



Law Enforcement
Conduct Commission

OPERATION CHIVERO

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

JUNE 2019



Law Enforcement
Conduct Commission

Office of Commissioner for Integrity

25 June 2019

41277/291

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 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 Chivero.

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

Yours sincerely

A handwritten signature in black ink, appearing to be 'Lea Drake', with a stylized flourish at the end.

The Hon Lea Drake
Commissioner for Integrity

Encl.

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1. Introduction

- 1.1 Operation **Chivero** and Operation **Rozzano** were two separate investigations conducted by the Law Enforcement Conduct Commission (**Commission**) into the conduct of two New South Wales Police Force (**NSWPF**) Highway Patrol (**HWP**) officers.
- 1.2 In addition to issues arising from the facts and circumstances surrounding the conduct of each officer, the Commission has also identified wider issues of concern arising from the manner in which allegations of misconduct within the HWP Command are investigated.
- 1.3 In particular, it is of concern that, where a complaint is made against an officer of HWP, it is investigated by another officer within the same Command. Given the size and structure of the HWP Command, it is likely, if not probable, that an investigating officer will have had a past, or even an ongoing, working relationship with the officer the subject of the investigation. The Commission was concerned to investigate whether such an arrangement could lead to an actual or perceived bias in favour of the subject officer.
- 1.4 The complaints, except for a minor infringement by an officer in Rozzano, were both found to be Not Sustained. Both complaints were investigated by officers from the HWP. Both investigator's reports were reviewed by Officer D, who is now no longer serving in the NSWPF.
- 1.5 The Commission decided it was appropriate to conduct a joint investigation of both complaints which would include private examinations.
- 1.6 After conducting several private examinations the Commission determined that, whilst it was appropriate to provide a report to Parliament, having regard to the provisions of s 63(5) (d) of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) the identity of the witnesses and persons referred to in the examinations and the locations of police stations, should be suppressed. Accordingly, codenames have been issued for the purposes of this report. There is to be no publication of the actual name of any person referred to in these reports in relation to the conduct examined.
- 1.7 The Commission will now present its report arising from Operation Chivero.
- 1.8 The In Car Video (ICV) footage obtained during this investigation by the Commission should be viewed prior to reading this Report. A pixelated version of the footage has been uploaded to the Commission's website with this Report.

2. The Commission's Report

2.1 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"*.

2.2 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.

- 2.3 Part 4 of the LECC Act sets out the functions of the Commission. Pursuant to section 29 the Commission may, *inter alia*, make findings and form opinions on the basis of its investigations as to whether officer misconduct occurred and to make recommendations as to 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 or whether consideration should be given to the taking of action under Part 9 of the *Police Act 1990*. However, the Commission cannot include in a report under Part 11 of the LECC Act a finding or opinion that any conduct of a specified person is officer misconduct unless the conduct is serious misconduct.

- 2.4 Serious misconduct is defined in section 10 of the LECC Act as:

(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.

- 2.5 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: section 61 (a).
- 2.6 Before expressing any opinion that serious misconduct has, or may have occurred, or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence, the Commission should be comfortably satisfied of the relevant facts, applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw*.¹ His Honour said:
- The seriousness of an allegation made, the inherent unlikelihood of any occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issues had been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.*²
- 2.7 Section 143 (Persons to be heard) requires the Commission, before including in a report under Part 11 any comment about a person that the Commission considers adverse, so far as practicable, to inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions.³
- 2.8 The Commission is taken to have complied with section 143 if it has held an examination at which the person who is the subject of the adverse comment concerned was informed of the substance of the grounds of the adverse comment and given an opportunity to make submissions.⁴
- 2.9 The Commission provided Officer A and Officer B, through their legal representatives, with a copy of the Commission's draft report and invited them to make submissions in response. The Commission considers that it has complied with section 143 of the LECC Act.

3. The Commission Investigation

- 3.1 Operation Chivero arose from a complaint made by Civilian 1. On 2 November 2016, Civilian 1 was stopped at Location 1 by Officer A and Officer C, both of the local Traffic and Highway Patrol, for driving an unregistered motor vehicle.

¹ (1938) 60 CLR 336.

² Ibid, at p.361.

³ LECC Act, section 143(1).

⁴ LECC Act, section 143(2).

Civilian 1 became upset during the exchange with the police officers and swore on numerous occasions. Officer A took issue with her continuing use of offensive language and arrested her. Whilst out of her vehicle and being handcuffed by Officer A, Civilian 1's head made contact with the body of the motor vehicle. The arrest was captured on the police vehicle ICV. Civilian 1 was processed at the police station, charged and then released. Civilian 1 subsequently complained that she had been assaulted by Officer A in the course of her arrest.

- 3.2 An internal investigation was conducted by Officer B of the local Highway Patrol. In his Resolution Outcome Report of 19 May 2017 Officer B found the complaints of unreasonable use of force and unnecessary use of arrest powers to be Not Sustained.
- 3.3 On 6 October 2017 the Commission decided to investigate both the complaint made by Civilian 1 regarding the conduct of Officer A and the conduct of the NSW Police Force investigation of the complaint.
- 3.4 The Commission conducted private hearings in this investigation on the following dates and heard evidence from the following persons:
 - 17 May 2018 and 5 June 2018 – Officer D
 - 27 August 2018 – Officer B
 - 20 September 2018 – Officer A.
- 3.5 The Scope and Purpose of the private examinations was:
 - 1) To investigate the complaint made by [Civilian 1] regarding the conduct of [Officer A] of the New South Wales Police Force [local] Highway Patrol at Location 1 on 2 November 2016.
 - 2) To investigate the conduct of the New South Wales Police Force investigation into the complaint made by [Civilian 1] regarding the conduct of [Officer A] of the New South Wales Police Force [local] Highway Patrol at [Location A] on 2 November 2016.
- 3.6 In reaching its conclusions and findings the Commission has relied on the ICV footage available to the Commission.
- 3.7 The Commission has considered the evidence of Officer A, Officer B and Officer D. Officer A's evidence is inconsistent with the ICV footage. The ICV footage was available to Officer B.
- 3.8 The Commission has considered the documents prepared as a result of Civilian 1's arrest and the subsequent investigation.
- 3.9 The evidence of Officer D was very helpful in understanding the complaint investigation process in place at the relevant time.

4. Resolution of the Factual Issues in Dispute

- 4.1 The Complaint Management Team (CMT) at Police Area Command 1 decided not to proceed with a criminal evidence-based investigation (EBI) of Civilian 1's complaint upon the basis that the ICV footage did not disclose any evidence of an assault. This was because of a finding that Officer A's hand was not used to force Civilian 1's head into the side of her vehicle. This conclusion was not available on the evidence. The ICV clearly demonstrates that, at the time Civilian 1's head hit the vehicle, it was held by Officer A's hand.
- 4.2 The offence allegedly committed by Civilian 1 was Offensive Language. In that circumstance the decision by Officer A to use his power of arrest was premature and inappropriate. Alternate measures were available including a Criminal Infringement Notice (CIN) or a Field Court Attendance Notice (Field CAN).
- 4.3 There was no evidence to support Officer A's alleged belief that, if he had not arrested Civilian 1, she would have continued to swear or, indeed, why that was relevant.
- 4.4 There was no behaviour by Civilian 1 which could have necessitated the use of force by Officer A to effect an arrest.
- 4.5 Civilian 1's behavior could not have given rise to a reasonable belief or suspicion that she might have been about to escape and, although an assertion concerning the possibility of escape by Civilian 1 was made in the Resolution Outcome Report prepared by Officer B, that possibility was denied by Officer A in his evidence before the Commission.
- 4.6 Civilian 1's behavior could not have given rise to a reasonable belief that she may have been about to escape, which necessitated the use of handcuffs by Officer A to effect her arrest.
- 4.7 The decision by Officer A to use force in arresting Civilian 1 was directly responsible for the escalation of the situation into unnecessary confrontation, during which Civilian 1 suffered an injury to her forehead, an alleged aggravation to a pre-existing injury to her right elbow and demonstrable stress and embarrassment.
- 4.8 The repeated use of the word "fuck" by Civilian 1 on a number of occasions prior to her arrest was used by her as part of her everyday language to express her feelings. It was not used to intentionally hurt the feelings of or to arouse anger, resentment or disgust in the mind of a reasonable person.
- 4.9 The additional swear word "cunt", alleged by Officer A to have been used by Civilian 1 when she closed the rear hatch of her car and was facing away from the police officers, was not captured on the audio component of the ICV. The Commission accepts that the capacity of the ICV to capture audio varies

considerably. Nevertheless, this allegation, which is contained in the statement prepared by Officer A in the COPS entry, and which was repeated by him in evidence, is uncorroborated. Corroboration might have been obtained if the second officer on the scene had been interviewed. Officer C, the second officer, was not interviewed by the internal investigator.

- 4.10 Offensive language is determined by contemporary standards. Views may differ as to what amounts to offensive language. Leaving aside the alleged use of the uncorroborated expletive, the totality of the language used and its context was not sufficient to satisfy the elements of the offence of Offensive Language.
- 4.11 Officer A propelled Civilian 1's head into the side of her vehicle. The ICV is very compelling. The CMT Police Area Command 1 ought to have ordered that a criminal EBI be conducted in order to determine whether or not the actions of Officer A amounted to an assault upon Civilian 1. The subsequent decision by HWP CMT Head Office in Sydney to confirm that a non-criminal EBI be conducted, was not reasonable on the material available. A criminal EBI should have been conducted.
- 4.12 HWP Head Office failed to check or sign off on the instructions issued to the nominated investigating officer, Officer B. The explanation offered by Officer D was that this was due to an administrative error. The Commission is unable to determine whether this failure was due to an inherent weakness in the complaints system or a single administrative error. In any event, this failure resulted in Officer B being instructed to conduct a Resolution rather than an EBI into the complaint by Civilian 1. As a result, the inquiries made were conducted on a very informal basis with no witnesses being interviewed and no evidence gathered in an admissible form.
- 4.13 Upon receipt of the Resolution Outcome Report prepared by Officer B, Officer D failed, as Professional Standards Manager (PSM), to detect that the investigation had been conducted as a Resolution rather than an EBI, even though he signed off on the quality of the investigation as being satisfactory.
- 4.14 Officer B was not suitably qualified or experienced, in the conduct of internal complaint investigations, to have been assigned the task of conducting either a Resolution or EBI. His performance in this task was dismal.
- 4.15 Officer A gave evidence that he thought that, at the time he prepared the Narrative in the COPS Entry on 3 November 2016, he was not aware of any complaint by Civilian 1. The email from Officer E of 2 November 2016 to Officer F suggests that he may have been informed. It is unlikely that Officer B would have spent in excess of 2 hours viewing the ICV on 3 November 2016 whilst completing the COPS Narrative if he had been unaware of the complaint. The Commission is satisfied that Officer A was aware of the complaint by Civilian 1.
- 4.16 The Narrative prepared by Officer A is very detailed and contains numerous conversations in the first person between Officer A and Civilian 1. In his

evidence he stated that he paid a lot of attention to the ICV because he wanted to ensure it contained as much detail as possible and that there were no discrepancies. He was aware that if the police prosecution went to court, the Narrative would be used as the facts in the matter. The Commission is satisfied that Officer A prepared the COPS Narrative in that detailed fashion because he was aware of the complaint by Civilian 1.

4.17 The Narrative, prepared with reference to the ICV footage, contains significant omissions and discrepancies. These are matters of grave concern. They are listed below:

- a. The statement that Civilian 1 leant her head forward causing her to head-butt the roof side of the car because she was resisting conveys the impression that Civilian 1 head-butted the car as a consequence of her own actions. This is contradicted by the ICV footage.
- b. There was no reference in the Narrative to Civilian 1 telling Officer A that she suffered from any pre-existing health condition, apart from an injury to her arm or elbow. However it is clear from the ICV footage that, Civilian 1 told Officer A that she suffered panic attacks for which she was taking medication.
- c. There was no reference to the fact that, after Civilian 1 was forcefully taken hold of by Officer A and handcuffed to the rear, Civilian 1 became highly emotional and proceeded to cry and scream and that her legs began to shake uncontrollably.
- d. There was no reference to Civilian 1 having sustained an injury to her forehead. At the roadside Civilian 1 put Officer A on notice on six occasions that he had 'banged', 'bashed' or 'smashed' her head against the car. Notwithstanding this, Officer A's evidence was that if he had seen any injury he would have recorded it in the COPS Narrative. Both Officer G and Officer E separately observed an injury to Civilian 1's forehead when Civilian 1 was conveyed to Police Station Y. The Commission is satisfied that Officer A was aware that Civilian 1's head had come into contact with her vehicle.
- e. Officer A refers to the handcuff on Civilian 1's right wrist being released and her being handcuffed to the front once she had 'composed herself'. However, it is apparent that when Officer A called on his partner for the handcuff key in order to release Civilian 1's right wrist, she was still crying and screaming and that her legs were shaking. Civilian 1 was demonstrably in a highly distressed state, rather than 'calm', when the decision to move the handcuff was made.
- f. The Narrative states that Civilian 1 'started to make demands of using police mobile telephones to call people'. This is inaccurate. In his evidence, Officer A agreed the words 'can I use your phone', or 'please can I use your phone', were not demands. The Commission reviewed the ICV footage and a

transcript of the audio taken from the ICV. There is no demand for the use of a police telephone. Civilian 1 is heard to say to Officer A on three occasions:

‘Can I just use a mobile phone’;

‘Can I use your phone’;

‘Can I ring my Dad please?’

- 4.18 Prior to Civilian 1 being grabbed by Officer A and told that she was under arrest, Civilian 1 was not distressed or in danger of injuring herself or anyone else. Civilian 1 became emotional and distressed as a direct response to her being arrested with considerable force by Officer A.
- 4.19 When Officer A approached Civilian 1 for the purpose of placing her under arrest he had determined to do so with force. Civilian 1 did not see Officer A approach her. The announcement that she was under arrest was given simultaneously with Officer A grabbing her by the arm. In such circumstances the reaction of Civilian 1 to pull away from the grip of Officer A was a reasonable shocked reflex to having been grabbed and not an attempt to avoid arrest.
- 4.20 Civilian 1 became irritated and commenced to swear, as a result of her being informed by police that she could not drive her unregistered motor vehicle. If Officer A had issued Civilian 1 with a CIN or Field CAN and departed without arresting her she would not have continued to swear. It was incumbent on Officer A in proceeding to arrest Civilian 1 pursuant to section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to prevent a continuation of her committing an offence by swearing, to have had a reasonable belief that she would continue to swear. Whilst it was certainly possible that Civilian 1 would have continued to swear to herself about the incident and the police once the police officers had departed, there would have been no one present to hear her, or be offended, since there were no members of the public in the vicinity.
- 4.21 It is of concern that the assessment contained in the CARA B document completed by Officer B, as to whether or not he had a conflict of interest in investigating the complaint, is an entirely subjective assessment. It is only reviewed in the event of the investigator alerting Highway Patrol Command that a conflict may exist. Officer B worked regularly as a Highway Patrol officer with Officer A. The Commission is satisfied that this arrangement could give rise to a reasonable perception of bias in the community.
- 4.22 The selection of Officer B by Highway Patrol Command to conduct the Resolution of this complaint was wholly inappropriate for the following reasons:
- a. Officer B had not completed any formal training in regard to the internal investigation of complaints;
 - b. Officer B’s personal complaint history was not one likely to inspire confidence in his ability to investigate;

- c. Officer B had not conducted an investigation/resolution of a complaint for more than 17 years at the time he was selected to investigate the complaint against Officer A; and
 - d. Officer B was not provided with any direct supervision or advice from more senior officers experienced in the investigation of complaints.
- 4.23 The investigation conducted by Officer B was egregiously incompetent in the following respects.
- a. Officer B did not interview Officer A's partner Officer C, who was a material witness to the alleged offensive language uttered by Civilian 1, one part of which was not captured by the ICV footage and therefore uncorroborated.
 - b. Officer B did not interview Officer A's partner Officer C regarding the assault which was the subject of complaint.
 - c. In compiling his report, Officer B is not clear as to whether he was relying upon what was contained in the Narrative of the COPS Event and apparently repeated by Officer A when interviewed, or whether he was relying upon an objective assessment of the available evidence, in this case the ICV. The Commission is satisfied that Officer B was not relying upon an objective assessment of the available evidence.
 - d. Officer B could not have had any regard to the ICV when considering the disputed facts. This was clearly apparent in respect of the following matters.
 - i. In his report Officer B had provided a description of the number of students' parents in the area at the time of the incident. In his evidence Officer B admitted that his estimate was an invention based upon his general knowledge of the area and did not reflect the facts demonstrated by the ICV footage. He had invented it.
 - ii. Officer B referred to the handcuffs on Civilian 1 being moved to the front when Civilian 1 'composed herself'. When viewing the ICV in the course of giving evidence, he agreed that at the time Officer A asked for the key to unlock the handcuff, Civilian 1 was crying, screaming and her legs were shaking uncontrollably. He acknowledged that she was, at that point in time, not composed.
 - iii. In his evidence before the Commission Officer B agreed that the description in his report as to how Civilian 1's head came to strike the car 'of her own accord', was not correct and that her head was propelled forward by Officer A's hand.

- iv. In his evidence, Officer B agreed there was nothing in the ICV footage that indicated Civilian 1 was planning to escape and that the use of handcuffs was therefore not necessary.
- e. When speaking with Officer A, Officer B did not make any contemporaneous notes which he could have had Officer A sign as being a true record of what Officer A had told him. In his report Officer B stated that Officer A believed Civilian 1 may have been about to escape and so he used reasonable force to prevent her. In his evidence Officer A denied forming any view that Civilian 1 may have been about to try and escape and stated that he did not recall saying this to Officer B.

5. Submissions in Response to the Draft Report

5.1 Officer A's submissions

5.2 Through his legal representative Officer A provided submissions in response to the draft report. He did not accept the Commission's findings for the reasons summarised below:

- 1) The Commission failed to call Officer C who would have been able to corroborate his version of events. Officer C's evidence would have assisted him. The Commission gave no explanation as to why Officer C was not called.
- 2) He had not attempted to omit evidence from the COPS report in which he made reference to the ICV footage.

5.3 Commission's response to Officer A's submissions

- 1) The Commission has not made any adverse finding concerning Officer A's evidence that the word "cunt" was used by Civilian 1 immediately preceding her arrest. The Commission investigation has limited its finding on that matter to its finding that the investigation was deficient because corroboration was not sought from Officer C who was present at the arrest. The Commission is satisfied that Officer C's testimony could not have added anything of value to the direct evidence provided by the ICV which shows Civilian 1's head striking the vehicle.
- 2) The Commission does not accept that Officer A's reference in the COPS entry to there being ICV footage as ameliorating the inaccurate factual details or lack of factual detail in the COPS entry which should be a true and accurate record of the event it purports to record.
- 3) The Commission accepts the submission that it does not follow that a failure to read police journals equates to Officer A not making a reasonable attempt to keep up-to-date with relevant law. Consequently, the Commission has removed that part of its draft report which dealt with this issue.

5.4 Officer B's submissions

5.5 Through his legal representative, Officer B provided submissions in response to the draft report. He accepted the Commission's findings at paragraph 4.22 of its report for the reasons set out at paragraph 4.23 of the report. His position is summarised below:

- 1) He submitted that *"without the necessary experience and qualifications and guidance from more senior officers, the investigation was fraught from the startbut that he did not fully appreciate the obligations put upon him in carrying out such investigation and further, that his failure to provide a competent investigation was hampered by lack of guidance and assistance."*
- 2) He did not engage in serious misconduct arising from the manner in which he conducted the investigation but, *"he lacked the relevant knowledge, experience (and intelligence) to successfully complete the task that was assigned to him."*
- 3) A more senior officer, Officer D, reviewed his report and *"signed off on it"* suggesting that he accepted the quality and findings of the investigation. He also submitted that *"it is apparent from [the Commission's] recommendations that there are serious flaws in the current operating system of how investigators are appointed and how reports are reviewed and accepted."*
- 4) The Commission should find that he did not have the necessary skills or knowledge to carry out the investigation, there were no support mechanisms in place, nor was there a thorough review of his report before he finalised it to ensure that he had complied with his obligations.
- 5) In conclusion, the Commission should not make a finding that he engaged in serious misconduct.

5.4 Commission's response to Officer B's submissions

5.5 The Commission accepts Officer B's submissions in regard to relevant mitigating and contextual factors. It is not persuaded in relation to the proposed finding of serious misconduct. When making this finding particular weight was given to Officer B inventing evidence concerning there being parent and children bystanders in the vicinity.

6. Findings

A. In relation to Officer A

6.1 The Commission rejects the version of events provided by Officer A.

- 6.2 The Not Sustained finding reached by Officer B in relation to Officer A's conduct cannot be maintained.
- 6.3 Officer A's conduct towards Civilian 1 in propelling her head towards her vehicle so that she sustained an injury in the course of her arrest was serious misconduct.
- 6.4 Officer A's conduct in preparing a misleading and self-serving COPS Narrative in relation to this arrest was serious misconduct.
- 6.5 Officer A's conduct in arresting and handcuffing Civilian 1 demonstrated a lack of understanding of the proper application of police powers of arrest and in the circumstances amounted to an excessive use of force.

B. In relation to Officer B

- 6.6 There are three explanations possible for the egregious failure of this investigation.
- 6.7 The first possible explanation is that Officer B corruptly conducted this investigation in a manner certain to ensure that a Not Sustained finding was made in relation to Officer A.
- 6.8 The second possible explanation is that Officer B conducted this investigation with reckless indifference as to the outcome, which produced a Not Sustained finding.
- 6.9 The third possible explanation is that Officer B is so seriously incompetent that the Not Sustained outcome was a foregone conclusion.
- 6.10 The investigative process undertaken by Officer B was entirely inadequate. The factual findings made by him were not supported by any evidentiary material. In fact, the substance of his findings is directly contradicted by the available evidence. In regard to some issues i.e. the non-existent members of the public in the immediate vicinity of the alleged offensive conduct, Officer B invented the evidence. Officer B misdescribed the contents of the ICV. He failed to interview Officer C who was present at all relevant times. His interview of Officer A was conducted in a manner certain to produce support for Officer A's version of events.
- 6.11 If it had not been for the evidence regarding the non-existent members of the public in the immediate vicinity of the alleged offensive conduct, the Commission might have accepted that Officer B was so seriously incompetent that the Not Sustained outcome was a foregone conclusion. However, taking into account that factor, the Commission is satisfied and finds that Officer B conducted his investigation with such reckless indifference as to the outcome that a Not Sustained finding was inevitable and is therefore satisfied and finds that Officer B's conduct was conduct which was serious misconduct.

7. Affected Persons

- 7.1 In Part 2 of this report the Commission set out the provisions of section 133 of the LECC Act dealing with the content of reports to Parliament. Subsections (2), (3) and (4) relate to “*affected persons*”.
- 7.2 The Commission is of the opinion that Officer A is an affected person within the meaning of section 133(3) of the *LECC Act*, being a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of the investigation.
- 7.3 The Commission is of the opinion that Officer B is an affected person within the meaning of section 133(3) of the *LECC Act*, being a person against whom in the Commission’s opinion, substantial allegations have been made in the course of the investigation.

8. Recommendations

A. Regarding Officer A

- 8.1 The complaint history and personnel file of Officer A held by the NSWPF should be reviewed. The Commission recommends that consideration be given to the taking of action against Officer A pursuant to section 173 of the *Police Act 1990*. The relevant Not Sustained outcome against Officer A should be reconsidered.

B. Regarding Officer B

- 8.2 The Commission finds that Officer B engaged in serious misconduct arising from the manner in which he conducted the investigation into the allegations against Officer A. The Commission recommends that consideration be given to the taking of action against Officer B pursuant to section 173 of the *Police Act 1990*.

9. Considerations Regarding the Complaint Investigation Process within Specialist Commands

- 9.1 In addition to the above Recommendations, the NSWPF should consider the following matters, whilst understanding that the changes involved would require the commitment of resources:

- (1) The number of Professional Standard Managers within the HWP be increased. Given the number of officers serving in that Command the Commission is of the view that three Professional Standard Managers would be the minimum number required to ensure a proper process.
- (2) Whilst the above suggested allocation of resources appears to the Commission to be the one most likely to produce a turnaround in the professionalism and fairness of investigations in the HWP, an alternative of equivalent resources in support of the Professional Standard Managers could be considered.
- (3) Professional Standard Managers should be officers who have had relevant investigative experience to enable them to issue directions and assess the thoroughness of an investigation, the likely accuracy of the facts recounted in a report, the findings made by the investigator in a report, the appropriateness of the recommendations in a report and identify the risk of real or perceived conflicts of interest.
- (4) A Superintendent should chair the Complaints Management Teams to reduce the risk of conflicts of interest and add a layer of further professional experience. This would be particularly useful in the consideration of regional investigations where special pressures on staffing exist.
- (5) Consideration be given to a review of the most effective means of ensuring changes in the law and best policing practices are delivered to NSWPF HWP officers. HWP officers are often absent from general duties for considerable periods. Consideration should be given to linking mandatory continuing education to promotion and, where the ultimate career position of a police officer has been reached, mandatory continuing education should be required at regular intervals in any event.

Operation Chivero
Report pursuant to s 132
Law Enforcement Conduct Commission Act 2016
June 2019

Contact information

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Hours of operation

08:30am to 4:30pm Monday to Friday (excluding weekends and public holidays)

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