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

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1. Introduction

1.1 On 10 November 2017 a protest was held in Eveleigh, Sydney, against the Australian Government's policies in relation to the detention of refugees and asylum seekers on Manus Island. Ms MIS1 and Ms MIS2 were arrested and conveyed to LAC1 Police Station where they were strip searched and then released without charge.

1.2 The incidents gave rise to two complaints. The first was an internal police report which alleged that Officer MIS3 had authorised an inappropriate strip search on Ms MIS1 and Ms MIS2. The second was a complaint made by Mr MIS4, a member of the public and former barrister, who was approached by Ms MIS1 and Ms MIS2. The second complaint canvassed broader issues concerning the treatment of the two women by police.

1.3 This report relates to the misconduct matter investigations conducted by the New South Wales Police Force (**NSWPF**) into the arrest and strip search of Ms MIS1 and Ms MIS2. These investigations were actively monitored by the Law Enforcement Conduct Commission (the **Commission**) pursuant to s 101 of the *Law Enforcement Conduct Commission Act 2016* (NSW) (**LECC Act**).

1.4 Three different Inspectors conducted separate investigations.

1.5 The Commission's monitoring of these misconduct matter investigations commenced prior to the Commission's broader inquiries into strip searching by the NSWPF. It extended throughout a large portion of that inquiry.

1.6 During the investigations the Commission raised concerns, including potential systemic issues around strip searches at LAC1 Police Station.

1.7 In May 2018 the Commander made a number of Not Sustained findings on the recommendation of the second investigator. The Commission was not satisfied that this investigation had been properly conducted and requested a further investigation.

1.8 A further investigation was undertaken by the Central Metropolitan Region. Whilst that further investigation resulted in additional Sustained findings, the Commission considered that Not Sustained findings were incorrectly made against the two searching officers. After further representations by the Commission Sustained findings were also made against the searching officers.

1.9 The Commission has decided to protect the identity of all persons involved in these investigations. Accordingly, all persons will be referred to by codenames in this report.

2. The Commission's Statutory Functions

2.1 Section 134 of the LECC Act provides that the Commission may prepare reports "*instead of or in addition to a request made under section 103, 104 or 105 in relation to a police investigation or decision*" and that "*the report may include such comments and recommendations as the Commission considers appropriate*".

2.2 The Commission is to provide a copy of the Report to the complainant, the Minister and to the Commissioner of Police. A copy of the report will be provided to the Presiding Officer of each house of parliament pursuant to section 138 of the LECC Act.

3. The Complaints

3.1 The misconduct matter investigation to which this Report relates arose from two complaints about the same incident. One complaint was initiated by Officer MIS5 on 14 November 2017 [LMI1703786] (**the internal complaint**). The second complaint was initiated by Mr MIS4 on behalf of Ms MIS1 and Ms MIS2 on 11 December 2017 to the Commissioner of Police [LIM1704162] (**the private complaint**). Both complaints related to the alleged unlawful arrest and strip search of Ms MIS1 and Ms MIS2.

3.2 The internal complaint alleged that Officer MIS3 had authorised an "inappropriate" strip search on Ms MIS1 and Ms MIS2 while they were in police custody at LAC1 Police Station. The Complaints Management Team

(CMT) at LAC1[1] commenced a resolution based investigation[2] into whether Officer MIS3 had failed to comply with the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) when he asked Officer MIS6 and Officer MIS7 to conduct the strip searches. Neither the internal police complainant, the triage officer nor the CMT identified any other issues with the manner in which Ms MIS1 and Ms MIS2 had been dealt with by police.

3.3 The private complaint made additional allegations. In response the NSWPF commenced a resolution based investigation into the following allegations:

a. That Officer MIS8 had unlawfully arrested Ms MIS1 and Ms MIS2;
b. That Officer MIS8 used unreasonable force when arresting Ms MIS1 and Ms MIS2;
c. That Ms MIS1 and Ms MIS2 were unlawfully strip searched at LAC1 Police Station and that the direction to conduct those strip searches was given by Officer MIS3;
d. That Officer MIS7 failed to comply with LEPRA when strip searching Ms MIS1 and Ms MIS2;
e. That Officer MIS9 failed to enter the names of Ms MIS1 and Ms MIS2 into the custody management system and as a result a custody record was not created.

3.4 The internal complaint and the private complaint were investigated together as part of the one investigation.

3.5 Ms MIS1 and Ms MIS2 had participated in a protest on 10 November 2017 organised by the Refugee Action Coalition. The protest commenced on Locomotive Street, Eveleigh. A Notice of Intention to hold a Public Assembly was lodged. A number of agreed conditions were included in this notice. The NSWPF consider the following two conditions to be relevant to the matter at hand:

[1] Now part of the Inner West Police Area Command.
[2] Under the NSWPF Complaint Handling Guidelines, a resolution based investigation is a less formal process for the investigation of complaints about police conduct. "Matters referred for resolution do not typically warrant the formality, complexity and authoritative decision making associated with evidence based investigations and as such do not require the involvement of the complaint management team". (p 11 of 76, Version dated February 2016).

1. Participants will not walk onto surrounding streets or participate in a mobile procession on any public street.
2. Crowd marshals and participants will not move past police containment lines and participants will obey all reasonable direction of Police.

3.6 Despite the authorised conditions, the protest became mobile and marched to the intersection of Boundary and Wyndham Street, Redfern. Police attempted on a number of occasions to manage and/or prevent further unauthorised protest. At various stages the protesters sat on the roadway and prevented the free flow of traffic.

3.7 Ms MIS1 claimed that Officer MIS8 grabbed her as she marched past a police van and lifted her into the rear of the vehicle. It is not disputed by Officer MIS8 that he grabbed Ms MIS1 by her clothing and lifted her into the back of the van. During a record of interview, Officer MIS8 admitted that he considered Ms MIS1 to be a "*ring leader within the protesting group*". His reasons for the arrest were to prevent her from continuing the offence and to protect the safety of others.

3.8 Officer MIS8 claimed that he gave several warnings to Ms MIS1, who was directing a group of protesters. The second warning was that if she continued she would be arrested for obstructing traffic. The third warning was that if she continued she would be arrested for obstructing traffic and breach of the peace.

3.9 Ms MIS2 was similarly lifted into the police van after she tried to grab Ms MIS1. Officer MIS8 claims that he told Ms MIS2, whilst he was placing her in the back of the vehicle, that she was under arrest for breach of the peace, obstructing traffic and attempting to allow someone to escape lawful custody

3.10 Mr MIS4's complaint specifically stated that there was no "*preamble, oral direction or warning of any kind*".

3.11 Officer MIS5, the nightshift duty officer at LAC1 Police Station, observed the women being placed into the back of the police vehicle. He requested the driver of the vehicle to take them to LAC1 Police Station.

3.12 Upon arrival at LAC1 Police Station, Officer MIS10 had a brief conversation with Ms MIS1 while she was seated in the rear of the Police Vehicle. He explained the reason for her arrest as being failing to move on. In response Ms MIS1 explained that she had no idea why she had been arrested and that "*...they did not verbally say anything to me, they just grabbed me*". Officer MIS3, who was the Mobile Supervisor for the LAC1 LAC on the evening in question, heard over the police radio that a police vehicle was returning to LAC1 Police Station with two females in the back. He also heard that the protestors had become aggressive and that people were trying to stop this police vehicle. He noted that the LAC1 charge room was busy and that the police docks were full.

3.13 At some point Officer MIS5 made a telephone call to Officer MIS3, advising him that the two women had been involved in the protests, that to his knowledge their identity had not been confirmed and that they had not been searched before entering the police vehicle.

3.14 Officer MIS3 did not speak to the arresting officer, but did speak to Officer MIS10 and Officer MIS11, who had conveyed the women to LAC1 Police Station. He only recalled the comment about a police vehicle being obstructed.

3.15 Officer MIS3 decided that it was necessary for Ms MIS1 and Ms MIS2 to be strip searched because they had come from a protest which he believed to be violent. He directed Officer MIS6 and Officer MIS7 to conduct the strip searches. He then advised the custody manager, Officer MIS9, that the women would be searched.

3.16 Ms MIS2 was taken to a cell and strip searched first. It appears that Officer MIS6 introduced herself and Officer MIS7. It is unclear whether Ms MIS2 was asked to consent to the search. A staged strip search was conducted on Ms MIS2 whereby all items of clothing were removed in a systematic way which allowed her to put on items of clothing before removing the

next item. Upon completion of the search Ms MIS2 was allowed to get dressed and she was returned to the dock.

3.17 Ms MIS1 was then taken to the same cell and strip searched. Officer MIS7 claimed that she introduced herself to Ms MIS1 and explained the reasons for the search. She stated that Ms MIS1 challenged the search and that she offered to get her supervisor, referring to Officer MIS3. She also claimed that she sought Ms MIS1' consent to the search. Ms MIS1 was asked to completely disrobe the top half of her clothing and she removed her outside pants. She kept her underpants on and Officer MIS7 ran her fingers around the inside of the waistband.

3.18 The door of the cell remained open during both searches. Closed Circuit Television (CCTV) of the hallway leading to the cell indicates that there were other persons entering the cell opposite, including ambulance officers and male police officers. The searching officers stated that they ensured the strip searches were conducted out of view of the door. It also appears that one of the searching officers may have been partially obstructing the view through the doorway.

3.19 The cell footage during the strip search was broadcast into the Supervisors Office and Custody Manager's Office. It is not known if anyone viewed that broadcast.

3.20 Officer MIS5 claimed to have had a second conversation with Officer MIS3. During this conversation he advised there was insufficient evidence to proceed with all of the charges, but that he was satisfied there was sufficient evidence for an arrest for breach of the peace. He asked for a detailed COPS Event to be created.

3.21 Officer MIS9 gave evidence that he had received a telephone call from Officer MIS5. This occurred whilst the second strip search was taking place. Officer MIS5 advised that the arrest for obstructing traffic could not be continued as there were no statements from motorists to support the charge. He advised that the women should be released immediately. Officer MIS9 stated that the custody room was very busy that evening and that he

decided to release both women without entering them into custody records because none of the computers were free.

3.22 Officer MIS9 told Officer MIS10 that the two women were to be released with no charges or infringements. When the decision to release both women without charge was made and communicated Ms MIS1 was still being strip searched. This was not communicated to the searching officers. The strip search was allowed to continue for a further period of approximately two and a half minutes.

3.23 At approximately 8.45pm Officer MIS10 told Ms MIS2 "*the reasons for your arrest was for the breach of the peace*" and indicated there would be no charges. Ms MIS1 then returned from being strip searched and they were both led out of the custody area.

4. The initial misconduct matter investigation by the NSWPF

4.1 On 19 January 2018 the Commission advised the NSWPF that it would commence monitoring the investigation of the two complaints pursuant to s 101 of the LECC Act.

4.2 In addition to the Commission's other oversight functions s 101 allows investigators of the Commission to be present as observers during interviews conducted by investigating police officers, confer with investigating police officers during the course of the investigation and request updates on the progress of the investigation.

4.3 The Commission requested all material obtained as part of the investigation.

4.4 The Commission considered that the investigation should be conducted as an evidence based investigation and not as a resolution based investigation.

4.5 Following a meeting between the Commission, the Misconduct Matter Investigator and the Commander, the Commission advised that it would consider it a serious investigative deficiency if Mr MIS4, Ms MIS1 and Ms

MIS2 were not interviewed. It reconfirmed that the investigation should be upgraded to an evidence-based investigation.

4.6 The Commission requested additional matters to be included in the scope of the investigation, including:

(i) Whether the strip search of persons being entered into custody was a standard practice at LAC1 Police Station; and

(ii) How many of the persons taken into custody at LAC1 Police Station after 6pm on the evening in question were subjected to a strip search.

4.7 The Commission also requested provision of the following information:

(i) CCTV footage relating to the custody, search and release of Ms MIS1 and Ms MIS2;
(ii) a copy of any available Body Worn Video (**BWV**) footage of the arrest;
(iii) copies of plans, instructions, orders and briefings regarding the NSWPF's management of the protest which led to the events in question;
(iv) details of all prisoners taken into custody at LAC1 Police Stations between 6 and 10pm on the evening in question.

4.8 The interview of Officer MIS8 was attended by and monitored by the Commission.

4.9 On 12 February 2018 the Commission sent a request pursuant to s 102(1) of the LECC Act seeking the items previously requested on 19 January and 5 February as well as a copy of all statements obtained in interviews with witnesses and involved officers.

4.10 The Local Area Commander advised that the investigation would be allocated to another misconduct matter investigator and that the requested material would be provided.

4.11 On 9 March 2018 the Commission sent an email to the new misconduct matter investigator, Officer MIS12 raising a number of matters for consideration prior to his finalisation of the investigation. These included:

(i) Statements from Ms MIS1 and Ms MIS2 confirming that they did not wish to pursue their complaints (as per the advice from the NSWPF) and confirming the accuracy of Mr MIS4's complaint;
(ii) A statement should be obtained from Mr MIS4;
(iii) The investigator should consider whether LEPRA had been complied with by each of the searching officers; the lawfulness of the strip searches; the lawfulness of strip searches at LAC1 Police Station more generally and whether the second strip search should have been interrupted when the decision had been made for Ms MIS1 and Ms MIS2 to be released without charge.
(iv) Consideration of the appropriateness and lawfulness of conducting strip searches in cells with camera feeds.

4.12 Officer MIS12 completed an Investigation Report (**Investigation Report 1**) on 9 March 2018. On 11 March 2018 Officer MIS12 advised that Investigation Report 1 "*addressed for the most part*" the issues raised by the Commission. He would raise with Officer MIS15 the obtaining of statements from Ms MIS1, Ms MIS2 and Mr MIS4.

4.13 On 30 April 2018 Officer MIS15 found the allegations against Officers MIS8, MIS3, MIS6 and MIS7 to be Not Sustained. She found the allegation against Officer MIS9 Sustained. The management action to be taken in relation to Officer MIS9 was formal counselling by the Commander and a direction to him to read and acknowledge the pages relating to Custody in the Code of Practice for Crime.

4.14 On 3 May 2018, a copy of Investigation Report 1 was made available to the Commission. After reviewing the report the Commission sent a notice pursuant to section 104 of the LECC Act on 7 July 2018 requesting a further investigation. Section 104 allows the Commission to request a further investigation if it is not satisfied that the misconduct matter has been properly investigated.

4.15 Following this notice, the NSWPF allocated the investigation to a new investigator, Officer MIS13, to conduct a further investigation into the matters raised by the Commission. Officer MIS13 conducted an evidence-based investigation. His Investigation Report (**Investigation Report 2**) was completed on 10 May 2019 and certified by Officer MIS14 on 14 May 2019.

4.16 Ultimately, Officer MIS14 made the following findings:

(i) A Sustained finding against Officer MIS8 for failing to comply with s 202 of LEPRA when executing the arrests. He was served a Commanders' Warning Notice and required to undergo a face to face training session on LEPRA arrest requirements;
(ii) A Not Sustained finding against Officer MIS8 in relation to whether the force used during the arrest was excessive.
(iii) A Sustained finding against Officer MIS3 for failing to comply with LEPRA in relation to the strip searches. He was served a Commanders' Warning Notice and required to undergo a face to face training session on LEPRA strip search requirements;
(iv) Not Sustained findings in relation to Officer MIS6 and Officer MIS7 for failing to comply with LEPRA in relation to the strip searches. These findings were later substituted for Sustained findings.

5. Areas of concern

Failure to obtain direct evidence from the complainant and the affected parties

5.1 The Commission suggested on several occasions that the investigator should interview Ms MIS1 and Ms MIS2 to obtain their direct evidence, given that the complaint had been made by a third party who was not present at the incident.

5.2 On 5 February 2018 the Commission indicated that it was concerned that the investigator did not propose to speak to the complainant or Ms MIS1 and Ms MIS2 even though the investigator had indicated to the Commission's investigators that there may be issues with the credibility of

Ms MIS1 and Ms MIS2. The credibility of Ms MIS1 and Ms MIS2 could not reasonably be questioned without testing their evidence.

5.3 On 9 March 2018, the Commission wrote to the second investigator and reconfirmed that suggestion and confirmed this to Officer MIS15 on 1 May 2018.

5.4 In Investigation Report 1, Officer MIS12 outlined the efforts he had made to contact Ms MIS1 and Ms MIS2. He stated that Ms MIS2 had advised him that she did not wish to supply a further statement as all the relevant details were in the complaint made by Mr MIS4. Ms MIS1 spoke to Officer MIS12 but did not call him back regarding the provision of a statement.

5.5 Officer MIS12 did not contact Mr MIS4 regarding the content of his complaint and the manner in which Mr MIS4 had obtained the information from Ms MIS1 and Ms MIS2. Despite this, Officer MIS12 surmised in Investigation Report 1 that as Mr MIS4 had not been present he had no direct evidence to offer. Officer MIS12 disregarded the complaint as evidence in its entirety, despite Ms MIS2 advising him that the complaint was her version of events. Investigation Report 1 stated that "*no report or complaint has been received directly from [Ms MIS1] and [Ms MIS2]*".

5.6 The Commission requested that further attempts be made to contact Ms MIS1 and Ms MIS2 in order to obtain written confirmation that Mr MIS4's complaint was a true representation of their version of events, and that Mr MIS4 be asked to provide a written statement.

5.7 Officer MIS13, the third misconduct matter investigator assigned to this matter, obtained statements from Mr MIS4, Ms MIS1 and Ms MIS2. He appropriately referenced and relied upon the statements of Ms MIS1 and Ms MIS2 in Investigation Report 2.

Whether the strip searches were lawful

5.8 It is common ground that Officer MIS3 requested two junior officers, Officer MIS7 and Officer MIS6, to conduct strip searches of Ms MIS1 and Ms MIS2. The two junior officers considered this to be a direction which they followed.

5.9 The misconduct matter investigation needed to establish, applying s 31 of LEPRA, whether Officer MIS3 and the two searching officers, *suspected on reasonable grounds that the strip searches were necessary for the purposes of the search*.

5.10 The first investigator spoke to Officer MIS3 and Officer MIS7 to obtain their version of events. In the later s 104 Notice the Commission advised that their evidence should have been obtained in a more formal manner. This was attended to by the third misconduct investigator.

5.11 Officer MIS3 initially stated that:

- He had been advised that Ms MIS1 and Ms MIS2 were brought in for "*…obstructing police or something like that*" and that he saw they had a megaphone and posters.
- He told Officer MIS6 that the women were from the protest and "*…had to be searched*".
- In the police station he saw Officer MIS7 and "*…told her they would have to be strip searched as we didn't know what they had on them, they had been at a violent protest…*".
- When asked whether strip searches were regularly undertaken at LAC1 Police Station, he responded that it depended on the seriousness of the offence and that it was pretty regular due to the type of clientele in LAC1.

5.12 When asked about the purpose of the strip search Officer MIS3 replied that they had come from a violent protest, past protesters had chains on them which could be used to harm themselves or others and that there had been a recent case where drugs had been found in the cells. This risk appeared to be elevated in his mind because the dock was full and Ms MIS1 and Ms MIS2 might be left in the cells, a concern which did not eventuate.

5.13 Officer MIS7 initially stated that:

- When told to conduct the strip search by Officer MIS3 she asked what the females were being searched for, and was told that "*they just came*

from that protest and weren't searched at the scene and could have anything on them down their pants, weapons on them....";

- The first search was without incident. However, at the beginning of the second search she advised that she "*was going to conduct a strip search on you to make sure you don't have anything on you that you shouldn't have, you know weapons, drugs, sharps*". Officer MIS7 gave an example of blades and syringes being found in someone's draw string recently;
- She did not have the second female remove her pants and underwear as she was menstruating, but ran her fingers on the inside of her waistband;
- She was surprised when she came back into the dock area and was told the two women would be released without charge;
- She believed that she did ask for them to consent as it is her "*normal spiel*";
- In relation to privacy, Officer MIS7 claimed that she asked the female (it is unclear whether this related to both Ms MIS1 and Ms MIS2) to move back so she was away from the doorway and out of sight.

5.14 Officer MIS6 initially stated that:

- Officer MIS3 instructed her and Officer MIS7 to conduct a strip search on the two females.
- Officer MIS7 introduced herself and Officer MIS6 to the first female.
- They did a staged search on the first female and then took her back to Officer MIS3 and then did a strip search in the same manner on the second female.
- They had the second female remove her pants and turn around, but not squat as she verbalised that she was uncomfortable.
- She believed that Officer MIS7 explained the reason for the search, but does not remember.
- She typically conducts a strip search when directed by a Sergeant. It depends on whether they have a history of concealing drugs or weapons, and it depends on the offence.

- When a female comes into custody she will ask the Sergeant if they want a search to be conducted, and whether it should be a general search or a strip search.
- When asked whether more females are strip searched when they enter custody, she responded that it depends on what they are in custody for, whether they are attending court, whether they are staying overnight or whether they have a history of concealing drugs or weapons.
- She conducts strip searches because she is directed to do so and the purpose is to find hidden weapons or drugs.
- She did not recall whether Officer MIS3 told her what she was searching for.

5.15 In its s 104 notice the Commission advised that firstly, it was not apparent how strip searches on Ms MIS1 and Ms MIS2 were justified and secondly, there appeared to be no consideration by the searching officers or Officer MIS3 as to whether a less invasive search would have sufficed.

5.16 The Commission requested a further investigation into this issue, as it appeared that neither Officer MIS3, Officer MIS7 nor Officer MIS6 had satisfied themselves to the requisite standard as to whether there were reasonable grounds that the strip searches were necessary for the purposes of the search.

5.17 In Investigation Report 1, Not Sustained findings were made against Officer MIS3 and the two searching officers. It was noted that Officer MIS3's decision-making and direction to the searching officers were "*problematic*".

5.18 Investigation Report 1 had found that Officer MIS7's actions were justified because she had heard "*urgent calls*" over the radio and questioned Officer MIS3 about the reasons for the search. Officer MIS6 was considered to be in an "*assisting role rather than lead*".

5.19 The Commission also pointed out that neither searching officer had properly explained the reasons for the strip searches to Ms MIS1 and Ms MIS2, had not sought their cooperation or consent and neither had conducted a less invasive search prior to conducting the strip search.

5.20 Officer MIS16 conducted a Quality Review of Investigation 1 in his role as Professional Standards Duty Officer. He concluded that Officer MIS3 had a strong safety basis for ordering the strip searches. However, he concluded that Officer MIS3 should have issued directions to the searching officers regarding the reasons for the search and what was being searched for.

5.21 Officer MIS16 concluded that the searching officers were bound to obey a lawful direction and he was satisfied that Officer MIS7 had made reasonable enquiries regarding the reason for the strip search and what was being searched for. Whilst Officer MIS6 did not make independent enquiries regarding the reason for the search, she was "*reasonably satisfied that she was acting lawfully under the guidance of* [Officer MIS7]".

5.22 The Commander agreed with this reasoning and considered it pertinent that Officer MIS3 had heard that "*a police truck has been surrounded by protesters*" and that the women were arrested for a "*substantive offence of obstructing police or similar*".

5.23 The Commission stated in the s 104 notice that upon further investigation, sustained findings should be made in relation to Officer MIS3 and the two searching officers.

5.24 The NSWPF commenced a further investigation which, after more detailed Records of Interview were conducted with Officer MIS3 and the two searching officers, recommended sustained findings against Officer MIS3 and the two searching officers.

5.25 Officer MIS13 concluded that Officer MIS3 did not have reasonable grounds to direct the strip search of either woman. Officer MIS3's reasons for believing the protest was violent and that the women had been aggressive or violent were not sufficient to justify a reasonable suspicion that a strip search was necessary. It appeared that he did not consider the two women individually, but rather as part of the protesters as a group. One of the searching officers had recorded in her notebook that Officer MIS3 had suspected that the women were in possession of drugs, which was not supported by the evidence. The only items in possession of one of the women was a loud hailer and a placard. The Investigator also questioned

Officer MIS3's authority to order that the searches be undertaken, given that he was not a Custody Manager.

5.26 The Investigator recommended that sustained findings be made on the basis that Officer MIS3 had not complied with ss 31 and 32(5) of LEPRA and contrary to the NSWPF Handbook, which directs that searches should be the least invasive type of search practicable in the circumstances. This finding was supported by the Professional Standards Manager (**PSM**) and certified by the Commander. Officer MIS3 was given a Commander's Warning Notice and a face to face training session relating to LEPRA strip searching requirements.

5.27 Officer MIS6 was unable to demonstrate that she had reasonable grounds for conducting the strip searches but deferred to Officer MIS3 as having provided those grounds. Officer MIS6 stated that she had not considered a less invasive search as she had been directed to conduct a strip search. Given that she was acting under direction, she did not believe she had any responsibility for satisfying s 31 of LEPRA. Officer MIS13 concluded that "…*she is not relieved of her obligations because she has been asked by another officer to conduct the search*…".

5.28 Whilst Officer MIS13 found that she had failed to comply with ss 31 and 32(5) of LEPRA and therefore recommended sustained findings, he took into account that, as a junior officer, she had been placed in a difficult situation. She had followed a direction and acted in good faith. He recommended additional training.

5.29 Officer MIS7's evidence was that she had made appropriate enquiries of Officer MIS3 before commencing the searches and that his responses gave her reasonable grounds to conduct the strip searches. She believed that the protest was violent because she had heard over the radio, "*one female officer in distress and call urgent*…". However, she did not make enquiries into Ms MIS1 and Ms MIS2's involvement in the protest. Officer MIS7 was aware that the decision to conduct a strip search rests with the searching officer. Officer MIS7 did not consider a less invasive form of searching the two women, as the information she received led her to believe that a strip search was appropriate.

5.30 Officer MIS13 recommended that a sustained finding be made against Officer MIS7. This was despite Officer MIS7 having made enquiries of Officer MIS3 to reach reasonable suspicion. She had also relied on what she had heard over the police radio. Officer MIS13 concluded that these were not "*factual grounds*" which the relevant case law required her to consider.

5.31 Officer MIS13 found that Officer MIS7 had failed to comply with LEPRA and thus recommended sustained findings. However, he acknowledged that she had conducted the searches in good faith and recommended that she would benefit from additional training. He commended her on having asked clarifying questions of the senior officer directing her to conduct the search.

5.32 The PSM who conducted a Quality Review of this investigation did not agree with the recommended Sustained findings against Officer MIS6 and Officer MIS7. He considered whether their failures were failures of performance or a conduct issue. The Commander agreed with the PSM and made Not Sustained findings.

5.33 On 13 June 2019 the Commission wrote to the NSWPF advising that it did not agree with the basis of the Not Sustained findings in relation to Officer MIS6 and Officer MIS7. The Commission cited the NSWPF Complaints Handling Guidelines which includes reference to circumstances when a sustained finding must be made. In the Commission's view there could be no finding other than a sustained finding.

5.34 The NSWPF made Sustained Findings against Officer MIS7 and Officer MIS6.

5.35 The NSWPF has since taken steps to clarify the policy in relation to officers who are directed to conduct strip searches. As the policy makes clear, it must be the searching officer who holds the requisite state of mind required by LEPRA i.e. that a strip search is necessary for the purposes of a search. This policy also clarifies what is meant by reasonable suspicion.

5.36 This is an important step in ensuring that junior officers are empowered to ask questions and satisfy themselves of the facts before exercising a search power under LEPRA and following a direction.[3]

Other issues related to the strip searches

5.37 While the second strip search was being undertaken it was communicated to LAC1 Police Station that Ms MIS1 and Ms MIS2 were to be released without charge and without any Infringement Notices.

5.38 There was an approximate two and a half minute delay after the decision was made to release both women. The second strip search continued during this time. The Commander concluded that it would have been unreasonable for a male custody manager to have approached the cell during this period. However, the Commission noted there was a female plain clothed police officer in the custody area at the relevant time who could have made that approach.

5.39 The PSM in Investigation Report 2 acknowledged that there was a 2 minute 28 second window between the decision that the two women be released without charge and the end of the second strip search. The PSM noted that it was a dynamic situation. The Custody Manager was occupied with other matters, there had been unclear communication and a lack of understanding of the circumstances, "*…all of which compounded on the ability of each officer involved to fulfil their required duties*".

5.40 The PSM stated that it would have been "*most desirable*" if the decision to release the two women without charge had been communicated and prevented the second strip search though it could never have been prevented in its entirety.

5.41 The Commission was concerned about whether privacy had been maintained during the strip searches. Adverse findings about the failure to maintain privacy during the searches were possible.

[3] Person Search Manual, NSWPF, August 2019.

This issue was not addressed in Investigation Report 2 and no relevant findings were made.

Whether the arrests were lawful

5.42 There was confusion concerning the reason for the arrest of both Ms MIS1 and Ms MIS2. The various accounts provided to the misconduct matter investigators referred to failing to comply with a move on direction, obstructing police and preventing a breach of the peace as reasons for the arrests.

5.43 This had a flow on effect on the decision-making of Officer MIS3 and the actions taken by the searching officers. This was caused in part by the context in which the arrest and conveyance took place.

5.44 Ultimately the NSWPF found that the arrest of the two women was unlawful as there was a lack of corroborative evidence, including from Officer MIS10 who observed both arrests, to support Officer MIS8's evidence that he complied with s 202 of LEPRA. No consideration was given in the misconduct matter investigation as to whether the arrests were warranted under s 99 of LEPRA.

5.45 The difficult circumstances confronted by police in managing the protest immediately prior to the arrests are acknowledged by the Commission.

Whether the force used during the arrests was excessive

5.46 It was not disputed that Officer MIS8 had grabbed Ms MIS1 by her clothes and lifted her into the vehicle. It appears that a similar method was used to get Ms MIS2 into the vehicle. Ms MIS1 and Ms MIS2 used the words "*pushed*" and "*shoved*" to describe the manner in which they were placed into the vehicle.

5.47 Consideration of this issue, whether Officer MIS8 complied with s 231 of LEPRA,[4] was given in Investigation Report 2.

[4] Section 231 of LEPRA allows for a police officer to use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after the arrest.

5.48 Not Sustained Findings were made in relation to Officer MIS8 on this issue. The Investigator was satisfied that the level of force used was commensurate with the circumstances surrounding the arrest.

Compliance with section 137 of the Police Act

5.49 Section 137(1)(a)(i) of the *Police Act 1990* requires:

> (1) As soon as practicable after the investigation of any misconduct matter by the Commissioner has been concluded and a report of the investigation finalised, the Commissioner must—
>
> (a) if the investigation followed a complaint—
>
> (i) if practicable, consult with the complainant before making a decision concerning any action to be taken as a result of the misconduct matter, and
>
> (ii) provide the complainant with advice as to any action already taken, and as to the Commissioner's decision concerning any action to be taken, as a result of the complaint,

5.50 The NSWPF did not communicate with the complainant prior to issuing or immediately after finalising Investigation Report 1.

5.51 On 28 June 2018 Mr MIS4 wrote to the NSWPF requesting a response. On 9 July 2018 the NSWPF advised Mr MIS4 that they had completed a review and they were "*waiting for a return response* [from the LECC] *to* [the] *findings*."

5.52 There is no indication that anyone considered if it was practicable to consult with the complainant prior to finalising the investigation and notifying the subject officers of the outcome.

5.53 In finalising Investigation Report 2 there is no indication whether anyone considered if it was practicable to consult with the complainant prior to making a decision regarding any action to be taken, or prior to making that

determination and notifying the subject officers. Mr MIS4 was notified of the outcome of this investigation by the NSWPF.

5.54 On 4 October 2019 the Commission suggested to the NSWPF that Mr MIS4 be advised that the two searching officers had now had sustained findings made against them. This did not occur until 11 February 2020.

Systemic strip searching at LAC1 Police Station

5.55 The Commission was concerned that there was systemic strip searching occurring at the LAC1 Police Station and raised these concerns with the NSWPF at an early stage.

5.56 The Commission later identified an earlier investigation at a neighbouring command in which the investigator had identified potential issues in the searching procedures at LAC1 Police Station. The commander of the neighbouring command wrote to Officer MIS17 of the LAC1 LAC two weeks prior to the incident involving Ms MIS2 and Ms MIS1 advising that "*There may be inconsistency in the application of searching as per LEPRA in regards to persons entering Custody at LAC1 Police Station…there are custody managers that do not conduct individual assessments in regards to strip searching and hold a belief that every person that is entered into custody is to be strip searched…there may be a perception that strip searching is a requirement when entering custody and some police hold fear of repercussions from custody managers for raising their concerns.*"

5.57 The Commission requested information concerning what actions Officer MIS17 had undertaken in response to that correspondence. The response was that Officer MIS17 had raised issues with his senior management team which included an email on the date of the strip search of Ms MIS1 and Ms MIS2. This email included "*In recent times I have dealt with a departmental issue from outside of this Command…an issue arising from the enquiry related to the searching processes around persons brought into custody at LAC1…Please be mindful of the need to adhere to legislation and departmental conditions that govern this space. There is a complete expectation from arresting Police to ensure prisoners are appropriately*

searched before they are brought here and this has been highlighted by Jason's email and the discovery of the drug exhibit."

5.58 On 30 August 2018 the Commission recommended an investigation into whether there were systemic issues with the LAC1 Police Station regarding strip searches as well as determining whether Officer MIS17 had adequately addressed the identified issues.

5.59 The NSWPF indicated that the issue of potential systemic strip searching at the LAC1 Police Station would be made a distinct issue for investigation within the investigation around the strip searches of Ms MIS1 and Ms MIS2. It did not consider the actions of Officer MIS17 as misconduct and advised that there would not be a misconduct matter investigation issue. Regardless, the Region Commander indicated that he had clarified with Officer MIS17 the importance of clearly outlining compliance requirements when communicating with staff.

6. Whether systemic issues were addressed

6.1 From the records available the Commission is unable to be satisfied that appropriate enquiries were made into whether there were systemic issues with strip searching at the LAC1 Police Station. It was not addressed as a discrete issue within the Investigation Report 2 despite an earlier assurance to that effect.

6.2 The PSM indicated in the final investigation report that "*There is no broad position that all persons coming into Custody at LAC1 Police Station will be strip searched. Since this issue has arisen, [Officer MIS14], [Central Metropolitan Region], in conjunction with the Professional Standards Command has initiated a full review of CMR Custody SOPS and has provided unambiguous communication to Commanders' as to the expectations with regards to Custody Management, both legislative and procedural compliance*."

6.3 The Commission subsequently requested information relating to custody management records for the evening of 10 November 2017. Forty percent of individuals brought into custody on that evening were subject to a strip

search. The Commission is satisfied there was no policy of strip searching everyone brought into custody at the LAC1 Police Station.

6.4 The NSWPF has, since the investigation of this complaint, reviewed policies and procedures relating to strip searches and have published a Person Search Manual which addresses many of the issues of concern.

7. The provision of the legal advice to the Commission

7.1 The *Police Act 1990* provides that the Commission is to be provided unrestricted access to all information within the NSWPF misconduct matters information system.

7.2 In reviewing this misconduct matter investigation the Commission identified two documents that were attached to the investigation but not physically uploaded to the system. They contained material claimed by police to be subject to legal professional privilege.

7.3 On 11 June 2019 the Commission requested a copy of these two documents pursuant to s 102 of the LECC Act. Further correspondence maintaining the Commission's request for this information were sent on 20 June and 7 August 2019.

7.4 On 20 September 2019 the NSWPF formally objected to the provision of the requested material, indicating the material contained "...*content which could invoke the provisions commonly referred to as legal professional privilege*".

7.5 On 4 October 2019, the Commission notified the NSWPF that the objection to the provision of the material was not of itself sufficient to abrogate the requirement to provide the material to the Commission pursuant to s 102 of the LECC Act and maintained the request. Even if a document is protected by legal professional privilege that privilege must give way to the specific power of the Commission to determine whether a misconduct matter is being or has been properly dealt with.

7.6 On 23 December 2019 the NSWPF wrote to the Commission regarding the request for the material, stating:

> "*Whilst that argument [for production of the material] had more force before being advised of the 'sustained' findings, arguably the Commission no longer needs the LPP material in order to perform its oversight function, that is, there is no longer "good reason" to waive legal professional privilege*."

7.7 On 10 January 2020 the Commission wrote to the NSWPF again maintaining the request for the material claimed to be protected by legal professional privilege. The Commission indicated, amongst other things, that the LECC Act does not confine the Commission's oversight function to ensuring appropriate findings are made against subject officers. The Commission's oversight function may include whether a misconduct matter was investigated and/or dealt with by the investigator, review officer and/or delegate appropriately.

7.8 On 23 January 2020, seven months after first receiving the Commission's request, the NSWPF provided the requested material to the Commission.

8. Conclusion

8.1 The Commission is satisfied that the NSWPF reached the appropriate finding on the available evidence.

8.2 The management action taken in response to the Sustained Findings were also appropriate in all the circumstances.

8.3 There is no evidence that there was systemic strip searching of individuals entering custody at LAC1 Police Station.

8.4 The provision of material to the Commission during the monitoring of this misconduct matter investigation was not timely. This is an issue being addressed by the Professional Standards Command and the Commission in a collaborative fashion.

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