

OPERATION MAINZ

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

MAY 2020

Office of Commissioner for Integrity

8 May 2020

47514/138

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 Mainz.

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

Yours sincerely,

A handwritten signature in black ink, consisting of a series of loops and a final downward stroke, representing The Hon Lea Drake.

The Hon Lea Drake
Commissioner for Integrity

Table of Contents

1. Introduction.....	1
2. The Commission’s Statutory Functions.....	3
3. The Commission’s Investigation	8
4. Analysis of Evidence.....	28
5. Submissions	37
6. Findings.....	40
7. Affected Persons	41
8. Considerations.....	41

1. Introduction

- 1.1 On 7 February 2019, the Law Enforcement Conduct Commission ('the Commission') decided to conduct an investigation pursuant to s 44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* (NSW) ('the LECC Act') into whether various New South Wales Police Force (NSWPF) officers had failed to comply with the requirements of the *Law Enforcement (Powers and Responsibilities) Act 2002* ('LEPRA') during the search of a young person, referred to in this report as MAI5, on 25 November 2018.
- 1.2 The search occurred on a main street in a major town in regional north western NSW. MAI5, who is an Aboriginal male, was walking on the street with two friends on the afternoon of 25 November 2018. He was aged 16 years and 5 months at the time. He was in possession of 2 grams of cannabis contained within a cigar-shaped foil.
- 1.3 Upon seeing the police, MAI5 dropped the foil, then picked it up and placed it in a pocket at the front of his shorts. He was observed by two police officers, Sergeant MAI1 and Constable MAI2, who had been patrolling the area in a marked police vehicle.
- 1.4 Sergeant MAI1 believed that the foil had been placed down the back of MAI5's pants. He conducted a limited strip search of MAI5 on the street. This search was recorded on the Body Worn Video (BWV) of Sergeant MAI1.
- 1.5 MAI5 denied he was in possession of any prohibited substances. When nothing was located during that initial search, he was handcuffed and taken back to the police station in a caged truck driven by Constable MAI3 and Constable MAI4. During this trip, MAI5 took the foil out from his pockets and discarded it in the back of the caged truck.
- 1.6 Upon arrival at the police station, Sergeant MAI1 conducted a more thorough strip search of MAI5 during which MAI5's shorts were pulled

down and removed. He was forced to squat by Sergeant MAI1 pressing down on his shoulder. Sergeant MAI1 then found the silver foil inside the caged truck and questioned MAI5 about it whilst he was still naked.

- 1.7 MAI5 was subsequently charged with possession of prohibited drugs in relation to the 2 grams of cannabis.
- 1.8 The Commission gave consideration to the relevant provisions of the LECC Act and determined that private examinations should take place.
- 1.9 MAI5 attended a private examination on 29 July 2019.
- 1.10 On 1 August 2019, 2 August 2019 and 2 September 2019, Sergeant MAI1, Constable MAI2, Constable MAI3, and Constable MAI4 gave evidence in private examinations before the Commission. The general scope and purpose of the examinations was:

To investigate whether Sergeant MAI1, Constable MAI2, Constable MAI3 or Constable MAI4, or any other New South Wales police officer involved in the arrest, detention and strip searching of MAI5, a young person, on 25 November 2018, engaged in serious misconduct.

- 1.11 For the reasons set out later in this Report the Commission finds that whilst Sergeant MAI1, Constable MAI2, Constable MAI3, and Constable MAI4 engaged in conduct which amounted to unsatisfactory performance during the search of MAI5 on 25 November 2018, their conduct did not amount to serious misconduct.
- 1.12 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 Mainz or included in this report without further order of the Commission.

2. The Commission's Statutory Functions

2.1 The LECC Act lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.

2.2 Section 10 of the LECC Act defines "*serious misconduct*":

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

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

(b) *a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good reputation 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: 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.

3. The Commission's Investigation

- 3.1 On the afternoon of 25 November 2018 MAI5 was walking west with two friends on a main street of a major town in regional north western NSW.

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

MAI5 is an Aboriginal male, who was then 16 years and 5 months old. He had possession of 2 grams of cannabis inside a cigar-shaped foil. On seeing the police, MAI5 dropped the foil. He then picked it up and placed it in a pocket in the front of his shorts.

3.2 Sergeant MAI1 was on patrol with Constable MAI2 in a marked police car and in uniform. Sergeant MAI1 believed that MAI5 had placed the foil down the back of his pants.² In fact, he had secreted it in a pocket at the front of his shorts. MAI5 was dressed in board shorts made from a thin synthetic material, without underpants, a t-shirt, baseball cap and shoes. It is common ground that MAI5 appeared to be under the age of 18.

3.3 MAI5 was searched on the street. The search was recorded on the BWV worn by Sergeant MAI1.³

The Body Worn Video

3.4 This video demonstrates the following:

- i. At 15:36:50 Sergeant MAI1 introduced himself to MAI5. He told him that he had seen him put something down the back of his pants and that he was going to search him. He began to question MAI5 about the foil and told him that he had seen him pick it up off the ground. MAI5 denied dropping any drugs and told Sergeant MAI1 that he was not wearing any “jocks”.⁴
- ii. At 15:37:28 two males known to MAI5 arrived. Sergeant MAI1 told them that MAI5 was fine and that he was going to be taken back to the station. He told MAI5’s friends to leave the area. He said, “*You start a crowd coming around here I’ll lock you up for hindering. That’s exactly what will happen.*”⁵
- iii. Sergeant MAI1 directed these young men to “move on”.⁶ As his friends left, MAI5 shouted to the two friends to tell his father.

² Private examination of Sergeant MAI1 at T7 from line 36.

³ Exhibit BKV1C.

⁴ At 15:37:04.

⁵ At 15:38:18.

⁶ At 15:38:18.

- Sergeant MAI1 told them to tell MAI5's father to come to the station. He asked Constable MAI2 to call for a caged truck.
- iv. At 15:38:34 Sergeant MAI1 asked MAI5 to put his hands back on the fence and began to pull the waistband of MAI5's shorts out so that he could look into the back of his pants. In doing so, he placed his fingers inside the waistband.⁷ Sergeant MAI1 was aware that he would be looking at MAI5's naked body⁸ and he understood that this amounted to a strip search.
 - v. MAI5 objected, saying "*You can't look down my pants cunt*", and Sergeant MAI1 replied: "*Well we can when you put something down there, can't we?*"⁹ Sergeant MAI1 denied in his evidence that he put his hands inside MAI5's pants.¹⁰ MAI5 further objected as he perceived Sergeant MAI1 was putting his hands down his pants. He effectively informed Sergeant MAI1 of that officer's duties pursuant to LEPR in relation to strip searches of persons under 18. He said, "*What are you doin, you can't put your hands down my bum...you can search me down at the station when my parents are there.*"¹¹ Sergeant MAI1 replied, "*Well, you actually don't know the rules, we can search you*".¹² Sergeant MAI1 would later concede that it was he who did not know the rules and that MAI5's understanding was correct.¹³ At all relevant times Sergeant MAI1 knew MAI5 was under 18. He looked under 18. This exchange further highlighted this fact.¹⁴
 - vi. MAI5 continued to deny possession of the foil of cannabis.
 - vii. Sergeant MAI1 conducted a pat search on the back of MAI5's pants and not the front.
 - viii. At 15:40:35 Constable MAI3 and Constable MAI4 arrived at the scene in a caged truck. Sergeant MAI1 informed Constable MAI3 that "*MAI5 has a foil down his pants and doesn't want to take it*

⁷ Private examination of Sergeant MAI1 at T8 from line 4.

⁸ Private examination of Sergeant MAI1 at T8 from line 22.

⁹ At 15:38:45.

¹⁰ Private examination of Sergeant MAI1 at T9 from line 1.

¹¹ At 15:38:50.

¹² At 15:39:00.

¹³ Private examination of Sergeant MAI1 at T58 line 19.

¹⁴ Private examination of Sergeant MAI1 at T15 from line 33.

*out himself so...*¹⁵ Constable MAI3 says *"I'm taking it out for you, am I?"*¹⁶ What Constable MAI3 did at that point was not recorded by the BWV.

- ix. At 15:42:17, after a further exchange in which MAI5 denied possession of the cannabis, Constable MAI3 asked MAI5: *"Where do you want to get your gear off; here or at the station?"*¹⁷ MAI5 protested that *"What do you mean, I ain't got nothing, cuz"*¹⁸ And Constable MAI3 informed MAI5: *"Oh well, we will go back to the station and we will get your gear off there"*.¹⁹ MAI5 was then handcuffed and placed into the back of the caged truck and taken to the police station.

- 3.5 On the way to the police station, MAI5 took the foil of cannabis out of his front pocket and discarded it in the back of the caged truck.

Video of the Police Station Vehicle Dock

- 3.6 The caged truck arrived at the vehicle dock of the police station. This area is surveilled by four separate static cameras, the feed from which was admitted into evidence.²⁰ It demonstrated the following:
 - i. At 3:35:50, the caged truck arrived in the vehicle dock of the police station.
 - ii. Sergeant MAI1, Constable MAI3 and Constable MAI4 stood outside the caged truck which was then inside the secure vehicle dock. Constable MAI2, who was with the other officers outside the truck, left and resumed her duties inside the station.
 - iii. At 3:36:32 the door to the caged truck was opened and MAI5 exited the vehicle with his hands handcuffed at the front of his body. Under direction from Sergeant MAI1, MAI5 moved over and placed his hands on the wall. He remained handcuffed. Sergeant MAI1 then commenced to search MAI5. This was prior

¹⁵ At 15:40:45.

¹⁶ At 15:40:50.

¹⁷ At 15:42:18.

¹⁸ At 15:42:21.

¹⁹ At 15:42:22.

²⁰ Exhibit BKV2C.

to any search of the vehicle which would have revealed the location of the foil of cannabis.

- iv. At 3:37:01 Sergeant MAI1 checked MAI5's pockets and undid the draw string of his shorts. He pulled MAI5's shorts down to the floor, lifted the back of his t-shirt and then pushed MAI5's right shoulder down in order to force him to squat.
- v. At 3:37:15 MAI5 kicked off his shorts. They were inspected by Constable MAI3. MAI5's evidence was that when Constable MAI3 was examining his shorts he made a rude remark regarding the state of his shorts. MAI5 was embarrassed by Constable MAI3's comments and also by having to stand naked except for his shoes and t-shirt. Constable MAI3 then went to the caged truck and inspected the rear pod. Sergeant MAI1 opened the left hand side rear door of the pod, reached in and removed the silver foil from the rear footwell which MAI5 had discarded. Sergeant MAI1 conceded in evidence that, if he had searched this area first, he would have found the foil.²¹
- vi. At 3:37:52 Sergeant MAI1 walked back to MAI5 and questioned him while MAI5 was still naked from the waist down. During this questioning MAI5 made admissions that the foil contained cannabis and was his for personal use.²² This questioning took approximately 30 seconds.
- vii. At 3:38:32, Constable MAI3 removed MAI5's handcuffs so that he could put his pants back on. MAI5 was escorted into the charge area of the station.
- viii. Constable MAI4 did not perform any duties in the vehicle dock. He stood and watched MAI5 being strip searched.

3.7 At approximately 4.00pm Constable MAI4 telephoned MAI5's father. He arrived at approximately 4:24pm.

3.8 MAI5 gave evidence that when he was in the vehicle dock he said to police: *"Don't you need a parent?"*²³ They responded that he did not

²¹ Private examination of Sergeant MAI1 at T37 from line 38.

²² Private examination of MAI5 at T12.

²³ Private examination of MAI5 at T10.

need a parent with him. Sergeant MAI1 conceded in evidence to the Commission that MAI5 may have asked for his father to be present at a strip search²⁴ and that possibly he had told MAI5 that he was going to search him without a parent present.

Charging of MAI5

- 3.9 MAI5 was processed by Constable MAI4 and charged by Sergeant MAI1 with possession of 2 grams of cannabis. MAI5 was released on strict bail conditions. He was fined when he came to be sentenced in the Children's Court.

The Evidence of Sergeant MAI1

- 3.10 Sergeant MAI1 gave evidence on 2 September 2019. His appearance at the Commission had been delayed due to personal family circumstances.
- 3.11 Sergeant MAI1 joined the NSWPF in May 2001. He had completed a course in policing at Charles Sturt University over two years, with one year in the field where he learnt about searching. He could not recall strip searches being covered in his course. Since then he has not received any tuition on strip searches.²⁵
- 3.12 Sergeant MAI1 was appointed a Sergeant on 11 November 2018, only weeks before this incident. His Sergeant's examination took place two or three years before his promotion.²⁶ A promotion to Sergeant requires a sound knowledge of LEPPRA.²⁷ In June 2018 he was transferred to the police station where the search of MAI5 took place. He was the senior officer involved in the arrest and subsequent strip search of MAI5. He conceded that it was he, as the senior officer, who directed and set the tone of the search.²⁸

²⁴ Private examination of Sergeant MAI1 at T25 from line 6.

²⁵ Private examination of Sergeant MAI1 at T49 line 23.

²⁶ Private examination of Sergeant MAI1 at T51 line 39.

²⁷ Private examination of Sergeant MAI1 at T51 line 14.

²⁸ Private examination of Sergeant MAI1 at T27 from line 11.

- 3.13 Sergeant MAI1 was served with his summons in July 2019 but did not give evidence until September 2019. He told the Commission he studied LEPRa closely before the examination.
- 3.14 Sergeant MAI1 told the Commission that in conducting a strip search on the street without a parent present, he relied on s 33(3A) of LEPRa, which allows a strip search without a parent if “*delaying the search is likely to result in evidence being concealed*”. Where that power is relied on, a police officer is required to make a record of their reasons for not conducting the search in the presence of a parent. Sergeant MAI1 did not make any record of his reasons. Sergeant MAI1 created a COPS event which outlined the arrest. No notebook entry of the strip search on the street or in the vehicle dock was made.²⁹ He claimed he did not do so because at that time he “*wasn’t fully aware of that (section)*”.³⁰
- 3.15 Sergeant MAI1 was aware that pulling MAI5’s pants out and looking at MAI5’s naked buttocks in the street amounted to a strip search. He was aware that MAI5 was under 18 and he agreed that he looked under 18.³¹ Sergeant MAI1 said that he knew a parent was required to be present at the time of a strip search,³² but that he conducted this strip search without MAI5’s parent being present because he wanted to “*stop the loss of evidence*”³³ while MAI5 was in transit.³⁴ This was notwithstanding MAI5 was handcuffed at the front and surrounded by police officers on the street.
- 3.16 Sergeant MAI1 accepted that it would have been preferable to place MAI5 in a police sedan to address this concern.³⁵ He could have placed MAI5 in the back of the sedan with Constable MAI2 next to him to ensure that no evidence was concealed, but he did not. Sergeant MAI1 conceded that the officers in the caged truck could have watched MAI5 but he did not instruct either Constable MAI3 or Constable MAI4 to turn

²⁹ Private examination of Sergeant MAI1 at T59 from line 24.

³⁰ Private examination of Sergeant MAI1 at T12 from line 6.

³¹ Private examination of Sergeant MAI1 at T9 from line 14.

³² Private examination of Sergeant MAI1 at T10 from line 45.

³³ Private examination of Sergeant MAI1 at T9.

³⁴ Private examination of Sergeant MAI1 at T9 from line 41.

³⁵ Private examination of Sergeant MAI1 at T11 from line 10.

around and watch MAI5 in transit. There was therefore no chance that those officers would see MAI5 dispose of evidence.³⁶

- 3.17 Sergeant MAI1 agreed that there was “*certainly*”³⁷ no reason to have strip searched MAI5 without a parent present.³⁸ MAI5 did remove the foil from his clothing whilst locked in the pod of the caged truck. Sergeant MAI1 retrieved it and there was no loss of evidence.
- 3.18 Section 32(5) of LEPRa mandates that police must use the least invasive search possible. Sergeant MAI1 agreed that when he searched MAI5 in the street, he did not run his hands over the front of MAI5’s shorts. He did not do so because he incorrectly believed that the foil was in the back of his pants. Sergeant MAI1 agreed that, notwithstanding his belief that the cannabis foil was in the back of MAI5’s pants, he should have conducted a thorough pat search.³⁹
- 3.19 Sergeant MAI1’s evidence was that he could not recall how Constable MAI3 searched MAI5 in the street and therefore could give no evidence about this despite being present at that search.⁴⁰
- 3.20 Sergeant MAI1 was aware that an illegal search could have many consequences for a police officer including a charge of assault, departmental disciplinary action, a complaint or the rejection of illegally obtained evidence.⁴¹
- 3.21 Sergeant MAI1 said that he conducted a strip search of MAI5 in the police vehicle dock because he wanted MAI5 searched “*as soon as possible*” and because he was concerned MAI5 might conceal drugs up his bottom⁴² even though he had his shorts on, was in the presence of three officers and was handcuffed.⁴³ Sergeant MAI1 conceded that any need he felt to avoid MAI5 secreting drugs in his possession did not

³⁶ Private examination of Sergeant MAI1 at T17 from line 42.

³⁷ Private examination of Sergeant MAI1 at T11.

³⁸ Private examination of Sergeant MAI1 at T11 from line 28.

³⁹ Private examination of Sergeant MAI1 at T13 from line 15.

⁴⁰ Private examination of Sergeant MAI1 at T16 from line 2.

⁴¹ Private examination of Sergeant MAI1 at T16 from line 14 & T30 from line 28.

⁴² Private examination of Sergeant MAI1 at T20 from line 1.

⁴³ Private examination of Sergeant MAI1 at T20 from line 46.

outweigh his obligation to comply with LEPR⁴⁴ and that this was an “*incredible proposition on which to base the setting aside of the LEPR requirement*”.⁴⁵ He could have sat a police officer next to MAI5 to prevent his fears being realised, but he did not think of that at the time.⁴⁶ This action would have prevented him overdosing if what was contained in the foil was a more dangerous drug.⁴⁷

3.22 Sergeant MAI1 was unable to identify any statutory power he might have to untie MAI5's shorts, pull his shorts down or force him to squat by pushing down on his shoulder. This was despite him having studied LEPR before he gave his evidence.⁴⁸ Although s 30 of LEPR provides a power to ask a person to remove their own clothing, there is no general power in LEPR which allows a police officer to remove a person's clothing. This was something that Sergeant MAI1 became aware of when he gave evidence at the Commission.⁴⁹

3.23 In the circumstances surrounding the strip search of MAI5 there was no request made to him to remove his shorts or squat. There was no failure to comply with any request. The search was imposed upon him without any consideration of the relevant issues.

3.24 Sergeant MAI1 was unsure of his power to touch a person to force them to squat.⁵⁰ In fact, s 30(4) specifically prohibits “*examination of the body by touch*” and certainly does not allow any pressure on the body,⁵¹ except in exceptional circumstances where modest force might be necessary when a police officer is faced with a refusal to comply. Sergeant MAI1 found this proposition hard to accept, again illustrating the limits to his understanding of his powers and responsibilities.⁵²

⁴⁴ Private examination of Sergeant MAI1 at T20 line 32.

⁴⁵ Private examination of Sergeant MAI1 at T21 from line 4.

⁴⁶ Private examination of Sergeant MAI1 at T22 from line 30.

⁴⁷ Private examination of Sergeant MAI1 at T23 from line 39.

⁴⁸ Private examination of Sergeant MAI1 at T28 from line 27.

⁴⁹ Private examination of Sergeant MAI1 at T28 from line 19.

⁵⁰ Private examination of Sergeant MAI1 at T29 from line 30.

⁵¹ Private examination of Sergeant MAI1 at T31 from line 8.

⁵² Private examination of Sergeant MAI1 at T30 from line 13.

- 3.25 Section 32 of LEPR provides that a police officer conducting a search of a person “*must ask for the person’s co-operation*”. Sergeant MAI1 was aware that he had to ask for co-operation, but he was unaware that that requirement was part of LEPR. He did not ask for MAI5’s co-operation.⁵³
- 3.26 MAI5 was handcuffed at the scene and the handcuffs stayed on until after the search was complete.
- 3.27 Sergeant MAI1 claimed he left the handcuffs on MAI5 to prevent him from concealing drugs, even though, by the time he was in the vehicle dock, there were three officers surrounding him.⁵⁴
- 3.28 Sergeant MAI1 also claimed that MAI5 was handcuffed at the scene to prevent escape and was handcuffed in the truck to prevent him from disposing of drugs. In fact, Sergeant MAI1 was holding onto MAI5 on the street and there were three other police officers surrounding him. The NSWPF Handbook provided at the time that handcuffs could be used to prevent escape or to prevent a person from injuring themselves. There was no chance of either of these contingencies arising in the circumstances surrounding the arrest and strip search of MAI5.
- 3.29 Sergeant MAI1 could provide no credible reason why MAI5 was handcuffed in the vehicle dock. He agreed that three police officers surrounded MAI5 and there was no chance of escape.⁵⁵ MAI5 should have had the handcuffs removed as soon as he got out of the van.⁵⁶ Despite the provision in the NSWPF Handbook that requires officers to make entries in their notebook when they use handcuffs, Sergeant MAI1 did not do so. His evidence was that it is “*certainly something that (I don’t) always do*”. In fact, he gave evidence that, even though this is provided for in the NSWPF Handbook, it was “*never a common practice for me or other (police officers)*”. His evidence was that no one had ever

⁵³ Private examination of Sergeant MAI1 at T31 from line 19.

⁵⁴ Private examination of Sergeant MAI1 at T32 from line 34.

⁵⁵ Private examination of Sergeant MAI1 at T35.

⁵⁶ Private examination of Sergeant MAI1 at T35 from line 30.

told him to make a note regarding this issue in his notebook either at the Academy or in his 17 years of service.⁵⁷

- 3.30 Sergeant MAI1 agreed that, had he searched the back of the van first, there would have been no need for a strip search.⁵⁸
- 3.31 Sergeant MAI1 conceded that questioning MAI5 about the cannabis during the search was a breach of LEPRa but he was not aware that this was prohibited at the time of the search.⁵⁹ He only became aware of this when studying in preparation for giving evidence at the Commission.
- 3.32 Sergeant MAI1 told the Commission that the issues which caused him to reject the alternatives to charging were an outstanding matter of aggravated theft, the fact that MAI5's father had trouble controlling him, MAI5's attitude to the offence and an employment prospect at a local butchery.⁶⁰ However, Sergeant MAI1 agreed that being charged with the possession of cannabis would not have improved MAI5's prospects of employment at the butchery and that fact would suggest a warning as appropriate;⁶¹ and also that going to gaol would not assist parental control.⁶²
- 3.33 Sergeant MAI1's knowledge of the provisions of the *Young Offenders Act 1997* was cursory,⁶³ despite having trained as a youth liaison officer.⁶⁴
- 3.34 Sergeant MAI1 conceded that he was the informant in the prosecution and that it was his decision to charge MAI5 with the offence of possession of 2 grams of cannabis whilst knowing that it could result in a custodial sentence in the Local Court.⁶⁵ Sergeant MAI1's evidence was that he "*certainly would have considered other options*". However, when

⁵⁷ Private examination of Sergeant MAI1 at T36 from line 16 to T37 at line 34.

⁵⁸ Private examination of Sergeant MAI1 at T37 from line 38.

⁵⁹ Private examination of Sergeant MAI1 at T38 from line 14.

⁶⁰ Private examination of Sergeant MAI1 at T40 line 43.

⁶¹ Private examination of Sergeant MAI1 at T42 from line 1.

⁶² Private examination of Sergeant MAI1 at T42 from line 11.

⁶³ Private examination of Sergeant MAI1 at T43 from line 5.

⁶⁴ Private examination of Sergeant MAI1 at T50 line 35.

⁶⁵ Private examination of Sergeant MAI1 at T38 from line 38.

asked about any alternatives to charging MAI5, he stated that there were none. When pressed he recognised that he could have given a verbal warning under the *Young Offenders Act 1997*.⁶⁶

- 3.35 Sergeant MAI1 agreed that the eventual outcome, which he considered to be in the “*interests of justice*”, may not have been in the interests of MAI5, or in line with the objects of the legislation, including keeping young Aboriginals out of custody.⁶⁷ MAI5 had never previously had the benefit of a caution or a warning and Sergeant MAI1 knew that.⁶⁸ On reflection he agreed that it might have been a good idea to issue a caution to MAI5 instead of charging him.
- 3.36 Section 8 of the *Children (Criminal Proceedings) Act 1987* provides a mechanism that avoids children unnecessarily spending time in custody. Once MAI5’s offence was clear, and his identity known, there was no need to take him into custody. He could have been taken home and later served with a Court Attendance Notice. Sergeant MAI1 was unaware of this legislation.⁶⁹
- 3.37 The Commission does not accept Sergeant MAI1’s evidence that he conducted a strip search in the street without a parent present because he believed that MAI5 would conceal evidence.⁷⁰

The Evidence of Constable MAI2

- 3.38 Constable MAI2 is a female constable who joined the NSWPF in August 2014. She was rostered as the custody officer at the time of MAI5’s arrest, strip searches and charging. She was junior to Sergeant MAI1,

⁶⁶ Private examination of Sergeant MAI1 at T39 from line 21.

⁶⁷ Private examination of Sergeant MAI1 at T45 from line 7.

⁶⁸ Private examination of Sergeant MAI1 at T48 from line 47.

⁶⁹ Private examination of Sergeant MAI1 at T55 from line 7.

⁷⁰ Private examination of Sergeant MAI1 at T19 from line 12.

who was also her shift supervisor that day. She accompanied Sergeant MAI1 when he arrested MAI5 on the street.

3.39 She gave evidence at the Commission on 1 August 2019.

3.40 Constable MAI2 had not dealt with MAI5 beforehand, but she could “*absolutely*” tell he was under 18 just by looking at him.⁷¹ She had seen MAI5 drop something but did not know where he dropped it. She knew that Sergeant MAI1 believed the silver foil had been placed down the back of MAI5’s pants.⁷² She was present when MAI5 objected to Sergeant MAI1 placing his hands down his pants and when MAI5 told Sergeant MAI1 he could search him at the station “*when my parents are there*”.⁷³

3.41 At approximately 3:37pm Constable MAI2 called the caged truck to take MAI5 back to the police station to be strip searched. Later at approximately 4:00pm she telephoned MAI5’s father to come to the police station.⁷⁴

3.42 Constable MAI2 could not remember if Constable MAI3 had placed his hands inside MAI5’s shorts but agreed that, if he had done so, it would amount to a strip search. She also agreed that she should not be present at the strip search because she was of the opposite sex.⁷⁵

3.43 Constable MAI2 was aware that as the custody officer it was her duty to ensure that the rights of persons in custody were protected, that their health and safety were maintained and that she was responsible for supervising staff in the custody area, including the cells and the vehicle dock.⁷⁶ Constable MAI2 was able to see the vehicle dock from where she performed her duties as custody officer via one of a number of television screens.⁷⁷ Despite knowing that MAI5 was a young person and

⁷¹ Private examination of Constable MAI2 at T7 from line 28, T8 at line 33 and T37 at line 8

⁷² Private examination of Constable MAI2 at T11 line 14.

⁷³ See Body Worn Video and private examination of MAI2 at T12 from line 45.

⁷⁴ Private examination of Constable MAI2 at T8 at line 43.

⁷⁵ Private examination of Constable MAI2 at T15 line 23.

⁷⁶ Private examination of Constable MAI2 at T16 from line 22.

⁷⁷ Private examination of Constable MAI2 at T17 line 10.

was being taken into custody for a strip search, Constable MAI2 did not watch the search to ensure compliance with LEPR⁷⁸, or ensure someone of the appropriate gender did so. She abandoned her duty to ensure compliance with LEPR because there was a senior officer conducting the search: “*I have a supervisor there...*” she reasoned. Constable MAI2 accepted that it was her responsibility as custody officer to ensure MAI5’s rights were protected, that that was the purpose of the cameras and it was her “*fault*” she did not do this.⁷⁹

3.44 She did not supervise what Sergeant MAI1 was doing because he was a sergeant and senior to her. Moreover, when she first gave evidence she was of the view that the search of MAI5 complied with LEPR and that Sergeant MAI1 was performing his duty properly.⁸⁰ However, she later conceded in evidence that “*we’ve breached LEPR (for multiple reasons)*”.⁸¹

3.45 Constable MAI2 initially asserted that Sergeant MAI1 was acting properly when he strip searched MAI5 without a parent or guardian present because of his fear that MAI5 was concealing evidence.⁸² When it was pointed out to her that there were three police officers with MAI5, and that police could have waited for his father, she conceded that any fear of MAI5 concealing evidence was not a proper justification for strip searching him without his father present.⁸³

3.46 Whilst Constable MAI2 knew that this was a young person being strip searched in the presence of three police officers whilst handcuffed, she did not consider calling his father. She conceded that this was a mistake on her part.⁸⁴

3.47 Constable MAI2 was shown the video of MAI5 being undressed and pushed down by Sergeant MAI1. Her evidence was that Sergeant MAI1 “*should not have done what he’s done*” because “*you are not allowed to*

⁷⁸ Private examination of Constable MAI2 at T17 from line 41 and T29 from line 10.

⁷⁹ Private examination of Constable MAI2 at T29 from line 23 at line 34.

⁸⁰ Private examination of Constable MAI2 at T18 line 31 and T19 at line 21.

⁸¹ Private examination of Constable MAI2 at T28 line 40 and T33 line 24.

⁸² Private examination of Constable MAI2 at T19 line 46.

⁸³ Private examination of Constable MAI2 at T20 at line 45.

⁸⁴ Private examination of Constable MAI2 at T21 from line 20 and at T23 line 11.

touch, examine the body, remove clothes” and therefore his conduct was a breach of LEPR.⁸⁵ Constable MAI2 believed that some touching was permissible. She was not aware that the degree of force used was irrelevant, as the prohibition in s 34 of LEPR is against “*the examination of the body by touch*”.⁸⁶

- 3.48 Constable MAI2 agreed that there was no need for MAI5 to be handcuffed.⁸⁷
- 3.49 When shown the video of a semi-naked MAI5 being questioned by Sergeant MAI1 after discovery of the foil, Constable MAI2 concluded that the young person should have been dressed and brought to the custody room. However, at that time, Constable MAI2 did not know that it was a breach of LEPR to question a suspect about the matter being investigated whilst the suspect is undressed.⁸⁸
- 3.50 At the time of MAI5’s arrest Constable MAI2 was both the custody officer and an arresting officer. As the custody officer she had a duty to supervise both his custody and his treatment by the arresting officers. She accepted that there may be a conflict involved in performing both roles simultaneously but her evidence was that it was a necessary evil because of staff shortages.⁸⁹

The Evidence of Constable MAI3

- 3.51 Constable MAI3 joined the NSWPF in April 2017⁹⁰ and has served all of his career at the subject station.
- 3.52 He gave evidence at the Commission on 2 August 2019.
- 3.53 Upon arrival at the scene of MAI5’s arrest, Sergeant MAI1 informed Constable MAI3 that MAI5 “*has a foil down his pants and he doesn’t*

⁸⁵ Private examination of Constable MAI2 at T24 line 7 and T24 line 47.

⁸⁶ Private examination of Constable MAI2 at T29 from line 46 and T30 line 7.

⁸⁷ Private examination of Constable MAI2 at T25 line 7.

⁸⁸ Private examination of Constable MAI2 at T26 from line 3, T27 lines 3 and 25 and T28 line 9.

⁸⁹ Private examination of Constable MAI2 at T32 at line 32.

⁹⁰ Private examination of Constable MAI3 at T6 line 18.

want to take it out himself”.⁹¹ Constable MAI3 was heard to respond “*I’m taking it out for you, am I?*” MAI5 had told the Commission that the officer with the beard (Constable MAI3) had “*got out of the car and came straight over to me pushing me up against the fence. He started putting his hands down the back of my pants*”. Constable MAI3 denied putting his hands down the inside of MAI5’s pants – his evidence was that he “*grabbed the outside of the waistband and give (sic) his pants a shake*”.⁹² The Body Worn Video does not disclose how Constable MAI3 searched MAI5.

3.54 Constable MAI3 did not ask MAI5 his age because he knew how old he was. He was familiar with MAI5 because of previous bail compliance checks regarding curfew.⁹³

3.55 Constable MAI3 gave evidence that when he said “*where do you want me to get your gear off, here or at the station*” he had in mind a strip search in the back of the police vehicle though that was not made clear.⁹⁴ Constable MAI3 did not search the front of MAI5’s pants.⁹⁵

3.56 Constable MAI3’s initial evidence was that the search of MAI5 complied with LEPR, but “*could have been done differently*”. He said it would have been “*beneficial*” for a support person to be present.⁹⁶ He did not agree that the search at the vehicle dock of the police station was a breach of LEPR without a parent or guardian present.⁹⁷ When his examination commenced at the Commission he believed that the search was legal.⁹⁸

3.57 Constable MAI3 knew that a person under 18 should have a support person present but had no idea what the relevant provisions of LEPR were.⁹⁹ He believed it was justified “*due to the urgency before they are*

⁹¹ Private examination of Constable MAI3 at T7 from line 42.

⁹² Private examination of Constable MAI3 at T8 line 12.

⁹³ Private examination of Constable MAI3 at T8 line 33.

⁹⁴ Private examination of Constable MAI3 at T10 from line 21.

⁹⁵ Private examination of Constable MAI3 at T11 line 36.

⁹⁶ Private examination of Constable MAI3 at T13 line 28.

⁹⁷ Private examination of Constable MAI3 at T14 line 25.

⁹⁸ Private examination of Constable MAI3 at T13 line 47.

⁹⁹ Private examination of Constable MAI3 at T15 line 11.

ingested or supposited".¹⁰⁰ He was challenged on this assertion. It was put to him that MAI5 was surrounded by three large male police officers and he could have been placed in a "fishbowl" cell inside the police station, under constant guard and recorded by cameras. If he did attempt to hide or ingest drugs, it would most likely have been observed. Eventually Constable MAI3 agreed that the search was not compliant with LEPRa because there was no parent or guardian present.¹⁰¹

3.58 Constable MAI3 was shown the video footage and agreed that Sergeant MAI1 breached s 30 of LEPRa when he removed MAI5's clothing himself.¹⁰² Constable MAI3 also agreed that Sergeant MAI1, in placing his hands on MAI5's shoulder and pushing him down to squat, engaged in conduct that was not compliant with LEPRa.

3.59 At the examination it became apparent that Constable MAI3 was conversant with the provisions of LEPRa. He was asked if he had been so well-informed at the time of the arrest. He admitted he was not familiar with the relevant provisions of LEPRa at the time of the search. Only after being summoned to the Commission, looking at the relevant material and then reading LEPRa, did he realise that the search transgressed LEPRa in various respects.

3.60 Constable MAI3 agreed that Sergeant MAI1 had breached LEPRa when he questioned MAI5 whilst he was being strip searched but his evidence was that he could not remember the conversation.¹⁰³

The Evidence of Constable MAI4

3.61 Constable MAI4 is a male Constable. He joined the NSWPF in August 2016.

3.62 Constable MAI4 arrived on the street in the caged truck with MAI3 at approximately 3:40 p.m. He was informed by Sergeant MAI1 that MAI5

¹⁰⁰ Private examination of Constable MAI3 at T16 line 3.

¹⁰¹ Private examination of Constable MAI3 at T17 line 4.

¹⁰² Private examination of Constable MAI3 at T19 from line 21.

¹⁰³ Private examination of Constable MAI3 at T21 from line 3.

had a foil down the back of his pants and that MAI5 did not want to take it out by himself. He had no prior knowledge of the matter before he arrived.¹⁰⁴

3.63 Constable MAI4 was watching when Sergeant MAI1 searched MAI5 on the street. He believed that he saw Sergeant MAI1 put his hands around the inside of the back of MAI5's pants¹⁰⁵ without giving him a pat down.

3.64 He agreed that, had Sergeant MAI1 done a full pat down, he would likely have been successful at finding the foil.¹⁰⁶ His evidence is consistent with the evidence of MAI5. It is inconsistent with Constable MAI3's evidence that he "*grabbed the outside of the waistband and give (sic) his pants a shake*".¹⁰⁷ Constable MAI4 was unaware that this amounted to a strip search because "*it's not removing any of the items of clothing*".¹⁰⁸ Once Constable MAI4 was informed that this amounted to a strip search he agreed that it should have been conducted in a private area and that MAI5 should have been informed of the officer's name and the reason for the search.¹⁰⁹

3.65 There was no enquiry made by Constable MAI4 about MAI5's age before he was placed in the back of the caged truck and taken back to the police station, even though he looked like he was under 18.¹¹⁰ According to Constable MAI4 this was because they were following orders: "*we had been asked to go there and transport him back to the station, and...as a matter of course, we followed that instruction*".¹¹¹ Constable MAI4 agreed that it was important to find out if someone is under 18 because "*if a strip search is going to be conducted on a person between 10 and 18 (you have present) a parent or guardian*".¹¹² He was not aware

¹⁰⁴ Private examination of Constable MAI4 at T7 from line 38.

¹⁰⁵ Private examination of Constable MAI4 at T8 from line 16 and T15 from line 23.

¹⁰⁶ Private examination of Constable MAI4 at T15 line 36 and T18 at line 39.

¹⁰⁷ Private examination of Sergeant MAI1 at T8 line 12.

¹⁰⁸ Private examination of Constable MAI4 at T8 from line 29.

¹⁰⁹ Private examination of Constable MAI4 at T9 from line 16.

¹¹⁰ Private examination of Constable MAI4 at T11 line 2.

¹¹¹ Private examination of Constable MAI4 at T11 from line 10.

¹¹² Private examination of Constable MAI4 at T11 from line 15.

of this at the time. He had acquired this knowledge after he had received his summons to give evidence at the Commission.¹¹³

- 3.66 When questioned about the appropriateness of conducting a strip search on the street, Constable MAI4 said it was “*not uncommon*” to conduct a strip search in the back of a caged truck with the door open. He considered that this process provides sufficient privacy to comply with s 33(a) of LEPPRA that a strip search be conducted in a “*private area*”.¹¹⁴
- 3.67 MAI5 was placed in the back of the caged truck on the basis that he was hiding drugs on himself of an unknown type. In this situation it was possible that MAI5 might have consumed those drugs on the way to the police station because hands were handcuffed in front. Constable MAI4 agreed that a wiser course would be to have him sit in the back of a sedan with an officer next to him, so that his behaviour could be monitored. This was not done.¹¹⁵
- 3.68 Neither Constable MAI2 nor Constable MAI4 identified MAI5. Had they done so they might have ascertained if he was the sort of person to take drugs in the back of a van.¹¹⁶ Constable MAI4 agreed he should have asked for MAI5’s age and name and found out more about him before putting him in the back of the van.¹¹⁷
- 3.69 Constable MAI4 viewed the video footage twice after the event and had also studied LEPPRA. Even so, the only non-compliance issues with LEPPRA that he could identify at the hearing were that he did not need to be there, and that a parent or guardian was not present.¹¹⁸ At the conclusion of his evidence he agreed that multiple breaches of LEPPRA had occurred in both the strip search on the street and in the vehicle dock at the police station.¹¹⁹

¹¹³ Private examination of Constable MAI4 at T11 line 25.

¹¹⁴ Private examination of Constable MAI4 at T13 line 26.

¹¹⁵ Private examination of Constable MAI4 at T14 from line 40.

¹¹⁶ Private examination of Constable MAI4 at T19 from line 2.

¹¹⁷ Private examination of Constable MAI4 at T18 line 23.

¹¹⁸ Private examination of Constable MAI4 at T19 from line 44.

¹¹⁹ Private examination of Constable MAI4 at T33 line 37.

- 3.70 Constable MAI4's presence at the search in the van dock was superfluous. He conceded that he was not needed. This was a breach of s 33(1) of LEPR which states that a strip search should not take place in the presence of a person whose attendance is not necessary. He acknowledged that he had only acquired this knowledge after he was summoned to give evidence.¹²⁰
- 3.71 Constable MAI4 asserted that delaying the search might have resulted in the drugs being hidden: *"if he's already tried to conceal it from us once, is waiting for a parent to arrive going to further allow that..."*¹²¹ Constable MAI4 maintained this position, even when reminded that MAI5 was surrounded by three police officers, making it unlikely that MAI5 would be able to conceal the drug without being observed.
- 3.72 Constable MAI4 ultimately but reluctantly agreed that this was not a good reason to proceed before a parent could be present.¹²² It was clear that this issue had not concerned Constable MAI4 at the time of the search. Only upon receiving his summons and studying LEPR did it occur to him that s 33(3A) of LEPR might justify the conduct of a strip search without a parent present.¹²³ At the time of the search he was not aware of any breaches of LEPR.¹²⁴
- 3.73 When Constable MAI4 was shown the video of Sergeant MAI1 taking off MAI5's pants and pushing him on the shoulder to make him squat, he identified the following breaches of LEPR: a person should not be touched while a strip search is being conducted, should not be undressed, should not be handcuffed and should not be questioned when undressed. All this was knowledge he had acquired after he was served with the summons. He was unaware of these prohibitions at the time of the arrest.¹²⁵

¹²⁰ Private examination of Constable MAI4 at T29 at line 16 and T30 line 4.

¹²¹ Private examination of Constable MAI4 at T21 from line 12.

¹²² Private examination of Constable MAI4 at T21 from line 24.

¹²³ Private examination of Constable MAI4 at T21 from line 46.

¹²⁴ Private examination of Constable MAI4 at T22 line 12.

¹²⁵ Private examination of Constable MAI4 at T24 line 19 to T27 at line 6.

- 3.74 Constable MAI4 had graduated from the Academy three years before this incident. He agreed that the materials provided at the Police Academy were quite extensive in relation to the powers available under LEPR.
- 3.75 He could not explain why, when confronted with an Aboriginal person under 18 years of age who was about to be arrested and strip searched, he was unable to recall or apply any of his relevant obligations under LEPR. Although he was given several opportunities to provide an explanation he responded “*I wouldn’t know what to say to that...*”¹²⁶

4. Analysis of Evidence

- 4.1 During the arrest, strip search and charging of MAI5, police committed multiple breaches of their legislative powers and internal protocols, set out below.

The Search in the Street

- 4.2 The Commission is satisfied that during the search on the street both Sergeant MAI1 and Constable MAI3 placed their hands inside the shorts of MAI5, pulled them out and looked inside them. They did this when they knew that he was wearing no underpants and that this amounted to a strip search. The Commission does not accept that Constable MAI3 “*grabbed the outside of the waistband and (gave) his pants a shake*”. This evidence is contrary to the evidence of MAI5 and of Constable MAI4.
- 4.3 The search of MAI5 on the street is comparable to the search which occurred in *Daniel Fromberg v R*.¹²⁷ In that case, a police officer reached to feel the inside of the appellant’s jeans with the intention of searching around the elastic of his underwear. The officer extended his hand towards the appellant’s genital area, and put his hand inside the

¹²⁶ Private examination of Constable MAI4 at T12 line 32, T26 line 10 and T32 from line 12.

¹²⁷ [2017] NSWDC 259 per Scotting DCJ.

appellant's jeans. The appellant objected and the police officer asserted the right to search. The appellant was handcuffed to the rear and with three officers nearby. The police officer reached into the appellant's pants and pulled out his jeans and underwear. He observed a plastic bag containing drugs sitting above the appellant's penis inside his underwear. This search was found to be illegal by the NSW District Court because it necessitated an examination of the appellant's body by touch, or an area not of the outer clothing, and was clearly more invasive than a frisk search or ordinary search pursuant to s 30 of LEPRA which allows a police officer to "*quickly run his or her hands over the person's outer clothing*".

- 4.4 *Fromberg* has not been considered subsequently by the NSW Supreme Court and remains good law.
- 4.5 Both these searches were strip searches. Both searches breached the following provisions of LEPRA:
 - a. The searches should have been conducted at a police station (s 31).
 - b. They were not the least invasive search practicable (s 32(5)). Had Sergeant MA11 or Constable MA13 run their hands over the *front* of MA15's shorts, as allowed by s 30, they would most likely have found the foil.
 - c. The searches should have been conducted in a private area (s 33(1)) – looking down the pants of a 16 year old boy in a public and busy street is not a search conducted in a private area and did not provide any privacy or dignity.
 - d. There was no parent or guardian present (s 33(3)). All officers failed to consider this requirement, despite the fact that MA15 looked under 18 and was known by the police to be under 18. All failed to make enquiries of his age. The Commission finds that all officers proceeded to perform, be involved in or observe a strip search

without a parent or guardian present due to their ignorance of or disregard for s33(3) and s 33(3A). And,

- e. Any danger of the foil being concealed could have been overcome by MAI5 sitting in a sedan vehicle with a police officer next to him. In any event, any danger of the foil being concealed would not have justified strip searching MAI5 in the absence of his parents under s 33(3A).

The Search in the Vehicle Dock

- 4.6 The search of MAI5 in the vehicle dock at the police station involved multiple breaches of legislative and departmental responsibilities:
 - a. It was not the least invasive search practicable (s 32(5)). Had any of the police officers searched the pod area of the caged truck, or run their hands over the front of MAI5's shorts as contemplated by s 30, before the strip search in the vehicle dock, they would have most likely found the foil.
 - b. Despite being obviously under 18 years of age, and known to some officers as being under 18 years of age, no police officer asked MAI5 his age. All failed in their duties pursuant to s 33(3) of LEPR to arrange for a guardian or parent to be present during the search. The lack of any record as required by s 33(3A), combined with all of the officers' abysmal knowledge of LEPR supports a finding that all police either conducted, or allowed to be conducted, the strip search in the vehicle dock without MAI5's parent present. This was not because of an actual belief that MAI5 would conceal evidence, but arose from their complete absence of knowledge of or disregard for the statutory requirement to have a parent or guardian present. Any fear that MAI5 might conceal the drug after he had arrived in the vehicle dock was not a proper or even credible justification for

breaching this provision.

- c. Constable MAI2, who as custody officer was “*accountable for ensuring the rights of people in custody are protected and supervising staff in the custody area*”,¹²⁸ failed in her duties as custody officer for MAI5, who was vulnerable as an underage Aboriginal person in custody. She failed to arrange for a parent to be present until after the search took place, despite believing MAI5 was underage.¹²⁹ The fact that Sergeant MAI1 was senior in rank to Constable MAI2 did not absolve Constable MAI2 of this responsibility.
- d. Section 30(b) of LEPRA empowers an officer to “*require*” a person to remove their clothing, but does not authorise the officer to remove it except in exceptional circumstances where modest force may be used. Sergeant MAI1 acted without power or authority when he undid the drawstring of MAI5’s shorts and pulled them down.
- e. Sergeant MAI1 physically forced MAI5 to the ground. He did not ask for MAI5’s co-operation in performing the strip search as required by s 32(3) of LEPRA.
- f. Sergeant MAI1 breached the provisions of s 33(4) of LEPRA which prohibits touching the body during a strip search, when he pushed MAI5’s shoulder forcing him to squat.
- g. All four officers failed to comply with proper procedure regarding handcuffs,¹³⁰ which provides that police officers are only justified in using handcuffs to prevent escape or injury to themselves or others.

¹²⁸ See ‘Custody’ in Code of Practice for Crime, and Standard Operating Procedures for Barwon Local Area Command.

¹²⁹ See Standard Operating Procedures for Barwon Local Area Command.

¹³⁰ See NSWPF Procedure regarding the use of handcuffs.

Once MAI5 was in the vehicle dock there was no risk of escape even if there had been any earlier.

- h. The questioning of a suspect while a strip search is being conducted is prohibited by s 32(8). It must be suspended while the search is being carried out. Sergeant MAI1 breached the provisions of LEPR when he questioned MAI5 about the foil of cannabis he found in the pod of the caged truck.
- i. MAI1 failed to consider the principles underlying the *Young Offenders Act 1997*. Although the decision was a matter for the exercise of Sergeant MAI1's discretion, he was required to give consideration to all relevant matters. In this instance the offence involved the possession of 2 grams of cannabis, which even Sergeant MAI1 agreed was "*tiny*" and MAI5 had never previously received the benefit of a warning or caution. Despite this, Sergeant MAI1 charged MAI5 with a criminal offence, knowing it may involve a custodial sentence. Sergeant MAI1 gave evidence that he had regard to the fact that MAI5's father had trouble controlling him, and that MAI5 had an employment prospect at a local butcher.¹³¹ The Commission is not satisfied that any consideration was given to the objects of the *Young Offenders Act 1997* by Sergeant MAI1. Sergeant MAI1's knowledge of the provisions of the *Young Offenders Act 1997* was totally inadequate,¹³² despite being trained as a youth liaison officer.¹³³ This was especially damaging in the circumstances surrounding MAI5's arrest as he was the senior officer and the informant. It would have been preferable in all the relevant circumstances if MAI5 had received a warning or caution. This would have allowed him to work and remain involved in the local community. The Commission understands that MAI5 has become

¹³¹ Private examination of Sergeant MAI1 at T40 line 43.

¹³² Private examination of Sergeant MAI1 at T43 from line 5.

¹³³ Private examination of Sergeant MAI1 at T50 line 35.

further involved in the criminal justice system since this incident. This may have been an opportunity missed by all police officers involved.

- j. Constable MAI2 and Constable MAI4 breached Rule 10 of the NSW Police “Code of Conduct and Ethics” in that they did not “*report misconduct of other NSW Police Force employees*”.¹³⁴ They witnessed Sergeant MAI1 commit multiple infractions of LEPR which resulted in a humiliating abuse of power by Sergeant MAI1 affecting a young person who was one of the most vulnerable in our community. The fact that the collective knowledge of these police officers of LEPR was negligible is an explanation but not an excuse for the breach of that code. And,
- k. None of the officers involved had any practical understanding of s105 of LEPR which allows an arrest to be discontinued at any time and points to the availability of warnings and cautions for persons under 18 as per the provisions of the *Young Offenders Act 1997*.

4.7 The evidence of all officers was that they had no idea that they were committing multiple breaches of LEPR. All four police officers improved their knowledge of LEPR before giving evidence, but only because they had been summoned to the Commission. Constable MAI3 was typical in that he conceded his knowledge of LEPR was “*pretty bad*” at the time of the incident but it was improved by virtue of preparing to give evidence at the Commission.¹³⁵

4.8 The evidence in the examinations might demonstrate that the education police officers are receiving regarding the application of LEPR is not always resulting in the practical application of the relevant legislation. Police officers engage in on-line learning after leaving the Academy, but it may be that a more effective way of learning would be face to face tutelage.

¹³⁴ NSWPF Code of Conduct and Ethics.

¹³⁵ Private examination of Constable MAI3 at T25 line 5.

- 4.9 Sergeant MAI1 candidly stated that in respect of computers, *“it’s not the best training environment. That’s something I struggle with”*.¹³⁶
- 4.10 The educational publication sent by police prosecutors, called UN2K, an acronym for “You Need to Know”, was also unknown to Constable MAI3.¹³⁷
- 4.11 Constable MAI3 had commenced a course on policing at the Police Academy in Goulburn from April 2018 for eight months, and gave evidence that this course covered *“the majority”* of police powers and responsibilities under LEPR, including *“an article on strip searches”*.¹³⁸ This was only shortly before the subject incident. Constable MAI4 had been through the Police Academy three years before this incident but had no idea at the time of the search that he was witnessing multiple breaches of LEPR.
- 4.12 All officers agreed that their knowledge of LEPR was poor and that they needed to familiarise themselves thoroughly with LEPR.¹³⁹ All police officers admitted to multiple breaches of LEPR in dealing with MAI5.¹⁴⁰ When asked to explain why this might be the case, Sergeant MAI1 proffered that he had not had proper training in LEPR despite the fact that it has been in existence for 13 years of his career.¹⁴¹
- 4.13 The junior officers agreed that if they saw a breach of LEPR they should take some action, such as raising the issue with the senior officer involved or other senior officers.¹⁴² The evidence was that this was difficult in practice.¹⁴³ This is a duty imposed by Rule 10 of the NSW Police Code of Conduct and Ethics, which states: *“An employee of the NSW Police Force must...report misconduct of other NSW Police Force*

¹³⁶ Private examination of Sergeant MAI1 at T55 from line 2.

¹³⁷ Private examination of Constable MAI3 at T25 from line 28.

¹³⁸ Private examination of Constable MAI3 at T24 from line 23.

¹³⁹ Private examination of Constable MAI2 at T34 at line 37, private examination of Constable MAI3 at T24 line 14 and T28 line 41, and private examination of Constable MAI4 at T36 from line 3.

¹⁴⁰ Private examination of Sergeant MAI1 at T52 line 8, and private examination of Constable MAI2 at T34 line 24.

¹⁴¹ Private examination of Sergeant MAI1 at T52 line 36 and T53 from line 10.

¹⁴² Private examination of Constable MAI2 at T34 at line 42, and private examination of Sergeant MAI1 at T29 line 26.

¹⁴³ Private examination of Constable MAI4 at T10 from line 32 and T36 at line 40.

employees". Constable MAI4 confirmed he had never reported the misconduct of another officer.¹⁴⁴

4.14 All officers conceded the need to ask a person their age if they thought he or she might be under 18.¹⁴⁵ MAI5 was never asked his age, and Constable MAI2, the custody officer, did not check his age until he was being charged, well after the strip searches had occurred.¹⁴⁶

4.15 The multiple breaches of LEPR by other officers followed the example set by the senior officer, Sergeant MAI1. He "*set the tone of the search*" and directed the search.¹⁴⁷ As a sergeant, he acknowledged that it was important to "*lead by example*".¹⁴⁸ Constable MAI3 deposed that his inaction was a combination of poor knowledge of LEPR and following the example set by a senior officer.¹⁴⁹ However, later in his evidence Constable MAI3 acknowledged that, as a junior officer, he needed to "*take (his) courage in (his) hands and say something*".¹⁵⁰ Constable MAI2 did not supervise what Sergeant MAI1 was doing because he was a sergeant and senior to her. Moreover, she was initially of the view that the search of MAI5 complied with LEPR and that Sergeant MAI1 was performing his duties properly.¹⁵¹ Sergeant MAI1 acknowledged that there was a need to train junior staff to have a good working knowledge of their obligations under LEPR and the *Young Offenders Act 1997*.¹⁵²

4.16 All officers who were asked were unaware of the provisions of s 105 of LEPR which provides that, in the case of a young person, an arrest can be discontinued. If they were aware of it, they did not use it.¹⁵³

4.17 In their treatment of MAI5, all police involved committed multiple breaches of their duties under LEPR and, in doing so, transgressed

¹⁴⁴ Private examination of Constable MAI4 at T10 from line 32.

¹⁴⁵ Private examination of Constable MAI2 at T35 line 2, private examination of Constable MAI4 at T36 line 29.

¹⁴⁶ Private examination of Constable MAI2 at T36 line 26.

¹⁴⁷ Private examination of Sergeant MAI1 at T27 from line 11.

¹⁴⁸ Private examination of Sergeant MAI1 at T54 from line 7.

¹⁴⁹ Private examination of Constable MAI3 at T31 from line 36.

¹⁵⁰ Private examination of Constable MAI3 at T32 from line 23.

¹⁵¹ Private examination of Constable MAI2 at T18 line 31 and T19 at line 21.

¹⁵² Private examination of Sergeant MAI1 at T54 line 23.

¹⁵³ Private Examination of Constable MAI2 at T35 from line 30, private examination of Sergeant MAI1 at T565 line 4, and private examination of Constable MAI4 from T30 line 8 and at T31 line 3.

many of the Statement of Values set down in the *Police Act 1990*, such as placing integrity above all, upholding the rule of law, preserving the rights and freedoms of individuals, seeking to improve the quality of the community and exercising their duties responsibly.¹⁵⁴ The Commission accepts the evidence of MA15 that Constable MA13 also made disparaging remarks directed at MA15. This undermined the work being done elsewhere to improve relations between police and the local community. Sergeant MA11 agreed that he failed the Statement of Values in many respects and that the treatment of MA15 amounted to bullying and was oppressive.¹⁵⁵

- 4.18 MA15 was a “child” within the meaning of the *Young Offenders Act 1997*. This scheme has as one of its objects the need to address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.¹⁵⁶ As a guiding principle the least restrictive form of sanction is to be applied against a child. MA15’s offence, the possession of 2 grams of cannabis, is an offence to which this scheme applies, as it involved less than half of the small amount of cannabis leaf within the meaning of the *Drug Misuse and Trafficking Act 1985*, which is five grams. This was an amount which Sergeant MA11 conceded was a “tiny, tiny amount”.¹⁵⁷ Applying the *Young Offenders Act 1997* a police officer might give a warning or issue a caution instead of charging a child in these circumstances. No warning was given or caution issued in this case. None of these officers considered an alternative to arrest and charging. They could have taken MA15 home and proceeded with a future Court Attendance Notice (CAN), if indeed they wanted to charge at all, but they did not do this.¹⁵⁸

- 4.19 Most officers deposed that strip searches were relatively rare. Constable MA12 had only been present at “four or five” strip searches other than

¹⁵⁴ Private examination of Sergeant MA11 at T57 from line 22.

¹⁵⁵ Private examination of Sergeant MA11 at T58 from line 8.

¹⁵⁶ See s 3 *Young Offenders Act 1997*.

¹⁵⁷ Private examination of Sergeant MA11 at T40 from line 13.

¹⁵⁸ Private examination of Constable MA12 at T37 from line 16.

MAI5.¹⁵⁹ Constable MAI3 deposed that it was “*not something happens often*”. This appeared to be his first.¹⁶⁰ Constable MAI4 could only recall being involved in “*several*” searches. When pressed, he estimated about 10, and none since 25 November 2018.¹⁶¹ The Commission obtained samples of monthly statistics on strip searches conducted in the Local Area Command for three separate months between May and October 2018 (before the Commission commenced investigating this issue) and March 2019. None of the officers involved in this hearing were involved in any of those searches.

5. Submissions

- 5.1 Legal representatives for all parties were provided with a draft version of this report and invited to make submissions. No legal representatives wished to make any submissions except the legal representative for Constable MAI4.
- 5.2 Submissions made on behalf of Constable MAI4 can be summarised as follows:
 - a. The general scope and purpose of the private examination differed from the purpose of the Commission’s investigation (referred to in paragraph 1.1 of this report) and “*the writer is not aware why the scope of the investigation changed between the date of MAI4’s evidence and the date of the report*”.
 - b. Had MAI5 volunteered the item in his possession, the searches may not have taken place unless the police suspected that he was also concealing other items.
 - c. The draft report made no reference to whether MAI5 had a criminal history prior to this incident, and if he did have a criminal history it would have been a relevant consideration in

¹⁵⁹ Private examination of Constable MAI2 at T38 at line 37 and T39 line 27.

¹⁶⁰ Private examination of Constable MAI3 at T24 from line 44.

¹⁶¹ Private examination of Constable MAI4 at T33 from line 43.

determining whether a warning, caution or prosecution would be appropriate.

- d. Paragraph 3.9 of the draft report referred to MAI5 being fined in the Local Court, but this was incorrect as he was a young person at the time and his matter would have been dealt with in the jurisdiction of the Children's Court.
- e. Paragraph 3.34 refers to Sergeant MAI1 making the decision to charge MAI5 whilst knowing that it could result in a custodial sentence in the Local Court. However, it is not for police to consider how a Magistrate might deal with a matter when deciding whether or not to charge an offender.
- f. Although the draft report highlighted the small amount of cannabis involved, it is noteworthy that the Children's Court determined that a fine would be appropriate instead of one of the lesser sentencing alternatives.
- g. The draft report did not reveal whether the Court imposed a conviction on MAI5, despite the heading "Charging and Conviction of MAI5".
- h. The draft report did not state whether the penalty imposed on MAI5 was the subject of an appeal to the District Court or whether it was considered to be unduly severe by either MAI5 or his legal representatives. Further, the draft report was silent on whether the Commissioner considered the penalty to be severe or otherwise.
- i. Paragraph 4.6(i) states that MAI5 became further involved in the criminal justice system since this incident, and that by choosing not to utilise a form of action other than charging, this was an opportunity missed by all police officers involved to allow MAI5 to focus on his career and be a part of the local community. However, the inference that this further involvement in the criminal justice system was attributable to all

police officers involved is without proper basis, given the lack of information about any previous criminal history and the circumstances of the subsequent criminal matters.

- j. It is conceded that LEPR was breached by the police officers involved in the search, but it is clear that each officer took the opportunity to familiarise themselves with the relevant legislation once they were served with their summonses, and the effect of the private examinations appears to be that they have improved their knowledge of LEPR.
- k. The findings of unsatisfactory performance are therefore unnecessary.
- l. The recommendations in the draft report (set out below in paragraphs 8.1 and 8.2) are agreed to.

5.3 The Commission notes the following in response to the submissions:

- a. As noted in paragraph 1.1, the purpose of the investigation was determined on 7 February 2019. A private examination is one of the methods open to the Commission to investigate alleged serious misconduct and it may focus on limited – not necessarily all – aspects of alleged serious misconduct.
- b. It was the responsibility of these officers to know MA15's criminal history before deciding on the appropriate course of action. Paragraph 3.32 sets out what Sergeant MA11 took into

consideration when he decided to charge MAI5, including that MAI5 had an outstanding criminal charge.

- c. The Commission accepts that MAI5's criminal charge which resulted from the search was dealt with in the jurisdiction of the Children's Court and not the Local Court.
- d. The Commission found, in paragraph 3.34, that Sergeant MAI1 made the decision to charge MAI5 without proper consideration of the principles set out in the *Young Offenders Act 1997*.
- e. The Commission highlights the small amount of prohibited drugs involved to emphasise the lack of consideration of the *Young Offenders Act 1997* by the police officers involved.
- f. There was no conviction recorded against MAI5 in respect of the offence relating to the search. The Commission can also confirm that the matter was not the subject of any appeal to the District Court.
- g. The police officers involved in the search of MAI5 did not properly consider available alternatives to charging, and that by failing to do so, they removed an opportunity for him to rehabilitate his life prospects without the intervention of the criminal justice system.
- h. Whilst the subject officers took the opportunity to re-appraise themselves with LEPPRA prior to the private examinations, the learning outcome was inadequate.

6. Findings

- 6.1 The Commission finds that Sergeant MAI1, Constable MAI2, Constable MAI3 and Constable MAI4 engaged in conduct which amounted to unsatisfactory performance on 25 November 2018 during the search of MAI5 on the street and in the vehicle dock of the police station.

- 6.2 The unsatisfactory performance of Sergeant MAI1 was a greater failure than that of the more junior officers who, to some extent, played follow the leader with their minds in neutral.
- 6.3 Given the Commission's findings regarding the absence of effective training of these officers, leading to ineffective practice in policing, the Commission was not persuaded that these obvious failures of performance amounted to serious misconduct.

7. Affected Persons

- 7.1 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*".
- 7.2 The Commission is of the opinion that Sergeant MAI1, Constable MAI2, Constable MAI3, and Constable MAI4 are affected persons within the meaning of subsection 133(2) of the LECC Act, being persons against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.
- 7.3 For the reasons stated in paragraph 6.3 above, the Commission is not of the opinion that consideration should be given to any of the forms of prosecution or disciplinary action listed in s 132(2) of the LECC Act.

8. Considerations

- 8.1 The current manner in which police are trained in their powers and responsibilities should be seriously reconsidered. This investigation demonstrates that whatever educational methods are being utilised by the NSWPF to inform officers of their powers and responsibilities in relation to LEPPRA, whether it be online learning, direct lectures at the Academy or publications by the police prosecutors, they are not being universally applied in the practice of policing.

- 8.2 The NSWPF should consider instigating wide-ranging, face to face tutorials or workshops led by Local Area Commanders in which real life situations are discussed as hypotheticals and which raise the various practical implementation of LEPR. Such sessions should not be conducted by a “talking head”, but by question and answer, with participation by attendees encouraged. These sessions could ideally be conducted at regular meetings of sergeants, who could then conduct the same sessions with more junior officers. This would create beneficial change from the top down. The attendance at such workshops should be compulsory. Active involvement in such lectures should be linked to promotion and salary increments.

Operation Mainz
Report to Parliament Pursuant to Section 132
Law Enforcement Conduct Commission Act 2016
May 2020

Contact information

Law Enforcement Conduct Commission

Level 3, 111 Elizabeth Street
Sydney NSW 2000
email: contactus@lecc.nsw.gov.au

Postal address

GPO Box 3880
Sydney NSW 2001
Phone: (02) 9321 6700
Toll free: 1800 657 079
Fax: (02) 9321 6799

Hours of operation

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

Copyright: © State of New South Wales through the Law Enforcement Conduct Commission, NSW, Australia, 2000. You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the Law Enforcement Conduct Commission as the owner. However, you must obtain permission from the Commission if you wish to (a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.

Disclaimer: This document has been prepared by the Law Enforcement Conduct Commission for general information purposes. While every care has been taken in relation to its accuracy, no warranty is given or implied. Further, recipients should obtain their own independent advice before making any decision that relies on this information. This report is available on the Commission's website: www.lecc.nsw.gov.au. For alternative formats such as Braille, audiotape, large print or computer disk, contact the Manager, Community Engagement by email: media@lecc.nsw.gov.au or phone: (02) 9321 6700, toll free: 1800 657 079 or fax: (02) 9321 6799.

ISBN: 978-1-74003-023-6

