



Law Enforcement
Conduct Commission

OPERATION ROZZANO

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

JUNE 2019



Law Enforcement
Conduct Commission

Office of Commissioner for Integrity

25 June 2019

32766/131

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 Rozzano.

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

Yours sincerely

A handwritten signature in black ink, appearing to be 'Lea Drake', written in a cursive style.

The Hon Lea Drake
Commissioner for Integrity

Encl.

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1. Introduction

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

2. The Commission's Report

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

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

(1) The Commission is authorised to include in a report under section 132:

(a) statements as to any of the findings, opinions and recommendations of the Commission, and

(b) statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.

(2) The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary infringement,

(c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,

(e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.

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

(3) An "affected person" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including

examination) concerned.

(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

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

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

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

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

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

(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) In this section:

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

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

- 2.5 The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: section 61(a).
- 2.6 Before expressing any opinion that serious misconduct has, or may have occurred, or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence, the Commission should be comfortably satisfied of the relevant facts, applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw*.¹ His Honour said:

*The seriousness of an allegation made, the inherent unlikelihood of any occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issues had been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences.*²

3. Background Facts

- 3.1 Operation Rozzano arose out of an incident on 23 January 2015 when Civilian 1 was pulled over by Officer A in relation to a traffic infringement, as a consequence of which Civilian 1 was charged with driving in a dangerous manner and for a prescribed concentration of alcohol offence.
- 3.2 Arising out of this incident, a solicitor made a number of allegations on behalf of the complainant Civilian 1. These are set out below.
- It was alleged that, after pursuing a car from NSW into the ACT, Officer A approached the recently stopped vehicle being driven by Civilian 1 and drew his service pistol. He then proceeded to tap on the driver's side window of Civilian 1's vehicle with that pistol.
 - Upon Civilian 1 obeying his direction to get out of the vehicle, Officer A holstered his pistol and directed Civilian 1 to lay face down, which he did. Whilst applying handcuffs to Civilian 1, Officer A kned him in the back and punched him in the neck.
- 3.3 In his complaint, the solicitor referred to extracts from the transcript and decision in the proceedings before an ACT Magistrate and he noted the following:

"....Soon after [Officer A] left the Courtroom, Special Magistrate Hunter made the following remarks (transcript page 31 from line 17 to page 33 line 26):

¹ (1938) 60 CLR 336.

² Ibid, at p. 361.

'I was horrified when I heard in cross-examination by him that he'd actually taken his gun out of his holster. I mean, that's not something Australian police do. Very rarely, in fact, I was under the impression that if they even took the snap lock of the holster off they had to report it.'

3.4 Her Honour continued:

'I mean, quite frankly, I was shocked that for a random breath test, admittedly we know that it's for the communities' safety, that's not an issue. I am very much for protecting the community in relation to drink driving and drug driving but I have to assess the situation and quite frankly I was appalled when I heard that this officer had pulled his gun out.

...I was quite distressed to see the action that he did in the man's back. I mean, was that necessary? He says it was but I don't see why. The man was probably scared, had his hands out in front. It's not as if he was, you know, going to move anywhere. He was clearly surrendered and as [legal representative] indicated, he didn't take his hand and put it around his back like you see, like a lot of other officers would do that and put him there.

...What I'm saying is that this officer's behaviour was extraordinary and quite offensive, in my view, and whether it was unnecessary, that's something I'm going to have to think about.

...What really troubles me, I must say, is that when you asked him what happened next he never mentioned that. I don't know whether you even knew about it.

...He didn't and whether he was minimising the actions he took, that concerns me. I must say I was absolutely shocked.

...The police are in a position of power. They must abide by all of the legislative provisions and also the common law to some extent and they know that because that power is so significant, particularly given they're armed.'

3.5 Ultimately, Special Magistrate Hunter dismissed the remaining charge of driving with a level 3 prescribed concentration of alcohol because the breathalyser used by Officer A was not an approved device in the Australian Capital Territory. Costs were awarded against the police for both charges.

3.6 Given there was already sufficient basis to dismiss the charge her Honour made it clear that she did not need to make any formal finding as to whether the excessive use of force justified exclusion of any evidence obtained pursuant to section 138 of the *Evidence Act 2011* (ACT). However, in summing up, her Honour made the following additional remarks (transcript page 68 at line 21):

'The application was made because of the conduct of [Officer A] which I have already outlined and whether the application of force on the defendant when he stopped the motor vehicle was excessive. I comment that whilst I was appalled that [Officer A] drew his gun in the circumstances that he did and that he pointed it at the window directly at the defendant level approximately with his face in circumstances where, in my view, it was clearly unnecessary. The officer had the choice of waiting for another constable to arrive. It is only a short distance from the [Police Station X] ... and he clearly had a radio in his vehicle because he had called both the New South Wales police officers and the Australian Federal Police.

...The other issue agitated by [Officer A] was that he could not see into the vehicle. Clearly that wasn't the case because the video clearly showed one person sitting in the driver's seat and there appears to be no-one else to be seen. In looking at the video there was significant lighting given by the police officer's vehicle headlights and there appeared to be a street light nearby. In my view, the drawing of the weapon upon this defendant was improper and quite frankly out of place and not necessary in the circumstances that [Officer A] found himself in. As was suggested by defence counsel, he could have sat in his car, waited for other police officers to arrive had he thought that there was going to be, the defendant may have had some form of arm in the car or upon him.'

- 3.7 The allegations against Officer A potentially involved him having committed a number of criminal acts in the ACT. The NSWPF therefore referred the complaint to the Australian Federal Police (AFP) for investigation to ascertain whether Officer A had committed a criminal offence(s). The AFP sought independent legal advice from the ACT Director of Public Prosecutions (DPP).
- 3.8 In a written advice dated 30 November 2017 the Director of the DPP concluded that although there was a prima facie case for criminal charges, there were no reasonable prospects of conviction as there appeared to be *"...a clear line of defence open to [Officer A] which in my opinion would very likely raise a doubt in respect of the matter"*.
- 3.9 The AFP conducted its own review of the matter and arrived at a similar conclusion i.e. that Officer A should not be charged with a criminal offence *"...as the circumstances of [Civilian 1's] lawful arrest required a legitimate use of force rendering the inevitable assault on [Civilian 1] to be vitiated."*
- 3.10 The NSWPF then conducted an evidence based non – criminal investigation. The investigation was conducted by Officer C of the Highway Patrol.
- 3.11 In his investigation Officer C had available to him the following material:
 - a. ICV Footage
 - b. Record of Interview with Officer A

- c. Court Transcript
- d. Statement of Officer A
- e. Photographs of the scene at night
- f. COPS Event E57622374
- g. Information from the complainant's solicitor

3.12 Officer C provided an Investigator's Report dated 15 September 2016. In his report Officer C set out the aspects of the complaint worthy of investigation. These are set out below:

- 1. Officer A's unnecessary use of the firearm in removing Civilian 1 from his vehicle and arresting him.
- 2. Officer A's unnecessary use of force in kneeling Civilian 1 in the back.
- 3. Officer A's use of force in punching Civilian 1 in the back when his hands were cuffed.
- 4. Officer A's untruthful evidence, under oath, about lighting of the area as an attempt to excuse his use of the firearm.
- 5. Officer A's refusal to tell the whole truth about the circumstances of Civilian 1's arrest, when he took an oath to do so.
- 6. Officer A's failure to make a use of force entry in the COPs data base, when mandated to do so under the NSW Police Force Handbook.

3.13 Officer C was made aware that, based upon an earlier recommendation by Officer D of the HWP, Officer A had already received training and counselling.

3.14 In the Investigator's Report, Officer C set out the complaint descriptions as below:

Unreasonable use of force (Items 1 – 3 above)

The Complainant alleges the footage shows Officer A jogging towards his client's vehicle with his firearm drawn, tapping the driver's side window glass twice with the firearm and opening the driver's side door.

The Complainant states Civilian 1 was in a position of surrender with both hands raised in the air as he exits the vehicle and lies down face first on the ground. The Complainant alleges these movements were in complete compliance with Officer A's directions.

The Complainant alleges the Subject Officer then holsters his firearm and handcuffs Civilian 1 whilst he was lying on his front, facing the road. Once handcuffed the Subject Officer forcefully knees his client in the mid to lower back and then punches his client in the back between the shoulder blades shortly afterwards.

Lying during proceedings/in a statement (Items 4 and 5 above)

The Complainant alleges that when he gave evidence before the Magistrate Court of the Australian Capital Territory, Officer A conceded under cross examination his oath meant telling the whole truth just not selective truth

of what had happened and that for first time under cross examination he told the Court that he had used his firearm not just *"I got the gentleman out of the car, handcuffed him for security and contact via NSW Police radio telling them what happened and asked for AFP to attend"*.

Officer A also conceded not having made any mention of the use of firearm nor subsequent knee in the back or punch, in his formal written statement.

Failure to make a use of force entry on COPS (Item 6 above)

The complainant alleged that under cross examination Officer A conceded that he had not made any mention of the use of his firearm in the COPS database.

3.15 The outcomes of Officer C's investigation are set out below:

1. Unreasonable use of force (display of firearm) – not sustained
2. Unreasonable use of force (assault-kneeing) – not sustained
3. Unreasonable use of force (assault-punching whilst handcuffed) – not sustained
4. Lying during proceedings – not sustained
5. Lying in a written statement – not sustained
6. Failure to comply with operational procedures (use of force entry in COPS database) – Counselling

3.16 On 8 March 2018, the Commission decided to commence an investigation. The scope and purpose of the examination was:

To investigate the conduct of the New South Wales Police Force investigation into the complaint made by [Civilian 1] regarding the conduct of Officer A of the New South Wales Police Force [local] Highway Patrol at [Location A] on 22 January 2015.

3.17 The Commission conducted private hearings in this investigation and heard evidence on 17 May 2018 and 5 June 2018 from Officer B. Officer B's evidence was chiefly concerned with the investigative processes of the HWP.

4. Findings

- 4.1 The procedures engaged in by the NSWPF ensured that there was an appropriate examination of the likely prospects of success in pursuing criminal charges against Officer A.
- 4.2 The Not Sustained findings made by Officer C concerning Officer A were not reasonably available in light of the evidence in the ICV.

5. Affected Persons

- 5.1 In Part 2 of this report the Commission set out the provisions of section 133 of the LECC Act dealing with the content of reports to Parliament. Subsections (2), (3) and (4) relate to “*affected persons*”.
- 5.2 The Commission does not make any adverse comment regarding the conduct of any individual officer.

6. Recommendations

- 6.1 The Commission recommends that the investigation outcome into Officer A’s conduct be set aside and that a further investigation be conducted by the NSWPF.

7. Considerations Regarding the Complaint Investigation Process within Specialist Commands

- 7.1 In addition to the above recommendation, the NSWPF should consider the following matters, whilst understanding that the changes involved would require the commitment of resources:
 - 1. The number of Professional Standard Managers within the HWP be increased. Given the number of officers serving in that command, the Commission is of the view that three Professional Standard Managers would be the minimum number required to ensure a proper process.
 - 2. Whilst the above suggested allocation of resources appears to the Commission to be the one most likely to produce a turnaround in the professionalism and fairness of investigations in the HWP, an alternative of equivalent resources in support of the Professional Standard Managers could be considered.
 - 3. Professional Standard Managers should be officers who have had relevant investigative experience to enable them to issue directions and assess the thoroughness of an investigation, the likely accuracy of the facts recounted in a report, the findings made by the investigator in a report, the appropriateness of the recommendations in a report and identify the risk of real or perceived conflicts of interest.
 - 4. A Superintendent should chair the Complaints Management Teams to reduce the risk of conflicts of interest and add a layer of further professional experience. This would be particularly useful in the consideration of regional investigations where special pressures on staffing exist.

5. Consideration be given to a review of the most effective means of ensuring changes in the law and best policing practices are delivered to NSWPF HWP officers. HWP officers are often absent from general duties for considerable periods. Consideration should be given to linking mandatory continuing education to promotion and, where the ultimate career position of a police officer has been reached, mandatory continuing education should be required at regular intervals in any event.

Operation Rozzano
Report pursuant to s 132
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