

# LECC

Law Enforcement  
Conduct Commission

## OPERATION HOSTA

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

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March 2022



## Law Enforcement Conduct Commission

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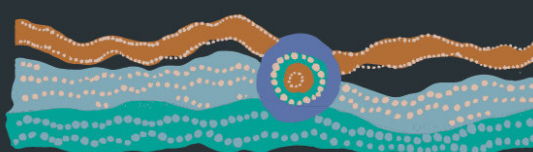
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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



## Office of Commissioner

24 March 2022

The Hon Matthew Ryan Mason-Cox 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 132(3) of the *Law Enforcement Conduct Commission Act 2016* ('the Act'), the Commission hereby furnishes to you a Report in relation to its investigation in Operation Hosta.

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

Yours sincerely,



The Hon Lea Drake  
Commissioner

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# 1. Introduction

- 1.1 The Commission's investigation in Operation Hosta arose from a complaint submitted to the NSW Police Force ('NSWPF') alleging that Officer HOS1 mistreated Civilian HOS2 during his arrest at a western Sydney train station on 6 November 2018.
- 1.2 On that date at about 6:00 p.m. Civilian HOS2 had alighted from a train and proceeded to the main concourse of the train station. He then jumped over the ticket barrier to exit from the station. Upon observing this conduct Officer HOS1 intercepted Civilian HOS2. He placed him under arrest when he failed to stop. After restraining and handcuffing Civilian HOS2, Officer HOS1 and his two colleagues, Officer HOS3 and Officer HOS4, moved Civilian HOS2 into the station manager's room.
- 1.3 Whilst inside the station manager's room it was alleged that Civilian HOS2 was subjected to physical and verbal mistreatment by Officer HOS1 before he was transported to the police station.
- 1.4 As part of its investigation the Commission obtained, amongst other things, the video footage from Officer HOS1's body-worn camera and CCTV footage from the train station, both of which captured the incident.
- 1.5 On 20 August 2020, pursuant to s 44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* ('the LECC Act'), the Commission decided to commence an investigation into the allegation of misconduct involved in the arrest of Civilian HOS2 on 6 November 2018.

# 2. The Commission's Statutory Functions

- 2.1 The LECC Act lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.
- 2.2 Section 10 of the LECC Act defines "*serious misconduct*":

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

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

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

(2) *In this section:*

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

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

2.3 “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 11(2) in these terms:

(2) ***Officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- (a) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (b) *arises, wholly or in part, from improper motives, or*
- (c) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (d) *arises, wholly or in part, from a mistake of law or fact, or*
- (e) *is conduct of a kind for which reasons should have (but have not) been given.*

2.4 The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

2.5 The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).

2.6 Section 29 provides the authority for the Commission to make findings and express opinions:

(1) *The Commission may:*

(a) *make findings, and*

(b) *form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:*

(i) *has or may have occurred, or*

(ii) *is or may be occurring, or*

(iii) *is or may be about to occur, or*

(iv) *is likely to occur, and*

(c) *form opinions as to:*

(i) *whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*

(ii) *whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and*

(d) *make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and*

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

(2) *Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.*

- (3) *The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (4) *An opinion or finding that a person has engaged, is engaging or is about to engage in:*
  - (a) *officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or*
  - (b) *specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (5) *Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*
- (6) *The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.*
- (7) *The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.*

2.7 This report is made pursuant to Part 11 of the LECC Act. Section 132(1) provides that the Commission may prepare reports “*in relation to any matter that has been or is the subject of investigation under Part 6*”.

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

- (1) *The Commission is authorised to include in a report under section 132:*
  - (a) *statements as to any of the findings, opinions and recommendations of the Commission, and*
  - (b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*
- (2) *The report must include, in respect of each affected person, a*



*statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

- (a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*
- (b) the taking of action against the person for a specified disciplinary infringement,*
- (c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*
- (d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*
- (e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

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

- (3) An "affected person" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.*
- (4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

2.9 In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.<sup>1</sup> Accordingly findings can form the basis of opinions and recommendations, even if they do not reach the standard of beyond reasonable doubt.

2.10 The Commission has made a determination to protect the identities of all persons involved. Accordingly, all persons and places will be referred to by codenames in this report. There is to be no publication

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<sup>1</sup> *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

of the name or image of any of the codenamed persons or places in relation to the evidence given in Operation Hosta or included in this report without further order of the Commission.

### **3. The Commission's Investigation**

- 3.1 The initial scope and purpose of the Commission's investigation in Operation Hosta was to investigate an allegation that on 6 November 2018 Officer HOS1 applied unreasonable use of force, displayed inappropriate behaviour and was inconsiderate and insensitive during the arrest of Civilian HOS2, and also that Officer HOS3 and Officer HOS4 failed to report his misconduct. On 12 November 2020 the Commission decided that it would not pursue the allegations relating to Officer HOS3 and Officer HOS4. Their conduct would be referred to the NSWPF for consideration.
- 3.2 The Commission decided that it would examine Officer HOS1 and that, because of the nature of the allegations and after taking into account the factors set out in s 63 of the LECC Act, that examination would be held in private.
- 3.3 The private examination was listed to be heard on 4 December 2020. On the application of Officer HOS1's representative it was adjourned to 27 January 2021.
- 3.4 On 22 January 2021, the legal representative for Officer HOS1 made an application to have the private examination further adjourned on medical grounds. A medical report was provided to the Commission in support of the application. This application was granted by the Commission.
- 3.5 This medical report provided by Officer HOS1's representative stated that an appropriate later date for Officer HOS1 to attend the Commission would be in August 2021.
- 3.6 No contact was made with the Commission by Officer HOS1's legal representative or Officer HOS1 regarding his readiness to attend a private examination. Therefore, on 16 September 2021, the Commission, by way of correspondence directed to his representative, provided Officer HOS1 with an opportunity to be heard, to advise the Commission of any limitations on his capacity to give evidence and to advise what arrangements might be entered into to accommodate any such limitation. No response was received.
- 3.7 The Commission forwarded another letter to Officer HOS1's legal representative on 21 October 2021 seeking to confirm whether Officer HOS1 was still legally represented. No response was received to this further correspondence. The Commission then sent a letter to Officer

HOS1 on 3 November 2021, copied to his legal representative, offering him the opportunity to give evidence at the Commission.

- 3.8 On 10 November 2021 the legal representative advised the Commission that the Commission's letter of 3 November 2021 had been sent to an old address and that Officer HOS1 wished to respond to the draft Report. However the legal representative had other commitments and requested additional time for a new legal representative to be found.
- 3.9 On 3 December 2021 the Commission was informed that Officer HOS1 had found a new legal representative. The Commission was informed that Officer HOS1 did not wish to appear. He only wished to make submissions. The new legal representative requested an extension of 7 days to file submissions, which was granted by the Commission. Submissions were to be filed by 13 December 2021. On 13 December 2021 the legal representative sought a further extension to 17 December 2021. The Commission granted an extension to 16 December 2021. Submissions, although late, were received on 16 December 2021.

## THE MATERIALS AND INFORMATION BEFORE THE COMMISSION

- 3.10 The combination of CCTV footage from the train station and Officer HOS1's body-worn video footage depicts the conduct complained of. Together they show the following events:
- (i) Civilian HOS2 jumped over the ticket barrier at 6:02 p.m. and thereafter walked towards the northern exit followed closely by Officer HOS1. Civilian HOS2 was holding a white hard hat in his left hand.
  - (ii) Civilian HOS2 turned to his left and appeared to look at Officer HOS1 but kept walking towards the northern exit.
  - (iii) Officer HOS1 took hold of Civilian HOS2 by the left arm and walked him over to a wall. He forcefully pressed Civilian HOS2 up against the wall.
  - (iv) Officer HOS3 and Officer HOS4 then appeared on the scene. The white hard hat was dropped by Civilian HOS2 as Officer HOS1 folded his left arm behind his back to handcuff him.
  - (v) Officer HOS4 conversed with an unidentified male, whilst a second unidentified male held up his mobile phone towards Officer HOS1 and Civilian HOS2.

- (vi) The following exchange then took place as Officer HOS1 held Civilian HOS2 up against the wall:

Officer HOS1: At this point in time you're under arrest.

Civilian HOS2: What for?

Officer HOS1: For failing to stop, when I asked you to stop, you continued walking, I don't know who you are, you jumped the gate, you're being recorded in a video, do you understand, do you understand that?

Civilian HOS2: Yes, yes.

- (vii) Officer HOS1 picked up the white hard hat and told the unidentified male with the mobile phone to leave. The unidentified male refused to leave. Officer HOS1 walked over to him. An exchange took place between them regarding the unidentified man's right to be there, his use of his mobile phone and whether a train station is a public place. Officer HOS3 walked back to Civilian HOS2.
- (viii) At 6:05 p.m. Officer HOS1 returned to Civilian HOS2. Officer HOS3 asked Civilian HOS2 for identification. Civilian HOS2 moved his shoulder and was then restrained by the officers. Civilian HOS2 said "*you grabbed my cock bro*" and Officer HOS1 replied "*don't grab anything, don't be stupid*". He caused Civilian HOS2's handcuffed arms to be lifted behind his back. The three officers then walked Civilian HOS2 to the station manager's room.
- (ix) Civilian HOS2 and the three officers entered the station manager's room at 6:06 p.m. Civilian HOS2 asked "*for a ticket?*" Officer HOS1 repeated "*don't do it*".
- (x) Once inside the room, Officer HOS1 asked Civilian HOS2 to get down on his knees so that a search could be conducted. Civilian HOS2 offered some resistance before he ended up on the ground. It is unclear whether he intentionally fell to the ground or if this was a result of the force applied by Officer HOS1. Officer HOS3 asked "*what are you doing?*", followed by Officer HOS1 saying "*stop, you going to stop or not? Are you going to stop or not? Are you going to stop or not? You're not going to stop? Because you're going to pass out in four seconds if you don't*".
- (xi) Civilian HOS2 was kneeling on the ground in front of a wall with Officer HOS1's left hand grasping the back of his neck. Officer HOS1 told Civilian HOS2 not to move and that if he moved again

then he *"gets sprayed"*. Civilian HOS2 offered no audible response. Officer HOS1 followed his remark with *"move again and you get sprayed. Do you understand that? Move again and you get sprayed. I don't want to do it but don't make me. Do you understand that? Do you understand that or not? Do you understand that? Do you understand that? I need a reply right now. Do you understand? Stay there don't move."*

- (xii) Officer HOS1 appeared to let go of Civilian HOS2's neck before saying *"you got the wrong guy man, you got the wrong guy."*
- (xiii) Civilian HOS2 was in tears and kneeling with the wall to his left. Officer HOS1 told him to move and said *"oh now we're crying?"* as he moved Civilian HOS2 to face the wall again. Officer HOS1 told Civilian HOS2 to stay on his knees. There appeared to be a short struggle as Civilian HOS2 said *"let me get on my knees bro"*.
- (xiv) Officer HOS1 continued his search of Civilian HOS2 as he said *"you got the wrong cop to mess around, do you understand that? I don't know who you dealt with before, you're not going to do that to me."*
- (xv) Officer HOS3 and Officer HOS4 began adjusting Civilian HOS2's handcuffs. The following exchange between Civilian HOS2 and Officer HOS1 then took place:

Officer HOS1:           Who do you think you're dealing with huh?

Civilian HOS2:       (inaudible)

Officer HOS1:       All you had to do is stop and give me your name. That's all you had to do. Now, you decided to walk away and be a tough guy.

Civilian HOS2:       Who are you bro? Who are you?

Officer HOS1:       I'm the police, you stop when I tell you to. I'm the police, you understand that? What am I wearing? What am I wearing? What am I wearing?

Civilian HOS2:       I don't know. Bro you got stink breath.

Officer HOS4:       You're not really helping your case.

Civilian HOS2:       What case man? What case?

Officer HOS1:       You jumped the gates. I tell you to stop, and you took away from me.

Civilian HOS2: I didn't hear you bro.

Officer HOS1: You don't hear me?

Civilian HOS2: No.

Officer HOS1: What are you, deaf?

Civilian HOS2: Yes.

Officer HOS1: Are you?

Civilian HOS2: Yes.

Officer HOS1: Oh ok, I didn't know you're deaf.

Civilian HOS2: Partially in the left ear.

Officer HOS1: Yeah?

Civilian HOS2: Yes.

Officer HOS1: Are you blind?

Civilian HOS2: No.

Officer HOS1: You saw my uniform?

Civilian HOS2: I don't care about your uniform.

Officer HOS1: There you go, you don't care about uniform. There you go, there you go.

(xvi) Officer HOS1 and Officer HOS3 had a short conversation about transporting Civilian HOS2. Officer HOS1 then said he would charge Civilian HOS2 with assault "*when he kicked me*". He also added "*he wants to play a game and kick police, and play around, well no worries then.*"

(xvii) Later on the following exchange took place between Officer HOS1 and Civilian HOS2:

Officer HOS1: You got the wrong guy.

Civilian HOS2: You got the wrong guy (inaudible) real criminal.

Officer HOS1: You are a criminal. You are a criminal for jumping the gates and not paying.

Civilian HOS2: I was paying man.

Officer HOS1: No, you jumped the gate.

Civilian HOS2: I come from Redfern, from a ten hour day bro -

Officer HOS1: What, what is it?

Civilian HOS2: - you do?

Officer HOS1: I don't understand what you're saying mate. So just because you do ten hours a day you can do whatever you want? Everyday is it? Great father figure you are. Is that what you teach your kids as well?

Civilian HOS2: Yep.

Officer HOS1: To disrespect police?

Civilian HOS2: Yep.

Officer HOS1: Oh good on ya. Father of the year huh?

Civilian HOS2: You're not even a police bro.

Officer HOS1: Father of the year aren't you?

Civilian HOS2: Bullshit.

Officer HOS1: Father of the year, isn't it? I don't teach my kids to disrespect police.

(xviii) At 6:11 p.m. Officer HOS1 told Civilian HOS2 that he would be transferred to the police station and charged with assault, resisting police and "*public transport*". Civilian HOS2 complained that his "*green stone*" was broken by Officer HOS1.

(xix) At 6:13 p.m. Officer HOS1 asked Civilian HOS2 for his first name, before he moved Civilian HOS2 to sit down at a table. They had a further exchange about what had happened, and then Officer

HOS1 proceeded to ask Civilian HOS2 for his surname, date of birth and address, which Civilian HOS2 provided.

(xx) At 6:18 p.m. Officer HOS1 opened the door and spoke to a man who is presumed to be Civilian HOS2's brother.

(xxi) There are no further events of significance until 6:29 p.m. when the three officers escorted Civilian HOS2 out of the room and into a police vehicle.

3.11 Later that evening, Civilian HOS2 was formally charged with the following:

- i. Assault police in execution of duty;
- ii. Resist officer in execution of duty;
- iii. Travel or attempt to travel without valid ticket; and
- iv. Not state name or address to an authorised officer.

3.12 Civilian HOS2 entered pleas of guilty to charges (iii) and (iv). Charges (i) and (ii) proceeded to a defended hearing in the local court on 31 May 2019. Charge (i) was dismissed because Officer HOS1 gave evidence that he thought the kick by Civilian HOS2 was accidental.

3.13 On 19 July 2019, a Magistrate was satisfied that charge (ii) was proven and imposed a conditional release order of six months without conviction. The Magistrate dismissed charges (iii) and (iv) pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*.

## 4. Analysis of Evidence

4.1 In determining whether Officer HOS1 engaged in serious misconduct, it is useful to consider the process of arrest in accordance with the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

4.2 Section 99 of LEPRA relevantly provides as follows:

*(1) A police officer may, without a warrant, arrest a person if:*

*(a) The police officer suspects on reasonable grounds that the person is committing or has committed an offence, and*

*(b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:*

*(i) ...*

*(ii) to stop the person fleeing from a police officer or from the location of the offence*



- 4.3 The footage shows Civilian HOS2 jumping over the ticket barrier without tapping off his Opal card and then walking towards the exit of the train station. His conduct indicated the possibility of an offence against s 77A(1) of the *Passenger Transport (General) Regulation 2017*. It was therefore open to Officer HOS1 to consider exercising his power of arrest pursuant to s 99(1)(a) of LEPR.
- 4.4 However, when exercising power pursuant to s 99 of LEPR the particular circumstances need to be considered. Civilian HOS2 could more appropriately have been issued with a warning, an Infringement Notice or a Court Attendance Notice. An arrest for that offence was unnecessary.
- 4.5 Section 133 of LEPR allows police officers to take identification particulars:
- (1) A police officer may take or cause to be taken all particulars that are necessary to identify a person who is in lawful custody for any offence.*
- 4.6 Questioning Civilian HOS2 in relation to his name, date of birth and address whilst in custody was lawful.
- 4.7 Section 27 of LEPR provides for the power to carry out a search after arrest, and is set out as follows:
- (1) A police officer who arrests a person for an offence or under a warrant, or who is present at the arrest, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything:*
- (a) that would present a danger to a person, or*
- (b) that could be used to assist a person to escape from lawful custody, or*
- (c) that is a thing with respect to which an offence has been committed, or*
- (d) that is a thing that will provide evidence of the commission of an offence, or*
- (e) that was used, or is intended to be used, in or in connection with the commission of an offence.*
- 4.8 As Civilian HOS2 was already under arrest Officer HOS1 could have lawfully conducted a search of Civilian HOS2, both on the concourse and inside the station manager's room, in accordance with s 27(1),

provided he had reasonable grounds to consider it prudent to do so in order to ascertain any of the matters set out in that section.

- 4.9 The Commission is not satisfied that there was any basis pursuant to s 27(1) of LEPRA on which Officer HOS1 could have lawfully conducted a search of Civilian HOS2. There was no basis for suspecting that any item in the possession of Civilian HOS2 presented a danger to a person, could be used to assist a person to escape from lawful custody, was a thing with respect to which an offence had been committed, is a thing that would provide evidence of the commission of an offence or was used to intended to be used in or in connection with the commission of an offence.

- 4.10 Sections 230 and 231 of LEPRA deal with use of force, and they are set out as follows:

**230 Use of force generally by police officers**

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

**231 Use of force in making an arrest**

*A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.*

- 4.11 There are two main sequences where force was used on Civilian HOS2. Based on the CCTV footage, the Commission has concluded that the force used by Officer HOS1 during the arrest on the concourse was not reasonably necessary. Officer HOS1 took hold of Civilian HOS2's left arm and moved him towards a wall. He forcefully pushed Civilian HOS2 up against the wall. Civilian HOS2 demonstrated no behaviour indicating an intention to escape and posed no danger to any person.
- 4.12 Civilian HOS2's arms were taken behind his back for the purpose of handcuffing him. There was no demonstrable need to handcuff Civilian HOS2. He was arrested for fare evasion. This was not a violent crime. The circumstances do not meet any of the criteria in the NSWPF operating procedures covering the use of handcuffs. Raising his arms behind his back whilst he was handcuffed was an unnecessary and unreasonable use of force in the circumstances adding insult to injury. The movement of Civilian HOS2's shoulder does not appear to have been an attempt to escape.

- 4.13 The second use of force occurred inside the station manager's room when Civilian HOS2 was being asked to get onto his knees. From the body-worn camera footage, it is unclear whether he was pushed down or if he fell down onto the ground of his own accord. Given the tone in which Officer HOS3 said "*what are you doing?*" and the surrounding circumstances it is possible that this remark was directed at Officer HOS1 although no final conclusion can be drawn about this matter.
- 4.14 Officer HOS1 can be observed using his left hand to push down on the back of Civilian HOS2's neck. There is no demonstrable need for this interaction.
- 4.15 These events involve a person who has engaged in fare evasion being pushed up against a wall, being handcuffed, having his handcuffed arms moved up his back, ending up on his knees in the station manager's office whilst being verbally abused and having his neck pushed forward.
- 4.16 On the visual evidence before the Commission the handcuffing of Civilian HOS2, and the subsequent use of force against him, was excessive and amounted to serious misconduct by Officer HOS1.
- 4.17 The Commission is satisfied that the tone, attitude and demeanour adopted by Officer HOS1 towards Civilian HOS2 was hectoring bullying. It demonstrates a proclivity to direct gratuitous barbs at someone in a position of disadvantage. Officer HOS1 says "*you got the wrong guy*" demonstrating supposed toughness and "*father of the year, aren't you?*" denigrating Civilian HOS2's family values. These were unnecessary and offensive remarks and could only have served to agitate and possibly frighten a person in custody. They demonstrate an inappropriate attitude by Officer HOS1 regarding his position as a police officer and his role in exercising his powers.
- 4.18 The Commission is satisfied that Officer HOS1's conduct towards Civilian HOS2 both on the concourse and in the manager's office amounted to bullying inappropriate conduct and was serious misconduct.
- 4.19 Officer HOS1 charged Civilian HOS2 with an offence arising from his allegedly kicking him. He withdrew this allegation at the hearing of this charge. That reconsideration is likely to have arisen after a sober consideration of the material on the body worn video and CCTV footage.
- 4.20 Officer HOS1 engaged in a conversation with an observer of his conduct on the concourse. An elderly gentleman was filming Officer HOS1's interaction with Civilian HOS2. Officer HOS1 attempted to

prevent that gentleman from using his telephone to film the interaction. He had no entitlement to interfere with that gentleman's conduct and his interaction with that gentleman demonstrated not only a failure to understand his powers but further bullying conduct. The Commission is satisfied that his attempt to bully that elderly gentleman and remove him from the scene was serious misconduct.

- 4.21 In all these respects Officer HOS1 demonstrated conduct that had the potential to bring the NSWPF into disrepute.

## 5. Submissions

- 5.1 The legal representative for Officer HOS1 was provided with a draft version of this Report and invited to make submissions. The submissions received can be summarised as follows:

- a. Officer HOS1's initial decision to arrest Civilian HOS2 instead of using an alternative to arrest was appropriate in the circumstances;
- b. Officer HOS1's search of Civilian HOS2 was lawful under ss 27 and 28A of LEPRA, and in the alternative, the miscarriage of discretion should not be viewed as serious misconduct;
- c. Officer HOS1's use of force was not excessive as Civilian HOS2's actions contributed to the use of force;
- d. Officer HOS1's attitude and language fell far short of serious misconduct; and
- e. Officer HOS1 did not demonstrate bullying conduct towards a bystander.

- 5.2 The Commission's response to the submissions is set out below:

- a. The alleged offence against s 77A(1) of the *Passenger Transport (General) Regulation 2017* committed by Civilian HOS2 carries a maximum penalty of five penalty units. It is a minor offence. An arrest for such an offence can aggravate and escalate a situation. Whilst the decision to arrest Civilian HOS2 was lawful, it was a poor exercise of discretion which contributed to the subsequent unsatisfactory interaction.
- b. The Commission maintains its view that the search under s 27 of LEPRA was unlawful for the reasons provided. The Commission maintains its view that the use of force was excessive.

- c. Although Civilian HOS2 did offer a minor degree of resistance inside the station manager's room, the use of force by Officer HOS1 was excessive and disproportionate to the minimum resistance offered by Civilian HOS2.
- d. It was submitted that "*Officer [HOS1] was dealing with an evolving and potentially violent situation*". The Commission rejects this characterisation. In any event Officer HOS1's attitude and language could only have served to worsen any situation and bring about a violent situation.
- e. The Commission maintains its view that Officer HOS1 attempted to bully the elderly bystander and that this was conduct which brought the NSWPF into disrepute.

5.3 The Commission is not persuaded by the submissions made on behalf of Officer HOS1.

## 6. Affected Persons

- 6.1 In Part 2 of this Report the Commission set out the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to "*affected persons*".
- 6.2 The Commission is of the opinion that Officer HOS1 is an affected person within the meaning of subsection 133(2) of the LECC Act, being persons against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.

## 7. Findings

- 7.1 Having considered the evidence and submissions, the Commission finds that the conduct of Officer HOS1, in unlawfully searching and using unreasonable and excessive force towards Civilian HOS2, and also in engaging in bullying conduct towards a bystander and Civilian HOS2 was serious misconduct.

## 8. Recommendation

- 8.1 The Commission recommends that consideration be given to the making of an order under s 181D of the *Police Act 1990* by the NSW Police Force against Officer HOS1.

# LECC

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