

OPERATION KARUKA

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

MAY 2020

8 May 2020

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 Karuka.

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

Yours sincerely



The Hon R O Blanch AM QC
Acting Chief Commissioner



The Hon Lea Drake
Commissioner for Integrity

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1. Introduction

- 1.1. The Commission's investigation in Operation Karuka arose from a complaint received on 20 July 2017 by KAR10C, who was then aged 29, about the conduct of police officers whilst he was in police custody following his arrest on 24 June 2017. KAR10C alleged that he was sexually assaulted and racially vilified by a police officer during a strip search of his person conducted in a cell at LAC1 Police Station following his arrest.
- 1.2. The complaint was referred to the NSW Police Force (NSWPF) for investigation. On 12 October 2017, the internal police investigation concluded that KAR10C's complaint was not sustained.
- 1.3. The Commission decided that it would investigate KAR10C's complaint, given its seriousness. The Commission was particularly concerned with the following matters:
 - (i) that KAR10C, a vulnerable person, was subjected to two strip searches at the police station, which appeared to be unjustified and the second of which might have involved unreasonable use of force.
 - (ii) whether during the second strip search of KAR10C, the police officers attempted to search a body cavity in contravention of both the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and the *Crimes (Forensic Procedures) Act 2000* (CFPA).
 - (iii) the failure by police officers to comply with provisions of LEPRA in relation to the conduct of the strip searches and whether this was indicative of systemic failures in the NSWPF with respect to the education and training of police officers as to their powers.
 - (iv) that, following the second strip search, KAR10C may have been left in the cell naked, handcuffed and visibly distressed for 28 minutes, before police officers returned to conduct a welfare check and to remove his handcuffs.

2. The Commission's Statutory Functions

- 2.1. The *Law Enforcement Conduct Commission Act 2016* (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.¹ 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 will be referred to by codenames in this report. There is to be no publication of the name or image of any of the codenamed persons in relation to the evidence given in Operation Karuka or included in this report without further order of the Commission.

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

3. Background

A. Events leading up to KAR10C's arrest

- 3.1 On 24 June 2017, at around 12:10am, NSW Police Officers KAR2 and KAR5 attended a multi-storey residential block of units in LAC1, in response to a resident report of a possible break and enter being in progress. The resident told Officers KAR2 and KAR5 that she had seen a male person of Aboriginal appearance, medium build, wearing a black jacket and a black hat forcibly gain entry to the building through a locked security door.
- 3.2 Whilst speaking with the resident, the police officers saw KAR10C coming down the stairs to the ground floor area. KAR10C matched the description provided by the resident and, on seeing him, the resident identified him as the person she had seen break into the building through the locked security door. KAR10C had a scooter in his possession. Officer KAR2 called for him to stop and KAR10C ran out of the building. A foot pursuit ensued, during which KAR10C threw the scooter at police to avoid apprehension. KAR10C was eventually caught in a doorway in a nearby street. Officer KAR2 observed that, when he was caught, KAR10C appeared to be attempting to remove or insert something into his underpants. He was subdued. Officer KAR2 conducted a search, during which a small piece of aluminium foil containing a small amount of white powder, believed to be a prohibited drug, was located inside his underwear. Nothing else was found.
- 3.3 KAR10C is Aboriginal. At the time of his arrest his parole had been revoked and a bench warrant issued for his arrest. He had a balance of one year, seven months and twenty-two days to serve.
- 3.4 KAR10C was taken to LAC1 Police Station in a caged vehicle manned by Officer KAR3 and Officer KAR7. On arrival at the police station, KAR10C was placed in cell number 4 and his handcuffs were removed. He was not taken to the custody manager.

B. The Strip Searches of KAR10C

- 3.5 Whilst in cell 4, KAR10C was subjected to a strip search, which was captured on CCTV. The footage (video only) shows that initially KAR10C appeared to be compliant and co-operative as he removed his articles of clothing at the direction of the police officers. He became visibly agitated when it appeared that he was asked to turn around and squat. There were no signs of physical aggression on his part. Nevertheless, KAR10C was then handcuffed to the front and shortly thereafter, the custody manager, Officer KAR1 entered the cell. KAR10C was still naked only a metre or so from Officer KAR1, who had him in clear view. There was no attempt by her to avert her view and no clothing or other item offered to KAR10C to provide privacy. There were three male police officers present. The CCTV shows that there was some discussion between Officer KAR1 and KAR10C but there is no record of the actual conversation.
- 3.6 After Officer KAR1 left the cell, the footage shows that whilst Officer KAR7 and Officer KAR3 were in the cell KAR10C stood up and performed two squats followed by another three squats in quick succession in front of the

two police officers. The police officers then left cell 4, where KAR10C remained naked and handcuffed to the front.

- 3.7 Shortly thereafter, KAR10C was handed his underwear, which he did not put on. He remained handcuffed. He was then moved to another cell (cell 2), and his handcuffs removed. After about 20 minutes a number of police officers entered the cell and conducted a strip search. The CCTV footage shows that KAR10C was handcuffed to the rear and brought down by force to the floor, where he was held down by Officer KAR2 and Officer KAR4, whilst Officer KAR3 forcefully lifted up KAR10C's leg by the ankle and Officer KAR5 visually inspected KAR10C's buttocks and groin. Nothing was found.
- 3.8 KAR10C was then left alone in the cell, naked and handcuffed to the rear, having refused to have his handcuffs removed. He was visibly distressed. He was left in that state for at least 28 minutes until Officer KAR4 and Officer KAR6 returned to the cell, removed the handcuffs and gave KAR10C water. KAR10C had his clothing with him in the cell but he was not in a position to put his clothes on whilst handcuffed. About fourteen minutes after the cuffs were removed, KAR10C put his shorts on.

C. The Complaint

- 3.9 On 20 July 2017, the Commission received a written complaint from KAR10C, in which he alleged that during his arrest he was humiliated and sexually assaulted by one of the arresting officers. He alleged that after being placed in a cell, the following occurred:

I was told to perform a compulsory strip search which I knew from prior arrests was stock standard so I followed the mentioned officer's orders/complied [sic] with his demand to do the strip search that was until I was ordered to bend over whilst with both hands part the cheeks of my buttocks which did take me by surprise [sic]/caught me off guard as in all the time I've been involved in the system this procedure/direction has never occurred so I did 3 x squats whilst having my feet parted wide which is protocol in the Department of Corrective Services. This wasn't good enough as the officer again demanded I bend over parting my buttocks so my anal cavity was exposed so he could see if I had any contraband I then responded [sic] to this by saying I wasn't going to comply until [sic] I spoke to (Legal-Aid) to see if this was allowed or if the officer could produce manuscripts that state I have to squat whilst parting my buttock cheeks then I'll be more than happy to comply. Well this made the officer mad and angry with rage then he stated/quoted these exact words: "You have no rights here, ya black bastard". That's when he all of a sudden became very aggressive then rushed me trying to put me in a wrist lock which didn't work as I somehow managed to break free that's when the other officers present jumped and subdued me (whilst naked!!!)

- 3.10 KAR10C alleged in his written complaint that it was during the second strip search that one of the arresting officers placed his index and middle finger into his rectum.
- 3.11 The Commission initially referred the complaint to the NSWPF for conduct of an internal investigation. The triage officer, Officer KAR11, who considered

KAR10C's initial complaint, recommended on 18 August 2017, referral to the Complaints Management Team (CMT) of the following issues, in substance: (1) whether the searching officer placed his fingers in KAR10C's rectum; (2) whether an unnecessary strip search was conducted on KAR10C in cell 2; and (3) whether Officer KAR2 said, whilst handcuffing KAR10C, *"You have no rights here, ya black bastard"*. The triage form noted that KAR10C was first searched in cell 4 but declined to obey a direction to part his buttocks, squatting three times instead and was then moved to cell 2. KAR11 provided a detailed description of what occurred in cell 2 for which he relied on the CCTV. Whether he also looked at the CCTV of the search in cell 4 is unclear, although it would have been available to him. He noted that, although the strip search in cell 4 was recorded in the custody management record, no record was made of the subsequent search in cell 2.

- 3.12 On 21 August 2017, Officer KAR8 was tasked with investigating the complaint. He issued directive memorandums to Officers KAR1, KAR2, KAR3, KAR4 and KAR5. Officer KAR8 received Officer KAR1's response on 22 August 2017 and formed the view that CCTV footage supported her assertions that KAR10C was *"violent and aggressive"*. He reviewed CCTV footage of the second search and was satisfied that at *"no point do any of the police place their hands in a position consistent with being able to insert their fingers into [KAR10C]'s rectum"*.²
- 3.13 Police complaint handling procedures require that if the allegations potentially involve criminal activity by an officer or if proven, are likely to result in reviewable sanction, the triage officer will refer the matter to the CMT recommending an *"evidence-based investigation"*, which involves a formal investigative process. Alternatively, if there appears to be no criminal activity or potential for reviewable action but nonetheless, there are elements of the complaint which suggest unsatisfactory conduct, the matter may be referred for a *"non-evidence based investigation"* or *"resolution"*, which involve a less formal gathering of evidence and is intended to result in a speedy resolution of the matter.
- 3.14 In KAR10C's case, the complaint was initially dealt with as an evidence-based investigation due to the seriousness of the allegation (sexual assault). After considering the available information, Officer KAR8 formed the view that he held *"no suspicion of criminal offence (sexual or otherwise) was committed by any of the subject officers"* and he requested the CMT to consider converting the investigation from evidence based to a resolution process, which it subsequently did.
- 3.15 On 26 August 2017, KAR10C was informed by letter that the investigation had been completed and revealed that there was no evidence to establish misconduct by police.
- 3.16 On 12 October 2017, Officer KAR8 finalised his resolution outcome report and found all matters against all the subject officers not sustained. The reviewing officers agreed with the findings.³

² See Ex BID1C-Email dated 3 September 2017 from Officer KAR8 to Officer KAR12.

³ See Ex BID2C-NSW Police Force Resolution Outcome Report for LMI1702786.

4. The Commission's Investigation

- 4.1 The Commission decided to hold examinations in Operation Karuka and, because of the nature of the allegations, and after taking into account the factors set out in s 63 of the LECC Act, decided that the examinations would be held in private.
- 4.2 The following witnesses were called to give evidence in private examinations before the Commission:
1. Officer KAR1
 2. Officer KAR2
 3. Officer KAR3
 4. Officer KAR4
 5. Officer KAR5
 6. Officer KAR6
 7. Officer KAR7
 8. Officer KAR8
- 4.3 Examinations took place on 23 and 24 October 2018, 27 November 2018, 4 and 5 December 2018 and 6 February 2019.
- 4.4 The general scope and purpose of the private examinations was to investigate whether:
1. *[Officers KAR1, KAR2, KAR3, KAR4 and KAR5], or any other NSW Police Force officer engaged in serious misconduct in relation to the treatment of [KAR10C] following his arrest and detention on 24 June 2017.*
 2. *There was conduct of the NSW Police Force that is or could be serious maladministration in connection with the application of the laws relating to searches, including in particular, strip searches and the application of the Crimes (Forensic Procedures) Act 2000.*
- 4.5 The Commission's investigation was not concerned with the arrest of KAR10C, which it accepts, on the evidence before it, was appropriate and lawful. Its focus was the treatment of KAR10C whilst in the cells at the police station, whether he was sexually assaulted by a police officer whilst in custody and whether the conduct of the police officers was indicative of wider systemic issues within the NSWPF, particularly in relation to education, training and knowledge of police officers as to their searching powers.

5. CCTV Footage of the searches

- 5.1 Both strip searches of KAR10C were captured on CCTV. They record the following:

First Search - Cell 4

- 5.2 At 12.33.49am: KAR10C enters cell 4 with Officer KAR7 behind him. KAR10C is handcuffed to the front. He is wearing a black shirt and black jeans. He has socks on. He is not wearing shoes. He stands in the middle of the cell. Officer KAR7 stands next to KAR10C. Officer KAR7 takes off his gloves and is seen speaking to KAR10C. KAR10C appears calm. Officer KAR7 points to the bench and KAR10C moves towards the bench as directed. He stands next to the bench, facing Officer KAR7. Officer KAR7 searches his own pockets (presumably looking for keys to handcuffs) and then moves towards KAR10C and starts unlocking handcuffs. (Vision of this is obscured by Officer KAR7).
- 5.3 At 12.34.37: Officer KAR3 enters the cell. Officer KAR7 is still undoing the handcuffs. KAR10C is compliant and offering no resistance. Officer KAR3 stands behind and to the left of Officer KAR7. Officer KAR7 removes the handcuffs and he steps away from KAR10C. KAR10C rubs his wrists. At 12.35.04 Officer KAR7 leaves the cell. KAR10C is still standing near the bench facing Officer KAR3. Officer KAR3 is standing in front of and to the right of KAR10C. KAR10C is still rubbing his wrists. Officer KAR7 returns to the cell at 12.35.11 and puts his gloves on. Officer KAR3 is already wearing gloves.
- 5.4 12.35.14 to 12.37.20: KAR10C removes his articles of clothing as directed. The clothes are removed in the following order: shirt, jeans, singlet, shorts. The clothes are passed either to Officer KAR7 or to Officer KAR3, who check each item of clothing. Once checked, they are placed on the bench.
- 5.5 At 12.37.20: KAR10C removes his underpants and places them on the floor to his left. Officer KAR7 gesticulates with his palm up and makes an upwards motion. Vision is obscured by Officer KAR3 but it appears that KAR10C slightly spreads his legs and lifts his testicles whilst Officer KAR3 and Officer KAR7 look on.
- 5.6 12.37.24 -12.37.42: Officer KAR7 makes a circular motion with his hand and KAR10C turns around so that his back is now facing Officer KAR7 and Officer KAR3. KAR10C lifts up his left leg with his knee bent so that the underneath of his sock is exposed. He then repeats that action with his right leg. He then turns around to face the 2 officers. KAR10C takes off his socks, inverting them as he takes them off, and holds a sock in each hand. Officer KAR7 makes a hand gesture and KAR10C runs his hand down each sock, stretching and then releasing each sock. KAR10C is now naked but for his wristwatch.
- 5.7 12.37.42-12.41.27: KAR10C turns slightly towards Officer KAR3, who has made a hand gesture. Officer KAR7 moves his hand in an up and down motion. KAR10C turns around so that his back is now facing the 2 officers. He spreads his legs slightly and lifts his left leg, although the actual lift is obscured by Officer KAR3. He is still holding a sock in each hand. Officer KAR7 makes an up and down gesture with his right hand. KAR10C shakes his head and turns slightly left to face Officer KAR3. Officer KAR3 appears to be speaking to KAR10C and he makes a hand movement. KAR10C appears to be speaking to both Officer KAR3 and Officer KAR7. At

- 12.38.08 KAR10C faces Officer KAR3 and is gesticulating with his right hand. He still has a sock in each hand. Officer KAR7 and KAR10C are having a discussion. KAR10C makes a back and forth movement with his hand, suggesting that he is indicating "No".
- 5.8 12.38.26-12.39.08: KAR10C picks up his singlet and then drops it. He then picks up his shorts with his left hand. He has both socks in his right hand. He places the shorts back on the bench. He continues to speak with the 2 officers. His hand gestures suggest that he is querying what the police officers are asking him to do. He then picks up his shorts and singlet.
- 5.9 At 12.39.08: Officer KAR7 leaves the cell. Officer KAR3 moves in closer to KAR10C. Officer KAR3 makes a hand gesture and KAR10C puts all the clothes he is holding back on the bench.
- 5.10 12.39.13-12.39.30: KAR10C is speaking to Officer KAR3 and he looks upset or angry. Officer KAR3 moves in closer to KAR10C. At 12.39.30 KAR10C puts up his right hand and it appears that Officer KAR3 is placing handcuffs on KAR10C but vision is obscured by Officer KAR3. KAR10C is rocking side to side whilst talking to Officer KAR3, who continues to apply handcuffs. KAR10C continues to talk. He appears upset or angry.
- 5.11 At 12.40.03: Officer KAR6 enters the cell and stands in the doorway. KAR10C is still speaking to Officer KAR3. He appears upset or angry.
- 5.12 12.40.10-12.40.26: Officer KAR3 steps in closer to KAR10C and appears to be applying downward pressure on the handcuffs so that KAR10C's arms are brought closer to Officer KAR3 whilst KAR10C moves his torso away from him. KAR10C then steps up on the bench, moving away from Officer KAR3, who has hold of KAR10C's left upper arm with his left hand and is holding down KAR10C's left wrist with his right hand. Officer KAR3 pushes KAR10C and then pulls him down off the bench and pulls KAR10C around in a half circle and pushes him down into a sitting position on the bench. KAR10C is obscured by Officer KAR3. Officer KAR6 continues to watch from the doorway.
- 5.13 12.40.26-12 40.37: Officer KAR3 moves to the right. KAR10C is still sitting down on the bench. Officer KAR3 appears to be talking to KAR10C. Officer KAR3 takes hold of KAR10C's upper arm and his wrist. He appears to apply a wrist lock to KAR10C's left arm (12.40.31) and pushes KAR10C down. KAR10C's facial expressions suggest that he is experiencing pain or discomfort.
- 5.14 12.40.38-12.41.27: Officer KAR7 walks into the cell. He stands to the left of Officer KAR6, who is still standing in the doorway. Officer KAR3 appears to be adjusting KAR10C's handcuffs. Officer KAR6 steps in and bends down to look at the handcuffs. He appears to be adjusting them but the vision is obscured by his body. Officer KAR3 is still holding KAR10C by the upper arm and wrist. Officer KAR7 moves to the left of the cell and towards KAR10C. KAR10C appears to be talking to Officer KAR7 as he moves his torso away from Officer KAR3, who is pushing KAR10C. Officer KAR6 continues to do something with the handcuffs. He also removes KAR10C's wristwatch during this time.

- 5.15 **12.41.28–12.42.30:** Officer KAR1 enters the cell. She stands in the doorway and there appears to be a conversation between Officer KAR1 and KAR10C. Whilst speaking to Officer KAR1, KAR10C points his head towards Officer KAR3. He continues to talk and then points his head towards the handcuffs. Officer KAR6 moves away from KAR10C and there is now a clear view of KAR10C sitting on the bench. Officer KAR3 appears to apply a wrist lock to KAR10C whilst he is sitting down on the bench and talking to Officer KAR1. (12.41.44) Officer KAR3 applies downward pressure and KAR10C appears to be protesting as he looks at Officer KAR3. Officer KAR3 places his right foot on the bench next to KAR10C and moves his head closer to KAR10C. Officer KAR6 is standing in front of KAR10C and Officer KAR7 is standing at the back of the cell. Officer KAR1 moves in closer (12.41.57). Officer KAR1 then moves closer to the door and speaks with Officer KAR7. Officer KAR3 is still holding KAR10C's wrist. Officer KAR1 moves closer to KAR10C. KAR10C is talking to Officer KAR3. Officer KAR3 then again appears to apply a wrist lock to KAR10C and pushes him down. KAR10C appears agitated and looks at Officer KAR3. KAR10C remains seated on the bench but moves his head and then rocks his torso. Officer KAR3 releases his wrist (12.42.29). Officer KAR7 moves in closer. Officer KAR1 and Officer KAR6 stand in front of KAR10C and Officer KAR3.
- 5.16 **12.42.30–12.43.21:** Officer KAR3 places his hand on KAR10C's left shoulder and pushes him down on the bench and then pushes him again. Officer KAR3 then moves away and KAR10C stands up. Officer KAR3 places his right arm on KAR10C's left shoulder. Officer KAR1 puts her hand up in a motion suggesting she is telling KAR10C to sit down. Officer KAR6 moves in next to Officer KAR3 and places his hand on KAR10C's chest and they both push KAR10C back down onto the bench. KAR10C remains seated and continues to talk to Officer KAR3 and Officer KAR1. In the meantime Officer KAR7 speaks with Officer KAR1 and then collects KAR10C's clothes from the bench. Officer KAR3 kicks KAR10C's underpants, which are still on floor of the cell, to Officer KAR7, who picks them up and then puts them back where they were. Officer KAR1 appears to be directing Officer KAR7 to pick up KAR10C's clothes, which he does. (12.42.42) Officer KAR1 walks out of the cell (12.43.10) and Officer KAR7 follows her. Officer KAR1 points to the floor and Officer KAR7 places KAR10C's clothes on the floor just outside the cell. KAR10C continues to speak with Officer KAR3 and Officer KAR6.
- 5.17 **12.43.19–12.43.58:** Officer KAR7 re-enters the cell and places KAR10C's singlet next to his underpants. At that point (12.43.20) KAR10C stands up and completes 2 squats whilst facing Officer KAR3 and Officer KAR6, who are looking at KAR10C. After placing the singlet on the floor, Officer KAR7 then again leaves the cell and stands outside of the cell. Officer KAR7 is not observing KAR10C whilst he completes the first 2 squats. Officer KAR1 is outside the cell and turns and walks out of sight. (12.43.20) She does not appear to have seen KAR10C squatting. After completing the first 2 squats, KAR10C is speaking to Officer KAR6 and Officer KAR3. He then completes a succession of 3 squats (at 12.43.31, 12.43.32 and 12.43.33). Officer KAR7 remains in the corridor outside the cell and then moves out of sight (12.43.37). KAR10C appears to still be protesting. Officer KAR3 and Officer KAR6 are standing and watching KAR10C. KAR10C then sits down (12.43.46)

- 5.18 **12.43.59-12.46.27:** Officer KAR7 re-enters the cell. KAR10C lifts his hands up and gesticulates towards Officer KAR3. KAR10C looks upset. The 3 officers are looking at KAR10C. Officer KAR7 then leaves the cell (**12.44.59**). Officer KAR6 picks up KAR10C's clothes from the floor of the cell and leaves the cell followed immediately by Officer KAR3. Officer KAR3 locks the cell door. (**12.45.10**) and moves out of view. KAR10C stands up and moves to the cell door. He moves his torso around as he appears to scratch his bottom. He lifts his arms up. Officer KAR7 returns (at **12.45.46**) and unlocks the door. He stands just outside the doorway. Officer KAR7 speaks to KAR10C. Officer KAR3 is standing behind Officer KAR7. Officer KAR3 kicks KAR10C's underpants into the cell (**12.45.52**). KAR10C moves back to the bench and he then picks up his underpants off the floor and walks out of the cell, following Officer KAR7. Officer KAR3 falls in behind KAR10C.
- 5.19 At no point since KAR10C's entry into the cell is there any sign of any physically aggressive behaviour towards the officers.

Second search - Cell 2

- 5.20 **12.46.16-12.46.21:** Officer KAR7 approaches the door to cell 2. KAR10C is walking behind him with Officer KAR3 to his left. Officer KAR7 unlocks the door to the cell and KAR10C enters. He is still naked and handcuffed to the front. Officer KAR7 closes the door to the cell. KAR10C is left alone in the cell.
- 5.21 **12.46.22-12.49.46:** KAR10C paces up and down the cell. He is visibly upset. Occasionally he stamps his foot and then continues pacing up and down. At one stage he puts his left leg onto the bench (**12.46.39**) and appears to be scratching himself but vision of the actual act is obscured. He spits into the toilet. (**12.48.29**). He continues pacing.
- 5.22 **12.49.56- 12.50.24:** Officer KAR6 approaches the cell, unlocks the door and enters the cell. KAR10C paces past Officer KAR6 but then stops next to Officer KAR6 and puts his hands up. Officer KAR6 removes KAR10C's handcuffs, first the right and then the left. KAR10C stands calmly whilst this takes place. KAR10C walks away from Officer KAR6 once the cuffs are fully removed. KAR10C looks upset and continues pacing. Officer KAR6 leaves the cell (**12.50.24**)
- 5.23 **12.50.24-12.50.51:** KAR10C continues to pace up and down. He is visibly distressed. At one point he covers his eyes with his hand and at another point he leans up against the wall and places his forehead against his hands (**12.50.45**).
- 5.24 **12.50.51 – 12.51.07:** Officer KAR6 returns to the cell, carrying KAR10C's clothes. He enters the cell and places the clothes on the bench near KAR10C's underpants. (**12.51.01**) KAR10C continues to pace up and down, visibly upset. Officer KAR6 leaves the cell.
- 5.25 **12.51.08-12.52.23:** KAR10C continues to pace up and down. He picks up his singlet and uses the singlet to wipe his eyes (**12.52.18**)

- 5.26 12.52.23- 12.52.32: Officer KAR6 enters the cell carrying a white cup (presumably containing water) and places the cup on the bench near KAR10C's clothes. There does not appear to be any interaction between Officer KAR6 and KAR10C. KAR10C continues to pace up and down, visibly upset, wiping his eyes with his singlet. Officer KAR6 leaves the cell.
- 5.27 12.52.33-12.58.57: KAR10C continues to pace up and down, visibly distressed. Occasionally he places his hands up against the wall and cries into his singlet (12.54.05, 12.54.26). He bangs his forehead slightly against the wall twice (12.54.33) and then sits down on the bench (12.54.41). He slumps forward with his head resting against his folded arms. He remains seated.
- 5.28 12.58.58: Officer KAR2 is seen walking to the cell door with Officer KAR5, Officer KAR4 and Officer KAR3 behind him. Officer KAR2 unlocks the door.
- 5.29 12.59.08-1.00.07: Officer KAR2 leans into the cell and appears to be talking to KAR10C, who is still sitting down. KAR10C has his head down and never looks up so his face cannot be seen. Officer KAR5 is standing behind Officer KAR2 during this time.
- 5.30 1.00.08: Officer KAR2 shuts the cell door and the 4 officers disappear out of sight.
- 5.31 1.00.09-1.03.02: KAR10C remains sitting down on the bench, slumped forward, resting his head on his arms.
- 5.32 1.03.03 - 1.03.18: Officer KAR2, Officer KAR5 and Officer KAR4 approach the cell. Officer KAR4 opens the door and the 3 officers walk into the cell. First Officer KAR4, followed by Officer KAR2 and then Officer KAR5. They stand in a row in front of KAR10C, who continues looking down at his feet and picking at his toes. It is not possible to tell whether anyone is saying anything to KAR10C.
- 5.33 1.03.19: Officer KAR2 bends down and appears to look between KAR10C's legs from a distance. Officer KAR5 walks towards KAR10C and looks behind the mattress leaning up against the wall behind where KAR10C is sitting.
- 5.34 1.03.30-1.03.45: Officer KAR4, Officer KAR2 and Officer KAR5 are watching KAR10C, who remains seated and looking at his feet. Officer KAR4 turns his head towards Officer KAR5 and appears to say something. Officer KAR5 appears to respond as he moves his hands to his left pocket (action obscured by Officer KAR2) (1.03.47). Officer KAR2 moves towards KAR10C and bends down and takes hold of KAR10C's left arm (at the wrist and at the upper elbow) and directs KAR10C up to a standing position. KAR10C is compliant (1.03.50). Officer KAR5 approaches KAR10C and takes hold of KAR10C's right arm with his left hand. Officer KAR5 is holding handcuffs in his right hand. KAR10C still looks upset and appears to be wiping his eyes with his right hand. (1.03.53) Officer KAR5 then directs KAR10C's right arm behind his back. KAR10C is compliant. (1.03.55) Officer KAR2 has hold of KAR10C's left arm under his armpit.

- 5.35 During this time, Officer KAR4 has remained in the same position observing. KAR10C looks at Officer KAR2 and Officer KAR2 appears to say something to KAR10C (1.03.57).
- 5.36 1.03.59-1.04.04: KAR10C makes a movement with his shoulder. Officer KAR2 moves back and then reacts by pushing KAR10C on the left side of his face, then grabs the back of KAR10C's head and pushes him towards the cell door so that the right side of KAR10C's body is pressed up against the wall. Officer KAR5 appears to still be handcuffing KAR10C.
- 5.37 1.04.05-1.04.08: KAR10C pushes with his shoulder against Officer KAR2 and Officer KAR2 moves his hand from the back of KAR10C's head to the back of his neck and back. Both Officer KAR2 and Officer KAR5 struggle with KAR10C as they bring him down to the bench and then onto the ground with KAR10C on his side facing the bench with his back to the police officers.
- 5.38 1.04.08-1.04.18: Officer KAR4 moves towards KAR10C's feet as Officer KAR2 and Officer KAR5 bring KAR10C to the ground, with his back to the officers and so that the front of his body is facing the bench. Officer KAR2 is now at KAR10C's head and Officer KAR5 is at his middle torso. It is not clear if Officer KAR5 has completed applying the handcuffs to KAR10C. Officer KAR4 is at KAR10C's feet and bends down onto one knee. He uses his shin to press KAR10C against the bench and to prevent him moving back. Officer KAR3 is seen running towards the cell. He enters the cell at 1.04.13 and moves in between Officer KAR5 and Officer KAR4.
- 5.39 1.04.18 - 1.04.23: Officer KAR3 takes a step back and is standing watching the other 3 officers who are holding KAR10C down in same positions as before. Officer KAR4 appears to say something and Officer KAR3 bends down. Officer KAR3 bends down further and then steps back towards cell door and appears to be looking down at KAR10C's buttocks area.
- 5.40 1.04.23-1.04.25: Both Officer KAR5 and Officer KAR3 bend down and look at KAR10C's buttocks area. Officer KAR5 bends down further with his head and looks more closely at KAR10C's buttocks area. KAR10C is still on his side. Officer KAR2 is still at KAR10C's head, holding him down by his shoulders.
- 5.41 1.04.28-1.04.35: Officer KAR5 lifts his head back up. Officer KAR3 moves back to KAR10C's feet and is looking towards KAR10C's buttocks area. Officer KAR5 bends down again with his head lowered and looks towards KAR10C's buttocks area. Officer KAR5 is holding KAR10C by the cuffs.
- 5.42 1.04.36- 1.04.39: Officer KAR3 stands up. Officer KAR3 lifts up KAR10C's right leg (vision obscured but KAR10C's foot reappears at 1.04.39). Officer KAR5 bends down to look at KAR10C's buttocks area. Officer KAR3 drops KAR10C's leg.
- 5.43 1.04.40-1.04.59: Officer KAR3 stands up. Officer KAR5 appears to be saying something to Officer KAR3, who appears to respond. Officer KAR3 bends down and lifts up KAR10C's right leg by grabbing his foot. He then lifts the leg higher until KAR10C's leg is straight and above the level of the

bench. Officer KAR4 steps away. (1.04.50) Officer KAR5 bends down and looks at KAR10C's groin and anal area. Officer KAR4 walks out of cell and stands just outside the doorway. Officer KAR3 drops KAR10C's leg. Officer KAR5 stands up. Officer KAR2 is still in the same position.

- 5.44 1.05.00-1.05.03: Officer KAR3 walks out of the cell past Officer KAR4 who is still standing just outside the door to the cell.
- 5.45 1.05.04: Officer KAR5 and Officer KAR2 release their holds on KAR10C and step away. They both walk out of the cell. KAR10C sits up. His clothes are on the floor in front of him, having been knocked over during the earlier struggle. The water cup is on the floor of the cell, the water having been spilt during the struggle.
- 5.46 1.05.05: Officer KAR3 is seen outside walking past the cell. He turns around and looks at KAR10C and makes a thumbs up gesture. KAR10C's reaction cannot be seen as his back is to the camera.
- 5.47 1.05.06-1.05.21: KAR10C stands up as Officer KAR5 and then Officer KAR2 leave the cell. KAR10C appears to be saying something but his back is to the camera. Officer KAR5, Officer KAR4 and Officer KAR2 are outside the cell door. Officer KAR2 and Officer KAR5 disappear out of sight and then Officer KAR4 disappears out of sight.
- 5.48 1.05.21- 1.32.40: During this period of time, KAR10C is still naked and handcuffed to the rear. He is visibly upset. He kicks the cell door occasionally. He paces around the cell. On a few occasions he bangs his head against the perspex cell wall with some force (1.05.54, 1.06.06, 1.07.12). He paces up and down. His mouth is moving as if he is shouting. On several occasions he walks up to the left hand side of the perspex cell wall and looks out. It appears as if he is attempting to attract attention. At 1.08.03 an unidentified person stands outside the corridor near the cell and observes KAR10C for a few seconds before disappearing out of sight. At 1.22.47 KAR10C stops pacing up and down and he sits down on the bench. He is still visibly upset. At 1.26.56 Officer KAR4 approaches the cell and observes KAR10C for a few seconds before disappearing out of sight.
- 5.49 1.32.43-1.33.22: Officer KAR4 and Officer KAR6 enter the cell. They appear to be talking to KAR10C, who has his head down. Officer KAR4 hands keys to Officer KAR6 who then approaches KAR10C and removes the handcuffs. KAR10C is compliant and still has his head down. The cuffs are fully removed at 1.33.20. The 2 officers leave the cell. KAR10C rubs his wrists. He is visibly very distressed.
- 5.50 At 1.37.25, Officer KAR6 returns to outside of cell and observes KAR10C for about 45 seconds. KAR10C remains seated with his head down.
- 5.51 1.44.31-1.51.15: Officer KAR1 returns to outside of cell and observes KAR10C. She knocks on the perspex wall to gain his attention. She appears to be talking to KAR10C. KAR10C initially does not respond but then he looks up and shakes his head. Officer KAR1 continues to observe KAR10C. KAR10C puts his shorts on and then sits down again. He appears upset. Officer KAR1 appears to be talking to KAR10C. She then moves to

the panel in the cell door and opens it. She gesticulates for KAR10C to hand her his clothes through the panel, which he does. She then moves to a door in the corridor and pulls out a blanket which she passes to KAR10C through the door panel. She continues to observe KAR10C for another minute or so and then leaves at 1.51.15.

- 5.52 At 1.51.40, Officer KAR1 returns to outside the cell and observes KAR10C for a few seconds.
- 5.53 At 2.03.36, Officer KAR6 appears outside the cell. He observes KAR10C for a few seconds. KAR10C is now asleep on the bench and covered with a blanket.
- 5.54 At 4.06.54, Officer KAR6 returns to the cell carrying blue overalls and opens the cell door. He wakes KAR10C up. Another unidentified police officer enters the cell. Both officers observe as KAR10C starts to put on the overalls (4.09.15). Both officers leave the cell (at 4.09.21), leaving the cell door open. KAR10C puts on the overalls, walks to the open cell door and stands there for a few seconds. He then sits down on the bench (at 4.10.00) and covers his head with the blanket. He remains sitting with his head down and covered by the blanket.
- 5.55 4.16.31: Officer KAR6 returns to the cell. He speaks with KAR10C. Officer KAR6 walks out of sight (at 4.16.50). KAR10C stands up and follows Officer KAR6 out of the cell. KAR10C disappears from view (at 4.16.55). Footage ends.

6. Evidence of the Officers

A. Officer KAR1

- 6.1. Officer KAR1 was the custody manager on duty on the evening that KAR10C was arrested and brought into the police station. She gave evidence that she had been a police officer for 26 years. Prior to the evening in question (24 June 2017) she had only performed the custody manager role once in the previous 5 years. She had had training as a custody manager a “significant amount of time before”.⁴
- 6.2. Officer KAR1 understood her duties as custody manager were the “control, care and custody of persons in my care” and that she would formulate a risk assessment for every prisoner who came into her custody or care.⁵
- 6.3 Officer KAR1 stated that every arrested person was searched to some degree but that they were not necessarily subjected to a strip search. The police officer conducting the strip search was the one who decided whether a strip search was required.⁶ That searching officer was then required to inform the custody manager of the strip search and the reasons for it, so that the records could be updated.

⁴ Transcript of private examination of Officer KAR1, 23 October 2018, p. 9.

⁵ *Ibid* p. 10.

⁶ *Ibid* p. 15.

- 6.4 As at 24 June 2017, Officer KAR1 was not familiar with the new custody production system, being a computer-generated program for creating and updating custody management records. Once a prisoner is brought into a police station, their name must be entered into the system and all relevant details entered, including whether a prisoner was strip searched and the reasons for the search. Officer KAR1 stated that since then, she has had on-the-job training.⁷ On the night of KAR10C's arrest she did not know how to implement the process but now knew how to update the custody production system so that a strip search and the reasons for the strip search were properly recorded.⁸
- 6.5 Officer KAR1 did not ask KAR10C whether he wanted a support person as she was of the view that he was not in a state where she could ask him such a question.⁹
- 6.6 Officer KAR1 said her first interaction with KAR10C was after his first search in the searching cell. She could not recall what KAR10C said to her but that it was *"abuse mostly"* and that he was *"agitated and angry"*.¹⁰ She had him moved to another cell (cell 2) so he could *"calm down and I could monitor him"*.¹¹
- 6.7 She observed KAR10C in cell 2 for several minutes and based on those observations formed the *"reasonable grounds to believe that he may have something on him"*.¹² She formed the view that her concerns were justified by KAR10C's actions - *"his pulling at his groin, his clenching his fists"*.¹³ She was concerned he may have weapons or drugs concealed. *"People secrete drugs everywhere - under armpits, in their toes."*¹⁴
- 6.8 She discussed her concerns with Officer KAR7, who provided her with assistance as he had experience in being a custody manager.¹⁵
- 6.9 Officer KAR1 conceded that she did not ask the officers about the first strip search and she accepted that it would have been reasonable for her to ask them what had been done before directing another strip search.¹⁶ She did not know that KAR10C had squatted four times during the first search and she agreed that that would have been relevant and important to know.¹⁷

Q: *If you were going to conduct another strip search, another demeaning and humiliating procedure, especially to someone who might be an aboriginal, do you not think you should have asked yourself, "is this really necessary"?*

⁷ *Ibid* pp. 11-12.

⁸ *Ibid* p 15.

⁹ *Ibid* p 20.

¹⁰ *Ibid* p 27.

¹¹ *Ibid* p. 28.

¹² *Ibid* p. 42.

¹³ *Ibid* p. 46.

¹⁴ *Ibid* p. 48.

¹⁵ *Ibid* p. 47.

¹⁶ *Ibid* pp. 51-52.

¹⁷ *Ibid* p. 50

A: *Of course.*¹⁸

6.10 Officer KAR1 agreed that the purpose of the second search was not to inspect the anal area.

Q: *However, you're clear that what was not necessary in the second search was any inspection of the anal area; correct?*

A: *That isn't what is – yes.*

Q: *That isn't what you do?*

A: *No*

Q: *Because in your experience, that is not something that is properly done under LEPR?*

A: *It's not allowed.*¹⁹

6.11 Officer KAR1 agreed that KAR10C was brought in to the police station and immediately taken to the searching cell to be searched without first being introduced to her as the custody manager. She stated that was one of her first shifts in the role as custody manager and she was not aware of what the usual practice was.²⁰

6.12 Officer KAR1 stated that as at the date of her giving evidence, it was still the case that people were brought in to the station and strip searched without seeking the permission of the custody manager.²¹

6.13 When Officer KAR1 was recalled to give further evidence on 27 November 2018, she reaffirmed that her observations of KAR10C in cell 2 influenced her decision to order a second search. She stated that his behaviour *"spitting in the toilet, aggressiveness, his raising his leg several times, his demeanour about hitting his head or aggression, his slouching his shoulders, his sitting on the edge of the bed"* led her to consider whether he was concealing something or whether he was attempting self-harm and thus the need for a second search. It was a decision-making process between herself and Officer KAR7.²²

6.14 Officer KAR1 reiterated her view that an officer is not entitled to inspect the anal area of a prisoner in a strip search situation. Based on her observations of KAR10C in cell 2, she was of the view that it was not likely that he was secreting anything in his anus.²³

6.15 Officer KAR1's account of what she observed must be considered in light of what was recorded by the CCTV. The footage does not show KAR10C being physically aggressive, nor does it show any attempt at self-harm.

¹⁸ *Ibid* p. 51.

¹⁹ *Ibid* p. 56.

²⁰ Transcript of private examination of Officer KAR1, 27 November 2018, p. 90.

²¹ *Ibid* p. 92.

²² *Ibid* p. 101.

²³ *Ibid* p. 113.

KAR10C was handcuffed to the front when he was brought into cell 2. He was visibly upset. At one point he banged his head against the wall but not with any force. His action suggested a frustration at the circumstances in which he found himself in rather than an attempt to self-harm.

6.16 Officer KAR1 was of the view, having viewed the footage of the second strip search of KAR10C in August 2017, that the force used was reasonable.²⁴ However, she clarified her evidence after further questioning and conceded that she was not present when the force was used and it was a decision made by the involved officers.

6.17 Officer KAR1 stated that it was not proper procedure to leave a prisoner handcuffed behind his back in a cell.²⁵ She agreed that it was very unsatisfactory for KAR10C, after being strip searched, to be left in the cell, naked and handcuffed to his back for 28 minutes. She could not provide an explanation as to why that delay had occurred but suggested that she may have been distracted by other matters, she had other duties or she was watching other people.²⁶ She agreed that it was most likely that, on noticing that he was handcuffed, she directed someone to go and remove the cuffs. The reason that it was not reported that KAR10C remained handcuffed in those circumstances for over 28 minutes was because she was not aware for how long KAR10C had been left in the cell in that situation. She was only made aware of the length of time during her examination before the Commission.²⁷ It does appear, however, that he was checked by other police officers at 1.08.03 and 1.26.56am.

6.18 Officer KAR1 was asked a series of questions about the appropriateness of a custody sergeant being present before a naked prisoner of the opposite sex. She was specifically asked the following:²⁸

Q: Do you have any personal embarrassment about seeing a naked man being searched or held in a cell while you're the custody sergeant? Does that cause you any personal embarrassment?

A: No. I was a registered nurse before policing, so...

6.19 Officer KAR1 stated that there were no arrangements in place to ensure that if a male prisoner was being strip searched, a male officer would be available to take on the responsibilities of custody manager or conversely, if a female prisoner was being strip searched, a female officer would be available to act as custody manager.²⁹

6.20 Officer KAR1 said that, whilst she would try not to be present before a naked male prisoner, if she needed to be there, there would be a reason for her presence.³⁰ She stated that if *"he wanted to speak to the custody manager at that time, that could be a reason. Some prisoners demand to*

²⁴ *Ibid* p. 114.

²⁵ *Ibid* p. 136.

²⁶ *Ibid* p. 147.

²⁷ *Ibid* pp. 148-149.

²⁸ *Ibid* p. 92.

²⁹ *Ibid* pp. 93-94.

³⁰ *Ibid* p. 95.

*... speak to the manager... As a manager, there's only one, so it would be me, if that's what he or she asks"*³¹ and later, *"mostly that they want to speak to the custody manager, in my experience and from my experience, that's usually the reason."*³²

- 6.21 Officer KAR1 later explained that the *"Superintendent of the police station appoints someone as custody manager, they have training, and the order of being appointed a custody manager is by having completed that training. So I can't designate a custody officer to be anyone else"*.³³ Officer KAR1 did not see it as a problem if, for example, a male custody manager came to speak to a naked female prisoner if that prisoner had asked to speak with the custody manager. *"It's just normal for the officer to come up and speak to them."*³⁴
- 6.22 Officer KAR1 initially could not recall whether KAR10C had requested to speak with her. She acknowledged that she had not recorded anywhere that he had requested to speak with her but conceded that due to her inexperience at the time with the new records system she may not have known where to record the information.³⁵
- 6.23 Later in her evidence, Officer KAR1 stated that *"I remember him wanting to speak to me. I do remember. Either entering or staying on the outside I'm not really sure unless I look at the footage, but I do remember having some conversation or speaking to him, even, in that first cell"*. She could not recall if he was naked at the time without looking at the footage.³⁶
- 6.24 She was asked the following series of questions:³⁷
- Q: *Was it relevant to whether or not you would enter that cell to speak with him when he is naked?*
- A: *If he asked to speak to me, definitely, I would have walked in and seen him naked.*
- Q: *Whether he was naked or not?*
- A: *Yes.*
- Q: *You wouldn't ask him to put his trousers or underpants on?*
- A: *No.*
- Q: *Why?*

³¹ *Ibid.*

³² *Ibid* p. 96.

³³ *Ibid* p. 158.

³⁴ *Ibid* p. 159.

³⁵ *Ibid* p. 96.

³⁶ *Ibid* p. 105.

³⁷ *Ibid* p. 106.

A: *I guess because it was an immediate request and I did what I could do to speak to him.*

- 6.25 Officer KAR1 could not recall what KAR10C spoke to her about nor indeed whether he said anything to her at all. She said that she could see that he was aggressive but she could not indicate what he said or did to give her this impression unless she looked at the footage.³⁸

B. Officer KAR5

- 6.26 Officer KAR5 gave evidence that at the time of KAR10C's arrest he had been a police officer for just under a year and he was at the rank of a Probationary Constable. He informed the Commission that searches of arrested persons were usually conducted as a matter of course, but not necessarily strip searches. Officer KAR5 did not agree that their training was not very effective and he expressed the opinion that police officers were trained well by other senior officers as they went through their probation.³⁹ Officer KAR5 understood that a record of a strip search had to be made in the custody records as soon as practicable after the search had been conducted.⁴⁰ Officer KAR5 stated that the purpose of a strip search was to determine if contraband was secreted on the person and that you did not want *"anyone doing anything to themselves whilst in custody"*.⁴¹ A squat is a mechanism used during a strip search to cause something to fall if it has been secreted out of view or internally.⁴² Officer KAR5 recalled that when he returned to the police station after arresting KAR10C (although he did not convey him to the police station), he was fairly certain that he was informed by Officer KAR7 that KAR10C had been subjected to a search but he was not cooperative.⁴³ He recalled Officer KAR1 directing him to conduct a further strip search of KAR10C.⁴⁴ He handcuffed KAR10C as he was acting aggressively. He also understood that Officer KAR1 had a concern that if he was not successfully strip searched, KAR10C would have to be taken to hospital to be x-rayed.⁴⁵ It is for this reason that Officer KAR5 handcuffed him - for transportation to the hospital.⁴⁶
- 6.27 Officer KAR5 understood that he was entitled to use reasonable force to execute a strip search.⁴⁷ Officer KAR5 agreed that he would not have found it necessary to undertake a second search if KAR10C had been compliant by performing a number of squats in an earlier search.⁴⁸ Officer KAR5 could not explain why he handcuffed KAR10C with his hands to the

³⁸ *Ibid.*

³⁹ Transcript of private examination of Officer KAR5, 24 October 2018, p. 16.

⁴⁰ *Ibid* p. 21.

⁴¹ *Ibid* p. 22.

⁴² *Ibid* pp. 23-24.

⁴³ *Ibid* p. 26.

⁴⁴ *Ibid* p. 27.

⁴⁵ *Ibid* p. 30.

⁴⁶ *Ibid* p. 32.

⁴⁷ Transcript of private examination of Officer KAR5, 27 November 2018, p. 58.

⁴⁸ *Ibid* p. 63.

rear for the purpose of transportation to hospital if he was still naked, as he would not be in a position to get dressed whilst handcuffed.⁴⁹

- 6.28 Officer KAR5 was shown the CCTV footage of the second search in cell 2. Officer KAR5 agreed that when KAR10C was subdued and lying on the ground during the second search in cell 2 he looked in his anal region to see if he could see “*anything stored within his buttocks*”.⁵⁰ He was asked the following:

Q: *So what is happening is this: [Officer KAR4] has restrained [KAR10C], [Officer KAR3], it seems, has either asked him or gestured or something for him to get out of the way, while [Officer KAR3] lifts up his leg and you bend over to have a look. Now, I find it difficult to reconcile that with, as it were, an accidental observation in the course of controlling a prisoner. Do you see my point?*

A: Yes.

Q: *What is your response to it?*

A: *I was still just hoping to make sure he had nothing on him.*

Q: *Quite. But, you see, by that stage he had been under control. What [Officer KAR3] has done is changed. What he's done is he's moved from control to opening his legs so that an inspection can occur of his groin or buttocks or anus-anyway, that part of [KAR10C]'s body, do you agree?*

A: *Yes, it appears that way.*

Q: *Now all this is happening quite quickly and you are to an extent, a spectator, but looking back now, do you think that was proper?*

A: *I guess it could have been done better.*

Q: *Well, should it have been done at all?*

A: No.⁵¹

- 6.29 Officer KAR5 agreed that when he gave his version of events in response to Officer KAR8's directive memorandum he mentioned the occasion of the first look he had at KAR10C's buttocks but did not mention the second occasion and Officer KAR3's involvement by lifting KAR10C's leg. He disagreed that it was a deliberate omission and said that he just overlooked it.⁵²

⁴⁹ *Ibid* p. 65.

⁵⁰ *Ibid* p. 66.

⁵¹ *Ibid* pp. 69-70.

⁵² *Ibid* p. 73.

C. Officer KAR2

- 6.30 Officer KAR2 had been a police officer since August 2014. At the time of KAR10C's arrest, Officer KAR2 was a Constable in the LAC1 licensing team but he was a responding officer, hence his involvement in the arrest. Officer KAR2 gave evidence that, as KAR10C fled, he threw a scooter at the police. He also said that as KAR10C was arrested a small foil article was located in his underpants. Officer KAR2 did not convey KAR10C back to the station. He recalled that on arrival at the station he was told by Officer KAR4 that there was a problem with the first search of KAR10C and that they might have to take him to hospital. As he was the arresting officer, he was also the responsible officer and he would have had to go to hospital with KAR10C and sit on "*hospital guard*".⁵³ Officer KAR2 understood that the reason for possibly taking KAR10C to hospital was, "*my understanding is that he started to sort of fall asleep and was showing signs of being drug affected, so it was to seek medical attention and also part of the arrest, drugs were found on him, down his pants, and then – so they were wondering if there were still any remaining that he was either secreting or hiding out of sight from police*".⁵⁴ He was not present during the first search and he could not recall specifically who gave him this information.
- 6.31. After his conversation with Officer KAR4 and about half an hour after arriving at the station, Officer KAR2 was informed by Officer KAR1 that KAR10C was not able to be fully strip searched and that, depending on the outcome of a "*chat*" Officer KAR2 was to have with KAR10C, he may have to be conveyed to the hospital.⁵⁵ He understood that the search was incomplete as they had not been able to check his anus area, between his buttocks, specifically that KAR10C was not performing a squat so they were not able to see anything.⁵⁶
- 6.32. Officer KAR2 stated that he would not have conducted the search if he had been told that KAR10C had performed five or six squats in the cell before his search.⁵⁷ In relation to conducting a strip search, Officer KAR2 agreed that the orthodoxy at the police service was that squatting was a reliable mechanism by which to determine if contraband was secreted in a person's anus as you would visually be able to see if there was anything there.⁵⁸
- 6.33. When he entered cell 2, he tried to engage KAR10C in conversation and to explain that they required him to squat. Officer KAR2 stated that KAR10C was initially non-responsive and he then became aggressive, which is when he and Officer KAR5 took him down to the ground and handcuffed him.⁵⁹ (Officer KAR2's recollection was that KAR10C was handcuffed to the front but it is clear from the CCTV that he was in fact handcuffed to the rear.) He was then able to get into a position to see KAR10C's anal area and he was satisfied that there was nothing secreted there. Officer KAR2 stated that

⁵³ Transcript of private examination of Officer KAR2, 23 October 2018, p. 9.

⁵⁴ *Ibid* p. 10.

⁵⁵ *Ibid* p. 6.

⁵⁶ *Ibid* p. 7.

⁵⁷ *Ibid* p. 12.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* p. 14.

the inspection of the anal area was incidental because as far as he was concerned the intention to strip search at that stage was over as KAR10C had become aggressive and they were endeavouring to restrain him.⁶⁰

6.34. Officer KAR2 stated that he strip searched most persons who were conveyed back to the police station, depending on the offence for which they were arrested.⁶¹ Every search must be recorded in the custody management record. Officer KAR2 thought that a female custody manager would be entitled to be present whilst there a male prisoner was naked as the custody manager has overall responsibility for the well-being of the prisoners and would have had that overall well-being in her consideration.⁶²

6.35. Officer KAR2 was recalled to give further evidence before the Commission. On that occasion, he was asked whether a full squat whilst facing him would be adequate and he responded:

*Again, I would say it depended on, if an item is secreted, how well they have secreted it or if they've just put it there. If it's just quickly placed there, then, yes. If it's completely secreted and hanging out, then no.*⁶³

6.36. He was pressed on his above response with the following questions:

Q: *If it's hanging out, I can understand why you might want to follow that line, but assuming you've got nothing; all you've got is a possibility and you ask someone to squat and they squat four times facing you, doing quick squats.*

A: Yes.

Q: *Would you think that would be adequate or not?*

A: Yes.⁶⁴

6.37. Officer KAR2 could not explain why, after the second strip search, KAR10C was left handcuffed behind his back in the cell for 28 minutes. He recalled informing Officer KAR1 that the search had been completed and he resumed his other duties.⁶⁵ Officer KAR2 conceded that KAR10C was not physically aggressive but *"verbally aggressive and appeared agitated."*⁶⁶ Officer KAR2 accepted that officers are not entitled to use force for the purposes of conducting a strip search.⁶⁷

6.38. When Officer KAR2 was played the CCTV footage of the second search of KAR10C, he stated that that was the first time he had viewed the footage. He conceded that during the physical altercation with KAR10C he was not at KAR10C's feet as he had thought but closer to his head area, and that he

⁶⁰ *Ibid* p. 21.

⁶¹ *Ibid* p. 25.

⁶² *Ibid* p. 32.

⁶³ Transcript of private examination of Officer KAR2, 4 December 2018, p. 42.

⁶⁴ *Ibid* p. 43.

⁶⁵ *Ibid* p. 45.

⁶⁶ *Ibid* p. 47.

⁶⁷ *Ibid* p. 49.

was mistaken when he said that he had had the opportunity to observe between his buttocks.⁶⁸ Officer KAR2 did not agree that the second search of KAR10C was conducted at his direction. Officer KAR2 agreed that on viewing the footage it showed that KAR10C was searched whilst restrained on the ground but he said the search was not at his direction.

- 6.39. Officer KAR2 accepted that it would have been difficult for KAR10C to dress himself whilst he was handcuffed behind his back but defended the decision as *"I would have had some fear at the time not to just undo his handcuffs and potentially do whatever he wanted to do, if he wanted to do anything."*⁶⁹ It was practice, however, when someone was left with handcuffs on, that he would ask another officer to go and check on them to see whether or not they have calmed down sufficiently to take them off.⁷⁰

D. Officer KAR3

- 6.40. Officer KAR3 had been a police officer since August 2015. Officer KAR3 conveyed KAR10C to the LAC1 Police Station after his arrest. He was not sure whether he introduced KAR10C to Officer KAR1, as the custody manager, on arrival at the station but it was his usual practice to do so.
- 6.41. Officer KAR3 then conducted a strip search of KAR10C but he could not recall if he directed the search, or Officer KAR7, being the other officer in the police truck. The purpose of the search was *"for anything that could harm him, myself or other officers or facilitate his escape"*.⁷¹ Everyone brought into custody would be searched but not necessarily strip searched. It would depend on the circumstances in each case. He would, for example, conduct a general search on a shoplifter but not a strip search unless he had reasonable grounds.⁷²
- 6.42. Officer KAR3 stated that KAR10C did not comply with his request to squat and *"eventually he sort of manoeuvred against the wall and did, like, a little sort of half-squat, but he maintained his buttocks clenched the entire time that I was dealing with him. I could tell his whole legs and buttocks were tight and clenched. He wouldn't release"*.⁷³ Officer KAR3 recalled that KAR10C did a half squat. He agreed that if KAR10C had performed a full squat, that would have been the *"end of it"* and his function in the execution of the search would be over.⁷⁴ Officer KAR3 raised his concerns about KAR10C's non-compliance with the custody manager, Officer KAR2, Officer KAR4 and Officer KAR5. He told those officers that KAR10C had been non-compliant with a direction to squat.⁷⁵ Officer KAR3 maintained that KAR10C did not allow him to complete the search thoroughly and his

⁶⁸ *Ibid* p. 59.

⁶⁹ *Ibid* p. 61.

⁷⁰ *Ibid* p. 63.

⁷¹ Transcript of private examination of Officer KAR3, 23 October 2018, p. 6.

⁷² *Ibid* p. 8.

⁷³ *Ibid* p. 9.

⁷⁴ *Ibid* p. 10.

⁷⁵ *Ibid* p. 13.

squat *“facing away with his butt clenched, away from me”* did not satisfy him as a completed search.⁷⁶

- 6.43. Officer KAR3 came to assist at the very end of the second search after hearing *“yelling or commotion”*. He entered the cell and lifted up KAR10C’s leg. He was able to see his buttocks area and he was satisfied that there was nothing concealed.⁷⁷ He confirmed that his purpose in lifting KAR10C’s leg was to see his *“anus as well as the body between his buttocks”*.⁷⁸ He heard another officer say *“check him”* or *“check it”* but he could not remember who said those words. He made the assumption that that was a direction to inspect KAR10C’s anal area, given that he was not able to do that during the first search.⁷⁹ Officer KAR3 understood that he is empowered to examine the anal area or buttocks during a strip search. *“It’s part of a strip search, and squatting and having a visual is part of that”*.⁸⁰
- 6.44. Officer KAR3 could not recall if KAR10C was handcuffed when he left the cell after the second search. After leaving the cell, he made a thumbs up gesture through the glass wall towards KAR10C. His explanation for doing so was that it was *“a smart alec response towards his threats and aggressiveness against me”* as KAR10C had been verbally aggressive and made threats to him during the first search.⁸¹
- 6.45. Officer KAR3 was asked about his understanding of what he was entitled to do as a part of a strip search. He stated that he was entitled to inspect the anus and genital area of a prisoner’s body during a strip search. He could not examine by touch and he was unsure whether he breached the law by lifting KAR10C’s leg to allow a visual inspection but he believed that it was *“necessary”*.⁸²
- 6.46. Officer KAR3 was of the belief that a searching officer could ask a prisoner to lift his testicles for the purposes of the search.⁸³
- 6.47. Officer KAR3 was shown the CCTV footage of the first search. He agreed that the footage showed that KAR10C was cooperating fully with directions during the strip search. He also accepted, based on the viewed footage, that *“given the physical positions which [KAR10C] has either voluntarily put himself in or been forced into would clearly demonstrate that there was no secretion”*. Officer KAR3 denied he put a wrist lock on KAR10C but when shown the video stated; *“It looked like I did”* and said that it was due to his *“aggressiveness”*.⁸⁴ Officer KAR3 acknowledged that on viewing the footage KAR10C performed full squats. He was asked the following:

⁷⁶ *Ibid* p. 14.

⁷⁷ *Ibid* p. 10.

⁷⁸ *Ibid* p. 12.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* p. 18.

⁸¹ *Ibid* p. 21.

⁸² Transcript of private examination of Officer KAR3, 27 November 2018, pp. 32-33.

⁸³ *Ibid* p. 35.

⁸⁴ *Ibid* p. 43.

Q: Officer, that really alleviates any suggestion that what [KAR10C] has done is anything other than a satisfactory squat for the purposes of your objective; correct?

A: I agree it is a full squat. I agree. I wasn't able to visually inspect, I think that's more my point.

Q: Well, we've really moved on from that, haven't we, because you've already accepted on more than one occasion that the physical conduct of [KAR10C] by this stage was more than ample as to have allayed any reasonable suspicion that you might have held out in relation to secreted objects in the buttock area?

A: In hindsight, I agree.⁸⁵

6.48. Officer KAR3 maintained during his evidence that:

"the direction that I needed him to do was to turn around and squat, so I could visually inspect between his buttocks, and that is what he didn't do".⁸⁶ "At that time, his continual refusal to turn around and do it made me believe that he was concealing something. As the situation continued, my suspicion grew because he just refused and then, as he refused, then he became more agitated and more aggressive, as I've mentioned before."⁸⁷

6.49. Officer KAR3 conceded, in hindsight, that after four or five squats there was no prospect of KAR10C having anything concealed in his buttock area but that at the time he was focussed on the process of what he needed KAR10C to do to be satisfied and not necessarily on what KAR10C was doing.⁸⁸ He was focused on having a visual inspection.⁸⁹

6.50. Officer KAR3 agreed that he should have informed the officers who would be conducting the second search, as to what had occurred during the first search, including the fact that KAR10C had squatted.⁹⁰

6.51. Officer KAR3 reiterated that he was too focused on what he wanted KAR10C to do. *"I wanted to have a visual inspection, and that's what I would have conveyed, that 'I haven't been able to visually inspect. He will not turn around and squat'. That's' what I would have said."* He offered this focus as being a reason as to why he did not include in his version of events to Officer KAR8 that KAR10C had squatted five times during that first search.

6.52. Officer KAR3 believed that he had a right to use force to turn KAR10C around and to get him to squat.⁹¹

⁸⁵ *Ibid* p. 45.

⁸⁶ *Ibid* p. 58.

⁸⁷ *Ibid* p. 59.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* p. 60.

⁹⁰ *Ibid* p. 74.

⁹¹ *Ibid* p. 75.

E. Officer KAR4

- 6.53. Officer KAR4 had been a police officer for 5 years. He was not involved in the arrest of KAR10C, his conveyance to the police station or the first search. He recalled that he responded to a call for assistance from Officer KAR2, who was part of his team in the licensing unit. Officer KAR4 could not recall how he came to be involved in the second search of KAR10C but that his role was to maintain the safety of his fellow officers during the search. He was aware that KAR10C had been violent prior to his arrest and ideally he would be present at any subsequent search *"thinking that he may become violent towards my colleagues"*.⁹²
- 6.54. In his response to Officer KAR8's directive memorandum dated 1 October 2017, Officer KAR4 reported that he was informed by Officer KAR2 that Officer KAR1 had said that if KAR10C refused to comply during the search he would need to be taken to hospital to complete the search. At the time of his response to Officer KAR8, he had little recollection of the events, including whether he had been present at the first search or only the second one. He had a memory of KAR10C being on the ground handcuffed to the back and him offering to take them off but KAR10C refusing.⁹³
- 6.55. Prior to that search, Officer KAR4 had had very little to do with strip searches as he was in the licensing unit. He had recently refreshed his knowledge of his powers under LEPR. His training consisted of training at the Academy and training led by the education and development officer, which could consist of briefings where a certain topic was covered as well as six-minute intensive training packages.
- 6.56. When Officer KAR4 was recalled to give further evidence before the Commission he was shown the CCTV footage of the second search. He agreed that he was involved in restraining KAR10C whilst he was on the ground. Specifically, he lodged his feet under KAR10C's calves and then locked him against the wall so that he could not move his legs about.⁹⁴ He then moved away from KAR10C, after which Officer KAR3 lifted KAR10C's leg. Officer KAR4 could not remember if he was asked to move away by any other officer but accepted that the sequence of events was that after he moved away from KAR10C, Officer KAR3 was able to lift his leg as he was no longer restrained.⁹⁵ Officer KAR4 had a clear memory of asking KAR10C if he wanted the cuffs removed immediately after the second search and KAR10C refusing. *"That's something I do remember, because I thought it was silly that he wouldn't let me take his handcuffs off"*.⁹⁶
- 6.57. Officer KAR4 was asked whether at the point KAR10C was handcuffed, he was aware that it was intended, while he was under control, to conduct a physical search of him. He responded: *"No. We wouldn't have handcuffed*

⁹² Transcript of private examination of Officer KAR4, 24 October 2018, p. 8.

⁹³ *Ibid* p. 13.

⁹⁴ Transcript of private examination of Officer KAR4, 27 November 2018, p. 26.

⁹⁵ *Ibid* p. 27.

⁹⁶ *Ibid* p. 28.

to have searched” and later, “I know that we wouldn’t handcuff someone for the purposes of searching. Like, I’ve never seen that done”.⁹⁷

- 6.58. Officer KAR4 conceded that at the point that KAR10C was naked, handcuffed on the ground and being restrained whilst Officer KAR5 inspected him, that he was assisting in a strip search.⁹⁸ Officer KAR4 stated that he understood that one was not entitled to use force to effect a strip search.⁹⁹ Officer KAR4 did not recall that the custody manager wanted KAR10C to be transported to the hospital but expressed the view that *“it makes sense to me that that’s why he would have been getting handcuffed”*.¹⁰⁰

F. Officer KAR6

- 6.59. At the time of giving evidence, Officer KAR6 had been a police officer for about 18 months. He had no recollection of the events surrounding KAR10C’s arrest and subsequent searches. He had acted in the role of custody assist and he understood the role to be to assist the custody manager in the welfare of the people in custody, including with bathroom breaks and the provision of food and water.¹⁰¹ The custody assist has no responsibility for the detained persons until the arresting officers place them in the dock. It is at that point that that person is under the direction of the custody manager and the custody assist.¹⁰² It is the practice to walk a person directly into the searching cell if the person is to be searched prior to putting them in the dock. His responsibility for the prisoner as custody assist would not arise until that search had been completed and he was placed in the dock.¹⁰³
- 6.60. Officer KAR6 thought it was not appropriate behaviour for a female officer having responsibility as a custody manager to have an interaction with a naked man in a cell whilst he was being strip searched.¹⁰⁴ Officer KAR6 could not specifically recall this occurring on this occasion.¹⁰⁵
- 6.61. Officer KAR6 stated that as at the time of giving evidence before the Commission, all prisoners brought into the LAC1 Police Station were subjected to a strip search.¹⁰⁶ It was the usual practice, for the purposes of the search, to direct the prisoner to squat with their back to the searching officer.

⁹⁷ *Ibid* p. 31.

⁹⁸ *Ibid* p. 33.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* p. 40.

¹⁰¹ Transcript of private examination of Officer KAR6, 5 December 2018, p. 6.

¹⁰² *Ibid* p. 7.

¹⁰³ *Ibid* p. 8.

¹⁰⁴ *Ibid* p. 10.

¹⁰⁵ *Ibid* p. 13.

¹⁰⁶ *Ibid* p. 16.

- 6.62. Officer KAR6's only training with respect to effective strip searching was at the Academy and then "*on the job training*" through observing other officers.¹⁰⁷
- 6.63. Whilst being shown the CCTV footage of the first search, Officer KAR6's attention was directed to the squats performed by KAR10C. Officer KAR6 was asked the following:
- Q: *You've had the opportunity at the commencement of your examination to look at the still photographs of those squats. In your ordinary exercise of a strip search, is that kind of behaviour sufficient compliance?"*
- A: *Yes.*¹⁰⁸
- 6.64. Officer KAR6 agreed that when a prisoner was placed in a cell there were rules about visiting the cell to visually see the prisoner and to make sure they were okay. The frequency of those welfare visits was determined by the custody manager. Any such checks conducted would be recorded on the custody management record.¹⁰⁹
- 6.65. Officer KAR6 was not aware of any requirement that an Aboriginal prisoner not be placed alone in a cell unless there were very good reasons to do so.¹¹⁰ He was referred to the Code of Practice for Crime (since superseded) in which it stated that: "*Do not detain an Aboriginal or Torres Strait Islander person in a cell unless no reasonably practical alternative is available. Where an Aboriginal or Torres Strait Islander is to be so detained, attempt to place them with another Aboriginal or Torres Strait Islander person.*"
- 6.66. Officer KAR6 has been directed on occasion whilst working as a custody assist with someone of the opposite sex to go into a cell to assist where a search of a male is taking place.¹¹¹

G. Officer KAR7

- 6.67. As at the night of KAR10C's arrest (24 June 2017), Officer KAR7 had been a police officer for eight and a half years, during which time he was stationed at LAC1. Most persons who were brought into custody to the station were strip searched for their own and officer safety. Officer KAR7 was now stationed at Lismore and his preference was still to strip search a person in custody even if he had no particular information about that person to justify such a search.¹¹² Any such search, and the outcome therefore, would then be recorded on the custody management record, which was filled in by the custody manager.¹¹³

¹⁰⁷ *Ibid* p. 23.

¹⁰⁸ *Ibid* p. 26.

¹⁰⁹ *Ibid* pp. 27-28.

¹¹⁰ *Ibid* p. 28.

¹¹¹ *Ibid* p. 33.

¹¹² Transcript of private examination of Officer KAR7, 5 December 2018, p. 6.

¹¹³ *Ibid* p. 8.

- 6.68. Officer KAR7 was one of the transporting officers who conveyed KAR10C back to the police station. Officer KAR7 confirmed that the first search of KAR10C took place prior to KAR10C being introduced to the custody manager as it was the system at the LAC1 Police Station to take the detainee to the searching cell on arrival.
- 6.69. Officer KAR7 understood that it was accepted practice to ask a person to lift their testicles for the purposes of the search. *“Yes, something that I’ve always done and I’ve seen done and I was taught earlier on in my career. It was no direction from management, and I don’t recall being taught at the academy.”* He would ask a person to squat but not to separate their buttocks.¹¹⁴
- 6.70. On viewing the CCTV footage of the first search, Officer KAR7 accepted that until the point at which he left the cell, KAR10C was compliant with directions.¹¹⁵ Officer KAR7 acknowledged that the footage showed that there was an exchange which took place between himself and KAR10C but he could not recall what the terms of exchange were.¹¹⁶
- 6.71. Officer KAR7 agreed that it was “unusual” for a female officer, even a custody sergeant, to enter a cell where a strip search of a male was taking place and that if it had been him, he would have asked Officer KAR6 to come in to assist.¹¹⁷
- 6.72. Officer KAR7 opined, based on the footage he had seen, that when he left the cell, the strip search had been adequately conducted. This included asking KAR10C to lift his feet up one at a time and to take off his shoes and socks for inspection. He was the senior officer and he was conducting the search.¹¹⁸ Officer KAR7 revised this evidence when asked to clarify that at the time he left the cell, KAR10C had not squatted and at that stage the search was not complete, according to his process. It was Officer KAR7’s practice to ask a person to squat but he had no specific recollection that he asked KAR10C to squat. He was of the view that a squat was necessary for the purposes of the search.¹¹⁹
- 6.73. Officer KAR7 was of the opinion that the first squat performed by KAR10C was not adequate as it was not *“slow and controlled... it was a bounce, more of a bounce than a squat”*.¹²⁰ However, the further three squats were adequate for the purposes of the strip search and he would regard it as over as *“he’s complied, so – and nothing’s dropped out”*.¹²¹ He would have assumed that someone would have then informed the custody manager of the result of the search. Officer KAR7 did not think that another strip search would have been necessary based on what he had seen.¹²²

¹¹⁴ *Ibid* p. 15.

¹¹⁵ *Ibid* p. 16.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* pp. 17-18.

¹¹⁸ *Ibid* p. 19.

¹¹⁹ *Ibid* p. 32.

¹²⁰ *Ibid* p. 21.

¹²¹ *Ibid* p. 22.

¹²² *Ibid* p. 23.

H. Officer KAR8

- 6.74. On 21 August 2017, Officer KAR8 was given the task by the Complaints Management Team ('CMT') of conducting an evidence-based investigation of the issues identified by KAR11. On 3 September 2017, Officer KAR8 determined that there was no criminal offence, sexual or otherwise involved in these events.¹²³ Officer KAR8 informed the CMT that Officer KAR1 considered that the strip search was conducted appropriately and there was no indecent assault and that, on examination of the CCTV footage, he agreed with her. On 8 September 2017, the CMT decided that the investigation should proceed as a "resolution" matter. (As explained earlier under "Background" at paragraph 3.13, if there is no likelihood that the evidence supports the commission of a criminal offence or conduct requiring reviewable sanction, it is handled as a non-criminal investigation or resolution.)
- 6.75. Of particular present relevance is that issue 2 was stated to be whether *"the subject officer [identified as Officers KAR2, KAR3, KAR4 and KAR5] conducted an unnecessary strip search in cell 2"*.
- 6.76. Officer KAR8 gave evidence that he sought information from Officer KAR1 by way of a directive memorandum as he was of the view that what had occurred during the first search in cell 4 was relevant to his investigation.¹²⁴ Officer KAR8 sought a comprehensive account from Officer KAR1 as to what occurred during the search in cell 4 and he expected her to comply to the best of her recollection.¹²⁵
- 6.77. Officer KAR8 stated that he did not speak with Officer KAR7, notwithstanding his involvement in the first search.¹²⁶ He explained that a resolution process is *"supposed to focus on quickly and efficiently determining what had occurred and only interviewing witnesses that would reasonably lead to resolving the matter."*¹²⁷ He said in support of his decision to speak with Officer KAR1 and not Officer KAR7 that: *"I looked at the footage and I determined which officers needed to be reasonably spoken to in relation to it. In particular, I placed some weight on [Officer KAR1]'s account, being an officer not involved in the search."*¹²⁸
- 6.78. Officer KAR8 provided as a further reason for not speaking with Officer KAR7 about the matter, that he was given clear directions from the CMT as to what his tasks were. If he wanted to undertake further tasks not set, he would have to go back to the CMT to provide them with the results of the set tasks and then seek further tasks. It was a CMT directed investigation and not his own investigation.¹²⁹

¹²³ Transcript of private examination of Officer KAR8, 5 December 2018, p. 5.

¹²⁴ *Ibid* p. 24.

¹²⁵ *Ibid* p. 29.

¹²⁶ *Ibid* p. 7.

¹²⁷ *Ibid*.

¹²⁸ *Ibid* p. 8.

¹²⁹ *Ibid* p. 14.

- 6.79. Officer KAR8 was satisfied that the CCTV footage of the searches in both cells 4 and 2 supported Officer KAR1's assertions and in particular,¹³⁰ her assertions about KAR10C's "*violent and aggressive demeanour*".¹³¹ Officer KAR8 stated that he tried to make his report to the CMT fair and as comprehensive as relevant.¹³² Officer KAR8 did not agree that the statement in his report that "*the strip search of [KAR10C] in cell 4 was suspended at the point he refused to squat or turn around and show his back to police*" implied that there was no squatting. Officer KAR8 asserted that his report was only a summary and that it was thus not an omission if there was no reference to the five squats. Officer KAR8 also noted that the CCTV footage was attached to his report, as were the directive memorandums,¹³³ and that the report was not to be read in isolation.¹³⁴ He noted that his report was subject to quality review and that the CMT would have viewed the footage. They would therefore have been aware of the five squats.¹³⁵
- 6.80. Officer KAR8 concluded after viewing the CCTV footage of the first search that the search was not adequate.¹³⁶ He made no finding as to the necessity for a strip search to have occurred at all.
- 6.81. Officer KAR8's view "*after watching the CCTV footage was that [KAR10C] was clearly behaving in a way which would give rise to suspicion that he had something in between his buttocks, and considering the violent nature of his arrest, and the fact that drugs were found on him beforehand, and taking into consideration the challenges that are faced within the charge room environment, as well as the criminal history of [KAR10C], as well as what he was arrested for, that my opinion was that [KAR10C] was certainly engaging in behaviour what would give rise to suspicion which may just justify a strip search of him*".¹³⁷ Officer KAR8 was content that his report was created to the best of his ability as an investigator.¹³⁸
- 6.82. Officer KAR8's private examination was resumed in February 2019. At that time he was a Sergeant and had been a police officer for over 16 years. He was shown the CCTV footage of the first search. He disagreed with the suggestion that KAR10C was not displaying any signs of aggression during that first search, with the qualification that there was no "*overt*" aggression displayed by KAR10C.¹³⁹ Officer KAR8 considered KAR10C's refusal to squat as implied aggression¹⁴⁰ and that refusing to obey a lawful command is "*a hostile act and correctly described as aggression*".¹⁴¹

¹³⁰ *Ibid* p. 40.

¹³¹ *Ibid* p. 42.

¹³² *Ibid* p. 44.

¹³³ *Ibid* pp. 50, 53.

¹³⁴ *Ibid* p. 59.

¹³⁵ *Ibid* p. 55.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* p. 62.

¹³⁸ *Ibid* p. 63.

¹³⁹ Transcript of private examination of Officer KAR8, 6 February 2019, p. 70.

¹⁴⁰ *Ibid* p. 71.

¹⁴¹ *Ibid* p. 74.

6.83. Officer KAR8 stated that a police officer could use reasonable force, such as applying a wrist lock, during a strip search if the prisoner was not complying with directions during that search.

6.84. Officer KAR8 was asked the following series of questions:¹⁴²

Q: *In your view, would that be a lawful act, to force someone to squat by the application of, shall we say, a painful wrist lock?*

A: *Provided it was reasonable at the time, your Honour, yes.*

Q: *What do you mean by “reasonable”?*

A: *As your Honour knows, use of force by police, it has to be reasonable at all times.*

Q: *Yes. So the question I’m asking you is: is it a reasonable use of force for a police officer to apply a wrist lock to someone in order to enforce compliance with a direction to squat?*

A: *Provided, your Honour, that there was the apprehension that that item was on that person, that that still existed, and that was not imbalanced by any other circumstances surrounding it, and if the officer—*

Q: *The kind of circumstances you’ve talked about—health, age, something of that kind?*

A: *Yes, your Honour, because frequently police will remove an item of clothing and find a colostomy bag or something similar.*

Q: *Aside from those items, you would, in your view, be entitled to use a wrist lock to require a squatting?*

A: *Yes, your Honour, as long as there were reasonable circumstances and the officer still held the apprehension that that item was going to be on the person and that they used force that was reasonable.*

6.85. Officer KAR8 was of the view that such force could be used to take off their trousers, their underpants, to force them to the ground and then hold their legs apart to enable an examination of their buttocks and to require them to squat.¹⁴³

6.86. Officer KAR8 was referred to the NSWPF Weapons and Tactics Policy and Review, and specifically to the direction, “*Be careful. Police have no power to make the person squat*” and asked what he thought that meant. He replied:¹⁴⁴

So what it means is that at all times the police need to have some sort of a reasonable justification for their requests and behaviour. So,

¹⁴² *Ibid* pp. 80-82.

¹⁴³ *Ibid* pp. 80-81.

¹⁴⁴ *Ibid* p. 82.

if there was no suspicion, perhaps the item that they are looking for is large in nature, a Bowie knife or something, for example, then obviously there would be no requirement for squatting and it is not a general thing that would happen routinely upon every search.

However, if you're looking for an item that's small, easily secretable or there is certainly previous indications, as there was in this case, that drugs or small items were on or about the groin or the buttock area of person, then certainly my understanding is that police can give a lawful direction for that person to squat.

6.87. Officer KAR8 was then asked the following:¹⁴⁵

Q: *So notwithstanding that they have no power to make a person squat, you're saying that they can still require someone to squat and if they refuse to do so, then you can use reasonable force?*

A: Yes.

6.88. Officer KAR8 viewed the CCTV footage and he considered the lifting of KAR10C's leg so that other police officers could look at his buttocks was a reasonable use of force.¹⁴⁶ Later in his evidence he confirmed his view that for the purposes of the strip search it was appropriate and lawful for at least two police officers to hold KAR10C down and for a third officer to lift his leg so that he could look between his legs.¹⁴⁷

6.89. Whilst the CCTV footage of the first search showed that there was some discussion between KAR10C and Officer KAR7, Officer KAR8 saw no need to seek information from Officer KAR7 as to what that discussion was about as the *"issues that need to be dealt with, which have been identified by the CMT and have been directed by them, are to be dealt with in an expedient manner and that the only people that are to be spoken to in relation to it would be the ones who would reasonably assist in resolving the complaint issues that were identified by the CMT"*.¹⁴⁸

6.90. Officer KAR8 considered the application of handcuffs during the first search was an appropriate use of handcuffs. He stated that at no time did he form the view that KAR10C was a flight risk or was able to escape but rather that KAR10C may have had drugs secreted on his person and he may have sought to ingest those drugs and that could cause him harm.¹⁴⁹ His evidence on this point was clarified:¹⁵⁰

Q: *I understand what you are saying is this: it's because it is possible that he had secreted some drugs and it's possible that his hands were free, he might seek to ingest it?*

¹⁴⁵ *Ibid* p. 83.

¹⁴⁶ *Ibid* p. 89.

¹⁴⁷ *Ibid* pp. 122, 125.

¹⁴⁸ *Ibid* p. 83.

¹⁴⁹ *Ibid* pp. 91-92.

¹⁵⁰ *Ibid* p. 92.

A: Yes, your Honour.

- 6.91. Officer KAR8 thought the application of a wrist lock on KAR10C by Officer KAR3 would be justified, noting that a wrist lock was used to gain compliance.
- 6.92. Officer KAR8 concluded that a wrist lock was justified in those circumstances where verbal directions were being given to KAR10C and were not being followed by him.¹⁵¹ Officer KAR8 did not make inquiries of the involved officers as to why a wrist lock was used as it appeared reasonable to him.¹⁵²
- 6.93. Officer KAR8 stated that he did not ask the officer whether he had given a direction with which KAR10C was uncooperative and that his investigation *“uncovered a number of things and that was generally that [KAR10C] throughout his entire arrest and up to being strip searched, was generally non-compliant with all police directions. There was not much that he actually complied with.”*¹⁵³
- 6.94. Officer KAR8 stated that KAR10C did not comply with directions as, although he squatted 5 times, they were not squats with his back facing to the police officers and his feet were not spread apart. The squat is a *“body position that’s well acknowledged, not just by the police force but other law enforcement jurisdictions and people who have cause to search people, to put them in a position where the area in between the buttocks can be visually inspected and that’s because it’s an area that’s commonly used to secrete things of a small nature.”*¹⁵⁴ He learned about the use and utility of squatting at the Academy and it was also usual police practice.¹⁵⁵ A squat with the feet set wide allows for a police officer to see in between the buttocks but not for the purpose of visually inspecting the anus.¹⁵⁶
- 6.95. Officer KAR8 recalled early in his career as a police officer that a young prisoner squatted in the manner KAR10C did and that was accepted at the time. They discovered later that the prisoner had secreted a small sim card between his buttocks, which he then removed, sharpened and used to harm himself whilst in custody.¹⁵⁷
- 6.96. Officer KAR8 stated in his report that at the end of the first search, KAR10C had not complied as he had not squatted with his back to the police officers, thus allowing a visual inspection of the buttocks area.¹⁵⁸ His view was that the search was incomplete and that it then continued in cell 2. He did not accept that it was second search.¹⁵⁹

¹⁵¹ *Ibid* pp. 95-96.

¹⁵² *Ibid* p. 97.

¹⁵³ *Ibid* p. 98.

¹⁵⁴ *Ibid* p. 108.

¹⁵⁵ *Ibid* p. 109.

¹⁵⁶ *Ibid* p. 108.

¹⁵⁷ *Ibid* p. 109.

¹⁵⁸ *Ibid* p. 110.

¹⁵⁹ *Ibid* p. 113.

- 6.97. Officer KAR8 was of the view that the footage showed that at some point after police had left the cell, despite being handcuffed, KAR10C reached around, took something out of his buttocks (which was never identified by any police officer) and put it in his mouth.¹⁶⁰
- 6.98. It did not strike Officer KAR8 as odd that a female officer (Officer KAR1) would come down and view a naked man in a cell. He stated that *"In the instance that I saw, in that footage, there was an obvious objection from [KAR10C] to being further searched. It was my understanding that she was exercising a role as the custody manager in trying to make sure, number one, that that person's welfare was being looked after."*¹⁶¹ Officer KAR8 also considered that a male custody officer could enter a cell in which a naked female prisoner was present in order to ensure that everything was all right.¹⁶²
- 6.99. Officer KAR8 stood by his report and still held the view that the police officers acted lawfully and there was nothing in their conduct warranting further investigation.¹⁶³ He thought it was appropriate in the circumstances that after the search was completed, for a period of 28 minutes KAR10C was left alone in the cell, naked and handcuffed to the rear.¹⁶⁴ He gave the following evidence:¹⁶⁵

Q: *He was clearly distressed as a result of what had occurred to him.*

A: *He's acting that way, yes.*

Q: *You think it may have been just theatrics, do you?*

A: *Your Honour, I – if you're asking for my opinion....*

Q: *Yes.*

A: *...truthfully, then yes, of course. These people, in my opinion, are people that are in custody, people that have had a very, very extensive dealing with police and the judiciary. They will easily be able to turn on that sort of behaviour.*

I. Section 54 Notice - Officer KAR9

- 6.100. In furtherance of its investigation, in August 2019, the Commission issued a section 54 Notice to Officer KAR9, who was Acting Commander of the LAC1 Police Station in October 2017. The Notice required a response to questions relating to the practices and procedures as to the conduct of strip searches in place at LAC1 around the time of KAR10C's arrest. Officer KAR9 stated that there was no specific practice as to strip searching detainees.

¹⁶⁰ *Ibid* p. 104.

¹⁶¹ *Ibid* p. 100; Transcript of private examination of Officer KAR8, 5 December 2018, p. 9.

¹⁶² Transcript of private examination of Officer KAR8, 6 February 2019, p 100.

¹⁶³ *Ibid* p. 126.

¹⁶⁴ *Ibid* pp. 128-128.

¹⁶⁵ *Ibid* p. 128.

6.101. Officer KAR9 was also specifically asked the following questions:

1. *Did you consider at that time (October 2017) that it was appropriate for a male detained person to be directed to squat and part his buttocks whilst facing away from the searching police officer so that the buttocks and anal area could be visually inspected during the search?*
2. *Do you consider now that it is appropriate for a male detained person to be directed to squat and part his buttocks whilst facing away from the searching police officer so that the buttocks and anal area can be visually inspected during the search?*
3. *In October 2017, did you consider it appropriate for a police officer or police officers to hold down a detained person during a strip search for the purposes of the search? Do you consider it appropriate now?*
4. *In October 2017, did you consider it appropriate for a police officer or police officers to use force to lift up a detained person's leg whilst being held down by other police officers so that the buttocks/anal area can be inspected? Do you consider it appropriate now?*

6.102. Officer KAR9 replied in the affirmative to all the above questions. He is a senior police officer who indicated that he thought the conduct of the officers was reasonably necessary although conceding it should have been done in a way to preserve the dignity of the prisoner. He also said that in some circumstances it may be necessary to conduct a person search prior to a new detainee in custody being introduced to a custody manager. He said that a prisoner may be required to squat and that reasonable force could be used to perform a search and that included lifting a leg to have a better view of the buttocks area.

7. Assessment

A. The searches

- 7.1 Pursuant to s 27 of LEPRA an arresting officer may search the detainee “*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*” certain enumerated items. S 28A(1) of LEPRA, authorises a police officer [may] search a person who is in lawful custody after arrest and seizure and detain anything found on the search.
- 7.2 Strip searches are the subject of specific provision in s 31(a) if a police officer suspects on reasonable grounds that “*the strip search is necessary for the purposes of the search*”. Although this is not completely clear, it appears that s 31(a) must apply to searches that are conducted pursuant to s 28A, namely they must be “*reasonably necessary*”. The approach that all prisoners might possibly be concealing any of the specified items on their persons justifies a strip search is plainly mistaken: there must be a reasonable suspicion in the particular circumstances that a concealment has occurred. This issue is engaged in respect of the search that occurred in cell 4, but not in cell 2.

- 7.3 S 31(a) of LEPR provides that a police officer may carry out a strip search of a person at a police station if the police officer suspects on reasonable ground that the strip search is necessary for the purposes of the search. The relevant LEPR provisions with respect to strip searches and the use of force are set out at Annexure 1.
- 7.4 Also relevant to the issues here is s 230 of LEPR, which authorises the use of reasonable force in the exercise of a function under the act by a police officer.
- 7.5 The Commission has had the advantage of the availability of a CCTV record of the relevant events. It provides an objective view of what actually occurred, although it is important to note that it does not contain an audio record, so the Commission can see but not hear what is going on. Full allowance must be made, however, for the situation in which the relevant police officers found themselves. On any account, the circumstances were attended with a greater or lesser degree of stress, attention is focused on particular parts of what is unfolding and there is no opportunity to rewind. Immediate impressions, if misconceived, remain uncorrected and form part of the memory. Unconscious reconstruction inevitably occurs as participants seek to recall a coherent series of events and one error of memory can, unknown to the witness, infect the whole.
- 7.6 Furthermore, decisions are made in the heat of the moment, and on the basis of immediate perception and understanding with no opportunity for reflection. Moreover, officers (not surprisingly) are aware of the risks of dealing with stressed and quite possibly angry individuals, who may well, and often enough, do react unpredictably and with frightening force. An attitude of self-protection, not minded to make allowances, is not therefore unreasonable.
- 7.7 It is, of course, essential that the Commission consider carefully and thoroughly the objective evidence that it has available. But it is essential that it be borne in mind that this perspective of hindsight was not available to the officers in the midst of a rapidly unfolding situation and thus the Commission must pay close attention to the circumstances from the officers' points of view. That is not, of course, to say that the objectively demonstrated circumstances must be ignored. To the contrary, they are vital to understanding what actually transpired. But considerable caution must be exercised before making adverse judgments about the conduct of the officers.
- 7.8 KAR10C was in lawful custody after arrest. It is accepted that the police officers had lawful authority to search him to ensure his safety and the safety of the police officers and that a strip search was deemed necessary for the purposes of the search, given that prior to his arrest he was found trying to conceal something in his underwear. The significant issues for the consideration of the Commission were the requirement by the officers that KAR10C squat during the first search; the use of wristlocks and his being handcuffed during this process; being made to walk naked from cell 4 to cell 2; the necessity for the second search; the use of force, including handcuffing, during that second search; and his being left unsupervised in the cell, naked, handcuffed to the rear, unable to dress and visibly

distressed for an extensive period of time, especially since he was a vulnerable person.

B. Competing versions

- 7.9 In the complaint made by KAR10C to the Commission he said that on the first occasion he was searched he was told twice to bend over and part his cheeks to expose his anal cavity. He also said that during the second search an officer had inserted his index and middle finger into his rectum. He made a further claim that an officer had called him “a *black bastard*”.
- 7.10 There is no support for any of those claims in the evidence of the police witnesses who gave evidence on oath and were extensively cross-examined. The claim made by KAR10C is in a statement made to the Commission. He was not called as a witness and consequently not made subject to cross-examination.
- 7.11 As his statement indicates, KAR10C has had significant exposure to the criminal justice system. His involvement in crime goes back to the time he was 13 years old and was continuous up until his arrest. He has a number of convictions for offences of dishonesty and at the time of his arrest he had been released from gaol on parole and was in breach of his parole order and a warrant had been issued for his arrest.
- 7.12 A further note of concern is KAR10C’s claim to have been digitally penetrated by two fingers. A viewing of the video indicates to the Commission that this did not happen and his claim is baseless. He was not called to give evidence and be cross-examined.
- 7.13 When considering the evidence of the police officers it must be borne in mind they were giving evidence a year and a half after the events and they had no opportunity to view the video before they gave evidence on the first occasion. They were questioned in detail about the events of that night. Not surprisingly their memories were imperfect and cannot be relied upon as a full and accurate account of the events.
- 7.14 That leads the Commission to view the video in order to ascertain accurate facts. The problem with that is the video is not accompanied by sound. All the police gave evidence that KAR10C was being abusive and aggressive in his attitude. That would not necessarily appear on the video footage. Consequently the video cannot be relied on entirely to draw conclusions about some matters.
- 7.15 Observations can be made from viewing the video footage that at times KAR10C appeared upset and angry. The question has to be asked whether this is because he was traumatised by the experience of these searches. If so that might lend some support to the proposition that the police behaved unreasonably. His statement indicates that he is quite familiar with being strip-searched. The problem only arose when he was asked to squat and his refusal to do so gave rise to the police suspicion he was hiding something. The interaction with police after that may have been upsetting. On the other hand he had been arrested by police in suspicious circumstances and he undoubtedly realised he was going back to gaol to serve the balance of

his parole which was for a significant period. That is a circumstance he must have found frustrating and very upsetting. The Commission does not believe that if he were upset that necessarily indicates it was because the actions of the police were unreasonable.

C. Officer KAR1

- 7.16 The first question in relation to Officer KAR1 is her visit to cell 4 when KAR10C was naked. She went there because he had asked for her attendance and his purpose was clearly to complain about the request of the police carrying out the search to perform an act. His complaint asserts the act in question was to bend over and part his buttocks. As has been noted he did not give evidence and could not be cross-examined. The evidence of the police officers was that he had been asked to squat.
- 7.17 LEPRa provides in s 32(7) that a search must be conducted by a police officer of the same sex as the person searched. In s 33 it is stated that *"the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched"*. It is quite clear that the legislation is designed to preserve the dignity of a person being searched in so far as that is possible. In the submissions made by the NSWPF to this inquiry it is said that *"the Commissioner of Police is committed to ensuring that all police understand their obligations to preserve the privacy and dignity of a person being searched"*.
- 7.18 The answer Officer KAR1 gave that she had been a nurse in a prior life is not an appropriate answer to her going to the cell when KAR10C was naked and then having a conversation with him. It is accepted she thought it was necessary to attend the cell where he was being questioned but it would have been very easy for her to ensure he was decently clothed when she attended. The matters to be taken into account on her behalf are that she had no real experience as a custody manager and had not received any recent training when she took over that role. Moreover the role was in a busy police station. The section of LEPRa is also not an absolute prohibition but says *"as far as is reasonably practicable in the circumstances"*. It is clear she did not give sufficient attention to his *"privacy and dignity"*.
- 7.19 The second question in relation to Officer KAR1 is the direction she gave for a further search of KAR10C. It appears that after she left cell 4 KAR10C did complete two squats followed by a further three. Evidence was given that ordinarily that would satisfy a requirement to ensure there was nothing between his buttocks. It appears Officer KAR1 was not aware that had been done and for that reason she ordered a further search. She thought at that point that KAR10C had been refusing to cooperate with the search and that refusal aroused a suspicion as to whether or not he was in fact concealing something. The evidence also established that there was a discussion of the possibility of taking him to a hospital because there was a suspicion he had secreted something in his rectum. Such problems do occur in police stations.
- 7.20 In view of the fact she did not know of the squats that had been performed she cannot be criticised for the order to carry out a further search. The

effect of that order however was to add to the indignities suffered by KAR10C that day. She also bears some responsibility since she was the officer-in-charge of the cells.

D. Officer KAR3

- 7.21 The first question in relation to Officer KAR3 is the use of a wrist lock on KAR10C in cell 4. S 230 of LEPR authorises the use of such force as is reasonably necessary to exercise a function under the act. The issue in his case is whether the wrist lock he applied to KAR10C was reasonably necessary. On the one hand a viewing of the video of what occurred in cell 4 might lead to the conclusion that KAR10C was being compliant and certainly that is true up to a point when he was resisting the demands of the police. Even then there is no apparent overt aggression directed at the police. On the other hand there is no sound recording associated with the video and it is not known what was said. The police evidence about this issue was that KAR10C was abusive, obstructive and using an aggressive tone towards the police when they were seeking his compliance. It is in those circumstances that Officer KAR3 reacted as he did. On the face of it there appears to be an overreaction in relation to a prisoner in handcuffs. On the other hand it is difficult to be clear in the absence of a sound recording of what was happening and where the video is being viewed in a context detached from the event itself. In those circumstances the Commission finds it difficult to make a finding adverse to the police officer. It was, in any event, not force for the purpose of making KAR10C squat. It was action taken in anticipation of what might arise from his abusive language and failure to co-operate.
- 7.22 The second question in relation to this officer is his use of force in cell 2 when he lifted KAR10C's leg so that the area around his buttocks could be seen. His position at this point was that he had been instructed by a superior officer to conduct a further search on the basis that what had occurred previously was not thorough enough. As indicated that order was given because Officer KAR1 was not aware of the five squats but it left Officer KAR3 to carry out some form of search that had not been done before. In view of that requirement and the failure of KAR10C to comply, the Commission does not believe it can be said the degree of force used was unreasonable. He was not involved in the struggle that ended with KAR10C on the ground. His involvement was to lift KAR10C's leg.

E. The report of Officer KAR8

- 7.23 The report of Officer KAR8 was deficient in that it did not mention the five squats that had occurred in cell 4. His answer that this could be seen by anyone who viewed the video he attached does not answer the criticism that the report should have been complete on its face so that the reader was immediately alerted to the issue. A full investigation of the matter would also have included an interview with Officer KAR7. The report was not the result of a thorough investigation but there is no suggestion of deliberately covering up evidence or making no attempt to perform his duty.

F. The incident

- 7.24 It appears that KAR10C became naked when he removed his clothes in cell 4 at 12:37. He was moved to cell 2 at 12:46 carrying his underpants. He was at this stage still handcuffed to the front. Those handcuffs were removed at 12:50. His other clothes were brought to him shortly after but he did not put them on. He was still naked at 1:03 when the second search occurred after he was handcuffed behind his back. That search finished at 1:05 and the evidence of Officer KAR4 was that he offered to take off the handcuffs then but KAR10C refused to let him do it. KAR10C was then not in a position to put his clothes back on until 1:33 when the handcuffs were removed. He did not do so until after 1:45 when he put his shorts on when Officer KAR1 checked on him.
- 7.25 This history must be reviewed against the provisions of LEPR where section 32(9) provides “*a person must be allowed to dress as soon as a search is finished*”. Section 33(5) states “*a strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search*”.
- 7.26 The search here did not comply with the legislation but to a degree that was because KAR10C did not take the opportunity to put his clothes back on and later to have his handcuffs removed so he could get dressed again. An overview of the incident indicates that the spirit of the legislation was not observed although acknowledging this was significantly because of the actions of KAR10C himself.

8. Submissions in Response

- 8.1 Submissions were received on behalf of the following persons:
- (a) Officer KAR1
 - (b) Officer KAR8
 - (c) Officer KAR3
 - (d) Officer KAR5
 - (e) Officer KAR6
 - (f) Officer KAR4
 - (g) The Commissioner of Police.
- 8.2 The Commission took into consideration the submissions received and consequently made changes to the findings and recommendations in the draft Report.

9. Conclusion

- 9.1 The attendance by Officer KAR1 in the cell where KAR10C was naked was not appropriate but it does not amount to serious misconduct in the circumstances of this case.
- 9.2 The second search was unjustified but it arose out of confusion and lack of communication and does not amount to serious misconduct. It is not a case of systemic failure in police practices and procedures. It was a failure of performance by the officers who could have avoided the second search by more effective communication.
- 9.3 There is no other serious misconduct by the police.

10. Affected Persons

- 10.1 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*".
- 10.2 The Commission is of the opinion that Officer KAR1, Officer KAR3 and Officer KAR8 are affected persons within the meaning of s 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.
- 10.3 For the reasons outlined earlier in the report, the Commission makes no serious misconduct findings against any of the police officers, and is not of the opinion that consideration should be given to any of the actions described in s 133(2).

11. Comment

- 11.1 Overall this incident was highly unsatisfactory. It was dragged out over a period of time because of miscommunication between the police officers and the second search in cell 2 seems to have been unnecessary. It involved KAR10C being naked in cell 4 for a period of time then marched naked to cell 2 where he was again searched and left again for a period handcuffed and naked. Even if his lack of clothing was largely his own doing it should not have gone on for so long.
- 11.2 Looked at as a whole it must be said that KAR10C should not have been treated in the way he was. On the other hand the incident occurred partly because of the inexperience of Officer KAR1 and a lack of communication between the various police officers involved. There is no doubt that the LAC1 Police Station is a busy one but that should not lead to the kind of indignities suffered by KAR10C.
- 11.3 Apart from the conclusion that a search in cell 2 was not necessary it is worth looking at what occurred. The bare facts are that KAR10C was handcuffed behind his back, there was then a struggle and he was put on the ground and then Officer KAR3 took the opportunity to lift his leg to see there was nothing between his buttocks. Without sound the video can be

interpreted in different ways. For example, one interpretation suggested was that the police officers intended to take KAR10C to hospital. However, he was naked and he would remain so if handcuffed as he was. Another was that they wanted him to comply with a further search, he resisted, and in the struggle they fell down and Officer KAR3 on hearing the noise ran to the cell and then seized the chance to lift his leg. Another is that the police agreed to bring him to the ground to enable Officer KAR3 to lift his leg and thus see his buttocks. This was not put to the police officers at the hearing and it appears Officer KAR3 came on the scene after the struggle occurred in the cell. Accordingly the Commission does not believe that this is what occurred. Nevertheless, it is a scenario that starkly raises the issue of what force can be used. LEPRa states that reasonable force can be used when exercising a function under the act. The Solicitor-General has provided advice to the NSWPF that this means “*reasonably modest*” force. Arguably if the third interpretation of the events is correct, what occurred was neither modest nor reasonable.

- 11.4 Judgments about such issues are very subjective and depend on the circumstances and need to be reviewed on a case-by-case basis. It is a difficult issue for a police officer in the field to make a decision quickly and in the agony of the moment. From the Commission’s perspective this is a matter of general interest and the question as to whether any assistance by way of advice to police can be given is one for consideration.
- 11.5 A similar issue is whether further guidance is needed in respect of vulnerable people being searched. Here, for example, KAR10C said he was anxious about the search because he had experienced a sexual assault. Of course an excuse such as that could be false to avoid a search but it is a matter for consideration. On the other hand there will be cases where there are real sensitivities that need to be considered.
- 11.6 The Commission notes the submission of the New South Wales Police Force that,

“The Commissioner of Police takes seriously any breach of LEPRa during a person search and seeks to identify opportunities for improvement. Situations where prisoners are naked and handcuffed for extended periods must be avoided wherever possible. Further the Commissioner of Police is committed to ensuring that all police understand their obligations to preserve the privacy and dignity of a person being searched. To that end NSWPF has revised our Custody SOPs and developed the Person Search Manual to provide clear and consistent guidance to police on searching practises.”
- 11.7 That submission clearly and appropriately acknowledges the responsibility of the police. It should also be noted that in 2019 a new NSWPF Person Search Manual was issued and provided updated instructions to police.
- 11.8 This event occurred in 2017 and the major part of the hearings took place in late 2018 and concluded on 6 February 2019. Since then a number of reports have been finalised in respect of strip searches. An analysis of all the issues and responses will be made in the Commission’s over-arching report on strip searches to be published later in the year.

ANNEXURE 1

LEPRA PROVISIONS-STRIP SEARCHES

Strip search is defined in s 3 as:

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

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

S 30 Searches generally

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

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

S 31 Strip searches

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

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

S 32 Preservation of privacy and dignity during search

- (1) A police officer who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.
- (2) The police officer must inform the person to be searched of the following matters:

- (a) whether the person will be required to remove clothing during the search,
 - (b) why it is necessary to remove the clothing.
- (3) The police officer must ask for the person's co-operation.
- (4) The police officer must conduct the search:
 - (a) in a way that provides reasonable privacy for the person searched, and
 - (b) as quickly as is reasonably practicable.
- (5) The police officer must conduct the least invasive kind of search practicable in the circumstances.
- (6) The police officer must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.
- (7) A search must be conducted by a police officer of the same sex as the person searched.
- (7A) However, if a police officer of the same sex as the person who is to be searched is not immediately available, a police officer may delegate the power to conduct the search to another person who is:
 - (a) of the same sex as the person to be searched, and
 - (b) of a class of persons prescribed by the regulations for the purposes of this subsection.
- The search by that other person is to be conducted under the direction of the police officer and in accordance with provisions of this Act applying to searches conducted by police officers.
- (8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.
- (8A) Subsection (8) does not prevent the asking of questions that only relate to issues of personal safety associated with the search.
- (9) A person must be allowed to dress as soon as a search is finished.
- (10) If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing.
- (11) In this section: "**questioning**" of a person means questioning the person, or carrying out an investigation (in which the person participates).

S 33 Rules for conduct of strip searches

(cf Cth Act, s 3ZI)

(1) A police officer who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:

- (a) the strip search must be conducted in a private area,
- (b) the strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched,
- (c) except as provided by this section, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

(2) A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present. Subsection (1) (b) does not prevent any such person who is of the opposite sex to the person being searched from being present during the search.

(3) A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must be conducted:

- (a) in the presence of a parent or guardian of the person being searched, or
- (b) if that is not acceptable to the person, in the presence of another person who is not a police officer and who is capable of representing the interests of the person being searched and whose presence is acceptable to that person.

(3A) Subsection (3) does not apply if a police officer suspects on reasonable grounds that:

- (a) delaying the search is likely to result in evidence being concealed or destroyed, or
- (b) an immediate search is necessary to protect the safety of a person.

In such a case, the police officer must make a record of the reasons for not conducting the search in the presence of a parent or guardian, or other person capable of representing the interests, of the person being searched.

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

(5) A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(6) A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(7) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

(8) This section is in addition to the other requirements of this Act relating to searches.

(9) In this section: **"impaired intellectual functioning"** means:

(a) total or partial loss of a person's mental functions, or

(b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or

(c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Procedures for searches of a more invasive nature are dealt with under the *Crimes (Forensic Procedures) Act 2000*.

Operation Karuka
Report pursuant to s 132
Law Enforcement Conduct Commission Act 2016
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