 March 2005, pp. 794, 800
265 PIC Transcript, CJ Kelly, 11 March 2005, pp. 800-801
266 PIC Transcript, CJ Kelly, 11 March 2005, p. 801
267 PIC Exhibits 20 & 22
268 PIC Exhibit 17B
269 PIC Transcript, CJ Kelly, 11 March 2005, p. 794
270 PIC Transcript, CJ Kelly, 11 March 2005, pp. 801-802

had to be *"more lethal"*. In other words he did not consider that the injuries to Hathaway serious enough to justify the calling of a critical incident.[271]

5.52 After being informed that Murphy had acknowledged he had made a mistake in not properly securing the scene, Kelly too acknowledged that it was a mistake but claimed that he only came to that view during the Commission's hearing.[272] This evidence is unusual given that Kelly was aware of the criticisms made by the Magistrate hearing the criminal proceedings in the Local Court. He gave the following evidence in answer to questions from the Commissioner:[273]

> Q: As soon as you found out that the magistrate had been critical – I'm not saying you were at the court, but you say you found out at some stage after that – when you found out about the magistrate's criticism, did you change your view or think about it in any different light?
>
> A: Sorry, I'm confusing myself, I think. What I'm trying to say – what I would say is my thought process was that, sure, things could have been done differently, but given that time and that particular moment at that minute, standing in the driveway, it seemed to be the right decision, and it wasn't until later on when we were displayed to us, I suppose, that certain things could aid us in, say, this inquiry, it was then that …
>
> Q: When was that "then"? At what point did you at some later stage start to identify things that you would have done differently?
>
> A: Sir, it is only since the last couple of weeks since the inquiry has been on that I have actually had close proximity to this whole arrest phase, so I really didn't give it much of a thought after that at all. I mean, if someone knocked on my door the next day, or a departmental inquiry took place after the court matter and they asked me that question then sure, I would have put my mind – or turned my mind to that decision making, but it is not until the inquiry started that I thought – sorry to give you such a wishy-washy answer, but I really don't recall.
>
> Q: That's alright, officer. I'm used to that.

[271] PIC Transcript, CJ Kelly, 11 March 2005, pp. 803-804
[272] PIC Transcript, CJ Kelly, 11 March 2005, pp. 807-808
[273] PIC Transcript, CJ Kelly, 11 March 2005, p. 809

6. THE FINDING OF THE KNIFE

6.1 The Commission is satisfied that Hathaway did not arm himself with a knife following his entry into the Property. Hathaway strongly denied in both the Local Court[274] and before the Commission that he had taken the knife. His evidence to the Commission was as follows:[275]

> Q: Whilst you were doing this, you grabbed a knife on the way through, didn't you?
> A: I definitely did not.
>
> Q: Definitely did not?
> A: No.

6.2 There are a number of matters which corroborate Hathaway's denial. These are discussed in the following paragraphs.

6.3 Mr Gaffney's evidence concerning his use, cleaning and placement of the knife on the morning of 6 February 2003 was also definite. There is no suggestion that he was mistaken. He said:[276]

> Q: Let's deal with the knife. I think you said you had used it earlier in that day?
> A: Yes, I had.
>
> Q: In what circumstances?
> A: In preparing to go to work, half past 8, something like that, I cut up some fruit to take for my lunch. I cut that up on the kitchen sink with that knife and packed the fruit in my box and then washed the knife in the sink, dried it and then replaced it in the drawer beside the sink.
>
> Q: You are quite certain about that?
> A: I am absolutely certain about that.
>
> Q: What did you wipe it with?
> A: There is a towel under the sink which I used for that purpose.
>
> Q: Was that a habit of yours, a daily habit?
> A: My wife would say not, but it happened on this occasion that I wiped the knife. The knife is one that stains if you don't wash the fruit juice off it, so on this particular occasion I was careful to wash it.

6.4 Hathaway's account of the route he took through the Property did not involve moving towards the area in the kitchen where Mr Gaffney secured the knife in the kitchen drawer. Hathaway said he entered the Property through the laundry and then turned into a hallway. He followed the hallway and turned into the bedroom where the incident occurred. In going this way he cut across the corner of the kitchen but did not go near to the drawer in which the knife was placed.[277]

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[274] PIC Exhibit 44, barcode 6586391
[275] PIC Transcript, AF Hathaway, 11 March 2005, p.829
[276] PIC Transcript, GP Gaffney, 22 February 2005, p.223
[277] PIC Transcript, AF Hathaway, 11 March 2005, p.815

6.5 The officers who were charged with taking photographs of the blood stains, McAlister, Philpott and Deissel, found no blood in the kitchen apart from one spot on the left front of the microwave. The spot on the microwave is consistent with the evidence of the officers that when Hathaway was arrested and taken from the Property, he was taken out through the kitchen and past the microwave. Although Hathaway was taken through the kitchen, it was on the other side of the kitchen to the drawer in which the knife had been placed by Mr Gaffney. McAlister's evidence on this issue was as follows:[278]

> Q: Your job, as dictated to you by Inspector Murphy, was to go around and film the blood, and no doubt you were very careful to find as much blood as you could to photograph. That was your job?
> A: I was to photograph, yes.
>
> Q: Apart from the blood on the microwave, did you not find one spot of blood anywhere else in the kitchen?
> A: I assume I would have taken a photograph of it if I did. I can't remember taking any others of anything in the kitchen, no.
>
> …
>
> Q: I want you to assume at the moment that there is no photograph of blood anywhere else in the kitchen apart from the microwave. It must follow, must it not, that you were unable to observe any blood spots in the kitchen at all apart from what you found on the microwave?
> A: That would – that would stand to reason, yes.

6.6 No fingerprints, blood or DNA were found on the knife, let alone fingerprints, blood or DNA matching Hathaway. Hathaway had injuries to his hands which caused him to bleed. It is common ground that he was bleeding from both his hands and feet when he entered the Property and that he had left a trail of blood. Amongst the photographs that make up Exhibit 4 in the Commission's hearing there are photographs of blood splatters in the premises next door to the Property showing the path Hathaway had taken, and blood smears on the door handle where he entered the Property.[279] Also included in Exhibit 4 are two photographs of Hathaway's mobile telephone covered with blood smears.[280] These photographs clearly show that, by the time he entered the Property on that day, Hathaway was leaving blood where ever he walked and on objects he touched.

6.7 Hathaway was also sweating profusely when he was arrested. The incident occurred in February, during the summer, and Hathaway had expended considerable energy during the pursuit, including leaping over fences. Both Jackson and Deissel gave evidence that Hathaway was sweating.[281] Deissel said he was *"... just covered in sweat"*.[282] Hathaway himself said, *"I was sweating pretty bad on the day because I was running – I ran for a fair while"*.[283] In these circumstances, it is very unusual that there was not the slightest biological trace linking the knife to Hathaway.

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[278] PIC Transcript, DG McAlister, 21 February 2005, pp. 45-46
[279] PIC Exhibit 4, barcodes 6573002-6573008
[280] PIC Exhibit 4, barcodes 6573019 & 6573020
[281] PIC Transcript, CJ Jackson, 22 February 2005, p. 184; PIC Transcript, AR Deissel, 8 March 2005, pp. 402-403
[282] PIC Transcript, AR Deissel, 8 March 2005, p. 427
[283] PIC Transcript, AF Hathaway, 11 March 2005, p. 833

6.8 McAlister gave evidence that as far as he could remember all the drawers and cupboards in the kitchen were closed when he took the photographs. His evidence is borne out by two photographs that form part of Exhibit 4.[284] A third photograph shows the drawer open but that photograph also shows a hand pointing at the open drawer.[285] McAlister agreed that this photograph was taken to show where the knife came from and that when he first took photographs the drawer was not open.[286]

6.9 Jackson's evidence was that when he walked through the kitchen, after entering the Property, he noticed that *"... some of the cupboards looked like they had been opened but there weren't – they were just pulled open, it wasn't ransacked or tipped on the floor"*. When shown a diagram of the kitchen he indicated that the cupboards he noticed as being open were those immediately under the drawer in which the knife had been placed. Despite giving this evidence he did not record, in either his statement or his notebook that the cupboards were open when he walked through the kitchen.[287] In the light of the photographs, and the evidence of Hathaway and McAlister, the Commission does not accept Jackson's evidence that the cupboards were open when he entered the kitchen.

6.10 Philpott said that she could not remember whether the drawers and cupboards were open or not.[288]

6.11 It would be expected that if Hathaway had entered the kitchen, on his way to the bedroom, and taken the knife there would be blood spots or smears on the drawers and cupboards and they would be open and in disarray. He would have been in a hurry and not known where to find the knife. The fact that there was no blood found in the kitchen, except for the spot on the microwave, and the drawers and cupboards were all closed lends weight to Hathaway's claim that he did not enter the kitchen.

6.12 The Commission is of the opinion that one of the officers who attended at the Property on 6 February 2003 planted the knife. Both Murphy and Bradshaw all but conceded this. Bradshaw's evidence was as follows:[289]

> Q: Did it occur to you as a possibility that someone other than Mr Hathaway may have placed the knife under the bed?
> A: That never entered my mind until it was alleged at the court case and I directly asked one of the officers involved did they do that.
>
> Q: Who was the officer that you asked?
> A: Briggs.
>
> Q: Did you ask him because you had formed the view that if it had been planted it was likely him?
> A: No, I asked him because he was briefing me on the court case at the time.

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[284] PIC Exhibit 4, barcodes 6573024, 6573025
[285] PIC Exhibit 4, barcode 6573026
[286] PIC Transcript, DG McAlister, 21 February 2005, pp. 65-66
[287] PIC Transcript, CJ Jackson, 21 February 2005, pp. 95-96
[288] PIC Transcript, JT Philpott, 22 February 2005, p. 203
[289] PIC Transcript, S Bradshaw, 10 March 2005, pp. 698-699

Q: Are you saying that the only reason you asked him was because it had been raised in court?
A: Yes.

Q: But having considered the allegation which was raised in court and the lack of evidence to link Hathaway to the knife, did it occur to you as a real possibility that someone had put the knife under the bed?
A: After the court case?

Q: Yes.
A: After the court case, that was a possibility.

Q: It was a real possibility, was it not?
A: It was.

6.13 Murphy was also prepared to concede that it was a possibility that the knife was planted by a police officer. He said:[290]

Q: Has it ever occurred to you as a possibility, having regard to the extraordinary results, or the odd results, that came back, [the lack of DNA] that perhaps the knife had been planted?
A: Sir, as a result of the negative results, I came of two possibilities.

Q: Yes.
A: Either Mr Hathaway used a cloth or something to grab the knife and go in there or it was deliberately placed there.

Q: Of course, based on the evidence as it is, you really can't say one way or the other?
A: I can't say one way or the other, sir.

…

Q: Officer, having recognised as a possibility that someone may have planted the knife – as a possibility – based on what you observed that day at the crime scene, who do you say might have had an opportunity to plant the knife?
A: The only ones that I can say definitely on oath did not plant the knife there or have anything to do with it was myself and the cleaners, because I was in their direct company the whole time they were there. The only time I became concerned as to the knife being there was when we found there was something, as in no DNA or fingerprints had been obtained from the knife. Is that the stage you are asking my opinion?

Q: Yes.
A: My opinion at that stage – I thought of Constable Jackson. However, the knife being there and not – and Jackson telling me that he never saw the knife produced at any stage would not have condoned his actions, so I ruled him out. I don't believe it led anything to Detective Briggs' inquiries, apart from the preference of a charge with reference to the knife. Sir, I don't know. If I was to nominate one officer who would be the officer I would have concerns about, I can't.

Q: Does it come down to this, that there were a number of officers who, if they had wanted to during the course of the day, at those premises were in a position to plant the knife?
A: That's correct.

[290] PIC Transcript, TP Murphy, 23 February 2005, pp. 364-366

6.14 Because the proper steps were not taken in accordance with the Guidelines to preserve and secure the scene, there were a number of officers who, during the course of the day, were in a position to plant the knife. This was acknowledged by Murphy, as quoted above. The evidence falls short of satisfying the Commission as to the identity of the particular officer. That said, in all the circumstances, it is concerning that those involved in the prosecution of Hathaway considered it appropriate to persist with the charges involving the knife.

7. THE PROSECUTION OF HATHAWAY

7.1 The prosecution of Hathaway commenced in Wagga Wagga Local Court on 10 December 2003. The presiding Magistrate was Mr W. Pierce. No evidence was taken on the first day of the proceedings. Rather, the Court, the NSW Police Prosecutor, and Hathaway's representative, dealt with the failure by NSW Police to produce documents in a timely fashion in answer to a subpoena that had been served on 27 November 2003.

7.2 The subject of the subpoena was the Critical Incident Investigation File. Hathaway's representative, Mr Weir, sought access to that file because he was of the view that it contained relevant information not included in the NSW Police brief against Hathaway that had been served on him. The brief did not include any medical reports, or information about Hathaway's injuries while in police custody, why he was taken to hospital, or information about his treatment. In addition the custody records for 6 February 2003 were not included in the brief, but by the time the matter commenced Mr Weir had already had access to those documents after having served a subpoena for their production.[291]

7.3 The reason NSW Police were able to leave this information out of the brief was that Hathaway was not charged on 6 February 2003 for the matters relating to the incident that day. Once it was learnt that he would have to be transferred to Albury Base Hospital for medical treatment he was released from custody and later, on 28 March 2003, re-arrested and charged. It is the details of that arrest that were included in the brief.

7.4 After hearing arguments from both sides the Magistrate found there was an overwhelming case for Mr Weir to have access to the Critical Incident Investigation File. Proceedings were then adjourned to allow him to view the file and seek instructions. On 11 December 2003, evidence was taken from Briggs and Jackson. The matter was then adjourned part heard until 22 March 2004. There were three more days of proceedings, the last being 24 March 2004. In his decision the Magistrate was critical of NSW Police and referred the matter to this Commission. He expressed the view that the knife was planted by a NSW Police officer, that the investigation was inadequate and that the evidence given by most of the officers was unreliable.[292]

7.5 The NSW Police prosecution reveals a number of features that suggest that the prosecution may have been conducted otherwise than in accordance with the prosecutor's duty to assist the Court in determining the truth. The prosecutor, Sergeant Morgan, in evidence, acknowledged the existence of this duty.[293] The matters of particular concern are as follows:

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[291] PIC Exhibit 44
[292] PIC Exhibit 44
[293] PIC Transcript, VA Morgan, 9 March 2005, p. 561

(a) NSW Police did not produce the documents the subject of the subpoena as they were required to. Had they wanted to claim privilege it would have been appropriate to have produced the documents in a sealed envelope and then articulated their argument in relation to privilege.

(b) The view was apparently taken by the prosecutor, Morgan, that documents forming part of the Critical Incident Investigation were *"privileged"* under Part 8A of the *Police Act 1990* and such privilege over-rode any duty of disclosure to Hathaway.

(c) NSW Police considered it unnecessary to supply to Hathaway, as part of the prosecution brief, medical evidence that had been obtained during the Critical Incident Investigation even though such evidence supported Hathaway's case that he had been assaulted by Jackson.

(d) The forensic evidence that indicated there was no forensic link between Hathaway and the knife was not supplied to Hathaway as part of the prosecution brief.

(e) Between 11 December 2003 and the recommencement of the hearing of the charges on 22 March 2004, no basic inquiries were carried out by Morgan to test the veracity of the prosecution case and, in particular, whether it was appropriate to proceed in relation to those charges that were being defended, including the charges related to the knife.

7.6 The correct way to resist a subpoena is to produce the documents required to the Court and then to present the argument as to privilege. In the Hathaway matter despite having sufficient time to produce the documents NSW Police instead chose to not respond to the subpoena. Had they produced the documents at the correct time the Magistrate could have considered their arguments and the Court's time would not have been wasted as it was on 10 December 2003. It was not Morgan's decision to resist the subpoena. Such matters are handled by the subpoena section of NSW Police in Sydney. Morgan however found herself in the situation of having to argue that the subpoena should be resisted. Although she did this on instructions she said she was also of the belief that the documents were not admissible because they were part of an internal police investigation.[294]

7.7 Morgan was under the misapprehension that the Critical Incident Investigation File was not something that she could have access to so she had not seen it and was not aware that it contained documents relevant to the defence. In evidence before the Commission she also said that the basis for her resisting the subpoena was that because the police officers had given evidence under objection to the Critical Incident team the evidence could not be used in the court proceedings.[295] This was an erroneous belief on her part as such an argument goes to admissibility of the evidence rather than being a basis for resisting the subpoena.

[294] PIC Transcript, VA Morgan, 9 March 2005, pp. 566-567
[295] PIC Transcript, VA Morgan, 9 March 2005, pp. 566-567

7.8 Morgan was aware that following Hathaway's arrest there had been a Critical Incident Investigation. Although she could not recall whether she was aware of this fact prior to the commencement of the Local Court proceedings, she acknowledged that Counsel for Hathaway had sought access to the Critical Incident Investigation File at an early stage. Morgan did not believe that she would have been given access to the Critical Incident Investigation File before the hearing. She said:[296]

> … Because it's an internal investigation, as such, I don't believe that had I asked for it that I would be given access to it.

7.9 Her evidence continued:[297]

> Q: Do you accept it may have contained material that would be relevant, or possibly relevant, to an issue in the case?
> A: Possibly. My understanding of that was that it was not material that was going to be admissible in any event.
>
> Q: Who told you that?
> A: That was just my own understanding of it. I don't believe anybody told me that. That was my understanding and that's how I ran that voir dire.

7.10 Morgan conceded that when the subpoena was called upon, she, on instructions, resisted production. No steps were taken by her to satisfy herself that the material which was the subject of the subpoena was relevant or irrelevant because:[298]

> … I didn't believe that I could have access to that internal investigation document.

7.11 At the Commission's hearing Counsel for the Commissioner of Police objected to the questioning of Morgan in relation to her failure to make any inquiries as to the contents of the Critical Incident Investigation File on the following grounds:

(a) Part 8A of the *Police Act 1990* – the legislation prevented Morgan or anyone else from making such an inquiry, or alternatively, if such an inquiry had been made, those in possession of the material would not divulge the contents of the inquiry to Morgan. While he drew a distinction between the Critical Incident Investigation and an Internal Affairs Investigation he was of the view that Morgan could not have known the stage of the investigation or what had been examined, *"... So, she can't know for the purpose of providing to the defence in a criminal proceeding what it is, the subject of the investigation, which may assist the defence. ..."*[299]

(b) A prosecutor or any person is prevented, by section 170 of the *Police Act 1990,* from making inquiries as to the status of documents brought into existence as a result of an investigation, under Part 8A.[300]

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296 PIC Transcript, VA Morgan, 9 March 2005, p. 566
297 PIC Transcript, VA Morgan, 9 March 2005, pp. 566-567
298 PIC Transcript, VA Morgan, 9 March 2005, pp. 567-568
299 PIC Transcript, VA Morgan, 9 March 2005, p. 569
300 PIC Transcript, VA Morgan, 9 March 2005, p. 569

(c) Prosecutors are bound to conduct the case upon the basis of the material before them and no more. Counsel for the Commissioner of Police said:[301]

> If a prosecutor is prosecuting, they can only be assisted by what they've got before them, so it is that basis on which a prosecutor prosecutes. He or she can't have in mind something which is not in front of them. It is something that they've got to know about, and if a prosecutor doesn't know about it, how could they have an obligation?

(d) Where a Critical Incident Investigation has led to an Internal Affairs Investigation the law prevents the contents of the Critical Incident Investigation being revealed.[302]

7.12 The position adopted by Morgan and Counsel for the Commissioner of Police, during the hearing, was misconceived. That said, Morgan should not be criticised personally if the approach she adopted was one endorsed by NSW Police. The Commission believes that the approach is misconceived for the following reasons:

(a) Part 8A of the *Police Act 1990* does not concern a Critical Incident Investigation. It concerns *"complaints"*. Indeed, it would be totally contrary to the Guidelines for a Critical Incident Investigation for it to be, in the words of Morgan, *"subject to privilege"*.[303] One of the reasons why a Critical Incident Investigation is conducted is to maintain public confidence in NSW Police. Whilst a Critical Incident Investigation may ultimately lead to a complaint and an investigation, there is no *"complaint"* as that term is understood by reference to sections 126 and 127 of the *Police Act 1990* where a Critical Incident Investigation has occurred. It is noted that in his Submissions in Reply Counsel for the Commissioner of Police conceded that this was also the Commissioner's view of the legislation.

(b) Section 170 of the *Police Act 1990* concerns documents *"... brought into existence for the purposes of this Part ..."* (subsection 170(1)). The documents comprising this Critical Incident Investigation File were not brought into existence for such a purpose. Counsel for the Commissioner of Police also conceded this point in his Submissions in Reply.

(c) Further, subsection 170(1) concerns admissibility only. The section does not prohibit disclosure of documents that are properly amenable to a subpoena. The most critical document was the report of Dr Kuswanto[304] which had been obtained by the Critical Incident Investigation Team on 27 February 2003. That report was consistent with Hathaway's version of what occurred within the bedroom. Even if that report had been obtained for *"the purposes of"* Part 8A of the *Police Act 1990,* which it wasn't, and was thereby inadmissible, provision of a copy of that report to Hathaway would have disclosed

[301] PIC Transcript, VA Morgan, 9 March 2005, p. 570
[302] PIC Transcript, VA Morgan, 9 March 2005, p. 570
[303] PIC Transcript, VA Morgan, 9 March 2005, p. 588
[304] PIC Exhibit 33

that one of the doctors who had seen him on 6 February 2003 was prepared to provide evidence that supported his version of events. While Counsel for the Commissioner of Police conceded this point he argued that it was still open to NSW Police to object to the production of documents on the basis of lack of forensic purpose or not in the public interest. It is difficult to understand how either argument would have been applicable to Dr Kuswanto's report.

7.13 It is hard to see how NSW Police could have come to the view that it was unnecessary to provide a copy of Dr Kuswanto's report as part of the police brief. On seeing the report for the first time, during the Commission's hearing, Morgan frankly acknowledged that it was a document that NSW Police should have ensured was supplied to Hathaway, and that had she been aware of it, she would have supplied a copy to Hathaway *"Without question"*.[305] The report was provided as part of some 500 pages of documentation that formed the Critical Incident Investigation File, after the legal argument during the first day of the hearing in the Local Court on 10 December 2003. Regrettably it appears that both Morgan and Hathaway's representative, Mr Weir, overlooked its production. As matters turned out, this was not significant because at the recommencement of the hearing in March 2004, Hathaway was able to produce a similar report from Dr Hennessy, his treating surgeon, at Albury Base Hospital.[306] Nevertheless, the stance taken by NSW Police in relation to production of documents comprising the Critical Incident Investigation had the potential to cause, or contribute to, a significant miscarriage of justice.

7.14 It is common ground that the forensic evidence[307] indicating that there was no DNA, fingerprints or blood found on the knife to link it to Hathaway was not served as part of the Prosecution Brief.[308] At some time Mr Weir knew that the forensic evidence was favourable to Hathaway's case. He may have received informal notice. That said, it was clearly proper and desirable for NSW Police to ensure that the evidence was included in the Brief. Morgan conceded that the forensic evidence, or lack of it, was significant and should have been served on the defence as part of the brief.[309]

7.15 On the evidence available one criticism that can be directed at Morgan is her apparent failure to make rudimentary inquiries in relation to certain issues that had arisen during the course of the evidence in December 2003, before the proceedings recommenced in March 2004. By that time, Morgan knew that there was no forensic evidence linking Hathaway to the knife,[310] and that Briggs had given evidence acknowledging that the Critical Incident Investigation Team had obtained a medical report in relation to Hathaway's

[305] PIC Transcript, VA Morgan, 9 March 2005, p. 572
[306] PIC Exhibit 7
[307] PIC Exhibits 40 & 41
[308] PIC Exhibit 32
[309] PIC Transcript, VA Morgan, 9 March 2005, pp. 574-575
[310] PIC Transcript, VA Morgan, 9 March 2005, pp. 574-576

injuries.[311] In relation to her failure to make any inquiries about the medical report she said:[312]

> A: If it was a document that formed part of the critical incident investigation, then I wasn't aware of it. It was, as you have said, put to Detective Briggs about the existence of the document. That didn't – I believe the critical incident investigation file, as I said, was subject to privilege, but I'm prosecuting the matter, it's obviously not my duty to be investigating it, but …
>
> Q: Call me old-fashioned, but there's not much to investigate, is there, apart from saying to Briggs, "What are you talking about?" That's the extent of the investigation you had to make.
> A: Yes.
>
> Q: Why didn't you do it?
> A: Well, then it's an oversight on my part. I don't remember the question being asked until you just read it to me now.

7.16 Morgan had also heard evidence to the effect that O'Neill had been concerned about the injuries to Hathaway and had said *"Whoever did this will hit the dock"* and yet she made no further inquiries. Her evidence about her lack of inquiries in relation to O'Neill's comment was:[313]

> Q: Did you ever go and check with Mr O'Neill whether he in fact had said it?
> A: No, I didn't.
>
> Q: Why not?
> A: I just didn't think to.
>
> …
>
> Q: That, if it was said by Inspector O'Neill, would have indicated to you, as an experienced and senior prosecutor, that a senior officer within Wagga Wagga police station may have been of the view that Mr Hathaway had been assaulted?
> A: Possibly.
>
> Q: Didn't you find it incumbent upon yourself to obtain instructions from Mr O'Neill as to what his position was?
> A: I don't know that he actually said that.
>
> Q: You didn't know because you didn't ask him?
> A: Yes, correct.
>
> Q: You could have picked up the phone?
> A: Yes.
>
> Q: Why didn't you do it?
> A: I just didn't think to.

7.17 She denied that the reason she had not made any inquiries was because she is a close friend of Jackson and she did not want to unearth anything that would create further difficulties for him.[314]

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311 PIC Transcript, VA Morgan, 9 March 2005, pp. 586-587
312 PIC Transcript, VA Morgan, 9 March 2005, p. 588
313 PIC Transcript, VA Morgan, 9 March 2005, pp. 581-582
314 PIC Transcript, VA Morgan, 9 March 2005, p. 582

7.18 It is true that Morgan was prosecuting the case and as such was not an investigator. Nevertheless, she conceded that it was part of her duties as a Police Prosecutor to satisfy herself that there was sufficient admissible evidence to connect a defendant to a crime before proceeding. Despite the fact that there was no forensic evidence to link Hathaway to the knife, and that Morgan had seen the photographs depicting the amount of blood at the scene she maintained that the case against him was not weak. She said:[315]

> Q: What do you say the credible evidence was which connected Hathaway to the knife, having regard to the fact that forensics had failed to reveal any connection at all?
> A: Forensics noted that there was an absence of DNA or blood.
>
> Q: Yes.
> A: The evidence that pointed toward Hathaway being in custody of a knife was purely circumstantial: that he'd broken into the house, as I understand it, he'd gone throughout the kitchen area and hid under a bed, and the knife was located under bed clothing where Hathaway had been. So there was nothing physical or scientific to connect him to it; it was simply circumstantial.
>
> Q: Pretty weak though, isn't it?
> A: I didn't believe it to be weak.
>
> Q: Did you make any inquiries as to whether they'd found any of Hathaway's blood in the kitchen?
> A: I don't remember if I made those inquiries, but there was an issue about Hathaway's footprints in the kitchen.
>
> Q: Yes.
> A: Mmm.
>
> Q: Were you aware that a lot of blood had been found around the house.
> A: In the bedroom, yes.
>
> Q: Not only in the bedroom, but there were bloody footprints leading from the back door into various rooms and ultimately the bedroom?
> A: I don't know about the other rooms. As I understood it – and I could be corrected, and the transcript will show this – he came through the back door, through the kitchen, up a hallway and into the bedroom.
>
> Q: Were you aware that there was no evidence of any blood in the kitchen apart from a spot of blood on the microwave which was close to the door through which one passes?
> A: I don't remember that.
>
> Q: Were you aware that there was no blood found in the area from which the knife was allegedly taken?
> A: Yes, I am aware that there was no blood on the benches or on the drawer.
>
> Q: But you say, do you, that the fact that the knife was found under the bed was sufficient circumstantial evidence in your view for the mater to proceed?
> A: Yes, I do.

7.19 Later in response to questions from her legal representative Morgan said that in her experience there is only a small chance of getting a DNA sample on an item where there has only been physical contact, without contamination with

[315] PIC Transcript, VA Morgan, 9 March 2005, pp. 575-576

blood or other bodily fluids. Because of this she said she had not been overly concerned about the lack of DNA evidence.[316] When questioned further on this point by Counsel Assisting she said that it was not *"clear"* to her that Hathaway had injuries to both his hands when he entered the Property, and that she did not remember that he had been carrying a mobile telephone and that photographs showed it was covered in blood. She did not agree that a situation where there was no contamination with blood and other body fluids and where DNA was not found, was not comparable to the situation in relation to Hathaway. She said, *"It would depend if Hathaway was bleeding from the hand in which he was carrying the knife"*.[317]

7.20 It seems that Morgan was content to allow the matter to *"drift on"* between December 2003 and March 2004 without any critical inquiry on her part in circumstances where she was clearly on notice that she may have been dealing with less than a complete picture. In this regard, she gave the following evidence:[318]

> Q: You were content, were you, to allow the case just to drift on, not working out from your own officers what the story was, and deal with it as and when it arose?
> A: Yes.
>
> Q: Is that the way you normally conduct your practice?
> A: To let the evidence come out in the hearing, yes.
>
> Q: Without having obtained instructions?
> A: Well, in this circumstance, I picked up the hearing on the day, and quite often you don't even have the opportunity to read a statement until the witness is reading it.
>
> Q: See, isn't your problem, officer, this, that this matter didn't conclude in December 2003, it went over to March 2004, and by that time you had ample opportunity, had you not, to investigate what the true facts were?
> A: Yes.
>
> Q: And you didn't do so, did you?
> A: Well, I don't understand what facts.
>
> Q: Was it true or not that Hathaway had been assaulted by Constable Jackson within the bedroom?
> A: No – I …
>
> Q: Why was it – next question – that a very significant medical report hadn't been handed over?
> A: Because I wasn't aware of it.
>
> Q: So you were quite content, were you, between December 2003 and March 2004 just to put the matter to one side and pick it up again on the next hearing date?
> A: More or less, yes.
>
> Q: And is that the way you normally conduct your practice?
> A: Yes.

[316] PIC Transcript, VA Morgan, 9 March 2005, p. 591
[317] PIC Transcript, VA Morgan, 9 March 2005, pp. 594-595
[318] PIC Transcript, VA Morgan, 9 March 2005, pp. 579-580

7.21 Morgan gave evidence that more often than not briefs are provided on the day of the hearing, she is required to deal with more than one hearing on any particular day, and as a consequence considerable pressure is placed upon her in relation to the extent that she can actually confer with relevant witnesses.[319] There is no evidence to suggest that this sort of pressure abated between December 2003 and March 2004 when the proceedings recommenced.

7.22 Nevertheless, if the pressures described by Morgan exist, then it is even more important for NSW Police to ensure that all relevant material is provided as part of the Brief and that those responsible for preparing the Brief, are brought to account where there has been a failure to provide sufficient information to a prosecutor to enable that prosecutor to properly discharge his or her duty to the Court, the defendant and the community at large.

7.23 In the present matter, there was a clear failure by both NSW Police and at least two officers involved in the proceedings to ensure that the prosecutor, Morgan, was fully aware of all relevant information to properly discharge her duty. It is necessary to cite but two examples. First, clearly the Officer in Charge of the matter, Briggs, knew of the existence of Dr Kuswanto's report.[320] Morgan was unaware of the existence of the report until she gave evidence before the Commission. Secondly, Murphy was aware that Jackson had admitted causing Hathaway's facial injuries. This information was never conveyed to Morgan.[321]

7.24 The Commission is of the opinion that it is not appropriate to express any adverse opinion in relation to Morgan. At least to some extent her behaviour was the product of a misconception as to what was required to be disclosed. Further, her failure to make follow up inquiries during the adjournment may be explicable by reference to an excessive workload.

[319] PIC Transcript, VA Morgan, 9 March 2005, pp. 564-565
[320] PIC Transcript, VA Morgan, 9 March 2005, p. 586
[321] PIC Transcript, VA Morgan, 9 March 2005, p. 579

8. THE ARREST OF WH-1

8.1 In 2002 WH-1 was a student attending university in Wagga Wagga. On 16 February 2002, he and some friends attended a university function and afterwards went to Romano's Hotel which is situated on the corner of Sturt Street and Fitzmaurice Street, Wagga Wagga. WH-1 told the Commission that at approximately 2.15 a.m WH-1 and a fellow student, WH-2, left the hotel. As a result of a dare or *"student prank"* they removed their clothing as they walked in a northerly direction up Fitzmaurice Street. A police vehicle driven by O'Neill approached them. According to WH-1, as soon as WH-1 and WH-2 saw the police car they put their clothes back on. O'Neill called to them to come over to him but WH-1 and WH-2 fled.[322]

8.2 WH-1 and WH-2 ran off in a southerly direction along Fitzmaurice Street. WH-2 said he turned left to run east down a laneway directly beside Romano's Hotel. The lane runs off Fitzmaurice Street in an easterly direction parallel to Sturt Street. WH-1 continued past the Hotel, turned left and ran east along Sturt Street. He said that as he neared Wagga Wagga Police Station, which is on the southern side of Sturt Street, he was confronted by a female police officer, Senior Constable Duncan, but he eluded her and kept running. WH-1 said that Duncan then continued to chase WH-2 and Jackson, who had emerged from the Police Station, pursued WH-1 down Sturt Street.[323] According to WH-2, after reaching the car park behind Romano's Hotel, he proceeded directly up an embankment with Duncan in pursuit. She slipped over. WH-2 made it over the levee and disappeared into the bush.[324]

8.3 At the end of Sturt Street is an intersection with a small lane known as Henley Lane. Somewhere in the vicinity of Henley Lane and Sturt Street, Jackson caught up with WH-1. It is not in dispute that WH-1 was struck with a baton. He received blows to his arms, shoulder, neck and, according to WH-1, his head.[325] He was arrested, taken back to the Police Station and charged with the offence of wilful and obscene exposure contrary to section 5 of the *Summary Offences Act 1988* and resisting arrest contrary to section 58 of the *Crimes Act 1900*.

8.4 A number of relevant facts are in dispute, namely:

(a) Whether, as claimed by WH-2, he ran in a northerly direction out of the car park behind Romano's Hotel up over the embankment or, alternatively, as claimed by Duncan and O'Neill, he ran along the northern side of Sturt Street and was chased up the levee bank at the end of Sturt Street.

[322] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, pp. 6-7
[323] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, pp. 9-10
[324] PIC Exhibit 43, PIC Transcript, WH-2, 7 March 2005, pp. 5-6
[325] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, p. 10

(b) Whether, at the end of Sturt Street, WH-1 resisted arrest or, more importantly, resisted arrest in such a way as to justify the use of force by Jackson.

(c) Whether Duncan and O'Neill ever observed WH-1 resisting his arrest by Jackson.

THE EVIDENCE OF WH-1 AND WH-2

8.5 WH-1 was a careful and compelling witness.

8.6 The fact that Jackson applied considerable force to WH-1 when affecting the arrest is not in dispute. The photographs taken by WH-1 of his injuries[326] and the medical records[327] bear out the truth of WH-1's evidence.

8.7 Having regard to the evidence of WH-1, the unsatisfactory aspects of the accounts given by O'Neill, Duncan and Jackson identified below, and the subsequent abandonment, by NSW Police of the resist arrest charge on the condition that WH-1 did not pursue an action against Jackson for excessive use of force, it may have seemed appropriate for the Commission to express the opinion that it was satisfied that police misconduct occurred. However, there are features of this incident which make it inappropriate for the Commission to take that course.

A DISCREPANCY IN THE ACCOUNTS GIVEN BY WH-1 AND WH-2

8.8 In their statements, both Duncan and O'Neill said that they observed behaviour on the part of WH-1 that was consistent with him resisting arrest.[328] The tenor of these observations was repeated by Duncan in her evidence although she had difficulty describing precisely what it was that caused her to believe that WH-1 was being *"aggressive"*. Duncan said:[329]

> Q: Was there anything that you saw or heard which would lead to you believe [sic] that there was proper evidence that he was resisting arrest?
> A: I don't understand the question.
>
> Q: What was it that you observed, if anything, that indicated to you that this man, WH-1, was resisting arrest?
> A: The only thing that I saw was him – when I say that I thought he was – that there was some confrontation where he had his hands up and …
>
> Q: Did he have his hands up to protect himself from the baton?
> A: No, that's – no, that wasn't what I was thinking, I don't think.
>
> Q: Was he approaching Constable Jackson in an aggressive way?
> A: Yeah, I think so. That's how I read it.
>
> …

[326] PIC Exhibit 58
[327] PIC Exhibit 59
[328] PIC Exhibits 27B & 36
[329] PIC Transcript, FM Duncan, 8 March 2005, pp. 516-517

> Q: That doesn't sound to me, unless there's something you're missing out, to be very aggressive conduct – a man standing there with his hands up and Jackson yelling, "Get down! Get down!" What in that is aggressive?
> A: Well, he wasn't getting down and I would say, yeah, that – I felt when I saw it – if I didn't feel that he was – that it was an aggressive situation I wouldn't have thought he needed help.

8.9 Duncan also said that she had no recollection of WH-1 advancing on Jackson but despite that felt his stance was aggressive. She eventually agreed that WH-1 and Jackson were *"facing up"*.[330]

8.10 The evidence of O'Neill was similar in that he had seen WH-1 move towards Jackson at the end of Sturt Street as a consequence of which *" ... my assumption at that stage was that it was an aggressive move"*.[331] Jackson too maintained that he was defending himself from an attack, and that it was absolutely clear to him that WH-1 was *"... going to assault me and make good his escape"*. Jackson was not sure however that that is how it would have appeared to an observer saying that he could not *"speak for other people"* or know what *"... is in their mind"*.[332]

8.11 To determine whether it is possible that either or both Duncan and O'Neill observed Jackson's conduct in effecting the arrest of WH-1, it is important to examine first whether those officers could have been at the eastern end of Sturt Street whilst Jackson was using his baton.

8.12 If the evidence of WH-2 is accepted, then he proceeded in a north-easterly direction out of the Romano Hotel's car park directly up the levee bank. That is, he never proceeded in an easterly direction down Sturt Street and could not have been chased by Duncan and O'Neill in that direction. It would follow that if WH-2's evidence was accepted, then each of Jackson, O'Neill and Duncan gave untruthful evidence to the Commission.

8.13 The difficulty with accepting WH-2's account of the chase is that it is inconsistent with the evidence given by WH-1 in one important respect. In relation to that aspect of the evidence, the version given by WH-1 at least makes it possible that Duncan and O'Neill were in a position where they could have observed Jackson's behaviour. WH-1's evidence was as follows (emphasis added):[333]

> Q: Thank you. So you headed to the corner of Fitzmaurice and Sturt Streets and turned left down Sturt Street?
> A: That's correct, yes.
>
> Q: And you were able to observe, were you, that WH-2 turned down the lane at the side of the hotel?
> A: Yes.
>
> Q: From Fitzmaurice Street?

[330] PIC Transcript, FM Duncan, 8 March 2005, p. 518
[331] PIC Transcript, TJ O'Neill, 9 March 2005, p. 626
[332] PIC Transcript, CJ Jackson, 11 March 2005, p. 771
[333] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, p. 9

A: Yes.

Q: Did you see him again?
A: I did. He continued in an easterly direction with myself and it was at that stage I did not see him again.

Q: All right. What, did you lose sight of him when he was in the car park or before that?
A: Would have been heading in an easterly direction down Sturt Street. I didn't see him as he went – I saw him go down the alleyway. I again saw him when I was heading in that easterly direction down Sturt and as I crossed the road, I didn't look that way again.

Q: Where was he when you saw him as you were heading in an easterly direction down Sturt Street?
A: **I believe he was in front of me a short distance.**

Q: **In Sturt Street?**
A: **Yes**.

8.14 This account, which places WH-2 running in an easterly direction down Sturt Street is consistent with the accounts given by O'Neill and Duncan and is inconsistent with the evidence of WH-2 which was as follows (emphasis added):[334]

Q: Alright. Okay. So you turned and ran. Where did you go and where, to your knowledge, did WH-1 go?
A: We both ran back towards Romanos. I turned left into a side alley that goes between Romano's and a building next to it, I'm not sure what that building is, and I headed up that alley back towards the back of Romanos and **then across to the levee bank of the river**. WH-1 went right around the front of Romanos, turned left into Sturt Street where the Wagga police station is and, yeah, he kept going down Sturt Street.

Q: Were you aware at the time, that is, on that night, that the Wagga police station was located in Sturt Street?
A: Yes.

Q: And after you had gone through the lane beside Romanos out into the car park, did you catch sight of WH-1 again?
A: I did briefly. I looked over my right shoulder and could see him running down Sturt Street. I only looked for a brief second and then that was the last I saw of him.

8.15 Having regard to the apparent conflict in this evidence, it is inappropriate to make any finding that Duncan and O'Neill could not have observed Jackson's conduct.

THE POLICE VERSION OF EVENTS

8.16 While the evidence of WH-1 and WH-2 is inconsistent, the evidence of the Jackson, O'Neill and Duncan lacks cogency. It must be remembered that the ultimate issue is not whether they were in a position to observe Jackson, but whether they observed conduct on the part of WH-1 which justified the degree of force applied to him by Jackson.

[334] PIC Exhibit 43, PIC Transcript, WH-2, 7 March 2005, pp. 5-6

8.17 The evidence given by Duncan and O'Neill as to what they observed was imprecise. Duncan's evidence was as follows:[335]

> Q: … What did you see?
> A: Well, I ran up the track a bit and then I could hear Jackson yelling. So I went back to make sure that he was okay and when I – I don't have a good memory of it, but they were – Jackson was yelling to him to – I think it was something like "Get down on the ground!", or – it was something like that. I don't remember exactly, and he – I know he had his baton out and the fellow was – I think he had his hands up. He was – like, initially I thought he – I thought that there was – he was going to attack him, that's what I thought was going to happen.
>
> Q: You changed your mind, didn't you?
> A: Pardon?
>
> Q: You changed your mind?
> A: I don't know that I changed my mind, but I did to go assist him, so I don't – I don't remember whether the first fellow – I don't know whether he complied or whether I didn't go to assist him because other police turned up: I don't remember. But they would be the reasons that I wouldn't go and help him.
>
> Q: Surely if you thought this offender was going to be any threat to Constable Jackson at that hour in the morning and at that particular place, bearing in mind …
> A: What time was it?
>
> Q: It was 2.20 in the morning. You weren't going to leave him there on his own if you thought that he was seriously at risk?
> A: No, I – if I thought that – that's why I believe that either the fellow complied with what he was saying or other police turned up. I don't know which, but had I still been thinking that he was at risk, I would have gone to help him.
>
> Q: You never saw, for example, did you, this offender assault Constable Jackson?
> A: I don't remember that.

8.18 O'Neill said:[336]

> Q: When you say in your statement that you saw the defendant moving towards the officer, what did you actually see?
> A: I saw him move towards him, sir. That's all I saw him do.
>
> Q: He wasn't behaving aggressively, though, was he?
> A: He appeared to me at that stage to be moving towards him so my assumption at that stage was that it was an aggressive move.
>
> Q: And you thought he might be in the process – he may soon attack or strike Jackson, did you?
> A: He was trying to evade police at that stage, sir, yes.
>
> Q: And that he might attack or use force on Jackson?
> A: Yes,sir.
>
> Q: Why didn't you step over and intervene?
> A: Constable Jackson appeared to be having the situation under control and I had another officer running off into the dark after another offender.

[335] PIC Transcript, FM Duncan, 8 March 2005, pp. 510-511
[336] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 626-627

Q: You said you never made your presence known to Constable Jackson when you were down that end of the street?
A: Not to my knowledge, sir, no.

Q: Was there any reason for that?
A: I was out of breath from trying to get up the levee bank, sir.

Q: I beg your pardon?
A: I was our of breath in trying to get up the levee bank, sir. I wasn't in a fit condition to be yelling out to anyone.

Q: It that a serious answer?
A: Yes, sir.

…

Q: Here you have a fellow officer down the end of the street who is in the process of arresting somebody, you come down there and see that somebody is making moves towards him and you seriously suggest, do you, that you didn't make any statement to Jackson to let him know that you were there, right behind him?
A: Not to my recollection, sir, no.

8.19 Oddly, on the evidence, neither Duncan nor O'Neill made their presence known to Jackson. O'Neill's reason for not calling out to Jackson was, as quoted above, that he was *"…out of breath from trying to get up the levee bank"*.[337] Duncan could not recall why she had not called out to Jackson or why she did not go to his assistance. She said:[338]

Q: No doubt you called out to Jackson to let him know that you were there?
A: No, I didn't.

Q: What?
A: I didn't yell out, no. I don't remember yelling out anyway.

Q: So you just walked over, had a look and then walked away?
A: No, I walked over and had a look. I felt that he needed my help, I was going to go to his assistance. I don't remember why I didn't. It would have been that either he got the situation under control and I felt that he had it under control, or I knew that he didn't need me there and I could go and chase the other fellow.

8.20 The evidence Jackson gave before the Commission in relation to whether he was by himself when he arrested WH-1 was also inconsistent with his statement.[339] In his evidence, Jackson claimed that he had been aware of the presence of Duncan and O'Neill. He said:[340]

Q: Well, how do you know they were there?
A: Well, I could hear Fiona and I believe I saw Inspector O'Neill when I was walking the offender back to the back of the police station.

Q: Where was Inspector O'Neill when you were walking him back to the police station?
A: He was on the footpath, on the northern side.

…

[337] PIC Transcript, TJ O'Neill, 9 March 2005, p. 626
[338] PIC Transcript, FM Duncan, 8 March 2005, p. 512
[339] PIC Exhibit 48
[340] PIC Transcript, CJ Jackson, 11 March 2005, p. 772

Q: When you first became aware of her presence, was this fellow behaving in an aggressive manner towards you?
A: I don't know whether she was there at that time or – I – once I had him under control, that's when I was able to look around and see where people were and a highway car pulled up in front of me as well and said "Are you right?". I said, "Yep, no worries".

Q: Who was that?
A: A highway car pulled up as well.

Q: Did they? Who was in that?
A: I don't know.

8.21 Jackson maintained in his evidence that in addition to the officers in the highway patrol car he had a clear recollection of seeing O'Neill in the area where he effected the arrest. As well he said that he had not only heard Duncan but had seen her, and she was close by, while he was carrying out the arrest. Despite that he was not sure, however, whether she had been in a position to have seen what went on. He could only say *"... she may well have been"*.[341]

8.22 In contrast, paragraph eight of Jackson's statement is as follows[342]:

> At the time I arrested the defendant, I was by myself and separated from the other police. The area was dark and poorly lit.

8.23 In relation to this part of his statement, Jackson gave the following evidence:[343]

Q: Now the evidence you have just given [about whether Duncan was close] to the Commission is false, is it not?
A: No, it is not.

Q: Well, was the statement that you gave to the police as part of the prosecution brief false?
A: No.

Q: Do you agree that the evidence that you have just given to the Commission is not capable of being reconciled with the statement:

> "At the time I arrested the defendant, I was by myself and separated from the other police. The area was dark and poorly lit."

A: Sorry, say that again?

Q: Do you agree with me that the evidence that you have just given is utterly inconsistent with paragraph 8 of your statement, which says, in the first sentence:

> "At the time I arrested the defendant, I was by myself and separated from the other police."

A: Well, I would have believed at the time I was, when I was arresting the offender.

Q: But you turned around and realised that that wasn't the case?
A: Well, I don't know whether they were there at the time of the arrest or they had arrived – or O'Neill's arrived afterwards, or Duncan was

[341] PIC Transcript, CJ Jackson, 11 March 2005, p. 773
[342] PIC Exhibit 48
[343] PIC Transcript, CJ Jackson, 11 March 2005, pp. 776-777

there at the time of arrest or she was chasing the other fellow. I just knew they were in the vicinity, but …

Q: Well, then, how could you possibly put forward to a court of law in your statement that "At the time I arrested the defendant, I was by myself and separated"?
A: Well I was at the time I said "You're under arrest".

Q: Is this the position: at the time you arrested the defendant you believed that you were by yourself and separated, but following the arrest you realised that you weren't?
A: Yes, that's correct.

Q: Is there any other explanation that you want to offer for the statement that you put in your police statement of 16 February 2002?
A: No.

Q: Do you agree that, at a bare minimum, the statement that "At the time I arrested the defendant, I was by myself and separated from the other police" is misleading?
A: No, it is not.

Q: You can't see that?
A: No.

8.24 Also of concern to the Commission is that only Jackson appears to have prepared a statement contemporaneously with events. His statement is dated 16 February 2002. Duncan's statement is dated 3 May 2002.[344] O'Neill's statement is dated 30 April 2002.[345] Both Duncan's and O'Neill's statements confirm their version of events, that is that they saw WH-1 facing up to Jackson. O'Neill's statement said, at paragraph six, that he saw Jackson strike WH-1 with his baton after WH-1 would not get on the ground as ordered by Jackson. He said that after being struck with the baton WH-1 *"... then lay on the ground"*. Duncan's statement recorded that Jackson drew his baton while yelling at WH-1 to *"Get on the ground"*, but made no comment about whether Jackson used his baton.

8.25 The notebooks of both Jackson[346] and Duncan[347] make no reference at all to the event.

8.26 WH-1 also said that on the night of his arrest he read the facts sheets but did not sign them because he denied what was written on them. He did not make a complaint that he had been assaulted but said that he raised with O'Neill, the fact that he was unhappy with the actions taken by the police and that he wanted to talk to Jackson. WH-1 said he wasn't sure *"... what I was trying to prove by trying to talk to him* [Jackson]*..."* but that O'Neill told him that Jackson wasn't available.[348]

8.27 O'Neill denied in evidence that WH-1 had ever alleged to him that he had been assaulted by Jackson.[349] Despite that denial O'Neill said he was aware

[344] PIC Exhibit 27B
[345] PIC Exhibit 36
[346] PIC Exhibit 61
[347] PIC Exhibit 62
[348] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, pp. 13-14
[349] PIC Transcript, TJ O'Neill, 9 March 2005, p. 613

that WH-1 was unhappy with the way he had been treated and particularly the way Jackson had used his baton. O'Neill said he became aware of WH-1's grievance on the night he was arrested. O'Neill agreed that WH-1 had asked to speak with Jackson about the incident but was unable to do so because Jackson had been unavailable.[350] The fact that WH-1 spoke to O'Neill, prior to his release from custody, about some disputed facts in relation to Jackson's role in his arrest is confirmed by O'Neill's duty book entry for that day.[351]

THE COURT PROCEEDINGS

8.28 Subsequent events in relation to the charging of WH-1 and the court proceedings are consistent with a concern by Jackson, and at least O'Neill, that Jackson may have gone too far in the application of force whilst arresting WH-1.

8.29 It is apparent that there was never any question that WH-1 would plead guilty to the offence of wilful and obscene exposure, but from the start he let it be known that he was determined to defend the charge of resisting an officer in the execution of his duty, contrary to section 58 of the *Crimes Act 1900*.

8.30 After a number of mentions in the Wagga Wagga Local Court, the resist arrest charge was withdrawn and a plea of guilty to the remaining charge of wilful and obscene exposure was entered. The result was recorded in a letter from WH-1's legal representative, Mr Paul, to WH-1 dated 15 November 2002 as follows:[352]

> We confirm that the writer attended court with you on 15 November 2002. We note that, after giving an undertaking to Inspector O'Neill that we would not be taking any action in relation to the use of the baton upon yourself, the police withdrew the charge of resist police officer in execution of duty. We note that a plea of guilty was entered to the charge of willful [sic] and obscene exposure. After accepting the plea of guilty and the facts in mitigation, the Magistrate, without proceeding to record a conviction, discharged you under section 10. The Magistrate ordered that you pay court costs of $59.00 within one month to the Wagga Wagga Local Court.

8.31 When shown the letter, WH-1 gave the following evidence:[353]

> Q: Did you have any discussions with him [O'Neill] yourself about giving an undertaking that you wouldn't take any action in relation to the use of the baton?
> A: Only once I'd left the courtroom. He pulled me aside on top of the stairs outside of the Court and just mentioned to me that I did give an undertaking not to proceed with any other Court action in regards to the baton.
>
> …
>
> The Commissioner:
> Q: Was there anyone else present with you when you spoke to O'Neill on that occasion outside the court?

[350] PIC Transcript, TJ O'Neill, 9 March 2005, pp. 615-616
[351] PIC Exhibit 65
[352] PIC Exhibit 50, barcode 6340322
[353] PIC Exhibit 42, PIC Transcript, WH-1, 7 March 2005, pp. 25-26

A: No, it was just him and myself.

Q: It was clear to you from the conversation that O'Neill knew about the undertaking?
A: Yes.

8.32 The Commission is of the opinion that the evidence of O'Neill in relation to the *"deal"* that was struck is unsatisfactory. He claimed that authority had been given by the Prosecutor to withdraw the charge before he had any knowledge that that would occur. He said:[354]

> I came to work on that day to go to court and expecting Constable Jackson to be at court and he wasn't at work, so I rang him and asked him where he was and he said there was a plea of guilty had been entered to the wilful and obscene exposure charge and that the authority had been given to withdraw the resist police charge, which was news to me, because I was the informant and no-one ever asked me if I wanted to withdraw the charge. So I then spoke to the prosecutor who told me that they had given authority to withdraw the charge and then I spoke to Anthony Paul and WH-1. But authority had been given to withdraw that charge before I had anything – any knowledge of it.

8.33 In an attempt to further explain what had happened he then gave the following evidence:[355]

Q: Look, wasn't this the fact, sir – I'm not trying to be difficult with you – you involved yourself in negotiating with Anthony Paul on behalf of WH-1 to have the resist arrest charge dropped, but on condition that WH-1 would not take any action in relation to the use of the baton upon him by Constable Jackson?
A: That was a discussion we had, yes, sir, but the charge – the prosecutor had already given authority to withdraw the charge.

Q: Then why was there any need to negotiate at all?
A: I was involving myself because I was the informant and no-one had asked me if I wanted to drop the charge. If I wasn't satisfied with the outcome, I was going to push the matter so the charge was re-raised.

Q: Does it follow, then, that you were satisfied and one reason you were satisfied was that this man WH-1 wouldn't be proceeding with any action in relation to the use of the baton upon him?
A: Yes.

Q: Doesn't it follow from that that you must have been aware at some point that WH-1 had a complaint in relation to the way he had been treated on the particular day in question?
A: He wasn't happy, no. I was aware of that, yes.

Q: His particular unhappiness concerned the way Constable Jackson had used his baton upon him; isn't that right?
A: In general terms, that's correct, sir, yes.

Q: When did you first become aware in general terms that that was the grievance which WH-1 had?
A: When he was released from custody that night.

8.34 In the Commission's opinion Jackson's evidence about the *"deal"* was even more unsatisfactory than O'Neill's. Jackson was shown a letter to WH-1

[354] PIC Transcript, TJ O'Neill, 9 March 2005, p. 614
[355] PIC Transcript, TJ O'Neill, 9 March 2005, p. 615

from his solicitor dated 31 October 2002 which contained, inter alia, the following:[356]

> We confirm that we have received a telephone call from Senior Constable Chris Jackson advising that he is now prepared to drop the resist arrest charge and only proceed with the offensive behaviour charge, which you are, of course, guilty of.

8.35 In relation to this letter, Jackson gave the following evidence:[357]

> Q: You were aware, were you not, officer, that Mr WH-1 was going to defend the charge of resist arrest?
> A: I'm not sure, no, I don't recall that.
>
> Q: Did you think that there was some prospect that he would be pleading guilty to both charges, did you?
> A: I thought so, yes.
>
> Q: Then why would you involve yourself in a, to use your words, "deal"?
> A: To save time, to save the court's time.
>
> Q: You wanted to save time and save the court's time?
> A: Yes.
>
> Q: Is that a serious answer?
> A: Yes. It is done all the time.
>
> Q: What, you cut deals to save the court time?
> A: Yes.

8.36 Jackson went on to provide a further explanation. That is, the *"deal"* not only saved court time, but allowed him to take a trip to Sydney and earn more money. His gave the following evidence:[358]

> Q: This letter suggests it is not Mr Paul ringing you; you are ringing him and telling him that you are prepared to drop the resist arrest charge and only proceed with the offensive behaviour charge. Now are you saying that you had decided to do that to save court time?
> A: Yes. Well, if I didn't have to go to court, it would save me time and I – court takes a lot of time. You can be there all day. It's – I think there was a trip away that – for work. That was why I agreed to it …
>
> Q: What?
> A: … come to think about it.
>
> Q: A trip away for work?
> A: Yes there was a – I think it might have been the Rugby World Cup, or there was a big function down here in Sydney and they were going to need other extra staff so the tag team, which I'm – I work with, would have had to go down, so you get five days worth of TA, so that's quite a good boost in your pay packet. For doing the same sort of work you get around $1,200, so I think …
>
> Q: Is this the position, officer, that to save court time and to get a bit more money in your pay packet …
> A: Yes.
>
> Q: … you decided that you would be prepared to drop the resist arrest charge?

[356] PIC Exhibit 50, barcode 6340321
[357] PIC Transcript, CJ Jackson, 11 March 2005, p. 781
[358] PIC Transcript, CJ Jackson, 11 March 2005, pp. 782-783

A: Yes. As long as the facts stayed the same.

Q: Well, what facts?
A: The facts – the police facts.

Q: Well, the police facts would have nothing to do with resist arrest if he was only going to be dealt with in relation to an exposure charge, surely?
A: No, some fact sheets they wipe out two words. Some facts sheets they wipe out two paragraphs. It all depends how detrimental it appears to your client.

Q: You're not suggesting, are you, he was going to be dealt with for wilful and obscene exposure and it would remain on the facts sheet that he had resisted arrest, and indeed, threatened to assault you?
A: I don't know whether that was taken out or not. I wasn't there at the time, but I believe …

Q: You struck the deal. What did you have in your mind, apart from getting some more money and saving Wagg Wagga Local Court a bit of time? Did you really think that all the facts, including the facts surrounding the allegation of resist arrest, would remain on the facts sheet?
A: Yes.

Q: Can I ask you this: what authority, as a constable of police, do you have to negotiate deals in relation to charges?
A: Just the authority as an informant and the police officer.

Q: So if you think it is in the public interest or in your own interest, and if you are going to make some more money, or in the interests of the court, it is appropriate for you, is it, to cut a deal in relation to a charge where you are the informant?
A: Yes. It happens all the time.

Q: Is there any limitation imposed upon you, as you understand it, in relation to that?
A: I would have had to have cleared it with the prosecutor at the time and if he said it was okay, then, yes, it was okay.

8.37 The evidence of Duncan probably reveals the explanation for the *"deal"* that is closest to the truth. She claimed that she was unaware that the matter would not be proceeding until the hearing. She was then informed by O'Neill that the matter would not proceed. As to the terms of her conversation with O'Neill, Duncan gave the following evidence:[359]

Q: What did he say?
A: I don't remember exactly what it was, but he intimated to me that it had – that he – I don't remember what – what words he used, but he intimated it had been withdrawn because we didn't want to give evidence or, like, that we didn't want that matter to proceed, and I was a little bit taken back by that. I didn't understand – I was like, "Well, why?"

Q: Right.
A: I didn't understand why they had done that.

Q: No doubt you asked him?
A: Well, he answered – he didn't give me an answer. He answered in a roundabout sort of way. I don't remember exactly what he said. He

[359] PIC Transcript, FM Duncan, 8 March 2005, p. 520

> just – it was – I still to this day don't know why they did that. I don't know why they withdrew it.

8.38 O'Neill denied that he had suggested to Duncan that the reason why the charge was being withdrawn was because police witnesses did not want to give evidence. He said:[360]

> Q: … Now, did you suggest to her that the reason why the charge was being withdrawn was because either you or other officers didn't want to give evidence?
> A: No.
>
> Q: Can you recall at all what you might have said to her?
> A: I can't, sir.
>
> Q: Can you …
> A: All I can tell you in regards to it is the same thing I told you yesterday: the matter was withdrawn. It wasn't my doing to withdraw the matter to start with. Now, I don't know what Fiona is talking about there.

And:[361]

> Q: Was it your position on the day the charge was withdrawn that you didn't want to give evidence?
> A: No, sir. That's not right. I was there to give evidence. I was waiting for the matter to go on.

[360] PIC Transcript, TJ O'Neill, 10 March 2005, p. 642
[361] PIC Transcript, TJ O'Neill, 10 March 2005, p. 644

9. AFFECTED PERSONS

9.1 A person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, an investigation, is an "affected" person for the purposes of a Report to Parliament by the Commission.[362]

9.2 Subsection 97(2) of the *Police Integrity Commission Act 1996* (the Act) requires the Commission to include in a Report to Parliament a statement in respect of each "affected" person 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,[363]

(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.

9.3 The Commission is, however, not limited in the kind of statement that a Report can contain concerning an "affected" person and is also not prevented from making a statement, as described in subsection 97(2), in relation to any other person (subsection 97(4)).

9.4 In addition the Commission may form opinions as to whether police misconduct, or other misconduct, has occurred: subsection 16(1)(a) of the Act. These opinions help to inform whether any recommendations should be made or opinions expressed as to whether consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences.

9.5 The expression "police misconduct" is not specifically defined by the Act. It nevertheless includes the following types of conduct (see section 5 of the Act):

(a) police corruption,

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

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[362] Subsection 97(3), *Police Integrity Commission Act 1996*

[363] 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 Commissioner to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (subsections 16(1)(b), 97(2)(b) of the Act) has no effective application to police officers. This is so even for police misconduct that occurred before this date.

(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*.

9.6 It follows that "police misconduct" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

9.7 The substantial allegations made in this investigation are as follows:

(a) That on 6 February 2003, Jackson applied excessive force to Hathaway during his arrest thereby causing him actual bodily harm, namely, significant injuries. In particular, he struck Hathaway a number of times with his baton causing a laceration to Hathaway's right cheek, swelling to Hathaway's knees, extensive facial fractures and fractures of the right ulna and finger.

(b) That on 6 February 2003, Murphy, Briggs, Philpott, Deissel, Jennings, O'Neill, and Kelly being police officers involved in a critical incident, each failed in their duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents.

(c) That on 6 February 2003 and thereafter, Murphy, knowing that Hathaway's injuries had been caused by Jackson, took steps to conceal Jackson's conduct from his superiors and the Critical Incident Investigation Team which commenced its investigation on 7 February 2003.

(d) That an officer attached to the Wagga Wagga Local Area Command planted a knife within the bedroom of the Property located at 79 Kincaid Street, Wagga Wagga, being the room in which Hathaway was arrested.

(e) That Morgan failed in her duty as a prosecutor to adequately ensure that there was proper disclosure of relevant materials to Hathaway's legal representative either prior to or during the prosecution of Hathaway at Wagga Wagga Local Court on 10-11 December 2003 and 22-24 March 2004.

(f) That Morgan also failed to adequately consider whether the admissible evidence against Hathaway was such that it was proper to proceed against him in respect of the following charges:

(i) That Hathaway on 6 February 2003 did possess an offensive weapon, to wit, a knife[364] with intent to prevent the lawful

[364] The knife is described differently in each of the two charges.

apprehension of himself contrary to section 33B(1)(a) of the *Crimes Act 1900*.

(ii) That Hathaway on 6 February 2003 did break and enter the dwelling house of Gary Gaffney situated at 79 Kincaid Street, Wagga Wagga and then while in such dwelling, did steal certain property, to wit, a long-bladed knife[365] the property of Gary Gaffney contrary to section 112(1) of the *Crimes Act 1900*.

(iii) That Hathaway on 6 February 2003 did assault Jackson, a police officer, while such officer was executing his duty and by that assault, did occasion actual bodily harm contrary to section 60(2) of the *Crimes Act 1900*.

(iv) That Hathaway on 6 February 2003 did resist Jackson, a police officer, while such officer was executing his duty contrary to section 546C of the *Crimes Act 1900*.

(g) That Jackson, Briggs, Deissel and Philpott, gave untruthful or unreliable evidence in the Wagga Wagga Local Court proceedings against Hathaway in relation to the charges arising out of the incident on 6 February 2003.

(h) That on 16 February 2002, Jackson applied excessive force to WH-1 during his arrest thereby causing him actual bodily harm, namely, bruising and swelling.

(i) That Duncan and O'Neill, knowing or suspecting that Jackson had applied excessive force to WH-1 during his arrest, falsely claimed that they had observed the arrest and that Jackson had used his baton appropriately in response to threatening behaviour by WH-1.

(j) That Jackson gave evidence to the Commission that he knew to be false or misleading in a material particular.

9.8 Based on these substantial allegations the Commission is of the opinion that each of the following is an affected person:

- Briggs, Timothy Scott, Detective Senior Constable
- Deissel, Amanda Rae, Probationary Constable
- Duncan, Fiona Maree, Senior Constable
- Jackson, Christopher John, Senior Constable
- Jennings, Melinda Maree, Senior Constable
- Kelly, Christopher John, Sergeant
- Morgan, Virginia Anne, Sergeant
- Murphy, Thomas Patrick, Inspector
- O'Neill, Timothy Joseph, Former Inspector

[365] The knife is described differently in each of the two charges.

- Philpott, Julie Therese, Constable

9.9 Each affected person gave his or her evidence after a declaration had been made under section 41 of the Act. Therefore pursuant to section 40 of the Act the evidence each person gave is not admissible against him or her in subsequent criminal or civil proceedings, except for proceedings for an offence against the Act, or for contempt, under the Act.

9.10 The Commission is not able to make any statement of opinion about any particular affected person in relation to allegation (d) above that an officer attached to the Wagga Wagga Local Area Command planted a knife within the bedroom of the Property located at 79 Kincaid Street, Wagga Wagga, being the room in which Hathaway was arrested. The Commission is of the opinion that one of the officers who attended the Property that day, 6 February 2003, planted the knife. There were a number of officers, who had access to the Property during the day and were in a position to plant the knife. However the evidence falls short of satisfying the Commission as to the identity of that particular officer.

DETECTIVE SENIOR CONSTABLE TIMOTHY SCOTT BRIGGS

9.11 Briggs is an affected person because he is the subject of the substantial allegations that:

(a) on 6 February 2003 he, being a police officer involved in a critical incident, failed in his duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents. Even without a critical incident being called Briggs should have recognised that the incident was a serious incident or crime scene and acted accordingly. Instead he acquiesced in the steps taken by Murphy that made it difficult if not impossible for the incident to be properly and independently investigated; and

(b) he gave untruthful evidence in the Wagga Wagga Local Court proceedings against Hathaway in relation to the charges arising out of the incident on 6 February 2003.

9.12 The Commission is of the opinion that Briggs engaged in police misconduct in relation to both of the above allegations: subsection 16(1)(a) of the Act.

9.13 The Commission is **not** of the opinion however that consideration **should** be given to the prosecution of Briggs for a specified criminal offence.

9.14 Briggs is a serving NSW Police officer so it is necessary to consider the issues raised by subsections 97(2)(b)(c) and (d) of the Act. In doing so the evidence Briggs gave to the Commission may be considered. Brigg's failure to take any of the steps required of the first officer at the scene of a serious incident, his acquiescence in Murphy's decision to have the bedroom cleaned, his failure to include all relevant information in the brief of evidence and his

decision to pursue the prosecution of Hathaway for offences relating to the knife, despite a complete lack of forensic and other evidence linking Hathaway to the knife, all reflect adversely on Brigg's competence, integrity and conduct as a police officer. The Commission is of the opinion that consideration **should** be given to the taking of action against Briggs pursuant to section 173 of the *Police Act 1990*: subsection 97(2)(d) of the Act.

PROBATIONARY CONSTABLE AMANDA RAE DEISSEL

9.15 Deissel is an affected person because she is the subject of the substantial allegations that:

(a) on 6 February 2003, she, being a police officer involved in a critical incident, failed in her duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents; and

(b) she gave unreliable evidence in the Wagga Wagga Local Court proceedings against Hathaway in relation to the charges arising out of the incident on 6 February 2003.

9.16 The Commission is of the opinion that while Deissel should have realised that the incident was a critical incident she was entitled to rely on the senior officers to assume control of the situation and make the relevant decisions, and should therefore bear no responsibility for those decisions.

9.17 However her failure to make any record of the incident in her notebook, and the manner in which she gave her evidence, before both the Local Court and the Commission, all reflect adversely on her integrity and conduct as a police officer. The Commission is **not** of the opinion that consideration **should** be given to the taking of action against her pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Deissel pursuant to section 173(1) and Schedule 1 of the *Police Act 1990* (subsection 97(4) of the *Police Integrity Commission Act 1996*).

SENIOR CONSTABLE FIONA MAREE DUNCAN

9.18 Duncan is an affected person because she is the subject of the substantial allegation that, knowing or suspecting that Jackson had applied excessive force to WH-1 during his arrest, she falsely claimed that she had observed the arrest and that Jackson had used his baton appropriately in response to threatening behaviour by WH-1.

9.19 The Commission has misgivings about the evidence given by Duncan, both in her statement and before the Commission, that she observed the arrest of the arrest of WH-1 and that Jackson's use of his baton was necessary and appropriate. However given the evidence of WH-1 the Commission is not satisfied that she did not make the observations she said that she did.

9.20 Therefore the Commission is not in a position to be able to make a statement of opinion as to whether Duncan engaged in police misconduct in relation to her involvement in the incident: subsection 16(1)(a) of the Act.

9.21 The Commission is **not** of the opinion that consideration **should** be given to the taking of action against Duncan pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act.

SENIOR CONSTABLE CHRISTOPHER JOHN JACKSON

9.22 Jackson is an affected person because he is the subject of the substantial allegations that:

(a) on 6 February 2003, he applied excessive force to Hathaway during his arrest thereby causing him actual bodily harm, namely, significant injuries. In particular, he struck Hathaway a number of times with his baton causing a laceration to Hathaway's right cheek, swelling to Hathaway's knees, extensive facial fractures and fractures of the right ulna and finger;

(b) he gave untruthful evidence in the Wagga Wagga Local Court proceedings against Hathaway in relation to the charges arising out of the incident on 6 February 2003;

(c) on 16 February 2002, he applied excessive force to WH-1 during his arrest thereby causing him actual bodily harm, namely, bruising and swelling; and

(d) he gave evidence to the Commission that he knew to be false or misleading in a material particular.

9.23 The Commission is of the opinion that Jackson engaged in police misconduct in relation to his involvement in the Hathaway incident and in relation to the evidence he gave in the Local Court and at the Commission. The Commission is not in a position to be able to make a statement of opinion of police misconduct in relation to his involvement in the arrest of WH-1: subsection 16(1)(a) of the Act.

9.24 Jackson gave evidence on objection with the benefit of a declaration having been made under section 41 of the Act. Therefore his admissions cannot be used against him in criminal or civil proceedings.

9.25 In relation to the allegation (a) above, the evidence concerning what happened in the bedroom consists of the evidence of Hathaway, the photographs, the medical evidence and the admission made by Jackson to Murphy, the substance of which was that he, Jackson, had caused Hathaway's injuries. This evidence provides sufficient basis for the Commission to express the opinion that consideration **should** be given to prosecution of Jackson for a specified criminal offence: assault occasioning actual bodily harm contrary to section 59 of the *Crimes Act 1900*.

9.26 In relation to the allegations (b) and (c) above the Commission is however **not** of the opinion that consideration **should** be given to the prosecution of Jackson for a specified criminal offence.

9.27 Section 107 of the Act provides as follows:

> 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.

9.28 As has been previously noted, Jackson gave all of his evidence on objection. Such objection does not, however, provide any protection in relation to the giving of false or misleading evidence: section 40(4) of the Act. Jackson was aware of his obligation to give truthful evidence.[366]

9.29 Pursuant to section 97(2)(a) of the Act, the Commission is of the opinion that consideration **should** be given to the prosecution of Jackson for two offences against section 107 of the Act, namely:

(a) that on 21 February 2005, at a hearing before the Commission at Wagga Wagga in the State of New South Wales, Jackson gave evidence that, to his knowledge, was false in a material particular in that in response to a question concerning Hathaway's injuries, *"In your considered opinion, did any of the injuries which we see on that photograph result from anything you did to Mr Hathaway on 6 February 2003?",* he did answer, *"No, I can't answer that"*.[367]

(b) that on 22 February 2005 at a hearing before the Commission at Wagga Wagga in the State of New South Wales, Jackson gave evidence that, to his knowledge, was false in a material particular in that in response to a question concerning Hathaway's injuries, *"Officer Jackson, if, as you have agreed, when you recorded in your notebook on 6 February and in your evidence which you gave on 11 December 2003 you were referring to the injury to the eye socket, would you mind telling us, to the best of your recollection, if you have one, how he got them?"*, he did answer, *"I'm not aware of how he received those injuries"*.[368]

9.30 Jackson is a serving NSW Police officer so it is necessary to consider the issues raised by subsections 97(2)(b)(c) and (d) of the Act. In doing so the evidence Jackson gave to the Commission may be considered.

9.31 In relation to allegation (a) above, Jackson's own acknowledgment that he had admitted to Murphy that he caused Hathaway's facial injuries is, together with the evidence referred to above (in paragraph 9.25), available to the Commissioner of Police for consideration in relation to taking action under sections 181D and 173 of the *Police Act 1990.* The Commission is of the opinion that the evidence, combined with Jackson's failure to recognise the

[366] PIC Transcript, CJ Jackson, 21 February 2005, p. 84
[367] PIC Transcript, CJ Jackson, 21 February 2005, p. 84
[368] PIC Transcript, CJ Jackson, 22 February 2005, p. 157

seriousness of the incident reflects adversely on Jackson's competence, integrity, performance and conduct as a police officer and that consideration **should** be given to the taking of action against Jackson under section 181D of the *Police Act 1990* (subsection 97(2)(c) of the Act).

9.32 If such action is not taken, then the Commission is of the opinion that consideration **should** be given to the taking of reviewable action under section 173 of the *Police Act 1990*: (subsection 97(2)(d) of the Act).

9.33 In relation to allegation (c) above the Commission has misgivings about the evidence given by Jackson, concerning the arrest of WH-1. However given the evidence of WH-1 the Commission is not satisfied that the events did not occur in the manner that Jackson, and the other police officers gave evidence. Therefore the Commission is **not** of the opinion that, in relation to this allegation, consideration **should** be given to the taking of action against Jackson pursuant to subsection 97(2)(a)(b)(c) or (d) of the Act.

SENIOR CONSTABLE MELINDA MAREE JENNINGS

9.34 Jennings is an affected person because she is the subject of the substantial allegation that on 6 February 2003, she, being a police officer involved in a critical incident, failed in her duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents.

9.35 Jennings was the custody officer so not present at the Property and not involved in the critical incident. Therefore she should not bear any responsibility for the handling of the critical incident.

9.36 A number of matters reflect adversely on her integrity and conduct as a police officer however. These include her failure to make any record of the incident in her notebook. In addition her statement does not include any reference to her role in the incident on 6 February 2003, but does include reference to a conversation in which Hathaway is alleged to have said that he was taking valium on 6 February 2003. Jennings included this reference despite the fact that on 6 February 2003 she did not record in the custody records any reference to Hathaway taking valium although she did record the names of other medications he admitted to taking. Finally the manner in which she gave her evidence to the Commission reflected adversely on her integrity and conduct as a police officer in that she was unhelpful and had to be reminded to tell the truth.

9.37 The Commission is **not** of the opinion that consideration **should** be given to the taking of action against her pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Jennings, pursuant to section 173(1) and Schedule 1 of the *Police Act 1990* (subsection 97(4) of the *Police Integrity Commission Act 1996*).

SERGEANT CHRISTOPHER JOHN KELLY

9.38 Kelly is an affected person because he is the subject of the substantial allegation that on 6 February 2003, he, being a police officer involved in a critical incident, failed in his duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents.

9.39 The Commission is of the opinion that Kelly, as an experienced officer in a supervisory position, ought to have recognised that the incident was a critical incident and that the action, or inaction, by Briggs and Murphy was inappropriate. His failure to recognise the seriousness of the incident, his failure to make any record of the incident in his notebook, his failure to make a statement or to come forward to the Critical Incident Investigation Team, together with the evidence he gave to the Commission, which at times was in direct conflict with objective evidence about the timing of certain events, all reflect adversely on his conduct as a police officer. However the Commission has taken into account the fact that on the day of the Hathaway incident he had very little if any input into the decisions that were made. Therefore the Commission is **not** of the opinion that consideration **should** be given to the taking of action against him pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act.

9.40 The Commission is of the opinion however that consideration **should** be given to the taking of non-reviewable action against Kelly, pursuant to section 173(1) and Schedule 1 of the *Police Act 1990* (subsection 97(4) of the *Police Integrity Commission Act 1996*).

SERGEANT VIRGINIA ANNE MORGAN

9.41 Morgan is an affected person because she is the subject of the substantial allegations that she:

(a) failed in her duty as a prosecutor to adequately ensure that there was proper disclosure of relevant materials to Hathaway's legal representative either prior to or during the prosecution of Hathaway at Wagga Wagga Local Court on 10-11 December 2003 and 22-24 March 2004; and

(b) failed to adequately consider whether the admissible evidence against Hathaway was such that it was proper to proceed against him in respect of the following charges:

(i) That Hathaway on 6 February 2003 did possess an offensive weapon, to wit, a knife[369] with intent to prevent the lawful apprehension of himself contrary to section 33B(1)(a) of the *Crimes Act 1900*.

[369] The knife is described differently in each of the two charges.

(ii) That Hathaway on 6 February 2003 did break and enter the dwelling house of Gary Gaffney situated at 79 Kincaid Street, Wagga Wagga and then while in such dwelling, did steal certain property, to wit, a long-bladed knife[370] the property of Gary Gaffney contrary to section 112(1) of the *Crimes Act 1900*.

(iii) That Hathaway on 6 February 2003 did assault Jackson, a police officer, while such officer was executing his duty and by that assault, did occasion actual bodily harm contrary to section 60(2) of the *Crimes Act 1900*.

(iv) That Hathaway on 6 February 2003 did resist Jackson, a police officer, while such officer was executing his duty contrary to section 546C of the *Crimes Act 1900*.

9.42 The Commission is of the opinion that Morgan did not engage in police misconduct in relation to her involvement in the prosecution of Hathaway: subsection 16(1)(a) of the Act.

9.43 The Commission is **not** of the opinion that consideration **should** be given to the prosecution of Morgan for a specified criminal offence.

9.44 Morgan is a serving NSW Police officer so it is necessary to consider the issues raised by subsections 97(2)(b), (c) and (d) of the Act. In doing so the evidence she gave to the Commission may be considered. The Commission is of the opinion that at least to some extent Morgan's behaviour in relation to the prosecution, and particularly her resistance to the subpoena, was the product of a misconception as to what was required and that this misconception may have been supported by information or instructions she received from the subpoena section of NSW Police in Sydney. In addition because of the demands of her practice she may have had no opportunity to consider the brief prior to the day the Local Court proceedings commenced in December 2003, and due to the continuing demands of her practice she may not have had any chance to further consider it between the December hearing dates and when the proceedings resumed in March 2004. Therefore the Commission is **not** of the opinion that consideration **should** be given to the taking of action against her pursuant to subsection 97(2)(b), (c) or (d) of the Act.

INSPECTOR THOMAS PATRICK MURPHY

9.45 Murphy is an affected person because he is the subject of the substantial allegations that:

(a) on 6 February 2003, he, being a police officer involved in a critical incident, failed in his duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management

[370] The knife is described differently in each of the two charges.

and investigation of critical incidents. In particular he failed to carry out the duties required of him by the Guidelines; and

(b) on 6 February 2003 and thereafter, knowing that Hathaway's injuries had been caused by Jackson, he took steps to conceal Jackson's conduct from his superiors and the Critical Incident Investigation Team which commenced its investigation on 7 February 2003.

9.46 The Commission is of the opinion that Murphy engaged in police misconduct in relation to his handling of the incident: subsection 16(1)(a) of the Act.

9.47 The Commission is of the opinion that consideration **should** be given to the prosecution of Murphy for a specified criminal offence, that of perverting the course of justice pursuant to section 319 of the *Crimes Act 1900*. The evidence to support this opinion is the evidence of the other officers as to Murphy's actions and decisions, Jackson's evidence of his admission to Murphy and Murphy's notebook,[371] duty book[372] and the Situation Report.[373]

9.48 An act which has the tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts is an act tending to pervert the course of justice and it is unnecessary that the prosecution prove that a particular offence has been committed or that a charge of a given nature is to be laid.[374] Here it was entirely possible that Jackson would face either criminal or disciplinary charges as a consequence of his conduct.

9.49 Murphy is a serving NSW Police officer so it is necessary to consider the issues raised by subsections 97(2)(b)(c) and (d) of the Act. In doing so the evidence he gave to the Commission, including his own admissions of his failure to act appropriately and poor decision making, may be considered. Murphy's failure to take any of the steps required of the Duty Officer at the scene of a critical incident or serious incident, his decision to have the bedroom cleaned, and the fact that he actively concealed Jackson's conduct from his superiors all reflect adversely on Murphy's competence, integrity, performance and conduct as a police officer. The Commission is of the opinion that consideration **should** be given to the taking of action against Murphy pursuant to section 181D or section 173 of the *Police Act 1990*: subsection 97(2)(c) or (d) of the Act.

FORMER INSPECTOR TIMOTHY JOSEPH O'NEILL

9.50 O'Neill is an affected person because he is the subject of the substantial allegations that:

(a) on 6 February 2003, he, being a police officer involved in a critical incident, failed in his duty to ensure that the critical incident was dealt

[371] PIC Exhibit 17B
[372] PIC Exhibit 19
[373] PIC Exhibit 18
[374] *The Queen v Rogerson (1992) 174 CLR 268*

with in accordance with established guidelines for the management and investigation of critical incidents; and

(b) knowing or suspecting that Jackson had applied excessive force to WH-1 during his arrest, he falsely claimed that he had observed the arrest and that Jackson had used his baton appropriately in response to threatening behaviour by WH-1.

9.51 The Commission is not of the opinion that O'Neill engaged in police misconduct in relation to his involvement in the Hathaway incident: subsection 16(1)(a) of the Act.

9.52 In relation to the WH-1 incident the Commission has misgivings about the evidence given by O'Neill, both in his statement and before the Commission, that he observed the arrest of WH-1, that Jackson's use of his baton was necessary and appropriate and that he did not know of the decision to withdraw the resist arrest charge prior to the day of the court proceedings. However given the evidence of WH-1 the Commission is not satisfied that he did not make the observations that he said he did.

9.53 Therefore the Commission is not in a position to be able to make a statement of opinion as to whether O'Neill engaged in police misconduct in relation to his involvement in the incident: subsection 16(1)(a) of the Act.

9.54 The Commission is **not** of the opinion that consideration **should** be given to the prosecution of O'Neill for a specified criminal offence in relation to either incident.

9.55 O'Neill is no longer a serving NSW Police officer. Accordingly the question of taking action pursuant to subsections 97(2)(b)(c) and (d) of the Act does not arise.

CONSTABLE JULIE THERESE PHILPOTT

9.56 Philpott is an affected person because she is the subject of the substantial allegations that:

(a) on 6 February 2003, she, being a police officer involved in a critical incident, failed in her duty to ensure that the critical incident was dealt with in accordance with established guidelines for the management and investigation of critical incidents; and

(b) she gave untruthful evidence in the Wagga Wagga Local Court proceedings against Hathaway in relation to the charges arising out of the incident on 6 February 2003.

9.57 The Commission is of the opinion that while Philpott should have realised that the incident was a critical incident she was entitled to rely on the senior officers to assume control of the situation and make the relevant decisions and should therefore bear no responsibility for those decisions.

9.58 However her failure to make a full record of the incident in her notebook (she omitted reference to her conversation with Jackson about what occurred in the bedroom), the discrepancy between her statement and her notebook entry (there is no reference to Hathaway looking around the room in her statement) and the manner in which she gave her evidence, both before the Local Court and the Commission, all reflect adversely on her integrity and conduct as a police officer.

9.59 The Commission is **not** of the opinion that consideration **should** be given to the taking of action against her pursuant to subsections 97(2)(a)(b)(c) or (d) of the Act. The Commission is of the opinion, however, that consideration **should** be given to the taking of non-reviewable action against Philpott, pursuant to section 173(1) and Schedule 1 of the *Police Act 1990* (subsection 97(4) of the *Police Integrity Commission Act 1996*).

10. PROCEDURAL MATTERS

POLICE PROSECUTORS

10.1 The primary duty of Police Prosecutors is to the Court.[375] They must act with fairness and impartiality in assisting the Court to attempt to ascertain the truth. The training of police prosecutors by NSW Police emphasises the basic principle that a legal practitioner's primary duty is to the Court, and that this duty is to be embraced by all police prosecutors, notwithstanding that they are not members of the legal profession.

10.2 As discussed in Chapter 7, the NSW Police prosecution of Hathaway was, at best, unsatisfactory in several respects. Despite the evidence of specific inadequacies in the preparation of the brief of evidence itself and in the manner in which Morgan handled the prosecution of Hathaway, the Commission has not expressed an opinion that police misconduct took place in relation to those aspects of the prosecution of Hathaway. There are, however, a number of procedural issues that arise regarding the Hathaway prosecution, in relation to which the Commission has made recommendations for improvement.

FULL DISCLOSURE OF ALL RELEVANT MATERIAL TO DEFENCE

10.3 The brief of evidence against Hathaway did not contain important documents in relation to his arrest and detention on 6 February 2003 and his injuries and treatment. In particular an expert medical certificate[376] written by a doctor at Wagga Wagga Base Hospital which described Hathaway's injuries as being consistent with Hathaway's version of what occurred within the bedroom was not included in the brief. Morgan admitted that had she been aware of the certificate she would have provided a copy to Hathaway.[377]

10.4 It is important that all briefs of evidence delivered to prosecutors and defendants contain full disclosure of all material to which a defendant is entitled. Issues relating to the duty of disclosure of all relevant materials are well canvassed in the training materials for NSW Police Prosecutors. In addition adherence to the Office of the Director of Public Prosecutions (ODPP) Prosecution Guidelines is a requirement of NSW Police Prosecutors Standard Operating Procedures (SOPs). Morgan gave evidence that she was aware of the ODPP Prosecution Guidelines as to the rules and duties of prosecutors.[378]

10.5 The Commission is of the opinion that NSW Police should give consideration to whether, in the Prosecutor's Training Program, there is sufficient emphasis

[375] NSW Police Court & Legal Services, Training Section, "Prosecutor Education Program: *Professional Standards*", 1.15
[376] PIC Exhibit 33
[377] PIC Transcript, VA Morgan, 9 March 2005, p. 572
[378] PIC Transcript, VA Morgan, 9 March 2005, pp. 561-562

on the requirement that prosecutors understand the duty of disclosure and the need to adhere to the ODPP Guidelines.

10.6 Further, the Commission is of the opinion that NSW Police should give consideration to whether there is a need for prosecutors to be better educated on the policies and/or obligations surrounding access to documents relating to internal investigations if they are caught by a subpoena. In particular, whether there is sufficient attention given in the training program to the different nature of documents resulting from a Critical Incident Investigation, as opposed to documents resulting from an Internal Affairs Investigation arising as a result of a complaint made under Part 8A of the *Police Act 1990*.

SUFFICIENCY OF PROSECUTION BRIEFS

10.7 Morgan gave evidence that it was part of her duties as a police prosecutor to satisfy herself that there was sufficient admissible evidence to connect a defendant to a crime before proceeding with a prosecution. Particularly relevant in relation to this matter was the issue of sufficiency of evidence connecting Hathaway with the knife.

10.8 Trainee NSW Police Prosecutors are taught that although it is not the role of the prosecutor to judge the weight and merit of each case this does not mean that a prosecutor can take the view that the court can decide a matter where there are obvious weaknesses in the prosecution. Prosecutors are taught that brief checking, which includes identifying charges that should be considered for withdrawal, is a most important task. Reference is made to the ODPP Guidelines as providing guidance on such matters.

10.9 Further, the Prosecutor's SOPs state that:[379]

> To assist in the continual improvement in the preparation of briefs of evidence, and to ensure high standards are maintained Police Prosecutors are to inform the Local Area Commander (via the Brief Manager/Education Development Officer/Crime Manager) and the informant of the perceived deficiencies.

10.10 From the evidence, it is apparent that either the adequacy of the brief was never seriously considered by Morgan, or that she failed to appreciate the inadequacies of the brief.

10.11 Whilst there may be some degree of substance in Morgan's suggestion that *"... I'm prosecuting the matter, it's obviously not my duty to be investigating it ..."*,[380] it is arguable that the deficiencies in the brief would (or should) have been obvious to a prosecutor of Morgan's experience, and hence should have, according to the SOPs, prompted her to take the appropriate action.

10.12 Morgan claimed in her evidence that her workload was heavy and the demands of her practice made it difficult for her to scrutinise briefs in detail.

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[379] NSW Police, Court & Legal Services, Prosecution Policy - SOPs & Guidelines, Brief Handling – Prosecutors Role
[380] PIC Transcript, VA Morgan, 9 March 2005, p. 588

Whilst this may have been true in this particular prosecution, it is unreasonable to generally accept that the pressures of the position will always constitute an acceptable excuse for a prosecutor's failure to properly discharge his or her duties to the Court and the defendant.

10.13 NSW Police currently has a system for reviewing briefs of evidence. According to the NSW Police Brief Preparation Guide, October 2004, all briefs are to be reviewed by a Brief Handling Manager. The Brief Preparation Guide provides a ten step process for the review of briefs by a Brief Handling Manager. Where the Brief Handling Manager is of the opinion that a brief does not satisfy the ten steps, the Brief Preparation Guide states that the brief will be returned to the officer so that the problem can be rectified. There is no evidence that the Hathaway brief was reviewed by a Brief Handling Manager. Notwithstanding that there may have been a prima facie case in relation to the knife offences, had the Hathaway brief been reviewed by a Brief Handling Manager and the ten step review process followed, it is probable that doubts would have been raised at an earlier time as to whether there was sufficient evidence to prosecute those offences.

CONFLICT OF INTEREST

10.14 The existence of a friendship between Morgan and Jackson gives rise to questions as to Morgan's objectivity in the Hathaway prosecution. Morgan admitted that she and her husband were close friends of Jackson and his wife. She told the Commission that her husband, who is also a member of NSW Police at Wagga Wagga Local Area Command, was Jackson's "support officer".[381] Morgan denied however that she had spoken in detail to Jackson about the events of 6 February 2003, or spoken to him in the context of the brief or her being the prosecutor.

10.15 Morgan said that she had spoken to Jackson around the time of the incident, at which time he had told her *"... something about it ..."*.[382] She denied that her friendship with Jackson was the reason she did not make any inquiries in relation to the medical report that had been obtained by the Critical Incident Investigation Team and to which Briggs had referred in evidence in the Local Court in December 2004.[383]

10.16 The Professional Standards Prosecutors Training Program places perhaps less attention to the nature of conflicts of interest than might be expected. Nevertheless it is categorically stated that:[384]

> Conflicts of interest have the potential to seriously undermine the professional credibility of a police officer, and the Police Service …
>
> You must avoid any financial or other interests that could compromise the impartial performance of your duties. **You must disclose any potential or**

[381] PIC Transcript, VA Morgan, 9 March 2005, p. 577
[382] PIC Transcript, VA Morgan, 9 March 2005, pp. 576-577
[383] PIC Transcript, VA Morgan, 9 March 2005, pp. 587-588
[384] NSW Police Court & Legal Services, Training Section, "Prosecutor Education Program: *Professional Standards*, 4.74-4.75

> **actual conflicts of interest to your manager or other senior officer.** (emphasis in original)

10.17 The Professional Standards Prosecutors Training Program also states, in relation to Prosecutors' Instructions:[385]

> … There should be no occasion where a police prosecutor conducting a particular case has a personal or command relationship with a police informant or witness in a case, save in the latter case of prosecutors stationed in the country. If there is such a situation, the Senior Manager, Court Unit should be notified with a view to allocate the case to another police prosecutor, or in special circumstances, to arrange for the Director of Public Prosecutions to take over a summary prosecution…

10.18 Notwithstanding that Morgan was a "prosecutor stationed in the country", given her close friendship with Jackson, who, although not the informant, was a material witness in the case, this was clearly one such instance where the Senior Manager, or else the Area Prosecutions Co-Coordinator, should have been notified with a view to allocating the matter to another prosecutor.

10.19 Morgan gave evidence that the re-allocation of prosecutors would have been difficult because there were not enough police prosecutors and that she "*Quite often* …" ran cases where there was a possibility of a conflict.[386] There was no suggestion however that she had ever in fact brought the possibility of a conflict to the attention of her superiors. This, of course, was her professional obligation.

10.20 Clearly, the directive noted above is explicit in setting out the standards expected of prosecutors; however, the existence of any number of professional or ethical standards will have little effect in situations where an individual chooses not to follow the rules for whatever reason.

10.21 While the Commission is aware that resolution of such issues in country centres may not always be readily achieved, a review of the rosters for the police prosecutors in the Southern Rivers District for the relevant dates (10-11 December 2003 and 22-24 March 2004) reveals that there were, at that time, two police prosecutors stationed at Wagga Wagga.[387] In fact on 10-11 December 2003 both police prosecutors were rostered to court duties at Wagga Wagga. When the proceedings resumed in March 2004 one of those prosecutors was rostered in Cootamundra and Temora. It would appear therefore that had Morgan raised her conflict on interest in relation to the Hathaway matter there was another police prosecutor who may have been able to take on the prosecution. Of course it is always possible that the other prosecutor may also have had a conflict of interest.

10.22 As noted above, the Professional Standards Prosecutors Education Program contains considerably less treatment of the issue of conflict of interest than might be expected. The Commission recommends that consideration be

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[385] NSW Police Court & Legal Services, Training Section, "Prosecutor Education Program: *Professional Standards"*, 2.1
[386] PIC Transcript, VA Morgan, 9 March 2005, pp. 562-563
[387] PIC Exhibit 69

given to placing greater emphasis on the identification and resolution of potential conflict situations in the Prosecutors Training Course. The Commission acknowledges the difficulties in having appropriate support on hand in country areas, so that in the event of a conflict arising alternative arrangements can be made to ensure police prosecutors fulfil their duties without bias or the appearance of bias.

CRITICAL INCIDENT GUIDELINES

10.23 The NSW Police Guidelines for the management and investigation of Critical Incidents (the Guidelines) provide *"... guidance for police officers and other people dealing with the timely and professional investigation and review of critical incidents"*. As already mentioned in Chapter 3, it is clearly stated that the Guidelines are not intended *"...to be a replacement for the application of sound common sense and good judgement expected of experienced police officers"*.[388]

10.24 The Guidelines provide the following definition of a critical incident:[389]

- Homicide of a police officer, whether or not the officer is on duty at the time
- Any death or injury resulting from the discharge of a police firearm (including attempted or actual suicide by police and civilians)
- Death or serious injury resulting from the use of police issue appointments
- Death or serious injury to any person in custody
- Death or serious injury arising from a police operation
- Death or serious injury arising from a police vehicle pursuit.

10.25 The first section of the Guidelines, titled "Preparing for Critical Incidents", outlines the general responsibilities of the Region Commander, the Local Area Commander, the Senior Critical Incident Investigator and the Review Officer in preparing to deal with a critical incident. This section also discusses mandatory alcohol and drug testing. The second section, titled "Roles and Responsibilities" sets out in detail the roles and responsibilities of the key officers in relation to a number of specifically defined critical incidents, for example death or serious injury arising from the use of police issue appointments and death or serious injury arising from a police operation.

10.26 In the Hathaway incident the relevant officers failed to carry out the roles required of them. It is possible that there were a number of reasons for that failure however clarification of two matters in particular should lead to an improvement in the response of all police officers, regardless of rank, to similar situations in the future. The first is clarification of the definition of *"serious injury"* and the second is the clarification of whose responsibility it is to call a critical incident.

[388] PIC Exhibit 54, Purpose of Guidelines
[389] PIC Exhibit 54

"SERIOUS INJURY"

10.27 The Guidelines give *"as a guide"* the following definition of a *"serious injury"* giving rise to a critical incident:[390]

> … a serious injury is one that would normally require emergency admission to a hospital and significant medical treatment

10.28 The senior officers involved in this incident, Briggs, Murphy and O'Neill all gave evidence that the incident did not fall into the definition of a critical incident because the injuries to Hathaway were not, in their opinion, serious enough. They were prepared to argue that because Hathaway's injuries did not require his *"emergency admission"* to hospital the injuries were not serious enough to call a critical incident. It should be noted that they made very few inquiries, if any, to determine if and when Hathaway was admitted to hospital and Murphy was prepared to say the matter was not a critical incident without making such inquiries.

10.29 It is true that the full extent of Hathaway's injuries could not be recognised without investigations such as an x-ray and CAT scan, together with expert medical opinion. However it could not realistically be in dispute that the actual injuries Hathaway suffered that day were *"serious"* or that they should have been obvious to the officers who saw him.

10.30 It is not unknown for people with a serious illness or injury to be treated at hospital without being admitted, and then sent home to await surgery or further treatment. It is also true that an injury can be serious even though the person suffering the injury has not lost consciousness or is still able to walk and talk. With this in mind the Commission recommends that NSW Police gives consideration to clarifying the definition of *"serious injury*" in the Guidelines. While not being prescriptive, it may be that a definition that excludes the requirement for *"emergency admission to a hospital"* and instead includes a requirement that the injury requires "significant medical treatment" is more appropriate.

THE DECISION TO CALL A CRITICAL INCIDENT

10.31 In the Hathaway incident neither of the senior officers at the scene, Briggs and Murphy, was prepared to make the decision to call a critical incident. Briggs said that such a decision was not his to make, and Murphy avoided making the decision on grounds related to whether Hathaway's injuries fell into the definition of *"serious injury"*.

10.32 In the Commission's Report to Parliament on Operation Saigon[391] the Commission investigated and made recommendations in relation to a fatal shooting of a civilian by NSW Police officers. At the time of that Report, June 2001, NSW Police was in the process of reviewing its guidelines for

[390] PIC Exhibit 54, Purpose of Guidelines
[391] Police Integrity Commission Report to Parliament Operation Saigon, June 2001

procedures with respect to certain categories of deaths and serious injuries. The Commission reviewed the proposed procedures and made recommendations including the following:[392]

> The Commission is of the view that there is a real risk of confusion and uncertainty where procedures allow a choice of options in circumstances where a swift and decisive response is needed.

And:[393]

> The draft policy also provides for some overlap or duplication of functions between officers. The Commission is of the view that this is unsatisfactory and may serve to obfuscate the division of responsibilities between officers, and that it would be preferable for clear and specific responsibilities to be accorded to individual officers.

10.33 It is acknowledged that these comments were made in relation to draft procedures for investigation of deaths from police shootings. It is also acknowledged that the current Guidelines do allocate specific tasks to specific officers at the scene of a critical incident. However the Commission is of the opinion that there is still some overlap of responsibility and that this has the potential to cause uncertainty. For example although the current Guidelines state that the First Officer at the Scene is required to make certain decisions including advising the Duty Operation Inspector, VKG Sydney, that a critical incident has occurred, the Guidelines also state that the Duty Officer is to assume command of the scene until relieved by the Local Area Commander or Senior Investigator.

10.34 In the Hathaway incident this allowed Briggs, who was the First Officer at the Scene to defer the decision making to Murphy, his superior officer, who arrived at the scene soon after Briggs. Although Murphy was able to observe the scene, he did not see Hathaway or his injuries first hand because, by the time Murphy arrived at the Property, Hathaway had already been arrested and taken to the Police Station. The Guidelines need to be unambiguous as to whose responsibility it is to call the critical incident so that the decision is made as early as possible and the appropriate actions taken, for example, the preservation of the scene.

10.35 None of the more junior officers saw it as their responsibility to either make a decision in relation to a critical incident or to question the decision of their superior officer. Although in the Hathaway incident they were not required to make a decision as to whether the incident was a critical incident because there were more senior officers present, it is still incumbent on every police officer to be able to recognise when an incident is a critical incident. The First Officer at the Scene is defined as *"the most senior officer who first arrives at the scene whatever their rank"*. In some instances this could be a relatively junior police officer.

10.36 NSW Police should consider the implications of Guidelines requiring all officers to make such a decision when in practice only senior officers ever

[392] Police Integrity Commission Report to Parliament Operation Saigon, June 2001, paragraph 7.6
[393] Police Integrity Commission Report to Parliament Operation Saigon, June 2001, paragraph 7.7

make such decision. It is not an effective risk management strategy for NSW Police to adopt Guidelines that are contingent upon the ability to officers to exercise discretionary judgments if officers have not been adequately prepared and empowered to do so.

FORENSIC TESTING OF POLICE BATONS

10.37 The Guidelines currently have a separate section dealing with death or serious injury resulting from the use of police issue appointments. However while this section gives the Duty Officer certain duties where a police firearm has been discharged it does not make any specific mention of what should be done where a police baton has been used and caused injury.

10.38 Where the incident involves the discharge of a police firearm one of the duties required of the Duty Officer is to instruct all police present at the time of the incident to stay at the scene until their firearm has been examined by the Forensic Ballistics Unit. The Guidelines provide a similar requirement in the circumstance of death or serious injury arising from a police operation. Briggs gave evidence that where a police issue firearm had been used it would be bagged and sealed at the scene and taken for testing.[394]

10.39 In the Hathaway incident serious injury resulted from the use of Jackson's police baton. However Jackson's baton was not forensically tested. Briggs gave evidence that despite the fact that he, Briggs, knew that Jackson had used his baton and that Hathaway was injured, he did not take any steps to secure the baton. He had no explanation for his failure to secure the baton and agreed in hindsight that *"... it would have been a good idea or a matter of good policing... "* to immediately secure the baton for forensic testing. He did not agree however that to secure the baton was fairly basic policing.[395]

10.40 The Commission suggests that NSW Police reviews the Critical Incident Guidelines and gives consideration to including a requirement that police issue appointments are secured for forensic testing following a critical incident where any appointments have been used, or are suspected of having been used.

STATEMENT AND NOTE TAKING

10.41 The evidence revealed, in relation to the arrests of both Hathaway and WH1, that a number of involved officers had not applied standard practice in relation to note taking and the preparation of statements. Of further concern is that the evidence revealed that the conduct was not limited to the more junior of the officers concerned, but also included considerably more experienced senior officers.

10.42 The deficiencies identified by the Commission included:

[394] PIC Transcript, TS Briggs, 23 February 2005, pp. 293-294
[395] PIC Transcript, TS Briggs, 23 February 2005, pp. 293-294

- the failure to properly and completely record significant details relating to serious incidents;
- collaboration amongst officers in the preparation of notebook entries and court statements;
- incomplete, and thereby potentially misleading, statements and duty book entries;
- the failure to prepare statements contemporaneously with the relevant incidents or events;
- inconsistencies between the event details recorded in notebook entries and subsequent statements prepared in relation to those same events; and
- the apparently deliberate failure to record information in notebooks and/or statements that was potentially adverse to another officer.

10.43 The deficiencies identified above have been discussed in detail in the body of the Report. That discussion included the following in relation to the particular officers: Jackson,[396] Murphy,[397] Philpott,[398] Deissel,[399] Jennings,[400] and the officers involved in the arrest of WH1.[401]

10.44 In relation to Critical Incidents, the requirement for officers to immediately and independently record observations in their notebook is an essential part of the Guidelines. Collaborative note taking or statement making has the potential to seriously undermine a Critical Incident Investigation and, just as importantly, public confidence in the independence, impartiality and thoroughness of the investigation procedure.

10.45 The evidence heard by the Commission, however, demonstrated a clear disregard by some officers of the requirement to independently record all details of relevant incidents or to prepare full and frank statements for tendering in Court proceedings. These requirements are, of course, rudimentary to effective and accountable police work.

10.46 In its Report to Parliament on Operations Copper, Triton and Nickel, the Commission commented on the undesirability of practices similar to those identified in Whistler.[402] Recommendations were made in that Report aimed at improving practices within NSW Police. The Commission reiterates the observations it made regarding the dangers of allowing such conduct to continue. These dangers include:[403]

- Courts will not have confidence in the integrity of documents presented by police officers;

[396] see paragraphs 2.17-2.18
[397] see paragraphs 4.4-4.5, 4.31-4.34
[398] see paragraphs 5.4-5.7
[399] see paragraphs 5.11-5.13
[400] see paragraphs 5.24-5.29
[401] see paragraphs 8.21-8.27
[402] Police Integrity Commission Report to Parliament Operations Copper, Triton and Nickel, June 2000
[403] Police Integrity Commission Report to Parliament Operations Copper, Triton and Nickel, June 2000, p. 97

- Courts and the community will lack confidence and trust in evidence presented by police officers: and
- Police officers may be prepared to give false evidence

10.47 The Commission noted in the previous Report that the failure to discourage such practices can have a negative impact on NSW Police and impede reform in the following ways:[404]

- management failure to identify the integrity issue raised by such conduct has the potential to lead officers to believe that the reforms being promulgated by management of the Police Service are simply rhetoric;
- inexperienced officers are inducted into a work ethic which is antithetical to the reform process;
- such conduct can be seen as an expedient alternative to diligent and skilled policing work; and
- it encourages disregard for court process and evidence, and teaches that deceptions can be maintained and covered up.

10.48 The Commission acknowledges and commends recent NSW Police initiatives in this particular area such as the Brief Improvement Project, and, in particular, the Brief Preparation Guide. In the Commission's opinion the latter document clearly addresses some of the issues identified in Operation Whistler, see for example the Brief Preparation Guide, Part One "Components of a Brief of Evidence", particularly "Contents of Statements", pp. 12-16 and Annexure 3 "Police Statement – Corroboration or Collaboration".[405]

10.49 However the issues regarding note taking and statement preparation identified in Whistler go to the most rudimentary of police functions. While acknowledging that NSW Police has made improvements the evidence uncovered in this Operation suggests that NSW Police should assess whether more needs to be done in this area to ensure that officers remain mindful of their basic responsibility to make, as a matter of course, comprehensive independent notes in respect of all relevant incidents to which they are a party or a witness.

10.50 Of concern is that the issues which became evident in Operation Whistler may be indicative of the persistence of a culture amongst some members of NSW Police that encourages the "closing of ranks" to protect a fellow officer and the command from the repercussions of that officer's improper, or even illegal, actions. To the extent that such a culture persists its elimination remains an ongoing challenge for NSW Police.

[404] Police Integrity Commission Report to Parliament Operations Copper, Triton and Nickel, June 2000, p. 99
[405] "Police Statement – Corroboration or Collaboration", Policing Issues & Practice Journal, January 2000

APPENDICES

APPENDIX 1 - ROLE AND FUNCTIONS OF THE COMMISSION

The Commission was established under the *Police Integrity Commission Act 1996* (the Act) on the recommendation of the Royal Commission into the New South Wales Police Service. The principal functions of the Commission, set out in section 13 of the Act, are:

> (a) to prevent serious police misconduct and other police misconduct,
>
> (b) to detect or investigate, or manage other agencies in the detection or investigation of, serious police misconduct,
>
> (c) to detect or investigate, or oversee other agencies in the detection or investigation of, other police misconduct, as it thinks fit,
>
> (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.

As far as practicable, the Commission is required to turn its attention principally to serious police misconduct (subsection 13(2)).

POLICE MISCONDUCT

The expressions "police misconduct" and "serious police misconduct" are not specifically defined by the Act. They nevertheless include the following types of conduct (see subsection 5(2)):

> (a) police corruption,
>
> (b) the commission of a criminal offence by a police officer,
>
> (b1) misconduct in respect of which 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.*

It follows that "police misconduct" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

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 (section 25);
- require any person (whether or not a public official or public authority) to produce documents or other things (section 26);
- enter public premises (section 29);
- obtain search warrants (section 45);
- obtain warrants under the *Telecommunications (Interception) Act 1979*;
- obtain warrants under the *Listening Devices Act 1984* (section 50); and
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private (section 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 (subsection 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 (subsection 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 (subsections 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 subsection 97(1) of the 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 (subsection 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" (subsection 97(3)). The Commission is, however, not limited in the kind of statement that a report can contain concerning an "affected"

person and is not prevented from making a statement as described in subsection 97(2) in relation to any other person (subsection 97(4)).

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 (subsection 16(2)(a)). The Commission may form opinions as to whether police misconduct or other misconduct may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (subsection 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 Act deems permissible opinions concerning police misconduct or other misconduct 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 (subsection 16(3)). That said, the Commission recognises, bearing in mind the definition of police misconduct may include conduct that amounts to criminal and disciplinary offences, 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 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.[406] 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

[406] 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" (subsections 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.

prosecutorial authority. That said, the Commission may make findings or 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 Commission to make a recommendation that consideration should be given to additional prosecutions.

Statements Regarding "Affected Persons"

Subsection 97(2) of the 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,
>
> (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.

Recommendations and Opinions Regarding Disciplinary Action Against Police

"Reviewable action" within the meaning of section 173 of the *Police Act 1990* refers to forms of disciplinary action that would ordinarily apply to more serious breaches of discipline. The available forms of reviewable action are:

- a reduction in a police officer's rank or grade;
- a reduction in a police officer's seniority;
- a deferral of a police officer's salary increment; and
- any other action (other than dismissal or the imposition of a fine) that the Commissioner of Police considers appropriate.

Owing to the seriousness of these forms of disciplinary action, a police officer may appeal the imposition of any of these penalties to the Industrial Relations Commission of New South Wales.

In addition to the requirement to include in a report to Parliament a statement of the Commission's opinions regarding those against whom substantial allegations have been made, the Commission has discretion to recommend that consideration be given to other disciplinary action. This includes "non-reviewable action" within the meaning of section 173 of the *Police Act 1990*. Non-reviewable action is disciplinary action available against police officers for less serious breaches of discipline. There is no avenue of appeal to the Industrial Relations Commission against the imposition of a form of non-reviewable action. The available forms of non-reviewable action are:

- coaching;
- mentoring;
- training and development;
- increased professional, administrative or educational supervision;
- counselling;
- reprimand;
- warning;
- retraining;
- personal development;
- performance enhancement agreements;
- non-disciplinary transfer;
- change of shift (but only if the change results in no financial loss and is imposed for a limited period and is subject to review);
- restricted duties; and
- recording of adverse findings.

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 or other persons carry out their respective duties and responsibilities.

APPENDIX 2 – WITNESS LIST

NAME	DATE OF APPEARANCE
Superintendent Stephen Bradshaw	10 March 2005
Detective Senior Constable Timothy Scott Briggs	22, 23 February & 10 March 2005
Constable Gregory James Cox	23 February 2005
Probationary Constable Amanda Rae Deissel	8 March 2005
Senior Constable Fiona Maree Duncan	8 March 2005
Craig Anthony Elphick	7 March 2005
Gary Patrick Gaffney	22 February 2005
Allan Frederick Hathaway	11 March 2005
Senior Constable Raymond Vincent Holmes	23 February 2005
Senior Constable Melinda Maree Jennings	8 March 2005
Sergeant Christopher John Kelly	11 March 2005
Senior Constable Dion Guy McAlister	21 February & 9 March 2005
Constable Christopher John Jackson	21, 22 February & 11 March 2005
Simon Michael Mansfield	21 February 2005
Sergeant Virginia Anne Morgan	9 March 2005
Inspector Thomas Patrick Murphy	23 February & 10 March 2005
Formed Inspector Timothy Joseph O'Neill	9, 10 March 2005
Constable Julie Therese Philpott	22 February & 9 March 2005
Kenneth William Smith	22 February 2005
WH-1	7 March 2005
WH-2	7 March 2005



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