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# LECC

Law Enforcement  
Conduct Commission

## Inquiry into NSW Police Force strip search practices

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December 2020



## Law Enforcement Conduct Commission

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# Transmission Letter



15 December 2020

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

The Hon Jonathan O'Dea MP  
Speaker  
Legislative Assembly  
Parliament House  
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

In accordance with section 138 of the *Law Enforcement Conduct Commission Act 2016*, the Commission hereby furnishes to you a Special Report, entitled *Inquiry into NSW Police Force strip search practices*.

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

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R O Blanch'.

**The Hon R O Blanch AM QC**  
Chief Commissioner

A handwritten signature in blue ink, appearing to read 'Lea Drake'.

**The Hon Lea Drake**  
Commissioner for Integrity

# Foreword

In October 2018, in response to a number of complaints and anecdotal information, the Law Enforcement Conduct Commission commenced the first of a suite of investigations into the way police conduct strip searches under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). Our Inquiry into NSW Police Force strip search practices, set out in this report, represents a significant body of work, comprising a total of seven investigations, as well as an analysis of NSW Police Force policies and training, and oversight of police investigations of complaints about strip searches.

Careful scrutiny of police strip search practices is crucial. Strip searches are an important tool for police in the detection of dangerous concealed items, or evidence of serious offences. However, they are also extremely intrusive. The experience of being strip searched is likely to be humiliating for the person searched and, according to expert psychological opinion provided to the Commission, can give rise to both immediate and lasting traumatic responses. Additionally, compliance with the legislative requirements for conducting strip searches is important because unlawful strip searches can result in failed prosecutions and expose the NSW Police Force to litigation.

The Commission's 2019 public hearings in Operations Brugge and Gennaker focussed particular attention on police practices of strip searching at music festivals. The Commission found the strip searches the subject of these investigations were unlawful. We were particularly concerned by the apparent lack of knowledge of some police officers about requirements for a lawful strip search, and the protections that must be afforded to young people when they are strip searched.

We are pleased that the NSW Police Force has responded decisively to the Commission's concerns in this regard, preparing a package of information and training to ensure that officers working at music festivals are well informed about what is needed to conduct a lawful strip search. We look forward to working with the NSW Police Force to evaluate, by way of an audit, the impact of the changed instructions and new quality assurance processes that have been implemented, when those changes have had some time to settle.

However, music festivals are not the only, nor even the most common setting in which strip searches occur. Strip searches by police are predominantly performed in custody – in police stations. The NSW Police Force response to the Commission's 2019 *Review of Standard Operating Procedures for strip searches in custody* was the prompt implementation of a consolidated policy, replacing a proliferation of local policies containing different, and at times incorrect instruction about strip searches. The new policy is a significant improvement and welcome development.

Strip searches cannot be conducted as a matter of mere routine, or just to check whether or not a person may have concealed something in their inner clothing. The thresholds set out in legislation are an important safeguard against routine strip searches. A recurrent issue throughout the Inquiry was the failure of officers to comply with, or at least to properly account for their compliance with, the legal thresholds for conducting a strip search. Our investigations considered circumstances in which officers had failed to show that the seriousness and urgency of the circumstances made it necessary to conduct strip searches 'in the field'. We

also identified officers who had searched a person's genital areas without reasonably suspecting this step was necessary for the purpose of the search, as required by law. Low rates of detection of relevant evidence during strip searches further suggests that officers have been routinely conducting strip searches without the requisite suspicion.

There remain some areas of ambiguity about the extent of police strip search powers, including what falls within the definition of a strip search and whether police are legally permitted to require someone to squat, bend over, part their buttock cheeks or move genitalia or breasts during a strip search. This is particularly relevant to the question of whether, and to what extent, force used during a strip search may be reasonable. Resolving this ambiguity is essential, not just for the officers that may be faced with this question in the execution of their duties, but also for proper oversight of complaints made by members of the public about police actions.

Another issue that warrants clarification is the meaning of 'seriousness and urgency' which is a threshold that must be satisfied before police can strip search a person in the field. The interpretation of this term has been raised in various reports to the NSW Government. While the NSW Police Force has proposed sound policy changes to further assist officers to decide when to strip search in the field, it is unable to particularise the types of offences that would not fall within the ambit of the term. The Commission has asked Parliament to clarify these issues.

This report makes 25 recommendations. Predominantly, the recommendations seek clarification of the instructions provided to police officers to ensure that strip searches are conducted lawfully. Some are aimed at enhancing record keeping to improve accountability and enhancing the quality assurance processes to check that strip searches are conducted appropriately and lawfully. Others are aimed at ensuring that training provided to officers about when and how to strip search is clear and comprehensive. Many of our recommendations are aimed at strengthening officer understanding about the thresholds that must be satisfied before conducting a strip search.

We wish to thank the NSW Police Force for its prompt and enthusiastic response to the Commission's concerns throughout the Inquiry. We are confident that the attention this Inquiry has provoked has raised awareness of all police officers about how to conduct strip searches in compliance with the law. This will benefit those officers, as well as the public of New South Wales.

We also wish to thank the various individuals and organisations, including the Police Association of NSW, that have provided comment and advice to the Commission about the way that strip searches are experienced by members of the public, and who have devoted their energies to increasing public awareness about the rights of individuals when strip searched.

Overall, we believe this Inquiry has delivered positive outcomes for the public of New South Wales, and for the police officers that serve it.



**The Hon R O Blanch AM QC**  
Chief Commissioner



**The Hon Lea Drake**  
Commissioner for Integrity

# Contents

Transmission Letter.....	i
Foreword.....	ii
Recommendations.....	vi
List of case studies.....	x
Executive Summary .....	xi
1. Introduction.....	1
1.1 History of the Inquiry .....	1
1.2 Methodology.....	2
1.3 Strip search powers in NSW .....	9
1.4 Strip searches undertaken by the NSW Police Force.....	10
2. Recent changes implemented by the NSW Police Force.....	17
2.1 State-wide communications .....	17
2.2 Changes to key policy documents.....	19
2.3 Changed practices at major events.....	19
2.4 Changes to the way strip searches are checked.....	20
3. Thresholds for strip searching.....	24
3.1 Multiple threshold requirements for strip searches .....	24
3.2 What constitutes a strip search? .....	26
3.3 Reasonable grounds for suspicion.....	32
3.4 Strip search is necessary for purposes of search .....	39
3.5 Seriousness and urgency - strip searches in the field.....	46
3.6 Search of genital area or breasts must be necessary for purposes of the search.....	53
3.7 Thresholds still apply to strip searches conducted ‘by consent’ .....	53
3.8 Recording the basis for consideration of each threshold requirement .....	55
4. Use of force and requests to move body parts during a strip search .....	57
4.1 Police practice regarding requests to squat or move genitalia during strip searches .....	57
4.2 Legislative and policy guidance on whether it is appropriate to request a person to move their body parts during a strip search .....	58
4.3 Resolving ambiguities.....	66
5. Strip searching at music festivals .....	68
5.1 Searching patrons at music festivals.....	68
5.2 What prompts decisions to strip search? .....	72

5.3	Changes to NSW Police Force practices at music festivals.....	74
5.4	Response to recommendations from the Coroner and the Special Commission of Inquiry into the Drug ‘Ice’ .....	81
5.5	Lost City 2020 .....	88
5.6	Recording identifying details if prohibited items not found.....	89
5.7	Drugs concealed internally .....	92
5.8	Banning notices .....	94
6.	Strip searches of young people.....	97
6.1	Reinforcing the legislative requirements.....	98
6.2	Approaches in other jurisdictions.....	101
6.3	Psychological impact of strip searches on young people .....	102
7.	Privacy and dignity considerations.....	107
8.	Education, training and supervision.....	113
8.1	Comments from officers during the Inquiry.....	113
8.2	How police are trained .....	115
8.3	Teaching person searches to new recruits .....	116
8.4	Continuing education for police officers .....	118
Appendix A.....		126
	Provisions in the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW) which contain safeguards for strip searches .....	126
Appendix B.....		132
Appendix C.....		135
	Strip searches by NSW Police Force Region .....	135
Glossary.....		149

## Recommendations

Recommendation 1: The Governance Command should perform ongoing dip sample reviews of the results of audits conducted by Police Area Commands and Police Districts of any strip search of a person who identified as an Aboriginal or Torres Strait Islander person (where that is known and recorded in COPS). The results of these reviews should be included as a standing item on governance risk compliance audits. ....23

Recommendation 2: The NSWPF should amend the Person Search Manual, Charge Room and Custody Management SOPs, COPS prompt and any relevant operational documents to make clear that:

- (a) if during a search an officer moves a person's clothes (other than the outer clothes mentioned in s 30) away from their body, or requires a person to move their clothes away from their body, in order to visually inspect inside those clothes this will constitute a strip search, whether or not this involves a visual inspection of their genital area or breasts, and
- (b) if an officer places their hand or fingertips inside a person's waistband, collar or sleeves (whether of outer clothing or inner clothing) this will also constitute a strip search. ....31

Recommendation 3: Parliament should consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide an exhaustive definition of a strip search. ....32

Recommendation 4: The NSWPF should amend the Person Search Manual and the Charge Room and Custody Management SOPs to:

- (a) advise officers that a strip search (as opposed to a general search) should not be considered unless the officer has reasonable grounds to suspect that a general search would not be sufficient to achieve the particular purpose of the search; and
- (b) emphasise in the Person Search Manual the requirement in s 32(5) that an officer 'must conduct the least invasive kind of search practicable in the circumstances' ..... 43

Recommendation 5: The NSWPF should revise the operational documents for music festivals to make clear to officers that general intelligence about drug use/offences and medical treatments and transports at previous events is not by itself sufficient to justify a suspicion that the seriousness and urgency of the circumstances make a strip search of an individual necessary. .... 50

Recommendation 6: The NSWPF should ensure that guidance on the seriousness and urgency requirement in s 31(b) for strip searches in the field is included in the Person Search Manual, and that guidance:

- (a) makes clear that concerns about serious risks to welfare based on suspicion of ingestion or internal concealment of drugs cannot justify a strip search;
- (b) advises officers to consider if steps other than strip searching the person could adequately mitigate the risk of evidence being disposed of; and



(c) identifies circumstances which frequently occur which would not be sufficient to satisfy the seriousness and urgency test in s 31(b) of LEPR.....	52
Recommendation 7: The NSWPF should instruct its officers (for example, in the Person Search Manual and Charge Room and Custody Management SOPs) that under LEPR, regardless of whether a person specifically consents to a strip search, the officer must ensure that all of the threshold requirements in section 31 and 32(6) are met, and the officer must still comply with all the rules and safeguards in ss 32-34. ....	55
Recommendation 8: The NSWPF should require officers to include in their contemporaneous record for a strip search their reasons:	
(a) for suspecting that a strip search was necessary for the purposes of the search;	
(b) for not doing a general search first, if they did not do so; and	
(c) for searching a person's genital area or breasts (if they did so). ....	56
Recommendation 9: The NSWPF policies regarding strip searches should clarify that a request that a person squat or perform any of the activities currently listed at paragraph 34 of the Person Search Manual cannot be made routinely, and must specifically account for the requirements set out in ss 32(5) and (6) and 33(5) and (6). ....	62
Recommendation 10: The Person Search Manual and other NSWPF policies regarding strip searches should explicitly prohibit police from touching a person's breasts, genitals or buttocks during a strip search. ....	65
Recommendation 11: The Parliament should clarify whether police can compel a person to squat, bend over, move their genitals or breasts during a strip search to facilitate visual inspection. ....	67
Recommendation 12: The NSWPF should refine the information provided to persons searched at music festivals and their support persons to address the issues raised by the Commission in this Report. ....	79
Recommendation 13: The NSWPF and the Commission should collaboratively conduct an audit of strip searches conducted at music festivals as a means of evaluating the impact of the new Music Festivals Field Processing Form and pre-event education package. The audit should be commenced 12 months from the date of publication of this report. ....	81
Recommendation 14: The NSWPF training in strip searches should explain what types of offences are serious enough to warrant a strip search in the field and should provide examples of what might not be a serious enough offence. ....	84
Recommendation 15: Parliament should consider providing specific guidance in the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> as to how the requirement in s 31(b) that 'the seriousness and urgency of the circumstances make the strip search necessary' is to be interpreted. ....	85
Recommendation 16: The reasons for conducting a strip search at pre-planned events such as music festivals should be recorded on Body Worn Video before the search commences. For other strip searches conducted in the field, but not at a pre-	

planned event, the reasons for the search should be recorded on Body Worn Video if it is practicable to do so. ....	87
Recommendation 17: The NSWPF should not record the name and CNI of an individual following a search in COPS unless a relevant offence has been detected. Such details should, however, be recorded in handwritten contemporaneous records, which are retained in accordance with the <i>State Records Act 1988</i> , with an appropriate cross reference to these handwritten notes being made in COPS. The NSWPF should not treat people under the age of 18 any differently in this regard. ....	92
Recommendation 18: The NSWPF should provide guidance to police officers about how they should prioritise the duty of care owed to individuals against other statutory obligations, such as the need to comply with the statutory obligations contained in Part 9 of LEPR and what type(s) of medical examination can be sought under s 138 of LEPR. ....	94
Recommendation 19: The NSWPF should provide the brochure for support persons to any support person attending a strip search of a young person or person with impaired intellectual functioning who is searched in police custody settings.....	101
Recommendation 20: NSWPF training in relation to strip searches should canvass the potential traumatic effects of strip searches on young people and people with intellectual impairment, as detailed in this report. ....	106
Recommendation 21: The NSWPF training for officers about conducting strip searches should include instructions relating to the very limited circumstances in which strip searches in caged vehicles may be performed and how to conduct strip searches in caged vehicles, with an emphasis on how to preserve the privacy and dignity of the person searched.....	109
Recommendation 22: The NSWPF must ensure that private spaces are made available for strip searching a person at any pre-planned event or strip search operation and part of the event planning should include checking that the doors or openings of any space used for the conduct of a search closes properly. ....	111
Recommendation 23: The NSWPF should ensure that the Associate Degree in Policing Practice curriculum pertaining to strip searches covers the following issues:	
(a) whether officers can ask a person to squat, bend over, move their genitalia to facilitate a visual inspection;	
(b) in what circumstances officers can use force during a strip search;	
(c) requirements for using a parent, guardian or support person and the practicalities of how they are to be made available and informed of their role; and	118
(d) conduct of strip searches in caged vehicles;	
(e) circumstances that may satisfy the test of ‘seriousness and urgency’ to make a strip search in the field necessary.....	118
Recommendation 24: The NSWPF should provide regular scenario based training to officers on what circumstances will and will not be sufficient to satisfy the seriousness and urgency requirement for a strip search in the field under s 31(b) of LEPR. This training should also assist officers to determine when there are reasonable grounds to suspect that it is necessary to conduct a visual examination of	

a person's genitalia during a strip search. It should be clear in both policy and training that doing this cannot be a routine part of a strip search but must be justified by the officer in each particular circumstance..... 124

Recommendation 25: The NSWPF should ensure that each of the changes and clarifications in policy regarding the threshold requirements for strip searches reflected in recommendations 2, 4-10, 14, 16, 17 and 19 are included in the education and training on strip search powers given to recruits and officers. .... 125

## List of case studies

Case study 1: Strip searches following a protest .....	45
Case study 2: When drugs are concealed internally – balancing duty of care and statutory obligations .....	93
Case study 3: Banned from the Sydney Olympic Park.....	95
Case study 4: Strip search of young people suspected of shoplifting.....	98
Case study 5: Operation Grasmoor .....	107
Case study 6: Lack of privacy during strip search at Hidden Music Festival.....	110

# Executive Summary

**Chapter 1** sets out the history of the Inquiry, which commenced in October 2018. The chapter outlines the various Commission investigations into strip searches conducted by police officers in NSW, as well as police investigations oversights by the Commission. It also sets out previous Commission work which analysed the policies, education and training provided to NSW police officers in relation to strip searches. It also provides an overview of the legislative basis for strip searches under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), and considers NSW Police Force data pertaining to searches and strip searches from 2015-2020. Appendix C presents information about strip searches across the state by location.

**Chapter 2** sets out changes to strip search practices, policy and other instructions that the NSW Police Force has implemented over the course of the Inquiry. These include the introduction of a new *Person Search Manual* and *Charge Room and Custody Management Standard Operating Procedures*, changes to processes for strip searching at major events such as music festivals, and changes to the way police records of strip searches are checked and audited. Given that police data indicates a high proportion of strip searches of people who identify as Aboriginal and Torres Strait Islander (17-19.5% of strip searches in each of the four years from 2016-17 were of Aboriginal people), we recommend enhanced auditing of strip searches of this demographic to increase scrutiny of police practices in this regard.

**Chapter 3** takes a detailed look at the threshold requirements that must be satisfied before an officer can lawfully strip search a person, what our investigations revealed about how these thresholds have been interpreted in practice, and what improvements in policy and practice are needed to increase compliance with the law. Every investigation completed by the Commission during the Inquiry found issues regarding compliance with the thresholds, the most common being failure to separately consider each of the threshold requirements that are set out in LEPRA, opening the risk that the strip search is not conducted lawfully. This chapter contains five recommendations for changes to the policy guidance given to police officers to clarify the steps that need to be considered prior to conducting a strip search. We focus on the requirement for seriousness and urgency before any strip search is undertaken ‘in the field.’ We emphasise that under LEPRA, even if a person specifically consents to being strip searched, officers are required to satisfy the threshold requirements for strip searches. We make a recommendation to improve the records made by police of the reasons they undertake a strip search and a recommendation that Parliament consider providing an exhaustive definition of a strip search within LEPRA.

**Chapter 4** considers the police practice of requiring a person to squat or move their genitals during a strip search. It also considers whether it is lawful for police to physically force a person to squat or open their legs during a strip search or even to remove a person’s clothing during a strip search. While the NSW Police Force policy was silent on this practice when the Inquiry commenced, the 2019 *Person Search Manual* told officers they could ask a person to do things to allow visual inspection, such as squat, lift testicles, part buttock cheeks, and lift breasts. There are differing views about whether police are empowered to ask or require a person to do such things to facilitate a visual inspection. We recommend the police policy makes it

explicit that such requests cannot be made routinely, and must specifically account for the threshold requirements in ss 32(5) and (6) and 33(5) and (6) of LEPR. We also recommend that police should be prohibited from touching a person's breasts, genitals or buttocks during a strip search. We consider the provision that makes it lawful for police to use reasonable force. The differing views as to whether police are permitted to *ask* or *require* a person to squat or move their breasts or genitals to allow visual inspection during a strip search has led to a lack of clarity as to whether (and if so, to what extent) it can be appropriate to use force to facilitate a visual inspection of a person's genitals and breasts. Accordingly, we recommend that Parliament clarify whether police can compel a person to squat, bend over, or move their genitals or breasts during a strip search to facilitate a visual inspection.

In **Chapter 5** we look at police practices for strip searching at music festivals. While police have no distinct statutory powers in relation to strip searches at music festivals, these events involve coordinated and pre-planned police operations, often supported by drug detection dog warrants. We look at how the use of drug detection dogs impacts decisions about conducting strip searches at music festivals and consider the NSW Police Force response to the Coroner's recommendations arising from the 2019 *Inquest into the death of six patrons of NSW music festivals*. This chapter also looks more closely at a range of changes to strip search practices introduced by the NSW Police Force to introduce quality control for decisions to strip search, provide patrons with more information about their rights during searches and improve officer training. We recommend that the NSW Police Force and the Commission conduct a future audit as a means of evaluating the impact of the new processes and training on the way strip searches are carried out.

We make recommendations to address a range of issues related to strip searches in the field: that officer training clarifies which offences are serious enough to warrant a strip search in the field and give examples of what might not be a serious enough offence; that Parliament consider clarifying the term 'seriousness and urgency' in LEPR; that the reasons for strip searches be recorded on Body Worn Video and that officers be provided with more practical advice about how to manage situations where a person has concealed drugs internally.

To mitigate the potential for negative inferences being drawn from COPS records relating to strip searches, we recommend that officers be instructed not to record a person's identifying details in COPS unless drugs are found (or some other offence is detected) during the search.

**Chapter 6** considers strip searches of young people. A focus within this chapter is the expert opinion sought by the Commission as a result of Operation Gennaker about the psychological impacts of being strip searched on young people. That opinion notes that young peoples' brains are in a process of development through adolescence to young adulthood, making them particularly vulnerable to the impacts of a traumatic experience. It describes a range of short and long term psychological impacts likely following a strip search, ranging from humiliation and distress to aggressive responses and trauma. We recommend that officer training in relation to strip searches should canvass the potential traumatic effects on young people set out in that expert opinion.

In **Chapter 7** we consider some of the practical issues around maintaining privacy and dignity when strip searches are conducted in the field, focussing on searches in

caged vehicles and at pre-planned operations. We state that a caged vehicle is generally an inappropriate location for a strip search, and searches conducted in caged vehicles would only be justifiable in rare and limited circumstances. We recommend that officer training specifically addresses what limited circumstances might be allowable. In relation to pre-planned events, the Commission recommends that the NSW Police Force always provide appropriate private spaces for conducting strip searches. The pre-planned nature of these events means that the NSW Police Force should always be confident that any doors or openings of spaces used for strip searches close properly. We also consider the use of CCTV to film searches in custodial areas, noting the new policy implemented by the NSW Police Force in 2019 appropriately addresses privacy concerns previously raised by the Commission about this practice.

**Chapter 8** considers evidence and information which reflects the way police have been educated and trained in relation to their strip search powers, along with the new initiatives being introduced to reinforce the appropriate use of strip search powers. We make recommendations that the Associate Degree in Policing Practice covers some of the key issues canvassed in this report, that regular scenario based training be provided to police officers about what will and will not be sufficient to satisfy the requirement that circumstances are serious and urgent before conducting a strip search in the field, and that all of the changes and clarifications regarding the threshold requirements for strip searches discussed in this report are included in the training and education given to recruits and officers.





# 1. Introduction

## 1.1 History of the Inquiry

In October 2018, following a number of complaints to the (Law Enforcement Conduct Commission) (Commission), as well as anecdotal information raising concerns about practices of some NSW police officers when conducting strip searches, the Commission commenced the first of a suite of investigations into the way police conducted strip searches under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). At that time, the Commission also sought input from members of the public who had been subjected to a strip search and who had concerns about whether the search was justified, and the nature and extent of the search.

Strip searches had not, up to that point, been one of the most commonly complained about matters. The NSW Police Force (NSWPF) estimates that between 2014 and 2018 it received only about 70 complaints about strip searches.<sup>1</sup> However, some of the complaints and other information received by the Commission indicated some widespread practices that appeared to contravene the legislative requirements for a strip search. In particular, the Commission was concerned by information that suggested that in some locations, strip searches may have been conducted as a matter of course rather than with due regard to the legislative thresholds and that police officers were not adhering to the safeguard requirements under LEPRA due to a lack of familiarity with those requirements or a lack of understanding about what was required when conducting a strip search.

From the outset the Commission was concerned, not only with the specific instances complained about, but with the relevant policies and training of police officers that guide police as to how to conduct strip searches in accordance with the law. The approach of the Commission, even when considering specific instances of unlawful strip searches, has been to approach the issues systemically. The Commission's emphasis has been on ensuring that the procedures and training which provide officers with guidance about how to act in accordance with legislation are clear and well understood. The Commission has also asked the NSWPF to ensure that where legislation is not explicit, the NSWPF's policies clearly set out how officers are expected to conduct searches.

Since the announcement of the Commission's Inquiry, there has been intense community interest in the way strip searches are conducted in NSW. There has been significant media reporting about the frequency of strip searches and the manner in which they are conducted, particularly in the context of strip searches at music festivals. There have been campaigns aimed at increasing community awareness about strip search legislation, and seeking changes to legislation, such as the Redfern Legal Centre's *Safe and Sound* campaign launched in December 2018. The Redfern Legal Centre also commissioned a research paper by academics from the University

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<sup>1</sup> NSW Police Force, *Searching Data - Appendix to paragraph 86 of Statement from Assistant Commissioner, Education and Training Command*, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, attached to Letter from NSWPF, Assistant Commissioner Professional Standards Command to Chief Commissioner, Law Enforcement Conduct Commission, 5 July 2019. It is noted that 'strip search' is not an allegation type tracked by the NSWPF, and hence data on the number of complaints that related to strip searches were compiled by a trend analysis, in which narrative summaries of complaints were searched for the term 'strip search'.

of NSW Law School (Dr Michael Grewcock and Dr Vicki Sentas) – *Rethinking Strip Searches by NSW Police*, published in August 2019.

The use of strip searches was considered by the Coroner in her *Inquest into the death of six patrons of NSW music festivals*, finalised on 8 November 2019.<sup>2</sup> The Coroner’s comments about strip searches and the NSWPF response are addressed in Chapter 5. The Special Commission of Inquiry into the Drug ‘Ice’ also considered police strip search practices, along with other police practice issues relevant to detection of drug offences.<sup>3</sup>

The issues raised by the use of drug detection dogs are relevant to the question of whether police formed a suspicion on reasonable grounds that a strip search was necessary, among other things. Some of the particular strip search matters considered by the Commission were instances where a strip search followed the use of a drug detection dog. The Commission has considered whether in those particular instances, police officers formed a suspicion on reasonable grounds, and more generally, the Commission has considered the instructions and training afforded to police officers about how such a suspicion should be formed. However, this report does not examine issues of the efficacy of drug detection dogs more generally, or questions about whether their use is compatible with the intentions behind the introduction of drug detection dogs as a policing tool. There is a considerable body of literature about these issues,<sup>4</sup> which may inform Parliament’s assessment of the ongoing utility of drug detections dogs.

This report accounts for work of the Commission throughout the course of the Inquiry, along with the range of changes to policy and practice implemented by the NSWPF which aim to address the concerns arising from our work.

## 1.2 Methodology

The Commission drew on a range of the powers set out in the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) to examine the practices of NSW Police Force in conducting strip searches, and informing and training its officers about how they are expected to conduct strip searches.

### 1.2.1 Examinations conducted by the Commission

During the course of this Inquiry, the Commission conducted seven (7) investigations pursuant to Part 6 of the LECC Act. Five of those involved examinations under s 61(a) of that Act:

- Operation Karuka – private hearings were held before the Hon M F Adams QC, Chief Commissioner, between 23 October 2018 and 6 February 2019, eight witnesses were examined;

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<sup>2</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019.

<sup>3</sup> Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Volume 3.

<sup>4</sup> See for example, NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, October 2006; Caitlin Hughes, Vivienne Moxham-Hall, Alison Rittera, Don Weatherburn and Robert MacCoun, *The deterrent effects of Australian street-level drug law enforcement on illicit offending at outdoor music festivals*, March 2017; Winifred Ella Agnew-Pauley & Dr. Caitlin Elizabeth Hughes (2019) *Trends and offending circumstances in the police use of drug detection dogs in New South Wales 2008–2018*, *Current Issues in Criminal Justice*, 31:1, 4–23.

- Operation Sandbridge - private hearings were held before the Hon M F Adams QC, Chief Commissioner, between 6 December 2018 and 31 January 2019, eight witnesses were examined;
- Operation Mainz - private hearings were held before the Hon L Drake, Commissioner for Integrity, between 29 July and 2 September 2019, five witnesses were examined;
- Operation Brugge - public hearings were held before the Hon M F Adams QC, Chief Commissioner, between 21 October and 13 December 2019, nine witnesses were examined;
- Operation Gennaker - public hearings were held before the Hon M F Adams QC, Chief Commissioner between 2 and 5 December 2019, 14 witnesses were examined.

Reports of each of the matters the subject of examination were tabled on 8 May 2020 and are available on the Commission's website. Each individual report contains findings about the specific conduct. Other than in Operation Sandbridge, the Commission did not make findings of serious misconduct against any individual officers. However, the Commission did conclude in Operations Brugge, Gennaker, Sandbridge and Mainz that the strip searches the subject of investigation were unlawful.

Two other matters were also subject of private hearings:

- Operation Grasmoor - private hearings were held before the Hon L Drake, Commissioner for Integrity, between 29 and 31 July 2019, four witnesses were examined;
- Operation Porto - private hearings were held before the Hon L Drake, Commissioner for Integrity, between 29 July and 1 August 2019.

Reports in these matters were presented to the Commissioner of Police and Minister for Police on 6 August and 11 August 2019 respectively.

The above investigations are discussed in this report to highlight some of the systemic deficiencies identified by the Commission, and the Commission's recommendations to the NSWPF to address those issues.

On 12 October 2020 the NSWPF advised the Commission that it agreed with the Commission's determination in Operation Porto regarding the involved officers, and they had received training and guidance. Additionally all officers in the relevant Region would receive face to face training from experienced staff from the Operational Support Group in relation to person searching and strip searching.<sup>5</sup>

On 16 October 2020 the NSWPF advised the Commission that the findings in Operation Mainz were accepted, and the officers' unsatisfactory performance would be addressed by way of training, advice and guidance.<sup>6</sup>

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<sup>5</sup> Letter from Acting Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Integrity, Law Enforcement Conduct Commission, 12 October 2020.

<sup>6</sup> Letter from Acting Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Integrity, Law Enforcement Conduct Commission, 16 October 2020.

### 1.2.2 Submissions regarding traumatic impact of strip searches

At the conclusion of the public hearings held under Operation Gennaker in December 2019, the then Chief Commissioner, the Hon M F Adams QC announced that the Commission would be seeking to call expert evidence on the psychological impacts on young persons of being strip searched in such circumstances.

On 17 July 2020, the Commission sought an expert witness opinion from Dr Susan Pulman of Pulman and Associates, a registered psychologist with expertise in child and adolescent development. On 9 October 2020, the Commission received the report, prepared by Dr Susan Pulman, 'The Impact of strip searches on young persons'. That report is discussed in Chapter 6.

### 1.2.3 Oversighted investigations

The oversight of police misconduct investigations is undertaken pursuant to Part 7 of the LECC Act. The oversight function is primarily undertaken either through the monitoring of misconduct matter investigations, pursuant to s 101 of the LECC Act, or by reviewing finalised misconduct investigations in order to determine whether those investigations were conducted reasonably and satisfactorily, and whether the outcomes were appropriate.

When the Commission monitors an investigation, the LECC Act allows for an authorised officer of the Commission to be present as an observer during interviews conducted by police officers for the purposes of the investigations; to confer with those police officers about the conduct of the investigation; and to request progress reports on the investigation. Commission investigators do not have the power of 'control, supervision or direction' but there is a duty on investigating police officers to co-operate with Commission investigators.<sup>7</sup>

When the Commission reviews a completed misconduct matter investigation, the LECC Act allows the making of requests for further information to determine whether the misconduct matter has been properly dealt with (s 102); for further investigation if the Commission is not satisfied the matter has been properly investigated (s 104); or for a review of the decision on any action to be taken as a result of the investigation, if the Commission is not satisfied with that decision (s 105).

During the Inquiry, the Commission monitored four complaints which were investigated by the Professional Standards Command (PSC) of the NSWPF under Strike Force Blackford. The Commission also monitored and reviewed a number of other investigations that contained allegations relating to inappropriate strip searches by police. Some of these are presented as case studies in this report.

On 21 July 2020, the Commission tabled two reports relating to police investigations regarding strip searches that were monitored by the Commission. The reports, *Arrest, Detention and Strip Searching of two female protesters on 10 November 2017* and *Strike Force Blackford* are available on the Commission's website.

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<sup>7</sup> Law Enforcement Conduct Commission Act 2016 (NSW), s 107(1).

### 1.2.3.1 Strike Force Blackford

Strike Force Blackford was established in March 2019 to investigate three complaints about the lawfulness and conduct of strip searches of two individuals at the Hidden and Secret Garden music festivals and two individuals outside The Star in Sydney in 2019 during a drug detection dog detection operation.<sup>8</sup>

Two additional complaints were later included in the strike force. These involved the strip search of a young woman at Midnight Mafia music festival in 2018 and of two young people at Midnight Mafia music festival in 2019.<sup>9</sup> Strike Force Blackford included a focus on broader organisational issues raised by the complaints with a separate report of 8 July 2020 detailing these issues and recommending policy or procedural changes prepared by the lead investigator.

All four of the investigations monitored by the Commission involved allegations of misconduct in relation to the conduct and lawfulness of specific strip searches at music festivals.

The analysis and findings in Strike Force Blackford have informed changes to NSWPF policy, procedures and training in relation to the conduct of strip searches in general and in particular, to the conduct of strip searches at music festivals.

### 1.2.4 Analysis of NSW Police Force policies, education and training

During the course of the Inquiry, the Commission also analysed the policies and other instructional documents that contain guidance to police officers about the way they are expected to conduct strip searches. The Commission also considered the training that is provided to recruits in the Associate Diploma of Policing Practice, run jointly by Charles Sturt University and the NSWPF.

In 2019, the Commission reviewed the policies and procedures that govern the way strip searches are conducted in police stations, also known as searches in custody. At the time the NSWPF had over 100 different standard operating procedures (SOPs) for searches in custody relevant to separate local police commands and police stations across the state. Across all regions there were considerable discrepancies in the instructions given to police about how to conduct searches. Of significant concern to the Commission was the fact that many SOPs contained incorrect and inconsistent references to both police policy and relevant legislation. Additionally, many SOPs lacked clarity about the extent of police powers and responsibilities in conducting searches, and none provided sufficient guidance as to the procedures that police should follow in conducting those searches, particularly on matters that are not explicit in legislation. Many of the localised policies had been in place for a considerable time, and the errors and lack of clarity contained within them would have hindered police in executing their duties. This is of significant concern especially where the relevant duties involve decisions concerning the execution of powers which involve a significant incursion into the liberties and dignity of individuals.

In July 2019 the Commission provided the Commissioner of Police with a draft report based on that review, which included five recommendations. The Commission's view was that the SOPs should, at a minimum, guide police about their responsibilities as

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<sup>8</sup> EXT2019-0648; EXT2019-0808; and EXT 2019-1107.

<sup>9</sup> EXT2019-1594 and EXT2019-2467. These matters relate to strip searches conducted at the Midnight Mafia music festival in May 2018 and May 2019.

set out in the legislation, and that guidance should be both current and comprehensive. Additionally, the SOPs should be consistent in the way that police are instructed to conduct strip searches. This is particularly important as police commonly change locations in the course of their employment.

Additionally, the Commission advised the NSWPF that the SOPs should provide police with practical guidance about how they are expected to carry out a strip search, including providing clarity regarding those practices about which LEPPRA is not explicit. The legislation is silent on a number of common practices used by police when they conduct strip searches – such as asking a person to squat or move their genitalia or bend over during a strip search to make it easier for police to conduct a visual inspection of the genital and anal area. There are other practical matters about which the legislation is not explicit – such as the circumstances in which police should require a person to remove top and bottom clothing separately in order to better preserve the person’s dignity during the search.

The SOPs are clearly the place where such practical guidance ought to be set out to ensure consistency in the way police conduct searches, and to ensure that police are clear about what types of practices are considered appropriate and acceptable by the NSWPF.

On 2 September 2019 the Commissioner of Police advised the Commission that the NSWPF supported all of the recommendations.<sup>10</sup> The NSWPF implemented two new policy documents dealing with person searches in custody and in the field: the *NSWPF Charge Room and Custody Management Standard Operating Procedures* (the Custody SOPs)<sup>11</sup> and the *NSWPF Person Search Manual 2019* (the Person Search Manual).

These new policies contain many improvements to the clarity and consistency of procedures, including the consolidation of custody procedures into one document and the removal of superseded local policies. However, the Commission had ongoing concerns about the lack of instruction provided to police in certain areas, as well as some broader legal issues which remained unresolved. The Commission continued to work with the NSWPF throughout 2019 to try to solve several critical issues that were not adequately addressed in the new policies. They included:

- the guidance provided to police about when to conduct a strip search in the field;
- instructions provided to officers about asking a person to squat or move their genitalia during a strip search, and practical guidance for police about how to respond if a person refuses a request to do such things;
- whether it is appropriate to use force in the conduct of a strip search; and
- practical guidance for police about how to satisfy the mandatory requirement of using a support person when conducting strip searches of young and vulnerable people.

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<sup>10</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 2 September 2019.

<sup>11</sup> The Charge Room and Custody Management SOPs were initially introduced in draft form in August 2019. There have been some amendments since that time, and the most recent version is dated November 2020. References in this report reflect the most recent amendment, but the material references has not changed substantially since the introduction of the policy in 2019.



The Commission's report, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody* was tabled in Parliament on 13 February 2020. It contains details about the way the new policies address the concerns and recommendations of the Commission, as well as outstanding issues. The chapters that follow will include further detail about the current status of the issues that remained unresolved at the conclusion of the review.

The Commission's consideration of the education and training provided to police officers and recruits is addressed in Chapter 8.

### 1.2.5 Submissions to the Inquiry

The Commission received a number of submissions to the Inquiry that have been considered in finalising this report. Where relevant, those submissions have been reflected in the chapters that follow.

Submissions were received from Redfern Legal Centre, the Public Interest Advocacy Centre, and Dr Vicki Sentas of the University of New South Wales, Faculty of Law.<sup>12</sup> While these raised a number of particular points about police strip search practices, a common theme was that legislative reform is needed, particularly in relation to clarifying the threshold for conducting strip searches 'in the field'<sup>13</sup> and seeking a different approach to provisions relating to strip searching young people under 18 years. In the chapters that follow, the Commission has noted the need for increased clarity about a number of the provisions governing strip searches by police, and has suggested that these be considered and addressed by Parliament. When that occurs there will be an opportunity for further consideration about the policies underpinning strip search powers, and the limits on those powers that are considered appropriate in our society.

The Commission received a submission on behalf of the Police Association of NSW.<sup>14</sup> It drew on that office holder's lengthy experience as a police officer and concerns raised by operational police officers following consultations in the preparation of that submission. In summary, the submission stated that officers conduct strip searches to address concerns for the safety of the person searched, or other people (including officers) due to suspected concealment of weapons or drugs. However, it emphasised that police officers do not relish the task of strip searching, and would prefer to avoid it if possible, as it causes embarrassment to both the officer and the person searched. The submission noted that police would benefit from increased training to improve their knowledge and confidence about how to conduct strip searches lawfully and appropriately.

The Commission also received a detailed submission from the NSW Police Force in response to a draft version of this report, which included a response to the proposed recommendations. The submissions are reflected in the chapters that follow where relevant. In summary the NSW Police Force requested an amendment to recommendation 1 to more accurately reflect which commands are responsible for

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<sup>12</sup> Letter from Chief Executive Officer, Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 30 November 2020; Letter from Principal Solicitor, Public Interest Advocacy Centre to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020; Letter from Dr Vicki Sentas, Senior Lecturer, Faculty of Law, University of New South Wales to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>13</sup> A strip search 'in the field' is a strip search carried out in a place other than a police station or other place of detention. See s 31 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

<sup>14</sup> Statement of Police Association NSW Official regarding strip searches by police, 25 November 2020.

the audit work described in the text, have asked for recommendations 2, 4, 5, 6(b), 6(c), 7, 10, 14, 17 and 20 to be removed, have agreed with recommendations 11, 13, 18, 24 and 25 and have indicated the NSW Police Force would consider recommendations 6(a), 8, 9, 12, 16, 19, 21, 22 and 23. After considering the submissions supporting that request, the Commission has determined not to remove any of its recommendations, although some have been clarified.

The NSWPF also submitted that strip searches conducted in the field where a person is to be taken into custody are informed by similar considerations to those which cause officers to conduct strip searches in police stations. The NSWPF submitted:

The strategic intent of NSWPF is for a safer NSW by enhancing our prevention, disruption, and response to crime as well as our capability to engage the community and maintain public safety. To do so, NSWPF must enforce legislation, for instance on drug and weapons possession and supply. Detection of crime requires the exercise of police powers in the field and people being taken into custody. During those interactions, searching is a necessity for safe policing.

There is much focus on strip searching being an infringement of an individual's dignity, and this is obviously a key consideration given the personal and intimate nature of the search. It is important, however, to understand the basis for strip searching – to protect the safety of the person being searched, police officers who have the responsibility for the safety of that person and others such as Ambulance and Corrective Services staff and other prisoners. Dangerous items and drugs concealed on someone's body pose risk. Police officers are trained to think about safety first and to conduct risk assessments in respect of each situation they face. Any review of the exercise of strip searching, whether by virtue of defining best practice, the process of strip searching, or circumstances in which strip searching occurs, must have safety considerations at the forefront.<sup>15</sup>

The Commission acknowledges the importance of safety considerations, particularly in relation to searches of people in custody after arrest, and to some extent, searches of people on arrest. However, it is important to distinguish searches in these circumstances from searches of persons without a warrant which are conducted under s 21 of LEPPRA (which captures the majority of strip searches in the field).

It is necessary to respond to the above submission by highlighting that officers exercising search powers on people who are not in custody, whether a strip search or a general search, are required by LEPPRA to form a suspicion on reasonable grounds that particular prescribed circumstances exist. Even for a strip search of a person in custody, an officer must suspect on reasonable grounds that a strip search is necessary. Such searches cannot legally be conducted to check whether or not a person might have concealed a dangerous item on their body. One of the key concerns for the Commission has been that in examples we have encountered throughout this Inquiry, police officers have not stepped through each of the threshold requirements before determining to conduct a strip search. There is a danger that the above emphasis on safety may obscure the specific requirements

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<sup>15</sup> Attachment 1 and 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020, quoting Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019.



contained in LEPR. The threshold requirements for strip searches are summarised in the section below, and are considered in detail in Chapter 3.

### 1.3 Strip search powers in NSW

Police powers in NSW were codified in LEPR following a recommendation from the Royal Commission into the New South Wales Police Force in 1997.<sup>16</sup>

Part 4 of LEPR contains a number of powers which enable police to conduct searches of people, including strip searches, without first getting a warrant. These include search powers that apply:

- **before** a person has been arrested – for example the power to stop, search and detain a person under s 21
- **on** arrest of a person – s 27
- **after** a person has been arrested and taken into custody – s 28A.

Each of these sections set out different thresholds that apply before a police officer can exercise the particular search power. For example, to search a person using the power in s 21, a police officer must suspect on reasonable grounds that the person has in their possession one of the type of items listed in that section (e.g. a prohibited drug). By contrast, s 28A merely provides that a police officer ‘may search a person who is in lawful custody after arrest’; the circumstance of the person being in lawful custody after being arrested is sufficient to trigger the power.

When exercising any of these search powers, LEPR provides that there are two types of searches that police can potentially conduct on a person – a general search, or a strip search. Generally speaking, if a search involves the officer doing more than running his or her hands over a person’s outer clothing, or the person removing more than their outer clothing (outer clothing being a coat or jacket or similar article, gloves, shoes, socks and hat), then the search constitutes a strip search.<sup>17</sup>

This distinction is important, because if an officer intends to strip search a person, additional requirements must first be satisfied. What those additional requirements are depend on the location of the person at the time of the proposed search. If the strip search is to be carried out at a police station or other place of detention, the police officer must suspect that the strip search is necessary for the purposes of the search. But if the strip search is to be carried out in any other place – referred to as a strip search ‘in the field’ – then the threshold is higher; the officer must suspect on reasonable grounds (1) that the strip search is necessary for the purposes of the search and (2) that the seriousness and urgency of the circumstances make the strip search necessary.<sup>18</sup>

These thresholds, and the extent to which NSWPF policies and practice are consistent with these legal requirements for the exercise of strip search powers, are considered in Chapter 3.

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<sup>16</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol II, pp 396-8; New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, p 4846 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

<sup>17</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 3(1) (definition of ‘strip search’) and s 30.

<sup>18</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 31.

LEPRA also contains safeguards to protect the privacy and dignity of people who are searched by police. There are general safeguards that apply to searches of all persons, for example a requirement that the police officer must conduct the least invasive kind of search practicable in the circumstances,<sup>19</sup> and the rule that a strip search must not involve a search of a person's body cavities or an examination of the body by touch.<sup>20</sup> There are also specific safeguards that apply to strip searches of children and people with impaired intellectual functioning.<sup>21</sup> The various safeguards applicable to strip searches are set out in full in Appendix A, and are referred to throughout this report where relevant. The particular safeguards which apply to strip searches of children and people with impaired intellectual functioning are the focus of Chapter 6, and safeguards relating to privacy and dignity are the focus of Chapter 7.

## 1.4 Strip searches undertaken by the NSW Police Force

In the financial years from 2015-16 to 2018-19 the NSWPF conducted a total of 51,527 strip searches.<sup>22</sup> Using figures from 2016-17 to 2019-20, the NSWPF on average conduct 12,245 strip searches annually.<sup>23</sup> In 2019-20 the NSWPF conducted 8,033 strip searches. This number is noticeably lower compared to previous years, in large part due to the impact of restrictions on public gatherings resulting in decreased number of strip searches in the field (for example, a number of large public events such as music festivals which would usually occur each year were not held in 2019-20). The NSWPF advised the Commission that the number of music festivals decreased from 40 in 2019 to 22 in 2020.<sup>24</sup>

Predominantly strip searches conducted by police are performed in custody – in police stations. On average between 2016-17 and 2019-20, 60% of the total number of strip searches were conducted in the field. In 2019-20, 53.3% of strip searches (4,285) were conducted in custody. However, there are a number of limitations to the NSWPF data collection in relation to strip searches. First, while the NSWPF keeps some records of strip searches in custody, there are no records of the number of general searches in custody, so the data on searches in custody is incomplete. Additionally, the NSWPF only has the capacity to record a strip search once per custody record<sup>25</sup> and therefore it is possible that higher numbers of strip searches actually occurred in custody.<sup>26</sup> The NSWPF advised the Commission that 'it is not possible to produce statistics on whether or not something was found' as a result of

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<sup>19</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 32(5).

<sup>20</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(4).

<sup>21</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 33(3) and 34.

<sup>22</sup> The NSW Police Force statistical data for 2015-16 is incomplete, and represents only the latter 6 months in that year. The NSW Police Force also submitted to the Commission that the data for that 6 month period may be understated as it was a period where the new custody management system was being implemented and officers were 'familiarising themselves with a new system'. Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>23</sup> This figure includes strip searches conducted in the field and in custodial settings.

<sup>24</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>25</sup> This means that even if a person is strip searched more than once in police custody, the system will only count one strip search.

<sup>26</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 11 May 2020 (enclosing COPS strip search data for financial years 2015-16, 2016-17, 2017-18 and 2018-19).

a strip search in custody.<sup>27</sup> Strip searches conducted in custody are recorded as an 'action' on the NSWPF Custody Management System. By contrast, a strip search conducted in the field is recorded on COPS as a 'Person Search' incident. If a prohibited item is located during a strip search in custody, the NSWPF add a separate charge and a COPS incident is created within the same event to reflect this.<sup>28</sup> The NSWPF cannot produce any data on the number of strip searches conducted in the custody that have resulted in a find. The absence of this data limits the capacity to measure how reasonable the conduct of strip searches were by way of outcomes.

The available data indicates that the number of strip searches in the field which resulted in a find – meaning the search located a prohibited item, dangerous object or other thing in connection with a crime – is relatively low. Only around a third of all strip searches detected a relevant item on the person strip searched – as can be seen Table 1 below, although in 2019-20 this was elevated to 46% of searches in the field resulting in a find. Such a low rate of detection raises the question as to whether police officers are adequately meeting the legislative thresholds of reasonable suspicion which are required to conduct a strip search. Issues relating to the satisfaction of the thresholds for searching in the field are explored further in Chapter 3. Tables 1 and 2 contain data reported by the NSWPF, however as discussed at 1.4.1, the figures relating to the proportion of strip searches which result in a 'find' are unreliable. The nature of the records retained by the NSWPF makes it difficult to say with certainty whether the find occurred during the strip search.

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<sup>27</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 11 May 2020 (enclosing COPS strip search data for financial years 2015-16, 2016-17, 2017-18 and 2018-19).

<sup>28</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

**Table 1: Number and percentage of strip searches conducted in the field<sup>29</sup> resulting in a find**

	2016-17	2017-18	2018-19	2019-20
Number of person searches conducted in the field (includes strip searches)	241,398	240,022	239,952	246,536
Number of strip searches conducted in the field	4,429	5,459	5,382	3,748
Number of strip searches conducted in the field resulting in a find	1,474	1,875	1,812	1,711
Percentage of strip searches conducted in the field resulting in a find	<b>33.3%</b>	<b>34.3%</b>	<b>33.7%</b>	<b>45.7%</b>

A total of 967,908 'person searches' were conducted in the field in the four years between 2016-17 and 2019-20. Person searches include general searches and strip searches.<sup>30</sup> Strip searches conducted in the field accounted for less than 2% of the total number of person searches conducted, with general searches accounting for 98%. In 2018-19, 239,952 person searches were conducted, with 2.2% of these (5,382) being strip searches. In 2019-20, the number of person searches increased by 6584 to 246,536. However, the percentage of strip searches conducted decreased to 1.5% with a total of 3,748 strip searches conducted in the field. Between 2018-19 and 2019-20 the total number of person searches increased by 2.7%, indicating an increase in general searches conducted by the NSWPF. The NSWPF advised the Commission that the decrease in the proportion of searches in the field that are strip searches, and the number of strip searches in the field is due to fewer music festivals occurring in the 2019-20 year due to COVID-19 pandemic, the introduction of the Safety Management Plan by the Independent Gaming and Liquor Authority and escalating costs for medical provisions required at music festivals.<sup>31</sup> The number of strip searches in the field may also have been impacted by the clarification of NSWPF strip search policy, or the Commission's increased attention on strip searches. However, it is noted that the total number of person searches increased compared to previous years, indicating an increase in general searches by proportion.

While the number of general searches in the field resulting in a find has increased since 2016-17, as a percentage, the figures are lower than those attributed to strip searches in the field resulting in a find.<sup>32</sup> They range from 9.8% to 12% across the four years as demonstrated in Table 2 below.

<sup>29</sup> Defined as searches conducted in places other than police stations or places of detention.

<sup>30</sup> These are recorded in a Person Search incident category in COPS.

<sup>31</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>32</sup> The NSWPF advised the Commission that some previous search categories (for frisk and ordinary searches, which existed under the *Law Enforcement (Powers and Responsibilities) Act 2002* until 2014) were not phased out of use in COPS until sometime after 2016 (for frisk searches) and 2019 (for ordinary searches). Accordingly, this may affect the delineation between general and strip searches used in Table 2. Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

**Table 2: Number and percentage of general searches conducted in the field resulting in a find**

	2016-17	2017-18	2018-19	2019-20
Number of general searches conducted in the field	236,969	234,563	234,570	242,788
Number of general searches conducted in the field resulting in a find	24,791	25,088	26,891	29,025
Percentage of general searches conducted in the field resulting in a find	10.5%	10.7%	11.5%	12%

Further detail about strip searches by location can be found in Appendix C.

### 1.4.1 Reason for search and objects located

For the four years from 2016-17 to 2019-20, NSWPF's reported rates of detection as a result of strip searches sit at about a third. There appear to be considerable limitations to the reported correlation between strip searches, rates of detection and items detected. It is not clear that an item reported as detected in an interaction which involved a strip search was actually detected as a result of the strip search itself. In a small number of instances, items reported as being located included bicycles, electrical appliances, amusement/vending machines, luggage and books.<sup>33</sup> In 2019-20 COPS records indicate that items located included 12 bicycles, two books/stationary and four 'computer wares'.<sup>34</sup> It is inconceivable that such items were located in a person's inner clothing. Presumably these items were located at another point during the interaction with police, and the interaction resulted in a strip search being undertaken.<sup>35</sup> The NSWPF has submitted that this represents 'a recording error and occurred less than 1%'.<sup>36</sup> These anomalies raise a question about whether other items recorded as a 'find' resulting from a strip search were indeed found as a result of the strip search, or may have been found at some other point in the interaction between police and the individual.

The lack of certainty about whether items were located as a result of the strip search itself is deeply concerning. Rates of 'find' are used by the NSWPF to justify the number of strip searches undertaken. If these figures are unreliable then this justification is wholly unsatisfactory.

As discussed below at 2.4, the new auditing process instituted by the NSWPF whereby commands are required to conduct a mandatory monthly audit of strip searches conducted in the field should improve scrutiny. The Commission hopes this may result in more accurate records about whether an item was detected as a result

<sup>33</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 11 May 2020.

<sup>34</sup> Letter from Assistant Commissioner, State Intelligence Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 5 August 2020.

<sup>35</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 11 May 2020; Letter from Assistant Commissioner, State Intelligence Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 5 August 2020.

<sup>36</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

of a strip search or whether it was detected during another part of the police interaction, such as a general search which occurred before the strip search was undertaken. It remains unclear, however, whether the record keeping capacities within the Computerised Operational Policing System (COPS) – a database in which police record all their operational activities – would allow this distinction to be accurately recorded.

Police records about items located suggest a correlation between the reasons for search (e.g. suspected possession of illegal drug) and the object found (e.g. drug). In 2018-19, suspected possession of an illegal drug accounted for 91.9% of the reasons why police decided that it was necessary to conduct a strip search. This correlation remained relatively consistent in 2019-20, with suspected possession of an illegal drug accounting for 88.4% of the reasons why police decided that it was necessary to conduct a strip search.

Between 2016-17 and 2019-20, drugs accounted for approximately 70% of items located during a strip search. There was an increase in MDMA/ecstasy<sup>37</sup> as a proportion of the types of drugs located over this period, surpassing methyl/amphetamine and cannabis in 2018-19. MDMA represented 34.4% of total drugs located as a result of a strip search in 2018-19 although this dropped to 20.7% in 2019-20 (see Table 3 below). In 2019-20, the most common drug type located was methylamphetamine followed by MDMA and cannabis. In 2019-20, after drugs the most common items located were sharp/cutting instruments and cash/documents, representing 6.8% and 5.5% respectively of total objects located.

**Table 3: Top three types of drugs located as a percentage of all drugs located**

Drug name	2016-17	2017-18	2018-19	2019-20
MDMA (Ecstasy)	25.2%	33.4%	34.4%	20.7%
Methyl/Amphetamine	29.8%	19.4%	19.5%	28.2%
Cannabis	20.5%	19.7%	16.3%	17.9%

## 1.4.2 Demographics

The NSWPF data shows children under the age of 18 made up 3.2% (175) of all those strip searched in the field for 2018-19. However when the age group is expanded to include those people under 25, this figure increases to 45.8% (2471). In 2019-20, children under the age of 18 made up 2.5% (94) of all those strip searched in the field. In that year 33.9% (1274) of persons strip searched in the field were under 25 years of age. According to a National Drug and Alcohol Research Centre report on Australian music festival attendees based on data from the 2019 Global Drug Survey, the age range of music festival attendees ranged from 16 to 70 years old, with the average age being 22.<sup>38</sup>

This trend is similar for young people strip searched in custody in 2018-19. Those under the age of 18 represent 2.5% (172) of all people strip searched in custody, however, when the age group is expanded to include those under 25, this figure increases to 22.3% (1525). In 2019-20, children under 18 years represented 2.2% (93)

<sup>37</sup> Methylenedioxymethamphetamine.

<sup>38</sup> Caitlin Hughes, Monica Barratt, Jason Ferris and Adam Winstock, 'Australian music festival attendees: A national overview of demographics, drug use patterns, policing experiences and help-seeking behaviour' 28 *Drug Policy Modelling Program Bulletin*, 3.



of all people strip searched in custody and those under 25 years represented 21.6% (924) of all people strip searched in custody.

In the last four years a large proportion of people strip searched identified as from an Aboriginal and Torres Strait Islander background. In 2018-19 Aboriginal and Torres Strait Islander people accounted for 17.1% of total persons strip searched. Of the total number of persons strip searched in 2018-19, Aboriginal and Torres Strait Islander people represented 8.9% of those strip searched in the field and 23.6% of those strip searched in custody. In 2019-20, 17.8% of all strip searches were conducted on Aboriginal and Torres Strait Islander people. See Table 4 below. Of the total number of persons strip searched in 2019-20, Aboriginal and Torres Strait Islander people represented 12.6% of those strip searched in the field and 22.4% of those strip searched in custody.

The high proportion of strip searches that are conducted on Aboriginal and Torres Strait Islander people when compared with their demographic representation in the community (3% of the population are Aboriginal and Torres Strait Islander people in New South Wales) has attracted concern for some time.<sup>39</sup> Recommendation 1 below aims to focus police attention on the underlying reasons for these statistical patterns.

The NSWPF submitted to the Commission that the proportion of strip searches conducted on Aboriginal and Torres Strait Islander people 'reflects the overrepresentation of [this demographic group] in the justice system'.<sup>40</sup> The NSWPF stated:

Although Indigenous people comprise 3% of the NSW population, BOCSAR reports the total Indigenous population in NSW custody was just over 25% of the custody population in December 2019. NSWPF has several strategies and programs, alone and in partnership with other agencies, to help achieve whole-of-government improvements to Indigenous over-representation within the justice system. NSWPF seeks to improve its engagement with Aboriginal communities, recruit more Indigenous police officers and has worked to implement recommendations from the Royal Commission into Aboriginal Deaths in Custody. High priority is given to develop policing practices for all employees which are culturally sensitive and culturally responsive. Training emphasises communication, addressing unconscious bias, and intergenerational trauma suffered by Aboriginal people. The 'NSWPF Aboriginal Strategic Direction 2018-2023' sets key priorities. NSWPF is a key partner in the Department of Communities and Justice – 'Reducing Aboriginal Over-representation Plan 2018-2020' [which] sets out specific actions to reduce Aboriginal incarceration rates.<sup>41</sup>

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<sup>39</sup> See for example, SBS, *Data Reveals Indigenous people in regional NSW targeted by police strip searches*, sbs.com.au, 17 September 2020.

<sup>40</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>41</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

**Table 4: Breakdown of number of Aboriginal and/or Torres Strait Islander people strip searched by in field, in custody and year**

	2016-17	2017-18	2018-19	2019-20
Strip Searched In Field	521	585	481	472
Strip Searched In Custody	2,185	2,117	1,611	958
Total number of Aboriginal and/or Torres Strait Islander people strip searched	2,706	2,702	2,092	1,430
Total number of all strip searches conducted per year	13,898	14,840	12,209	8,033
Percentage of Aboriginal and/or Torres Strait Islander people strip searched to all persons strip searched	19.5%	18.2%	17.1%	17.8%

### 1.4.3 Outcomes

There are various legal actions the NSWPF can take as a result of a strip search resulting in a find. These range from more punitive measures such as issuing a Court Attendance Notice (CAN)<sup>42</sup> to issuing Criminal Infringement Notices (or ‘on-the-spot fines’) and employing diversionary strategies such as the Cannabis Cautioning Scheme which gives the police ‘the discretion to formally caution rather than charge offenders for minor cannabis offences’.<sup>43</sup>

The NSWPF issued a CAN for the majority of offences detected following a strip search. In 2018-19 a Field CAN was the most common legal action and was issued on 868 occasions representing 46% of all outcomes from events in which a strip search was recorded.<sup>44</sup> This was followed by Bail CAN which was issued on 543 occasions representing 28.8% of all outcomes. In 2019-20, Bail CAN was the most common legal action (41.1% or 699 occasions). Field CAN has increased as a percentage of all types of legal action from 40.8% in 2016-17 to 46% in 2018-19, although it was used less frequently in 2019-20 – representing 33.5% of legal actions in that year. In relation to less serious legal actions, there was an increase in instances in the use of Criminal Infringement Notices (CINs) between 2017-18 and 2019-20 from eight to 115. The NSWPF trialled the use of a new category of infringement notice in January 2019 – the Drug Criminal Infringement Notice. These are discussed in Chapter 5.

There are limitations to the NSWPF data relating to outcomes from strip searches, because it is not possible to ascertain whether the legal actions result directly from the search or from other offences arising during the police interaction. Given the volume of strip searches undertaken by police, the Commission has relied on quantitative data in the above analysis, and has not undertaken a narrative analysis of COPS information. Narrative analysis may explain why certain legal options such as a CAN have been pursued as opposed to others, such as a warning.

<sup>42</sup> Including Field, Bail, Future and No Bail.

<sup>43</sup> Drug and Alcohol Coordination, NSW Police Force, *Cannabis Cautioning Scheme: Guidelines for Police*, March 2013, p. 1.

<sup>44</sup> It is noted that an event involving a strip search may result in more than one charge, as multiple offences may have been identified by police.



## 2. Recent changes implemented by the NSW Police Force

Over the course of our Inquiry, the NSWPF has made a number of changes to the information it provides to police about how strip searches should be conducted. This includes changes to the policy documents which set out what is expected from police officers, and the introduction of fact sheets, tools and prompts to remind police officers of the legal requirements for conducting strip searches in NSW. The new guidance aims to improve strip search practices, from the conduct of the search, to the records kept about searches conducted and the way more senior police supervise strip searches to make sure they are being conducted lawfully.

The NSWPF has also changed some of its governance structures to put measures in place to ensure Commands are reviewing, evaluating and auditing all strip searches, oversighted by the NSWPF Governance Command.<sup>45</sup> A position of Corporate Sponsor for Police Powers has been allocated to the Deputy Commissioner Field Metropolitan, and two executive groups have been created – Police Powers and Music Festivals, which aim to ensure the lawful and consistent application of powers including strip searches.<sup>46</sup>

The new guidance issued by the NSWPF is a significant improvement, as it offers more clarity than the policy and educational information which were in circulation prior to 2018. However there are a range of practical and legal issues about the way police are expected to conduct strip searches that remain unclear. Those outstanding issues are addressed later in this report.

This chapter sets out the relevant changes to practices, policy and other instructions given to police officers since the Commission's Inquiry began.

### 2.1 State-wide communications

After the Inquiry commenced, the NSWPF almost immediately began to consider the policies it had in place to instruct police about how to conduct strip searches.

In 2018, the NSWPF Education and Training Command (ETC) conducted a Police Powers Forum to look the use of police powers including strip searches.<sup>47</sup> In mid-2018 a Lessons Learned Unit was created within the ETC to assist in trend analysis, including consideration of the use of strip search powers.

In November 2018, the Assistant Commissioner and Corporate Sponsor for Diversion, Reoffending, Custody and Corrections sent out a state-wide email to all police

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<sup>45</sup> At the time of writing the Performance and Program Support Command (within which the Governance, Risk and Compliance Team was located) was being restructured. The Governance Command now includes the Risk and Compliance Team, which is involved in conducting audits. Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>46</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 10 July 2020.

<sup>47</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 27.

officers reminding them of the key sections of LEPR that govern strip searches.<sup>48</sup> The email also reminded officers that LEPR does not empower automatic strip searches of people entering custody at police stations, that where strip searches were recorded by CCTV in a police station, the recording should not be broadcast throughout the facility 'unless it is necessary to do so to satisfy work, health and safety obligations.' Officers were reminded to record any reasons necessitating any such broadcast in the Custody Management System (which is a part of COPS). The message instructed officers to keep access to any video footage of strip searches strictly limited to preserve the privacy of the person searched. The message also reminded police to record the reasons for all strip searches in the Custody Management System.

In April 2019, the NSWPF sent a state-wide email message reminding officers of the key sections of LEPR that govern strip searches, informing officers of a short video tutorial about using Body Worn Video (BWV) to film strip searches, and reminding officers to record the reasons for strip searches in the Custody Management System and that police cannot assist correctional staff with strip searches unless they can rely on powers under LEPR to conduct the search.<sup>49</sup>

The NSWPF issued two state-wide messages in September 2019 – the first advising officers that strip searches could no longer be 'self-verified'<sup>50</sup> on COPS (and would need to be checked by a supervisor from that time forward), and the second advising that new standard operating procedures relating to Custody and Searching had been published.<sup>51</sup> This is discussed at 2.4.

The NSWPF advised the Commission that it sent a state-wide message to police officers in October 2019 reminding them of the prohibition on strip searching a child under the age of 10 years (including looking into or removing nappies).<sup>52</sup>

The state-wide messages are a useful reminder to police officers about their responsibilities and the requirements for a lawful strip search, and can direct police to relevant policy and procedures. They may also alert officers with a supervisory role about issues they should watch for and discuss with more junior officers, or they may prompt relevant officers within Police Area Commands (PACs) and Police Districts (PDs) to review their practices and procedures to ensure they conform to legislative requirements. As a means of addressing concerns that police are insufficiently aware of the legislative requirements for conducting strip searches,<sup>53</sup> such state-wide emails may play a part in a more comprehensive approach.

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<sup>48</sup> Email from Assistant Commissioner, Corporate Sponsor for Diversion, Reoffending, Custody and Correction, NSW Police Force, 2 November 2018.

<sup>49</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May 2020.

<sup>50</sup> After an Event is created in COPS, it must be verified, which means checking it for accuracy and completeness. If an event is 'self-verified', the officer who created the event is required to check their own record for accuracy. In other instances, a supervisor is required to check that the event contains relevant information and is coherent and complete.

<sup>51</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May 2020.

<sup>52</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May 2020.

<sup>53</sup> See Lessons Learned Unit, Education and Training Command, NSW Police Force, *Lessons identified – Best Practice Strip Searching Guidelines for Pre-Planned Events Involving Drug Detection Dogs*, November 2018.

## 2.2 Changes to key policy documents

In August 2019, in response to the Commission's draft report of the Review of the Custody SOPs, the NSWPF implemented a single Standard Operating Procedure dealing with the way person searches are conducted in custody: the *NSWPF Charge Room and Custody Management Standard Operating Procedures* (the Custody SOPs) and the *NSWPF Person Search Manual 2019* (the Person Search Manual).<sup>54</sup> These new SOPs were publicised to all police on 13 September by way of a state-wide email message. The introduction of a single policy pertaining to charge room and custody management procedures is a significant improvement on the pre-existing proliferation of inconsistent localised policies. The NSWPF has since removed any local SOPs from circulation.

The primary policy document which explains how police are to exercise their general powers and functions is the *NSW Police Force Handbook* (the Handbook). The NSWPF has many more detailed policies and procedures, which contain instructions about how to exercise specific police powers, however the Handbook is the first step in unpacking the instructions available to police. In August 2019, the NSWPF updated the section of the Handbook that gave instruction about 'custody' including searches conducted on people in custody. That section now refers to the new Custody SOPs.

The NSWPF updated the Handbook regarding 'Person Searches' in October 2019. It simply directs police to the new Person Search Manual and Custody SOPs.

Until 2018 the Handbook was complemented by the *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (the Code), which set out police powers to search and detain, seize property, arrest and question suspects. The Code contained outdated information about strip searches. For example, it referred to the three types of searches that appeared in the legislation before it was amended in 2014. The Code was withdrawn in 2018 and the relevant information was merged into the current iteration of the Handbook.

## 2.3 Changed practices at major events

In November 2018 the NSWPF Lessons Learned Unit, situated within the Education and Training Command, conducted an evaluation of the way strip searches are conducted by police at major events, such as music festivals or sporting events. The review conducted by the Lessons Learned Unit made three recommendations:

- that the NSWPF develop a template for operational orders for pre-planned events utilising drug detection dogs;
- that the NSWPF develop, endorse and implement Best Practice Guidelines for Strip Searching at pre-planned events utilising drug detection dogs; and

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<sup>54</sup> A public version of the Person Search Manual, with some detail removed, was published by the NSWPF in September 2019. Throughout this report, references to the Person Search Manual are to the internal version of the Manual released to the NSWPF in August 2019. The two documents are substantially similar.

- that the NSWPF develop educational products to support those Best Practice Guidelines, such as short video lessons and an article in the Police Monthly journal, which is circulated to NSW police officers.

The Lessons Learned Unit also indicated it would conduct a further evaluation following the implementation of those recommendations. This evaluation has been delayed indefinitely due to the public health restrictions associated with Covid-19.<sup>55</sup>

The NSWPF introduced a standardised drug detection briefing for all police working at music festival events in late 2019. Briefings are usually delivered by the Event Commander, Drug Detection Commander and an intelligence team. The briefing contains information about the nature of the event, police powers, drug detection and search processes, and processes for dealing with persons taken into custody. This is discussed in more detail in Chapter 5. Due to the impact of the Covid-19 pandemic, and the cessation of many major events since early 2020, some of the new measures have not been formally introduced or evaluated by NSWPF.<sup>56</sup>

## 2.4 Changes to the way strip searches are checked

Police officers have always been required to keep records of any strip search they conduct in COPS, in a COPS Event record. The Event record contains relevant details such as the names of officers and other people involved, the location date and time, the powers used and the outcome (whether any items were found after the search) and a narrative describing what transpired. This is important for accountability and transparency, allows the police officer's version of events to be checked if there is a later complaint or legal action, and for supervisors to check that the use of the strip search power, insofar as the record describes it, complied with LEPR.

After an Event is created in COPS, it must be verified, which means checking it for accuracy and completeness. Until September 2019, police officers could self-verify any COPS Event that related to a person search (both general searches and strip searches). The NSWPF ceased COPS Event self-verification on 4 September 2019. Now all COPS Events relating to a person search must be verified by a Duty Officer or other designated officer.

In mid-December 2019, the NSWPF introduced enhancements to the way strip searches are recorded in COPS.<sup>57</sup> These include prompts which pop up when a strip search event type is created, which contain the following description of what constitutes a strip search:

A strip search can include requiring the person to remove all their clothing, but it must never involve the removal of more clothing than is reasonably necessary for the search. If a person is required to remove anything more than their coat or jacket (or similar item of outer clothing) or their gloves, shoes, socks or hat, it is a strip search.

<sup>55</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 28 May 2020.

<sup>56</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May 2020.

<sup>57</sup> NSW Police Force, *COPS Enhancement Recording of Strip Searches User Guide*, December 2019.

A search can also go beyond a person search without the removal of any clothing at all. Requiring a person to remove clothing to allow a visual examination of person's genitals, buttocks, breasts or underwear is a strip search.<sup>58</sup>

The officer is prompted to confirm that the circumstances of the event meet the strip search criteria. If COPS identifies the person searched as being under 18 or as having an intellectual impairment, officers are required to fill out a mandatory field that asks them to record whether or not a support person was present during the search. If a support person was used, the name, date of birth, contact details and relationship to the person searched must be recorded. If no support person was used, reasons must be entered into COPS.

These changes to the verification process and the addition of new information and more mandatory fields in COPS should result in better quality assurance of these records and better identification of any deficient practices within commands. The Commission notes that COPS records are generally made after the event has taken place, so these prompts do not provide 'real time' guidance to officers. However, in time, these changes may cement knowledge of some of the key legal requirements for searches, in particular the definition of a strip search and the requirement for police to ensure a support person is present during any strip search of a young person or person with an intellectual impairment (unless the circumstance in s 33(3A) are satisfied).

On 13 September 2019, the NSWPF Governance Command conducted an audit of all strip searches of people under 18 years. Analysis was provided to Police Area Commands and Police Districts to address issues arising, including record management, data input, clarification of details and use of powers.<sup>59</sup>

Following this, monthly audits were conducted by the Governance Command which reviewed all juvenile strip searches across the state, assessing:

- State of mind [of the officer];
- Safeguards;
- Age;
- Privacy;
- Same sex searching officer;
- Use of force;
- Filming; and
- Records.<sup>60</sup>

The NSWPF submitted to the Commission that:

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<sup>58</sup> This text is from NSWPF's COPS and appears as a pop-up prompt when an officer selects a strip search category in a COPS Event.

<sup>59</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>60</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May, 2020.

In December 2019 NSWPF Governance Command commenced monthly auditing of strip searching of juveniles. A Senior Review Officer ... audited 100% of juvenile strip searches and found only 2 events containing insufficient information in that 12 month period. Those 2 events were referred to the relevant Crime Manager for review and re-submitting.<sup>61</sup>

On 21 November 2019, the NSWPF also required commands to conduct their own mandatory monthly audit of all COPS Events containing a strip search for both adults and people under 18 years of age (capturing strip searches in the field). The results of this audit are recorded in the Command Management Framework (CMF),<sup>62</sup> along with a record of any corrective action (such as training, guidance or supervision) which is taken to address any failure to comply with legislation or policy.<sup>63</sup> The CMF monthly test requires that a dip sample of strip searches (adult and juvenile) be reviewed by a senior officer (Duty Officer, Crime Manager or Senior Manager).<sup>64</sup> Commands were issued a Quality Assurance Checklist to assist in reviewing COPS Events to check that the basic legislative requirements set out in LEpra are recorded.<sup>65</sup>

Over time, such audits may serve to educate officers when they are advised their COPS Event contains insufficient records. However, gaps in a deficient COPS account may not be able to be filled if there are no other contemporaneous records, such as Police Notebook entries, which record the missing details.

The NSWPF submitted to the Commission that the audits conducted by the Governance Command were only ever intended to be a temporary measure, and the ongoing auditing was best situated within the responsibility of Police Area Commands and Police Districts:

... to ensure well-timed recording, learning and change, this must occur at Command level. Governance Command is a facilitator. Responsibility for ensuring appropriate use of police powers by officers rests with the Police Commander and/or Police Operations Commander of each Police District. This ensures contemporaneous review of use of powers and identification of any issues which require attention or training.<sup>66</sup>

Given the high proportion of strip searches of people who identify as Aboriginal and Torres Strait Islander people (discussed at 1.4.2) particularly in the custodial setting, the Commission considers that the Governance Command should regularly review the results of audits conducted by Police Area Command and Police Districts of any strip search of a person who identified as an Aboriginal or Torres Strait Islander person. While the searches of this population group when conducted in the field should be picked up by the monthly COPS audits conducted by commands, the Commission considers that, given the high proportion of strip searches compared to

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<sup>61</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020. These results have not been provided to the Commission for verification.

<sup>62</sup> The CMF is a self-assessment risk audit tool used by commands to identify compliance with selected legislation and policy. The records within the CMF can also be interrogated at a regional and state level.

<sup>63</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 10 July 2020.

<sup>64</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>65</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 14 May 2020.

<sup>66</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

population density, searches of Aboriginal and Torres Strait Islander people in custody should receive increased scrutiny, to ensure compliance with policy and legislation, and bring any potential deficiencies or systemic issues to the attention of commands to be addressed.

**Recommendation 1:** The Governance Command should perform ongoing dip sample reviews of the results of audits conducted by Police Area Commands and Police Districts of any strip search of a person who identified as an Aboriginal or Torres Strait Islander person (where that is known and recorded in COPS). The results of these reviews should be included as a standing item on governance risk compliance audits.

The NSWPF advised the Commission that it agreed that Police Area Commands and Police Districts would review all strip searches of people under 18 years and all people who identified as an Aboriginal or Torres Strait islander person (where that is recorded on COPS). The NSWPF also agreed that the Governance Command would perform dip samples reviews of those audits and include this information as a standing item on governance risk compliance audits.<sup>67</sup>

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<sup>67</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.



## 3. Thresholds for strip searching

There are multiple threshold requirements that must be satisfied before an officer can lawfully strip search a person. In all of the investigations into strip searches completed by the Commission to date, there have been issues regarding compliance with the thresholds. A common problem to emerge from these investigations, and in the District Court case of *Fromberg*, is that if officers conflate these requirements into a single threshold question, and do not separately consider each of the different threshold requirements in LEPR before conducting a strip search, they risk acting unlawfully.

This chapter will examine the different threshold requirements that an officer must satisfy to lawfully conduct a strip search, what our investigations revealed about how these thresholds are interpreted in practice, and what improvements in policy and practice are needed to ensure greater compliance with these legal thresholds.

### 3.1 Multiple threshold requirements for strip searches

Police have a number of search powers, each particular to different situations. For example, there are powers relating to searches on persons who have not been arrested, on persons under arrest, and on persons in custody after being arrested. There are specific prerequisites which apply to the use of each of those search powers. These are set out in s 21, s 21A, s 23, s 27, s 28 and s 28A.

LEPRA contains two different types (or tiers) of person searches – general searches and strip searches. An officer can conduct a general search if the requirements in those sections are satisfied. However, if the officer intends to conduct a strip search, s 31 of LEPRA imposes **additional** threshold requirements which must be met. Section 31 provides (emphasis added):

A police officer may carry out a strip search of a person if—

- (a) in the case where the search is carried out at a police station or other place of detention—the police officer **suspects on reasonable grounds** that the strip search is **necessary** for the purposes of the search, or
- (b) in the case where the search is carried out in any other place—the police officer **suspects on reasonable grounds** that the strip search is **necessary** for the purposes of the search and that the **seriousness and urgency** of the circumstances make the strip search necessary.

Section 31 therefore provides for two different thresholds for conducting a strip search: one which applies to conducting a strip search in a police station or other place of detention, and a separate, higher threshold for strip searches conducted in any other place.

If the police officer intends in the course of a strip search to search a person's genital area, or, in the case of a female or transgender person who identifies as female, the person's breasts, a further specific threshold requirement applies. Section 32(6) of LEPRA prohibits a police officer from searching those areas of a person's body 'unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search'.



Table 6 below identifies the search powers in LEPR which permit police to conduct searches of a person without a search warrant, and describes the different cumulative threshold requirements that police must satisfy to conduct a strip search, including a search of a person's genital area or breasts.

**Table 6: Threshold requirements for conducting a strip search under Part 4 of LEPR**

Legal circumstance of person and relevant search power	Threshold 1 - requirements to conduct a person search (of any type)	Threshold 2- requirements to conduct a strip search	Threshold 3- requirement to search the person's genital area or breasts
Person is not under arrest – s 21 (and s 21A)	Police officer must suspect on reasonable grounds the person has in their possession or control certain types of items (eg something stolen, or used to commit an indictable offence, or a prohibited plant or drug – see ss 20-21)	<p><b>If search is to be carried out in a police station or place of detention</b> – police officer must suspect on reasonable grounds that the strip search is necessary for the purposes of the search (s 31(a))</p> <p><b>If search is to be carried out in any other place</b> – police officer must suspect on reasonable grounds:</p> <p>(1) that the strip search is necessary for the purposes of the search and</p> <p>(2) that the seriousness and urgency of the circumstances make the strip search necessary (s 31(b))</p>	<p>Police officer must suspect on reasonable grounds that it is necessary for the purposes of the search to search the genital area of the person, or in the case of a female or a transgender person who identifies as female, the person's breasts (s 32(6)).</p>
Person is not under arrest but is in a public place or school – s 23	Police officer must suspect on reasonable grounds the person has a dangerous implement unlawfully in their possession/control ('dangerous implement' is defined in s 3(1) and includes a firearm, prohibited weapon, knife or laser pointer)		
Person is under arrest (for an offence or under a warrant)– s 27(1) (and s 28)	Police officer must suspect on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything that would present a danger, could assist a person to escape from custody, or relates to the commission of an offence (eg evidence)		
Person is under arrest (for purpose of being taken into lawful custody)– s 27(2) (and s 28)	Police officer must suspect on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything that would present a danger, or could assist a person to escape from custody		
Person is in lawful custody after having been arrested – s 28A	Person must be in lawful custody after arrest (no requirement regarding state of mind of searching officer)		

An officer intending to conduct a strip search must separately consider each of these threshold requirements, as discussed below.

The threshold requirements for strip searches in other Australian jurisdictions vary. There are some jurisdictions which impose higher thresholds than LEPR. For example, to conduct a strip search in Victoria under the *Control of Weapons Act 1990* (Vic), an officer must have conducted an outer search of the person first and must believe (rather than suspect) on reasonable grounds that a strip search is necessary for the purposes of the search, and that the seriousness and urgency of the circumstances require the strip search to be carried out.<sup>68</sup> In the ACT, under the *Drugs of Dependence Act 1989* (ACT) an officer can search (including strip search) a person prior to arrest only if the officer believes on reasonable grounds that it is necessary to do so to prevent the concealment, loss or destruction of any thing connected with an offence; and that the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without a warrant or of an order of a court.<sup>69</sup>

## 3.2 What constitutes a strip search?

### 3.2.1 Definitions in LEPR

Originally LEPR included three types of searches – ‘frisk searches’, ‘ordinary searches’ and ‘strip searches’ – each of which was separately defined.<sup>70</sup> The distinct legal concepts of a frisk search and an ordinary search were collapsed following recommendations from the NSW Ombudsman in 2009 and the Statutory Review of LEPR in 2013.<sup>71</sup> The definitions of ‘frisk’ and ‘ordinary’ searches were removed from LEPR in 2016 and replaced with the current s 30, which provides:

#### **Searches generally**

In conducting the search of a person, a police officer may—

- (a) quickly run his or her hands over the person’s outer clothing, and
- (b) require the person to remove his or her coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not, except in the case of a strip search, all of the person’s clothes), and
- (c) examine anything in the possession of the person, and
- (d) pass an electronic metal detection device over or in close proximity to the person’s outer clothing or anything removed from the person, and

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<sup>68</sup> *Control of Weapons Act 1990* (VIC) sch 1 cl 7(1).

<sup>69</sup> *Drugs of Dependence Act 1989* (ACT) ss 188 and 189.

<sup>70</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (version in force as at 31 August 2016) s 3. This was based on the ‘three-tiered personal search model’ in the Commonwealth *Crimes Act 1914*: New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, p 4847 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

<sup>71</sup> The NSW Ombudsman noted that in practice, there was little difference between those two types of searches, and the same safeguards applied to both: NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002* (2009) pp 57-58 and p. 63 (recommendation 4); Department of Attorney General and Justice and Ministry for Police and Emergency Services (NSW), *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (LEPR), 2013, pp 25-27.

(e) do any other thing authorised by this Act for the purposes of the search.

This is referred to in practice as a ‘general search’, although LEPR does not use this term.

The term ‘strip search’ is still defined in s 3 of LEPR, and this definition has remained unchanged since it was introduced:

**strip search** means a search of a person or of articles in the possession of a person that may include—

- (a) requiring the person to remove all of his or her clothes, and
- (b) an examination of the person’s body (but not of the person’s body cavities) and of those clothes.

Certain aspects of the definition of a strip search are not included in s 3, but instead appear under s 33 (which is entitled ‘Rules for conduct of strip searches’). The rules in s 33 include:

- ‘A strip search must not involve a search of a person’s body cavities or an examination of the body by touch’ (s 33(4))
- ‘A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search’ (s 33(5))
- ‘A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search’ (s 33(6)).

During the Second Reading speech for LEPR the Attorney General explained that ‘The safeguards in subclauses (4) to (6) of clause 33 are, without exception, mandatory and clarify that a strip search is, in fact, a visual search and not an examination of the body by touch’.<sup>72</sup> The Attorney General therefore expressed the definition of a strip search in these terms:

A strip search is defined as a search of a person or of articles in the possession of the person that may include requiring the person to remove all of his or her clothes, but only those clothes necessary to fulfil the purpose of the search, and a visual examination of the person’s body and a search of those clothes.<sup>73</sup>

The removal from LEPR of distinct concepts of the different types of searches, with clear definitions, has somewhat blurred the definitional line in the legislation between strip searches and non-strip searches (however called). This creates the risk that officers intending to search a person do not have a clear understanding of when they need to be satisfied that the different, higher threshold requirements that apply to strip searches have been met. For example, in Operation Gennaker, an investigation into strip searches conducted by police at the Lost City Music Festival in February 2019, the Commission found that at the time of the festival there was a lack of

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<sup>72</sup> New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, p 4847 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

<sup>73</sup> New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, p 4847 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

appreciation by officers of the difference between a general search and a strip search.<sup>74</sup> The Commission found that two boys were unlawfully strip searched at that festival because the officers involved had not adequately turned their minds to the threshold requirements for a strip search.<sup>75</sup> Similarly, in Operation Brugge, which considered the strip search of a 16 year old girl at the Splendour in the Grass festival in 2018, the Commission found that one of the reasons the strip search was unlawful was because the police officers at the festival approached the various threshold requirements in LEPPRA 'as a single, threshold question', and the requirements 'were not given separate consideration, as they ought to have been'.<sup>76</sup>

### 3.2.2 Descriptions in the Person Search Manual

Since the events the subject of Operations Gennaker and Brugge, the NSWPF has updated its policies regarding strip searches. The Person Search Manual now directs officers that there are two types of searches – 'a person search (a person search not involving a strip search – s.30)' and a strip search. It describes a person search (i.e. a general search) as follows:

For a person search, an officer may examine the person by touching their outer clothing, taking no more time than is reasonably necessary to safely carry out the search. This can include police examining the edges of the outer clothing by running their fingertips around the inside of the waistband, collar or sleeves of that clothing, but no more.

Police can require the person to remove their coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not all of their clothes).

...

Police can also move a person's clothing to permit a visual inspection of the body, but not of the persons genital area, or the breasts of a female or transgender person who identifies as female (this would constitute a strip search – see para 28).

Police can examine anything in the possession of the person. They can also pass an electronic metal detection device over or in close proximity to the person's outer clothing or anything removed from the person.<sup>77</sup>

The Person Search Manual contains the following comments describing a strip search:

#### **What is a strip search?**

Anything that goes beyond what is permitted by a person search (as described above) is a strip search. Strip searches may or may not involve the removal of clothing.

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<sup>74</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020 para 5.29.

<sup>75</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020 para 5.10-5.18.

<sup>76</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016* (May 2020), paras 5.20-5.21.

<sup>77</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 6.

### ***Strip searches with clothing removed***

A strip search can include requiring the person to remove all their clothing, but it must never involve the removal of more clothing than is reasonably necessary for the search. If a strip search is to require the removal of all clothing, it should be done in stages. For example, police should, where practicable, allow the person to remove their top and then replace it before asking the person to remove pants.

...

If a person is required to remove anything more than their coat or jacket (or similar item of outer clothing) or their gloves, shoes, socks or hat, it is a strip search.

### ***Strip searching with no clothing removed***

A search can go beyond a person search without the removal of any clothing at all. Requiring a person to move clothing to allow a visual examination of the person's genitals, buttocks, breasts (in the case of a female or transgender person who identifies as female) or underwear (underpants or bra) is a strip search. For example, requiring a person to pull out the waistband of their jeans to allow a visual inspection inside the jeans is a strip search.<sup>78</sup>

The Person Search Manual provides further comments about what practices police can engage in as part of a strip search, including asking a person to move parts of their body.<sup>79</sup> These aspects are discussed in Chapter 4 of this report.

### **3.2.3 Will moving a person's clothes to inspect their body or running fingertips inside waistbands, collars or sleeves constitute a general search or a strip search?**

The NSWPF's descriptions of search practices in the Person Search Manual include practices which are not explicitly mentioned in LEPR. Under the description of a general search the Person Search Manual includes:

- 'police examining the edges of outer clothing by running their fingertips around the inside of the waistband, collar or sleeves of that clothing', and
- 'police can also move a person's clothing to permit a visual inspection of the body, but not of the person's genital area, or the breasts of a female or transgender person who identifies as female'.

The Redfern Legal Centre (RLC) raised concerns with the Commission about the inclusion of the above practices in the description of a general search in the Person Search Manual. The RLC submitted that the practice of running fingertips around the inside of the waistband, collar or sleeves contravenes s 30 of LEPR.<sup>80</sup> The RLC also stated that neither the 'purported power' to move a person's clothing to permit a visual inspection of the body nor the focus on the genital area or breasts as indicating that a search has become a strip search' have a legislative foundation.<sup>81</sup>

Neither of the practices of feeling inside a person's waistband or moving a person's clothes to permit visual inspection of the person's body are expressly authorised by

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<sup>78</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, pp 6-7.

<sup>79</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, pp 7-8.

<sup>80</sup> Letter from Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 29 October 2019.

<sup>81</sup> Letter from Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 29 October 2019.

the general search power in s 30 of LEPR. Section 30 only states an officer may 'quickly run his or her hands **over** the person's outer clothing' (emphasis added) and/or 'require the person to remove a coat or jacket or similar article of clothing, and any gloves, shoes, socks or hat'.

Section 30 is drafted as an exhaustive list of actions permitted during 'searches generally'. The definition of a strip search in s 3 of LEPR, by comparison, is inclusive; it 'means' any search of a person or their possessions, including a search that involves the person being required to remove all their clothes, and an examination of the person's body. Reading these sections together, it is apparent that the intention of the legislative drafters was that any person search action that is not listed in s 30, and particularly any action that is more intrusive than searching a person's outer clothes, falls within the definition of a strip search. The fact that a search does not involve the removal of a person's clothes does not mean it is not a strip search, as the NSWPF itself acknowledges.

The comments of Judge Scotting in the District Court case of *Fromberg v R* support this interpretation. The case concerned two separate strip searches of the appellant, who had been stopped by police when he was riding his motorcycle because he did not have his helmet strap done up. The first search occurred when the officer, having gone through his jacket pockets and searched his bag:

... asked the appellant to unbuckle his belt, so that the officer could make sure that there was nothing behind his belt or in the lining of his jeans. The officer then reached to feel inside the appellant's jeans with the intention of searching around the elastic of his underwear... the officer extend[ed] his hand quickly towards the appellant's genital area. In response to the officer putting his hand inside his jeans the appellant pulled back from the officer and said, 'No, fuck off, you can't do that'.<sup>82</sup>

Judge Scotting held that the officer's actions constituted an unlawful strip search:

...As soon as the appellant unbuckled his belt, the officer intended to examine the inside of his jeans around the waistband of his underpants. The officer reached forward quickly and took hold of the appellant's jeans in a way that made it clear he intended to search the inside of them. That examination was by necessity an examination of the appellant's body or an examination by touch of an area that was not of the outer clothing, it came within the definition of a strip search and clearly involved a more invasive search than that provided for by a frisk search or an ordinary search.<sup>83</sup>

The second search of the appellant occurred after the appellant initially pulled away from the officer trying to put his hand inside his jeans. The appellant was handcuffed and the officer 'reached into the appellant's pants and pulled out his jeans and underwear', and upon observing a plastic bag containing the drugs sitting above the appellant's penis, the officer 'removed the bag'.<sup>84</sup> Judge Scotting held that this constituted a second strip search,<sup>85</sup> and further commented that:

...the pulling out of the appellant's underwear and the removal of the drugs by the officer involved touching the appellant's body, which is prohibited by section 33(6) [sic] LEPR. A strip search authorises the removal of a person's clothing and the

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<sup>82</sup> *Fromberg v R* [2017] NSWDC 259, [10].

<sup>83</sup> *Fromberg v R* [2017] NSWDC 259, [38].

<sup>84</sup> *Fromberg v R* [2017] NSWDC 259, [11].

<sup>85</sup> *Fromberg v R* [2017] NSWDC 259, [39] and [42].



examination of their body and their clothing, to locate items that may be of interest. The touching of a person's body is prohibited, particularly if they are cooperating, as the appellant had been doing.<sup>86</sup>

These comments support the interpretation that an officer placing their hands inside a person's waistband, and/or pulling out a person's waistband to look inside constitutes a strip search.

The Person Search Manual acknowledges that 'requiring a person to pull out the waistband of their jeans to allow a visual inspection inside the jeans is a strip search'.<sup>87</sup> It follows that if the officer themselves pulls out the person's waistband, that will also constitute a strip search. Further, as is clear from the comments of Judge Scotting in *Fromberg*, the officer who does so runs the risk of breaching the prohibition on conducting an 'examination of the body by touch' in s 33(4), and will need to be very careful to what extent he or she touches the person's body while doing so. Section 33(4) is discussed further in Chapter 4.

The Commission recommends that the NSWPF amend the Person Search Manual and Custody SOPs and any other relevant operational documents to clarify that any search practice involving an officer placing their fingertips or hands inside a person's waistband, or a person's clothes being moved away from their body in order for an officer to inspect inside, constitutes a strip search. The NSWPF should also clarify this in the description of a strip search in the prompt that pops up in COPS (discussed in 2.4).

**Recommendation 2:** The NSWPF should amend the Person Search Manual, Charge Room and Custody Management SOPs, COPS prompt and any relevant operational documents to make clear that:

- (a) if during a search an officer moves a person's clothes (other than the outer clothes mentioned in s 30) away from their body, or requires a person to move their clothes away from their body, in order to visually inspect inside those clothes this will constitute a strip search, whether or not this involves a visual inspection of their genital area or breasts, and
- (b) if an officer places their hand or fingertips inside a person's waistband, collar or sleeves (whether of outer clothing or inner clothing) this will also constitute a strip search.

The NSWPF submitted<sup>88</sup> that the Commission should remove recommendation 2 on the grounds that it is inconsistent with LEPR, the Person Search Manual and advice provided to the NSWPF by the Solicitor General.<sup>89</sup> The Commission does not accept that the recommendation is inconsistent with LEPR, for the reasons stated above. The Commission also notes that the Solicitor General's advice does not specifically consider whether running fingertips inside a person's waistband, collar or sleeves while the clothes are still being worn by that person constitutes a general or strip search. However, in light of the varying views about whether such a practice falls

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<sup>86</sup> *Fromberg v R* [2017] NSWDC 259, [43] While His Honour cited s 33(6), it is evident from the context that this was an error and in substance his Honour was referring to s 33(4).

<sup>87</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 7.

<sup>88</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>89</sup> Annexure A to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 20 January 2020.



within the ambit of a general or strip search, both the NSWPF and the community would benefit from Parliament giving consideration to amending LEPPRA to provide an exhaustive definition of the legal scope and limits of a strip search.

**Recommendation 3:** Parliament should consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide an exhaustive definition of a strip search.

### 3.3 Reasonable grounds for suspicion

Each threshold for a strip search set out in Table 6 above includes a requirement that the officer ‘suspect on reasonable grounds’ a certain matter. This section will consider the legal principles which apply when assessing whether there are reasonable grounds for a suspicion, and discuss different kinds of matters which officers have taken into account as the basis for a suspicion.

#### 3.3.1 Legal principles on what constitutes reasonable grounds for a suspicion

The threshold requirement that an officer must have a suspicion on reasonable grounds involves both a subjective and an objective element.<sup>90</sup> The officer must subjectively hold the suspicion based on information that he or she thinks is an adequate basis for that suspicion. But the information on which the officer relies must also, viewed objectively, provide a reasonable basis for the suspicion. The facts and circumstances on which the officer relies must be ‘sufficient to induce in the mind of a reasonable person’ the same suspicion.<sup>91</sup>

In *R v Rondo* the NSW Court of Criminal Appeal set out the following principles:

- (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the [relevant] state of affairs... A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
- (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
- (c) What is important is the information in the mind of the police officer...at the time... [and] whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.<sup>92</sup>

The Commission’s *Review of NSW Police Force Standard Operation Procedures for strip searches in custody* recommended that the NSWPF include guidance to police about how to form a suspicion on reasonable grounds that a strip search is necessary

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<sup>90</sup> *Attalla v State of NSW* [2018] NSWDC 190, [9].

<sup>91</sup> *Prior v Mole* (2017) 261 CLR 265, 270 (Kiefel and Bell JJ).

<sup>92</sup> *R v Rondo* (2001) 126 A Crim R 562, 576-577 (Smart AJ, with whom Spigelman CJ and Simpson J agreed).

for the purposes of the search.<sup>93</sup> The Person Search Manual released by the NSWPF in August 2019 and the Custody SOPs include significant improvements in terms of the guidance provided. Both policies state that any officer who searches a person must hold the state of mind required and that there must be some factual basis for a reasonable suspicion. The policies include the key elements of the principles in *R v Rondo*, including that a reasonable suspicion involves less than a reasonable belief but more than a possibility, the material or information relied on must have some probative value and must afford the officer reasonable grounds to form the suspicion.<sup>94</sup>

### 3.3.2 Suspicion based on an officer's interpretation of a person's behaviour

Courts will carefully scrutinise any arguments that an officer's interpretation of a person's behaviour provided, in part or in full, a reasonable basis for his or her suspicion that the person needed to be searched, particularly when the person's behaviour was open to multiple interpretations.

For example, in *Attalla v State of NSW*, it was submitted that one of the reasons the female arresting officer suspected that Mr Attalla possessed a prohibited drug, and therefore that a search was justified, was his 'visual focus on police'.<sup>95</sup> The officer stated that Mr Attalla 'immediately stopped texting...when he saw us', he 'appeared startled' and '[h]is eyes widened and he maintained a fixated watch on us as our vehicle approached'.<sup>96</sup>

Judge Taylor in the District Court dismissed this argument, stating that he did not think:

... that Mr Attalla's attention on the police vehicle or the police when they alighted from the vehicle can have any force as a reasonable ground for a suspicion that he was in possession of prohibited drugs. It is unsurprising that a person's attention (in the early hours of the morning, when there is no evidence of other activity) would be directed to a police car driving towards them with headlights on, only a short distance away, and subsequently, on the officers as they approached and spoke to the person. Any other conduct, such as looking away or ignoring the police, would be peculiar and if anything more engendering of suspicion.<sup>97</sup>

That arresting officer also said that her suspicion was also based on Mr Attalla's preliminary answers to her questions about why he was sitting on a stone wall at the corner of Bourke and William Street in the early morning.<sup>98</sup> Judge Taylor also dismissed this argument, commenting that Mr Attalla had 'answered her questions directly' with answers that did not 'suggest dishonesty', and 'could not be suggestive of any criminal offence'.<sup>99</sup> His Honour also did not accept that:

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<sup>93</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operation Procedures for strip searches in custody*, January 2020, pp. 31-32.

<sup>94</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 4; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications and Security Command, November 2020, p. 20.

<sup>95</sup> *Attalla v State of NSW* [2018] NSWDC 190, [10], [14]-[15].

<sup>96</sup> *Attalla v State of NSW* [2018] NSWDC 190, [31]-[32] (emphasis in original, citations omitted).

<sup>97</sup> *Attalla v State of NSW* [2018] NSWDC 190, [36].

<sup>98</sup> *Attalla v State of NSW* [2018] NSWDC 190, [10].

<sup>99</sup> *Attalla v State of NSW* [2018] NSWDC 190, [37].

an account by Mr Attalla for sitting on the stone wall could, false or true, support a suspicion of possessing prohibited drugs. A false account might support a suspicion that Mr Attalla did not want to disclose the true reason for his presence, but that provides no link to possessing prohibited drugs.<sup>100</sup>

Judge Taylor commented that the female arresting officer 'appeared ready to find an untruth when there was none, and then used that in her mind to bolster her suspicion'.<sup>101</sup> Further, in response to an argument that Mr Attalla's 'change in demeanour' to become more 'aggressive' during the officer's conversation with him was part of the basis for the officer's suspicion that he possessed drugs, Judge Taylor commented that:

It is not surprising that a person may become more adamant when it is suggested, especially by the police, that they are untruthful, even more so when they are to be searched because of it. It is unlikely to be a reasonable basis for the suspicion asserted.<sup>102</sup>

Similarly, the District Court in *Fromberg* made clear that the fact that a person insists on their legal rights and objects to a search is not a reasonable ground upon which to form a suspicion that the person has something to hide.<sup>103</sup>

In *Fromberg*, when the officer first reached his hand inside the appellant's jeans towards his genital area the appellant pulled back from the officer and objected to the search.<sup>104</sup> Following that the appellant was handcuffed, the officer reached into the appellant's pants and pulled out his jeans and underwear, observed the drugs inside his underpants and removed them.<sup>105</sup> Judge Scotting held that both strip searches were unlawful. His Honour commented that:

the reasonable suspicion that the officer had to conduct the second strip search was based on his own unlawful act. The appellant was entitled to insist on his legal rights and to resist the first unlawful strip search. Lawful resistance cannot be used as to provide a basis for reasonable suspicion.<sup>106</sup>

His Honour noted that the officer's evidence was that 'after the appellant pulled away...he [the officer] became concerned that he may have had a weapon or dangerous item secreted in his pants or underwear'. Judge Scotting dismissed this as reasonable grounds for the strip search as there was 'simply no logical connection between the suspicion initially held by the officer about the possession or a prohibited drug and the fact that the appellant pulled away that could have resulted in the suspicion that the appellant was carrying a dangerous item'.<sup>107</sup>

Judge Scotting in that case stated the general principle that '[n]o adverse inference can be drawn from a person insisting on their rights being adhered to and the law

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<sup>100</sup> *Attalla v State of NSW* [2018] NSWDC 190, [38].

<sup>101</sup> *Attalla v State of NSW* [2018] NSWDC 190, [34]-[35], [37]-[39] (emphasis in original, citations omitted).

<sup>102</sup> *Fromberg v R* [2017] NSWDC 259, [35].

<sup>103</sup> *Attalla v State of NSW* [2018] NSWDC 190, [35]; *Fromberg v R* [2017] NSWDC 259, [29], [39].

<sup>104</sup> *Fromberg v R* [2017] NSWDC 259 [9]-[11].

<sup>105</sup> *Fromberg v R* [2017] NSWDC 259 [9]-[11].

<sup>106</sup> *Fromberg v R* [2017] NSWDC 259, [39] (citing *Streat v Bauer* NSWSC unreported, 16 March 1998).

<sup>107</sup> *Fromberg v R* [2017] NSWDC 259, [42].

strictly followed, and such conduct should not be confused with conduct that can be considered suspicious'.<sup>108</sup> As the Commission observed in Operation Sandbridge:

...the law protects the subject from unlawful intrusions and an assumption that persons who decline to answer questions by police have something unlawful to hide is neither logical nor reasonable. It is obvious that a person might well, and reasonably, object to a search merely because it would constitute an unjustified interference with their personal integrity.<sup>109</sup>

### 3.3.2.1 Behaviour of patrons at music festivals leading to searches

In Operation Brugge the Commission asked officers who worked at the Splendour in the Grass music festival in July 2018 what sort of behaviours might cause them to search a person after the person had been 'indicated' by a drug detection dog but denied carrying any drugs. Officer BR3 responded 'just a combination of their behaviour', such as 'A constant fidgeting ... while walking back ... the initial build-up, what we have witnessed as well and then while walking toward the thing fidgeting, trying to veer in different directions'.<sup>110</sup>

Officer BR4 gave evidence that she may or may not search the patron, depending on whether she had observed the patron to appear drug affected or nervous; whether they were grabbing for their pockets; were trying to conceal something or had sought to avoid the drug detection dog.<sup>111</sup> Officer BR4 acknowledged that everyone reacts differently when stopped by police with a dog, but stated that those different ways of acting would invariably lead her to reasonably suspect that they are in possession of drugs.<sup>112</sup>

The Commission found that the fact that officers were forming suspicions that persons were in possession of drugs based on interpretations of those persons' reactions to seeing drug detection dogs was problematic. The Commission stated that avoidant or ostensibly nervous reactions could equally be explained innocently, including by reason of a normal reaction to police in numbers such as were present at the 2018 Festival or fear of wrongful suspicion or search. Nervous or avoidant reactions are therefore an unreliable (and unreasonable) source of suspicion of possession of drugs to justify a search.<sup>113</sup>

Since the events the subject of Operation Brugge the NSWPF has developed new operational documents for use by officers at music festivals, including Music Festival

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<sup>108</sup> *Fromberg v R* [2017] NSWDC 259, [29] (citing *Streat v Bauer* NSWSC unreported 16 March 1998, per Smart J).

<sup>109</sup> Law Enforcement Conduct Commission, *Operation Sandbridge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.5.

<sup>110</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.72 and see Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 142 lines 15-18.

<sup>111</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 200 line 11.

<sup>112</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016* (May 2020) para 3.92; Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 200 line 32 – T 201 line 13 and line 29.

<sup>113</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016* (May 2020) para 5.18.

Guidelines.<sup>114</sup> These guidelines list behavioural indicators, grouped into ‘observable behaviours’ and ‘suspicious actions,’ which an officer may observe in the process of drug detection. The ‘observable behaviours’ include behaviours for which there can easily be innocent explanations, including nervous or avoidant behaviours as mentioned in Operation Brugge (for example, trembling, having eyes wide open or surprised or scared facial expressions). The *Music Festival Guidelines* however do emphasise that ‘some signs may be due to people being nervous at the sight of police’, and they direct officers to ‘interact with individuals displaying these signs to try to determine a reason for these behaviours’, and that ‘searching police should make notes indicating why they think the person’s behaviour was suspicious of them being in possession of drugs or other illegal items’.<sup>115</sup>

The NSWPF has emphasised to the Commission the importance of police being able to ‘rely on their experience and powers of observation to form a reasonable suspicion’,<sup>116</sup> and referred to the High Court case of *Prior v Mole*.<sup>117</sup> In that case Kiefel and Bell JJ effectively rejected an argument from the appellant that it was ‘irrational’ for a police officer to ‘take into account observed patterns of human behaviour in predicting the likely behaviour of an individual’.<sup>118</sup> That case concerned the question whether a police officer had reasonable grounds to believe that a particular intoxicated person, Mr Prior, was likely to keep drinking in the street if he was not arrested, when this belief was partly based on his years of experience of dealing with people who were intoxicated.

The NSWPF emphasised the following general proposition put by Nettle J in that case:

A police officer may, and ordinarily is expected to, bring to bear his or her previous experience as an aid in detection and policing of past and anticipated offending. Where past experience has taught that identified circumstances coincide with particular kinds of offending, it is logical and reasonable to infer that the occurrence of similar circumstances entails a possibility of coincident similar offending.<sup>119</sup>

The case of *Prior v Mole* supports the position that it may be reasonable for an officer, when determining what inferences to draw from a person’s behaviour, to take into account the officer’s experience of the criminal actions of other persons who displayed similar behaviour.

However, past experience of other persons’ behaviour will not by itself provide a reasonable basis to suspect that a particular person displaying similar behaviours has engaged (or will engage) in offending. As Nettle J noted, it may be reasonable for an officer to infer, based on past experience, that the occurrence of similar circumstances entails a **possibility** of similar offending. But a possibility of offending

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<sup>114</sup> NSW Police Force *Music Festival Guidelines*, Public Transport and Public Safety Command [Draft]. The NSWPF also developed an online training module about Music Festivals, which was introduced on 23 November 2020. Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>115</sup> NSW Police Force *Music Festival Guidelines*, Public Transport and Public Safety Command, [Draft].

<sup>116</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 10 July 2020.

<sup>117</sup> *Prior v Mole* (2017) 261 CLR 265.

<sup>118</sup> *Prior v Mole* (2017) 261 CLR 265, 275.

<sup>119</sup> *Prior v Mole* (2017) 261 CLR 265, 290.

is not the same as a reasonable suspicion of offending.<sup>120</sup> In the case of *Prior v Mole*, the officer did not solely rely on his experience of what other intoxicated persons had done in forming his belief that Mr Prior would continue drinking in the street; he also relied on his observations of Mr Prior's behaviour, which was 'aggressive, abusive, and indicative of intoxication' and 'displayed a lack of judgment and included drinking in a public place in the presence of police'.<sup>121</sup>

The lawfulness of a search based on an officer's reliance on observations of nervous and other equivocal behaviours will depend on the particular facts and circumstances in each case. While past experience may suggest to the officer that such behaviour may be an indicator of guilt, the Music Festival Guidelines themselves emphasise that this cannot be assumed.

As the District Court's judgment in *Attalla* shows, officers who rely too heavily on observations of a person's equivocal behaviours to justify a search, even in combination with other factors, run the risk of being found to have acted unlawfully.<sup>122</sup>

In Chapter 5 the Commission recommends that the NSWPF and the Commission should conduct an audit of strip searches at music festivals to evaluate the impact of the new operational materials. This audit would provide the NSWPF with feedback as to whether the information about behavioural indicators is providing appropriate guidance to officers regarding what will constitute reasonable grounds for a suspicion that a search is justified under LEPRA.

The NSWPF submitted to the Commission that 'the effectiveness of behavioural indicators may be difficult to judge or audit given the individual varying factors in situations and police thought processes. An indicator of success may be an increased level of items located and recording of the behaviours that assisted the officer in forming grounds for the search.'<sup>123</sup>

### 3.3.3 Suspicion based on location in a place where there has been a high incidence of crime

A question arises as to whether the fact that a person is present in a location, or at an event, where a high incidence of particular types of crime has been recorded in the past, can form the basis for a reasonable suspicion that person should be searched.

In *Attalla v State of NSW* the District Court considered the submission that Mr Attalla's location was one of the matters which formed the reasonable grounds for the female arresting officer's suspicion that he was carrying drugs. That officer gave evidence that Darlinghurst, and in particular Bourke Street were, 'very well known...particularly well known for prostitution, solicitation, street offences, drug crime' and that the corner at which Mr Attalla was sitting 'in particular is probably the highest incidence of prostitution and vice events in that particular area'.<sup>124</sup> She also

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<sup>120</sup> *R v Rondo* (2001) 126 A Crim R 562, 576-577 (Smart AJ, with whom Spigelman CJ and Simpson J agreed).

<sup>121</sup> *Prior v Mole* (2017) 261 CLR 265, 299.

<sup>122</sup> *Attalla v State of NSW* [2018] NSWDC 190, [34]-[43].

<sup>123</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>124</sup> *Attalla v State of NSW* [2018] NSWDC 190, [27].



said that the main crimes she came across at that corner would be prostitution and drugs, and other 'street crimes such as possessing implements to break into houses or cars'.<sup>125</sup>

Judge Taylor held that the location of Mr Attalla:

may be a matter that could, with other relevant matters, form the basis for a reasonable suspicion, but it is plainly insufficient by itself...The location did not suggest Mr Attalla to be possessing prohibited drugs any more than it suggested that Mr Attalla was engaged in prostitution or house-breaking, matters no officer suspected.<sup>126</sup>

These comments suggest that the location of a person in a 'high crime' area or event may legitimately form part of the basis for a reasonable suspicion for a search under s 21 of LEPR, but will not be sufficient to justify a search on its own. As Dr Grewcock and Dr Sentas in their August 2019 research paper *Rethinking Strip Searches by NSW Police* have commented, 'reasonable suspicion must be particular to the person and the specific factual context'.<sup>127</sup>

### 3.3.4 Officer conducting the search must hold the requisite suspicion

It is the searching officer who must hold the relevant suspicion on reasonable grounds for the search to be lawful, even if that officer is conducting a strip search at the direction of another officer. This can become an issue when the officer directing the searching officer only passes on limited information to the latter when giving the direction.

In Operation Sandbridge, the Commission investigated the strip search of a man at the Kings Cross Police Station. The man had been arrested in the street by an officer, SAN1, who searched him at the time but found nothing on him. He was then taken to the police station where Officer SAN1 directed two police officers, one of whom was SAN4, to strip search the man. The Commission found that:

Officer SAN4 had no proper basis for conducting the search ... Officer SAN1 had conveyed only that she believed he 'might have had something' but not the basis for that belief and it is clear that Officer SAN4 had no independent suspicion, let alone one based on reasonable grounds, that a strip search was necessary...his conduct of the strip search at Officer SAN1's direction was not, as he should have known, authorised by his LEPR powers.<sup>128</sup>

The NSWPF Person Search Manual and the Custody SOPs now make clear to officers that:

The officer who undertakes the search must hold the required state of mind. For example, where a male officer asks a female officer to search a female, the male officer must give the female officer enough information for her to independently form the required state of mind.<sup>129</sup>

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<sup>125</sup> *Attalla v State of NSW* [2018] NSWDC 190, [28].

<sup>126</sup> *Attalla v State of NSW* [2018] NSWDC 190, [42].

<sup>127</sup> Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police*, August 2019, p. 14.

<sup>128</sup> Law Enforcement Conduct Commission, *Operation Sandbridge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.17.

<sup>129</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 4; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications and Security Command, November 2020, p 20.



### 3.4 Strip search is necessary for purposes of search

Even if an officer is satisfied that the threshold requirements for a general search have been satisfied, that officer cannot strip search the person unless the officer also suspects on reasonable grounds that the strip search is **necessary** for the purposes of the search (s 31 LEPPRA).

This is a distinct and additional requirement to the officer having reasonable grounds to suspect that a search power has been triggered. The officer must reasonably suspect that he or she needs to conduct a strip search, as opposed to just a general search, in order to achieve the objective of the particular search. The suspicion must also be specific as to the particular items of clothing to be moved or removed during the search. A strip search must not involve the removal of more clothes, nor involve more visual inspection, than the officer believes on reasonable grounds to be reasonably necessary for the search.<sup>130</sup> The officer must therefore be able to justify the necessity of removing or moving each of the items of clothing that are moved or removed during the search.

If, for example, an officer is relying upon the search power in s 21, before conducting a strip search which involves asking the person to remove their jeans, the officer must have reasonable grounds for suspecting:

- that the person is in possession of one of the items for which the officer is permitted to search under s 21, **and**
- that the particular item he or she suspects the person has in their possession is located either in their jeans, or on their body under their jeans, and therefore it is necessary to ask the person to move/remove their jeans in order to retrieve that item.

In Operation Gennaker, young person GEN13C was indicated by a drug detection dog, and was subsequently asked to remove his pants and underpants.<sup>131</sup> The evidence in the searching officer GEN9's records as to the reason GEN13C was searched was that GEN13C's 'enlarged pupils' and 'shaky' presentation<sup>132</sup> founded his suspicion.<sup>133</sup> In his experience, these were signs of drug affectedness.<sup>134</sup> The Commission was satisfied that these observed symptoms were sufficient to establish a reasonable belief as to a general search, but did not amount to reasonable grounds to remove GEN13C's pants and underwear.<sup>135</sup> The Commission was not satisfied that the searching officer believed, on reasonable grounds, that the removal of both GEN13C's pants and underwear, or visual inspection of the area under his testicles, was reasonably necessary for the purposes of the search of GEN13C.<sup>136</sup>

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<sup>130</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(5) and (6).

<sup>131</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, paras 3.43-3.44.

<sup>132</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, T 285 line 35-36.

<sup>133</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, T 289 line 14.

<sup>134</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, T 285 line 39-T 286 line 2; T 303 lines 13-18.

<sup>135</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.12.

<sup>136</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.13.

### 3.4.1 Suspicion based on general information about criminal behaviour not sufficient justification

The use of the word ‘necessary’ in s 31 means it is not enough that the officer suspects that it would be **prudent** to conduct a strip search of the person, for example to just check they are not in possession of anything prohibited or dangerous.<sup>137</sup> Merely prudential strip searches, whether in the field or in the police station, are unlawful.

For example, it would not be enough for an officer merely to rely on their general experience or understanding that patrons at music festivals conceal drugs within their internal cavities. There must be reason for the officer to suspect that the individual they intend to search has in fact done so. As the Commission stated in Operation Brugge:

Officers who gave evidence at the public examination referred to their experience or expectation that some music festival patrons will conceal drugs within their internal cavities. A general belief or expectation cannot amount to reasonable grounds that a strip search is necessary for the purposes of a particular search as is required by s 31(b) of LEPR.<sup>138</sup>

This is supported by the comments of the District Court in *Attalla* that a person’s presence in a location in which there is a high prevalence of particular types of crime **may** be a matter which **could** form the basis for a reasonable suspicion, but it would be ‘plainly insufficient’ in itself.<sup>139</sup> The fact that certain criminal behaviour has been committed in an area, or at an event, is not, objectively, a sufficient basis on which to conclude that a particular individual had engaged in that behaviour; the reasonable suspicion must be based on information particular to the individual.

In Operation Gennaker the young person GEN14C was strip searched after he had been seen adjusting a concealed bum bag in the entry line to the Festival. He had not been indicated by a drug detection dog, and he removed the bum bag, provided it to police, explained its innocent purpose and denied having any drugs on him. He was nonetheless strip searched, involving him being required to remove all his clothes and being asked to squat and cough.<sup>140</sup> Officer GEN12 gave evidence that during a strip search he would ask a person to lift his testicles and to then ‘squat and cough’<sup>141</sup> because ‘it’s just from experience that people secrete items under their testicles or in their bum cheeks or anus.’<sup>142</sup>

The Commission found that the fact that there was a concealed bum bag, combined with GEN12’s ‘experience’ that people may secrete items in that area, did not amount

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<sup>137</sup> If the contrary interpretation had been Parliament’s intent, the word prudent would have been used in s 31 (cf. s 27 of LEPR).

<sup>138</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.17.

<sup>139</sup> *Attalla v State of NSW* [2018] NSWDC 190, [42].

<sup>140</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.69 and para 5.15.

<sup>141</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, T 402 line 20.

<sup>142</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, T 402 line 25; Law Enforcement Conduct Commission *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.16.

to reasonable grounds that a strip search was necessary for the purposes of the search. The Commission was not satisfied that GEN12 believed, on reasonable grounds, that the removal of all of GEN14C's clothing was reasonably necessary for the purposes of the search of GEN14C.<sup>143</sup>

### 3.4.2 Should a general search be conducted prior to a strip search?

The requirement that an officer suspect on reasonable grounds that a strip search is necessary for the purposes of the search must be read alongside the requirement in s 32(5) that an officer must conduct the least invasive kind of search practicable in the circumstances. Together, the effect of these two requirements is that in practice an officer will generally be required to complete a general search of a person before conducting a strip search.

In *Attalla*, Judge Taylor held that s 32(5) will be breached when the officer responsible for a strip search does not have a satisfactory explanation as to why an ordinary [i.e. general] search was not first undertaken.<sup>144</sup>

In *Fromberg* Judge Scotting noted that the officers did not conduct a frisk search of Mr Fromberg's lower body (on the outside of his jeans) prior to strip searching him. The strip search was unlawful because '[a]t that point in time, there was no evidence that the officer had the requisite suspicion to conduct a strip search and it would not have been reasonable for him to hold that suspicion.'<sup>145</sup> His Honour held that:

... at no time did the officer conduct a frisk search of the appellant's lower body, which was the least invasive type of search available and he thereby failed to comply with section 32(5) LEPRA. If the officer had performed a frisk search of that area, it is likely that he would have detected the drugs and this may have amounted to the reasonable suspicion to conduct a strip search.<sup>146</sup>

Judge Scotting's comments reveal the connection between the necessity requirement in s 31 and s 32(5). They demonstrate that it will be difficult for an officer to satisfy a court that he or she reasonably suspected that a strip search was necessary if the officer did not do a less invasive search of the relevant area first.

The Commission's findings in Operation Mainz illustrate the benefits of conducting a thorough general search before initiating a strip search. MAI5, a 16 year old Aboriginal boy, had placed a foil containing cannabis into the front pocket of his shorts. The officer who witnessed this believed he had placed it down the back of his pants. The officer only conducted a pat down search of the back of MAI5's pants, not the front, before pulling out his pants and looking inside. Another officer also did not pat MAI5 down before strip searching him. The Commission held that both these strip searches breached s 32(5), and pointed out that had either officer 'run their hands over the *front* of MAI5's shorts, as allowed by s 30, they would most likely have found the foil'.<sup>147</sup>

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<sup>143</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, paras 5.17-5.18.

<sup>144</sup> *Attalla v State of NSW* [2018] NSWDC 190 [99] - [100].

<sup>145</sup> *Fromberg v R* [2017] NSWDC 259, [38].

<sup>146</sup> *Fromberg v R* [2017] NSWDC 259, [40].

<sup>147</sup> Law Enforcement Conduct Commission, *Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 4.5.

The Commission found in Operation Grasmoor that a strip search of a young Aboriginal male was not justified under s 31 on the basis of the officer's belief that the young person may have had a concealed knife, because if he had such a knife, it would have been discovered by a pat down search, which the officer had not done.

Both the Person Search Manual and the Custody SOPs now direct officers under the heading 'When can a person be strip searched?' that 'Police can never undertake strip searches as a matter of course. Police must always be able to justify each decision to strip search'. The documents then set out the requirements in s 31.<sup>148</sup> Both the Person Search Manual and the Custody SOPs state that 'There is no need to start with a person search before moving to the strip search, provided a strip search is justified in the circumstances'.<sup>149</sup> The Commission disagrees with this.

As demonstrated by *Attalla* and *Fromberg*, officers who proceed straight to conducting a strip search without first conducting a general search run the real risk of breaching both s 31 and s 32(5). The latter provision, requiring that the search carried out 'should be the least invasive kind of search practicable in the circumstances' is emphasised in the Custody SOPs but not the Person Search Manual.<sup>150</sup>

The NSWPF submitted that the reference to 'least invasive kind of search' in section 32 of LEPR:

...applies to the type of search that has been deemed appropriate. In other words, if an officer has properly decided to conduct a strip search, he or she need not have conducted a general search first, but, that officer must conduct the strip search in the least invasive way possible.<sup>151</sup>

When LEPR was first introduced in 2002, during the Second Reading speech the Attorney General discussed the concept of 'least invasive kind of search' in the context of the three tiers of search types which were defined in LEPR when that legislation first commenced – 'frisk', 'ordinary' and 'strip' searches.<sup>152</sup> This tends to support the interpretation preferred by the Commission that 'least invasive kind of search' refers to the distinct types of searches available under LEPR. The NSW District Court adopted this interpretation of s 32(5) in both *Atalla* and *Fromberg*.

However, the interpretation suggested by the NSWPF may be available, either in addition or in the alternative. Accordingly, the Commission suggests that should Parliament amend LEPR to clarify the strip search provisions, the meaning of 'least invasive kind of search' should be made clearer.

The NSWPF submission went on to state:

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<sup>148</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 7; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 21.

<sup>149</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 6.

<sup>150</sup> NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 19. This requirement appears in the list of 'Privacy and dignity rules for all person searches' in the back of the Person Search Manual, but is not mentioned in the body of the document.

<sup>151</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>152</sup> New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, p 4847 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

The practical effect is: if a general search would have sufficed then, yes, it is unreasonable to proceed straight to a strip search, but to say an officer can never proceed straight to a strip search misunderstands the legislation. ... in any event, recommendation [4] asserts a position with which the NSWPF agrees and which is clearly reflected in the existing [Person Search Manual]. There is, therefore, no basis nor need for it.<sup>153</sup>

Fundamentally, the NSWPF and the Commission agree that in circumstances where a general search would be sufficient for the purpose of the search, it is not appropriate for an officer to proceed straight to a strip search.

One of the key concerns of the Commission throughout the Inquiry has been the question of how well police officers understand and record their reasoning against the various threshold requirements for a strip search. In particular, the Commission has been concerned by examples which demonstrate officers rolling the decision making process into one step rather than stepping through each element of the thresholds before determining to conduct a strip search. As such, the Commission remains of the view that the Person Search Manual should more clearly explain to officers how to go through these steps.

The Commission recommends that the NSWPF amend the Person Search Manual and the Custody SOPs to advise officers that a strip search should not be considered unless the officer has reasonable grounds to suspect that a general search would not be sufficient to achieve the particular purpose of the search (for example, if a person admitted they were carrying drugs inside their bra). Adopting this approach would help officers comply with the threshold requirement of necessity for a strip search, and the requirement for the least invasive kind of search practicable.

The Person Search Manual should also be amended to emphasise in the body of that Manual the requirement in s 32(5) of LEPR, in the same way it is emphasised in the Custody SOPs.

**Recommendation 4:** The NSWPF should amend the Person Search Manual and the Charge Room and Custody Management SOPs to:

- (a) advise officers that a strip search (as opposed to a general search) should not be considered unless the officer has reasonable grounds to suspect that a general search would not be sufficient to achieve the particular purpose of the search; and
- (b) emphasise in the Person Search Manual the requirement in s 32(5) that an officer 'must conduct the least invasive kind of search practicable in the circumstances'.

### 3.4.3 When will it be necessary to conduct a strip search of a person in custody?

Section 28A of LEPR gives police the power to search a person who is in lawful custody after arrest. If the officer intends to strip search the person in custody in reliance on s 28A, s 31(1)(a) requires that the officer must suspect on reasonable

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<sup>153</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

grounds that the strip search is ‘necessary for the purposes of the search’.<sup>154</sup> Section 28A does not specify what the purposes of a search are if conducted under that section. Previous reviews of LEPR have linked the power to search a person in custody with the duty of care police owe to persons in the custody area, including police.<sup>155</sup>

The new NSWPF Custody SOPs and Person Search Manual direct officers that the purpose of searching a person in lawful custody under s 28A is ‘to ensure the safety of police, the person in custody and other people in custody at the time’.<sup>156</sup>

The requirement in s 31(b) that an officer reasonably suspects that a strip search of a person in custody is necessary means that police are prohibited from strip searching persons in custody as a matter of routine. As the Commission stated in Operation Karuka: ‘[t]he approach that all prisoners might possibly be concealing any of the specified items on their persons justifies a strip search is plainly mistaken: there must be a reasonable suspicion in the particular circumstances that a concealment has occurred’.<sup>157</sup>

The Commission noted in its *Review of NSW Police Force Standard Operating Procedures for strip searches in custody* that:

Reasonable grounds to suspect that a strip search is necessary could only be reached after consideration of the circumstances of the person’s arrest, including any searches already undertaken, the person’s behaviour, or credible information about their past behaviour in custody that makes it reasonable to suspect they may be carrying any of the things listed in ss 27(1) and (2) – that is dangerous items, things that may be used to escape from custody, or things related to an offence.<sup>158</sup>

As part of its oversight function, the Commission monitored and reviewed the NSWPF’s investigation into the alleged unlawful arrest and strip search of two protesters in 2017. The Commission tabled a report into this matter on 21 July 2020.<sup>159</sup> A central question in that matter was whether the relevant officers had reasonable grounds to suspect that the strip searches of the women in custody were necessary.

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<sup>154</sup> New South Wales, *Hansard*, Legislative Assembly, 15 May 2014, p 48 (Brad Hazzard, Attorney General, and Minister for Justice) (‘Item [22] [of the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*] retains the existing test in section 31 for conducting a strip search in the field but amends the test applicable at a police station in accordance with a recommendation of the Ombudsman’); NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, 2009, p. 63 (recommendation 5).

<sup>155</sup> See NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, 2009, p 61-62 and Department of Attorney General and Justice and Ministry for Police and Emergency Services (NSW), *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), 2013, p. 33.

<sup>156</sup> NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, November 2020, p. 19; NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 10.

<sup>157</sup> Law Enforcement Conduct Commission, *Operation Karuka, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 7.2.

<sup>158</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 12.

<sup>159</sup> Law Enforcement Conduct Commission, *Report on the Monitoring of NSW Police Force Misconduct Matter Investigation – LMI1703786: Report pursuant to s 138 of the Law Enforcement Conduct Commission Act 2016*, July 2020.



## Case study 1: Strip searches following a protest

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In November 2017 two women who participated in a protest in Sydney were arrested and conveyed to a Sydney metropolitan police station. The reasons for their arrest were unclear, but the arresting officer later gave evidence that their arrests related to obstructing traffic and breach of the peace.

The Mobile Supervisor at the Local Area Command decided it was necessary for the women to be strip searched because they had come from a protest which he believed to be violent. He had heard that a police vehicle was returning to the police station with two females in the back, that the protestors had become aggressive and that people were trying to stop this police vehicle. He had been advised that the two women had been involved in the protests, they were arrested for 'obstructing police or something like that', their identities had not been confirmed and they had not been searched before entering the police vehicle.

The women were taken in turn to a cell and strip searched. One woman was required to remove all her clothes in stages. The other woman was asked to completely disrobe the top half and remove her pants. She kept her underpants on and a female officer ran her fingers around the inside of the waistband. It was decided there was insufficient evidence to proceed with charges, and after being strip searched the women were released.

Two complaints were made to the NSWPF about the arrest and strip search of the women. The initial investigation by police found the allegations that the arrests and strip searches were unlawful to be not sustained, on the basis that the Mobile Supervisor had sufficient reasons to order the strip searches for the safety of the two women and/or others in custody.

The Commission reviewed the investigation, identified deficiencies and requested a further investigation. The Commission noted that it was not apparent how the strip searches of the women were justified, and that there appeared to be no consideration by either the searching officers or the Mobile Supervisor whether a less invasive search would have sufficed. The Commission indicated that sustained findings should be made in relation to those officers and the Mobile Supervisor.

The NSWPF agreed to the further investigation, and ultimately, the NSWPF made sustained findings against the Mobile Supervisor and the searching officers for failing to comply with LEPR in relation to the strip searches. The Mobile Supervisor was served a Commanders' Warning Notice and required to undergo a face to face training session on LEPR strip search requirements.

The Person Search Manual and Custody SOPs both instruct that '[p]olice can never undertake strip searches as a matter of course'.<sup>160</sup> They provide the following guidance to officers about when they can strip search a person in custody:

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<sup>160</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p 7; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 21.



If a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search (that purpose being to ensure the safety of police and people in custody), they can carry out a strip search.

However, police should ensure that the type of search carried out, and the extent to which it is carried out, is proportionate to the risk posed. For example, a person with no criminal history who is in custody having been arrested for the purpose of a breath analysis is unlikely to pose the same threat as a person known to be violent.<sup>161</sup>

Both documents also state that police should ‘consider if there has been a previous search, the type of search that was carried out and the result of that search, when determining whether a search is necessary’.<sup>162</sup> The Custody SOPs also emphasise that ‘the search carried out **should be the least invasive kind of search practicable in the circumstances**’.<sup>163</sup>

In July 2019 the Commission recommended that the NSWPF should clarify the role of the custody manager in deciding whether a general search or strip search is necessary in the circumstances.<sup>164</sup> The Custody SOPs now make clear that while an officer must advise the Custody Manager of the intention to strip search a person in custody prior to undertaking the search, the ‘decision to search remains with the searching officers’ and therefore ‘[i]t is the searching officer who must hold the state of mind required by LEPPRA to search’.<sup>165</sup>

### 3.5 Seriousness and urgency - strip searches in the field

To strip search a person ‘in the field’ (i.e. in a place other than a police station or place of detention) an officer must suspect on reasonable grounds, not only that the strip search is necessary for the purposes of the search, but also that ‘the seriousness and urgency of the circumstances make the strip search necessary’.<sup>166</sup>

LEPPRA does not provide any guidance as to what sort of circumstances will meet this additional threshold, and there are no cases which have expressly considered the meaning of this phrase. Although ‘seriousness and urgency’ of circumstances is a threshold requirement for the exercise of statutory search powers in other jurisdictions, those terms are also not defined in those statutes.<sup>167</sup>

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<sup>161</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 10; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 20.

<sup>162</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 4; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 20.

<sup>163</sup> NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 19 (emphasis in original).

<sup>164</sup> Law Enforcement Conduct Commission *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, pp 31-32.

<sup>165</sup> NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 20.

<sup>166</sup> See s 31(b) LEPPRA. This requirement originally also applied to strip searches of persons in custody at a police station or other place of detention, but was removed following a recommendation from the NSW Ombudsman: see New South Wales, *Hansard*, Legislative Assembly, 15 May 2014, p. 48 (Brad Hazzard, Attorney General, and Minister for Justice); NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002* (2009) p. 63 (recommendation 5).

<sup>167</sup> *Control of Weapons Act 1990* (VIC) sch 1 cl 7; *Police Powers (Public Safety) Act 2005* (TAS) s 22; *Police Administration Act 1978* (NT) s 119; *Drugs of Dependence Act 1989* (ACT) s 188.

In both Operation Brugge and Operation Gennaker the Commission found that the officers conducting strip searches at musical festivals had not been provided sufficient guidance as to what circumstances might satisfy the seriousness and urgency requirement.<sup>168</sup>

In Operation Brugge officers were asked what circumstances they considered would satisfy the seriousness and urgency requirement and therefore justify a strip search. Three officers mentioned ingestion or internal concealment of drugs:

- Officer BR1, a Chief Inspector, offered the examples of police having formed a view that the person ‘had ingested something’ or ‘ingested something or had something in them’ that had broken.<sup>169</sup>
- Officer BR3 gave evidence that, for the patrons he searched, the source of the ‘urgency’ was his fear for the safety of the patron stemming from items that they may have secreted in their cavities.<sup>170</sup>
- Officer BR4 stated that the only matter she imagined might have presented to her as urgent circumstances justifying the strip search of BRC was a belief that BRC had concealed or inserted drugs inside her, and that she was therefore at risk of harm.<sup>171</sup> When asked when she would form such a suspicion, she responded ‘an admission, usually’.<sup>172</sup>

Officer BR1 also suggested that the prevalence of young persons acting as ‘mules’, carrying a high volume of drugs for themselves and/or others,<sup>173</sup> could be a circumstance that would satisfy the ‘seriousness and urgency’ requirement.<sup>174</sup>

There are significant problems with these interpretations of the threshold requirement for a strip search in s 31(b). A mere fear for the safety of the patron will not be sufficient grounds for a search unless there is a reasonable basis for it, and a general experience or understanding of the criminal behaviour of attendees at other events is not of itself a reasonable basis to form a suspicion that a particular person has engaged in the same behaviour.

Even if an officer has formed a reasonable suspicion that a person has ingested or internally secreted drugs, this is not a logical basis for an officer to conduct a strip

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<sup>168</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.26; Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.29.

<sup>169</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 21 October 2019, T 57 lines 24-28; Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.50.

<sup>170</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 125 lines 2-5; Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.74.

<sup>171</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October 2019, T 211 lines 21-28 and T 212 line 12.

<sup>172</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October 2019, T 211 lines 30-32.

<sup>173</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 21 October 2019, T 61 lines 13-32.

<sup>174</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.51.

search of the person, as a strip search would not enable the officer to remove the drugs in either case. LEPRa explicitly prohibits officers from searching a person's body cavities.<sup>175</sup> If the officer has a reasonable suspicion that a person has drugs secreted inside them and the casing for the drugs has, or could, burst, these safety concerns can only be addressed by taking the person to a hospital. Concerns that cannot be addressed by conducting a strip search cannot, as a matter of logic, 'make the strip search necessary' under s 31(b). Police responses to persons suspected of concealing drugs internally are discussed further in 5.7.

In Operation Brugge the Commission concluded that the strip search of BRC was not justified as neither of the relevant officers held a suspicion on reasonable grounds that a strip search was necessary for the purposes of the search and that the seriousness and urgency of the circumstances made the strip search necessary.<sup>176</sup>

### 3.5.1 Risk of concealment or destruction of evidence

The risk of destruction or concealment of evidence may satisfy the seriousness and urgency requirement for a strip search to be conducted in the field.<sup>177</sup> However this must be a real (rather than a speculative) risk that is not, or cannot be, effectively mitigated by other measures.

In Operation Mainz Sergeant MAI1 gave evidence that he had conducted a strip search of MAI5, an Aboriginal boy who he was aware was under 18 years old, and he did so without one of his parents being present because he 'wanted to stop the loss of evidence' while MAI5 was in transit to the police station.<sup>178</sup> The Commission considered that any risk of MAI5 concealing the foil of cannabis while in transit could have been addressed by placing him in the back of the police sedan with an officer next to him to watch him.<sup>179</sup> However MAI5 was placed in the back of a caged truck. Even then, Sergeant MAI1 conceded that the officers in the caged truck could have been directed to turn around and watch MAI5 while he was in transit to ensure he did not conceal evidence.<sup>180</sup>

The Commission ultimately found that s 33(3) and (3A) (and other sections) of LEPRa had been breached.<sup>181</sup> While the focus in Operation Mainz was a different section of LEPRa, the Commission's analysis demonstrated that a suspicion by an officer that a strip search was necessary because of a risk of evidence being

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<sup>175</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(4).

<sup>176</sup> *Law Enforcement Conduct Commission Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.9.

<sup>177</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October 2019, T 329 lines 8-26; *Law Enforcement Conduct Commission Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.117.

<sup>178</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, T 9; *Law Enforcement Conduct Commission Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.15.

<sup>179</sup> *Law Enforcement Conduct Commission, Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 4.5(e).

<sup>180</sup> *Law Enforcement Conduct Commission, Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.16.

<sup>181</sup> *Law Enforcement Conduct Commission, Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 4.5. Section 33(3A) of LEPRa relevantly provides that the rule in s 33(3) that a strip search of a child must be conducted in the presence of a parent, guardian or support person does not apply if the officer reasonably suspects that 'delaying the search is likely to result in evidence being concealed'.

concealed will not be considered reasonable if there were measures that the officer could reasonably take to mitigate that risk.

The NSWPF submitted that ‘there is no such statutory or common law requirement that a police officer must refrain from a strip search where that risk can be mitigated by other measures.’<sup>182</sup> The Commission is of the view that the additional requirement that the ‘seriousness and urgency of the circumstances make the strip search necessary’ has the practical effect of requiring officers to consider whether an alternative to strip searching is practicable in the circumstances.

The NSWPF further submitted that there may be practical limitations to considering alternatives to a strip search in the field, for example ‘officers do not always work in pairs, an officer may not be able to maintain vision, a prisoner may deliberately obscure vision and objects may be present which present risk’.<sup>183</sup> The Commission accepts there may be practical impediments. However, this does not obviate the need for officers to consider, in the particular circumstances in which they find themselves, whether any such impediments exist which would mean that the circumstances were sufficiently serious and urgent such that a strip search in the field was necessary.

### 3.5.2 Policy guidance about ‘seriousness and urgency’

The Person Search Manual currently does not provide any guidance to officers about what kind of circumstances might be sufficiently serious and urgent to make a strip search necessary under s 31(b) of LEPR.

The Person Search Manual does however emphasise under the question ‘Can police search body cavities if they suspect something is secreted internally?’ that police ‘must never conduct a strip search by searching the person’s body cavities’, and that ‘[w]here police suspect that a person has swallowed drugs or anything else that may be harmful to ingest, they should immediately arrange for the person to receive medical attention.’<sup>184</sup> This at least indirectly guides officers that medical treatment, rather than a strip search, is the appropriate response to a concern that a person has ingested drugs. The direction regarding medical treatment is further discussed at 5.7 below.

Some of the draft operational documents for music festivals recently developed by the NSWPF, including the Music Festival Guidelines, provide guidance to officers that general intelligence about what has happened at the event in previous years can be used as **part** of the reasonable grounds for concluding that the seriousness and urgency of the circumstances makes a strip search necessary, including charges for drug offences at festivals of the same type, ejections for intoxication, the number of people who required medical treatment or hospitalisation, and the number of overdoses.<sup>185</sup>

The Commission is concerned that such guidance may appear to suggest that officers may conduct a strip search as a matter of routine based on general suspicion

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<sup>182</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>183</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>184</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 10.

<sup>185</sup> NSW Police Force *Music Festival Guidelines*, Public Transport and Public Safety Command,[draft], pp 10-11 (5.2)

about the behaviour of people who attend that type of event, when the threshold requirements in s 31 have not been met.

The suspicion required under s 31 relates to the necessity to strip search the **particular individual**. General information about the prevalence of drug offences and drug taking behaviour at previous music festivals, and the resulting medical issues, is not of itself a reasonable basis on which to suspect that a strip search of a particular individual at the present festival is necessary.

**Recommendation 5:** The NSWPF should revise the operational documents for music festivals to make clear to officers that general intelligence about drug use/offences and medical treatments and transports at previous events is not by itself sufficient to justify a suspicion that the seriousness and urgency of the circumstances make a strip search of an individual necessary.

### 3.5.2.1 Draft guidance regarding seriousness and urgency

In its report on Operation Brugge the Commission advised that:

The NSWPF should take a policy position and communicate it to operational staff regarding the circumstances which will not satisfy the *'seriousness and urgency'* test in s 31(b) and the exception in s 33(3A) of LEPR. Any such approach would, of course, need to preserve due discretion in the individual officer, who must form his or her view based on the exigencies of the particular situation. Such a measure would, however, increase consistency in the application of LEPR and relieve junior staff from the burden of making decisions which, with only minor variables, regularly recur at gatherings such as the Festival. These include positive drug dog indications, nervous or anxious behaviour by patrons upon sighting a drug dog, admissions or denials by a patron in respect of whom a dog has given a positive indication that they are carrying any drugs, and so on.<sup>186</sup>

The NSWPF has advised the Commission that the Person Search Manual is being reviewed and the following information will be included in an amended version:

***What constitutes 'serious and urgent' for the purpose of strip searching in the field?***

**Will you be conveying the person to a police station?**

- **If the person will not be conveyed to a police station, do you have reasonable grounds to suspect that the consequences of not strip searching the person would be serious? For example:**

- Do you have reasonable grounds to suspect that the person has an item on them, unable to be located through a pat-down search, which may cause a serious risk to their welfare or the welfare of someone else (eg: police, public) in the immediate future?

- Do you have reasonable grounds to suspect that the person may have evidence of a serious offence on them, unable to be located through a pat-down search, which they may dispose of once they are no longer in police presence?

- **If an arrested person is to be conveyed to a police station, can the strip search wait until the person is at the police station? For example:**

- Do you have reasonable grounds to suspect that the person has an item on them, unable to be located through a pat-down search, which may cause a serious risk to their welfare or the welfare of someone else (eg: police, public) in the immediate future?

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<sup>186</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 7.2.

- Do you have reasonable grounds to suspect that the person may have evidence on them, unable to be located through a pat-down search, which they may dispose of before or while being conveyed?
- Is there any other reason that the person must be strip-searched now?<sup>187</sup>

The inclusion of this content ('the draft guidance') in the Person Search Manual would be a significant improvement. That draft guidance makes clear that the officer must have reasonable grounds to suspect that the circumstances of the particular individual are sufficiently serious and urgent to justify a strip search in the field. It requires officers to consider if a general search would be sufficient, and appropriately advises the officer to consider safety and disposal of evidence. However, to address the issues raised by the officer's evidence in Operation Brugge regarding interpretation of the seriousness and urgency requirement, some further detail is required.

First, in relation to welfare concerns, it is implicit from the references in the draft guidance to items the person has 'on them' that concerns about items the person may have **inside them** (ingested or internally secreted) are not relevant to the decision to strip search. Concern about items being inside people was the most common reason given by officers in Operation Brugge for believing that the seriousness and urgency of the circumstances justified a strip search. The Person Search Manual should therefore give explicit guidance that concerns about serious risks to welfare based on suspicion of ingestion or internal concealment of drugs cannot justify a strip search. Instead, as the Person Search Manual already mentions, medical attention should be sought.

Secondly, in advising officers to consider the risk that evidence of a serious offence may be disposed of, the draft guidance should direct officers to consider if steps other than strip searching the person could adequately mitigate that risk, for example, whether the person can be watched by an officer to ensure they have no opportunity to dispose of evidence.

Thirdly, the draft guidance does not identify circumstances which frequently occur at music festivals (and other places) which would **not** satisfy the seriousness and urgency test in s 31(b) of LEPPRA. In Operation Brugge, BRC was strip searched after she was indicated by a drug detection dog, even though she denied possessing drugs and no officers recorded any symptoms exhibited by her which suggested drug affectedness.<sup>188</sup> An officer's reasonable suspicion in such circumstances may satisfy the threshold for the exercise of power in s 21 to conduct a (general) search for drugs, but would not of itself be sufficient to meet the test in s 31(b). The 'seriousness and urgency' requirement for a strip search is clearly intended to be additional to that. As Dr Grewcock and Dr Sentas note, under LEPPRA a strip search in the field cannot be justified:

... on the basis that despite an ordinary [ie general] search not detecting any items, the officer still maintains a reasonable suspicion that the person is in possession of

<sup>187</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020 para 9.18-9.20 and Appendix F

<sup>188</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.10.



drugs. Serious and urgent circumstances must exist in addition to the reasonable suspicion of possession of a relevant item, not as a default rationale for continuing to a strip search because nothing initially is found.<sup>189</sup>

**Recommendation 6:** The NSWPF should ensure that guidance on the seriousness and urgency requirement in s 31(b) for strip searches in the field is included in the Person Search Manual, and that guidance:

- (a) makes clear that concerns about serious risks to welfare based on suspicion of ingestion or internal concealment of drugs cannot justify a strip search;
- (b) advises officers to consider if steps other than strip searching the person could adequately mitigate the risk of evidence being disposed of; and
- (c) identifies circumstances which frequently occur which would not be sufficient to satisfy the seriousness and urgency test in s 31(b) of LEPR.<sup>190</sup>

The term ‘serious offence’ in the draft guidance also requires further consideration and definition. This is discussed in 5.4.1.

The NSWPF advised the Commission that it would consider including the information specified above in Recommendation 6(a) in the Person Search Manual to make clear that what may be considered serious and urgent from a welfare perspective does not necessarily justify a strip search.<sup>191</sup> With regard to recommendation 6(c), the NSWPF advised the Commission that ‘it is dangerous to be so prescriptive’ given the variety of circumstances in which officers may find themselves, and that ‘listing some, but not all circumstances which would not be sufficient to satisfy the seriousness and urgency test in s 31(b) could lead to error and over-reliance on the examples provided’.<sup>192</sup> The Commission remains of the view that it is important that officers be given some assistance in understanding the types of incidents which would not, on their face, satisfy the seriousness and urgency requirements for strip searches in the field. This would not replace officer discretion, but would be valuable for increasing the consistency with which officers consider their circumstances.

That said, there would be merit in Parliament considering whether the threshold of ‘seriousness and urgency’ could be clarified to resolve any ambiguity about the types of circumstances which would or would not fall within its ambit. As discussed in Chapter 5, suggestions have previously been made to the Government about how to clarify that threshold.

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<sup>189</sup> Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police*, August 2019, p. 19.

<sup>190</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 7.2.

<sup>191</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>192</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.



## 3.6 Search of genital area or breasts must be necessary for purposes of the search

Section 32(6) provides:

The police officer must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.

The effect of this provision is that a reasonable suspicion that a strip search is necessary (per s 31) is insufficient justification for searching the person's genital area or breasts. The officer needs specific justification for why those intimate areas need to be searched. This is reinforced by the rule in s 33(6) that a strip search must not involve more visual inspection than the officer believes on reasonable grounds to be reasonably necessary for the purposes of the search.

The District Court confirmed in *Attalla* that the requirement in s 32(6) is a pre-requisite to searching the genital area or breasts which must be satisfied on the evidence.<sup>193</sup> Judge Taylor held that the officers who had searched Mr Attalla had breached LEPRA as neither of them gave evidence of a suspicion on reasonable grounds that it was necessary to search his genital area for the purposes of the search.<sup>194</sup>

It follows that a strip search should not routinely include inspection of the genitals or breasts. In Operation Brugge officer BR4 gave evidence that having a person squat so as to see whether they had anything inserted within their vagina or anus,<sup>195</sup> and bending down to see if something was protruding,<sup>196</sup> was part of her standard, strip searching procedure. The Commission commented that this necessarily meant officer BR4 could not have been turning her mind to the additional, necessary requirements under LEPRA in order to lawfully conduct strip searches in the way that she did.<sup>197</sup> The Commission concluded that in the case of the strip search of BRC, officer BR4 had in fact breached s 32(6) (and s 33(6)).<sup>198</sup>

## 3.7 Thresholds still apply to strip searches conducted 'by consent'

Section 34A provides that an officer may search a person with the person's consent if before carrying out the search the officer has (1) sought the person's consent and (2) provided the person with evidence he or she is a police officer (if not in uniform) and the officer's name and place of duty.

Section 29(2) provides that for searches conducted with consent:

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<sup>193</sup> *Attalla v State of NSW* [2018] NSWDC 190, [99].

<sup>194</sup> *Attalla v State of NSW* [2018] NSWDC 190, [99].

<sup>195</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 222 line 21 – T 223 line 13.

<sup>196</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, T 223 lines 15-41.

<sup>197</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.20.

<sup>198</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.14.

- all of the sections in Division 4 of LEPRA still apply to those searches;
- the ‘purpose of the search’ is the purpose for which the police officer obtained consent to search; and
- a general consent to the carrying out of a search is not consent to carry out a strip search unless the person consents to the carrying out of a strip search.

Division 4 of LEPRA contains ss 31-34. The effect of s 29(2) is that even if a person specifically consents to a strip search, the officer cannot strip search the person unless the officer satisfies all the threshold requirements in s 31. All the rules and safeguards for searches in ss 32, 33 and 34 will also apply to a search by consent, and therefore, if the officer intends to search a person’s genital area or breasts, he or she must still satisfy the requirement in s 32(6).

Section 34A was inserted into LEPRA to ensure that searches by consent had a legislative basis but also to ensure that the safeguards in LEPRA would apply to those searches.<sup>199</sup> The obtaining of a person’s consent to a strip search is therefore not a mechanism that enables an officer to avoid the requirements in ss 31-34.

If a person consents to a search under s 34A, the benefit for the officer from a legal perspective is that he or she is not confined to searching the person only for the purposes contained in by ss 21-28A. Section 29(2) provides that the ‘purpose of the search’ for a consensual search is whatever purpose the person consented to.

This is a technical question. Is the effect of a person giving consent to a search that the officer does not need to be able to satisfy the threshold requirements for the exercise of search powers in ss 21-28? The NSWPF obtained advice from the Solicitor General on this point. The Solicitor General preferred the view that an officer conducting a search by consent does not need to hold the state of mind required by s 21, s 22, s 23, s 27 or s 28 to conduct the search. This would mean that an officer can, pursuant to s 34A, conduct a general search by consent.

However, the Solicitor General advised that the thresholds for strip searches in s 31 **would** still apply to a search done with a person’s consent.<sup>200</sup> Therefore even if, as the Solicitor General advises, the threshold requirements in ss 21-28 do not apply to a consensual search (‘Threshold 1’ in the table at 3.1), this will make little difference to officers conducting strip searches in practice, as the threshold requirements in ss 31 and 32(6) (‘Threshold 2’ and ‘Threshold 3’ in the table) and the rules in ss 32-34 will still apply.

This means that, in effect, the legislation does not permit a strip search to be conducted ‘by consent’ without satisfaction of the legislative prerequisites. For example, an officer who has a person’s consent to conduct a strip search in the field will still need to have reasonable grounds for suspecting:

- that a strip search is necessary for the purposes of that search - that is, for suspecting that whatever they are looking for in the search (1) exists and (2) is

<sup>199</sup> Department of Attorney General and Justice and Ministry for Police and Emergency Services (NSW), *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), 2013, pp 27-29; New South Wales, *Hansard*, Legislative Assembly, 15 May 2014, p 45 and p 48 (Brad Hazzard, Attorney General, and Minister for Justice).

<sup>200</sup> Annexure A to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 20 January 2020.

located in an item of the person's clothing or on an area of the person's body that cannot be lawfully searched as part of a general search;

- that the seriousness and urgency of the circumstances make the strip search of the person necessary; and
- that it is necessary to search the person's genital area or breasts (if the officer intends to do so).

As all the rules and safeguards in ss 32-34 also apply to a strip search conducted with the person's consent, an officer conducting such a search will still under s 32(2) be required to inform the person whether they will be required to remove clothing during the search, and why it is necessary to remove the clothing. Also, it is implied from s 29(2)(a) that the officer will as a matter of practice need to tell the person the purpose of the search they want to conduct.

The NSWPF submission was that a strip search can be conducted by consent by virtue of s 29(2)(b), and 'such a search would be subject to the rules and safeguards imposed by Division 4' as stated above.<sup>201</sup>

The NSWPF should make clear to its officers that even if a person specifically gives their consent to be strip searched (as per s 29(2)(b)), the officer has no power to strip search the person unless all of the threshold requirements in ss 31 and 32(6) and the rules in ss 33 and 34 are complied with.

**Recommendation 7:** The NSWPF should instruct its officers (for example, in the Person Search Manual and Charge Room and Custody Management SOPs) that under LEPR, regardless of whether a person specifically consents to a strip search, the officer must ensure that all of the threshold requirements in s 31 and 32(6) are met, and the officer must still comply with all the rules and safeguards in ss 32-34.

### 3.8 Recording the basis for consideration of each threshold requirement

An issue that emerges from the Commission's investigations and the cases of *Attalla* and *Fromberg* is that if officers do not separately consider each of the different threshold requirements in LEPR before conducting a strip search, they risk acting unlawfully. One mechanism for encouraging officers to turn their minds to whether each relevant threshold has been met is to require that they record their justification against each threshold.

The Person Search Manual requires that police 'make a contemporaneous record of all person searches in their notebook, and electronically in COPS and/or the custody management record' and that those records 'should clearly set out the type of search carried out [i.e. general or strip] and the reason for the search'.<sup>202</sup> The Person Search Manual does not direct officers that they should record their justification against each of the threshold requirements set out in Table 6 above. However, the Person Search Manual does specifically provide that '[i]n the case of a strip search carried

<sup>201</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>202</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 5.

out in the field, the seriousness and urgency of the circumstances that made the strip search necessary must also be recorded.<sup>203</sup>

The Commission considers that officers should also be directed to record in their notebook and COPS why they decided that a strip search was necessary for the purposes of the search. If the officers did not conduct a general search first, they should be required to record their reasoning as to why they did not do so. Also, if a search of the person's genital area or breasts was conducted, the officer should record the specific justification for searching those areas, as required by s 32(6).

**Recommendation 8:** The NSWPF should require officers to include in their contemporaneous record for a strip search their reasons:

- (a) for suspecting that a strip search was necessary for the purposes of the search;
- (b) for not doing a general search first, if they did not do so; and
- (c) for searching a person's genital area or breasts (if they did so).

The NSWPF submitted that the Person Search Manual already requires police to record the reason for a search, which encompasses the elements set out in Recommendation 8. While the Commission notes that officers are required to record the reasons for strip searches, the Commission considers the guidance should explicitly require each of the elements described in recommendation 8. Such explicit guidance is likely to improve the nature of the records made by officers.

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<sup>203</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 5.

## 4. Use of force and requests to move body parts during a strip search

Over the course of the Inquiry, the Commission has observed many instances of police officers asking a person to bend over, squat, part their buttock cheeks or move their genitalia during a strip search to allow officers to conduct a visual inspection of the person's private parts. When the Inquiry commenced, although these practices appear to have been relatively common, there was nothing explicit in NSWPF policy or training which addressed whether or not officers could ask a person to do these things during a strip search, nor whether it was expected they do so and the circumstances in which it would be appropriate.

The NSWPF explicitly addressed this issue in the Person Search Manual and Custody SOPs introduced in August 2019, following the Commission's *Review of NSW Police Force custody Standard Operating Procedures for strip searches*.<sup>204</sup>

This chapter considers the practice of police requiring a person to squat or move their genitals during a strip search. It also considers whether it is lawful for police to physically force a person to squat or open their legs during a strip search, or even to remove a person's clothing during a strip search.

### 4.1 Police practice regarding requests to squat or move genitalia during strip searches

Despite the requirement that a person's genital area or breasts cannot be searched unless the officer suspects on reasonable grounds that this is necessary for the purpose of the search,<sup>205</sup> the Commission has encountered a number of matters in which police indicated their regular practice during a strip search was to ask a person to squat, bend over, part their buttocks or move their genitalia to allow police to conduct a visual inspection of those body parts during a strip search.

For example, in Operation Brugge, officer BR4 told the Commission that she believed she had the power to ask a person to touch their own intimate body parts in order to assist with a strip search and had done so in the past.<sup>206</sup> BR4 said she had not had any specific training as to that method<sup>207</sup> but had adopted that practice from the police handbook.<sup>208</sup> BR4 acknowledged that asking a person to bend over or squat

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<sup>204</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force custody Standard Operating Procedures for strip searches*, January 2020.

<sup>205</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 32(6).

<sup>206</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 28. See also Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October T 225 line 7.

<sup>207</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 28. See also Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October T 227 line 10.

<sup>208</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 28. See also Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October T 225 line 15.

and spread their intimate body parts was an extremely personal invasion and it would require 'a very good reason' to ask a person to do this. However, she also indicated that having a person squat during a strip search so she could see if there was anything protruding from their vagina or anus was part of her standard strip searching procedure.<sup>209</sup>

In Operation Gennaker, one of the searching officers advised the Commission that while he had not received specific training as to whether he was entitled to ask a person to manipulate their genitalia during the course of a search, he had assumed that it was lawful to do so.<sup>210</sup> Another officer who performed searching duties at the Lost City Music Festival in February 2019 told the Commission that asking a young person to lift his testicles and then 'squat and cough' was something he would require a patron to do during a search.<sup>211</sup> This officer had indicated his experience was that 'people secrete items under their testicles or in their bum cheeks or anus'. He was less clear about whether he was making a request, or whether a person was required to comply when asked to perform these actions during a strip search – although he did agree that a young person would be likely to believe they had no choice but to comply.<sup>212</sup>

In Operation Karuka, officers required a man searched while in police custody to squat a number of times, and when that did not allow the officers sufficient visual inspection of his genital area, they used force to hold him down while one officer inspected his anus.

The examples the Commission has encountered during the Inquiry, as well as examples highlighted in media<sup>213</sup> and other reports<sup>214</sup> suggest that the practice of police officers asking a person to squat – or squat and cough, bend over, part their buttocks and move their testicles to allow officers to visually inspect their genital area is common.

## 4.2 Legislative and policy guidance on whether it is appropriate to request a person to move their body parts during a strip search

At the time of the events examined in Operations Brugge, Gennaker and Karuka, there was no policy direction that explicitly stated that police officers were

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<sup>209</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 44. See also Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 24 October T228 line 3, T222 21-T223 line 13, and T T223 line 15-41.

<sup>210</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 26.

<sup>211</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 26. See also T4.12.19 P 402 L20.

<sup>212</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 26. See also Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, 4 December 2019, T403 line 39; and T 404 Line 7

<sup>213</sup> See for example: 9MSN, 'Made me drop, squat and cough: Class action brewing over NSW police strip searches', 27 May 2020; Angus Thompson, 'Don't strip search for drug possession: report urges law reform', *Sydney Morning Herald*, 22 August 2019.

<sup>214</sup> Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police*, August 2019.

empowered to ask a person to squat, bend over or move their genitalia during strip searches.

Since then, the NSWPF has clarified the guidance provided to officers about these practices. The Custody SOPs and Person Search Manual now contain the following instruction:

Officers can ask a person to do things to allow visual inspection such as, for example:

- (a) lift testicles
- (b) part buttock cheeks
- (c) spread fingers and toes
- (d) lift breasts
- (e) turn their body to face a different direction
- (f) open their mouth and shake their hair, or
- (g) squat.<sup>215</sup>

The Custody SOPs and Person Search Manual also contain the further proviso:

However, a police officer must not search the genital area of the person, or the breasts of a female or a transgender person who identifies as a female, *unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.*<sup>216</sup>

While this proviso essentially repeats the safeguard at s 32(6), the above listed actions go well beyond the LEPRA definition of a search or strip search.

In terms of what the legislation explicitly empowers an officer to require a person to do during a strip search, LEPRA only sets out the following:

- under s 21A and s 28(1), police are explicitly given a power to *require* a person to open his or her mouth to enable it to be searched, or shake or otherwise move their hair;
- s 30 gives a police officer power to '*require* a person to remove [certain items of outer clothing] ... but not, *except in the case of a strip search*, all of the person's clothes ...'; and
- s 32(2) obliges an officer, where it is reasonably practicable to do so, to inform the person being searched 'whether the person will be *required* to remove clothing during the search' (italics added).

Section 32(3) requires a searching officer to 'ask for the person's cooperation' when strip searching. This requirement applies to both general and strip searches.

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<sup>215</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 7; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 23.

<sup>216</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 7; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, Communications & Security Command, November 2020, p. 23.



#### 4.2.1 Differing views

There are a range of differing views about whether police are empowered to ask or require a person to perform certain actions during a strip search to facilitate the visual inspection of a person's body.

The NSWPF formed the position taken in the Person Search Manual following legal advice from the Solicitor General. That advice did not address the issue of whether police could require a person to perform such actions, or, whether a person is under a legal obligation to comply with a request to squat or move their genitalia, but did indicate police could make a request that a person did so.

An alternative position, and one expressed in the Commission's *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, is that police have no power to require a person to actively assist the search, particularly by moving testicles, buttock cheeks, breasts or squatting (although if a person were to resist or hinder the execution of the search this may be an offence under s 546C of the *Crimes Act 1900*).

This view is informed by an analysis of what LEPRA explicitly empowers police to do in the context of a strip search – as set out in ss 21A, 28 and 30 described above. Given that the legislation is explicit with regard to opening the mouth and shaking hair, but silent on the other actions listed in the Person Search Manual, and also given the invasiveness of the strip search powers, another reasonably open interpretation is that police cannot require a person to do things such as squat, move their testicles or buttock cheeks, lift their breasts or squat, and there is no implied power for police to do so. At most, police might seek a person's consent to do these things, however, police cannot require a person to comply, and moreover, cannot use force to effect compliance.<sup>217</sup>

The NSW Ombudsman's 2009 report into certain powers conferred on police under LEPRA considered that the use of directions to squat was a means of police circumventing the prohibition on searches of body cavities.<sup>218</sup> The Ombudsman also noted at the time that the NSWPF policy regarding strip searches advised police 'be careful; police have no power to make the person squat'.<sup>219</sup> The current policy, and the advice upon which it is based, sidestep the issue about whether an officer can 'make the person squat'.

The Ombudsman noted:

If Parliament is of the view that such search practices assist in reducing embarrassment by minimising direct visual observation, while ensuring that the person is not secreting evidence or items that could be used to harm themselves, clear guidance must be provided to ensure the proper conduct of this search practice. If left unregulated, practices such as these have the potential to

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<sup>217</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 37.

<sup>218</sup> NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 111.

<sup>219</sup> NSW Police Force, Police Continuing Education, *Searching Manual*, October 2006, p. 32, quoted in NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 112.

compromise the dignity of a person. Consequently, it may be necessary to review this practice and if necessary regulate its use in New South Wales.<sup>220</sup>

The Ombudsman recommended Parliament consider reviewing the police practice of asking people to squat during a strip search to determine if further safeguards should regulate that practice.<sup>221</sup> This recommendation was considered under the Statutory Review of LEPRA in 2013, but ultimately changes to the legislation were not supported:

On its face, the practice of asking persons to squat during a search clearly has the potential to compromise the dignity of a person during a strip search. However, the practice also allows the search of certain areas with minimal visual observation or physical contact, and thus has the potential to reduce embarrassment in situations where a search of the genital area might otherwise have been conducted under s 32(6) on reasonable suspicion.... On balance the review does not consider... that a review is required of the practice of requesting that people squat for the purpose of such a search.<sup>222</sup>

Drs Grewcock and Sentas have further commented that the practice is degrading and humiliating, and prefer the approach taken in Tasmania, in which police are required to seek a court order for a forensic procedure if they believe a person has prohibited items concealed in their body.<sup>223</sup> However, the Commission notes that requests from police may be based on a reasonable suspicion that items are concealed in a person's genital area, but not internally concealed. Further consideration of the issue of searching body cavities is detailed at 4.2.5 below.

Following Operation Gennaker, the Commission considers that unless and until the limits of the powers of police to require a person to perform such actions is clarified in case law, or in the legislation itself, the NSWPF is entitled to rely on the advice it has received from the Solicitor General.

The Commission however, considers that the NSWPF policy should be further qualified, in that when making a request that a person squat or bend over or move their genitalia to facilitate visual inspection during a strip search, the request must nevertheless comply with the requirements in ss 32 and 33. This is discussed in 4.2.2 below.

#### 4.2.2 Whether the request is necessary in the circumstances

As highlighted at 3.6 above, any search which involves a visual inspection of a person's genital area, or the breasts of a female or transgender person who identifies as female cannot be conducted routinely as part of a strip search.

Similarly, given the operation of ss 32(5) and (6) and 33(5) and (6), police should not be requesting a person to move their genitalia, bend or squat unless they have reasonable grounds to suspect that the person has:

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<sup>220</sup> NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 112.

<sup>221</sup> NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 112.

<sup>222</sup> NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002*, 2013, p. 34

<sup>223</sup> Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police*, August 2019, p. 42.

- concealed relevant items<sup>224</sup> in those parts of their body; *and*
- any visual inspection is no more than is believed on reasonable grounds to be necessary to search for the items; and
- no more clothes than necessary for the search are removed; *and*
- it is the least invasive search practicable.

It should be unequivocally clear in NSWPF policy that a request during a strip search that a person squat or move their genitalia (whether in the field or in custody) should not be made by way of routine, and that such requests should certainly not be made casually or to satisfy mere curiosity as to whether or not relevant items might possibly be concealed in the persons genital area.

While the Person Search Manual refers to the safeguard expressed at s 32(6), and states that such requests can only be made if the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search, it would be prudent for the instructions to further emphasise that such requests cannot be made routinely as part of a search. Additionally, this instruction should be consolidated in regular training provided to police officers about how strip searches can be conducted lawfully. This is discussed in Chapter 8.

**Recommendation 9:** The NSWPF policies regarding strip searches should clarify that a request that a person squat or perform any of the activities currently listed at paragraph 34 of the Person Search Manual cannot be made routinely, and must specifically account for the requirements set out in ss 32(5) and (6) and 33(5) and (6).

The NSWPF advised the Commission it would consider this recommendation.<sup>225</sup>

#### 4.2.3 Cooperation and consent

There is a particular difficulty with the lack of clarity around whether it is indeed lawful for police to request a person squat or move their intimate body parts during a strip search, because it raises the question of what can be done if a person refuses to comply.

The Commission has previously expressed the view that force cannot be used to oblige a suspect to cooperate with such a request, since there is no legal obligation to do so.<sup>226</sup> The Commission has also previously expressed the view that if a search, *or part of a search* is to be carried out ‘with consent’ police must not use language that could reasonably be understood as compelling the person to submit.<sup>227</sup> Therefore, in requesting a person to perform particular actions during a strip search, police must be unambiguous in their language, and not use language which conveys

<sup>224</sup> Section 21 empowers a police officer to stop and search, seize and detain a person without a warrant if the officer suspects on reasonable grounds that the person may have on them anything stolen, unlawfully obtained, anything used in the connection of a relevant offence, dangerous items and prohibited drugs. Importantly, relevant offences are set out in s 20 and include indictable offences and offences relating to firearms and explosives, and other dangerous items.

<sup>225</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>226</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 40.

<sup>227</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 38.

a requirement or demand. This may raise practical challenges if an officer believes a person is concealing items around their genitalia and that person refuses to consent or cooperate with a request to move their body parts to allow visual inspection.

As outlined in chapter 3, the Commission has formed the view that that regardless of whether a person consents to being strip searched, the officer must still be satisfied of all the threshold requirements in s 31 (and s 32(6)), and comply with all the rules and safeguards in ss 32-34.

#### 4.2.4 Using force during a strip search

Section 230 of LEPR provides for the police use of force in exercising their powers. It is lawful for a police officer exercising a function under LEPR to use such force as is reasonably necessary to exercise the function.

The Custody SOPs and the Person Search Manual contain the following instruction regarding when force may be used during a strip search:

##### **Can police use force to carry out a search?**

Police must always ask for the person's co-operation when carrying out a search.

Where a person is resisting the lawful exercise of the search, police can use force as is reasonably necessary to allow them to carry out the visual inspection necessary for the purpose of the search (see s.230 of LEPR).<sup>228</sup>

The question of when it is appropriate for a police officer to use force during a strip search is not clearly answered, particularly as the NSWPF has instructed police that they can ask a person to squat, bend over, or move their breasts or genitalia during the search. It should be emphasised that s 230 of LEPR is a provision which applies generally to police powers. It states:

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

At the same time, s 33(4) of LEPR states:

A strip search must not involve a search of a person's body cavities or an examination of the body by touch.

In the Person Search Manual, the NSWPF has addressed these provisions with the following instruction:

Police must not examine the person's body by touch when strip searching. This does not mean police cannot touch the person at all. For example, if officers are required to use force to carry out the search or restrain a violent person, it will be necessary to incidentally touch the person's body to remove their clothing.<sup>229</sup>

While restraint of a violent person is one matter, the perhaps more critical issue is whether police can use force to conduct a visual inspection of a person's genital area or breasts, if the person does not comply with a request that they squat or move their body to allow that visual inspection.

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<sup>228</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 6; NSW Police Force *Charge Room and Custody Management Standard Operating Procedures*, November 2020, p. 27 [8.9].

<sup>229</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, para 39.

Here the differing views as to whether police are permitted to *ask* or *require* a person to squat or move their breasts or genitalia to allow visual inspection during a strip search reveal a weakness in the legislation.

On the one hand, the view can be taken that police cannot use force to effect compliance with a request that a person squat or move their genitalia.<sup>230</sup> It is noted, in relation to this that while ss 21A(1) and 28(1) allow police to require a person to open their mouth to allow it to be searched, ss 21A(2) and 28(2) expressly prohibit police from forcibly opening a person's mouth. Given there is no express power to require a person to squat or move their genitalia, it also seems, by virtue of ordinary statutory construction, that any inference that police can use force to make a person do these things is unavailable. The Commission also notes the comments of Judge Scotting in *Fromberg v R*<sup>231</sup> which emphasised that the strip search in that matter, in which a police officer pulled open Mr Fromberg's pants and reached inside to remove a plastic bag containing prohibited drugs, was unlawful, partly because it involved touching Mr Fromberg, which is prohibited by s 33(4).

Another view is that a police officer may use reasonable force to move the body to conduct a visual inspection. This view was preferred by the Solicitor General in the advice that informs the NSWPF policy position. In that advice, the Solicitor General opined that moving the body to allow a visual inspection would not amount to 'examination of the body by touch' and such force might generally be expected to be relatively 'modest'. However it does not appear that the Solicitor General's advice offers an opinion about whether police may require (as opposed to request) a person to squat or move their breasts or genitalia to allow visual inspection during a strip search.

In Operation Karuka, force was used by officers during an inspection of the suspect's anus. This force was extreme by any standard. Officers brought the Aboriginal male suspect to the ground, while naked and handcuffed, and forcibly lifted his leg to conduct their visual inspection. The Commission expects that both individuals searched and police officers might find it upsetting when such force is used during a strip search. However, ultimately the Commission did not conclude that the force was unreasonable in the circumstances, as the officers involved suspected the man continued to conceal something, and while he did squat, he refused to do so in the manner directed by the police officers to enable their visual inspection. The Commission did, however conclude the second strip search of the man (the one involving the use of force) was unjustified and arose out of confusion and lack of communication, which amounted to a failure in performance by the involved officers.<sup>232</sup>

The issue of using reasonable force to view a person's genitalia during a strip search is a difficult one. The legislation does not provide clear answers as to how police should appropriately conduct a visual inspection of a person they reasonably suspect to be concealing an item in or around their genital area, although the decision in *Fromberg* suggests that any touching of the body during the strip search may be prohibited.

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<sup>230</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 40.

<sup>231</sup> *Fromberg v R* [2017] NSWDC 259

<sup>232</sup> Law Enforcement Conduct Commission, *Operation Karuka, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, p. 45.

Despite the lack of clarity within the legislation, the Commission considers that at a minimum, before any force is used, a person should be given the opportunity to comply with a request that they move to facilitate visual inspection. The NSWPF advised the Commission that it agrees that before any force is used a person should be asked for their cooperation.<sup>233</sup>

The Commission observed examples of this not occurring such as in Operation Mainz, which considered the lawfulness of two strip searches of an Aboriginal boy in a regional town. During the second strip search, conducted in a police van dock in the absence of his parents or a support person, police forced the boy to squat, without first asking and allowing him the opportunity to comply.

Further, while there are differing views about whether police can ask a person to squat or move their body during the strip search, the Commission considers that force could not be considered reasonable if it involved the officer touching the person's breasts, genitals or buttocks. While it may be conceivable that moving a person's legs or arms might fall within the parameters of what is reasonable to exercise the function of searching for relevant items reasonably suspected of being concealed on the person, touching a person's breasts, genitals or buttocks is particularly invasive. Such use of force would offend the prohibition against examination of the body by touch, and could not be considered the least invasive search practicable.<sup>234</sup>

The NSWPF policy and training provided to officers regarding strip searches must be amended to provide guidance about how police are expected to gain compliance to requests for people to move their body to facilitate a search. The policy should explicitly prohibit officers from touching a person's breasts, genitals or buttocks. Instructions to officers as to how to conduct a visual examination of those parts of a person's body without such touching should be conveyed in training.

Such training could discuss examples of how to use force that is reasonable in the circumstances, including all the thresholds that must be reached prior to any use of force.

**Recommendation 10:** The Person Search Manual and other NSWPF policies regarding strip searches should explicitly prohibit police from touching a person's breasts, genitals or buttocks during a strip search.

The NSWPF submitted that the above recommendation is unnecessary given the Person Search Manual advises officers that they cannot conduct an examination by touch.<sup>235</sup> The Commission remains of the view that it is important to advise officers that in circumstances where force is being used, officers should not touch a person's breasts, genitals or buttocks.

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<sup>233</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>234</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 32(4) and (5).

<sup>235</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.



#### 4.2.5 Prohibition against searching a person's body cavities

As indicated above, LEPPRA prohibits a search of a person's body cavities.<sup>236</sup> However, while limiting searches of a person's genital area, a search limited to a visual inspection of the genital area is allowed, providing the relevant thresholds have been satisfied (as set out in 3.1 above).

In a number of places, NSWPF policies remind officers they cannot undertake a cavity search.<sup>237</sup> However a question also arises as to whether visual examination of a person's genital area could be described as 'an external examination of a person's private parts', which falls within the definition of an 'intimate forensic procedure' under the <sup>238</sup> *Crimes (Forensic Procedures) Act 2000* (the Forensic Procedures Act).

The Redfern Legal Centre has submitted to the Commission that it considers a direction that a person squat or part their buttocks to fall within the definition of a body cavity search, which is prohibited under LEPPRA.<sup>239</sup>

The NSWPF views the two statutes as governing separate activities - the Forensic Procedures Act governs the collection of forensic material for use on the investigation of offences while LEPPRA searches to obtain evidence of offences. The Commission considers this may be defensible. Section 114 of the Forensic Procedures Act expressly states that it is not intended to limit or exclude the operation of another law relating to the carrying out of searches of the person.<sup>240</sup> However, s 113(2) of the Forensic Procedures Act states that 'the rights and protections conferred by this Act are in addition to those conferred by Parts 9 and 15 of the LEPPRA'. The Forensic Procedures Act confers much greater rights and protections to a person undergoing an intimate forensic procedure than a person searched under Part 9 LEPPRA, particularly in relation to Aboriginal and Torres Strait Islander people. The additional protections set out in ss 9-13 of the Forensic Procedures Act include that the subject may refuse to consent to the procedure.<sup>241</sup> It may also be arguable that in circumstances where police wish to conduct a visual examination of a person's genitals, the protections under the Forensic Procedures Act are applicable.

While the NSWPF has settled on the view that the two statutes involve no conflict, this position is less than clear.

### 4.3 Resolving ambiguities

The above discussion shows that there are a range of practices that are common, and now codified within NSWPF policy, which are not clearly derived from powers set out in LEPPRA. Additionally, there are differing opinions about whether those practices are lawful. Following from this uncertainty is the question of whether (and if so, to what extent) it can be appropriate to use force to facilitate a visual inspection of a person's genitals and breasts (provided it is at least suspected by the

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<sup>236</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 33(4).

<sup>237</sup> See for example, the NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 7 and the NSW Police Force Music Festival Field Strip Search Briefing.

<sup>238</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), s 3.

<sup>239</sup> Letter from Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 29 October 2029.

<sup>240</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), s 114(e).

<sup>241</sup> *Crimes (Forensic Procedures) Act 2000* (NSW), s 10(1)(i).



searching officer, on reasonable grounds, to be necessary for the purpose of the search).

The lack of clarity in relation to these issues makes it difficult for police and for oversight bodies to decide with certainty whether it is lawful for an officer to ask a person to do these things, and use force if that request is refused. This is not a satisfactory situation given how intrusive and often traumatic strip searches are for the person searched.

The Commission has made observations about the minimum circumstances that should be satisfied in the interests of reasonableness and preservation of dignity, when officers make those requests. The Commission has also accepted that police can rely upon the advice it has received at present. This at least provides a consistent framework. However, unless and until the ambiguities discussed in this report are clarified in legislation or through decisions from the court, the lawfulness of this practice remains debatable. This lack of clarity places officers and the NSWPF at risk of liability in any potential litigation. It places the public in great uncertainty as to the extent of a person's rights when being strip searched. Given how common these practices are, this ambiguity should be resolved.

**Recommendation 11:** The Parliament should clarify whether police can compel a person to squat, bend over, move their genitals or breasts during a strip search to facilitate visual inspection.

The NSWPF advised the Commission it agrees that this issue should be clarified by Parliament.<sup>242</sup>

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<sup>242</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

## 5. Strip searching at music festivals

Many of the complaints about strip searches that the Commission considered over the course of the Inquiry related to strip searches occurring at music festivals. Police have no distinct statutory powers in relation to strip searches at music festivals. The thresholds for undertaking a strip search are the same as for any other strip search undertaken in a location other than a police station. These thresholds are discussed in Chapter 3. However, police searching strategies at music festivals are coordinated and pre-planned operations often supported by drug detection dog warrants. The NSWPF considers drug detection dogs to be the most effective way to screen large numbers of people, and their deployment at many music festivals is a response to concerns that such events have a higher concentration of prohibited drugs than other locations and events. Police have distinct systems for processing the volume of people who are indicated by drug detection dogs, including using established structures to conduct the searches such as dis-used ticket booths or special tents provided by the NSWPF or the event organiser.

Some of the evidence received over the course of the Inquiry suggests that while strip searches are by no means an inevitability following a drug detection dog indication, officers do not always make clear decisions about whether a search is necessary, whether that search should be a strip search, or whether that strip search should involve the patron being asked to squat or move their genitalia. This chapter looks at some of the examples and information that gave rise to this concern, as well as the changes the NSWPF proposes to introduce to ensure that searches at music festivals are undertaken lawfully.

The way police approach searching at music festivals touches upon a number of other policy issues, such as decriminalisation of recreational drug use, which are beyond the scope of this report. These issues have been discussed at length in the report of the Coroner's *Inquest into the death of six patrons of NSW music festivals*. The Coroner made six recommendations to the NSWPF. The *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (Report into the Drug 'Ice') also made recommendations about the use of strip searching by police. These are addressed at 5.4 below.

### 5.1 Searching patrons at music festivals

The policing of music festivals involves significant police resources. Officers are drawn from different commands under a 'user-pays' model where festival promoters are obliged to pay for some of the police officers attending.

#### 5.1.1 Drug detection dogs

Drug detection dogs are used by the NSWPF at many music festivals in accordance with warrants authorising their use. The drug detection dogs are often stationed with their handlers at, or near, the entrance to the festival so that patrons are required to pass them when entering.

A range of NSWPF policies and briefings for officers working at music festivals involving drug detection dogs instruct officers that an indication by a drug detection dog alone does not constitute reasonable grounds to conduct a search of an individual.<sup>243</sup> The NSWPF advised that a positive drug detection dog indication is used as the basis for further enquiries to determine whether reasonable grounds for a search exist.<sup>244</sup> There must be additional reasons for conducting a search. These reasons must be recorded in a field processing form and on COPS.

An officer from the NSWPF Dog Unit works with his or her paired drug detection dog. There are numerous ways a drug detection dog may indicate to his or her handler that a person has been in contact with illegal drugs. These include but are not limited to:

- the dog may sit near the person; or
- the dog may pull towards the person; or
- the dog may turn and follow the person.<sup>245</sup>

The NSWPF advised that changes in behaviours varies with different breeds of dog, their work experience, age and relationship with the handler.<sup>246</sup>

When a handler is satisfied that the drug detection dog has indicated a scent in the airspace around a person, the handler will approach the person and provide his or her name and other details as required under LEPR.<sup>247</sup> The handler will then caution the person and explain that the drug detection dog has indicated the possible presence of illegal drugs. The handler will ask the person if they are in possession of illegal drugs or know why the dog may have indicated the presence of their scent. The drug detection dog handler passes the person to a support officer and advises that officer of any relevant details of his or her interaction, including conversation, with the person. The drug detection dog handler will not make a written record of the search and will not conduct the search, although handlers may be equipped with Body Worn Video, and may use this to record interactions with patrons.<sup>248</sup> The support officer is then responsible for forming a view based on available information, including advice from the drug detection dog handler, as to whether or not the person should be subject to a search and if so, what type of search is required. If the person is to be strip searched he or she will be handed to a police officer of the same gender. This officer must then form the requisite suspicion before undertaking the strip search in a private area. They must also consider the need for the presence of a support person for any person under 18 or with intellectual impairment, in

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<sup>243</sup> This information appears in information available to police on the NSWPF's Police Transport and Public Safety Command intranet page: *NSWPF Detection Dogs – Dog Unit*. It has more recently been included in the NSWPF's template Drug Detection Plan to be used in planning drug detection at festivals, and the NSWPF Music Festivals Guideline.

<sup>244</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>245</sup> Interview with Drug Detection Dog Handler in Strike Force Blackford on 7 May 2019.

<sup>246</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>247</sup> See Part 15 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

<sup>248</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

compliance with s 33(3). Officers are required to record in COPS whether a drug detection dog was used by choosing 'yes' or 'no' from a drop down menu.<sup>249</sup>

Drug detection dogs are accredited annually to detect prohibited drugs.<sup>250</sup> The dogs appear to have a very high degree of smell sensitivity, and can detect the scent of prohibited drugs in the airspace, as well as residual scent on clothes. That said, drug detection dogs cannot distinguish between a residual scent, and possession of prohibited drugs on a person.

There are varying views as to the accuracy of drug detection dogs. The NSWPF submitted:

...there are very few, if any, cases where a drug detection dog has indicated an illegal drug odour in the airspace occupied by a person where there has been absolutely no contact between the person identified and illegal drugs at some prior point in time. The reasons why drugs may not be found as a result of a search following positive indication by the drug detection dog include that the person or their belongings may have acquired an odour from being in close contact with illicit drugs, the person may have recently ingested illicit drugs prior to the search, or is a habitual user and/or the illicit drugs were hidden such that they could not be detected in a person search, or they were secreted in a body cavity.<sup>251</sup>

The NSW Ombudsman conducted a review of the use of police drug detection dogs over a two year period following the introduction of the *Police Powers (Drug Detection Dogs) Act 2001*.<sup>252</sup> In those two years there were 10,211 drug detection dog indications<sup>253</sup> and there were 2664 occasions when a prohibited drug was found on a person following a dog indication.<sup>254</sup> This amounts to approximately 26% of all indications. During the Ombudsman's review, the NSWPF submitted that the reliability of drug detection dogs was about 70% accuracy.<sup>255</sup> The Ombudsman noted that this figure was obtained 'by adding the proportion of occasions when a drug is found to the proportion of occasions when no drug is found, yet some explanation is provided as to why the dog might have indicated the person searched.'<sup>256</sup> For a number of reasons, the Ombudsman had difficulty in accepting the NSWPF measure as an appropriate means of gauging the accuracy of drug detection dogs, including that accuracy in detecting a scent should not be confused with the dogs' accuracy in detecting actual drugs.<sup>257</sup>

These figures remain relatively consistent. In a submission from the NSWPF to the Commission in relation to Operation Brugge, the NSWPF advised that in 2018-19, drugs were located in 28.3% of strip searches that followed a drug detection dog

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<sup>249</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>250</sup> Law Enforcement Conduct Commission, Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016, May 2020, para 3.61.

<sup>251</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>252</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006. It is noted that the Ombudsman's review considered the use of drug detections dogs in a variety of locations, with the most common location being public transport. A breakdown of the various locations can be found on p. 29 of the Ombudsman's report.

<sup>253</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p. 27.

<sup>254</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p. 29.

<sup>255</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p. 49.

<sup>256</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p. 49.

<sup>257</sup> NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006, p. 49.

indication.<sup>258</sup> And in that same year, when strip searched following a drug detection dog indication, the person admitted to having recently used or possessed drugs 46.8% of the time. Adding these proportions, 74.5% of strip searches that followed a drug detection dog indication, either located drugs, or resulted in an admission of recent use or proximity to drugs.<sup>259</sup> NSWPF data also shows that in the five years to 2018-19, on average, drugs were located when a person was strip searched following a drug detection dog indication 35.4% of the time, and in 82.3% of strip searches conducted following a drug detection dog indication, there were either drugs located or the person admitted to recently having used or been in possession of drugs.<sup>260</sup>

Data from the NSWPF suggests that police always search a person following a positive drug detection dog indication, although that is more likely to be a general search than a strip search. Data from the NSWPF shows that in 2017-18, 14.1% of people who received a drug detection dog detection were strip searched, but 100% were searched.<sup>261</sup> This suggests that police rely heavily on drug detection dog indications to inform their suspicion about whether a search is warranted.

The NSWPF submitted that 'a drug detection flag is only created on COPS following a search after an indication given. The exact number of indications is not known because a dog may have indicated and no search was undertaken of any kind, resulting in no COPS flag.'<sup>262</sup>

Table 7 below is drawn from data provided by the NSWPF Strategic Intelligence and Capability Command<sup>263</sup> It illustrates that police do not necessarily resort to strip search following a drug detection dog indication. However, it also shows a significant increase in the number and proportion of strip searches following a drug detection dog detection over the five years (2014-2019).

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<sup>258</sup> Although the proportion of strip searches following drug detection dog indications that resulted in locating drugs was 40.5% in 2014-15 and 43.5% in 2015-16. NSWPF, *Submission to Commission*, 4 May 2020, Appendix C.

<sup>259</sup> NSW Police Force, *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, Appendix C.

<sup>260</sup> NSW Police Force, *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, Appendix C.

<sup>261</sup> The NSWPF reported that in 2017-18 the number of people who received a positive detection by drug detection dogs was 10184. (NSWPF GIPA 2019-1563). The NSWPF advised the Commission that the number of people searched following a drug detection dog indication in that same year was 10,183 – NSW Police Force, *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, Appendix C.

<sup>262</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020

<sup>263</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

**Table 7. Proportion of searches following a drug detection dog indication that are strip searches**

Year	Person searches following a drug detection dog indication	Strip searches following a drug detection dog indication	Proportion searches following a drug detection dog indication which were strip searches
2014-15	14,243	619	4.3%
2015-16	10,208	663	6.5%
2016-17	9,630	681	7.1%
2017-18	10,800	1,518	14.1%
2018-19	12,037	1,685	14.0%
2019-20	6,384	493	7.7%

**Source: NSWPF Strategic Intelligence and Capability Command, 27 November 2020**

The NSWPF is not required to publicly report on the number of drug detection dog finds. South Australia is the only jurisdiction in which this activity is required to be publicly reported.<sup>264</sup> South Australia Police publicly report annual data including the types of location in which detection dogs have been deployed (e.g. licensed premises, public place); numbers of indications, detections, residual admissions and residual denials (where no drugs are located after a detection); number and type of enforcement action taken (e.g. arrest, cannabis expiation notice); and the total number of seizures and types of drugs seized during detection dog deployments.

## 5.2 What prompts decisions to strip search?

As discussed in chapter 3, while police are instructed to use other observations or information when forming a decision to search a person following a drug detection dog detection, the behavioural characteristics that police commonly rely upon to inform their suspicion as to whether a search or strip search is necessary may be innocently explained by other things. For example, reactions such as nervousness, seeking to avoid drug detection dogs, or even having enlarged pupils may be explained innocently – ‘including by reason of normal reaction to police in [significant] numbers or fear of wrongful suspicion or search’ - they do not necessarily suggest the patron has consumed or possesses drugs.<sup>265</sup>

Another concerning observation the Commission has made during the Inquiry is that of junior officers being directed, or at least feeling they have been directed, to conduct strip searches at music festivals. In some of the examples we observed, the search procedures set out at 5.1 appear to have resulted in some junior searching officers feeling that they must strip search any person brought to them by the drug detection dog handlers, despite policy documents advising that an indication by a drug detection dog is not itself sufficient grounds to search.

<sup>264</sup> Under s 52C of the *Controlled Substances Act 1984* (SA) the SA Commissioner of Police must report annually to the Minister regarding the number of times a drug detection dog indicated the presence of a controlled drug, precursor or plant in the context of a search.

<sup>265</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.18.



In three of the four misconduct investigations conducted by police under Strike Force Blackford, at least one officer stated they felt they were under pressure or directed to conduct strip searches at the relevant music festival. A constable who was the subject officer in an investigation of a strip search at Midnight Mafia festival in 2019 told police investigators 'I felt police were under pressure at this event to conduct strip searches.'<sup>266</sup> Another constable who conducted strip searches at the Secret Garden festival in 2019 also stated that she felt under pressure to conduct strip searches.<sup>267</sup> When interviewed she stated that she was 'not in a position to say "no" to anyone when I was directed to search' people.<sup>268</sup> The police investigator concluded there was no apparent justification for the strip search of (the complainant) and the constable appeared to have believed 'that she had been directed to search all persons upon whom the drug detection dogs had detected, and she followed these instructions.'<sup>269</sup> In this matter, sustained findings were recommended in relation to the lawfulness of the search and the adequacy of the records created about the search.

In the investigation of a strip search at the Hidden Music festival in 2018, the subject officer, a senior constable said he had little experience of conducting strip searches. He told police investigators that he was aware that an indication from a drug detection dog was insufficient for a strip search, and that he felt that officers were 'sometimes' put under 'pressure' to conduct strip searches.<sup>270</sup> He also stated that many officers may not have a 'good knowledge of what you can and can't do' under sections 31 to 33 of LEPR.<sup>271</sup> This lack of understanding of the LEPR provisions relating to strip searches was also observed in Operations Brugge and Gennaker.<sup>272</sup> It is also noted that in 2018 the NSWPF Lessons Learned Unit acknowledged a lack of compliance with, and consistent application of LEPR strip search requirements.<sup>273</sup>

Another relevant observation is that strip searches conducted in locations other than police stations only locate relevant items (such as prohibited drugs) around a third of the time.<sup>274</sup> This low rate of detection or 'finds' calls into question the formation of reasonable suspicion that a strip search is necessary for the purpose of the search. It suggests that police may be resorting to strip searches too readily. That said, it is clear that drug use occurs at music festivals.<sup>275</sup> The Commissioner of Police submitted to the Coroner's inquest that music festivals create a concentrated market for drug supply and organized crime groups.<sup>276</sup>

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<sup>266</sup> Typed record of interview between MIS7 and MIS13, 8 August 2019, p. 9.

<sup>267</sup> Typed record of interview between MIS7 and MIS9 on 21 August 2019, p. 8.

<sup>268</sup> Typed record of interview between MIS7 and MIS9 on 21 August 2019, p. 9.

<sup>269</sup> NSW Police Force, Investigator's report in IAPro ref. EXT2019-1107, p. 5.

<sup>270</sup> Typed record of Interview between MIS7 and MIS5 on 18 June 2019, p. 11.

<sup>271</sup> Typed record of Interview between MIS7 and MIS5 on 18 June 2019, p. 11.

<sup>272</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, Part C; Law Enforcement Conduct Commission *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, Part C.

<sup>273</sup> NSWPF, Lessons Learned Unit, *Lessons Identified - Best Practice Strip Search Guidelines for Large Events*, November 2018, p. 8.

<sup>274</sup> See part 1.4 to this report.

<sup>275</sup> See for example, NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019; NSW Health, *Guidelines for Music Festival Event organisers*, December 2019, p. 4.

<sup>276</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 17.



## 5.3 Changes to NSW Police Force practices at music festivals

In 2019 the NSWPF established a 'Music Festivals Project' to develop a consistent approach to planning police responses at music festivals. The Music Festivals Project has led to the standardisation of the processes used for drug detection, searching, custody management and education of police engaged working at music festivals. The NSWPF consulted with a number of organisations to inform the development of these new processes, including the Independent Liquor and Gaming Authority, NSW Health, the Australian Festivals Association and industry representatives.<sup>277</sup>

In November 2019, the NSWPF implemented new search processes at music festivals. A key change has been the introduction of a Process Area Supervisor. The Process Area Supervisor is responsible for quality assurance for all searches, including confirming if the seriousness and urgency of the circumstances warrant a strip search. Officers intending to conduct a strip search are required to present the Field Process Form to the Process Area Supervisor for verification, although the decision and justification for the search remains with the searching officer.<sup>278</sup>

The NSWPF has developed and trialled a new field processing form which aims to increase consistency in the way searches and arrests are documented at large events. The form is to be completed for every search conducted, whether or not drugs or other items are found on the person searched.<sup>279</sup> These forms are additional to the pre-existing requirement for police to make notes in their official police notebook of their actions while on duty.<sup>280</sup> The field processing form contains a 'Strip Searches Briefing Document' on the reverse side which contains a summary of strip search powers.

In May 2020 the NSWPF advised the Commission:

Over recent months the NSWPF has seen consistency in the information and education being provided to police regarding their use of powers and their obligations at music festivals. Consistent processes and standardised forms have been developed and trialled in the field, and this has concentrated on the provision of detailed information about the use of powers in relation to strip searching, specifically on juveniles and vulnerable persons.

...

The NSWPF is exploring legislative change to expand the definition of intoxication in the Liquor Act. Currently it only covers intoxication by alcohol. A change in the legislation to include intoxication by other substances, such as drugs, will assist not only police, but also licensees to properly manage patrons that are intoxicated. The overarching guidelines and standardised forms are all undergoing review by [NSWPF's Office of Legal Advice] and [Office of General Council].<sup>281</sup>

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<sup>277</sup> NSW Police Force, *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, pp. 15-16.

<sup>278</sup> Decisions to conduct a general search do not require verification by the process supervisor.

<sup>279</sup> NSW Police Force Music Festivals Drug Detection Briefing (template), 2019.

<sup>280</sup> NSW Police Force, *Police Handbook*, Chapter N.

<sup>281</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 28 May 2020.

### 5.3.1 Music Festivals Processing Form

The Music Festivals Field Processing Form (the field processing form) aims to increase consistency and completeness of the records of persons searched at music festivals. It prompts officers to ask particular questions and obtain relevant information, which is later copied into COPS.

The field processing form captures identifying information of persons to be searched in a section entitled 'pre-search'. Further discussion about how police obtain identifying information of persons who are searched, particularly those who are found not to have any prohibited drugs, is below at 5.6.

Police are prompted by the field processing form to ask three mandatory questions, to ascertain if the person searched has any drugs in their possession, has been proximate to drugs or has taken any drugs in the past 24 hours. This information is recorded under a heading 'Behaviours/Admissions/History' and assists police to understand the reasons for drug detection dog indications, including when no drugs are located. Officers are instructed to 'record conversations and observations in notebook.'

The field processing form allows space to record the officer's observations or other information they relied upon to inform their suspicion that a search is warranted. There is a 'yes/no' space for recording whether a general search is required, and below this, another 'yes/no' for consideration of whether a strip search is required. In the strip search section a selection of 'seriousness/urgency considerations' are listed, allowing five options to be ticked:

- safety concerns;
- destruction of evidence;
- indictable offence;
- ingestion or drug; and/or
- other (with limited space for details).

Clearly, any relevant details are expected to be recorded in the officer's official notebook. Chapter 3 reflects the Commission's views about the applicability of these considerations within the parameters of LEPRA.

There is space on the field processing form for recording whether a parent, guardian or support person was requested, if the strip search is of a juvenile, whether the support person was present, or reasons why if they were not, and space for noting the name and contact number of the support person.

The field processing form clearly states:

Before strip searching you must complete form to this point and consult process supervisor.

Following this, there is space for the Process Area Supervisor to record their satisfaction with reasoning to progress to a strip search.

There is space for noting whether any items are located, whether Body Worn Video is used, who conducted the search, where items were located, any action taken by police (such as Criminal Infringement Notice, Future Court Attendance Notice,

Charge, Infringement, Cannabis Caution) along with a requirement to record reasons why no Criminal Infringement is issued for any detected drug offences.

The field processing form also has space to record the name and signature of the person checking (the Process Area Supervisor).

There is no space to record specifics of the search itself, particularly if there is a strip search – for example, whether the person was allowed to dress their top half before their bottom half was undressed. Presumably this should be recorded in the officer's notebook, or captured on Body Worn Video, if used.

All in all, the field processing form does appear to provide useful prompts to guide an officer through the relevant details to be recorded in relation to the decision to search, the type of search and the outcome of the search.

The Commission considers this form to be comprehensive, and if used correctly, and in conjunction with the proper use of an officer's notebook, it should significantly enhance record keeping of searches at music festivals.

The field processing form should also assist in guiding officers as to the relevant thresholds in deciding whether to search a person and if so what type of search is necessary. The Strip Searches Briefing Document on the reverse of the form contains further details about when strip searches may be undertaken, and contains information distinguishing between general and strip searches. It notes that strip searches can be done when clothing is removed, or when clothing is not removed but is moved to allow officers to visually examine genitals or breasts, pursuant to the decision in *R v Fromberg*. The briefing document reminds officers they cannot search the genital area of a person, or the breasts of a female or transgender person identifying as female, 'unless it is reasonably necessary for the purpose of the search'. The field processing form reminds officers that 'a person may ask for a support person to be there and must be allowed to dress as soon as the search is finished.' Regarding the grounds for the search, it states:

**When can a person be strip searched?** Police must always be able to justify each decision to strip search. Police can only conduct a strip search in the field if they suspect on reasonable grounds that a strip search is necessary for the purposes of the search and that the seriousness and urgency of the circumstances make that strip search necessary at that place.

The field processing form also reminds officers that:

- a drug detection dog indication alone is not sufficient to form reasonable suspicion;
- searches must be conducted in private;
- contemporaneous records must be kept; and
- persons under 10 cannot be strip searched and persons between 10-18 years of age or persons with impaired intellectual functioning must be strip searched in the presence of a parent/guardian or acceptable person capable of representing their interests (and who is not a police officer).

The Commission considers the field processing form to be a useful and comprehensive instructional document for officers. If supported by adequate and regular training to assist in the formation of reasonable suspicion, and discerning

when circumstances are sufficiently serious and urgent as to warrant a strip search in the field, this should serve to improve the decision making and record keeping relating to use of strip search powers in the field.

### 5.3.2 Notebook stickers

The NSWPF has started issuing stickers to be placed in officers' Police Notebooks which are 'handed out at the festival and ... [used] as a ready reckoner to ensure compliance with critical aspects of the legislation.'<sup>282</sup>

The stickers contain prompts regarding powers under s 21 to stop, search and detain a person and a separate sticker addresses the powers to strip search. The stickers contain a significantly summarised version of the powers, and provide suggested wording to be used when police exercise the power:

Q. I am ..... from ..... I suspect you are in possession of ..... And I am going to search you. Do you understand that?

A.

Q. For the purpose of searching for ..... you will be required to remove ..... **I ask for your cooperation.**

A. <sup>283</sup>

There are blank spaces to allow an officer to fill in details of the reason for the search and any item found – presumably the sticker would be stuck in the page of the notebook where the details of the search are recorded, and saves the officer time when writing the details of the interaction.

The Commission anticipates that the stickers will bring an increased consistency to the interaction police have with festival patrons being searched. In particular, the stickers should increase the likelihood that s 202 (which requires an officer to state their name and place of duty, and the reason for the exercise of the power) is satisfied.

### 5.3.3 Information to assist persons searched and support persons

In late 2019, the NSWPF trialled the use of a brochure (the brochure) to assist support persons to understand the person's rights when being searched, and posters in search areas to inform any person searched about their rights. These are reproduced in Appendix B.

The brochure contains a simplified version of the statutory requirements regarding searches and strip searches, including information about what police must and must not do.

The brochure is a welcome development, and should prove to be a useful tool. It should assist those involved in the search to have a clearer understanding about the rights and interests of the person searched, and how the support person can assist to protect those interests (by knowing the person's rights and speaking up if police fail to follow the protocols or do things that are not permitted during the search). The

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<sup>282</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, p. 18.

<sup>283</sup> NSW Police Force, Excerpt from Notebook sticker for strip searches.

brochure contains instructions about how to make a complaint in circumstances where the person believes police have broken the rules.

That said, the Commission recommends that the NSWPF refine some parts of the brochure to give greater clarity (noting this must be balanced against creating a succinct and easy to understand document):

- The brochure appears to be aimed at support persons who are not a parent or guardian. It should be used in circumstances where a parent or guardian is the support person as well, as the instructions remain relevant and parents or guardians may be unaware of the law surrounding strip searches.
- The brochure advises that police can ask a medical practitioner to perform the search if circumstances require it. The relevant circumstances should be explained. This issue is discussed in more detail at 5.7.
- The brochure suggests that strip searches at music festivals cannot always be conducted in absolute privacy, and states: 'Because of the context in which strip searches are undertaken at music festivals, it is not always possible to ensure absolute privacy. The law requires police to do what they reasonably can to ensure privacy'. It would be useful to explain that if the support person or the person searched is concerned that sufficient privacy is not being provided they can raise this as an objection, and if greater privacy cannot be accommodated, they may make a complaint about the search. **Recommendation 21** in Chapter 7 outlines Commission's view that any designated searching area used at a pre-planned event should be checked prior to the event to ensure that the doors or other openings close properly to maintain the privacy of the person searched.
- The brochure should explain the NSWPF approach to using Body Worn Video during strip searches for the benefit of the person searched and the support person.
- The brochure should advise that a person's identifying details need not be provided unless drugs or some evidence of a relevant offence are located during the search.

The NSWPF has advised that the information poster 'Police Searches: Your Rights' will be clearly visible in all designated search areas at music festivals.<sup>284</sup> It is another welcome innovation, and should provide greater clarity as to the way police can exercise the power to strip search.

The Commission recommends that the NSWPF considers the following refinements to the poster:

- explain the NSWPF approach to using Body Worn Video during strip searches;
- clarify that any person may ask for a support person to be present during the strip search;
- refer to how the individual can make a complaint about the search;

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<sup>284</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, Appendix H.

- include advice about the use of force in circumstances where a person resists (this is not currently addressed); and
- advise that a person's identifying details cannot be required unless drugs or some evidence of a relevant offence are located during the search.

**Recommendation 12:** The NSWPF should refine the information provided to persons searched at music festivals and their support persons to address the issues raised by the Commission in this Report.

The NSWPF advised the Commission it would consider this recommendation.<sup>285</sup>

### 5.3.4 Pre-event education package

In late 2019 the NSWPF introduced mandatory joining instructions for police working at music festivals. Since then, the joining instructions have been developed into an online education package, called Music Festivals Fundamentals. The roll-out of this package has been delayed by restrictions on holding music festivals due to the management of public health in response to Covid-19.

The joining instructions and education package include links to online educational resources which reinforce LEPPRA search requirements. This serves as a pre-event briefing. The NSWPF Strip Searches Briefing Document, a copy of the police Notebook sticker containing strip search fundamentals, and access to short video lessons about strip searches and using Body Worn Video during strip searches will be included in Music Festivals Fundamentals.<sup>286</sup>

The NSWPF plans the following additional measures will be implemented, when festival events recommence after public health restrictions relating to Covid-19 are lifted:<sup>287</sup>

- Officers will be required to complete the online mandatory training package, Music Festival Fundamentals, before performing duties at a music festival. The education package will cover:
  - information on the different genres of music and specific drug related information relevant to each genre;
  - information on drug overdose, what this looks like and what to do (particularly addressing the welfare of patrons);
  - state of mind education including information on behavioural indicators;
  - information on searching, including a link to the Person Search Manual;
  - information on concealment methods;
  - videos about BWV strip search recording, young person specific support person use, and a general strip search video;

<sup>285</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>286</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, pp 15-16.

<sup>287</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, pp 17-18.

- information on Drug Criminal Infringement Notices; and
- information on amnesty bins.
- Upon arrival for duty, officers will be required to acknowledge that they have completed the training package and understand the powers relevant to their duties at the music festival.
- The NSWPF proposes that the online education package will replace the delivery of educational material in the pre-event briefing. However, the NSWPF advised the Commission it will consider delivering an oral pre-event briefing that covers the requirements for strip searching young people at any event at which young people might attend.

The NSWPF has advised the Commission that any officer performing duties at a music festival will be required to complete the online education package prior to commencing duties within the festival. The package takes about 45 minutes to complete and the NSWPF has determined that it should be completed within the last 12 months prior to the festival at which the officer is performing duties. The NSWPF also submitted that the introduction of the Process Supervisor adds an extra layer of scrutiny.<sup>288</sup>

However, purely electronic information may be too limited. Officers are unable to ask questions, either about the extent of powers or how they are exercised in practice. In light of the evidence before the Commission in *Operations Brugge* and *Gennaker* that officers were unaware of the particular safeguard requirements for strip searching young people, the Commission considers an oral briefing should be delivered regarding searches of young people at relevant festivals in addition to the online package.

In December 2019, the NSWPF also developed a new template for drug detection briefings held at music festivals (the drug detection briefing). These briefings are typically delivered by Commanders to all officers working at a music festival. The drug detection briefing reinforces:

- it is not the role of the drug detection dog handler to form the requisite suspicion to commence a search of a person following a positive indication from a drug detection dog;
- an indication from a drug detection dog alone is not sufficient to form the requisite suspicion to conduct a search of a person, but that police must also rely on observations of the person and any other information that they have received or have access to; and
- how police drug detection should be undertaken in light of the use of amnesty bins.

The drug detection briefing instructs police not to interact with the amnesty bins, however, clearly drug detection dogs may still make positive detections on a person who may have disposed of drugs in an amnesty bin, which may result in that patron being searched by police. Police are not precluded from strip searching just because a person may have disposed of drugs in an amnesty bin. The relevant issue is

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<sup>288</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.



whether the searching officer has formed the requisite suspicion that a search is necessary in accordance with LEPRA.

As noted in Chapter 3, the NSWPF proposes to introduce in the Person Search Manual additional explanation about whether the seriousness and urgency of a situation necessitates a strip search. This is encouraged. The Commission suggests the NSWPF evaluate how the additional guidance improves officer understanding of the thresholds, informed by a collaborative audit with the Commission in 12 months' time. This timeframe should allow for analysis of the next music festival season, given the 2019-20 festival season was cut short by the public health restrictions related to Covid-19. However, if such events remain on hold throughout that period due to continuing public health related restrictions, the timeframe for commencing the audit may be extended by agreement.

**Recommendation 13:** The NSWPF and the Commission should collaboratively conduct an audit of strip searches conducted at music festivals as a means of evaluating the impact of the new Music Festivals Field Processing Form and pre-event education package. The audit should be commenced 12 months from the date of publication of this report.

The NSWPF advised it agrees with this recommendation.<sup>289</sup>

## 5.4 Response to recommendations from the Coroner and the Special Commission of Inquiry into the Drug 'Ice'

In her report *Inquest into the death of six patrons of NSW music festivals*, the NSW Coroner made six recommendations to the NSW Police Force<sup>290</sup> to address her concerns that policing practices, including the use of drug detection dogs and strip searching at music festivals tended to lead to harmful means of drug consumption, including: panic ingestion; double dosing; pre-loading; and insertion of drugs in body cavities in an effort to avoid detection.

The Coroner's first recommendation to the NSWPF was to stop using drug detection dogs at music festivals. This was not supported as the NSWPF considers drug detection dogs the most effective way to screen crowds of people for prohibited drugs.<sup>291</sup> However, the NSWPF noted that drug detection dogs were not used at all festivals, and when they were used, their use resulted in the detection of significant quantities of drugs which otherwise would have been brought into the festivals.<sup>292</sup> The Report into the Drug 'Ice' also recommended that the NSWPF 'cease the use of drug detection dogs at music festivals and implement other detection practices to

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<sup>289</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>290</sup> Two of these were also directed to the Department of Premier and Cabinet, Department of Health and Department of Communities and Justice.

<sup>291</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 137.

<sup>292</sup> NSW Government's response to the Coroner's Inquest into the death of six patrons of NSW music festivals, 12 December 2019, p. 9.

target illicit drug supply.<sup>293</sup> The Government responded that it did not support that recommendation.<sup>294</sup>

The Coroner's second recommendation to the NSWPF was that it alter its policy regarding strip searching at music festivals such that:

2. a. There is a reasonable suspicion that the person has committed or is about to commit an offence of supply a prohibited drug, and
- b. There are reasonable grounds to believe that the strip search is necessary to prevent an immediate risk to personal safety or to prevent the immediate loss or destruction of evidence, and
- c. The reasons for conducting the search are recorded on Body Worn Video before the search commences.
- d. No less invasive alternative is appropriate in the circumstances.<sup>295</sup>

This recommendation was 'noted' and marked for consideration following the completion of the Commission's Strip Search Inquiry.<sup>296</sup>

The Report into the Drug 'Ice' also made two recommendations about strip search practices. Recommendation 81 in that report was that 'the Department of Premier and Cabinet, the NSW Police Force, NSW Health and the NSW Department of Communities and Justice develop strategies to limit the use of strip searches of people suspected of being in possession of prohibited drugs for personal use only, including consideration of the need to amend legislation, policy and/or procedural guidelines'.<sup>297</sup> Recommendation 82 in that report mirrored the Coroner's second recommendation (above).<sup>298</sup> At the time of writing, the Government response to these recommendations has not been published. However, the Report into the Drug 'Ice' noted that the NSWPF had submitted to that Special Commission of Inquiry that, it 'wants to maintain the current power to strip search but supports amendments to LEPRA to clarify the current power to strip search'.<sup>299</sup>

#### 5.4.1 Limiting strip searches to circumstances involving a 'serious offence'

In Chapter 3 and above at 5.3 we have set out the NSWPF's proposed changes to the Person Search Manual which would insert additional guidance about whether the circumstances are sufficiently serious and urgent so as to make it necessary to conduct a strip search in the field (the draft guidance). If introduced the draft

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<sup>293</sup> Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Recommendation 80, Volume 3, p. 830.

<sup>294</sup> NSW Government, *News*, 'Special Commission of Inquiry into 'Ice' report released', 4 March 2020, <<https://www.nsw.gov.au/news/special-commission-of-inquiry-into-ice-report-released>>.

<sup>295</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 137.

<sup>296</sup> NSW Government's response to the Coroner's Inquest into the death of six patrons of NSW music festivals, 12 December 2019, p. 9.

<sup>297</sup> Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Recommendation 81, Volume 3, p. 837.

<sup>298</sup> Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Recommendation 82, Volume 3, p. 837.

<sup>299</sup> Professor Dan Howard SC, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Volume 3, p. 836.

guidance may ensure that strip searches in the field are only used in the more serious matters, although it would not go as far as the Coroner's recommendations at 2 (a) and (b).

The Commission supports the approach of including additional guidance about the seriousness and urgency requirements for strip searches in the field, although some further clarification than what is in the draft guidance may be needed.

The draft guidance does not limit the use of strip searches to circumstances that involve a suspicion that the person has committed or is about to commit an offence of supply of a prohibited drug, as recommended by the Coroner at 2 (a). Instead, it guides officers to consider whether a decision not to strip search would have serious consequences, and asks:

***What constitutes 'serious and urgent' for the purpose of strip searching in the field?***

**Will you be conveying the person to a police station?**

**• If the person will not be conveyed to a police station, do you have reasonable grounds to suspect that the consequences of not strip searching the person would be serious? For example:**

→ Do you have reasonable grounds to suspect that the person has an item on them, unable to be located through a pat-down search, which may cause a serious risk to their welfare or the welfare of someone else (eg: police, public) in the immediate future?

→ Do you have reasonable grounds to suspect that the person **may have evidence of a serious offence on them**, unable to be located through a pat-down search, which they may dispose of once they are no longer in police presence? (emphasis added)<sup>300</sup> ....

In relation to the recommendation that strip searches be limited to detection of the offence of supply of a prohibited drug, the NSWPF submitted to the Special Commission of Inquiry into the Drug 'Ice' that:

To require police to further establish a reasonable suspicion that a person has or is about to supply a prohibited drug is impracticable. It is impracticable for police to formulate any suspicion as to amounts of drugs a person may be in possession of. It is also important to note that a supplier can be in possession of a large amount of drugs or may be in possession of and supply one single pill.<sup>301</sup>

In relation to the discussion of 'serious and urgent' within the draft guidance, the NSWPF has not provided the Commission with details about how officers might form the suspicion that a person 'may have evidence of a serious offence' on them, nor what falls within the definition of a 'serious offence'. The term 'serious offence' is undefined in legislation. LEPRA contains a definition for 'serious indictable offence' which is an offence punishable by five (5) or more years' imprisonment.<sup>302</sup> Criminal

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<sup>300</sup> NSW Police Force, *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, para 9.18-9.20 and Appendix F.

<sup>301</sup> Commissioner of Police, NSWPF, *Submission to the Special Commission of Inquiry into the Drug 'Ice' and other amphetamine type substances*, <https://www.iceinquiry.nsw.gov.au/assets/scii/closing-submissions/Closing-submissions-on-behalf-of-the-Commissioner-of-the-NSW-Police-Force.pdf>, para 34.

<sup>302</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 3.

procedure distinguishes between indictable offences and summary offences,<sup>303</sup> with indictable offences generally being considered more serious, as is reflected in the lengthier penalties they attract.

The Commission considers that the use of the term 'serious offence' in the draft guidance may not provide sufficient assistance to officers when deciding whether or not to strip search a person - particularly if the person is suspected of possession or even supply of a small quantity of drugs at a music festival (offences which may be dealt with by way of caution, infringement notice or summary prosecution). It may be more meaningful for the terminology to reflect the available criminal procedures (penalty notice, summary prosecution or indictable prosecution) or to reflect whether the person is suspected of having particular quantities of drugs on them at the time.

In Chapter 3, the Commission recommended further clarification to the draft guidance, including listing the types of circumstances which frequently occur which would not be sufficient to satisfy the seriousness and urgency test in s 31(b) of LEPPRA. It would be useful for the NSWPF to clarify whether it intends drug offences involving small quantities to be the kinds of circumstances that do not ordinarily satisfy the seriousness and urgency test within s 31(b).

In any case, the Commission considers that the training in relation to strip searches should clarify which types of offences fall below the level of 'serious offence' and therefore would not ordinarily lead to strip searches being expected. The Commission will monitor the impact of the inclusion of the draft guidance as part of the audit work recommended above (Recommendation 13). This will include consideration of the types of offences which police officers consider to fall within the term 'serious offence', which is hoped will assist in identifying whether further clarification of the policy is needed.

**Recommendation 14:** The NSWPF training in strip searches should explain what types of offences are serious enough to warrant a strip search in the field and should provide examples of what might not be a serious enough offence.

The NSWPF asked that this recommendation be removed. It submitted:

The NSWPF does not propose to define 'serious' in such a way as to exclude, for example, small quantities of drugs, or other specific categories of offences. To do so would be too prescriptive and unworkable for a practical perspective.

It would be a mistake to equate 'serious and urgent' with an indictable offence. It is impossible to know with any accuracy the quantity of a drug that someone has on their person prior to a search being carried out. A summary offence can be sufficiently serious to warrant a strip search; this is particularly the case with the knowledge that 'one pill can kill'.

The guidance that has been developed by the NSWPF requires a police officer to consider the consequences of not searching rather than having regard to the offence type. For example:

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<sup>303</sup> Indictable offences punishable by information (an indictment) in the Supreme Court or the District Court per s 8 *Criminal Procedure Act 1986* (NSW). A summary is an offence that is not an indictable offence (s 3, *Criminal Procedure Act*). Some indictable offences may be dealt with summarily, per Chapter 5 CP and Tables 1 and 2 of Sch 1 of the *Criminal Procedure Act*.

“Do you have reasonable grounds to suspect that a person has an item on them, unable to be located through a ‘pat down’ search, which may cause a serious risk to their welfare, or the welfare of someone else, in the immediate future?”

The NSWPF is mindful that should it provide examples of the types of offences that may warrant a strip search in the field, a police officer may fail to consider whether other offences also necessitate a search. Individual officers should make the decision based upon what they have observed and, if in doubt, seek guidance from a senior officer.

A guided discussion during face to face command training could give examples of potential offences, which would also meet the Commission's view on face to face training.<sup>304</sup>

While the NSWPF has indicated it could give examples in face to face training of potential offences that may not warrant strip searching it remains unclear how the NSWPF proposes to do this given the views above, which indicate it does not consider the term ‘seriousness and urgency’ excludes any particular types of offences, and it does not propose to advise officers to limit the use of strip searches to supply level offence, or other offences which attract higher penalties.

In light of the above submission from the NSWPF and the varying views presented to the Government about what circumstances may be sufficiently serious and urgent as to make a strip search necessary, including those presented under the Coroner's report and the Report into the Drug ‘Ice’, it appears that the clearest way to resolve questions about how the expression in s 31(b), ‘seriousness and urgency of the circumstances’ should be interpreted would be for that expression to be made clearer in legislation. For example, the legislation could clarify the kinds of circumstances that would or would not be sufficient to meet this threshold, or the types of considerations that are or are not relevant to the assessment of whether the threshold has been met.

**Recommendation 15:** Parliament should consider providing specific guidance in the *Law Enforcement (Powers and Responsibilities) Act 2002* as to how the requirement in s 31(b) that ‘the seriousness and urgency of the circumstances make the strip search necessary’ is to be interpreted.

The NSWPF submitted to the Special Commission of Inquiry into the Drug ‘Ice’ that it supported amendments to LEPR to clarify the current power to strip search.<sup>305</sup>

#### 5.4.2 Recording the reasons for strip searches on Body Worn Video

The Coroner's recommendation to police at 2(c) is that the reasons for a strip search should be recorded on Body Worn Video. The Commission considers the practice of using Body Worn Video (BWV) to record the reasons for strip searches to be a useful accountability tool, not only in relation to strip searches at music festivals, but indeed to any strip search in the field.

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<sup>304</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>305</sup> Commissioner of Police, NSWPF, *Submission to the Special Commission of Inquiry into the Drug ‘Ice’ and other amphetamine type substances*, <https://www.iceinquiry.nsw.gov.au/assets/scii/closing-submissions/Closing-submissions-on-behalf-of-the-Commissioner-of-the-NSW-Police-Force.pdf>, para 30.

Given the poor record keeping noted in the strip searches considered during the Commission's Inquiry, the Commission supports and affirms this element of the recommendation.

The Body Worn Video Standard Operating Procedures (BWV SOPs) indicate that BWV is to be used by police to record events, incidents and evidence, in a manner equivalent to a notebook (although not replacing the need for officers to make written records). Police are given a discretion to decide when it is appropriate to activate their BWV, in line with the requirements in the SOPs. The NSWPF advised the Commission that:

Not all officers have access to individual body worn cameras when they perform duty at music festivals. It can depend upon a number of matters including competing policing priorities at the time and availability.<sup>306</sup>

The BWV SOPs indicate a number of circumstances in which BWV should be used by police, including:

- when police normally use their official police notebook to record information;
- to capture evidence or record something of relevance;
- when exercising a police power;
- performing a policing function;
- as part of first response crime and incident investigations;
- general patrolling of licensed premises, public transport and other public areas;
- whilst conducting vehicle stops;
- during conversation with members of the public which may relate to an incident, is relevant to an investigation, or is possibly valuable police or crime related information; and
- in situations where the use of force is anticipated.<sup>307</sup>

The BWV SOPs require any video of a strip search taken for evidentiary purposes to be filmed from behind the person searched and at 45 degrees for the purpose of maintaining the person's privacy while meeting evidentiary requirements.<sup>308</sup> The Commission accepts this minimises the intrusion into a person's privacy by having a custody manager of the opposite sex viewing the footage.

The Person Search Manual indicates that police should capture a strip search on BWV where possible, in accordance with the instruction contained in the BWV SOPs.

Recording the reasons for a strip search would be compatible with the instructions in the BWV SOPs, and would provide further accountability for the conduct of strip searches. It may also assist where evidence of compliance with LEPR is required,

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<sup>306</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>307</sup> NSW Police Force *Body-Worn Video Standard Operating Procedures*, Education and Training Command, 27 November 2018.

<sup>308</sup> The NSWPF *Body-Worn Video Camera Standard Operating Procedure* provides for recording strip searches by a support officer of the same sex, to the rear and at 45 degrees of the person searched.



should the lawfulness of searches be challenged at court, or complaints are made about the conduct of police during a search.

The Commission considers that the NSWPF policy guidance should emphasise that police should record the reasons for the strip search on BWV where that tool is available before the search.

**Recommendation 16:** The reasons for conducting a strip search at pre-planned events such as music festivals should be recorded on Body Worn Video before the search commences. For other strip searches conducted in the field, but not at a pre-planned event, the reasons for the search should be recorded on Body Worn Video if it is practicable to do so.

The NSWPF advised the Commission it would consider this recommendation.<sup>309</sup>

As to the Coroner's recommendation at 2(d), the Commission notes that s 32(5) already requires police to undertake the least invasive search practicable. The Commission has set out above at 3.4.2 its conclusion that a general search should be completed before a strip search is considered, unless the officer has reasonable grounds to suspect that a general search would not be sufficient to achieve the particular purpose of the search (for example, if a person admitted they were carrying drugs inside their bra). Recommendation 4 above, addresses the changes the Commission considers the NSWPF should make to ensure the Person Search Manual and Custody SOPs appropriately reflect this approach.

#### 5.4.3 The Coroner's other recommendations to police

The third of the Coroner's recommendations related to the use of discretion in relation to drug possession in the event that pill testing was introduced at music festivals.<sup>310</sup> The NSWPF did not support this recommendation, and the Government has firmly rejected one of the key recommendations of the Coroner, being the introduction of pill testing at music festivals in NSW.<sup>311</sup> The Government has agreed to implement another of the Coroner's recommendations, which was for the introduction of amnesty bins at music festivals where patrons may dispose of any prohibited drugs without sanction. The amnesty bins had some limited use in early 2020 prior to the introduction of public health restrictions aimed at preventing the spread of Covid-19, which meant that many planned music festivals did not go ahead. Accordingly, it appears too early to properly evaluate whether the introduction of amnesty bins has impacted police strip search practices at music festivals.

The fourth recommendation the Coroner made to the NSWPF related to training provided to police attending music festivals. She recommended that:

Regardless of the policing model in place, that training should:

- a. Instruct police not to take punitive action against people in possession of drugs for personal use, and to concentrate their operations on organised drug dealing, social disorder and other crimes.

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<sup>309</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>310</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 138.

<sup>311</sup> NSW Government's response to the Coroner's Inquest into the death of six patrons of NSW music festivals, 12 December 2019, p. 10.



b. Emphasise that while a primary part of policing at music festivals involves crowd control and enforcement of laws, it is part of good policing, and an objective at music festivals, to engage positively with festival goers wherever possible, to provide support and comfort where needed and to act to reduce or minimise harm.<sup>312</sup>

The NSWPF responded to this recommendation by indicating it would trial the use of Criminal Infringement Notices as an enforcement response to patrons found in possession of small quantities of prohibited drugs.

If a person is found in possession with a prohibited substance for personal use at a music festival, the discretion lies with the officer to determine what action to take in the circumstances. Every person has different circumstances and every drug detection differs. In recognition of the legal and social implications which can result from a charge for drug possession, the NSW Police Force is currently trialling Drug Criminal Infringement Notices (CINs). CINs provide an alternative to punitive action by allowing for an on-the-spot fine to be issued to persons found in possession of small quantities of prohibited drugs. To date, there has been good compliance with CINs that have been issued, which infers they are being well received by young persons and the community. The NSW Police Force supports a vibrant entertainment culture in NSW and officers in attendance at music festivals are there to ensure the safety of all patrons. All officers must attend a pre-event briefing prior to the commencement of their shift. If a patron requires medical treatment for any reason, including due to drug consumption, officers will always provide assistance and render aid, if required.<sup>313</sup>

Two further recommendations from the Coroner were also directed to the Department of Premier and Cabinet, Department of Health and Department of Communities and Justice. The first of these related to the introduction of drug amnesty bins. The second related to strip search practices:

That in the event personal possession remains a criminal offence, a group of relevant decision makers from each of the above stakeholders is convened to develop strategies to limit strip searches to those individuals suspected of supplying illicit drugs, rather than those in possession for personal use. That should involve consideration of the need to amend legislation, policy and/or procedural guidelines.<sup>314</sup>

The response to this recommendation again referred to the introduction of Criminal Infringement Notices as a mechanism to reduce harm, presumably by making a less punitive outcome available should a person be found in possession of smaller quantities of prohibited drugs. However, it is unclear how the availability of this outcome would affect the practice of strip searching, unless the NSWPF policy guidance clarifies that offences that may be dealt with by way of penalty notice do not ordinarily satisfy the test of being so serious and urgent as to make a strip search in the field necessary.

## 5.5 Lost City 2020

While the Commission seeks a thorough evaluation of the changes introduced by the NSWPF to music festival strip search practises after they have been in place for a

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<sup>312</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 138.

<sup>313</sup> NSW Government's response to the Coroner's Inquest into the death of six patrons of NSW music festivals, 12 December 2019, p. 12.

<sup>314</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 139.

longer period, the Commission has observed some early indicators that the changed practices have led to improvements.

The Commission raised concerns in its Operation Gennaker report about the requirements under s 33 being met during strip searches of young persons at the 2019 Good Life Lost City Music Festival. In particular, there was no record that a parent, guardian or support person was present in 25 of the 30 strip searches conducted. Further, of the 30 strip searches conducted, drugs were located on only nine occasions. Other concerns pertained to privacy measures and the lack of a caution. The Commission found that while the police officers' conduct was unlawful, there was limited direction and guidance provided in the conduct of strip searches.

The Commission is pleased to note a vast improvement in the overall conduct and recording of strip searches at the 2020 Good Life Lost City Music Festival underage event. However, there remain issues with the quality of record keeping.

Fewer strip searches and higher rates of find were recorded at the February 2020 event. Event narratives indicate 11 of the 12 strip searches found a relevant item and were conducted in the presence of a support person. Eight young persons were offered but declined the opportunity for a parent or guardian to be present during the strip searches. However, in three instances it was not clear whether this offer was put to the young person before the strip search, noting police attempted to contact the mother of one of the young persons after they were arrested and the matter was handed over to investigators.

In three of the 11 instances where an independent support person was present, it was not clear from the COPS record that the young persons had consented to their attendance. In one of the 11 instances where a support person was present, they appeared to be under 18 years of age, and therefore not appropriate to represent the interests of the young person. In one instance, the details of the support person were not recorded, making it difficult to assess the appropriateness of that individual in representing the interests of the young person, while in four instances a name was provided, but it was not clear what the person's position was or what organisation they came from.

In the one instance where a support person was not present during the strip search, the reasons for progressing with the strip search were documented in accordance with the requirements of s 33(3A), and on paper appear reasonable.<sup>315</sup>

Overall, the Commission is encouraged by the improvements in the recording of strip searches and adherence to LEPPRA requirements at the 2020 Good Life Lost City Music Festival.

## 5.6 Recording identifying details if prohibited items not found

Evidence was considered in Operation Brugge as to the processes for collecting the identifying details of persons who were searched, with nothing found.<sup>316</sup> The

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<sup>315</sup> The Commission has not conducted an investigation into the particular incident, however has considered the reasons recorded in the COPS Event Record.

<sup>316</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.115ff.

Commission was told that for adult patrons (over 18 years of age), if nothing was located during a strip search, police officers would record the event under a 'CNI number of "unknown" (male or female) ... in lieu of the identity details of the person, so as to safeguard their privacy.'<sup>317</sup> However, the Commission was also told that this practice was not utilised for patrons under 18 years of age:

...I would have an expectation that no youth is recorded as an unknown person. If we believed they were under the age of 18, we would – and I know there's no obligation for them to supply their details, but I would hope that we would know who that person is to verify; particularly at the festival, it's a licenced premises and I wouldn't want a youth, if we believed that they were 16, 17, walking around ...<sup>318</sup>

This practice suggests that at least for persons under 18 years, the name and other identifying particulars of people who were strip searched were routinely recorded even when there was nothing found during the search. It is also clear from the evidence that in 2018 officers at the Splendour in the Grass festival were not told that they should advise patrons that it was their right not to provide police with their details unless drugs were found.

Police routinely ask people to provide their identifying details, such as a driver's licence, to police at the beginning of, or during, the search. Officers use this information to make a record of the search, and the details are later recorded in COPS. The field processing form now confirms this approach, and nowhere on it, or in the information provided to persons searched or their support persons, is there any advice that identifying details need not be provided unless an offence has been detected.

The Commission is concerned that COPS records which note the reasons for a search as 'suspected illegal drug possession' create a negative inference about the person searched, which may be used as a justification for a subsequent strip search, even when the previous COPS entry noted that nothing had been found. This was confirmed by the Forward Commander of the Drug Detection Dog operation for the 2018 Splendour in the Grass festival, although he noted he would not rely solely on that record in deciding whether to search.<sup>319</sup>

The Commission is particularly concerned by evidence arising in Operation Brugge that while officers may at times record persons over the age of 18 as 'unknown CNI' in COPS if no evidence of an offence was detected following the search, they routinely recorded the identifying details of people under 18 years.

Police officers are required to create records when they exercise powers. This is an important accountability measure. It allows the exercise of that power to be reviewed in any later complaint, litigation or for trends and training needs analysis (whether this is done by the NSWPF or by external agencies). The evidence presented to the Commission in Operation Brugge suggested that police could use a generic identifier such as a 'CNI number of "unknown" (male or female)' in place of

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<sup>317</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.115.

<sup>318</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 23 October 2019, T 306, L15-22 (evidence of the Forward Commander of the Drug Detection Dog operation for the 2018 Splendour in the Grass festival).

<sup>319</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.116.

the name of person searched even where there is nothing located.<sup>320</sup> However, the NSWPF subsequently advised the Commission that:

The NSWPF must create a record if a power is exercised. It is essential that a COPS record is made when a search power has been exercised. The use of an unknown CNI does not depend on whether or not there is a find – unknown CNI will be used if the identity of the person is unknown. It would be inaccurate to use an unknown CNI where the person's identity is known, and would potentially be a breach of the *State Records Act 1998*.<sup>321</sup>

While the Commission considers it important that adequate records are kept of all searches, this *must* be balanced against adequate protection to individuals from future adverse inferences. While police may request a person's identifying details, the power to demand them is limited, and is set out in LEPRA Part 3.<sup>322</sup> It is not inevitable that the powers contained in Part 3 will be enlivened in the context of most searches at music festivals following a drug detection dog indication. While the briefings provided to drug detection dog handlers make it clear that a person is not compelled to provide their details unless drugs are found, these instructions do not indicate that police should convey this to the person searched. It is likely that persons asked to provide their identifying details before a search, or even show their proof of identification, assume they are required to do so, when this is not the case.

To mitigate the potential for negative inferences to be drawn from COPS records relating to drug searches, officers could be instructed not to record a person's identifying details in COPS unless drugs are found (or some other offence is detected) during the search. The practice should be no different for people under the age of 18 years. Officers could still ask for identifying details before the search, to assist in their assessment of the circumstances (for example, by checking criminal history in COPS, or to ascertain the age of the person being searched), and record the identifying details in their notebook or the field processing form in compliance with the *State Records Act 1998*. In circumstances where no drugs are found, the COPS record could refer to a generic identifier (not an 'unknown CNI' but one that has been appropriately created for the purpose), and include a cross reference to the handwritten notes contained in the officer's notebook or field processing form. This way, the identifying details can be located on hard copy records if required (for example, if there is a subsequent complaint or litigation). The COPS record could then include a cross reference to the location of the relevant handwritten notes – such as the Police Notebook number or the fact that the details are recorded in the Field Processing Form completed at the relevant event.

Alternatively, when collecting relevant details, officers could advise the person that they are not compelled to provide their details unless drugs are found. It is important that both officers and patrons are aware of this. Therefore, operation orders and

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<sup>320</sup> Law Enforcement Conduct Commission, *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.120.

<sup>321</sup> NSW Police Force *Operation Brugge, Submissions by the Commissioner of Police in response to the April 2020 Draft Report by the Law Enforcement Conduct Commission*, 4 May 2020, p. 16. Section 12 of the State Records Act requires each public office to make and keep full and accurate records of the activities of the office.

<sup>322</sup> For example, there are powers to require a person to disclose their identity in relation to providing information about an indictable offence (see s 11); where a person is a defendant in an Apprehended Violence Order (see s 13A); for passengers in vehicles suspected of being used in connection with an indictable offence (see s 14). Section 19 provides a police officer may request a person who has been required to disclose their identity under Part 3 to provide proof of their identity.

briefings should advise officers to communicate this to patrons, and the orders should be clear about how that should be conveyed.

**Recommendation 17:** The NSWPF should not record the name and CNI of an individual following a search in COPS unless a relevant offence has been detected. Such details should, however, be recorded in handwritten contemporaneous records, which are retained in accordance with the *State Records Act 1988*, with an appropriate cross reference to these handwritten notes being made in COPS. The NSWPF should not treat people under the age of 18 any differently in this regard.

The Redfern Legal Centre submitted that while it supported the approach suggested in the above recommendation, it had concerns about the impact it may have on the process of being able to obtain documents/materials after the event for a potential complaint or tort matter. The experience of the Redfern Legal Centre is that when utilising information access processes under the *Government Information (Public Access) Act 2009*, the NSWPF generally limit their initial searching to COPS, and only searches for Notebooks after a COPS entry has been located.<sup>323</sup> While the Commission notes that the recommended approach may increase the time taken to locate relevant records, if an appropriate cross reference is made in COPS, the records should still be retrievable.

In response to the approach recommended above, the NSWPF asked that the recommendation be removed, and emphasised that the person's name should be recorded 'irrespective of whether anything is found' to facilitate subsequent searches for records of the search.<sup>324</sup> The Commission agrees that the person's name should be recorded. The above approach addresses the need to make a full contemporaneous handwritten record, appropriately referenced within COPS. The NSWPF did not make any comment on the alternative suggestion that officers could advise the person that they are not compelled to provide their details unless drugs are found. The Commission remains of the view that it is important that practices are implemented which will mitigate the chance of subsequent negative inferences being drawn from COPS records indicating searches for drugs took place where there nothing was located.

## 5.7 Drugs concealed internally

Both the NSWPF and the Coroner have observed that some patrons resort to concealing drugs internally in order to avoid detection by drug detection dogs.<sup>325</sup> This can be particularly risky to the individual if the drugs are absorbed into the bloodstream.

Section 138 of LEPRA gives an officer of or above the rank of sergeant power to request a doctor to examine a person in custody if the person has been charged with an offence, and the officer has reasonable grounds for believing a medical examination will provide evidence of the offence.

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<sup>323</sup> Letter from Chief Executive Officer, Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 30 November 2020.

<sup>324</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>325</sup> NSW Coroner, *Inquest into the death of six patrons of NSW music festivals*, 8 November 2019, p. 111.

While the Commission heard evidence from a number of officers that suggests police have concerns that festival goers may secrete drugs internally, and the practice of asking a person to squat during a strip search has been described as a means of detecting internally concealed drugs, the current Person Search Manual does not address s 138. Case study 2 illustrates an instance in which police took a person to hospital to obtain assistance in the removal of internally concealed drugs.

### **Case study 2: When drugs are concealed internally – balancing duty of care and statutory obligations**

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A young woman was arrested for drug possession in December 2017 at a music festival and escorted to Concord Hospital where she was detained by police for more than six hours. Police became aware that she had secreted illicit drugs internally and was unable to remove them herself. She eventually consented to receiving medical assistance to remove the secreted drugs. She pleaded guilty to the supply of prohibited drugs in September 2018 and was sentenced accordingly.

The Commission wrote to the NSWPF in order to understand the powers the police officers relied on during the young woman's detention.

The NSWPF advised that arresting officers were acting under a duty of care as they were concerned the illicit drugs may be fatal if absorbed into the young woman's bloodstream. The NSWPF acknowledged that the arresting officers did not apply the safeguards contained in Part 9, Division 3, of LEPR during the young woman's detention as:

... there was an urgent need to convey [the young woman] to a hospital without administering custody procedures under Part 9 of ... (LEPR).<sup>326</sup>

The Commission has advised the NSWPF that the facts in this matter appeared to identify a gap in advice and guidance to frontline police officers who become aware (often when policing music festivals) that a person has secreted illicit drugs internally.<sup>327</sup>

There appears to be a lack of guidance given to police officers about how they should prioritise the duty of care owed to individuals against other statutory obligations, such as the need to comply with the statutory obligations contained in Part 9 of LEPR. Similarly, there does not appear to be any guidance given to police officers about what type(s) of medical examination can be sought under s 138 of LEPR.

The Commission asked the NSWPF if it agreed with the above concerns about possible gaps in NSWPF guidance, policy and procedure and, if so, how these might be addressed.

The NSWPF responded in May 2020, advising that the Person Search Manual currently advises police that they must never search a person's body cavities. If an officer observes a person 'attempting to swallow drugs or anything else that may be

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<sup>326</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Oversight, Law Enforcement Conduct Commission, 23 January 2020.

<sup>327</sup> Letter from Commissioner for Integrity, Law Enforcement Conduct Commission, to Assistant Commissioner, Professional Standards Command, NSW Police Force, 20 March 2020.



harmful to ingest, they should take all necessary steps to prevent a person from doing so', in the interests of preventing self-harm.<sup>328</sup> The Manual also instructs:

Where police suspect that a person has swallowed drugs or anything else that may be harmful to ingest, they should immediately arrange for the person to receive medical attention.<sup>329</sup>

The above instructions do not address the circumstances of a person having secreted drugs in their vagina or anus, and do not clarify the type of medical examination that can be requested to obtain evidence of the offence, nor how to balance obtaining such evidence against the duty of care to the individual.

The NSWPF has indicated it will address the issue of s 138 in the next iteration of the Person Search Manual, by adding an explanation that an officer may ask a medical practitioner to examine a person in lawful custody to detect evidence of an offence:

- if the person has been charged with an offence, and
- there are reasonable grounds for believing that an examination of the person may provide evidence as to the commission of that offence.<sup>330</sup>

The Commission agrees that the Person Search Manual should make reference to s 138 but the suggested text does not go much further than restating the legislative provision. The guidance should contain more practical advice to officers about how to manage the situation, including what kinds of examination can be requested and how to liaise with medical staff in the circumstances.

**Recommendation 18:** The NSWPF should provide guidance to police officers about how they should prioritise the duty of care owed to individuals against other statutory obligations, such as the need to comply with the statutory obligations contained in Part 9 of LEPR and what type(s) of medical examination can be sought under s 138 of LEPR.

The NSWPF advised the Commission it accepts this recommendation.<sup>331</sup>

## 5.8 Banning notices

Over the course of the Inquiry, the Commission has observed a number of matters in which patrons of music festivals have been ejected from the venue and issued banning notices. A number of complaints were received from patrons alleging they were unlawfully issued banning notices by police following a strip search. These related specifically to bans under the Sydney Olympic Park Regulation (the Regulation).

The Regulation allows patrons to be issued a banning notice under clause 11(1), which states:

- (1) The Authority may ban a person from entering any part of Sydney Olympic Park for any period (not exceeding 6 months) determined by the Authority if the person contravenes any provision of this Regulation.

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<sup>328</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 10.

<sup>329</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 10.

<sup>330</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Integrity, Law Enforcement Conduct Commission, 25 May 2020.

<sup>331</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.



Police are authorised to exercise the functions of the Authority under section 57 of the *Sydney Olympic Park Act 2001*.

The NSWPF operational orders for the Hidden Music Festival 2019 held at Sydney Olympic Park instructed police that patrons should be issued banning notices if the patrons had been issued some form of legal notice, such as a penalty notice, Field Court Attendance Notice or Cannabis Caution.

The Commission raised concerns with the NSWPF about this approach because it was considered unlikely that on every occasion a patron was issued with such a legal process, they would have also contravened a provision of the Regulation, authorising the issuing of a banning notice.

Case study 3 is one example.

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### **Case study 3: Banned from the Sydney Olympic Park**

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A man was ejected from the Hidden Music Festival in 2019, and issued a banning notice, following a strip search in which no drugs or other prohibited items were located by police. In a complaint to NSWPF, the man also alleged that his friends were all issued banning notices as well, even though no drugs were located on any of them.

When police initially investigated the complaint, they made findings against the officer who had created a COPS record of the incident because he had incorrectly recorded himself as the searching officer, when in fact he had not conducted all of the searches himself. He had delegated some of the searches to other officers, but had not recorded any details of the searches.

There were differing views among police as to the statutory basis for issuing the banning notices arising from this investigation. As a result of a lack of clarity on the issue, the NSWPF Complaint Management Team sought internal legal advice on the issuing of bans at Sydney Olympic Park for future operational orders and training purposes.

The Commission requested further information about that advice, and advised the NSWPF that in order to be issued a banning notice from Sydney Olympic Park the legislation requires that a person must have contravened the Regulation. We noted the view of senior police that banning notices should only be considered in conjunction with legal process. We also noted that operational orders for the Hidden Music Festival 2019 indicated persons dealt with under legal process should be issued a banning notice. It was not clear that such legal process would necessarily involve a breach of the Regulation, even though a breach of the regulation is a necessary prerequisite to the issuing of a banning notice.

On 1 June 2020 the NSWPF advised the Commission that, consistent with their legal advice, police would discontinue issuing banning notices. In practice, banning notices will now be issued by the Sydney Olympic Park Authority. Police will retain an enforcement role for contraventions of the Sydney Olympic Park Authority Regulation where applicable. Operational orders and briefings for future events at Sydney Olympic Park will now remind officers that the decision to issue bans rests with the Authority. How this will operate in practice remains to be seen.

The Redfern Legal Centre suggested to the Commission that the NSWPF should be required to correct the COPS record for any person who was issued a banning notice by a police officer without lawful authority, including removal of any warnings on COPS that refer to such banning notices. The Commission agrees, and expects that the NSWPF would make the relevant corrections to the COPS record as a matter of course, including the removal of warnings, should it become aware that a banning notice was issued without appropriate authority. This may occur through requests to the NSWPF under s 15 of the *Privacy and Personal Information Protection Act 1998*, or through a review by the NSWPF of banning notices issued where no items were found. The Commission considers it would be prudent for the NSWPF to proactively take steps to check the accuracy of COPS records in relation to banning notices issued, at least in the past two years.

## 6. Strip searches of young people

Police are required to comply with additional safeguards when strip searching a child between 10-18 years of age, or a person with impaired intellectual functioning.<sup>332</sup>

Sections 33(3) and (3A) provide:

(3) A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must be conducted:

(a) in the presence of a parent or guardian of the person being searched, or

(b) if that is not acceptable to the person, in the presence of another person who is not a police officer and who is capable of representing the interests of the person being searched and whose presence is acceptable to that person.

(3A) Subsection (3) does not apply if a police officer suspects on reasonable grounds that:

(a) delaying the search is likely to result in evidence being concealed or destroyed, or

(b) an immediate search is necessary to protect the safety of a person.

In such a case, the police officer must make a record of the reasons for not conducting the search in the presence of a parent or guardian, or other person capable of representing the interests, of the person being searched.

Police are not permitted to strip search a person under 10 years of age.<sup>333</sup>

Over the course of 2019 there was significant publicity about the number of young people who had been strip searched by police in recent years. The NSWPF data shows children under the age of 18 made up 175 (3.2%) of all those strip searched in the field for 2018-19, and 172 (2.5%) of all people strip searched in custody in the same year. In the previous year, 156 (2.8%) people under the age of 18 were strip searched in the field and 260 (2.8%) were strip searched in custody. In 2019-20, children under the age of 18 made up 2.5% (94) of all those strip searched in the field and 2.2% (93) of all people strip searched in custody.

The Commission was troubled by the examples encountered during the Inquiry, in which police officers were unaware of the legislative requirements governing strip searches of young people. These included strip searches at music festivals, in custody and in other locations 'in the field'.

The NSWPF improved the guidance provided to police officers about strip searches of young people and people with impaired intellectual functioning under its Person Search Manual and Custody SOPs, issued to police in August 2019. It is hoped that this, along with the mandatory review of all COPS records that relate to strip

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<sup>332</sup> Impaired intellectual functioning is defined in s 33(9) as a total or partial loss of a person's mental functions or a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

<sup>333</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s33(2).

searches of a young person (discussed at 2.4 above) will improve compliance with the legislation.

## 6.1 Reinforcing the legislative requirements

Concerns about police failure to comply with legislative provisions regarding the use of a support person are not new. The NSW Ombudsman's review of LEPRA and the Statutory Review of LEPRA, conducted by the Department of Attorney General and Justice and Ministry for Police and Emergency Services (the 2013 statutory review) noted that failure to use a support person has been a problem since LEPRA commenced.<sup>334</sup> As a result, the safeguards regarding the strip search of children were strengthened by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* by inserting s 33(3A).

Operations Mainz, Brugge and Gennaker illustrate more recent examples of officers, including those of some seniority and lengthy careers within the NSWPF, being unfamiliar with the particular requirements for strip searching young people. They also revealed failures of the processes for checking that the legislation had been complied with. For example, in Operation Gennaker, of the 30 recorded strip searches of young people, 25 contained no reference as to the presence of a support person and there was no record made of the reasons for the absence of the support person, despite this being a requirement under s 33(3A). There was no parent, guardian or support person present during the strip searches of any of the three complainants in that matter.<sup>335</sup>

In each of three above investigations, the Commission heard from officers who stated they did not know that a support person was required to be present for a strip search of a young person. Similar examples have been encountered in the other work of the Commission – see for example case study 4.

### **Case study 4: Strip search of young people suspected of shoplifting**

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In February 2018, staff at a jewellery store situated within a retail shopping complex on the NSW mid-north coast saw that a ring valued at \$149.00 was missing from a display case. Examination of CCTV footage identified two young people close by the display cabinet around the time the ring was believed to have gone missing. Police were called and three male officers attended. They spoke to the store manager who showed the officers the CCTV footage. From that footage, descriptions of two young people were obtained, one male and the other female. Police located these young people about two hours later in the shopping centre, and after being spoken to, they agreed to accompany police back to the jewellery store for further questioning.

Police contacted the father of the female young person, who was informed of the situation. During this conversation it was established that she was Aboriginal, and the father requested that an Aboriginal Cultural Liaison Officer (ACLO) attend.

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<sup>334</sup> NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services, Review of the Law Enforcement (Powers and Responsibilities) Act 2002, 2013; NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, 2009, pp. 116-130.

<sup>335</sup> Law Enforcement Conduct Commission, *Operation Gennaker, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 5.22.

On the advice of an Inspector, who was not in attendance but who had been contacted to provide advice about whether the young people should be searched, police decided to strip search both of the young persons at the shopping centre. A female officer attended to assist. Both young people were taken to the store lunch room where their pockets were emptied and bags searched. The male young person was asked by Police whether he would submit to a search on the basis that there were reasonable grounds to suspect that they had the ring. He was strip searched behind a cupboard, in the break out room of the store. The ring was not located. The female young person was strip searched in the disabled toilets of the shopping centre, by the female officer. Male police officers were standing outside the first cubicle while the female young person was strip searched inside the second cubicle by the female officer. The door of the cubicle was held ajar by a plastic tub during the search. The ring was not located on her.

Although the young persons had requested an ACLO or parent or guardian be present during the searches, no such persons were present, and due to insufficient evidence, no formal action was taken against the young persons for the alleged theft.

In late February 2018, following a complaint, police commenced an internal investigation into the matter. The Commission oversighted the investigation. The police investigation was limited to whether a breach of s 33(3)(a) of LEPR<sup>336</sup> and the Code of Practice of CRIME had occurred. During the course of the investigation, the female officer provided evidence that in 19 years as a serving police officer she had never had a support person present during the strip search of juveniles, and that she was unaware of s 33(3)(a) of LEPR. The internal investigation found that four out of the five officers involved in the strip search of the young people had contravened s 33(3)(a) of LEPR.

The investigator's report stated:

It is clear from the response from all subject officers that a general level of misunderstanding, or lack of knowledge, exists in relation to the requirements of Section 33 of LEPR, that is, the requirement for a person between the ages of 10 and 18 to have a support person present, when strip searched. This aspect should be further explored by the Education and Development Officer (EDO) to ensure clarity, particularly in relation to clause (3A) (a) of section 33 which indicates the requirement of Subsection 3 (presence of a parent or guardian) does not apply if a police officer suspects on reasonable grounds that delaying the search is likely to result in evidence being concealed or destroyed.

In September 2018, each of the involved officers completed remedial training on s 33 of LEPR.

The Commission also asked the NSWPF to consider whether the strip searches of the young people complied with s 31(b)<sup>337</sup> of LEPR. The NSWPF investigation

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<sup>336</sup> Section 33(3)(a) of the *Law Enforcement (Powers and Responsibilities Act 2002)* provides that a strip search of a child aged between 10 and 18 years must be conducted in the presence of a parent or guardian.

<sup>337</sup> Section 31(b) of the *Law Enforcement (Powers and Responsibilities Act 2002)* provides that a police officer may carry out a strip search in a place other than at a police station or other place of detention if the officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search and the seriousness and urgency of the circumstances made the strip search necessary.

had not considered whether the seriousness and urgency of the circumstances made the strip search necessary, even though during the investigation it was clear that at least one searching officer admitted that he was not aware of s 31(b) of LEPRA. The Commission considered the following factors were capable of contradicting that the seriousness and urgency of the circumstances, made the strip search necessary:

- the alleged shoplifting occurred some three hours prior to the strip searches, and therefore the ring may well have been disposed of during that period of time;
- the retail value of the item was \$149.00 and therefore not significant;
- neither young person had a criminal record or any intelligence of concern in police holdings; and
- the suspects were vulnerable persons, as defined in LEPRA, and therefore the significant impact of conducting a strip search on vulnerable persons should have outweighed all considerations, given the low level nature of the offence.

In July 2019, the Commission advised the NSWPF that further education and training should be carried out to ensure the involved officers received proper training on all provisions relating to the strip searches of young people, including the necessity for the urgency and seriousness thresholds to be met.

Case study 4, along with the examples in Operations Brugge and Gennaker, again highlights a deficiency in the consideration by police of whether the threshold for conducting a strip search in the field has been met. The provisions in s 33(3A) which allows for circumstances in which a search in the presence of a support person may not be practicable must also be read with s 31(b). In Chapter 3 the Commission has addressed the need for further guidance, both in policy and training, regarding whether circumstances satisfy the 'seriousness and urgency' threshold.

It seems likely that the failures regarding the presence of support persons during the strip search of young people, and the associated record keeping required to demonstrate the presence or give reasons pursuant to s 33(3A) if no support person was present, are at least partially due to a lack of regular training about these particular safeguards. As detailed in Chapter 8, strip search powers have not been included in the mandatory continuing policing education program since 2012, which is well before the amendments to s 33 and the insertion of s 33(3A). While references to the amendments to LEPRA were circulated to police in 2016 in an article in the *Policing Issues and Practice Journal*,<sup>338</sup> and articles in the *Police Monthly* (journal),<sup>339</sup> the demonstrated widespread unfamiliarity with these provisions suggests that publication of that material, and whatever localised reinforcement of the amended power may have been provided within commands was insufficient. It is essential that the NSWPF provides regular reinforcement of the legislative requirements associated with the exercise of police powers, and moreover, when those powers are amended, and that this is made the subject of universal officer training.

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<sup>338</sup> NSW Police Force *Policing Issues and Practice Journal*, September 2016;

<sup>339</sup> NSW Police Force, 'LEPRA – long awaited amendments', *Police Monthly*, July 2014, p. 3-6; 'Your search powers', *Police Monthly*, September 2016, pp. 18-19.

As well as revealing compliance failures, Operations Brugge and Gennaker also illustrated that prior to the Commission's Inquiry the NSWPF had not satisfactorily considered the role of the support person during the strip search, or what information that person may need to execute that function appropriately. The policy and training documents were silent about what the support person was expected to do during the strip searches, and how police, the support person, and the person being searched, should interact.

The Commission acknowledges that the NSWPF has now introduced information to be provided to a support person when strip searches occur at music festivals. This is discussed in detail at 5.3.3, and need not be repeated here. The Commission considers that this information should also be available at police stations, and provided to support persons when a strip search of a young person or a person of impaired intellectual functioning occurs inside a police station. The NSWPF should also consider how such information could be made available to a support person in the circumstances of a strip search in the field that is not associated with a pre-planned event.

**Recommendation 19:** The NSWPF should provide the brochure for support persons to any support person attending a strip search of a young person or person with impaired intellectual functioning who is searched in police custody settings.

The NSWPF advised it would consider this recommendation.<sup>340</sup>

## 6.2 Approaches in other jurisdictions

The legislation governing the use of strip searches within the Australian Capital Territory and the Commonwealth jurisdictions contain special protections for persons who are 'incapable of managing his or her affairs', which would presumably include both young people and people with impaired intellectual functioning. Section 3ZI(1)(f) of the *Crimes Act 1914* (Cth) provides that a strip search under s 3ZH may only be conducted on such persons if the person has been arrested and charged or if a magistrate orders that it be conducted; and in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of another person (other than a constable) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person. Magistrates making such an order must have regard to the seriousness of the offence, the age or any disability of the person and any other matters the court thinks fit.<sup>341</sup> The ACT contains similar provisions, limiting the strip searches of a person incapable of managing his or her affairs to those who have been arrested and charged or those permitted by court order.<sup>342</sup> Strip searches conducted under those provisions are also required to be conducted 'in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of another person (other than a police officer) who is capable of

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<sup>340</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>341</sup> *Crimes Act 1914* (Cth), s 3ZI(2).

<sup>342</sup> *Crimes Act 1900* (ACT), s 227.



representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person'.<sup>343</sup>

The approach taken within the ACT and Commonwealth legislation governing strip searches is preferred by Drs Grewcock and Sentas of the University of New South Wales. However, they also note concerns that it could lead to increased arrests and charges in order to bring young people to be strip searched in a police station.<sup>344</sup> In the alternative, they suggest changing the thresholds for strip searching people under 18 to conform to the child protection principles outlined by the NSW Office of the Children's Guardian. This would effectively limit strip searches of people under the age of 18 years to circumstances where there were grounds to suspect the young person was concealing something that posed a risk to their safety.

The draft guidance regarding seriousness and urgency, discussed above at 3.5.2.1, does not go so far as to limit strip searches to situations involving a suspected risk of safety, as it also would allow for strip searches in circumstances where officers suspect that evidence may be concealed or disposed of. However, if the NSWPF were to include some guidance that police should consider whether steps other than strip searching the person could adequately mitigate the risk that evidence of a serious offence will be disposed of, this may significantly reduce the rate of strip searches of young people. This is the subject of the Recommendation 6 in Chapter 3.

### 6.3 Psychological impact of strip searches on young people

At the conclusion of the public hearings in Operation Gennaker, the then Chief Commissioner, the Hon M F Adams QC, announced that the Commission would be seeking to call expert evidence on the psychological impacts on young persons of being strip searched. Subsequently, in light of the evolving situation with COVID-19, a decision was made to obtain a written expert opinion on the subject rather than call evidence. The Commission sought an expert opinion from Dr Susan Pulman. On 9 October 2020, Dr Pulman presented her report, *'The impact of strip searches on young persons'* (Dr Pulman's report), to the Commission.

Dr Pulman's report reviewed the current research in relation to the psychological impact of strip searches on young people. It noted that there is a lack of research specific to the impact of police strip searches on young people, particularly in the context of music festivals, and limited empirical research on the impact of strip searches in general. While considering recent research relating to police interactions with young people at music festivals and more generally, Dr Pulman's report also considered a number of Australian and international reports and studies relating to strip searches in correctional settings, the impact of stop-search type interactions with police, as well as research on youth psychology - with an emphasis on emotional and mental health responses to dehumanisation, trauma and perceived injustice.

Dr Pulman's report noted that young peoples' brains are in a process of development through adolescence to young adulthood, making them particularly vulnerable to the impacts of a traumatic experience.<sup>345</sup> The report reflected on the proportion of

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<sup>343</sup> *Crimes Act 1900* (ACT), s 228(1)(f).

<sup>344</sup> Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police*, August 2019, p. 47.

<sup>345</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 10.

young people who may have experienced past trauma such as physical or sexual abuse<sup>346</sup> and indicated that a background of domestic violence would also result in a higher rate of social and emotional problems.

Dr Pulman's report considered studies of people's experiences of being strip searched, including a recent study of people searched at music festivals.<sup>347</sup> Dr Pulman noted:

The experience of being strip searched can be humiliating and distressing and has the potential to re-traumatise children and young people who have been sexually abused. Children and young people subjected to these searches may suffer trauma, anxiety, fear, shame, guilt, powerlessness and stress.<sup>348</sup>

Dr Pulman noted that the studies she considered indicate that interactions with police at music festivals created feelings of anxiety (even for those who were not carrying prohibited substances), and dehumanisation, social anxiety and humiliation, sometimes lasting a considerable time after the event. In relation to feelings of dehumanisation, Dr Pulman wrote:

A heightened state of arousal can increase the chance that police encounters may escalate, as aggressive behaviours are more likely to occur when the fight or flight system is activated. Additionally, a large body of research has linked experiences of discrimination, dehumanisation and rejection to heightened levels of aggression. As is apparent from individual's [*sic*] accounts, strip searches are viewed as unlawful, embarrassing and dehumanising. Importantly, dehumanisation does not solely occur at a macro level (i.e. genocide) but also occurs in response to everyday violations of respect or thoughtlessness. Experiencing dehumanisation can lead to sadness, shame, cognitive destruction (i.e. negative self-cognitions) and most commonly, heightened levels of aggression. Hence, strip searches may have important psychological impacts resulting from feelings of dehumanisation.<sup>349</sup>

Dr Pulman's report went on to note the potential for retaliatory or displaced aggression (which may occur as a result of perceived injustices) as a response to such negative psychological impacts, including aggression directed at other festival patrons, police or indeed even other people a considerable time after the strip search event. This, combined with the impacts of increased alcohol consumption in music festival settings could be dangerous.<sup>350</sup> In relation to humiliation and social anxiety, Dr Pulman wrote:

Humiliation also has an association with aggressive behaviour and may be more pronounced for young individuals with less cognitive control. In relation to strip searches specifically, they were described as dehumanising and terrifying. One participant detailed how the strip-search procedure brought up memories of a previous assault:

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<sup>346</sup> The Australian Bureau of Statistics, *Personal Safety Survey*, 2016, indicated that 1 in 6 women and 1 in 9 men experience physical or sexual abuse before 15 years of age.

<sup>347</sup> Hughes, C., Barratt, M., Ferris, J., and Winstock, A., *Australian music festival attendees: a national overview of demographics, drug use patterns, policing experiences and help-seeking behaviour*, 2019.

<sup>348</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 5.

<sup>349</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 6 (citations omitted).

<sup>350</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 7 (citations omitted).

*"A female police officer came over and put her hands on me, and I found that very distressing, because coming from domestic violence, someone putting their hands on my body without my permission is very distressing."*

While others commented on the lasting effects the procedure had on their concentration, mental health and work life:

*"I stayed at the festival until about like ten o'clock at night, and tried to enjoy myself, but I just found myself sitting there and feeling really hollow and staring into space [crying], and then the next day I started having panic attacks. ... I just kept thinking about it, and reliving it over and over, and trying to function and trying to do my thesis and just making a fucking mess of everything. ...the consequences are just far reaching, and I just slumped into a depression and I've just been trying really hard to get my well-being together."*

The above quotes highlight the damaging nature of the consequences that can result from being strip searched. With these experiences in mind, it is best to proceed under the assumption that strip searches are invasive and at for most [*sic*], will exist on a spectrum from distressing to completely traumatic for the individuals who undergo them.<sup>351</sup>

The Commission understands that the above quotes from people who experienced strip searches were drawn from interviews of people who had been searched by police following drug detection dog indications, conducted by Dr Peta Malins between 2016-2018. These are reported in her research paper, *Drug Dog affects: Accounting for the broad social, emotional and health impacts of general drug dog operations in Australia*.<sup>352</sup> The quoted material does not necessarily describe the experiences of individuals strip searched by NSW police.

Drawing on research about police interactions beyond the music festival context, Dr Pulman referenced research showing links between invasive police encounters and poor health outcomes, such as psychological distress, higher depressive symptoms and higher rates of post-traumatic stress disorder (PTSD).<sup>353</sup>

A longitudinal study found a relationship between personal and vicarious police contact and heightened depressive symptomology in youth, and like previous research, found that more intrusive procedures (i.e. stop and search) were associated with heightened depressive symptomology.<sup>354</sup>

Dr Pulman observed that aggressive and defensive behaviours could be considered developmentally normal for young adolescents, and when coupled with the potential for perceived injustice relating to the strip search, defensiveness or aggression may lead to escalation of the interaction, including charges related to the defensive or aggressive behaviour towards police.<sup>355</sup> Dr Pulman also stated that being strip searched 'may have lasting impacts on how young people view and subsequently interact with law enforcement.'<sup>356</sup> The negative subjective experience of strip searches may be damaging to the young person's perceptions of law enforcement

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<sup>351</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 8 (citations omitted).

<sup>352</sup> Dr Peta Malins, *Drug Dog affects: Accounting for the broad social, emotional and health impacts of general drug detection dog operations in Australia*, International Journal of Drug Policy 67 (2019) 63-71

<sup>353</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 9.

<sup>354</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 9 (citations omitted).

<sup>355</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 10.

<sup>356</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 10.

and authority more generally, diminishing trust, and discouraging cooperation even in the long term.<sup>357</sup> Dr Pulman also discussed the short and long term mental health impacts of strip searches on young persons:

In the weeks following, young people may experience intrusion symptoms, rumination, shame or guilt, however they are more vulnerable than other populations in that they lack the skills or resources to appraise the situation effectively and seek social support. Moreover, parents are a key factor in helping children recover from single incident trauma, however children traumatised by a strip search may be reluctant to reach out to their parents, due to shame or fear of further punishment.

In the long term, the single exposure traumatic event can lead to a slew of physical problems such as increased heart rate or reactivation of physical symptoms when reminded of the trauma. Single exposure trauma increases the risk for depression, dissociative experiences and PTSD in young people. There is also a well-established link between trauma exposure and juvenile delinquency highlighting the long term adverse consequences that could arise from strip searches.<sup>358</sup>

Dr Pulman also highlighted that young people with a history of sexual or physical abuse are particularly vulnerable to traumatic responses to strip searches, and stated:

Considering that physical therapy often triggers memories of prior sexual assault for patients it can be safely assumed that strip searches have an equal if not much higher chance of triggering pre-existing trauma behaviours and reactions. These reactions might include dissociation or intense stress and panic, complete immobilisation and withdrawal or aggressive behaviours like punching and kicking.<sup>359</sup>

Dr Pulman also stated that young people with intellectual disability or cognitive impairment are particularly vulnerable, noting this demographic group is widely reported to experience higher likelihood of sexual abuse than the broader population, and their impairment or disability may diminish their capacity to understand and assert their rights in a power-imbalanced interaction.<sup>360</sup> With regard to young people from Aboriginal and Torres Strait Islander backgrounds, Dr Pulman observed the over-representation of Aboriginal and Torres Strait Islander people in police interactions. She noted that subjectively negative experiences of police interactions, especially if accompanied by a perception of unfair targeting, 'may exacerbate already existing negative attitudes regarding police authority. Indeed the effects (outlined above) regarding mental health, aggression and broader social consequences may be compounded for individuals who have experienced a history of police maltreatment in the past. ... Moreover, the anticipation of being unfairly targeted by police activities could consistently trigger a stress response, leading to long-term neurological consequences.'<sup>361</sup>

Dr Pulman's report shows the seriousness of the potential impacts of strip searches on young people, particularly those with additional vulnerabilities. Those impacts can

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<sup>357</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, pp. 10-11.

<sup>358</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 12 (citations omitted).

<sup>359</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 14 (citations omitted).

<sup>360</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 16.

<sup>361</sup> Dr Susan Pulman, *The impact of strip searches on young persons*, Expert Report, October 2020, p. 16.

result in long lasting harm to the individual searched, but may also pose risks to others in proximity to a searched individual, particularly if the experience was perceived as unjustified or was not handled with sensitivity.

Dr Pulman's report serves to emphasise the importance of compliance with the thresholds and safeguards relating to the use of strip search powers. While these issues have been addressed in this report, the Commission further considers that the potential traumatic effects of strip searches, particularly on young people and people with intellectual impairment, should be canvassed in training undertaken by police officers relating to strip searches.

The NSWPF advised the Commission that it agreed that strip searches may be stressful and traumatic for most people, particularly young people, and for these reasons, police officers must ensure searches are conducted lawfully.<sup>362</sup>

**Recommendation 20: NSWPF training in relation to strip searches should canvass the potential traumatic effects of strip searches on young people and people with intellectual impairment, as detailed in this report.**

Dr Pulman's comment that strip searching processes which are perceived by members of the public to be unjustified or disproportionate may undermine respect for law enforcement, further highlights the importance of the NSWPF implementing and maintaining rigorous processes for ensuring that strip searches are lawful and conducted in a manner that protects the privacy and dignity of the person searched. It also demonstrates how important it is that the NSWPF respond effectively to any legislative and policy non-compliance, so that trust in the NSWPF can be maintained.

The Commission looks forward to the NSWPF providing further information detailing the results of its monthly audits of strip searches of young people (discussed above at 2.4), to demonstrate the results of its changed quality assurance processes.

The NSWPF asked that the above recommendation 'in its current form' be removed, because 'officers are not currently trained to identify people that have been subjected to a traumatic incident in their life'. The NSWPF added that it would consider 'reinforcing the seriousness of the potential effects of strip searches'.<sup>363</sup> The Commission's recommendation however, is not limited to training pertaining to young people who have experienced prior trauma, but to all young people. The Commission expects that the NSWPF should be able to raise awareness with police officers about the potential traumatic effects of strip searches within the training provided to officers.

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<sup>362</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>363</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

## 7. Privacy and dignity considerations

Sections 32 and 33 contain requirements for preserving a person's privacy and dignity during a strip search. The provision must be complied with, as far as is reasonably practicable in the circumstances.<sup>364</sup> There are a range of legislated protections for the privacy and dignity of the person being searched. These include requirements for providing privacy during the search, restrictions on who may be present during a strip search (including that the search must, as far as practicable, be conducted by a person of the same sex as the person being searched), and requirements that a person be allowed to clothe themselves after the search is over.

Two provisions set out the requirement to ensure privacy during strip searches. Section 32(4)(a) provides that police 'must conduct the search in a way that provides reasonable privacy for the person searched'. Section 33(1)(a) states that as far as reasonably practicable, the police officer conducting the search must conduct it in a private area. This chapter considers some of the practical issues relating to maintaining privacy when searches are conducted in the field.

### 7.1.1 Searches in caged vehicles

Over the course of the Inquiry, the Commission encountered a number of instances in which police conducted a strip search in the field in the back of a caged police vehicle, or 'paddy wagon'. For example, in Operation Grasmoor, police conducted a strip search of a young person in a caged vehicle, as described in case study 5.

#### **Case study 5: Operation Grasmoor**

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One early morning in March 2018, a Senior Constable and Probationary Constable were conducting routine patrols in a regional NSW township, when they saw a young Aboriginal male riding a motorbike on a public street without a helmet. The officers tried to stop the young person, but he accelerated away from them and after he lost control of the motorbike a short time later, he ran away from the police.

The officers chased and arrested the young person by applying force, including knee strikes to the lower half of his body, and placed him in the rear pod of the police vehicle, which was parked on a major highway. The young person was made to remove all of his clothes, lift his genitals and pull the cheeks of his buttocks apart – without a parent or guardian present. Nothing adverse was found on the young person as a result of the search. When the officers decided to arrest the young person, they did not know that the motorbike had been stolen and therefore decided to pursue, chase, arrest and strip search the young person because he was riding a motorbike without a helmet.

The Commission commenced an investigation into a complaint received from the Aboriginal Legal Service regarding the treatment of the young person by police.

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<sup>364</sup> *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, s 32(1).



During their evidence, police admitted to strip searching the young person in the rear of a police vehicle on a public street, without first asking him how old he was or telling him why they needed to search him. The officers both stated the search took place in that location because they thought the young person may have used a screwdriver or similar implement on him, given that the ignition system wiring on the motorbike he was riding had been tampered with.

The Commission found that both officers lacked the necessary level of suspicion to carry out a strip search of the young person, and that they did not possess the necessary knowledge of their obligations under LEPRA when dealing with a child or vulnerable person in regards to conducting a strip search. Most disappointingly, the Commission also found that neither officer considered alternative methods of responding to the young person, for example issuing him with a warning under the *Young Offenders Act 1997* (NSW), or taking him home and issuing him with a future court attendance notice. One officer stated in his evidence that upon reflection, there was actually no reason at all to arrest the young person without a warrant.

The Commission's investigation found that the officers contravened many sections of LEPRA in that they:

- did not inform the young person why he needed to remove his clothing (s 32(b));
- did not undertake the least invasive kind of search practicable in the circumstances (s 32 (5));
- failed to meet the thresholds of 'seriousness and urgency' to make the strip search necessary (s 31);
- failed to conduct the strip search in the presence of a parent or guardian or another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person (s 33(3)); and
- did not comply with the legislative requirement to record the strip search on COPS, or note that it had occurred without the presence of a parent or guardian (s 33(3A)).

Over the course of the Inquiry the Commission received complaints that have suggested that caged vehicles do not provide adequate privacy and are therefore not an appropriate location to conduct strip searches. Some of the information provided by complainants who had been searched in caged vehicles included that they felt humiliated and degraded. Complainant concerns included the lack of privacy from unclosed doors and having to crouch in a confined space while removing clothing.

The Commission considers that a caged vehicle is generally an inappropriate location for a strip search and could only be justified in rare and limited circumstances, given such searches would involve a person having to bend and disrobe in an uncomfortable and potentially undignified position, and therefore minimal privacy can be afforded. The appropriateness of the use of a vehicle for a strip search depends on the circumstances in question, including the seriousness and urgency of the circumstances and the unavailability of an alternative such as relocating the



person to a police station. Additional factors would include the location in which the vehicle is situated, time of the event, proximity to other people, and of course, whether a strip search in the circumstances was appropriate in the circumstances at all. That said, while it is clear that conducting strip searches in police vehicles is not uncommon, there does not appear to be any documentation or training materials which outline how such searches should be conducted.

It would be appropriate for the NSWPF to include instruction about the practicalities of conducting searches in caged vehicles in the training provided to police about how to conduct strip searches, and clarifying the very limited circumstances in which strip searches in caged vehicles may be performed. This would assist in ensuring consistent and appropriate practices across the state.

**Recommendation 21:** The NSWPF training for officers about conducting strip searches should include instructions relating to the very limited circumstances in which strip searches in caged vehicles may be performed and how to conduct strip searches in caged vehicles, with an emphasis on how to preserve the privacy and dignity of the person searched.

The NSWPF advised the Commission that it maintains the back of a caged vehicle affords reasonable privacy, but it would consider this recommendation.<sup>365</sup>

### 7.1.2 Strip searches at pre-planned operations

The Commission has considered a number of complaints about the lack of privacy afforded to persons searched at pre-planned operations, such as music festivals and planned drug detection dog operations in public locations.

When planned drug detection dog operations are undertaken by the NSWPF, police may set up tents in which searches are to be conducted. At music festivals, police have used structures supplied by the event organisers, or may utilise NSWPF searching tents.

In Operation Brugge, the young person BRC gave evidence that the opening to the tent in which she was strip searched did not close, and she could see the male officer standing outside, with his back to the tent.<sup>366</sup> She told the Commission the tent was 'not very private'.<sup>367</sup> BRC was visibly distressed during the search and afterwards, and told the Commission she felt 'completely humiliated' by the experience.

Case study 6 is another example of a complaint regarding the lack of privacy for strip searches conducted in a room at a music festival. The complaint was investigated by the NSWPF, and this investigation was monitored by the Commission under Part 7 of the LECC Act.

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<sup>365</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>366</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.18; Law Enforcement Conduct Commission, Record of Interview of BRC, 29 August 2019, p. 19.

<sup>367</sup> Law Enforcement Conduct Commission *Operation Brugge, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 3.18; Record of Interview of BRC, 29 August 2019, pp. 18-19.

## Case study 6: Lack of privacy during strip search at Hidden Music Festival

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A female patron who attended the Hidden music festival in 2019 complained to the NSWPF about the way she was strip searched by police at the event. One of the things she complained about was that she was not afforded proper privacy during the strip search. The officer who undertook the search told police investigators that 'in terms of the location provided to conduct the searches... the doors were unable to be fully closed as they apparently locked automatically.'<sup>368</sup> The complainant stated the door was left open during the strip search.<sup>369</sup> The investigator concluded that if the booths did not provide reasonable privacy, it was not the fault of the searching officer. The responsibility fell to the police officers responsible for planning the policing response to the event.<sup>370</sup>

Following discussion and correspondence between the Commission and investigating police the lead investigator undertook to conduct further inquiries into whether the NSWPF properly fulfilled its obligations under ss 32 and 33 of LEPPRA regarding the provision of reasonable privacy in circumstances where the policing event is pre-planned with strip searches expected.

In late August 2020 the NSWPF advised the Commission that the North Western Metropolitan Region decided it would no longer use the lockable search booths available at the event location. Instead purpose built screened and fenced search areas will be used. The NSWPF advised that these have proven to be safer for both persons being searched and police.

Pre-planned events afford the NSWPF with an amount of control over the locations in which strip searches are to be conducted. The Commission considers that the event planning should consider the locations in which strip searches are to be conducted so that they ensure both appropriate privacy and a safe environment, including that there is sufficient space between police and the person searched for the search to be conducted in a dignified manner.

Where doors or tent flaps do not close properly, this can cause additional anxiety and humiliation to the person searched, in circumstances where it is likely the person is already feeling those stresses. Given the requirement of ss 32(4)(a) and 33(1)(a), the Commission expects that operation plans take into account the need to provide reasonable privacy for persons being strip searched. Where the NSWPF chooses to use existing rooms or structures to conduct searches, these should be checked prior to the event to ensure they satisfy the requirement to provide reasonable privacy.

The Music Festival Guidelines give the Drug Detection Forward Commander the responsibility for ensuring that the operation affords privacy and respect for all involved.<sup>371</sup> The Guidelines also state that the process area in which strip searches are conducted must adhere to the requirement to manage privacy and dignity when strip searching as well as being able to accommodate large volumes of general searches.<sup>372</sup> These instructions are appropriate, and should also apply to any other

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<sup>368</sup> NSW Police Force, *Investigator's report for IAPRO Ref EXT2019-0808*, 21 November 2019, p. 7.

<sup>369</sup> Letter from Redfern Legal Centre to Chief Commissioner, Law Enforcement Conduct Commission, 18 April 2019, p. 2.

<sup>370</sup> NSW Police Force, *Investigator's report for IAPRO Ref EXT2019-0808*, 21 November 2019, p. 7.

<sup>371</sup> NSW Police Force *Music Festivals Guidelines*, Public Transport and Public Safety Command [draft], p. 8.

<sup>372</sup> NSW Police Force *Music Festivals Guidelines*, Public Transport and Public Safety Command [draft], p. 16.

pre-planned drug detection operation (such as those conducted at train stations). The Commission expects that the operational plans for **any** pre-planned drug detection dog operation, whether a music festival or otherwise, will describe the structures in which strip searches are planned to be conducted to ensure that privacy and dignity requirements are considered appropriately.

**Recommendation 22:** The NSWPF must ensure that private spaces are made available for strip searching a person at any pre-planned event or strip search operation and part of the event planning should include checking that the doors or openings of any space used for the conduct of a search closes properly.

The NSWPF advised the Commission it would consult with relevant internal stakeholders about this recommendation.<sup>373</sup>

### 7.1.3 Use of CCTV to film strip searches in custodial areas

The Commission's *Review of the NSWPF Standard Operating Procedures for strip searches in custody* recommended that the SOPs should include consistent guidance as to whether it is appropriate for strip searches to be filmed by CCTV or other recording equipment.<sup>374</sup> The Commissioner of Police has stated this recommendation had been implemented in both the Custody SOPs and the Person Search Manual.<sup>375</sup> These updated policies provide instruction about the filming of strip searches in the field and in custody. Both documents instruct police that ideally all strip searches are to be filmed as evidence of the integrity of the search and include advice about appropriate techniques to record strip searches on Body Worn Video equipment which aim to preserve privacy at the same time as making a record of the search.

The Person Search Manual appropriately instructs police to be mindful of CCTV in public places and that an area captured on public CCTV is not a private area as required for strip searches. Overall, this guidance strikes an appropriate balance between the requirement that police afford a person privacy, while reflecting the relevant case law to record the strip search. Section 33(1)(b) prohibits, 'as far as reasonably practicable in the circumstances' a strip search being conducted 'in the presence or view of a person who is of the opposite sex to the person being searched', and s 33(1)(c) states that strip searches must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

The new policies indicate the custody manager is to record whether they viewed the search on CCTV in the custody records, and has the responsibility to ensure all reasonable steps are taken to ensure CCTV capturing a strip search is not able to be viewed by anyone other than the custody manager. The Commission accepts it may be necessary for a custody manager to view footage of the strip search. The SOPs indicate that it is the responsibility of the custody manager to ensure the safety of persons in custody and ensure police comply with their obligations under ss 32 and

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<sup>373</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>374</sup> Law Enforcement Conduct Commission, *Review of NSW Police Force Standard Operating Procedures for strip searches in custody*, January 2020, p. 31.

<sup>375</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 2 September 2019.

33. This is consistent with the statutory role of the custody manager under Part 9 of LEPR, to facilitate the rights of persons in custody and assist vulnerable persons.

In light of the fact that a custody manager of the opposite sex may view the CCTV footage, the NSWPF should consider including an instruction in the SOPs that the searching officer should, as far as practicable, conduct the search at a similar angle to CCTV cameras as would be filmed on Body Worn Video. The statutory requirement of privacy must be taken seriously and real-time access to a monitor that might show a strip search taking place must be limited to the custody manager. While the Commission accepts that the custody manager has been allocated responsibility for ensuring privacy for strip searches captured on CCTV, it is not clear what steps have been taken at each custodial location to ensure that strip searches captured on CCTV are not viewed by anyone other than the custody manager.

#### 7.1.4 Removal of all clothing

Section 33(5) provides that a strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be necessary for the purposes of the search. Additionally, s 33(9) provides that a person must be allowed to dress as soon as the search is finished.

The Commission's *Review of NSWPF Standard Operating Procedures for strip searches in custody* recommended the NSWPF introduce consistent guidance as to whether police should require a person to remove all clothing at once. The Commission notes that the NSWPF has now addressed this in its Custody SOPs and Person Search Manual. For example, the Person Search Manual states:

A strip search can include requiring the person to remove all their clothing, but it must never involve the removal of more clothing than is reasonably necessary for the search. If a strip search is to require the removal of all clothing, it should be done in stages. For example, police should, where practicable, allow the person to remove their top and then replace it before asking the person to remove pants.<sup>376</sup>

The Commission welcomes this instruction.

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<sup>376</sup> NSW Police Force *Person Search Manual*, Office of the Commissioner, August 2019, p. 5.

## 8. Education, training and supervision

During the hearings over the course of this Inquiry, the Commission was struck by comments made by officers which indicated they had not undertaken recent training in relation to the exercise of strip search powers, or could not remember their training with any clarity. Some of the officers who had been in the NSWPF for many years indicated that they had not received any training about strip searches since they had left the NSW Police Academy (the Academy) in Goulburn. As noted in both Operation Gennaker and Operation Brugge, the Commission considered that poor training and education of officers in relation to their strip search powers was a systemic issue of concern.

While all recruits receive some training in police powers, including search powers, as part of the Associate Degree in Policing Practice, the Commission has raised questions about how, and how frequently, training and education about police powers is reinforced. While junior officers are expected to learn from more senior officers on the job, if more senior officers have not had any formal refresher training, this poses a risk that incorrect and possibly inappropriate or unlawful practices become entrenched.

Since the commencement of the Inquiry, the NSWPF has introduced a range of strategies to remind all police officers about their powers to conduct strip searches. This is a welcome development. This chapter considers some of the evidence and information collected by the Commission which reflects the way police have been educated and trained in relation to their strip search powers. It also considers the new initiatives being brought in by the NSWPF to reinforce the appropriate use of strip search powers.

### 8.1 Comments from officers during the Inquiry

Over the course of the Inquiry, the Commission heard evidence that raised concerns about the training officers received in relation to the exercise of strip search powers. While junior officers could remember some training about police powers during their studies at the Academy, the Commission was particularly concerned by comments from more senior officers which indicated they had not received any recent training about the conduct of strip searches, and some could not remember the training relating to strip searches from their studies at the Academy.

For example Sergeant MA11, who was examined under Operation Mainz, could not recall strip searches being covered at the Academy (where he was a student from 2002-03).<sup>377</sup> He did recall reading some information about police powers as part of the vocational course leading to his appointment to Sergeant in 2018, noting that he

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<sup>377</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, p. 50.

imagined 'searching was in there'<sup>378</sup> but he told the Commission he had not received any continuing education about strip searches since the Academy.<sup>379</sup>

During Operation Karuka, the Commission asked six involved officers about the training they had received on strip searches. Of the six, four officers could not recall the training they had received about strip searches at the Academy or as continuing education once they became police officers even though three had studied at the Academy in the past five years.<sup>380</sup> The fourth had been a police officer for 26 years, and could not recall any specific training in relation to strip searches.<sup>381</sup> A further two officers stated that they had received training on strip searches at the Academy and that they had learned how to conduct strip searches from other officers.<sup>382</sup> The Commission was particularly concerned by comments from the Custody Manager in this investigation which indicated she could not recall having received training in relation to strip searches.<sup>383</sup> The Commission acknowledges that the five day *Safe Custody Course*, which is a prerequisite to working as a Custody Manager within the NSWPF refers to the search powers in LEPR.<sup>384</sup> The courses relevant to working within the custody areas of NSWPF stations are discussed further at 8.4.3.

The Commission was also concerned by comments from involved officers during Operation Brugge in which they indicated a lack of awareness of the particular protections afforded to people aged between 10-18 years when strip searched.<sup>385</sup> One of the officers in that matter, who had been in the NSWPF for 14 years, told the Commission he had completed only five minutes of mandatory continuing police education on strip searches,<sup>386</sup> and his training had never included examples of what circumstances might meet the threshold of serious and urgent.<sup>387</sup>

Similarly in Operation Gennaker some officers could not remember specific training in the obligations relating to strip searching young people.<sup>388</sup> More junior officers told the Commission they had been trained in strip search powers at the Academy but some could not remember the specifics of what was taught in that regard.<sup>389</sup>

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<sup>378</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, p. 51.

<sup>379</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, p. 50.

<sup>380</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 23 October 2018, p. 12.

<sup>381</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 22 October 2018, p. 58.

<sup>382</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 24 October 2018, p. 16.

<sup>383</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 22 October 2018, p. 42.

<sup>384</sup> NSW Police Force *Safe Custody Course*, Annexure 11 to Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019.

<sup>385</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, p. 161.

<sup>386</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, p. 187.

<sup>387</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Brugge*, Sydney, 22 October 2019, p. 126, line 31, p. 128, line 35.

<sup>388</sup> Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, p. 257; Transcript of Law Enforcement Conduct Commission Public Hearing, *Operation Gennaker*, Sydney, 4 December 2019, p. 405.

<sup>389</sup> See for example Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, 2 August 2019, p. 32.



The female officer who assisted in the strip search detailed in case study 4 in Chapter 6 provided evidence that in 19 years as a serving police officer she had never had a support person present during the strip search of juveniles, and that she was unaware of s 33(3)(a) of LEPRA.

These examples indicate a need for regular reinforcement of the training relating to police powers, and specifically strip searches.

## 8.2 How police are trained

Training in respect of police powers commences at the Academy, when officers are taught the relevant provisions of LEPRA, common law powers, case law, relevant NSWPF policies and procedures. Practical training in the exercise of powers is also delivered at the Academy.

After the Academy and beyond attestation, the exercise of police powers is addressed in mandatory and vocational training available to all police officers – see 8.4 below. Since the Commission’s strip search inquiry began, the NSWPF has used a variety of methods to deliver training to officers about strip search powers:<sup>390</sup>

- **Microlearns:** Two minute training videos or presentations that are accessible on the NSWPF intranet site and are presented as real life scenarios. For example, In March 2019 the NSWPF introduced a short ‘micro-learn’ video that deals with use of body worn video while strip searching.
- **SMIT:** Six minute intensive training packages which are documents that can be assessed through the intranet for review by police officers and then presented at a Command briefing where an officer would run through a scenario or hypothetical with the team and use it as a prompt for discussion. For example, a SMIT scenario-based training about strip searches was distributed on February 2019.
- **Police Monthly:** This journal is circulated monthly within the NSWPF. It provides regular articles on current topics for police officers; includes reports on court results and also reports generally on trends affecting police officers.

The NSWPF has also introduced informational screen savers and notebook stickers as a means to reinforce the basic elements of strip search powers while officers are at work. It has also developed an online educational package for officers working at music festivals, which it plans to roll out when such festivals occur in the future (discussed at 5.3).

In December 2019 the NSWPF developed a ‘Police Powers Portal’ which is located on the NSWPF intranet. It contains educational resources and publications in relation to police powers. It includes a series of guides, called ‘Law On’, which have been ‘developed by ETC [the Education and Training Command] and have been legally endorsed by the Operational Legal Advice Unit, Police Prosecutions Command.’<sup>391</sup> The Law On guides relate to a variety of topics, including ‘person stop and search’.

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<sup>390</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, pp. 20-21.

<sup>391</sup> Letter from A/Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner of Integrity, Law Enforcement Conduct Commission, 16 October 2020.



## 8.3 Teaching person searches to new recruits

Police recruits must complete the Associate Degree of Policing Practice (ADPP) in order to enter the NSWPF. The ADPP is delivered cooperatively by Charles Sturt University (CSU) and the NSWPF. Police officers who deliver training at the Academy must have or be in the process of obtaining a Graduate Certificate in Adult Learning through CSU.<sup>392</sup>

The ADPP focuses on the theory, practice and application of various ‘practice domains’: community engagement, intelligence, investigation, legislation, response, decision making, critical thinking, risk assessment, mitigation and safety practices within the profession of policing.<sup>393</sup>

In 2018-19 the Education and Training Command reviewed the material that recruits are taught about police powers. Recruits are now required to attain 100% to pass in police powers examinations at the end of session 1 and 2, over and above the former 80% pass mark.<sup>394</sup>

### 8.3.1 Training support for probationary constables

Part of the training provided to probationary constables includes practical experience within a local command over 42 weeks (sessions 3-5 of the ADPP). During this time, Field Training and Assessment Officers (FTAOs) oversee the training and progression of probationary constables. The FTAOs are officers with at least 15 months service and have completed a two-day training course. The FTAO sign off when they observe that probationary constables have completed key skills and competencies, including undertaking an appropriate search and strip search.<sup>395</sup>

Probationary constables also have a ‘buddy’, who is either a Constable or Senior Constable, whom they work with daily. The buddy system is in place for the first 12 weeks of session 3. The buddy will change after six weeks. In the first four weeks the probationary constable must work ‘3 up’, with a FTAO and another officer at all times.<sup>396</sup> This approach emphasises practical learning from more senior officers. Accordingly it is essential that those more senior officers have a sound grasp of both the legislative requirements and the practical issues that arise when using police powers such as strip searches. Without this the senior officer will risk passing on ignorant assumptions and poor practices on junior officers.

### 8.3.2 Curriculum content relating to strip searches

In 2018 the Commission reviewed the curriculum content relating to strip searches contained in the class Facilitator’s Guide (the Guide).<sup>397</sup> The Guide is not a complete record of the information conveyed in class. The Guide sets out the slides to be used

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<sup>392</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 9.

<sup>393</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 8.

<sup>394</sup> Minister for Police and Emergency Services, Response to Supplementary Question 176, Budget Estimates, 2019-20, 24 September 2019, p. 50.

<sup>395</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, pp. 9-10.

<sup>396</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 10.

<sup>397</sup> Letter from Manager, Prevention and Education, Law Enforcement Conduct Commission, to A/Assistant Commissioner, Education and Training Command, NSW Police Force, 29 August 2018.

and the general information that must be covered. It includes lesson outcomes and instructions for the facilitator. Class content will also be informed by group discussion. However, the Commission was concerned that the content had an insufficient focus on the formation of suspicion to conduct strip searches in custody and the field. Additionally, the Guide did not cover a range of practical issues relating to how strip searches should be conducted, including seeking cooperation or consent, whether police could ask a person to squat or move their body to facilitate visual inspection, use of force, how privacy and dignity should be protected during a strip search, or the use of a parent/guardian or support person for searches of people between 10-18 years.

While additional matters may have been covered in class discussion, there is a risk that subject matter that is not set out in the Guide will not be covered in class. There is also a risk that the issues, if covered, will be covered inconsistently from class to class.

In late 2019 the NSWPF introduced curriculum changes relating to the way strip searches are taught in the ADPP.<sup>398</sup> As well as some additional content relating to ss 31 and 32, the changes included increased focus on formation of suspicion for a strip search taught by way of video, role play scenarios and computer simulation scenarios; the introduction of a 'police powers pocket guide' to all students which includes a summary of strip search powers; the introduction of two 'police powers' exams which require a 100% pass mark, and assessment of whether a student can justify a strip search as part of the operational safety component (which teaches how to safely use police powers).

There are a range of further policy issues that the NSWPF has recently settled, or is in the process of settling, which should also be reflected in the training provided to students in the ADPP, including:

- whether officers can ask a person to squat, bend over, move their genitalia to facilitate a visual inspection;
- in what circumstances officers can use force during a strip search;
- requirements for using a parent, guardian or support person and the practicalities of how they are to be made available and informed of their role; and
- conduct of strip searches in caged vehicles
- circumstances that may satisfy the test of 'seriousness and urgency' to make a strip search in the field necessary.

**Recommendation 23:** The NSWPF should ensure that the Associate Degree in Policing Practice curriculum pertaining to strip searches covers the following issues:

- (a) whether officers can ask a person to squat, bend over, move their genitalia to facilitate a visual inspection;
- (b) in what circumstances officers can use force during a strip search;

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<sup>398</sup> Letter from Assistant Commissioner, Education and Training Command, NSW Police Force, to Manager, Prevention and Education, Law Enforcement Conduct Commission, 25 February 2020.

- (c) requirements for using a parent, guardian or support person and the practicalities of how they are to be made available and informed of their role; and
- (d) conduct of strip searches in caged vehicles;
- (e) circumstances that may satisfy the test of 'seriousness and urgency' to make a strip search in the field necessary.

The NSWPF advised the Commission it would consider this recommendation.<sup>399</sup>

### 8.3.3 Evaluation of curriculum delivery

The NSWPF and CSU recently conducted an evaluation of the ADPP curriculum delivery focussing on the effectiveness of the 'integrated curriculum' which is taught both academically and in practice in PACs and PDs. The report, *Evaluation of the ADPP Curriculum Delivery 2018/19* made 26 recommendations for improved delivery.<sup>400</sup> This evaluation did not consider the content of the academic modules or assessments of students, but the delivery of the course. Interestingly, the evaluation concluded there was 'a clear disconnect between operational officers and the operation at Goulburn, with operational officers having little or no knowledge of what or how topics are being taught to Probationary Constables.'<sup>401</sup> It also concluded that staff were 'divided' as to their preparedness to teach the curriculum.<sup>402</sup>

Some notable recommendations from that evaluation included:

Consideration should be given to enhancing scenario based training to provide students with an understanding of how to respond effectively to situations with non-compliant or aggressive citizens.<sup>403</sup>

FTAOs and EDOs need to have an understanding of the curriculum at Goulburn and how it is delivered, to adequately support Probationary Constables.<sup>404</sup>

Consideration should be given to the introduction of a formal process of support and information giving to new members of teaching staff at Goulburn. This should be recordable and assessed by a competent teaching mentor.<sup>405</sup>

Continuous professional development of staff should be mandatory and monitored and recorded as part of an annual review process.<sup>406</sup>

The Commission supports these views as they echo some of the issues that have arisen during our Inquiry.

## 8.4 Continuing education for police officers

A variety of training is provided to police officers to ensure they are informed about the various aspects of their duties, including mandatory education programs and vocational training which equips officers with knowledge relating to specialised roles.

<sup>399</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>400</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*.

<sup>401</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, p. 56.

<sup>402</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, p. 62.

<sup>403</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, Recommendation 7, p. 7.

<sup>404</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, Recommendation 8, p. 8.

<sup>405</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, Recommendation 12, p. 8.

<sup>406</sup> Rogers, Colin., *Evaluation of the ADPP Curriculum Delivery 2018/19*, Recommendation 13, p. 8.

Formal and informal training is provided within commands, which has been described to the Commission as follows:

Police officers work within a rank-based system where they are constantly supervised and led by officers of a higher rank. There are official leadership positions within Commands, such as Team Leaders and Leading Senior Constables and all police officers are supervised in the course of their duties. Performance issues are reported up the chain of command and addressed according to policy and standards of performance requirements. Commands run team briefings, morning meetings, shift change-over meetings and other regular and daily briefings and meetings where current issues are raised and police officers are advised on changes in legislation or practice. Training may also occur through mentoring and buddy systems and formal Performance Improvement Plans or Conduct Management Plans.<sup>407</sup>

Throughout their careers, police officers are required to satisfactorily complete competency based assessments.<sup>408</sup> The competency requirements are tested by using mandatory training and incremental testing.<sup>409</sup> Incremental Testing (for non-commissioned officers above the rank of probationary constable) is a half hour online exam comprising of 40 questions, which must be taken prior to progressing to a higher increment within a rank. Incremental testing does not apply to constables progressing through levels 3-5, and those increments are awarded for 12 months service at each increment.<sup>410</sup>

#### 8.4.1 Mandatory training about strip search powers

The Mandatory Continuing Police Education (MCPE) program is developed by the Education and Training Command (ETC). Police must complete the MCPE program in a training year to get an incremental progression within a rank.

Mandatory training under the MCPE is delivered either online or face to face by Education and Development Officers (see 8.4.2 below). Up to 2018-19 the MCPE program was three days in duration, two being weapons training.<sup>411</sup>

In June 2019 the NSWPF introduced an online MCPE unit – ‘Use your powers’. The Commission has been advised it contains training regarding strip search powers. However training relating to person searches, including strip searches, has not featured much at all in the MCPE program. The last time a unit about searches was listed on the MCPE program was 2012-13, although records indicate that unit was withdrawn.<sup>412</sup> Before that, a unit about LEPPRA was listed in 2005-06.

The MCPE program for 2020-21 includes training on strip searches and mental health.

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<sup>407</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 18.

<sup>408</sup> Specifically, the requirements relating to competency based assessment are contained in the *Crown Employees (Police Officers – 2017) Award* and apply to commissioned and non-commissioned officers as defined in section 3 *Police Act 1990*.

<sup>409</sup> Officers must score 70% overall and 100% in the 8 mandatory questions on police powers that are within the test. Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, pp. 14-15.

<sup>410</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 15.

<sup>411</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 16.

<sup>412</sup> Content from NSWPF Intranet, *MCPE/CD/EA Training Packages*, accessed 20 June 2020.

### 8.4.2 Education and Development Officers

Education and Development Officers (EDOs) are ‘substantially attached to ETC or operate in connection with ETC, [and] work in the field, or operational areas of NSWPF’.<sup>413</sup> They are located in local commands and specialist operational commands. EDOs identify training requirements within their command that are additional to the mandatory and vocational training provided to officers.<sup>414</sup>

The complaint that led to Operation Sandbridge resulted in sustained findings against the subject officers in relation to the way they conducted the arrest and searches of the complainant. Part of the response to the issues arising in Operation Sandbridge was that the EDO was required to ensure that all Command staff were reminded of their powers of arrest, searching and strip searching. This was done by a variety of means, including officers being required to complete SMITs on strip searches, emails reminding officers to appropriately record strip search details, and reminding them about appropriate use of strip search powers, discussions about the legislative basis for strip searches in weekly staff briefings and circulation of Microlearn videos.<sup>415</sup> In addition, each of the subject officers were required to acknowledge that they understand their powers of arrest and search as per LEPR and police policies and procedures.<sup>416</sup>

### 8.4.3 Other relevant training programs

The Constables Education Program is currently available to officers up to the point they are confirmed as a Constable. Constables are not required to pass exams to progress to increments within the rank of Constable. The ETC is considering extending the program so that it finishes prior to and is a pre-requisite for promotion to Senior Constable.<sup>417</sup> The Commission considers this would be prudent, and urges the NSWPF to include training in police powers, including strip search powers, as part of that extended program.

A four hour long ‘Police Powers workshop’ has been available for commands to utilise over recent years, which focusses on arrest and searches. It includes a component on searching children and people with impaired intellectual functioning. The training is not mandatory, and it is up to local commands to decide whether it is needed. The NSWPF intends to develop an online version of this training.<sup>418</sup>

In June 2020 the NSWPF updated its Operational Safety – Person Search Techniques Guide to reflect the instructions regarding strip searching that now appear in the

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<sup>413</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 2.

<sup>414</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 2.

<sup>415</sup> NSW Police Force, Police Area Commander, Response to Law Enforcement Conduct Commission s 54 Notice no 15 of 2019, 17 September 2019, pp. 5-6.

<sup>416</sup> NSW Police Force, Police Area Commander, Response to Law Enforcement Conduct Commission s 54 Notice no 15 of 2019, 17 September 2019, pp. 5-6.

<sup>417</sup> Statement from Assistant Commissioner, Education and Training Command, NSW Police Force, to Law Enforcement Conduct Commission, 17 April 2019, p. 15.

<sup>418</sup> NSW Police Force, Education and Training Command, *Strategic Intent 2019-2024*.

Person Search Manual and Custody SOPs. The Person Search Techniques Guide is a component of the Operational Safety Instructor Training System.<sup>419</sup>

In July 2020, the NSWPF informed the Commission that, along with other police forces across Australia, it had developed Behavioural Observation and Suspicious Activity Recognition training (BOSAR). The BOSAR training focuses on behavioural analysis, including 'physiological signs of nervousness and anxiety and possible indicators of deceit, together with training in understanding the role that context plays in deciphering behaviour'.<sup>420</sup> A two-day training BOSAR program became available across the NSWPF on 6 July 2020. The Commission understands that arrangements for participating in the BOSAR training would be made at the Command level.

The Custody Workshop (one day) and Safe Custody Course (five days) are vocational training provided to officers who wish to work in the custody environment as Custody Assistant or Custody Manager. The Custody Workshop course outline provided to the Commission indicates that it canvasses ss 28A and 31 of LEPR and record keeping requirements relating to strip searches. However the course outline does not appear to cover thresholds for undertaking general or strip searches, nor the safeguards in ss 32-33. The course outline does not address the requirements for support persons for strip searches of a young person or with impaired intellectual functioning. The discussions relating to support persons only address the requirements relating to vulnerable persons during investigative procedures (such as questioning) which are covered in Part 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016*. The Safe Custody Course does appear to cover all of the relevant LEPR provisions regarding strip searches, as well as provisions in the Police Handbook, and the LEPR Regulation. The Commission understands that the courses now also refer to the Custody SOPs.

Given the high frequency of strip searches in custodial settings when compared to searches in the field, the Commission considers it important that both courses cover police strip search powers and the practicalities of conducting strip searches in detail.

#### 8.4.4 Face to face and needs based training

The Commission acknowledges that online education is lower cost and may be easier to organise than face to face sessions, as it does not require officers to be physically present in one location at one time. The Commission notes that the NSWPF is introducing a new online education package for officers undertaking duties at music festivals (see 5.3.4). Online training in this context may be practical and efficient, given that officers may be brought in from a range of different locations (for example, as user-pays police) to work at a major event or festival.

However, comments from a range of police officers during the Inquiry indicated that face to face sessions may be more meaningful and more memorable and therefore a more effective way to educate officers. For example, officers in Operation Mainz indicated that computer based education did not have the most impact – one officer

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<sup>419</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to A/Chief Commissioner, Law Enforcement Conduct Commission, 10 July 2020.

<sup>420</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to A/Chief Commissioner, Law Enforcement Conduct Commission, 10 July 2020.



at the rank of Sergeant stated 'it's not the best training environment. That's something I struggle with'.<sup>421</sup> He told the Commission of the popularity of online training but stated that he finds face to face training more beneficial than online training.<sup>422</sup> Other comments suggested the training that officers had completed in relation to strip searching was not memorable, for example some of the officers involved in the events the subject of Operation Karuka could not remember or clearly bring to mind any training they had received in relation to conducting a strip search.<sup>423</sup>

The Commission notes the use of SMITs by the NSWPF as a means of refreshing training in strip search powers. The Commission considers this format may work well to revise the content of legislation, however the use of a short, text based question and answer format may not be best suited for exploring how to satisfy the thresholds for strip searches or practical issues such as dealing with non-compliant subjects. Similarly, the NSWPF's use of methods such as posters, screen savers and stickers serve as useful reminders of legislative requirements, and should be commended. However, the Commission is concerned that these methods may not be sufficient to address some of the more complex or challenging decisions about whether, and if so how, a police officer should conduct a strip search – such as the deficiencies in the decision making process used by officers when determining to conduct a strip search that were considered above in Chapter 3.

In Operation Mainz the Commission concluded that the investigation demonstrated that the educational methods being utilised by the NSWPF to inform officers of their powers and responsibilities in relation to LEPR are not being universally applied in the practice of policing.<sup>424</sup> The Commission asked the NSWPF to consider:

... instigating wide-ranging, face to face tutorials or workshops led by Local Area Commanders in which real life situations are discussed as hypotheticals and which raise the various practical implementation of LEPR. Such sessions should not be conducted by a 'talking head', but by question and answer, with participation by attendees encouraged. These sessions could ideally be conducted at regular meetings of sergeants, who could then conduct the same sessions with more junior officers. This would create beneficial change from the top down. The attendance at such workshops should be compulsory. Active involvement in such lectures should be linked to promotion and salary increments.<sup>425</sup>

The model suggested by the Commission would allow officers to debrief and workshop responses to scenarios encountered in their experience. This should be supported by educational strategies that reinforce the content of the legislative

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<sup>421</sup> Law Enforcement Conduct Commission, *Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 4.9; Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, at T55 from line 2.

<sup>422</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Mainz*, Sydney, 2 September 2019, at p. 54.

<sup>423</sup> Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 22 October 2018, p. 42; Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 23 October 2018, p. 12; Transcript of Law Enforcement Conduct Commission Private Hearing, *Operation Karuka*, Sydney, 23 October 2018, p. 19.

<sup>424</sup> Law Enforcement Conduct Commission, *Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 8.1.

<sup>425</sup> Law Enforcement Conduct Commission, *Operation Mainz, Report to Parliament pursuant to section 132 Law Enforcement Conduct Commission Act 2016*, May 2020, para 8.2.



provisions which set out an officer's powers. Such training should assist officers to fill those gaps with practical strategies that comply with the legislation.

Also, Operation Brugge demonstrated a clear need for specific and practical training on what circumstances will – and will not – be sufficiently serious and urgent to justify a strip search in the field. This training should provide multiple examples and cover various scenarios. This training could be provided in short face to face workshops delivered by officers in the ETC, with supplementary reminders circulated in other text based and online formats.

In response to the above consideration set in the Commission's Operation Mainz, the NSWPF informed the Commission that in November 2020 it would launch a new training system, Police Education and Training Environment (PETE), and further advised that on 23 November 2020, a Music Festivals online training module was introduced in PETE.<sup>426</sup> The new system is designed to allow for 'blended learning through the delivery of online training packages and facilitated, face to face training that is relevant to, and consistent with, the local operational environment.'<sup>427</sup> The NSWPF indicated that the PETE system:

...will include EDO facilitator guides to reinforce mandatory online training modules; access to modules of learning across vocational and leadership courses; and templates to facilitate a range of desktop exercises. Local training days are a priority of the Commissioner's Executive Team and once maturity within the system has been achieved, EDOs will be able to develop additional training packages to meet local needs.

The PETE learning management system will provide EDOs with an increased ability to place greater focus on delivering local training to meet operational requirements. Senior officers, supervisors, Field Training and Assessment Officers, Field Training Instructors for Driver Development, Operational Safety Instructors, Personal Training Instructors and a range of specialist officers will be able to enhance the training experience. These changes are envisaged to improve the consistency and quality of training outcomes for NSWPF officers.<sup>428</sup>

The Commission notes the developments to be implemented by the NSWPF, and looks forward to being provided with further detail about what the system entails and how it will be utilised within commands. It does not, at present, appear to implement a significant increase in face to face learning sessions, although it is noted there may be capacity for that to develop in time. The Commission remains convinced of the importance of face to face learning opportunities to ensure that uncertainties in police powers and practices can be appropriately explored and settled so that officers gain clarity and consistency in their approach.

Additionally, the Commission notes that the NSWPF has implemented a system of regular audits, undertaken by the Governance, Risk and Compliance Team and commands focusing both on searches in the field and searches of persons under 18 years. The focus of those audits, discussed at 2.4, primarily addresses record keeping, but also may be used to inform consideration by the command of the use of powers by its officers. The Commission considers the results should be considered

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<sup>426</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>427</sup> Letter from A/Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Integrity, Law Enforcement Conduct Commission, 16 October 2020.

<sup>428</sup> Letter from A/Assistant Commissioner, Professional Standards Command, NSW Police Force, to Commissioner for Integrity, Law Enforcement Conduct Commission, 16 October 2020.

by the ETC, in order to inform some needs based analysis of whether and where additional training is required to be conducted. The ETC may also be well positioned to assist EDOs to use the audit reports to identify training needs within their commands.

These strategies appear compatible with the Strategic Intent for the ETC for 2019-24 which included the following:

- Establish individual command training needs based upon operational risks to design specific education/training packages to enhance capabilities in key areas of operation
- Engage the Education and Development Officer network to enable the identification of training needs and delivery of material by top quality facilitation
- Build a culture of learning reinforcement to enhance the professional capability of police officers by driving understanding of justification for core duties and powers
- Engage learning reinforcement by establishing and leading Communities of Practice where shared learning and skills/knowledge are part of course requirements
- Develop learning requirements that extend beyond confirmation to the first five years of service to strengthen professional requirements and operational capabilities
- Deliver a Lessons Learned capability supporting a learning organisation that identifies, researches and understands problems, mitigates risks and promotes evidence-based best practice policing through the sharing of knowledge.<sup>429</sup>

The information being generated from both the centralised and command level audits could inform decisions about where face to face scenario training may be beneficial, or where to utilise other existing training programs such as the Police Powers Workshop.

**Recommendation 24:** The NSWPF should provide regular scenario based training to officers on what circumstances will and will not be sufficient to satisfy the seriousness and urgency requirement for a strip search in the field under s 31(b) of LEPR. This training should also assist officers to determine when there are reasonable grounds to suspect that it is necessary to conduct a visual examination of a person's genitalia during a strip search. It should be clear in both policy and training that doing this cannot be a routine part of a strip search but must be justified by the officer in each particular circumstance.

In addition to the implementation of such scenario based training and the use of audit results to inform the allocation of training needs, the Commission notes that a range of the recommendations in this report relate to changes or clarifications in NSWPF policies which are designed to improve officers' compliance with the threshold requirements for strip searching under LEPR. It is crucial therefore that each of these changes or clarifications are included in the training and educational

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<sup>429</sup> NSW Police Force Education and Training Command, *Strategic Intent 2019-24*, (accessed 20 July 2020).

materials provided both to recruits in the Academy and to officers on an ongoing basis.

**Recommendation 25:** The NSWPF should ensure that each of the changes and clarifications in policy regarding the threshold requirements for strip searches reflected in recommendations 2, 4-10, 14, 16, 17 and 19 are included in the education and training on strip search powers given to recruits and officers.

The NSWPF advised the Commission it accepts recommendations 24 and 25.

# Appendix A

## Provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) which contain safeguards for strip searches

### **Part 4 Search and seizure powers without warrant**

#### **32 Preservation of privacy and dignity during search**

(1) A police officer who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.

(2) The police officer must inform the person to be searched of the following matters—

- (a) whether the person will be required to remove clothing during the search,
- (b) why it is necessary to remove the clothing.

(3) The police officer must ask for the person's co-operation.

(4) The police officer must conduct the search—

- (a) in a way that provides reasonable privacy for the person searched, and
- (b) as quickly as is reasonably practicable.

(5) The police officer must conduct the least invasive kind of search practicable in the circumstances.

(6) The police officer must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.

(7) A search must be conducted by a police officer of the same sex as the person searched.

(7A) However, if a police officer of the same sex as the person who is to be searched is not immediately available, a police officer may delegate the power to conduct the search to another person who is—

- (a) of the same sex as the person to be searched, and
- (b) of a class of persons prescribed by the regulations for the purposes of this subsection.

The search by that other person is to be conducted under the direction of the police officer and in accordance with provisions of this Act applying to searches conducted by police officers.

(8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.

(8A) Subsection (8) does not prevent the asking of questions that only relate to issues of personal safety associated with the search.

(9) A person must be allowed to dress as soon as a search is finished.

(10) If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing.

(11) In this section—  
questioning of a person means questioning the person, or carrying out an investigation (in which the person participates).

### **33 Rules for conduct of strip searches**

(cf Cth Act, s 3ZI)

(1) A police officer who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following—

- (a) the strip search must be conducted in a private area,
- (b) the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched,
- (c) except as provided by this section, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

(2) A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present. Subsection (1)(b) does not prevent any such person who is of the opposite sex to the person being searched from being present during the search.

(3) A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must be conducted—

- (a) in the presence of a parent or guardian of the person being searched, or
- (b) if that is not acceptable to the person, in the presence of another person who is not a police officer and who is capable of representing the interests of the person being searched and whose presence is acceptable to that person.

(3A) Subsection (3) does not apply if a police officer suspects on reasonable grounds that—

- (a) delaying the search is likely to result in evidence being concealed or destroyed, or
- (b) an immediate search is necessary to protect the safety of a person.

In such a case, the police officer must make a record of the reasons for not conducting the search in the presence of a parent or guardian, or other person capable of representing the interests, of the person being searched.

(4) A strip search must not involve a search of a person's body cavities or an examination of the body by touch.

(5) A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

- (6) A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.
- (7) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.
- (8) This section is in addition to the other requirements of this Act relating to searches.
- (9) In this section—
- impaired intellectual functioning means—
- (a) total or partial loss of a person's mental functions, or
  - (b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
  - (c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Note— Procedures for searches of a more invasive nature are dealt with under the *Crimes (Forensic Procedures) Act 2000*.

### **34 No strip searches of children under 10 years**

A strip search must not be conducted on a person who is under the age of 10 years.

#### **34A Searches carried out with consent**

- (1) A police officer may search a person with the person's consent but only if the police officer has sought the person's consent before carrying out the search.
- (2) A police officer must, before carrying out any such consensual search, provide the person with—
- (a) evidence that the police officer is a police officer (unless the police officer is in uniform), and
  - (b) the name of the police officer and his or her place of duty.

## **Part 15 Safeguards relating to powers**

### **201 Police powers to which this Part applies**

- (1) This Part applies to the exercise of the following powers by police officers—
- (a) a power to stop, search or arrest a person,
  - (b) a power to stop or search a vehicle, vessel or aircraft,
  - (c) a power to enter or search premises,

- (d) a power to seize property,
- (e) a power to require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes),
- (f) a power to give or make a direction, requirement or request that a person is required to comply with by law,
- (g) a power to establish a crime scene at premises (not being a public place).

This Part applies (subject to subsection (3)) to the exercise of any such power whether or not the power is conferred by this Act.

Note—

This Part extends to special constables exercising any such police powers—see section 82L of the *Police Act 1990*. This Part also extends to recognised law enforcement officers (with modifications)—see clause 132B of the *Police Regulation 2008*.

(2) This Part does not apply to the exercise of any of the following powers of police officers—

- (a) a power to enter or search a public place,
- (b) a power conferred by a covert search warrant,
- (c) a power to detain an intoxicated person under Part 16.

(3) This Part does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

## **202 Police officers to provide information when exercising powers**

(1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power—

- (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
- (b) the name of the police officer and his or her place of duty,
- (c) the reason for the exercise of the power.

(2) A police officer must comply with this section—

- (a) as soon as it is reasonably practicable to do so, or
- (b) in the case of a direction, requirement or request to a single person—before giving or making the direction, requirement or request.

(3) A direction, requirement or request to a group of persons is not required to be repeated to each person in the group.

(4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

(5) If a person subject to the exercise of a power to which this Part applies asks a police officer present for information as to the name of the police officer and his or



her place of duty, the police officer must give to the person the information requested.

(6) A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1)(a) and (b) only once on that occasion.

### **203 Police officers to give warnings when giving or making directions, requirements or requests that must be complied with**

(1) A police officer who exercises a power to which this Part applies that consists of a direction, requirement or request must give a warning to the person subject to the exercise of the power that the person is required by law to comply with the direction, requirement or request.

Note—

A failure to comply with the direction, requirement or request does not constitute an offence unless a warning under this section has been given—see section 204B.

(2) A warning is not required if the person has already complied with or is in the process of complying with the direction, requirement or request.

(3) A police officer must comply with this section as soon as is reasonably practicable after the direction, requirement or request is given or made.

(4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

### **204 Detention period for search of vehicles etc limited**

A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose of the search.

#### **204A Validity of exercise of powers**

(1) A failure by a police officer to comply with an obligation under this Part to provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power.

(2) Subsection (1) does not apply if the failure to comply occurs after the police officer was asked for information as to the name of the police officer or his or her place of duty (as referred to in section 202(5)).

(3) Subsection (1) does not apply to the exercise of a power that consists of a direction, requirement or request to a single person.

**204B Commission of offence in relation to exercise of powers where failure by police officer to comply with this Part**

(1) A person does not commit an offence under this Act of failing to comply with a direction, requirement or request given or made by a police officer under or in connection with a power to which this Part applies unless the obligations under this Part are complied with when exercising the power.

(2) Subsection (1) does not apply to a failure by a police officer to comply with an obligation under this Part that does not render the exercise of the power by the officer unlawful because of section 204A.

# Appendix B

## NSWPF Your Rights Poster

### POLICE SEARCHES: YOUR RIGHTS

#### Why are you being searched?

Police are allowed to stop, search and detain you if they suspect you are carrying:

1. stolen or illegally obtained items
2. things police think may be used illegally (e.g. tools to break into houses)
3. **ILLEGAL DRUGS**, knives or weapons.

#### What rules do police have to follow when doing a search?

**BEFORE** you are searched, police **MUST** tell you **WHO** they are, **WHERE** they are from and **WHY** they want to search you. If they haven't already told you, ask for the officer's name, police station and why they want to search you. If they aren't wearing a police uniform, you can ask to see proof they are police e.g. an identity card.

The police can ask for your **CONSENT** to be searched. **You are allowed to say NO.**

If the police say they want to search you anyway, they **MUST** tell you that if you do not comply with the search you will be committing an offence. If you refuse to be searched, the police may arrest you and use force to search you.

When conducting a search (whether you consent or not), police are **ALLOWED** to:

1. Quickly run hands over your outer clothing
2. Ask you to remove your jacket or outer clothing and any shoes, socks and hat
3. Examine anything in your possession
4. Use a metal detector near your outer clothing or anything removed from you.


To maintain your privacy and dignity during the search, police **MUST**:

1. tell you whether you have to remove clothing, and explain why you must do that
2. ask for your co-operation
3. try to give you some privacy and try not to be too intrusive
4. try to do the search as quickly as they can.

Unless you have been told that the search will be a strip search, police **MUST NOT** ask you to take off your clothes (except your outer clothing) or look inside your underwear.

You **MUST** be searched by a person of the same gender as you. If a police officer of the same gender is not immediately available, the officer who wants to search you might ask a person who is not a police officer, but who is the same gender, to search you.

Police **MUST NOT** ask you questions about the reason for the search while searching you, unless the questions relate to safety.



#### Can police strip search me?

Police **MUST NOT** strip search you if you are under 10.

If you are 10 or older, police can strip search you if – having decided you can be searched – the police officer thinks it is necessary, serious and urgent. If you want to, you can ask the police officer why they think the circumstances are serious and urgent. They are not obliged to tell you.

#### What rules do police have to follow when doing a strip search?

**BEFORE** you can be strip searched, police must tell you **WHO** they are, **WHERE** they are from and **WHY** they want to strip search you e.g. to look for **ILLEGAL DRUGS**. If they haven't already told you, ask for the officer's name, police station and why they want to strip search you. Police must warn you that if you don't let them search you, you'll be committing an offence.

In addition to the rules about privacy and dignity described earlier, when doing the strip search, police **MUST**:

1. try to do the strip search in a private area (if that is possible at the time)
2. let you put your clothes back on as soon as the search is finished.

If you are between 10-18, or if you believe have special intellectual needs, the strip search **MUST** be done with your parent or guardian present or, if you prefer, some other person capable of representing your interests.

**Police ARE NOT ALLOWED TO:**

1. remove more clothes than they think necessary
2. directly touch your body (but they can touch your clothes), unless you resist (then police can use as much force as necessary to enable a visual search)
3. search inside your body (but they can look inside your mouth)
4. ask you questions about the reason for the search while performing a strip search, unless the questions relate to safety
5. strip search you near or in view of a person who is of the opposite gender to you (unless that cannot be done in the circumstances or the person is your parent, guardian or personal representative e.g. your lawyer or independent support person);
6. search your genitals or, if you are female / transgender person who identifies as female, your breasts unless the police officer suspects that it is necessary to do so. For example, if the police officer suspects you have pills concealed under your breasts.

Police may need to seize your clothes as exhibits. If police seize your clothes, they **MUST** ensure you are given appropriate clothing in the circumstances.

## When conducting a strip search, police **MUST NOT**:

- Strip search a child under 10.
- Question the person. However, police can ask safety related questions e.g. if a pocket contains a syringe.
- Examine the naked body by touch. However, if the person being searched does not co-operate, police may have to use physical force to restrain the person and remove or lift clothing to allow a visual inspection. The use of force may involve touching the person's body and may involve more than one police officer.
- Search body cavities, other than inside the person's mouth. Police are allowed to ask the person to open their mouth and the person must comply with that request.
- Require the removal of more clothes than is reasonably necessary. Usually, police will ask the person to take their clothes off one half of their body (e.g. t-shirt first), then allow them to redress and ask them to take their clothes off the other half of their body (e.g. pants second). They do not have to do it this way, but it is a way of giving the person some dignity and privacy and make the process less intrusive.
- Make more of a visual inspection than is reasonably necessary for the purposes of the search.

## RE SOURCE S

You can access the legislation (LEPRA) governing police powers on your smartphone:

<https://www.legislation.nsw.gov.au/#/view/sg-cl/2002/103/part4/div4>



NSW Police Force

## POLICE SEARCHES AT MUSIC FESTIVALS: BEING A SUPPORT PERSON

You have been asked to be a support person for someone who is being strip searched in accordance with the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA). This pamphlet explains your role to protect the rights of the person being searched.

### What is your role?

If police need to strip search a person aged between 10 and 18 or someone with impaired intellectual functioning, police can only search if either a parent/guardian is present OR the person prefers someone else be present, who can represent that person's interests (and who is not a police officer).

Your role is to support the person being searched to ensure their rights are represented. You are **not** obliged to act as an advocate for the person being searched - you are not required to defend them. **But you should speak up if you believe police are not obeying the rules in this pamphlet.**

Please remember that police are at work, doing a job, and performing the search because they believe it is necessary to do so and believe

Version 1.0 6/12/18

they have the power to do so. So, you must not physically interfere in the search or be verbally abusive. The search will be faster if there is co-operation.

#### Why are police conducting a search?

Police are allowed to search people for a variety of reasons. For example, police may stop, search and detain someone if they reasonably believe the person is in possession of illegal drugs, weapons, stolen things or other things used to commit crimes.

#### Does it matter if the person does not consent to being searched?

Yes and no.

In most circumstances, police will ask for co-operation in being searched. Only the person being searched may consent to the search.

You cannot consent, or withhold consent, on their behalf. Police do not need your permission to perform a search.

A person being searched may refuse to consent to being searched. However, police may choose to use their powers in LEPR to search the person.

If they are to be searched anyway, police may decide to:

- warn them that if they do not agree and co-operate with the search they may be committing an offence
- arrest them
- use reasonable force necessary to carry out the search. The more resistance there is to

a search, the more force that may be used to conduct the search.

#### What are the rules and what am I looking out for?

Police must conduct a strip search in accordance with LEPR. Below is a simplified version of what police must and must not do.

**Before conducting a strip search, police MUST** tell the person their name, police station, why they are being searched (in broad terms e.g. I am looking for illegal drugs) and whether they will be required to remove their clothing during the search. They must tell the person being searched why it is necessary to remove clothing e.g. "I think you have drugs concealed under your clothes". If a police officer is not in uniform, they must show the person evidence that they are a police officer. You can ask for identification.

You may see police run their hands over outer clothing, examine things (e.g. jacket, hat, socks, back pack and bags), look inside pockets and ask for outer clothing to be removed. They may also use a metal detector. These actions are not a strip search. They are an ordinary or person search.

If necessary for the search, police may look inside clothes, including underwear. They may ask that other clothes be removed (e.g. t-shirt, shorts, or underwear) and visually examine the person's body (including genitals and breasts). This is a strip search. You are involved because a strip search is proposed to be conducted.

Police **MUST** try their best to:

- Preserve privacy and dignity during a strip search
- Conduct the strip search in as private an area as possible in the circumstances
- Make sure that the strip search is not done in the presence or view of someone who does not need to be there, or of someone of the opposite sex unless the person being searched consents to their presence either as a personal representative or as medical practitioner.

Because of the context in which strip searches are undertaken at music festivals, it is not always possible to ensure absolute privacy. The law requires police to do what they reasonably can to ensure privacy.

#### Police conducting strip searches **MUST**:

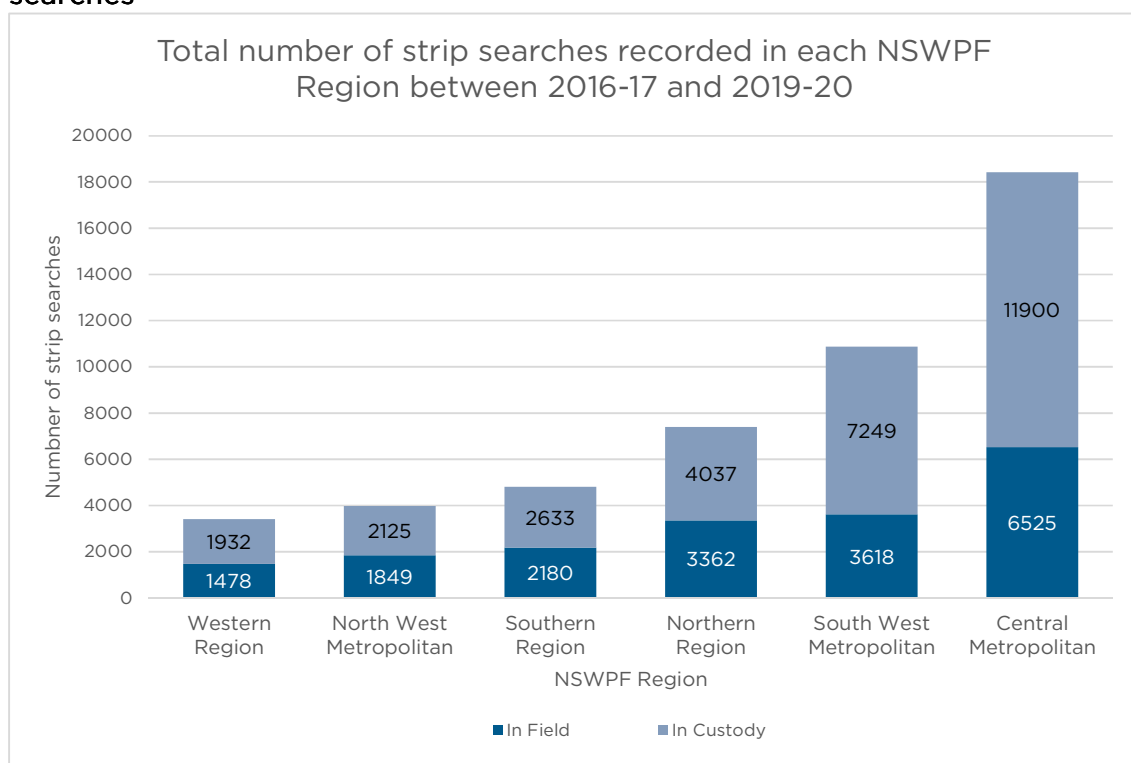
- Allow the person being searched to dress as soon as a search is finished.
- Ensure the person being searched has reasonably appropriate clothing if their clothes are seized during the search (e.g. as an exhibit or to release the drugs if they are concealed).
- Be the same sex as the person being searched. If there is no police officer of the same sex available to conduct the search, then ensure an authorised person of the same sex conducts the search (e.g. a nurse or an ambulance officer).
- Use Body Worn Video to film the search, if it is working and available to the police officer.

# Appendix C

## Strip searches by NSW Police Force Region

The information in this Appendix is drawn from statistical information provided to the Commission from the NSWPF on 11 May 2020,<sup>430</sup> 13 July 2020,<sup>431</sup> 20 August 2020<sup>432</sup> and 27 November 2020.<sup>433</sup> It should be noted that the data provided by the NSWPF is constrained by a number of factors, which have not (and due to complexity, cannot) be fully explored or represented in the data below. These factors include population growth and its effects over last four years and the impact of boundary and personnel changes as a result of re-engineering within NSWPF in 2017. The Commission is unable to compare strip search data prior to 2016-17 as a new custody system was introduced by NSWPF in 2014 and strip searches were only recorded in the system after December 2015.<sup>434</sup>

**Graph 1: The number of strip searches recorded between 2016-17 and 2019-20 categorised by NSWPF Region broken down by in field and in custody strip searches**



<sup>430</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 11 May 2020.

<sup>431</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 13 July 2020.

<sup>432</sup> Letter from Assistant Commissioner, State Intelligence Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 20 August 2020.

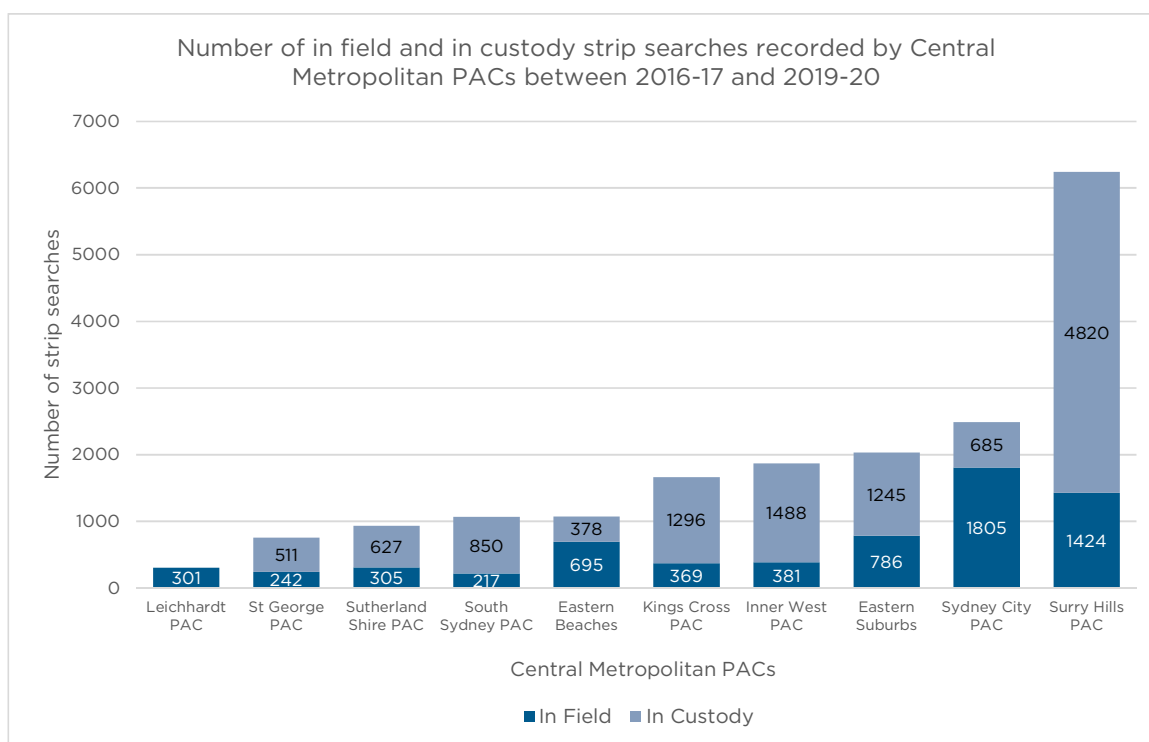
<sup>433</sup> Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>434</sup> There is a discrepancy between the total number of strip searches the NSWPF recorded and the data provided to the Commission on the number of strip searches conducted by Region, PAC and PD. This discrepancy is 92 strip searches.

In the last four years, the NSWPF recorded a total of 48,888 strip searches – an average of 12,222 strip searches annually. The Central Metropolitan Region recorded the largest number of strip searches conducted by region: 18,425 or 37.7% of the total number of strip searches in the state between 2016-17 and 2019-20. The South West Metropolitan Region recorded the second largest total in the number of strip searches during this period with, 10,867 strip searches or 22.2% of the total number of strip searches recorded in the state. In both the Central Metropolitan Region and South West Metropolitan Region, in custody strip searches accounted for a majority of their strip searches, 64.6% and 66.7% respectively.

### Central Metropolitan Region

**Graph 2: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by Central Metropolitan Police Area Command**

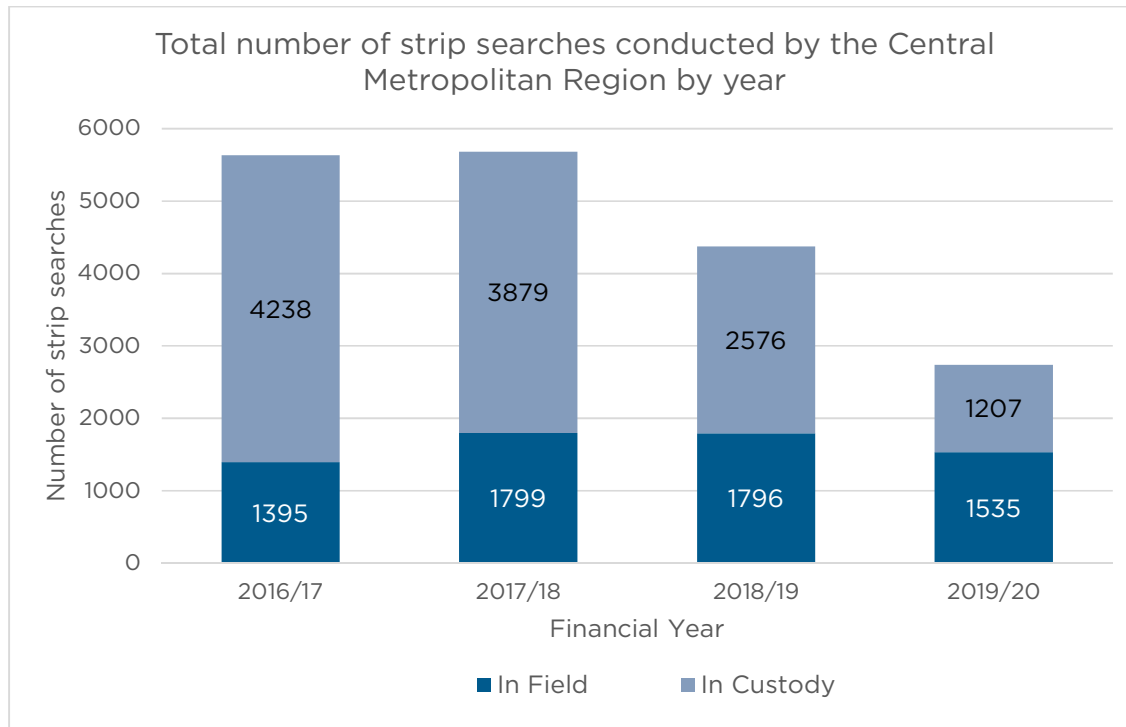


\*Leichhardt PAC recorded no in custody strip searches during this time period.

Between 2016-17 and 2019-20, the Central Metropolitan Region recorded 18,425 strip searches, of which 6525 were conducted in the field and 11,900 in custody. Of the 18,425 strip searches recorded, Surry Hills PAC was responsible for 6244 or 33.9% of the region's total. The majority (77.2%) of strip searches recorded by Surry Hills PAC were conducted when the individual was in custody. Sydney City PAC recorded the largest number of in field searches with 1805 across the period accounting for 27.7% of the Central Metropolitan in field total.



**Graph 3: The number of strip searches recorded by the Central Metropolitan Region by year**



There was a marked decrease in the number of strip searches recorded by Central Metropolitan PACs between 2018-19 and 2019-20, with the total falling from 4,372 to 2,742. Whilst Surry Hills PAC continued to record the highest number of strip searches in the Central Metropolitan Region accounting for 34.58% of the total number of strip searches in 2018-19, in 2019-20 this fell to 24.95%.

In response to inquiries from the Commission in relation to the number of strip searches conducted by Surry Hills and Sydney City PAC, the NSWPF advised that 'Surry Hills PAC (and Kings Cross) statistically have disproportionately high number of strip searches compared with other commands across the State.'<sup>435</sup> The NSWPF advised that the number of strip searches recorded is a reflection of:

- The type of crime prevalent in those Commands. For example, drugs, goods in custody (unlawful possession) and violent crimes involving weapons;
- There is a prominent clientele of people who are drug or alcohol addicted, suffer from mental illness, are at risk of suicide, or are members or affiliates of outlaw motorcycle gangs;
- The highest incidence of drugs found as a result of strip searches across NSW are in these two Commands;
- The presence of a Medically Supervised Injection Centre at Kings Cross Police Area Command, which is utilised by an average of 300 illicit drug users per day which inevitable leads to higher incidence of drug users frequenting the area (who may also engage in other criminal activity);

<sup>435</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 13 July 2020.

- e. The fact that a number of people who enter into Kings Cross or Surry Hills Police Stations or who are taken into custody already have additional warnings on the NSWPF Central Names Index (CNI). A large number of persons arrested within these Commands are repeat offenders and/or are known to Custody Managers and Assistants;
- f. Corrective Services holding cells being located at Surry Hills PAC. Surry Hills takes transfers from other police stations as it is a priority (custody) holding location within the Central Metropolitan Region; and
- g. Safety concerns in those police stations arising from the above.<sup>436</sup>

Supplementing this explanation, the NSWPF stated:

In addition to the demographics of the area is the presence of Sydney Police Centre as a large processing station for other police units; it also houses the Corrective Services holding cells where custodies are transitioned from police charge rooms.

A large portion of the strip search data reflects the policing of high-risk dance and music festivals held in Surry Hills PAC – including the Hordern Pavilion, Moore Park. These festivals are proven to involve a large amount of illicit drug supply and illicit drug use resulting in large numbers of overdoses and attendees requiring medical intervention.

...

Due to the number of licensed premises and population demographic mentioned above, Surry Hills has a high incidence of emerging trend of 'dial a dealer' illegal drug supply which could also be a contributor in the elevated number of strip searches.

...

Surry Hills processes the highest volume of custodies in the region. It also has the largest percentage of those custodies which are transferred to Corrective Services; 55% of the custodies from Surry Hills PAC were transferred to Corrective Services. This would be a reflection on the types of custodies for serious offences which are processed at Surry Hills; often by specialist units.<sup>437</sup>

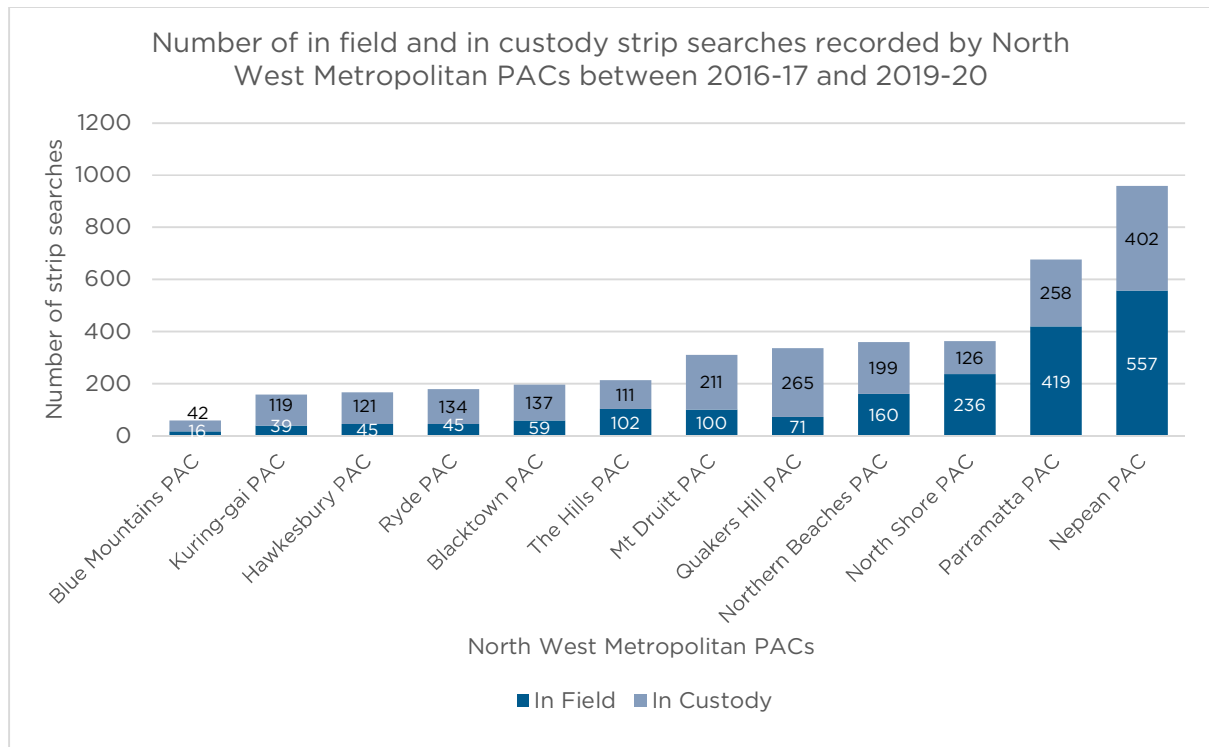
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<sup>436</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

<sup>437</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

## North West Metropolitan Region

**Graph 4: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by North West Metropolitan Police Area Command**

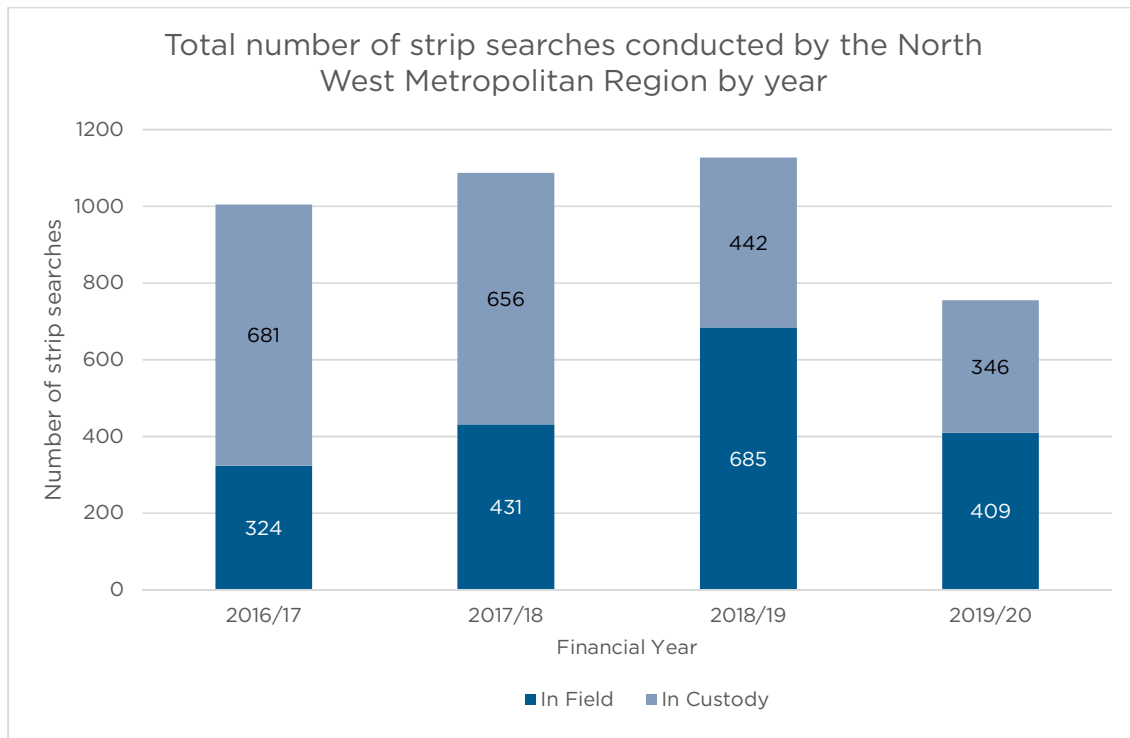


Between 2016-17 and 2018-19, Nepean PAC consistently recorded the largest number of strip searches in the North West Metropolitan Region. In 2016-17, the Nepean PAC recorded conducting 189 strip searches, this increased by 112.7% in 2018-19 to 402 strip searches. Most notably, the number of strip searches recorded by Nepean PAC in the field rose from 61 in 2016-17 to 327 in 2018-19. The NSWPF attributed this increase to a number of music festivals including Defqon 1 where officers conducted 246 in field strip searches, FOMO Rolling Loud (118), Transmission (65) and Ultra (82).<sup>438</sup> The cancellation of the Defqon music festival in 2019 by the NSW Government saw a fall in the number of in field strip searches recorded by Nepean PAC; down to 71.<sup>439</sup> This is reflected in the total number of in field strip searches recorded by the North West Metropolitan region as seen in Graph 5.

<sup>438</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

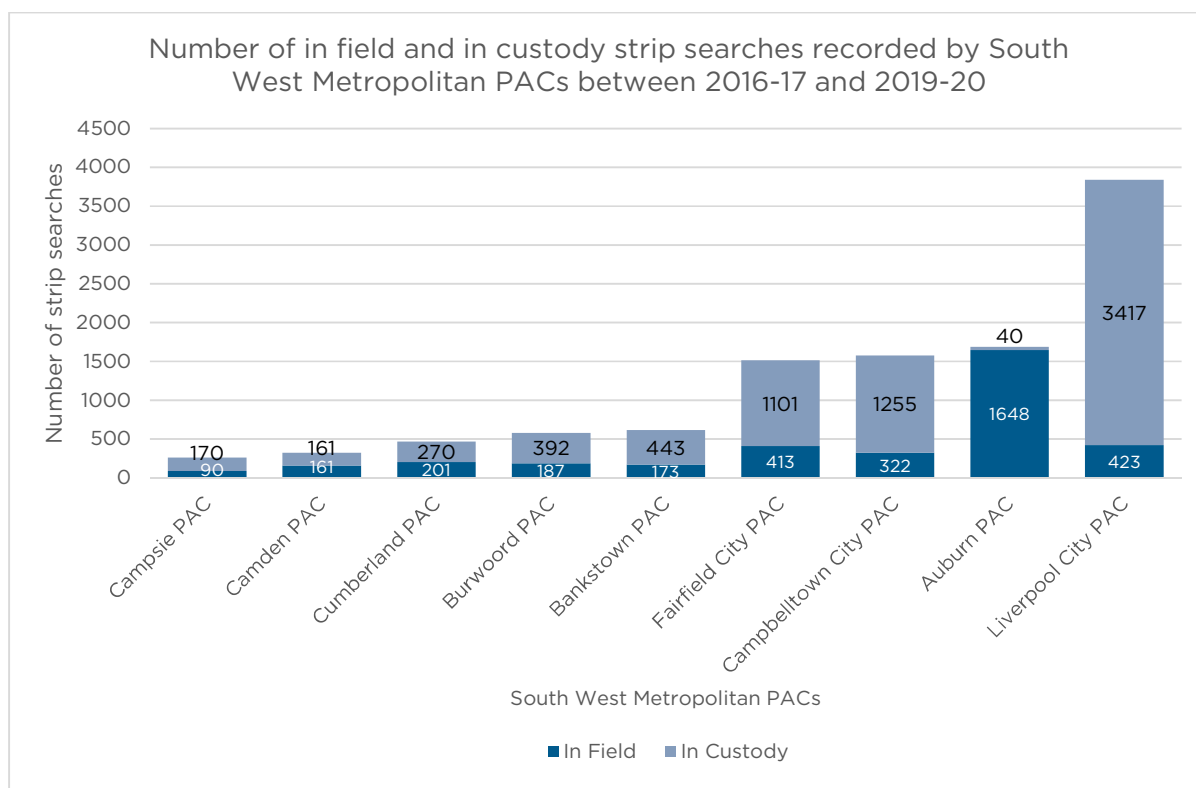
<sup>439</sup> Letter from Assistant Commissioner State Intelligence, NSWPF to Chief Commissioner LECC, 5 August 2020.

**Graph 5: The number of strip searches recorded by the North West Metropolitan Region by year**



## South West Metropolitan Region

**Graph 6: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by South West Metropolitan Police Area Command**



Taken together Auburn, Campbelltown City, Fairfield City and Liverpool City PACs account for nearly 80% of the total number of strip searches conducted in the South West Metropolitan Region over the last four years. Auburn PAC recorded conducting 246 strip searches in 2016-17, this figure increased to 689 strip searches in 2018-19. Of these strip searches, 677 were recorded as being conducted in the field. In 2018-19, Auburn PAC (689) and Liverpool City PAC (984) combined, were responsible for nearly 60% of all strip searches recorded in the South West Metropolitan Region.

In 2019-20, Liverpool City PAC recorded a total of 1164 strip searches (136 in the field and 1028 strip searches conducted in custody). This accounted for 52.93% of the total number of strip searches conducted by the South West Metropolitan Region in that year. In the South West Metropolitan Region, Liverpool City PAC has recorded the largest number of in custody strip searches over the four year period, recording 698 in 2016-17, 838 in 2017-18, 853 in 2018-19 and 1028 strip searches in 2019-20.

In 2018-19, 98% of all strip searches recorded by Auburn PAC occurred in the field.<sup>440</sup> Auburn PAC's responsibilities include policing the Sydney Olympic Park Precinct. Between 2015 and 2019, 31 music festivals (half which were deemed high-risk) were held in the area.<sup>441</sup> In 2019-20 due to bushfires and the COVID 19 pandemic, a

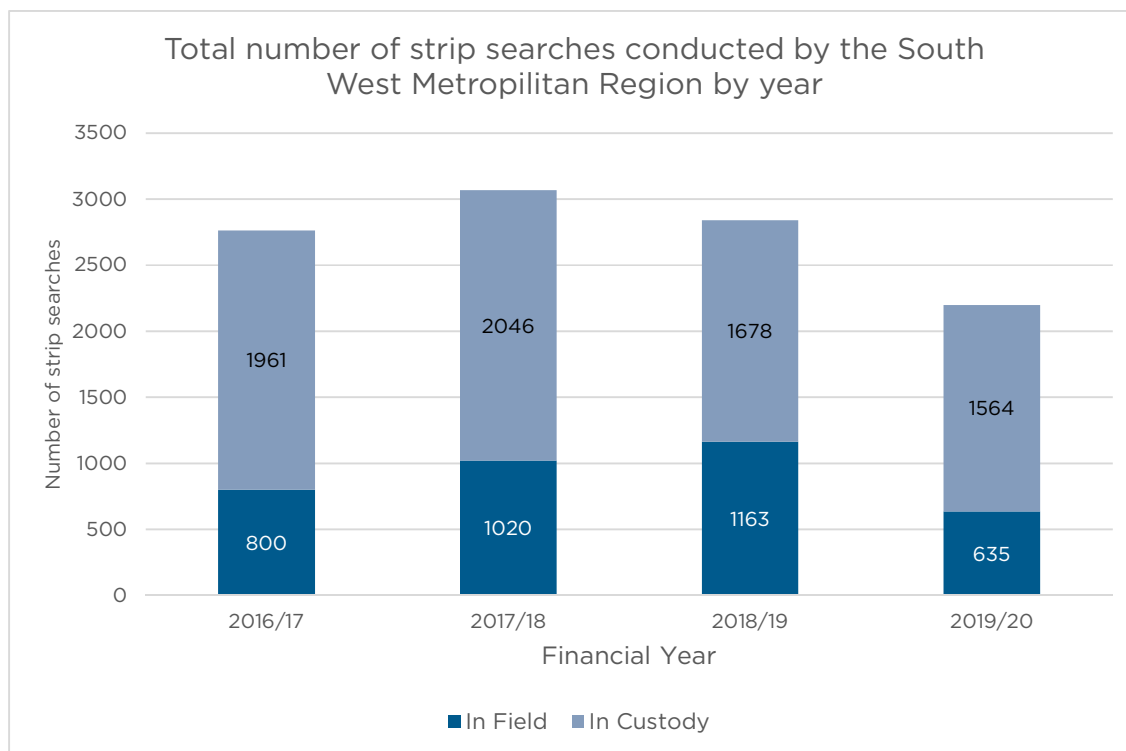
<sup>440</sup> 100% of strip searches were conducted in the field in 2016-17, 97% in 2017-18, 98% in 2018-19 and 93% of all strip searches conducted by Auburn PAC occurred in the field.

<sup>441</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

majority of events were cancelled and the number of strip searches conducted in the field by Auburn PAC fell to 146 compared to 677 the previous year.

In a letter dated 13 July 2020 the NSWPF advised the Commission that following the re-engineering of the NSWPF, Liverpool City, Fairfield City and Campbelltown City PACs became 'super-commands' incorporating neighbouring commands.<sup>442</sup> The NSWPF attributed the high number of strip searches recorded in the South West Metropolitan Region to the policing of Firearms Prohibition Orders and Weapons Prohibition Orders, high visibility and pro-active policing, increases in population density and population growth and the type and frequency of crime (high crime rates featuring violence, weapons, dangerous articles and drugs), higher incidence of arrest and higher custody rates.<sup>443</sup> In particular, the NSWPF emphasised the following characteristics about Liverpool City PAC 'It has a high prevalence of violent incidents featuring weapons and dangerous articles, as well as drug and property crime; Liverpool has the largest number of people in custody, by far, of all metropolitan commands; social problems and high drug use/dealing in Liverpool and Warwick Farm.'<sup>444</sup>

**Graph 7: The number of strip searches recorded by the South West Metropolitan by year**



The effect of the cancellation of a number of major events in the Sydney Olympic Park Precinct is reflected in the sharp decrease in the number of in field strip searches conducted in the South West Metropolitan Region in 2019-20.

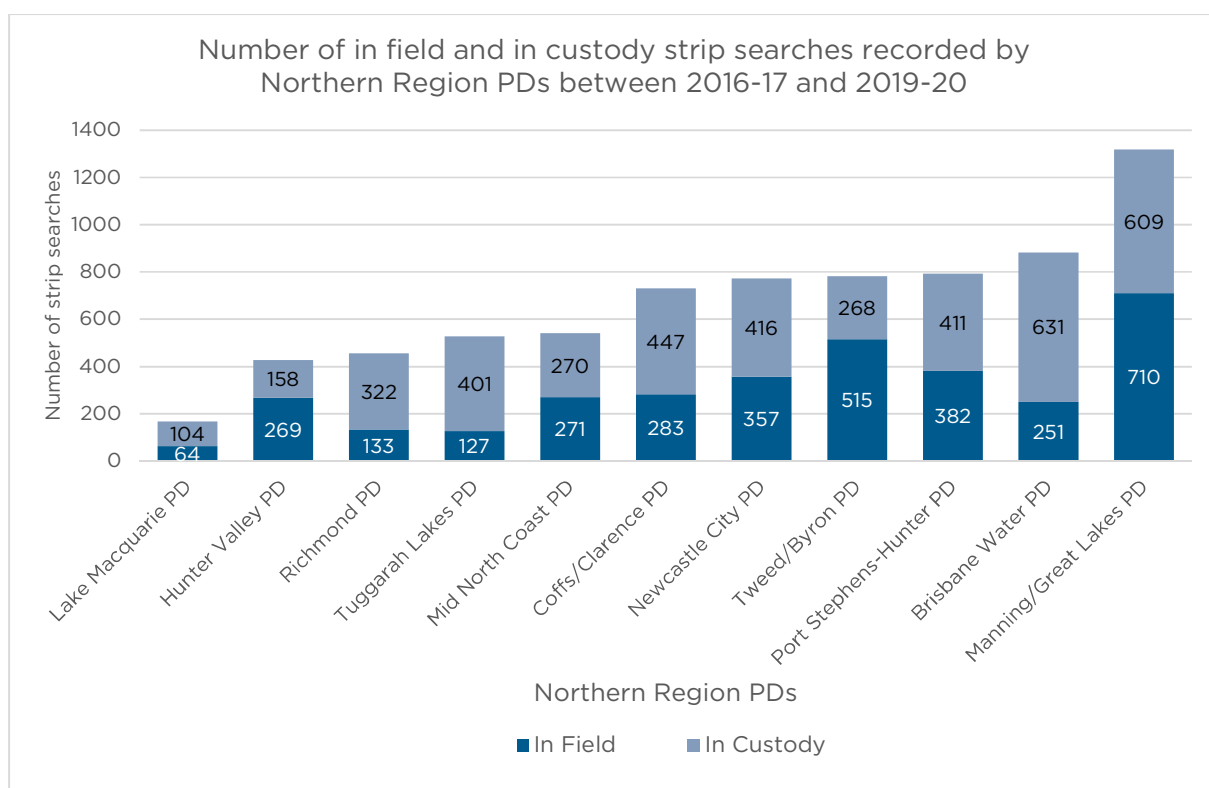
<sup>442</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

<sup>443</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

<sup>444</sup> Attachment 3 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

## Northern Region

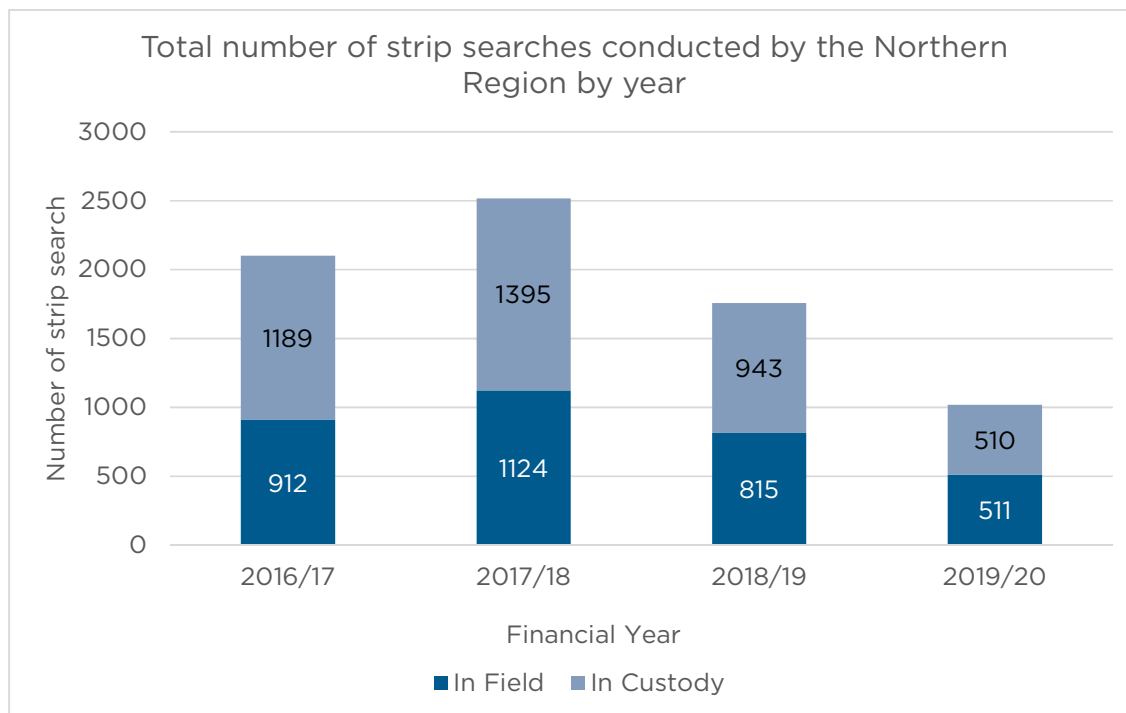
**Graph 8: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by Northern Region Police District**



Over a four year period, Brisbane Waters PD recorded the largest number of in custody strip searches in the Northern Region, totalling 631. In 2018-19, Brisbane Waters PD recorded 51 in field strip searches and 148 strip searches in custody; in custody strip searches accounted for nearly 75% of the total number of strip searches conducted in Brisbane Waters PD that year. In 2018-19, Manning/Great Lakes PD, recorded the largest number of in field and in custody strip searches in the Northern Region, 135 and 151 respectively.



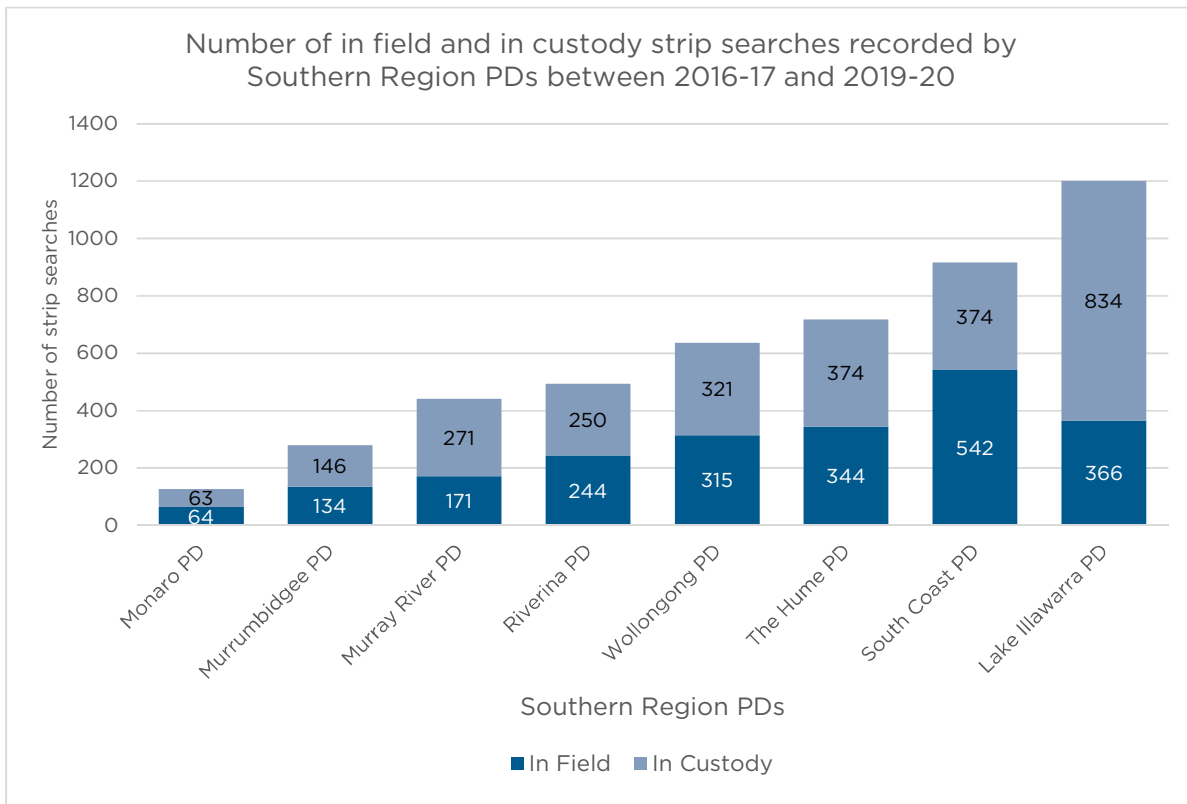
**Graph 9: The number of strip searches recorded by the Northern Region by year**



Between 2016-17 and 2019-20, the Northern Region recorded a total of 7,399 strip searches – 3362 conducted in the field and 4037 in custody strip searches. Whilst the number of strip searches being conducted by Manning/Great Lakes PD has fallen with 497 strip searches in 2017-18 to 286 strip searches in 2018-19 and 100 strip searches in 2019-20, Manning/Great Lakes PD was responsible for 17.8% of the total number of strip searches conducted in the Northern Region between 2016-17 and 2019-20; 15.1% strip searches in custody and 21.1% of strip searches in the field.

## Southern Region

**Graph 10: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by Southern Region Police District**



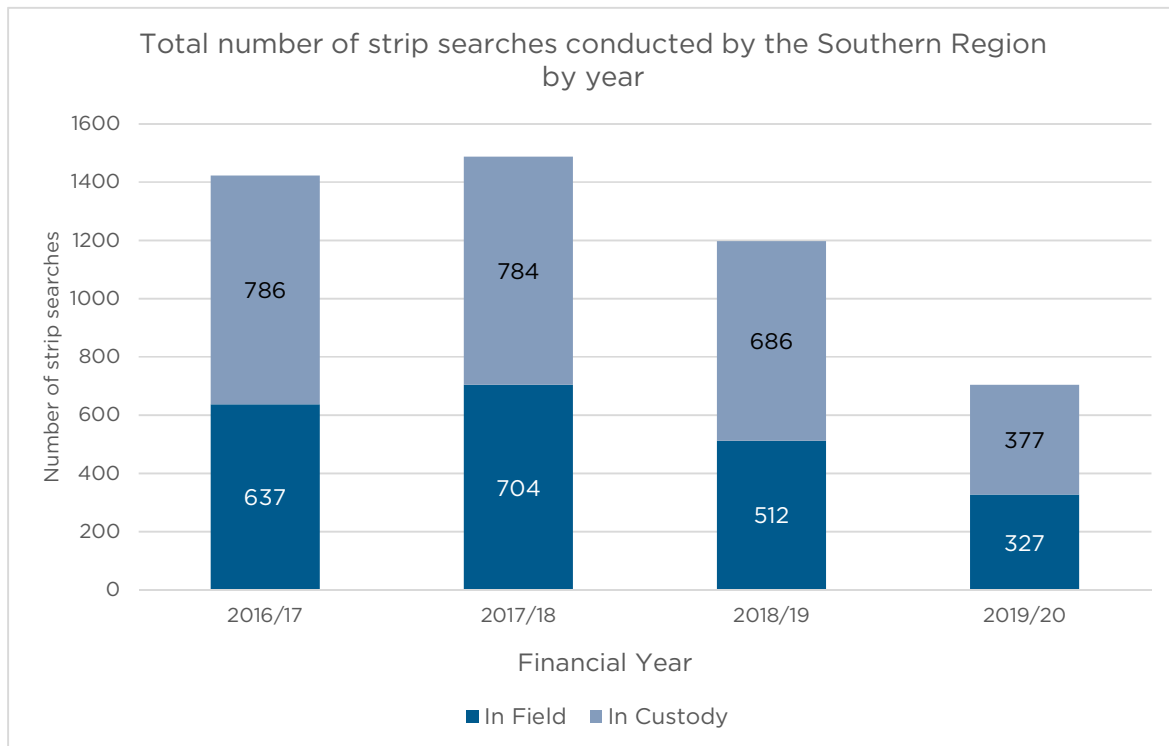
Between 2016-17 and 2019-20, Lake Illawarra PD and South Coast PD consistently recorded the largest number of strip searches in the Southern Region. Taken together in any given year, South Coast PD and Lake Illawarra PD account for over 40% of the total number of strip searches conducted in the Region. In 2017-18, Lake Illawarra PD and South Coast PD accounted for 47.3% of the total number of strip searches recorded in the Southern Region.

In the 13 July 2020 letter to the LECC, the NSWPF attribute the large number of strip searches conducted by Lake Illawarra PD and South Coast PD to the geographical area and population policed by each police district,<sup>445</sup> most notably, the South Coast Correctional Centre, Nowra Local Court, Batemans Bay Local Court and Bega Local Court falling within the boundaries of the South Coast PD. The NSWPF also explained that individuals who are held in custody for extended periods of time are more likely to be searched, for their safety and the safety of officers, and this can include being strip searched. The NSWPF made note that the presence of outlaw motorcycle gangs in the Southern Region, and an associated risk of weapons, drugs and other contraband being concealed, is relevant to the number of strip searches recorded in the Southern Region.<sup>446</sup>

<sup>445</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

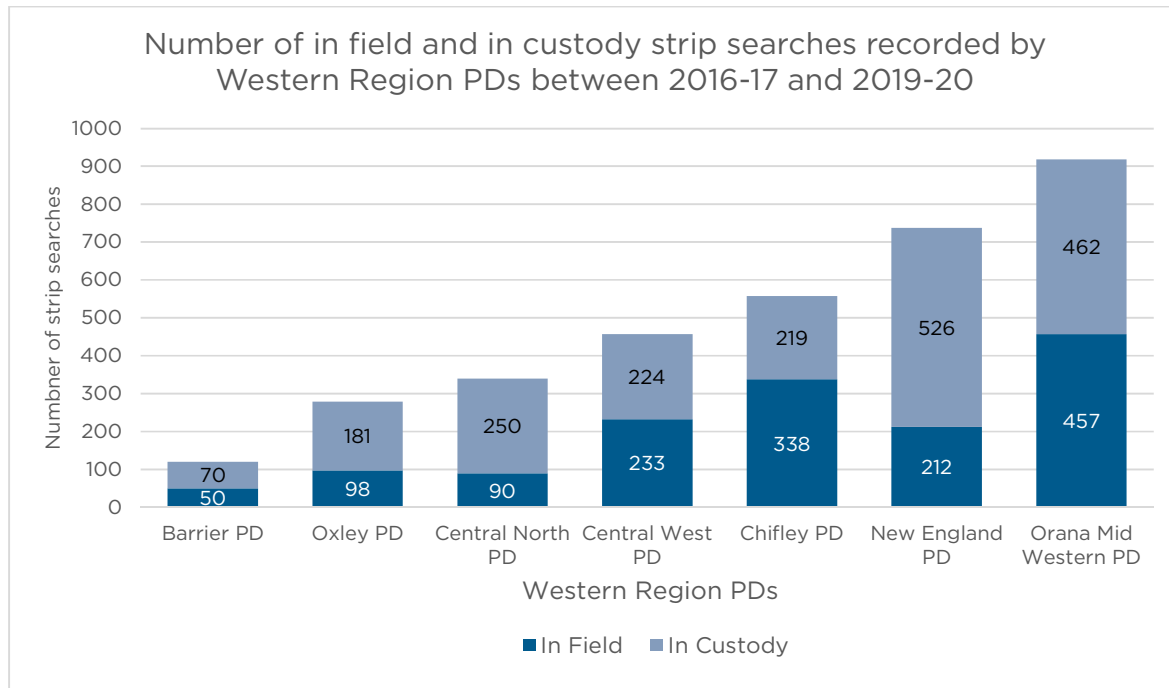
<sup>446</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

**Graph 11: The number of strip searches recorded by the Southern Region by year**



## Western Region

**Graph 12: Number of in field and in custody strip searches between 2016-17 and 2019-20 categorised by Western Region Police District**



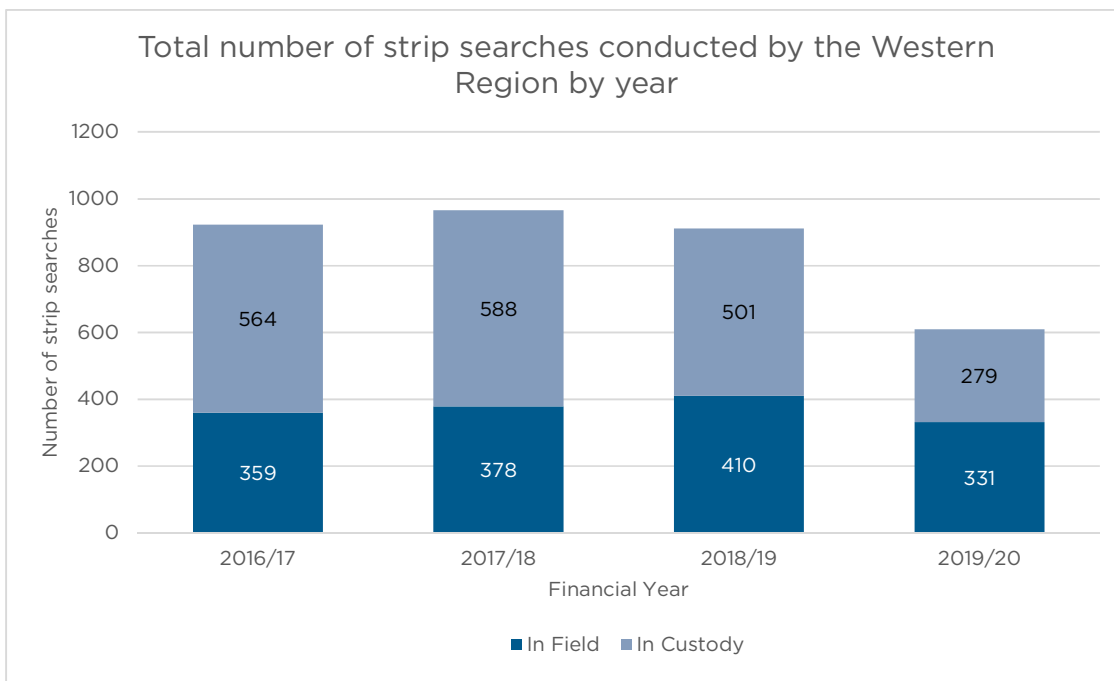
Between 2017-18 and 2019-20, strip searches conducted by New England PD and Orana Mid-Western PD accounted for nearly 50% of all strip searches recorded in the Western Region. The NSWPF emphasised that these police districts are responsible for regional centres including Armidale, Moree, Dubbo, Mudgee and Wellington as well as Macquarie Correctional Centre and Orana Juvenile Justice.<sup>447</sup>

In late 2017, Mudgee, Orana, Coonamble and Warren Local Area Commands were amalgamated to form Orana Mid-Western PD. A proactive response by Orana Mid-Western PD Region Enforcement Squad to crime following the amalgamation resulted in 'a 57% increase in person search numbers.'<sup>448</sup> The number of strip searches in the field conducted by Orana Mid-Western PD rose from 80 in 2016-17 to 130 in 2019-20, an increase of 62.5%.

<sup>447</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020 and Attachment 1 to Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 27 November 2020.

<sup>448</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

**Graph 13: The number of strip searches recorded by the Western Region by year**



The number of strip searches recorded by the Western Region, both in the field and in custodial settings has remained relatively stable.<sup>449</sup>

<sup>449</sup> Letter from Assistant Commissioner PSC, NSWPF to Chief Commissioner LECC, 13 July 2020.

# Glossary

Glossary	Description
Academy	NSW Police Force Academy in Goulburn.
ADPP	Associate Degree in Policing Practice delivered jointly by Charles Sturt University and the NSW Police Force.
BWV	Body Worn Video.
CNI	The Central Number Index that police assign to an individual and use in records in the Computerised Operational Policing System.
Command Management Framework	A self-assessment risk audit tool used by NSW Police Force commands to identify compliance with selected legislation and policy. The records within the CMF can also be interrogated at a regional and state level.
Commission	Law Enforcement Conduct Commission, New South Wales.
COMPASS	NSW Police Force Command Performance Accountability System.
COPS	The NSW Police Force Computerised Operational Policing System, a database in which police record all their operational activities.
Custody Management System	A part of the Computerised Operational Policing System used by police to record information about people brought into custody.
Custody SOPs	The NSW Police Force <i>Charge Room and Custody Management Standard Operating Procedures</i> (first introduced in August 2019).
EDO	Education and Development Officer in the NSW Police Force.
FTAO	Field Training and Assessment Officer in the NSW Police Force.
General search	A search of a person that does not involve a strip search. A general search may involve an officer running his or her hands over a person's outer clothing, and/or the person removing their outer clothing (outer clothing being a coat or jacket or similar article, gloves, shoes, socks and hat).
(Searches conducted) 'in the field'	Searches conducted in any place other than a police station or place of detention.
LECC	Law Enforcement Conduct Commission, New South Wales.
LECC Act	<i>Law Enforcement Conduct Commission Act 2016</i> (NSW).
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW).
Microlearn	A two minute training video or presentation that is accessible on the NSW Police Force intranet site and is presented as a real life scenario to train officers.

NSW	New South Wales.
NSWPF	New South Wales Police Force.
Operation Brugge	An investigation by the Commission under Part 6 of the LECC Act into the police strip search of a 16 year old girl at a Byron Bay music festival in 2018.
Operation Gennaker	An investigation by the Commission under Part 6 of the LECC Act into the police strip search of three teenage boys at an under 18s music festival in February 2019.
Operation Grasmoor	An investigation by the Commission under Part 6 of the LECC Act (including private examinations) into the police strip search of a young Aboriginal male in the back of a police van on a public street.
Operation Karuka	An investigation by the Commission under Part 6 of the LECC Act into two strip searches of a handcuffed Aboriginal male in a Sydney police station in June 2017.
Operation Mainz	An investigation by the Commission under Part 6 of the LECC Act into the police strip search of a 16 year old Aboriginal boy in the street of a large regional town and later in the vehicle dock of the local police station in November 2018.
Operation Sandbridge	An investigation by the Commission under Part 6 of the LECC Act into the arrest and strip search of a 53 year old male in inner Sydney in March 2015 and subsequent unsuccessful prosecution of him for hindering police in the execution of their duty.
PAC	Police Area Command.
PD	Police District.
Person search	A search of a person that could be either a general search or a strip search.
Person Search Manual	The NSW Police Force <i>Person Search Manual 2019</i> .
SMIT	A six minute intensive training package containing documents that can be assessed through the NSW Police Force intranet for review by police officers and presented at a Command briefing.
SOPs	Standard Operating Procedures.
Strip search	Defined in s 3 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> as a search of a person or articles in possession of a person that may include requiring a person to remove all of his or her clothes and the examination of a person's body (but not of a person's body cavities) and of those clothes.



# LECC

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