

LECC

Law Enforcement
Conduct Commission

OPERATION SANDBRIDGE

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

MAY 2020

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1 Introduction

- 1.1. On 19 July 2018, the Law Enforcement Conduct Commission (the Commission) received misconduct information in the form of a District Court judgment dated 29 May 2018 in the civil proceedings of *SAN1C v the State of New South Wales*.¹ Much of the following discussion concerning the facts, and on the issue of whether the conduct of police was unlawful, has been extracted from the judgment of the District Court. For ease of reading the precise quotations have not been indicated although the fact of extraction is indicated. The judgment is annexed to this report. The Commission considers that the findings of the Court should be accepted, although it is not legally bound to do so. Except for the evidence of Officer SAN2, who was present at the time of SAN1C's arrest, and whose evidence was not available to the Court, the facts were fully litigated and, with respect, the judgment demonstrates a careful evaluation of the evidence with which the Commission, having carefully considered the judgment, agrees.
- 1.2. In a number of respects, however, the Commission's findings go further than those made by the Court. This is a reflection of its quite different function of determining whether serious misconduct occurred and also takes into account the evidence which was given before it.

The following brief outline of the issues is taken from the judgment.

SAN1C was in 2015 a 53-year-old man with no relevant criminal record. On Tuesday, 24 March 2015 at about 3.30am, SAN1C was sitting on a stone wall in front of a church in Bourke Street, Darlinghurst, texting on his mobile phone when he was confronted by three police officers, Officer SAN1, Officer SAN2, and Officer SAN3, who was there as an observer. After a short conversation, Officer SAN1 announced that she reasonably suspected SAN1C of being in possession of prohibited drugs and proposed that he be searched.

When SAN1C refused to submit, Officer SAN1 told SAN1C that he was under arrest for hindering police in the execution of their duty. As she laid hands on him, another police vehicle arrived. Officer SAN4 alighted from that vehicle and, as Officer SAN1 withdrew to speak to other officers in that vehicle, Officer SAN4 imposed a wrist lock on SAN1C, handcuffed him and conducted a search. No drugs were found.

Officer SAN1 then directed SAN1C to get into the rear cage of a police wagon and he was taken to Kings Cross Police Station. He was there subjected by two male police officers, at the direction of Officer SAN1, to a "strip search". This involved him, at the command of the two police officers; removing his pants and underpants; lifting his genitalia to allow inspection of the area underneath; and squatting while thus naked.

¹ *SAN1C v State of NSW* [2018] NSWDC 190

SAN1C was thereafter given a Court Attendance Notice for hindering police in the execution of their duty, and allowed to leave the police station. The court proceedings were ultimately dismissed.

SAN1C sued the State of New South Wales for wrongful arrest and assault and battery by the police officers.

Shortly prior to the trial, the State conceded that the strip search was unlawful. In the course of the trial the State also conceded that the continued detention of SAN1C, after he was subjected to a search by Officer SAN4, was unlawful. Thus, the State conceded that it was not entitled to continue the arrest of SAN1C after the initial search or to take him back to the police station.

- 1.3. The remaining issues that required determination were identified by the Court as follows:
- (1) Did Officer SAN1, prior to her announcement of a proposed search, suspect on reasonable grounds that SAN1C was in possession of a prohibited drug, and was thereby entitled to search SAN1C?
 - (2) Did Officer SAN1 suspect on reasonable grounds that SAN1C had hindered police in the execution of their duty to conduct the search?
 - (3) Was Officer SAN1 satisfied that SAN1C's arrest was reasonably necessary to prevent a continuation of the offence of hindering?
 - (4) Was Officer SAN4 lawfully justified in applying a wrist lock, handcuffing and conducting a search of SAN1C?

Each of these questions was answered by the Court in the negative.

- 1.4. The Court found in favour of SAN1C and awarded damages in the amount of \$110,000, of which \$35,000 comprised exemplary damages. The Court found in relation to the strip search of SAN1C that the police officers used *"a most invasive power without the slightest justification"*.²
- 1.5. Further, *"the grievous nature of the offensive conduct might be mitigated in circumstances of urgency or turmoil, but here the admitted worst offence, the strip search, was done in the relative peace of the police station, where there was no resistance from SAN1C. Even this did not produce any consideration of the requirements of the law governing strip searches by any officer."*³
- 1.6. His Honour expressed the view that *"the decision to compel a strip search appeared to be a response to SAN1C's lack of submission at the scene"* and that this warranted a significant award of exemplary damages.⁴

² Ibid, para 118

³ Ibid

⁴ Ibid, para 119

- 1.7. The judgment of the Court raised the following issues:
- (i) A person, going about his daily business, was unlawfully arrested and subjected to the degrading ordeal of being strip-searched, during which he was asked to lift his genitals and to squat and cough, in significant part because he chose to exercise his legal rights and protested against the actions of police.
 - (ii) The conduct of the defendant in the civil proceedings, particularly because of the concessions made so late in the day, giving rise to the following finding by the Court, "*Although the State made concessions about the lawfulness of the continued arrest, the belated and limited nature of those concessions meant that SANIC was forced to undertake litigation with its concomitant stress, worry, time and cost, to establish that which the State eventually conceded.*"⁵
 - (iii) What, if anything, flowed from the decision in the proceedings in so far as training and education of NSWPF officers? Did the NSWPF bring the decision, which was very critical of the actions of the involved police officers, to the attention of those officers so that they might learn from their mistakes and not repeat them in the future? Was further training in police powers provided to those officers? Was the decision a catalyst to provide more comprehensive and specific training in police powers under the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)* and was it included in any such training?
- 1.8. The Commission decided that the conduct of the involved NSWPF officers and the NSWPF itself was of such concern that it warranted investigation. That investigation became Operation Sandbridge.

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*

⁵ Ibid, para 78

is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,

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

(2) *In this section:*

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

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

2.3 “Officer maladministration” and “agency maladministration” are both defined in s 11 of the LECC Act. “Officer maladministration” is defined in s 11(2) in these terms:

(2) *Officer maladministration means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- (a) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (b) *arises, wholly or in part, from improper motives, or*
- (c) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (d) *arises, wholly or in part, from a mistake of law or fact, or*
- (e) *is conduct of a kind for which reasons should have (but have not) been given.*

2.4 The conduct of an officer or agency is defined as “serious maladministration” if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

2.5 The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).

2.6 Section 29 provides the authority for the Commission to make findings and express opinions:

- (1) *The Commission may:*
 - (a) *make findings, and*
 - (b) *form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:*
 - (i) *has or may have occurred, or*
 - (ii) *is or may be occurring, or*
 - (iii) *is or may be about to occur, or*
 - (iv) *is likely to occur, and*
 - (c) *form opinions as to:*
 - (i) *whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*
 - (ii) *whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and*
 - (d) *make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and*
 - (e) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter or opinions or the results of any such investigations.*
- (2) *Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.*
- (3) *The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*

- (4) *An opinion or finding that a person has engaged, is engaging or is about to engage in:*
- (a) *officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or*
 - (b) *specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.*
- (5) *Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*
- (6) *The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.*
- (7) *The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.*

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

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

- (1) *The Commission is authorised to include in a report under section 132:*
 - (a) *statements as to any of the findings, opinions and recommendations of the Commission, and*
 - (b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*
- (2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*
 - (a) *obtaining the advice of the Director of Public Prosecutions*

with respect to the prosecution of the person for a specified criminal offence,

- (b) the taking of action against the person for a specified disciplinary infringement,*
- (c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*
- (d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*
- (e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

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

- (3) An "affected person" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.*
- (4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

2.9 In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.⁶ Accordingly findings can form the basis of opinions and recommendations, even if they do not reach the standard of beyond reasonable doubt.

2.10 The Commission has made a determination to protect the identities of all persons involved. Accordingly, all persons will be referred to by codenames in this report. There is to be no publication of the name or image of any of the codenamed persons in relation to the evidence given in Operation Sandbridge or included in this report without further order of the Commission.

⁶ *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

3 The Commission's Investigation

- 3.1 The Commission decided to hold examinations in Operation Sandbridge and, because of the nature of the allegations, and after taking into account the factors set out in s 63 of the LECC Act, decided that the examinations would be held in private.
- 3.2 The following witnesses were summonsed to give evidence in private examinations before the Commission:
1. SANIC
 2. Officer SAN1
 3. Officer SAN2
 4. Officer SAN3
 5. Officer SAN4
 7. Officer SAN6
 8. Officer SAN7
 9. Senior Constable SANC1. (This officer gave evidence about the general education and training of police officers at both the academy and on-the-job. The evidence did not have specific relevance to this investigation and will, therefore, not be included in this report.)
- 3.3 Examinations took place on 6 and 10 December 2018; 25 and 31 January 2019.
- 3.4 The general scope and purpose of the private examinations was to investigate whether:
1. *Officer SAN1, Officer SAN2, Officer SAN3, Officer SAN4 or any other NSW police officer engaged in serious misconduct during the arrest and detention of SANIC on 24 March 2015.*
 2. *The NSW Police Force engaged in conduct during the civil proceedings arising out of the arrest and detention of SANIC on 24 March 2015 that is or could be serious maladministration.*
 3. *The NSW Police Force engaged in conduct in connection with the application of the laws relating to searches, including in particular, strip searches and the application of the Crimes (Forensic Procedures) Act 2000 that is or could be serious maladministration.*
- 3.5 In addition the Commission issued Notices pursuant to s 55 of the LECC Act on 9 October, 30 October, 13 December and 17 December 2018 and 8 August 2019 and a Notice pursuant to s 54 on 16 August 2019.

4 Evidence

A. Evidence of SAN1C

4.1 SAN1C's evidence in the trial as to his movements before being accosted by police was summarised in the judgment as follows.

4.2 In the evening of Monday, 23 March 2015, after spending time with his solicitor at The Rocks in Circular Quay, and meeting another acquaintance at the Quay, he walked to Woolloomooloo to have a coffee and sit at the Finger Wharf. He was unable to obtain the coffee. He thought he would go to a pub in William Street and commenced to walk up Bourke Street. When he arrived at the corner of William and Bourke Street, he realised it was after the 1.30am lockout time, so he would be unable to enter the pub. He walked across William Street and purchased a pack of cigarettes at a 24-hour convenience store at the corner of Bourke and William Streets. He then walked about 40 metres up Bourke Street, sat on a stone ledge in front of the church and commenced responding on his mobile phone to a text he had received from one of the friends he had been with earlier in the evening. He was wearing a watch, blue jeans, a blue t-shirt, brown leather shoes and a checked blue sports jacket. By that stage the time had reached about 3.30am. There were three street lights within close proximity of where SAN1C was sitting, which shed sufficient light to enable him to be viewed from at least 50 metres.

4.3 SAN1C gave the following evidence in the Commission:

4.4 He was arrested on 24 March 2018, taken to Kings Cross Police Station and subjected to a strip search. He was handcuffed to the rear and placed in the back of the police truck. (T 5) He could not recall how he got into the truck "*though someone helped me*". (T 9) On arrival at the police station, he was told by Officer SAN2 to get out of the truck. He explained to her that he had a knee injury and that it was impossible for him to get out of the truck with his hands cuffed behind his back. Officer SAN2 told him to "*crawl out of the truck*" and that that was his problem, not hers. (T 5) He crawled out on his knees whilst he was still handcuffed to the back.

4.5 At the point of his arrest, he was subjected to a general search. He was restrained by two officers. Officer SAN4 searched his pockets, the inner lining of his thighs, his groin area, the top of his body and across his hands to ensure that he had no weapons or concealed illegal substances. (T 8)

4.6 On arrival at the police station, and after getting out of the truck he was taken to a holding area where he was told to sit. (T 10) By the time he was seated, the handcuffs had been removed but he could not recall when that had occurred. (T 12) A police officer, who he assumed was the Custody Sergeant, approached him and informed him that he was to be subjected to a search. He could not recall whether he was told that it would be a strip search. (T 11)

4.7 He was taken into a room close by to where he was sitting. He was not introduced to the officers who were to search him nor provided with any

documents, except for a court attendance notice, which he was given after he had been searched. (T 13) There were three searching officers. One was Officer SAN4, but he could not recall the names of the other two. He was not asked to co-operate or consent to the search. He felt that he had no choice but to comply with directions as he was worried about what might happen if he did not. (T 15) He was not told why the police officers were searching him. (T 16) He was directed to first take off his shoes, then socks, T-shirt, jeans and underpants. (T 17-18). The officers placed each item of clothing on the floor. He recalled that the officers were talking to him in a smug way and *"they made derogative marks about the brand of my underwear"* (T 17).

- 4.8 When he was naked, the officers asked him to lift up his genitalia and to squat. He could not recall which act he was directed to first do. (T 19) He was not asked to perform any other acts. He was then handed his clothes and he got dressed (T 20). He was devastated and in a state of shock (T20). He was then taken back outside to the area where he had initially sat on arrival at the station. Officer SAN2 then came to speak to him and *"basically threw the paper in my face and said to me, 'Give that to your little lawyers'"*. (T 22) He was escorted out of the police station by Officer SAN3. (T 21)

B. Evidence of Officer SAN1

- 4.9 The Court summarised the evidence of Officer SAN1 as follows. She, Officer SAN2, and Officer SAN3 were in a police vehicle proceeding north down Bourke Street towards William Street.
- 4.10 It appears that Officer SAN1 was driving and that Officer SAN2 was in the backseat. Officer SAN3 noticed SAN1C from 50 metres away, Officer SAN1 from 15 metres. She turned the car to the right into St Peters Street and parked.
- 4.11 SAN1C watched the police vehicle and its occupants as the car stopped a few metres short of where he was sitting. At this stage, Officer SAN1 said she *"started to form some reasonable suspicion"* of SAN1C. The officers got out of the car and walked towards SAN1C. Officer SAN1's account of the ensuing conversation was as follows:

"A. ...I said, 'Hey, mate, I'm Officer SAN1 from Kings Cross Police. What are you up to?'"

...

In response he said, 'Nothing, I'm just having a rest,' and I said, 'Where have you been?'"

...and he said, 'Just up at the Cross,' and I said, 'Where are you off to?' and he said, 'I'm just going home,' and I said, 'Where's home?' and he said, 'The Rocks,' and I said, 'Why are you up here if you're walking from Kings Cross to The Rocks. It's the totally wrong direction.'

...He said, 'I haven't done anything wrong. I'm calling my lawyer. You have no jurisdiction to do this.'

...

I said, 'Mate, this doesn't really make sense to me. It's nearly 4 o'clock in the morning and you're up here by yourself, having walked in the wrong direction to get from Kings Cross to The Rocks.'

A. He then said I think, 'I haven't done anything wrong. I'm calling my lawyer. You can't do this.'

...

Q. Did you respond at all to that comment of SAN1C's?

A. I did. I said, 'Now that you're getting aggressive about it, it's raising my suspicions even more that something's not right here and I'll let you know that I believe you may be in the possession of prohibited drugs and I'm going to submit you to a search.'

Q. At that point in time did SAN1C say anything to you?

A. He did. He stood up off the wall and stepped in towards me and was waving his right finger in my face and said, again words to the effect of, 'You can't do this. I'm calling my barrister. You're not searching me. I haven't done anything wrong.'"

- 4.12 The case, made by the State on behalf of the NSWPF, to justify the proposed search, and which were submitted to constitute the reasonable grounds for Officer SAN1 suspecting SAN1C to be in possession of a prohibited drug, comprised the following: the place, time and date where and when SAN1C was sitting; SAN1C's visual focus on the police, and in particular Officer SAN1; SAN1C's answers to the preliminary questions asked of him; and his change in demeanour, becoming more aggressive during the conversation. As to the place, date and time, Officer SAN1 gave evidence that Darlinghurst, in general, and Bourke Street, in particular, were, *"very well known...particularly well known for prostitution, solicitation, street offences, drug crime"*.

"Bourke Street generally, but that corner [of Bourke Street and William Street where the convenience store is located] in particular is probably the highest incidence of prostitution and vice events in that particular area...wasn't the only area patrolled. It was the whole of Darlinghurst and the whole of Woolloomooloo as well as the entertainment precinct of Kings Cross."

Officer SAN1 also said that the main crime she came across at the corner of Bourke Street and William Street:

"would be prostitution and drugs which often go hand in hand as well, as well as other street crimes such as possessing implements to break into houses or cars. That would be the main threat."

- 4.13 The Court noted that no evidence had been given about the time of day (3.30am) or the day of the week (Tuesday morning) being the particular times for crime in the area. However, even though it may be less common, even far less common, for a person to be sitting on a stone wall in the early hours of the morning, compared to say 3.30pm, there was no evidence that indicated any connection between the time of the day (or the day of the week) and the possession of prohibited drugs, or even offences generally at that location. Accordingly, the time of day, and the day of the week were rejected as being relevant to the reasonableness of Officer SAN1's suspicion.
- 4.14 As to SAN1C's visual focus, Officer SAN1 said that SAN1C, *"immediately stopped texting... when he saw us. I started to form some reasonable suspicion"*.
- 4.15 Officer SAN1 said she noticed SAN1C when she was 15 metres away. The police car was proceeding north approaching SAN1C. Officer SAN1 noticed that SAN1C looked up from his phone. She said, *"He appeared startled. His eyes widened and he maintained a fixated watch on us as our vehicle approached which was a slow speed."* The police car was parked within five metres of SAN1C.
- 4.16 As the Court observed, even at 5 kilometres an hour, travelling that distance of 10 metres would take about 7 seconds, during which Officer SAN1 observed SAN1C sitting on a ledge, texting on his mobile, then look up, notice the police vehicle, stop texting and maintain his focus on the police and their vehicle. Officer SAN1, as the apparent driver, would also have directed some of her attention to where she was parking the car. The duration of her observations could not have been long, but by then Officer SAN1 had started to form a suspicion.
- 4.17 Officer SAN1 said that after the conversation quoted above, she formed the opinion that SAN1C might have been under the influence of drugs. His eyes were *"extremely wide and he was fixated on. He didn't blink at all during the conversation and he had a, a, a strange facial expressions, being a strange smirk on his face as he spoke to me"*. He remained seated.
- 4.18 Taking up the question of the time when SAN1C's attitude towards the police became more aggressive, the Court thought it unsurprising that a person may become more adamant when it is suggested, especially by the police, that they are untruthful, even more so when they are to be searched because of it. Accordingly, it was unlikely that this would provide a reasonable basis for the suspicion asserted. But, in the event, the Court concluded that in fact SAN1C did not alter his demeanour until the proposal of the search was raised. Accordingly, the circumstance of his changed demeanour did not provide any ground for a suspicion of possessing prohibited drugs, since his demeanour did not change until after the suspicion had been formed and he was told he was required to submit to a search.
- 4.19 Nor did the Court consider that SAN1C's attention on the police vehicle or the police when they alighted from the vehicle could have any force as a reasonable ground for a suspicion that he was in possession of prohibited

drugs. It is unsurprising that a person's attention, in the early hours of the morning, when there is no evidence of other activity, would be directed to a police car driving towards them with headlights on, only a short distance away, and subsequently, on the officers as they approached and spoke to the person. Any other conduct, such as looking away or ignoring the police, would be peculiar and, if anything, more engendering of suspicion.

- 4.20 The answers given by SAN1C to Officer SAN1's questions appeared to be significant to her. But SAN1C remained seated, he answered her questions directly, and the circumstance that he was across William Street and 40 metres up Bourke Street, when one of the most direct routes home from the centre of Kings Cross was along the south side of William Street, does not suggest dishonesty, even less so when a 24-hour convenience store is nearby. If his answers were not dishonest, their content could not be suggestive of any criminal offence.
- 4.21 The Court did not accept that an account by SAN1C for sitting on the stone wall could, false or true, support a suspicion of possessing prohibited drugs. A false account might support a suspicion that SAN1C did not want to disclose the true reason for his presence, but that provides no link to possessing prohibited drugs. The Court concluded that Officer SAN1 appeared ready to find an untruth when there was none, and then used that in her mind to bolster her suspicion.
- 4.22 The only matters raised by Officer SAN1 that, in the Court's view, had any arguable connection with the suspicion of possessing prohibited drugs were the location of SAN1C, and his having the appearance of being under the influence of drugs.
- 4.23 The latter was not supported by any evidence of Officer SAN3. Officer SAN2 did not give evidence, so there is no corroboration of this opinion or these observations of Officer SAN1. The Court therefore inferred that Officer SAN2's evidence would not have assisted the State on this point, noting that the State did not plead the grounds for this suspicion until part way through the trial was not a point in its favour. Officer SAN2 gave evidence to the Commission, set out below, but she did not suggest that SAN1C's appearance suggested the use of drugs.
- 4.24 Further, Officer SAN1 did not ask SAN1C if he was in possession of drugs. The Court was not persuaded that there were any visual signs indicating that SAN1C was affected by drugs and did not accept that, at the time, Officer SAN1 believed that SAN1C was under the influence of drugs. On this point, whilst also being skeptical as to Officer SAN1's evidence about SAN1C's facial expression, it did not accept that she regarded it as suggesting the use of drugs.
- 4.25 As to the location of SAN1C, the Court considered that it could, with other relevant matters, have formed the basis for a reasonable suspicion, but it was plainly insufficient by itself, noting that Officer SAN1, herself, did not form that opinion only on the basis of the location. The location did not suggest SAN1C was in possession of prohibited drugs any more than it suggested that he was engaged in prostitution or housebreaking, matters which no officer suspected.

- 4.26 For these reasons, the Court found, and the Commission agrees, that there were no reasonable grounds for Officer SAN1 to suspect that SAN1C possessed prohibited drugs and therefore she had no lawful justification to search him.
- 4.27 The Court noted that there was another reason why Officer SAN1 was not entitled to search SAN1C. Section 32(7) of LEPR requires:

"(7) A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned."

In other words, Officer SAN1, as a woman, was not lawfully entitled to search SAN1C, and he was therefore entitled to resist. When she announced the proposed search only Officer SAN2, also a female officer, was present, apart from Officer SAN3 who was present only as an observer. The evidence did not indicate that Officer SAN3 would conduct the search or that any words were said to suggest that a person other than Officer SAN1 would conduct the search.

Officer SAN3's evidence was to the effect that Officer SAN1 said she "was going to search" SAN1C. SAN1C's response, "You're not searching me" indicates the same. On Officer SAN1's account, she said, "I'm going to submit you to a search," and, "You're going to be submitted to a search." In circumstances where no potential male police officer was present to conduct the search, the Court was satisfied that these words necessarily connoted a search by either Officer SAN1 or possibly Officer SAN2. . In that event, an illegal search was proposed, and for this reason also, SAN1C was entitled to resist. The Commission regards this conclusion as inevitable.

- 4.28 Officer SAN1 gave the following evidence in the Commission:
- 4.29 She had been stationed at Kings Cross for just under ten years. She had spent about three and a half or four years in general duties before moving to the drug unit and detectives. During her time in general duties, she patrolled the Kings Cross/Darlinghurst area every nightshift. She could not recall whether there were any prostitutes in the vicinity on the night of SAN1C's arrest but it would have been unusual if there were none. She would have occasion to stop perhaps 20 people on a Saturday night and less during the week. Of those persons stopped, she would search about a quarter.⁷
- 4.30 She arrested SAN1C in the early morning of 24 March 2015. She made a statement in relation to that arrest on 6 May 2015; gave evidence in the Local Court criminal proceedings in September 2015 and in the civil proceedings in the District Court in 2018.
- 4.31 She formed an adverse view about SAN1C, firstly, because of the location. That area was known for prostitution and drug supply. On occasion, she had stopped persons for the purpose of asking them questions because

⁷ Transcript of private examination of Officer SAN1, 10 December 2018, pp.35-36

they were seated alone in Kings Cross. She accepted that persons have a legal right to refuse to answer questions but that that refusal alone could give rise to suspicion in her mind that they might be carrying drugs or involved in some other crime.⁸ Officer SAN1 was asked the following series of questions⁹:

Q: *I've told you, what I've told you is this: you have got a man alone 2am in this particular area, where SAN1C was, and I want you to assume you went up to him and said, "What are you doing here?" He said, "I don't have to tell you that and I don't propose to tell you anything, please go away". Let's assume that occurred. Would you regard that as sufficient to raise your suspicion?*

A: *It would raise my suspicion somewhat, yes.*

Q: *Sufficient to then and there detain and search them?*

A: *No, not necessarily.*

Q: *What if you then said, "I have a suspicion about your behaviour and I want to search you". And he said, "No, you don't have legal right to search me". Would that reinforce your suspicion, or not?*

A: *It would probably increase my suspicion somewhat, yes.*

Q: *You think, do you, that an ordinary member of the public who doesn't want to be searched by a police officer is therefore likely to be carrying drugs or committing a crime? Do you think that?*

A: *I don't think that necessarily, but it would begin to increase my suspicions, yes.*

Q: *I see. So the exercise of legal rights is something you do not have regard to when you're considering whether or not you have a suspicion that they are conducting some criminal activity?*

A: *I do have regard for it. I do understand they have a right not to answer.*

Q: *Right. But when they exercise that right, that, to your mind, starts some process of suspicion, does it?*

A: *It would be one of many factors that would start, yes.*

4.32 Since the SAN1C decision, Kings Cross had implemented a change with respect to conducting strip searches at the station, namely that prior to any such search taking place, police officers are required to speak with the Custody Manager first and obtain their permission to conduct the search. Prior to that change, it was Officer SAN1's understanding that unless it was

⁸ *Ibid*, p.8

⁹ *Ibid*, p.9

a drink driving charge, most prisoners were strip searched prior to being placed in custody.

- 4.33 Officer SAN1 read the judgment in preparation for her appearance before the Commission but otherwise had not read it as she did not want to. She was aware of the issues during the hearing and she still had the view that she personally had a reasonable suspicion. She was now aware of the distinction between *“personally having a suspicion and, on the other hand, objectively whether that suspicion was reasonable”* and that that distinction was *“vital”*.¹⁰
- 4.34 Officer SAN1 agreed that she would have been assisted by reading the judgment in *SAN1C* and understanding what a judge thought about whether her actions were objectively reasonable or not. No-one had suggested to her at the time that she should read the judgment or that it might be a learning experience for her. She also agreed that it *“would be helpful if in training sessions certain scenarios are set up, the kind of scenario that often arises... in which you were called on to analyse whether objectively this might or might not justify exercising search powers”*.¹¹
- 4.35 She spoke with her Commander after the decision was handed down and she was provided with provisions of LEPRA as a *“refresher”*. Strip searches were not a focus at the Academy and she did not remember *“ever having learnt them until perhaps this year in the detectives program”*.¹² She may have learnt the provisions in relation to strip searching at the Academy but *“they definitely weren’t the sections that were focused upon”*.¹³ She learnt on the job. One change in the procedure was that in the last couple of months, officers were advised that permission should be obtained from the custody manager prior to conducting a strip search. She had been at Kings Cross for six and a half years prior to the arrest of SAN1C. The position during that period of time was the decision to conduct a strip search was that of the arresting officers.¹⁴
- 4.36 After SAN1C was brought into the police station, he sat in the loading dock for a short period of time. They were awaiting male officers as she had determined by that stage that a strip search was necessary.¹⁵ He had been brought in to be charged with hindering police by refusing the search. He would have been strip searched in any event as the standard operating procedures at that time were that people detained or in custody at the police station were routinely strip searched.¹⁶
- 4.37 At the time of SAN1C’s arrest, there were three types of searches-frisk, ordinary and strip. Now there is only an ordinary and a strip search. Officer SAN4 conducted a frisk search but he was unable to conduct a proper ordinary search because of SAN1C’s *“physically resisting and refusing”*. Had

¹⁰ Ibid, p. 11

¹¹ Ibid, p.13

¹² Ibid, p.18

¹³ Ibid.

¹⁴ Ibid, p.19

¹⁵ Ibid.

¹⁶ Ibid, pp 20-21

he consented to an ordinary search and that had been appropriately conducted, it would have been the end of the matter.¹⁷ Up until her suspicion was heightened by the circumstances, she would have been satisfied with only an ordinary search. She was not told by Officer SAN4 that the ordinary search had failed, but she assumed that it had and for that reason advised the other officers that SAN1C was to be taken back to the police station. She considered an ordinary search at the police station would not be sufficient as:

"The fact that we ended up back at the police station and it had gone on for that long, and it had - he refused so adamantly, my suspicion had increased to the point where at that time I felt that a strip search was necessary for the purpose of the search."¹⁸

- 4.38 Officer SAN1 could not recall whether she advised the custody manager when she arrived at the station or even who the custody manager was. She had no recollection of any such conversation. The standard process at the time was that someone involved in the situation would call the sergeant or custody manager. *"It's whoever has a second, jumps on the phone and makes the call". "If the custody manager wasn't down in a couple of minutes, someone would realise someone's forgotten to call them and would do so, or would ask a question, 'Have you called the custody manager?'."¹⁹*
- 4.39 Officer SAN1 could not recall how SAN1C got out of the police truck. She assumed that he stepped out but she was not sure about how he did so as there are two different types of caged vehicles.²⁰
- 4.40 Officer SAN1 could not recall having a conversation with Officer SAN4 about the need to conduct a strip search of SAN1C. It was her intention that this should occur and there may have been a *"common understanding that he was doing that at my direction"*. She assumed that Officer SAN4 conducted a strip search based on her belief.²¹
- 4.41 In the week prior to giving her evidence, Officer SAN1 was asked by the Commander to acknowledge her understanding of the powers of search and arrest under LEPRA. She was provided with sections 21, 30 to 33 and 99 of LEPRA and asked to read them. She had not received any correspondence or communication from the Education Officer. She was not aware that she was required to ask a person for their co-operation during a strip search. She now understood that to be the case. She articulated the proper procedure if, as an arresting officer, she was to undertake a strip search:

"You need to have reasonable suspicion that it's necessary for the purpose of the search; you have to advise them that you're going to ask for their cooperation in the search; that they are going to be

¹⁷ *Ibid*, p.21.

¹⁸ *Ibid*, p.25

¹⁹ *Ibid*, p.26

²⁰ *Ibid*, p.27

²¹ *Ibid*, p.28

asked to remove clothing; what that clothing is and why you are doing that. They have to be searched by someone of the same sex and out of the view of anyone of the opposite sex. No persons who are not reasonably necessary to be there are to be present. Privacy - it is conducted in a private place.”²²

- 4.42 As stated earlier, the procedure had changed but previously the decision rested with the arresting officer as to whether a strip search was to be conducted. After the search the police officer would then walk the person into the charge room and introduce them to the custody manager. Now permission to conduct a strip search is first sought from the custody manager.²³
- 4.43 Officer SAN1 prepared the COPS entry of the event on the same night that she created the charge. The same information contained in that COPS event was copied straight across to the Facts Sheet which accompanied the charge. She made a statement for the purpose of the criminal proceedings against SAN1C on 6 May. She spoke with the solicitor acting for the State of New South Wales in the civil litigation and they went through her statement with her but did not prepare a fresh statement for her.
- 4.44 The following was put to Officer SAN1:²⁴
- Q: *In all fairness, I think you should understand that on one view of your conduct, and indeed if I accept SAN1C’s evidence, one would find, is that this was really a form of pay-back for his declining to be compliant with you, for his indignation at insisting he had legal rights and feeling that you were outraging his legal rights, and that you were out to show him who was boss. That is what this conduct smacks of. Now, what do you want to say about that?*
- A: *That’s not what I thought at the time at all. We deal with difficult people on a daily basis. If you let that upset you to the level of influencing how you respond, then - well, you wouldn’t be a very successful police officer. I’m used to resistance in different forms.”*
- 4.45 Prior to the incident with SAN1C no-one had raised any concerns about Officer SAN1’s conduct during searches she had conducted or had directed to be conducted.
- 4.46 At the time of searching SAN1C, Officer SAN1 said she believed that she had a legal right to do so. Her suspicion was heightened by his refusal to allow to be searched and the fact that he told her that he was going home yet he was walking in the opposite direction to where he resided. She was of the view that there was no sensible or legitimate explanation as to how SAN1C

²² *Ibid*, p.31

²³ *Ibid*, p.31

²⁴ *Ibid*, p.36

came to be at the location he was.²⁵ She was asked the following questions:²⁶

Q: *His assertion that you had no legal reason to search him, how could that possibly raise a suspicion, or support a suspicion? That's what I have difficulty in understanding.*

A: *In my experience, it's very unusual for someone who - someone to refuse if there's no basis for that refusal. I'm not saying it's, like, unlawful for him to do so, but in my experience, if you legitimately have done nothing wrong, if you had nothing in your possession, there would be no reason to refuse a search.*

Q: *You might regard it as humiliating, did that not occur to you, that a middle-aged man with no criminal offences might think it humiliating to be searched in a public street by uniformed police officers?*

A: *I can see that in hindsight, perhaps, but it was dark, it was - there was no-one else around, it wasn't a spectacle, it was in a quiet laneway.*

Q: *So he shouldn't have been humiliated, is that what you're saying?*

A: *No, I can see in hindsight he may have been, but that's not something I turned my mind to at that time.*

4.47 She adhered to the evidence contained in her prepared statement. She could not recall if she was present in court either when SAN1C gave his evidence about the incident either in the civil proceedings or in the Local Court proceedings. She gave her evidence last in the civil proceedings. She did not agree with all of the evidence summarised in the District Court judgment.²⁷

C. Evidence of Officer SAN2

4.48 Officer SAN2 gave the following evidence:

4.49 At the time of SAN1C's arrest in March 2015 she had been a police officer for over 5 years and had only worked at Kings Cross police station. She left the force in May 2015. She was not asked to provide a witness statement in the criminal proceedings against SAN1C. She was contacted by a private law firm in relation to making a statement for the civil proceedings. She could not recall who contacted her. She recalled having a phone conference during which she was asked questions about the event involving SAN1C. Ultimately she was not required to give evidence in those proceedings.²⁸

4.50 On the evening of SAN1C's arrest, she was working in the same truck as Officer SAN1. Officer SAN1 was driving. They saw SAN1C sitting on a dark wall and Officer SAN1 suggested that they go speak to him. They

²⁵ *Ibid*, pp.38-41

²⁶ *Ibid*, p.42

²⁷ *Ibid*, p.44

²⁸ Transcript of private examination of Officer SAN2, 6 December 2018, pp 4-12.

approached him and asked him questions about what he was doing in the area. Officer SAN1 spoke to him *"normally, asked the general questions, if you are suspicious of someone in an area well known for these sort of things, you chat to them. He was very-yeah-defensive, wasn't providing much detail, wasn't really answering the questions that were being asked"*.²⁹ It was a standard stop. In her experience, she had stopped and questioned persons in similar circumstances to those of SAN1C. Their suspicion regarding SAN1C was first aroused because the route he was taking to get home did not make sense. Thereafter, it was his way of answering, *"it was very defensive, which I guess could raise suspicion as well"*³⁰. In addition other factors were the fact that he was in a place where drug deals frequently took place, the time of day and the fact that he was sitting in the dark.

- 4.51 SAN1C was handcuffed on arrest because he was *"very argumentative and defensive. He wasn't compliant... I believe he was resisting a bit"*.³¹
- 4.52 The usual practice when someone was brought back to the station, if they were to be strip-searched, was to take them straight into the searching room. Two officers were required and the custody sergeant would generally be down in the custody area. Not everyone would be strip searched. It would be only if a police officer believed that there was or likely could be something on the body of the person which an ordinary search would not find. SAN1C would have been brought back to the station either for a strip search or to be given a summons. Prior to returning to the station, they would have radioed ahead to let the custody sergeant know that they were bringing someone in. She could not recall if that occurred on this occasion. However, you could bring people back for the purpose of issuing them with a summons and then they would not necessarily be entered into the custody system nor brought to the attention of the custody sergeant.
- 4.53 Officer SAN2 could not recall who searched SAN1C. Officer SAN3 was with them in the van so he would have been one of them. If Officer SAN4 had not returned to the station, then someone would have made a call upstairs to get another secondary male officer. The system in place was that the custody manager would be informed that a strip search was to take place. Even if the custody manager was not in the custody area, they had CCTV and could see it. She had had training to do with searches whilst at the academy.³²
- 4.54 When conducting a strip search, she would ask a female detainee to systematically remove their articles of clothing. She would not force anyone to remove clothing. She would handcuff them and complete a more thorough search. Once they were naked, she would ask them to squat with their arms out and then they could get dressed.³³

²⁹ *Ibid*, p.13

³⁰ *Ibid*, p.17

³¹ *Ibid*, p.19

³² *Ibid*, p.28

³³ *Ibid*, pp.31-32

4.55 If a naked detainee requested to speak with the custody manager, she would ask them to get dressed first and she would then take them to see the custody manager. She would not have a naked female detainee present before a male custody sergeant and vice versa.³⁴

D. Evidence of Officer SAN3

4.56 Officer SAN3 gave the following evidence:

4.57 He was a constable. At the time of SAN1C's arrest he was a probationary constable and he had been a police officer for only about three and half months, during which time he had only been stationed at Kings Cross. He was now working in a remote police station. At the time of the arrest he was confident of his knowledge about stop, search and detain powers but less confident about strip searching. He understood that he had the power to stop, search and detain someone if he had a reasonable suspicion that someone has a prohibited drug on their person, or anything unlawfully obtained or relevant to the commission of a relevant offence.³⁵

4.58 On the night of the arrest, as a probationary constable, he was there more or less to observe what Officer SAN1 and Officer SAN2 did. He recollected Officer SAN1 asking SAN1C what he was doing there, where had he come from and where was he going. She commented on his walking in the opposite direction to where he lived and that she thought that was strange.

4.59 Officer SAN3 was asked about his training at the academy. He recalled that they were given written materials throughout lectures but he could not recall receiving any specific training or material on the interpretation of sections of LEPR, only the actual provisions. Since leaving the academy he had been given no training on search powers but he had recently received online circulars with respect to strip searches.

4.60 Officer SAN3 was aware that there had been a judgment in the civil proceedings in SAN1C but he was never informed of the outcome.³⁶ Since that decision was handed down he has not been asked to formally acknowledge his understanding of police powers, policies and procedures.³⁷

4.61 It was the practice then, at Kings Cross, to search most persons who were brought into custody. He has conducted one strip search in the year where he is currently located. It is only a two-manned police station.

4.62 Officer SAN3 agreed that his statement and Officer SAN1's statement prepared in relation to the prosecution of SAN1C were almost identical. He was shown an email from Officer SAN1 dated 6 May 2015 sent to Officers SAN3, SAN4 and SAN5. The email stated:

"Sorry to do this to you but I need a statement in relation to the matter of SAN1C.

³⁴ *Ibid*, p.33

³⁵ Transcript of private examination of Officer SAN3, 31 January 2019, p.22

³⁶ *Ibid*, pp.26-28

³⁷ *Ibid*, p.29

Officer SAN4 and Officer SAN5 I know you didn't really do anything but it's our word v his and I really don't (sic) want him to get off. it will just be corroborating (sic) and the fact that we called for another car due to his aggression. Thanks.

Steve, you were with me and ajay so it will be pretty much the same as mine. Let me know if you need help with it.

Ive (sic) attached mine for reference."

- 4.63 Officer SAN3 initially stated that he did not copy her statement but that he refreshed his memory from her statement, hence the similarity.³⁸ However, on reflection, Officer SAN3 conceded that he must have copied it, given the similarities. It was his practice now to prepare statements only from his memory. He relies on his own Fact Sheets and his own COPS entries or his notebook. At that time however, on receiving the email from Officer SAN1, he felt pressure that his statement should reflect what Officer SAN1 wanted it to as expressed in her email.³⁹
- 4.64 It was general practice that the main person interacting with the person of interest would obtain the relevant details and make notes in their notebook. He may have been given the notes to countersign but he would not have made his own notes in those circumstances.⁴⁰ He had no recollection if Officer SAN1 made notes of the interaction with SAN1C. He now makes his own notes for his own record.
- 4.65 Officer SAN4 conducted a pat down search of SAN1C and took his phone and his wallet and handed them to Officer SAN3. He did not look at his driver's licence. He did not think that SAN1C was asked his name, nor was there any attempt to identify SAN1C or conduct a criminal history check, prior to taking him back to the police station. SAN1C was handcuffed to the front when he got into the police van. He could not recollect how SAN1C got into the van, whether he stepped up or whether Officers SAN4 and SAN1 assisted. He could not recall if SAN1C said anything about a knee injury at that time.⁴¹
- 4.66 Once SAN1C was back at the police station, Officer SAN4 told him that they were going to strip search SAN1C. He was not booked in. He was taken to a small room off the van dock. At that time, the majority of persons brought in under arrest were strip searched. Officer SAN3 noted that a lot of persons were brought in for drug-related offences and many of them had warnings for hiding drugs or other items in their underwear or between their buttocks so it was standard practice to strip search them. He conceded that there was no suggestion that SAN1C had any drugs on him, but that Officers SAN1 and SAN4 were still of the belief that he may have prohibited drugs on him. SAN1C was then issued with a Field CAN and they released him through the roller door attached to the van dock.

³⁸ *Ibid*, pp. 33-34

³⁹ *Ibid*, p.55

⁴⁰ *Ibid*, pp.37-38

⁴¹ *Ibid*, pp.38-41

- 4.67 It would have been useful for his learning experience to have been informed of the outcome of the civil proceedings in SAN1C. He had had no interaction with anyone involved in the matter until giving his evidence before the Commission.⁴²
- 4.68 During the strip search SAN1C was asked to lift his genitals and to squat. It was standard practice during a strip search to ask a male prisoner to perform those actions. It was his understanding that a police officer could ask a person to perform those actions and he had gained that understanding from working with senior officers who had done it. He had never been in a situation where a person had refused to comply with those directions but he understood that you cannot touch a person during a strip search. He has never asked someone to part their buttocks during a strip search nor has he ever been present during a strip search where someone has been asked to do that. *"My understanding is that's the general purpose of the squat, because that's what you will achieve without them actually having to part it or you actually requiring them to do something of that nature."*⁴³

E. Evidence of Officer SAN4

- 4.69 Officer SAN4 gave the following evidence:
- 4.70 He had been a police officer for over ten years. He was involved in the arrest of SAN1C on 24 March 2015. He received a radio request to attend the scene, which he did. On arrival, he saw Officer SAN2 struggling with SAN1C and he went to assist. *"He was trying to pull away from her...I don't believe he was trying to punch her or anything, but it looked like he was trying to get away from her and she was trying to control him."*⁴⁴ SAN1C was not handcuffed at the time. He took hold of SAN1C's left hand and applied a wristlock *"to try and control him"*. He was informed shortly afterwards that SAN1C needed to be searched and they believed that he may have had something in his possession. The wristlock was effective and shortly thereafter he placed handcuffs on SAN1C. He then conducted a full search which turned up nothing. That search would have included him running the outside of his hand up both sides of the inner thigh and the back as well but he now did not have a recollection of doing that as it was four years ago.⁴⁵
- 4.71 After nothing was found, Officer SAN1 told him that they were going to take SAN1C back to the police station. SAN1C was helped up into the back of the truck. He could not recall there being any protest by SAN1C as to a sore knee or being unable to climb up.
- 4.72 His next involvement with SAN1C was back at the police station. Officer SAN1 had asked him to come back to conduct a strip search of SAN1C. At that time, any person who came into custody at Kings Cross would be strip

⁴² *Ibid*, p.44

⁴³ *Ibid*, pp.46-47

⁴⁴ Transcript of private examination of Officer SAN4, 10 December 2018, p.7

⁴⁵ *Ibid*, pp.8-12

searched "for officer safety and safety of that person."⁴⁶ Some time before the incident with SAN1C, they received an email informing them that not all prisoners would be strip searched and that if they were to be strip searched, the custody manager would have to sign off on it. For this reason, he believed that there would be a custody record of SAN1C having been strip searched. He clarified that if someone was brought back for the purpose of either identification or a strip search and then given a field CAN, then they would not be booked into custody.⁴⁷

- 4.73 He conducted all strip searches in the same manner. He asked everyone to squat whilst facing him. He would ask them to take off their underwear last so that they were not naked for too long. Most of the time he would not ask them to completely remove their underwear but just pull them down and then ask them to squat.⁴⁸ It was just "*done as a matter of course*" to ask the men to lift up their genitalia for the purpose of the search.⁴⁹ He learnt that this was a reasonable request from on the job training. He also learnt about searches at the academy but he could not recall being taught the "*full-on process*".⁵⁰ Officer SAN3 was present during the strip search. After the search was completed, SAN1C was brought out of the search room and walked into the custody area.
- 4.74 He made a written statement for the purpose of the criminal prosecution of SAN1C, which was relied on in the civil proceedings and in which he gave evidence. After the judgment was handed down in the matter he was not provided with a copy nor with any advice about the outcome of the proceeding.⁵¹ It would have been helpful for him to know the outcome, particularly if it amounted to him having acted unlawfully. "*I would have-you would think that if you are involved in a matter, you would be advised of the outcome, at least.*"⁵²
- 4.75 The day before appearing before the Commission, he was asked by a Chief Inspector to sign a document acknowledging that he understood his powers under LEPR.
- 4.76 During his time at Kings Cross station, he found drugs in about fifty percent of the strip searches he conducted. Generally they were located in the underwear but in about twenty percent of cases, a squat would produce a pill or drugs. He found weapons only in about five percent of searches.⁵³
- 4.77 He would find it unusual for a female custody sergeant to enter a cell whilst a male prisoner was naked. The way to handle such a situation would be to ask the prisoner to first get dressed.⁵⁴

⁴⁶ *Ibid*, p.28

⁴⁷ *Ibid*, pp.29-30

⁴⁸ *Ibid*, p.36

⁴⁹ *Ibid*, p.33

⁵⁰ *Ibid*, p.34

⁵¹ *Ibid*, p.37

⁵² *Ibid*, p.39

⁵³ *Ibid*, pp.41-42

⁵⁴ *Ibid*, p.44

4.78 He explained that there was a line on the floor of the searching cell at Kings Cross and that if the detainee stood behind that line, they were not captured on the CCTV. He would normally inform the person that *"If you don't want to be on the camera, you need to stand behind the line. It's for your privacy"*. He recalled that SAN1C stood behind that line.⁵⁵

F. Evidence of Officer SAN6

4.79 Officer SAN6 gave the following evidence:

4.80 In March 2015, he had only been a sergeant for two months.⁵⁶ He was promoted to that position at Kings Cross police station in January 2015. On 24 March 2015, he was performing the role of custody sergeant and he recalled that on that particular shift he had one person in custody, who had been arrested on a warrant and transferred over to the holding cells in Surry Hills. He was not called upon to manage the custodial situation of SAN1C.⁵⁷ Until he was served with a summons to appear before the Commission, he had no knowledge about this matter.⁵⁸

4.81 Officer SAN6 explained that the custody sergeant also performed the role of sergeant, which meant performing other duties in addition to custody management. If there was no-one in custody then the general operating procedure at Kings Cross was that they would go back upstairs to the supervisor's officer (it is a three-level police station) and complete other tasks. CCTV would inform the custody sergeant if there was someone in the charge room. Ordinarily, somebody from the charge room would call the custody sergeant when somebody was brought into custody.

4.82 He explained that it was usual that if a person was to be strip searched, that search would occur prior to that person being introduced to the custody manager. *"You wouldn't want them to be put into a dock without having been searched, for their safety, for your safety as the custody manager and the officer's safety. But you would hope, as the custody manager, that you were told."*⁵⁹ There was a requirement that anyone brought into custody be searched and have their property physically removed from them. A higher threshold was required for the further step of a strip search.⁶⁰

4.83 If a person was brought into the station, but then issued with a Field Court Attendance Notice (Field Can), it is possible that they would not be entered into the custody management system. This would all depend on how long they were in the station for. If someone, for example, was brought in to confirm identification, then that process would take only a few minutes and they could then be issued with a Field Can without entering them into custody.⁶¹

⁵⁵ *Ibid*, p.45

⁵⁶ Transcript of private examination of Officer SAN6, 6 December 2018, p.24

⁵⁷ *Ibid*, p.16

⁵⁸ *Ibid*, pp. 17-19

⁵⁹ *Ibid*, p.30

⁶⁰ *Ibid*, p.31

⁶¹ *Ibid*, p.38

4.84 Aboriginal and Torres Strait Islander people have been identified as being at greater risk whilst in custody and, where possible, they are placed in a cell with another person or have a support person there.⁶²

G. Evidence of Officer SAN7

4.85 Officer SAN7 gave the following evidence:

4.86 He was a Detective Chief Inspector and he had been an inspector since October 2011. At the time of SAN1C's arrest, he was Crime Manager at Kings Cross. A crime manager takes care of the detectives and the Crime Management Unit. They have more of a strategic focus as opposed to a tactical one.

4.87 He was shown a copy of a "triage form" document, recording an internal police complaint arising from the filing of the Statement of Claim by SAN1C. That form noted that the four issues raised in the claim were wrongful arrest, false imprisonment, assault and battery and details in relation to damages. Officer SAN7 signed that form on 26 July 2018. He declined the investigation but prior to doing so, he read the judgment handed down in relation to the claim. He requested a copy of the SAN1C decision as he was concerned that the judge might have identified any dishonest behaviour on the part of the officers, such as perjury or lying, or any misconduct matters and he wanted to be informed about such issues.⁶³

4.88 In addition to the matters he had identified in the triage form, he acknowledged that the SAN1C decision also criticised the police practice of using other police officer's statements to assist in the preparation of their own statement. He stated that he understood that it "*seems to be quite a common practice with police, and still is*".⁶⁴ He referred to the NSWPF document "Brief Preparation-Guide" prepared by the Education and Training Command which includes a policy and procedure for the preparation of statements. He noted that that policy did not forbid the practice but noted that if another officer's statement was used to refresh their memory, the fact of having done so should be disclosed in that officers' statement. He noted that police statements tend to include the paragraph "*In making my statement, I have refreshed my memory from the statement of Officer X*".⁶⁵ He did not read Officer SAN3's statement for the purpose of the triage or to determine whether the criticism by the judge was justified or not.

4.89 Officer SAN7 thought it was bad practice to consult another officer's statement. "*When I joined we were never allowed to do that. But I note it's not good, Commissioner, but in the policy it doesn't forbid it and I think it's probably bad policy, especially with his Honour's comments, and, as I see myself, we don't let witnesses look at each other's statement and then make a statement, so we are putting police in the same position.*"⁶⁶ He was of the

⁶² *Ibid*, p.39

⁶³ Transcript of private examination of Officer SAN7, 31 January 2019, p.6

⁶⁴ *Ibid*, p. 8

⁶⁵ *Ibid*, pp.8-9

⁶⁶ *Ibid*, p.10

view that the policy should prohibit officers refreshing their memory from other officers' statements. He noted that his Honour used strong words in his judgment and the officer's credibility was really diminished. He conceded that the officer should have disclosed the fact that he had used another officer's statement to prepare his own. He indicated that it was an oversight on his part that he did not include that criticism in his triage document when considering SAN1C's complaint.

- 4.90 Officer SAN7 acknowledged that the triage is not only designed *to slap some officer on the wrist* but is also designed as a *management tool to check on the kinds of things that you might want to improve* and that it does identify issues, policies and problems.⁶⁷
- 4.91 Officer SAN7 was shown the email sent by Officer SAN1 to Officer SAN3 (see paragraph 4.42) and asked for his response to its content, to which he replied "*poor practice*". It was not appropriate, especially with the copy of her statement also being attached. He agreed that it was a "*wink wink nudge nudge*" for the officer to say the same thing as Officer SAN1.⁶⁸ However, he also pointed out that if Officer SAN3 had mentioned in his statement that Officer SAN1 had provided him with a copy of her statement then it would not have been deceitful or carried the implication of collusion.⁶⁹
- 4.92 He accepted that if he had turned his attention to the issue, particularly given that Officer SAN3 was a probationary constable and had only been on the job for a few months, that he would have identified this as bad practice and required some corrective direction to the subject officer.⁷⁰
- 4.93 Officer SAN7 was shown a further email sent on 19 May 2015 from Officer SAN1 to Officers SAN8 and SAN4 which said:

"Sorry to do this to do (sic) but I need to get statements from you in the matter of SAN1C. (the dick head on Bourke Street that refused to be searched and carried on). I know you guys wearnt (sic) there to start with but its basically just our word against his and aj wont be here obviously so I kinda need a couple of extra statements.

Officer SAN4, you also were handcuffed so were kinda resisted,

Ive attached my statement for your reference."

- 4.94 He was of the view that that email was in the same vein as the earlier email and that it was poor practice and opened the police up to criticisms of collusion at court. He agreed that it was also unprofessional and that it read like an "*us against them*" appeal.⁷¹

⁶⁷ *Ibid*, p.11

⁶⁸ *Ibid*, p.14

⁶⁹ *Ibid*, p.15

⁷⁰ *Ibid*.

⁷¹ *Ibid*, p.16

4.95 He accepted that a strip search of anybody, but especially an otherwise respectable person going about their business, was particularly humiliating and that doing it unlawfully was a serious matter.⁷² He identified the strip search as an issue for Officer SAN1 but he declined the investigation as he relied on s 132(g) of the *Police Act 1990*⁷³ and the fact that the matter had been fully explored in civil proceedings. It was pointed out to Officer SAN7 that the civil proceedings were concerned with SAN1C's right to damages but that it did not deal with the disciplinary or managerial issues.

*"I looked at it more as performance issue than a conduct issue and I looked at police policy, what performance means, and it includes incompetence, it includes poor judgment, it includes lack of understanding and it includes mistake. His Honour's judgment at paragraph 99 refers to Officer SAN1 admitting that she's not familiar with the strip search powers. My view, Commissioner, was that this matter could be declined and that we introduce some education and training issues throughout the whole of the command so it doesn't happen again."*⁷⁴

4.96 It was put to Officer SAN7 that the significance of the unlawful strip search was a matter which warranted investigation given that *"she's a senior constable dealing with a member of the public where it was at least reasonable at least to ask her, 'have you done this before?'"*⁷⁵ He conceded that on reflection that it was not appropriate to decline the investigation.

4.97 Officer SAN7 expressed the view that Officer SAN1 realised after the decision that *"she had got it all wrong"* and the officers signed personal acknowledgements that they now knew their powers of arrest and strip searching.⁷⁶

4.98 One of the actions recommended by Officer SAN7 was for an email to be sent to all officers demanding that all legal requirements be met prior to strip searching a person. This was done and the email set out the provisions of s 31 of LEPRA. Officer SAN7 felt that that was adequate as it pointed out to officers that they had to comply with LEPRA and would know to consider LEPRA before making a decision to use their strip search powers.⁷⁷

4.99 Officer SAN7 indicated that they were now conducting appropriate training. He had organised a training day for all custody managers which was to be held at Kings Cross on 12 February 2019. The training was to be

⁷² *Ibid*, p.17

⁷³ S.132(g) of the *Police Act 1990* provides that: In deciding whether any misconduct matter concerning a police officer or the NSW Police Force should be, or does not need to be, investigated or dealt with, the Commissioner may have regard to such matters as the Commissioner thinks fit, including whether, in the Commissioner's opinion civil, criminal or disciplinary proceedings, or a coroner's inquest, relating to the subject-matter of the misconduct matter are pending or reasonably in contemplation.

⁷⁴ Transcript of private examination of Officer SAN7, 31 January 2019, p.19

⁷⁵ *Ibid*, p.23

⁷⁶ *Ibid*, p.19

⁷⁷ *Ibid*, p.24

conducted by police prosecutors and it would include a discussion of the SANIC decision and the decision in *Fromberg*.⁷⁸ As well as reiterating the law it would provide concrete examples. He thought it was important for the supervisors to have the training first as then they would not let anyone strip search without the supervisor's permission.⁷⁹

4.100 Officer SAN7 agreed that it was a breach of the standard operating procedures for SANIC not to have been entered into the custody management system.⁸⁰

4.101 He set out "*actions proposed*" in his triage document but he had had no follow up to know whether any of them had been implemented. Officers SAN1 and SAN3 were asked to sign statements acknowledging that they understood their powers under LEPR. Another action was to dip sample events involving the search of persons to ensure conformity with LEPR and police policies and procedures. This was being put into practice.⁸¹

4.102 Another proposed action was "*to monitor criminal proceedings to their finality and make an appropriate assessment of convictions that are overturned on appeal*". He expressed the view that "*we are not catching matters that are overturned on appeal. This was overturned on appeal obviously for the reasons that are ultimately articulated in the civil proceedings. I think we need something in place to capture it earlier...When you are dealing with them and it's three and a half years later, the memories are faded and they don't remember a lot of detail. I think it's much better dealing with it earlier, at the time.*"⁸² He conceded that that recommendation was *ambitious* and that it had not been implemented. There was no system currently in place to inform police officers of outcomes of particular proceedings as a matter of course, but that there should be. He felt that it would have made a difference if any issues identified could have been dealt with "*contemporaneous to the incident.*"⁸³

4.103 He formed the conclusion that the conduct of the officers did not fall within the ambit of serious misconduct. He had a different view from his Honour as he could "*see the other side of it*". "*My reasoning at the time was I honestly thought it was a performance issue. I know now that his Honour is saying that they used quite neutral language in the judgments, but his Honour didn't say they were dishonest*". "*They were quite candid I thought in a lot of their evidence. That played on my mind, that it was a performance issue and that it was probably dealt with from an education and training angle.*"⁸⁴

⁷⁸ District Court decision of *R v Fromberg* [2017] NSWDC 259

⁷⁹ *Ibid*, p.25

⁸⁰ *Ibid*, p.30

⁸¹ *Ibid*, p.36

⁸² *Ibid*, p.38

⁸³ *Ibid*, p.39

⁸⁴ *Ibid*, pp.42-43

4.104 He agreed that the SAN1C decision should have been brought to the attention of the subject police officers and discussed with them as they were otherwise none the wiser as to their conduct.⁸⁵

4.105 The NSWPF have sent out emails throughout the year reminding police officers of their stop, arrest and search powers. They have also put all the requirements of LEPRA into their operational orders. Officers are also reminded of their powers during every single operation they conduct and that they cannot just strip search without proper justification. He was confident that the changes implemented were working.⁸⁶

5 Assessment of Evidence and Findings

5.1 The facts surrounding the arrest and subsequent strip search of SAN1C are set out in the SAN1C decision⁸⁷ and speak for themselves.

5.2 The Court found that:

- (i) there were no reasonable grounds for Officer SAN1 suspecting that SAN1C possessed prohibited drugs and therefore she had no lawful justification to search him;
- (ii) Officer SAN1, as a woman, was not lawfully entitled to search SAN1C and he was entitled to resist;
- (iii) SAN1C was not hindering police in the execution of their duty as the search was unlawful and SAN1C was entitled to resist the unlawful assault; and
- (iv) there was no legal justification for the force used by Officer SAN4 and it constituted an assault and battery.

5.3 His Honour also expressed concern about the following:

"The circumstance of Officer SAN3 using the statement of Officer SAN1 to prepare his statement is a matter that casts doubt upon his account. Her willingness to provide her statement, notwithstanding that she was an experienced police officer, indicates an improper practice that is of concern. Whilst in Officer SAN1's experience this practice of police officers exchanging statements may be common, it nevertheless creates the same problems of contamination of evidence as witnesses being interviewed together, as it involves one witness using another's recollection. This potential collusion of witnesses or contamination of evidence has been repeatedly described as improper. It is a matter that impacts adversely on the credit of the police evidence."⁸⁸

⁸⁵ *Ibid*, p.44

⁸⁶ *Ibid*, p.41

⁸⁷ *SAN1C v NSW* [2018] NSWDC 190

⁸⁸ *Ibid*, par.21

- 5.4 It is apparent that the officers involved in the arrest and strip search of SAN1C lacked or appeared to lack basic knowledge of their powers under LEPRO. This was noted by the Court (at par 99): "*Officer SAN1 admitted to a lack of familiarity with the requirements of s.31*". Did her lack of knowledge excuse the poor treatment of SAN1C? She maintained that she had a genuine belief that SAN1C was in the possession of drugs because of his resistance to being searched. "*In my experience, it's very unusual for someone who - someone to refuse if there's no basis for that refusal. I'm not saying it's, like, unlawful for him to do so, but in my experience, if you legitimately have done nothing wrong, if you had nothing in your possession, there would be no reason to refuse a search.*" (see par 4.26)
- 5.5 It is apparent that Officer SAN1 held a belief, although not objectively reasonable, that she was entitled to subject SAN1C to a search because if he had nothing to hide, he would not have refused. This is clearly not the law and it is concerning that an officer of her experience, some 6 years at the time of SAN1C's arrest, claimed to hold this belief. It entirely ignores the fundamental principle, undoubtedly known to the officer, that the law protects the subject from unlawful intrusions and an assumption that persons who decline to answer questions by police have something unlawful to hide is neither logical nor reasonable. It is obvious that a person might well, and reasonably, object to a search merely because it would constitute an unjustified interference with their personal integrity. As important is the obvious irrationality of inferring (as distinct from merely speculating) what SAN1C might have been doing, when there was nothing at all capable of pointing to criminality of any kind. The fact that he gave an explanation for the direction of his walk that seemed inconsistent with his address could not sensibly give rise to any relevant suspicions; nor could his protests. These points are so objectively obvious that it is not possible to accept the truthfulness of the officer's evidence that she actually suspected, let alone believed, that SAN1C's behaviour lawfully justified detention, search, handcuffing, removal to the police station and a strip search.
- 5.6 In the Commission's view, the more likely explanation by far is that Officer SAN1 was motivated by a desire to demonstrate to SAN1C that police were not to be trifled with. It is also difficult to accept that the officer was as comprehensively ignorant of LEPRO as she implied, whatever was or was not taught to her at the Academy. Her actions indicate not that she was ignorant of the law but, rather, was indifferent to it. She was well aware that LEPRO dealt with searches, including strip searches. And, if her superiors had failed to lead her by the hand through the provisions, that did not excuse her own failure to ensure that she understood her powers and the limits on them before she attempted to exercise them. It is at all events important that the training regime, however it might be done and whatever its form, ought to make impossible for any officer, particularly one as senior as Officer SAN1, to use ignorance as an excuse. Therefore, the position taken by Officer SAN7 that this was a mere performance issue was untenable. His approach is discussed below in further detail.
- 5.7 It appears that after the decision in SAN1C was handed down, nobody formally discussed it with Officer SAN1 so that she could have learnt from her mistakes, nor did any of her superiors ensure that she read and

understood its implications. It is concerning that Officer SAN1 read the judgment in preparation for her appearance before the Commission but otherwise had not read it because she had not wanted to. (See par.4.13) She said she was now aware of the distinction between “*personally having a suspicion and, on the other hand, objectively whether that suspicion was reasonable*” and that she now understands the importance of that distinction. However the Commission finds it impossible to accept that the officer was in fact ignorant of the distinction, which is fundamental to the LEPR regime as it relates to arrest, search, and the use of force, issues with which she must have been regularly dealing for some years. As stated before, the appropriate conclusion is that Officer SAN1 was simply indifferent to the need for reasonableness and acted on the ground that she would do as she thought was appropriate on the basis of mere guesses, the significance of which she wrongly thought was increased if the subject of those guesses protested. In short, Officer SAN1 was indifferent to the legal limits of her powers as a police officer. Officer SAN1 thought she was entitled to obedience. This was not in accord with her duty.

- 5.8 Officer SAN1’s true attitude is demonstrated by her insult of SAN1C as expressed in her email to Officer SAN3 and Officer SAN4 seeking statements that supported her version of events. Her characterisation was entirely unjustified but established that her contempt for SAN1C arose from his non-compliance with her demands, an attitude which in large part explains the unlawful and unreasonable way in which she interacted with him. This necessarily leads to a realistic concern that this has been her *modus operandi* whenever interacting with members of the public. She said that members of the public she had dealt with had not complained about her conduct. This was perhaps fortunate for them. But the public has no duty to know the law: Officer SAN1 did.
- 5.9 The Commission finds that Officer SAN1’s conduct in relation to SAN1C was unlawful to a degree that amounted to serious misconduct. This misconduct, though perhaps based in part on inadequate knowledge of her powers, was significantly contributed to by her failure to acquaint herself with the relevant provisions of LEPR and indifference to the little she did know. This attitude was made possible by the failure of the NSWPF to institute an adequate regime of training that would not have permitted such a state of affairs.
- 5.10 It is necessary also to deal with the conduct of the officers in relation to their statements. It is clear that Officer SAN1’s contact with them was to influence them to make statements that were consistent with hers, because “*its basically just our word against his [ie, ‘the dickhead’] and aj won’t be here obviously so I kinda need a couple of extra statements*”. For this purpose, there was, or should have been, no need for them to see her statement as distinct from setting out what they recalled of the circumstances. In the context, it is clear that Officer SAN1 intended to suggest that the extra statements should reflect her own, as indeed they did. In attempting to influence the content of the statements of the other officers and, consequently, the evidence which they might give, she committed very serious misconduct.

- 5.11 On the more general issue of officers sharing their statements, it is difficult to see any justification for it. The crucial question is what the individual officer is able to say, derived from his or her direct knowledge of the relevant facts. If they have no such knowledge or recollection, to repeat it from another's statement does not in fact add to the cogency of the statement and is calculated to deceive readers of the statement as to its actual provenance. On the other hand, if the officer in fact has a recollection of the relevant facts, that recollection can and should be related, uninfluenced by the statements of others. Having access to those other statements thus both serves no useful purpose and is likely to mislead. Although to some extent the candid admission that the officer has consulted another's statement counters some of the criticism, it does not without more detail inform the reader as to the true extent of the officer's recollection. By the time he or she comes to give evidence, unravelling this issue is obviously problematic and will almost certainly adversely affect the reliability of the evidence and the credibility of the witness, as indeed occurred in the SAN1C proceedings. The practice should cease.
- 5.12 As pointed out, Officer SAN3 should, at the very least, have referred to the fact that he relied upon Officer SAN1's statement when preparing his own. The Commission accepts that he was an inexperienced officer with only three month's practical experience and that, as a probationary constable, he looked to his more senior officers for guidance as to appropriate conduct. Officer SAN3 eventually admitted that he copied Officer SAN1's statement. He has since adopted a practice of relying on his notebook and his own memory when preparing statements. The Commission accepts that his inexperience and lack of guidance from those senior to him resulted in his making a statement which did not set out all that it should have. The Commission finds that whilst Officer SAN3's conduct fell short, it did not amount to serious misconduct.
- 5.13 As noted above, the use of the wristlock was found to be an assault and battery as there was no legal justification for it. That conclusion followed from the finding that there were no reasonable grounds for Officer SAN1 to suspect that SAN1C possessed prohibited drugs and therefore she had no lawful justification to search him. Thereafter, every act which followed with respect to the arrest, search, detention, and strip search of SAN1C had no lawful justification. The Commission accepts the evidence of Officer SAN4 that, when he was called to the incident involving SAN1C, SAN1C was physically struggling with Officer SAN2. He was informed shortly afterwards that SAN1C needed to be searched as they believed that he may have had something in his possession.
- 5.14 The Commission is satisfied that Officer SAN4 acted in the belief that SAN1C was aggressively resisting lawful arrest. This was conveyed to him by Officer SAN2 and, based on what was happening when he arrived, it was reasonable for Officer SAN4 to have rendered assistance by applying a wristlock to control SAN1C. In the circumstances, whilst the treatment of SAN1C was unwarranted, the Commission does not find that Officer SAN4's conduct at the time of his arrest amounted to serious misconduct.
- 5.15 Shortly prior to the trial in the civil proceedings, the State of NSW conceded that the strip search was unlawful. In the course of the trial, the

State also conceded that the continued detention of SAN1C, after he was subjected to a search by Officer SAN4 was unlawful. However, these concessions do not obviate the need for the Commission to consider whether the police committed any serious misconduct in connection with these events.

- 5.16 As has already been noted, Officer SAN4 conducted a strip search of SAN1C at the police station. This involved requiring SAN1C to squat and move his testicles. Certainly, SAN1C had not consented to the requirement but had complied because it was clear that the officer was asserting legal control. Since, however, this procedure was conventional and Officer SAN4 understood that he was acting within his powers the Commission does not consider that, in taking these actions, he had committed any serious misconduct.
- 5.17 A more fundamental objection to the legality of strip searching SAN1C is that Officer SAN4 had no proper basis for conducting the search. There was no matter that could have given rise to a reasonable suspicion that the search was necessary. Officer SAN1 had conveyed only that she believed he "*might have had something*" but not the basis for that belief and it is clear that Officer SAN4 had no independent suspicion, let alone one based on reasonable grounds, that a strip search was necessary. He acted at the direction of Officer SAN1 and also, it seems likely, in accordance with the general rule at the time applying in the Kings Cross Police Station that persons brought into custody were to be strip searched. In light of that rule the Commission is not minded to make a finding of misconduct against Officer SAN4, although his conduct of the strip search at Officer SAN1's direction was not, as he should have known, authorised by his LEPR powers.
- 5.18 Although Officer SAN1 had not herself conducted the search, it is clear that it was conducted at her direction. There was no legal basis for the direction. Considering the circumstances as a whole, the only reasonable explanation was that it was instituted to humiliate SAN1C for his non-compliance with her earlier unreasonable directions and Officer SAN1's indifference to the legal limits on police powers, of which she was only vaguely aware. This conduct was a serious breach of her duty.
- 5.19 The Commission was originally concerned that the litigation was not conducted in accordance with the model litigant policy (see Annexure). The Commission is satisfied that there is no basis on which to find that the NSWPF, did not act in accordance with that policy.
- 5.20 As noted, an investigation of the complaint was declined by Officer SAN7 as he relied upon s 132(g) of the *Police Act 1990*, concluding that the issues had been canvassed during the civil proceedings. As he acknowledged, in hindsight, that decision was not appropriate (see par. 4.76). It is now accepted by the NSWPF that the mere fact of civil proceedings cannot be a ground, unless the circumstances are exceptional, for declining to investigate misconduct information. It is obvious that, whilst civil proceedings might resolve issues between the State of NSW and a plaintiff who has sued because of unlawful police conduct, it will do nothing about the officers' responsibility for that conduct and the duty of the

Commissioner to deal with it. This is even more so when it is appreciated that by far the majority of such litigation is settled before judgment. At every point, the NSWPF failed to appropriately respond to the SAN1C decision. Officer SAN7 agreed that the SAN1C decision should have been brought to the attention of the subject police officers and discussed with them as they were otherwise none the wiser as to their conduct. The Commission is satisfied that the NSWPF has since taken measures to educate and train their officers as to their powers by way of regular email updates, stickers and on-line training. In addition, training involving practical case scenarios has been implemented. The Commission has recently addressed this issue in its report to Parliament: *“Review of the NSWPF Standard Operating Procedures for Strip searches in Custody, January 2020”* which was made public on 13 February 2020. The Commission is satisfied that the NSWPF is presently taking measures to address the Commission’s concerns about its training and education of officers in this regard.

6 Submissions in Response

- 6.1 The Commission received Submissions from Counsel for Officer SAN1 and from the NSWPF.
- 6.2 Counsel for Officer SAN1 submitted that a serious misconduct finding should not be made against Officer SAN1. In support of this submission he noted the lack of proper training provided to officers at the time; the subsequent training and courses Officer SAN1 has completed since the arrest of SAN1C in 2015; and the fact that Officer SAN1 has had no other complaints made against her. He also included a table which set out Officer SAN1’s achievements since she joined the police force in 2009, including the Kings Cross Rotary Police Officer of the Year Award for Consistently High-Performance awarded to her in 2019.
- 6.3 The Commission maintains its finding against Officer SAN1. However, taking into account Counsel’s submissions regarding the concessions and acknowledgements made by Officer SAN1 since the judgment of the District Court and her subsequent service as a police officer, the Commission has decided to make no recommendation as to reviewable action.
- 6.4 The NSWPF concluded in its submissions that:
 - (1) The NSWPF did not challenge the proposed findings in the Draft Report.
 - (2) The NSWPF accepted that statements made by a police officer must be in the officer’s own words. If an officer refreshes his or her memory from any source, including another officer’s statement, it must be declared in their statement. No statement should be copied. The NSWPF undertakes to improve the NSWPF guidance and education around the issue.
 - (3) The NSWPF recognised the importance of officers having both adverse and favourable comments made by the judiciary communicated to the subject officers in a timely fashion. However, there were limitations to

what NSWPF could practicably achieve without the assistance of other NSW agencies.

7 Summary of Findings

- 7.1 For the reasons outlined earlier in this report, the Commission finds that Officer SAN1's conduct amounted to serious misconduct.

8 Affected Persons

- 8.1 In Part 2 of this report the Commission set out the provisions of s133 of the LECC Act dealing with the content of reports to Parliament. Subsections (2), (3) and (4) relate to "*affected persons*".
- 8.2 The Commission is of the opinion that Officers SAN1, SAN2, SAN3 and SAN4 are affected persons within the meaning of section 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. As noted at paragraph 7.1, the Commission has made a finding of serious misconduct against Officer SAN1. However, for the reasons set out at paragraph 6.3, the Commission is not of the opinion that consideration should be given to any of the actions described in s 133(2).
- 8.3 The Commission has made no adverse findings against Officers SAN2, SAN3 and SAN4 and is not of the opinion that consideration should be given to any of the actions described in s 133(2).

9 Recommendations

- 9.1 The Commission makes no recommendations.

ANNEXURE



8387444



District Court
New South Wales

Case Name: **SAN1C** v State of NSW

Medium Neutral Citation: [2018] NSWDC 190

Hearing Date(s): 26, 27, 28 February; 1, 2, 23 March; 17 May 2018

Date of Orders: 29 May 2018

Decision Date: 29 May 2018

Jurisdiction: Civil

Before: P Taylor SC DCJ

Decision: (1) Judgment for the plaintiff in the sum of \$112,387.67.
(2) Defendant to pay the plaintiff's costs.
(3) Liberty to either party to make application to amend order (2), including to seek a special costs order, by notification by email to my associate within 14 days.

Catchwords: TORTS – intentional tort - wrongful arrest – false imprisonment – assault and battery – strip search - police – reasonable grounds for suspicion – aggravated damages – exemplary damages

Legislation Cited: Law Enforcement (Powers and Responsibilities) Act 2002, s 21, s 24, s 31, s 32, s 99, s 230

Cases Cited: Adams v Kennedy (2000) 49 NSWLR 7
Coote v Kelly; Northam v Kelly [2016] NSWSC 1447
Day v Perisher Blue Pty Ltd (2005) 62 NSWLR 731
Goldie v Commonwealth of Australia (No 2) [2004] FCA 156
Gray v Motor Accidents Commission (Gray v MAC) (1998) 196 CLR 1; [1998] HCA 70
Lamb v Cotogno (1987) 164 CLR 1; [1987] HCA 47
MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657 at 666;



8387444



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MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657 at 666;



8387446

Makinson d'Apice Lawyers (defendant)

File Number(s): 2017/115668

Publication Restriction: None

JUDGMENT

A. Introduction

- 1 **SAN1C** was in 2015 a 53-year-old man with no relevant criminal record.
- 2 On Tuesday, 24 March 2015 at about 3.30am, **SAN1C** was sitting on a stone wall in front of a church in Bourke Street, Darlinghurst, texting on his mobile phone when he was confronted by three police officers,¹ **Officer SAN1**, **Officer SAN2**, and **Officer SAN3**, who was there as an observer.² After a short conversation, **Officer SAN1** announced that she reasonably suspected **SAN1C** of being in possession of prohibited drugs and proposed that he be searched.
- 3 When **SAN1C** refused to submit, **Officer SAN1** told **SAN1C** that he was under arrest for hindering police in the execution of their duty. As she laid hands on him, another police vehicle arrived. **Officer SAN4** alighted from that vehicle and as **Officer SAN1** withdrew to speak to other officers in that vehicle, **Officer SAN4** imposed a wrist lock on **SAN1C**, handcuffed him and conducted a search. No drugs were found.
- 4 **Officer SAN1** then directed **SAN1C** to get into the rear cage of a police wagon and he was taken to Kings Cross Police Station. He was there subjected by two male police officers, at the direction of **Officer SAN1**, to a "strip search", which involved him, at the command of the two police officers; removing his pants and underpants; lifting his genitalia to allow inspection of the area underneath; and squatting while thus naked.
- 5 **SAN1C** was thereafter given a Court Attendance Notice for hindering police in the execution of their duty, and allowed to leave the police station. The court proceedings were ultimately dismissed.

¹ Exhibit 3.

² T183/29-39.



8387447

6 **SAN1C** sued the State of New South Wales for wrongful arrest, and assault and battery by the police officers.

B. Issues

7 Shortly prior to the trial, the State conceded that the strip search was unlawful. In the course of the trial, the State also conceded that the continued detention of **SAN1C**, after he was subjected to a search by **Officer SAN4**, was unlawful. Thus, the State conceded that it was not entitled to continue the arrest of **SAN1C** after the initial search, and to take him back to the police station. The issues thus are as follows:

- (1) Did **Officer SAN1**, prior to her announcement of a proposed search, suspect on reasonable grounds that **SAN1C** was in possession of a prohibited drug, and was thereby entitled to search **SAN1C**.
- (2) Did **Officer SAN1** suspect on reasonable grounds that **SAN1C** had hindered police in the execution of their duty to conduct the search.
- (3) Was **Officer SAN1** satisfied that **SAN1C**'s arrest was reasonably necessary to prevent a continuation of the offence of hindering.
- (4) Was **Officer SAN4** lawfully justified in applying a wrist lock, handcuffing and conducting a search of **SAN1C**.
- (5) What is the appropriate level of damages, including any aggravated or exemplary damages.

8 It can be seen that the lawfulness of the initial search is pivotal to several aspects of the claim. The power ultimately relied upon by the State for **Officer SAN1** to conduct a search is found in the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") at s 21. That section relevantly provides:

"21 Power to search persons and seize and detain things without warrant

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:

(a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,

...

(d) the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.



- 9 Thus, the lawfulness of the search proposed by **Officer SAN1** under the provision depended upon her suspecting on reasonable grounds that **SAN1C** possessed a prohibited drug. Of these two elements, the subjective suspicion and the objective reasonable grounds, only the latter was in issue. **SAN1C** did not submit that **Officer SAN1** lacked a suspicion of the type alleged.
- 10 The grounds relied on by the State to justify the proposed search, and which were submitted to constitute the reasonable grounds for **Officer SAN1** suspecting **SAN1C** to be in possession of a prohibited drug, comprised: the place, time and date where and when **SAN1C** was sitting; **SAN1C**'s visual focus on the police, and in particular **Officer SAN1**; **SAN1C**'s answers to the preliminary questions asked of him; and his change in demeanour, becoming more aggressive during the conversation.

C. The evidence of the encounter

- 11 **SAN1C** recounted that in the evening of Monday, 23 March 2015, after spending time with his solicitor at The Rocks in Circular Quay and meeting another acquaintance at the Quay, he walked to Woolloomooloo to have a coffee and sit at Finger Wharf.³ He was unable to obtain the coffee. He thought he would go to a pub in William Street, and commenced to walk up Bourke Street.⁴ When he arrived at the corner of William and Bourke Street, he realised it was after the 1.30am lock-out time, so he would be unable to enter the pub.⁵ He walked across William Street and purchased a pack of cigarettes at a 24-hour convenience store at the corner of Bourke and William Streets. He then walked about 40 metres up Bourke Street, sat on a stone ledge in front of the church and commenced responding on his mobile phone to a text he had received from one of the friends he had been with earlier in the evening.⁶ He was wearing a watch, blue jeans, a blue t-shirt, brown leather shoes and a chequered blue sports jacket.⁷ **SAN1C** did not appear to be challenged about any of this evidence. By that stage the time had reached about 3.30am.

³ T70-71.

⁴ T71-72.

⁵ T72.

⁶ T73.

⁷ T77/5.



- 12 There were three street lights⁸ within close proximity of where **SAN1C** was sitting, which shed sufficient light to enable him to be viewed from at least 50 metres.⁹
- 13 Meanwhile, **Officers SAN1, SAN2 and SAN3** were in a police vehicle proceeding north down Bourke Street towards William Street. **Officer SAN1** was driving, it appears,¹⁰ and **Officer SAN2** was in the backseat. **Officer SAN3** noticed **SAN1C** from 50 metres away, **Officer SAN1** from 15 metres. She turned the car to the right into St Peters Street and parked.
- 14 **SAN1C** watched the police vehicle and its occupants as the car stopped a few metres short of where he was sitting. At this stage, **Officer SAN1** said she "started to form some reasonable suspicion"¹¹ of **SAN1C**. The officers got out of the car and walked towards **SAN1C**. **Officer SAN1**'s account of the ensuing conversation was as follows:¹²

"A...I said, 'Hey, mate, I'm **Officer SAN1** from Kings Cross Police. What are you up to?'

...

In response he said, 'Nothing, I'm just having a rest,' and I said, 'Where have you been?'

...and he said, 'Just up at the Cross,' and I said, 'Where are you off to?' and he said, 'I'm just going home,' and I said, 'Where's home?' and he said, 'The Rocks,' and I said, 'Why are you up here if you're walking from Kings Cross to The Rocks. It's the totally wrong direction.'

...He said, 'I haven't done anything wrong. I'm calling my lawyer. You have no jurisdiction to do this.'

...

I said, 'Mate, this doesn't really make sense to me. It's nearly 4 o'clock in the morning and you're up here by yourself, having walked in the wrong direction to get from Kings Cross to The Rocks.'

A. He then said I think, 'I haven't done anything wrong. I'm calling my lawyer. You can't do this.'

...

Q. Did you respond at all to that comment of **SAN1C**'s?

⁸ T189/10, 36.

⁹ T208/10-22, T213/35-38.

¹⁰ T184/41-43, cf T219/17.

¹¹ T291/34.

¹² T220/27-T222/8.



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A. *I did. I said, 'Now that you're getting aggressive about it, it's raising my suspicions even more that something's not right here and I'll let you know that I believe you may be in the possession of prohibited drugs and I'm going to submit you to a search.'*

Q. *At that point in time did SAN1C say anything to you?*

A. *He did. He stood up off the wall and stepped in towards me and was waving his right finger in my face and said, again words to the effect of, 'You can't do this. I'm calling my barrister. You're not searching me. I haven't done anything wrong.'*

15 **Officer SAN3** described the encounter somewhat differently. He said: **██████████**

Officer SAN1 asked: "Hey mate, what are you doing here?"

"Q. *Do you recall a response to that by SAN1C?*

A. *He said that he'd been walking home, he'd been up at the Cross. ██████████
Officer SAN1 ██████████ asked where his home was, and he said that it was at
The Rocks. At this point Officer SAN1 ██████████ asked if he was walking
from the Cross to The Rocks, why was he up this direction, and he said he
was just sitting having a rest.*

...

Q. *What did you hear or see occur between those two people?*

A. *I'm trying to think if there was any further conversation, but I think it was at that point that Officer SAN1 ██████████ said that the story didn't make much sense to her, that she believed him to be in possession of drugs and was going to search him."¹³*

Q. *What was his demeanour like up to the point that Officer SAN1 ██████████ said to him the story didn't make much sense, believed him to be in possession of drugs and was going to search him?*

A. *Up until that point it was, wasn't aggressive. He'd been answering question up until that point, compliant, I would say.*

Q. *Following Officer SAN1 ██████████ saying those words, did his demeanour change at all?*

A. *Yes, it did.*

Q. *In what way did it change?*

A. *So at that point he stood up. His tone has become harder, more aggressive and he said, 'You're not searching me. You have no right to. You need a warrant,' and he was going to call his lawyer."¹⁴*

16 **SAN1C** gave his account as follows:¹⁵

"A. *They proceeded to - Officer SAN1 did most of the talking at that time. She walked over to me and said, 'What are you doing here?' And my reply was, 'I'm just sitting, having a cigarette, texting and minding my own business.'*

¹³ T187/17-35.

¹⁴ T191/40-T192/4.

¹⁵ T79/50-81/1.



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...She said, 'Where do you live?' And I told her Harrington Street at The Rocks. And she asked my name and I gave it to her, and she said, 'Oh, you're a long way from The Rocks,' and I said to her, 'Well, I live in the city, so I don't see it as a long way.' And she said, 'Where have you been tonight?' And I replied, I said, 'I was at Ship Inn Hotel before I got here.' And she said to me, 'Have you been drinking?' And I said to her, 'I've had a few beers with a friend of mine.' And she said - well, she kept repeating that I was in the wrong direction of my - of where I reside and I said to her, 'Well, it's - it's not a really a crime to be sitting. I live in the city and I live in the vicinity of the city, so to me, it was quite odd that she was asking that question repeatedly.

...And then she said she wanted to conduct a strip search. And I said--

...'Why would you want to do that? I've done nothing wrong, I'm sitting here, minding my own business. Am I a person of interest? You have no right and no jurisdiction to ask that of me.' And she became--

...quite aggravated and annoyed at my reply.

...She kept repeating the - the - she said, 'Well, we're - we're allowed to conduct a - a search whenever we feel like, how we feel it and when we feel like it. We have the right to do that.' And I said, 'No, you don't have the right to do that, because I haven't done anything wrong. Please tell me what I've done wrong.' And she said, 'We don't have to give you that answer. We don't have to tell you anything and we don't have to have any reason.

Q. What happened then?

A. I refused to do so.

...

A. I kept sitting on the ledge. I didn't - I didn't stand up.

Q. You had remained seated throughout this conversation?

A. Yes, I did."

- 17 **SAN1C** accepted that **Officer SAN1** may have given her name and station and said, "I believe you may be in possession of prohibited drugs and I'm going to submit you to a search".¹⁶ He also accepted that **Officer SAN1** may have said:

"Mate, this really doesn't make sense to me. It just doesn't seem right. It's almost 4 o'clock in the morning and you're sitting up here in the dark by yourself, having walked in completely the wrong direction to get from Kings Cross to The Rocks?"¹⁷

- 18 **SAN1C** accepted that **Officer SAN1** said, "I don't need a warrant to search you,"¹⁸ but denied that she said, "I just need reasonable suspicion to search you",¹⁹ or that she said, "I will also just let you know that a failure to

¹⁶ T122/34-38.

¹⁷ T123/1-4.

¹⁸ T124/15-18.

¹⁹ T124/21.



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*comply with a search and you will be committing an offence*²⁰ or that she said, *"I'll let you know that hindering police and refusing a search is an offence."*²¹

However, in his evidence, **SAN1C** subsequently conceded that **Officer SAN1** may have said, *"This is your last warning. Failing to comply with a search and you are committing an offence"*²² and that he was told he was under arrest.²³ He said that **Officer SAN1** referred to a strip search, and that it was her who first became aggressive and annoyed.

19 No statements of Officers **SAN1** and **SAN3** were in evidence. **Officer SAN3** gave evidence that he made a statement 52 days after the event, having refreshed his memory from the charge sheet and **Officer SAN1**'s statement. He accepted that it was part of his training that he ought never to interview witnesses together because of the possibility of collusion and contamination. Yet he asked to see **Officer SAN1**'s statement and she provided it to him. He accepted that in his statement, and **Officer SAN1**'s, the conversations were identical, but denied that he simply copied her statement.

20 **Officer SAN1** accepted that the facts sheet was her statement *"in a different form"*, and that an officer who is asked to make a statement would look at the facts sheet, *"A hundred percent. I don't think a police officer would ever create a statement without refreshing their memory from the fact sheet...you would always read the fact sheet"*.²⁴

D. Analysis

21 The circumstance of **Officer SAN3** using the statement of **Officer SAN1** to prepare his statement is a matter that casts doubt upon his account. Her willingness to provide her statement, notwithstanding that she was an experienced police officer, indicates an improper practice that is of concern. Whilst in **Officer SAN1**'s experience this practice of police officers exchanging statements may be common, it nevertheless creates the same problems of contamination of evidence as witnesses being interviewed

²⁰ T124/33.

²¹ T131/5.

²² T131/21.

²³ T132/2.

²⁴ T296/298.



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- together, as it involves one witness using another's recollection. This potential collusion of witnesses or contamination of evidence has been repeatedly described as improper.²⁵ It is a matter that impacts adversely on the credit of the police evidence.
- 22 Recollection of the precise words of conversations is difficult, even in the immediate aftermath of an interaction. The accuracy of the recollection is not improved by the passage of time.²⁶ It is unlikely that any of the accounts are entirely accurate.
- 23 **Officer SAN2** was not called. I was informed, without evidence, that she was no longer in the police force and had moved interstate. Without evidence, I did not regard this as a satisfactory explanation for her absence.
- 24 **Officer SAN2**'s absence means that there was no evidence supporting **Officer SAN1**'s evidence of a change in demeanour in **SAN1C** before **Officer SAN1** stated that she had formed the suspicion that he possessed prohibited drugs and proposed to search him. **Officer SAN2**'s absence enlivens the possibility of a *Jones v Dunkel* inference. I find that I am entitled to infer that **Officer SAN2**'s evidence would not have assisted the police.
- 25 Even without this inference I would have preferred the evidence of **SAN1C** and **Officer SAN3**. The evidence of both **Officer SAN3** and **SAN1C** was that **SAN1C** became more aggressive *after* he was told he must submit to a search. I accept this evidence. It seems unlikely that **SAN1C** would refer to contacting his lawyer merely when his account was questioned, and more likely would do so when he was required to submit to a search. It follows that I do not accept the evidence of **Officer SAN1** that **SAN1C** stated, "*I haven't done anything wrong, I'm calling my lawyer. You have no jurisdiction to do this*"²⁷ in response to **Officer SAN1** saying his journey home, "*It's the totally wrong direction*". **SAN1C** was not likely to say, "*You have no jurisdiction to do this*", when nothing is being done or directed other than questions being asked.

²⁵ Day v Perisher Blue Pty Ltd (2005) 62 NSWLR 731; Coote v Kelly; Northam v Kelly [2016] NSWSC 1447.

²⁶ See Watson v Foxman (1995) 49 NSWLR 315 at 318-319.

²⁷ T221/19-20.



26 **Officer SAN1**'s account that **SAN1C** remained seated until she told him that she believed he was in possession of drugs, and said she would submit him to a search also tends to support a conclusion that the direction that he submit to a search was the occasion when he became more assertive in resisting the police's demands.

E. Reasonable grounds for suspicion of possession of prohibited drugs

27 I referred earlier to the matters that the State asserts constituted reasonable grounds for the suspicion of **Officer SAN1**. As to the place, date and time, **Officer SAN1** gave evidence that Darlinghurst, in general, and Bourke Street, in particular, were, "*very well known...particularly well known for prostitution, solicitation, street offences, drug crime*".²⁸

*"Bourke Street generally, but that corner [of Bourke Street and William Street where the convenience store is located] in particular is probably the highest incidence of prostitution and vice events in that particular area...wasn't the only area patrolled. It was the whole of Darlinghurst and the whole of Woolloomooloo as well as the entertainment precinct of Kings Cross."*²⁹

28 **Officer SAN1** also said that the main crime she came across at the corner of Bourke Street and William Street:

*"would be prostitution and drugs which often go hand in hand as well, as well as other street crimes such as possessing implements to break into houses or cars. That would be the main threat."*³⁰

29 **Officer SAN3** testified that this corner was:

*"where a lot of the prostitutes ply their trade, as it's one of the few areas in the command that they can, because they can't solicit anywhere near residential areas or churches. So we get a number of complaints from residents just regarding them soliciting out the front of their house, or various other street level crimes, be it drugs or antisocial behaviour."*³¹

30 There was no evidence given about the time of day (3.30am) or the day of the week (Tuesday morning) being the particular times for crime in the area. It is not a matter I could infer from judicial knowledge. Although it may be less common, even far less common, for a person to be sitting on a stone wall in the early hours of the morning, compared to say 3.30pm, there was no evidence that indicated any connection between the time of the day (or the day

²⁸ T216/31-32.

²⁹ T217/30-34.

³⁰ T218/1-3.

³¹ T185/22-26.



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- of the week) and the possession of prohibited drugs, or even offences generally at that location. I reject the grounds of the time of day, and the day of the week as being relevant to the reasonableness of **Officer SAN1**'s suspicion.
- 31 I referred earlier to **SAN1C**'s visual focus. **Officer SAN1** said that **SAN1C**, "*immediately stopped texting...when he saw us. I started to form some reasonable suspicion*".³²
- 32 **Officer SAN1** said she noticed **SAN1C** when she was 15 metres away. The police car was proceeding north, approaching **SAN1C**. **Officer SAN1** noticed that **SAN1C** looked up from his phone. She said, "*He appeared startled. His eyes widened and he maintained a fixated watch on us as our vehicle approached which was a slow speed.*"³³ The police car was parked within five metres of **SAN1C**.
- 33 Even at 5 kilometres an hour, travelling that distance of 10 metres would take about 7 seconds, during which **Officer SAN1** observed **SAN1C** sitting on a ledge, texting on his mobile, then look up, notice the police vehicle, stop texting and maintain his focus on the police and their vehicle. **Officer SAN1**, as the apparent driver, would also have directed some of her attention to where she was parking the car. The duration of her observations could not have been long, but by then **Officer SAN1** had started to form a suspicion.
- 34 **Officer SAN1** said that after the conversation quoted above, she formed the opinion that **SAN1C** might have been under the influence of drugs. His eyes were "*extremely wide and he was fixated on. He didn't blink at all during the conversation and he had a, a, a strange facial expressions, being a strange smirk on his face as he spoke to me*".³⁴ He remained seated.
- 35 I referred earlier to the timing of when **SAN1C**'s attitude towards the police became more aggressive. It is not surprising that a person may become more adamant when it is suggested, especially by the police, that they are untruthful,

³² T219/33.

³³ T219/5.

³⁴ T221/25.



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- even more so when they are to be searched because of it. It is unlikely to be a reasonable basis for the suspicion asserted. But I have concluded that [REDACTED] SAN1C did not alter his demeanour until the proposal of the search was raised. In that event, the circumstance of his changed demeanour does not provide any ground for a suspicion of possessing prohibited drugs, since his demeanour did not change until after the suspicion had been formed and he was told he was required to submit to a search.
- 36 Nor do I think that SAN1C's attention on the police vehicle or the police when they alighted from the vehicle can have any force as a reasonable ground for a suspicion that he was in possession of prohibited drugs. It is unsurprising that a person's attention (in the early hours of the morning, when there is no evidence of other activity) would be directed to a police car driving towards them with headlights on, only a short distance away, and subsequently, on the officers as they approached and spoke to the person. Any other conduct, such as looking away or ignoring the police, would be peculiar and if anything more engendering of suspicion.
- 37 The answers given by SAN1C to Officer SAN1's questions appeared to be significant to her. But SAN1C remained seated, he answered her questions directly, and the circumstance that he was across William Street and 40 metres up Bourke Street, when one of the most direct routes home from the centre of Kings Cross was along the south side of William Street, does not suggest dishonesty, even less so when a 24-hour convenience store is nearby. If his answers were not dishonest, their content could not be suggestive of any criminal offence.
- 38 Nor do I accept that an account by SAN1C for sitting on the stone wall could, false or true, support a suspicion of possessing prohibited drugs. A false account might support a suspicion that SAN1C did not want to disclose the true reason for his presence, but that provides no link to possessing prohibited drugs. Officer SAN1 appeared ready to find an untruth when there was none, and then used that in her mind to bolster her suspicion.
- 39 The only matters raised by Officer SAN1 that, in my view, have any arguable connection with the suspicion of possessing prohibited drugs are the



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- location of **SAN1C**, and him having the appearance of being under the influence of drugs.
- 40 The latter was not supported by any evidence of **Officer SAN3**. **Officer SAN2** did not give evidence, so there is no corroboration of this opinion or these observations of **Officer SAN1**. I can, and would, infer that **Officer SAN2**'s evidence would not have assisted the State on this point. That the State did not plead the grounds for this suspicion until part way through the trial is not a point in its favour.
- 41 Further, there was no suggestion that **Officer SAN1** raised this with **SAN1C**, that is, she did not ask him if he had been taking drugs. I am not persuaded that there were any visual signs indicating that **SAN1C** was affected by drugs. In this circumstance, I do not accept that at the time, **Officer SAN1** believed that **SAN1C** was under the influence of drugs.
- 42 That leaves the location of **SAN1C**. That may be a matter that could, with other relevant matters, form the basis for a reasonable suspicion, but it is plainly insufficient by itself. **Officer SAN1**, herself, did not form that opinion only on the basis of the location of **SAN1C**. The location did not suggest **SAN1C** to be possessing prohibited drugs any more than it suggested that **SAN1C** was engaged in prostitution or house-breaking, matters no officer suspected.
- 43 For these reasons, I find that there were no reasonable grounds for **Officer SAN1** suspecting that **SAN1C** possessed prohibited drugs, and therefore she had no lawful justification to search him.
- 44 **SAN1C** submitted that what is reasonable for **Officer SAN1** to suspect must take into account other matters reasonably capable of being known. There is authority supporting this submission.³⁵ One such matter was the clean criminal history of **SAN1C**, a matter which would tend to militate against the likelihood of him possessing prohibited drugs. But my conclusions are not dependent on a finding that for the suspicion to be reasonable, **Officer SAN1** first needed to consider **SAN1C**'s criminal history.

³⁵ *Streat v Bauer* (Supreme Court (NSW), Smart J, 16 March 1998, unreported).



45 There is however another reason why **Officer SAN1** was not entitled to search **SAN1C**. Section 32(7) of LEPR requires:

"(7) A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned."

46 In other words, **Officer SAN1**, as a woman, was not lawfully entitled to search **SAN1C**, and he was therefore entitled to resist. When she announced the proposed search, only **Officer SAN2**, also a female officer, was present, apart from **Officer SAN3** who was present only as an observer. The evidence did not indicate that **Officer SAN3** would conduct the search, or that any words were said to suggest that a person other than **Officer SAN1** would conduct the search.

47 **Officer SAN3**'s evidence was to the effect that **Officer SAN1** said she "was going to search" **SAN1C**. **SAN1C**'s response, "You're not searching me" indicates the same. On **Officer SAN1**'s account, she said, "I'm going to submit you to a search," and, "You're going to be submitted to a search." In circumstances where no potential male police officer was present to conduct the search, I am satisfied that these words necessarily connoted a search by either **Officer SAN1** or possibly **Officer SAN2**. The State did not submit otherwise. In that event, an illegal search has been proposed, and for this reason also, **SAN1C** was entitled to resist.

F. Reasonable grounds for suspecting an offence

48 In order to lawfully to arrest **SAN1C**, **Officer SAN1** must satisfy the requirements of s 99 of LEPR, which include:

- (a) suspecting on reasonable grounds that **SAN1C** is committing or has committed an offence;³⁶ and
- (b) being satisfied that arrest is reasonably necessary for one of a number of listed reasons.³⁷

49 The State alleges that **Officer SAN1** suspected **SAN1C** of hindering police in the execution of their duty, in this case, searching him for prohibited drugs. I have found the search unlawful, so **SAN1C** was entitled to resist the

³⁶ s 99(1)(a).

³⁷ s 99(1)(b).



unlawful assault. He was thus not hindering the police in the execution of their lawful duty.

- 50 But it is not sufficient for **SAN1C** to be entitled to resist the police. The focus in s 99(1)(a) is the reasonable suspicion of **Officer SAN1**. If she suspected on reasonable grounds that **SAN1C** was hindering police, she may be entitled to arrest him even if she was wrong and **SAN1C** was not hindering police.
- 51 Similar to the concession made by **SAN1C**, in respect of **Officer SAN1**'s suspicion of him being in possession of prohibited drugs, **SAN1C** did not contest (or resist with any vigour) **Officer SAN1**'s suspicion of "*hindering*". Rather, the focus of the challenge was on whether **Officer SAN1**'s suspicion was reasonable.
- 52 The alleged unreasonableness of **Officer SAN1**'s suspicion was founded on the lack of an entitlement to search. Although **SAN1C**'s resistance to a search was the basis of **Officer SAN1**'s suspicion or belief that he had committed an offence of hindering police, and that he was continuing to do so, that suspicion is only reasonably based if the entitlement to search exists, or is reasonably believed to exist. The former is the same point which is found against the State already. There was no entitlement to search **SAN1C** because there was no reasonable basis for a suspicion of possessing unlawful drugs.
- 53 But could **Officer SAN1** have a reasonable belief of an entitlement to search **SAN1C**, even if her suspicion that he was in possession of prohibited drugs was not reasonably based? I do not think so. The matters which rendered her suspicion of possessing prohibited drugs unreasonable (and which deny her entitlement to search) also render her belief in an entitlement to search unreasonable.
- 54 Once **Officer SAN1** has no reasonable belief in an entitlement to search, she can have no reasonable suspicion that **SAN1C** has hindered police in the lawful execution of their duty. And the entitlement to arrest under s 99(1) is unavailable. Accordingly, the arrest is unlawful.



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55 I do not need to decide whether s 99(1)(b) was satisfied in respect of SAN1C because the requirement of s 99(1)(a) is not. However, there is force in the submission by the State that Officer SAN1 was satisfied that the arrest was reasonably necessary to stop SAN1C hindering the search³⁸ so as to allow the search to proceed (if the search was otherwise lawful).

G. The wrist lock, handcuffing and search by Officer SAN4

56 Officer SAN4 arrived in a police vehicle just as Officer SAN2 was laying hands on SAN1C to complete the arrest and handcuff him. Officer SAN1 withdrew to speak with another officer in the arriving vehicle. Officer SAN4 noticed that Officer SAN2 "appeared to be struggling" with SAN1C, "He was pulling away from her, she was trying to contain his arms. I took hold of one of his arms". Officer SAN4 then put SAN1C's left arm in a "wristlock" which he described as "an approved technique for pain compliance" whereby the pressure "forces the hand back and affects the...radial nerve". This occurred for up to 30 seconds. Officer SAN4 secured compliance from SAN1C. SAN1C was then handcuffed with his hands to the rear of his body. Officer SAN4 then performed an "ordinary search" which involves a "systematic" search:

*"starting from top, working your way down, frisking on the outside of the clothes. If there's a jumper it can be taken off. Obviously if you're handcuffed, that's a bit difficult, but through all pockets, up and down each leg, and with the blade of the hand in the groin area and around the buttocks and around - in the shoes as well."*³⁹

57 Officer SAN4 made no notes of the events at the scene. He had no involvement, apart from assisting with the search. He conceded that he put SAN1C in a wrist lock and put him in handcuffs, and that both were "for the purpose of searching him".⁴⁰

58 The lawfulness of Officer SAN4's actions in applying the wrist lock, the handcuffs and conducting the ordinary search were in issue. The State considered and refused to make an application for a late amendment to its defence to rely on s 24 of LEPR, a provision which empowers a police officer to search a person who is in lawful custody. The State conceded that no provision other than s 24 was relied on to justify the search, and expressly

³⁸ See 99(1)(b)(i), see also (iv) and (v).

³⁹ T163/21-25.

⁴⁰ T168/1-6.



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declined to amend its defence to rely on s 24 in circumstances where the Court decided and announced that s 24 needed to be pleaded to be relied upon. In these circumstances, including that the State proposed to amend to plead s 24 but then withdrew that application after consideration, I cannot, in fairness, allow a defence relying on s 24 to be maintained, whatever might have been its merits had that issue been fully ventilated.

- 59 Notwithstanding the State indicating that there was no other provision relied upon, s 230 of LEPRA was pleaded and was raised again in subsequent submissions. Section 230 provided:

"230 Use of force generally by police officers

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function."

- 60 The State contended that Officer SAN4 was entitled to use reasonable force to assist Officer SAN1 to search SAN1C, perhaps even to arrest SAN1C (notwithstanding that Officer SAN4 volunteered that all his actions were for the purpose of the search), without compliance with another provision.

- 61 But I do not think s 230 is an independent source of power to exercise a function such as search or arrest. Rather, it permits the use of such force as is "reasonably necessary" to exercise the function. The lawfulness of the function to be exercised (such as arrest or search) is governed by the other provisions, such as ss 24 and 99, that attend the exercise of those powers.

- 62 In *State of New South Wales v Bouffler*,⁴¹ the Court of Appeal stated:

"In our opinion, the words and syntax of ss 9(1), 99(2) and 99(3) make it plain that each individual officer who exercises the function must have the requisite state of mind. The use of the indefinite article in the first phrase of each provision, viz: 'a police officer may', or 'a police officer must not ... unless', combined with the use of the definite article in the second phrase, viz: 'the police officer', makes this clear.

In this regard, we consider the statement of Meagher JA, Gleeson JA and Adamson J agreeing, in State of New South Wales v McCarthy, at [25], relating to ss 9(1) and 10(2), that the requirements of each provision 'must be satisfied in relation to each officer who relies upon the power as having authorised his entry' to be correct. It is apparent from Meagher JA's

⁴¹ [2017] NSWCA 185 at [47]-[49].



construction of the provisions that this conclusion was arrived at independently of the concession made by the State in that case.

The same conclusion applies in respect of the words and syntax of s 99(3) in its form at the time of the incident involving the respondent. Section 99(3) provided that a police officer 'must not arrest a person ... unless the police officer suspects' one of the matters specified in the paragraphs of the subsection. It is not sufficient that a police officer arrest a person on the instruction of another officer, even if that other officer had the state of mind specified in the subsection."

- 63 I note that s 99 has been amended since the occasion to which these comments relate.
- 64 The decision in *Bouffler* also clarifies that if a police officer is "assisting another police officer", these statutory requirements remain.⁴²
- 65 In that event, there is no legal justification for the force used by Officer SAN4 on SAN1C, and it constituted an assault and battery. There is no pleaded defence to this action, and there is no evidence to satisfy the s 99 or s 21 requirements. SAN1C is entitled to compensation for this assault.

H. Damages

- 66 SAN1C claims damages, including aggravated and exemplary damages, for the following conduct:
- (a) the assault and battery on Bourke Street by Officers SAN1 and SAN2;
 - (b) the wrongful arrest on Bourke Street by Officer SAN1;
 - (c) the assault and battery by Officer SAN4 on Bourke Street involving the wrist lock, the handcuffing to the rear, and the search;
 - (d) the continued unlawful imprisonment after the search, including at Kings Cross Police Station; and
 - (e) the strip search at Kings Cross Police Station.
- 67 Item (e), the strip search, was admitted to be unlawful shortly prior to the trial, and item (d), the continued unlawful imprisonment, was admitted by the State during the trial. As for item (c), no justification for the assault by Officer SAN4 was pleaded, the unlawfulness of the assault was never conceded, and the reliance on s 230 was, at the end of the trial, only faintly maintained. I have found that the conduct of Officer SAN4 in searching and handcuffing SAN1C

⁴² See [61], [62].



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constituted an unlawful assault. I have also found items (a) and (b) - the wrongful arrest and also the relatively low level assault by **Officers SAN1 and SAN2** - to be established.

68 **SAN1C** claimed damages according to the following schedule:

Head of damage	General	Aggravated	Exemplary
Assaults/Batteries on Bourke St	\$15,000	\$10,000	
Wrongful Arrest/False Imprisonment (from arrest)	\$15,000	\$15,000	
False imprisonment (after arrest)	\$10,000	\$10,000	
Assault/Strip Search	\$20,000	\$30,000	
Combined Exemplary damages			\$100,000

69 Thus, the total claim is \$125,000 compensatory damages, including \$65,000 for aggravated damages, plus \$100,000 for exemplary damages.

70 The State submits that damages should be assessed at \$11,000 as follows:

Head of damage	Assessment
Assault (continuation of handcuffing from completion of search to St Peters Street to their removal at the police station)	\$1,000
Assault (strip search)	\$3,000
False imprisonment (for a period of about 35 minutes)	\$2,000



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Aggravated damages (for the humiliation)	\$5,000
Exemplary damages	\$0
Total	\$11,000

(a) The arrest and initial imprisonment

(i) Relevant principles

- 71 The tort of false imprisonment is a tort of strict liability focussed on the "*vindication of liberty and reparation to the victim*" rather than any wrongdoing on the part of the defendant.⁴³ Damages for the tort compensate not only for the loss of liberty, but also for the loss of dignity and reputation.⁴⁴ Thus, damages are assessed by reference to the duration of the deprivation of liberty and for the hurt or injury to feelings such as by the "*injury, mental suffering, disgrace and humiliation suffered as a result of the false imprisonment*".⁴⁵
- 72 There is not "*some kind of applicable daily rate*".⁴⁶ A substantial proportion of the ultimate award is for "*the initial shock of being arrested*".⁴⁷ An "*interference with personal liberty even for a short period is not a trivial wrong*".⁴⁸ In this case, the period of imprisonment was under an hour, although the greater proportion of damages should be awarded for the initial embarrassment of arrest.
- 73 Putting aside matters of aggravation, I would allow \$15,000 for the wrongful imprisonment, including the arrest on Bourke Street, and a further \$10,000 for the continuation of that arrest in the police wagon and at Kings Cross Police Station.

⁴³ State of NSW v Smith [2017] NSWCA 194 at [153].

⁴⁴ Goldie v Commonwealth of Australia (No 2) [2004] FCA 156 at [14], Fleming J, The Law of Torts, 8th ed, LBC (1992) at 29, Smith at [154].

⁴⁵ Trindade and Cane, The Law of Torts in Australia, 3rd Edition, OUP (1999) at 302, Goldie at [14], Smith at [154].

⁴⁶ Ruddock v Taylor (2003) 58 NSWLR 269 at [49].

⁴⁷ Ruddock at [49], Thompson; Hsu v Commissioner of Police of the Metropolis [1998] QB 498 at 515.

⁴⁸ Watson v Marshall (1971) 124 CLR 621 at 632; [1971] HCA 33, Smith at [157].



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- 74 Aggravated damages are compensatory, assessed from the point of view of the plaintiff, whereas exemplary damages are of a punitive or deterrent nature, and focussed on the conduct of the defendant.⁴⁹
- 75 Injury to **SAN1C**'s feelings caused by the insult, humiliation and the like are a component of aggravated damages, reflecting the circumstance where the manner of the wrongful act aggravated the harm done.⁵⁰
- 76 Damages for false imprisonment are to reflect the "*disgrace and humiliation*" of an arrest. Yet this is also a factor of aggravation. Care must be taken not to double count an item of damage where the various categories of damages are not self-contained.⁵¹ Compensatory damages, including aggravated damages, must be awarded before considering whether and what exemplary damages should be awarded.
- 77 I take into account the aggravating factors that the arrest occurred in the dark of night, in a public place and by multiple police officers. However, this was an arrest where there was no one else evidenced to be present, in particular, no one known to **SAN1C**. **SAN1C** rightly protested his arrest, but that protest was disregarded by **Officer SAN1**. I also take into account that the arrest involved being placed in a caged police vehicle and taken to a police station.
- 78 Although the State made concessions about the lawfulness of the continued arrest, the belated and limited nature of those concessions meant that **SAN1C** was forced to undertake litigation with its concomitant stress, worry, time and cost, to establish that which the State eventually conceded. No contrition was expressed by **Officer SAN1** for any item of conduct, a matter that may impact aggravated as well as exemplary damages.
- 79 I allow an additional \$10,000 for aggravated damages for the wrongful arrest and imprisonment, as mentioned.

⁴⁹ State of NSW v Abed [2014] NSWCA 419 at [230], New South Wales v Zreika [2012] NSWCA 37 at [60]-[64].

⁵⁰ See Lamb v Cotogno (1987) 164 CLR 1 at 8; [1987] HCA 47, Uren v John Fairfax (1966) 117 CLR 118; [1966] HCA 40, Abed at [213].

⁵¹ See New South Wales v Radford (2010) 79 NSWLR 327 at [97]; [2010] NSWCA 276, Abed at [234].



(b) **The minor assault**

80 I assess \$1,000 damages for the relatively minor assault by **Officer SAN1**, accompanied by **Officer SAN2**, in laying hands upon **SAN1C**, against his will in connection with the arrest.

(c) **The assault by Officer SAN4**

81 The assault by **Officer SAN4** comprised the wrist lock, the handcuffing, and the search. The wrist lock was designed to, and did, inflict severe pain on **SAN1C**, although it lasted for no more than 30 seconds. The handcuffing was painful. **SAN1C** gave evidence of stating at the time, "You're breaking my wrist. Is this necessary?" **SAN1C** also said that he felt threatened and gave evidence of forceful and insulting language being used. He felt hurt and embarrassment, and an invasion of privacy as his whole body was patted down.

82 A statement of **SAN1C**,⁵² unsigned but dated 4 May 2015, tendered in the proceedings records **Officer SAN2** (the "Taller Officer") saying to him in Bourke Street during the interaction there, "Shut the fuck up and do as you're told." "You're a fucking smart ass aren't you?" "You'll know when I break your fucking wrist you little cunt." "You're not so smart now are you, you fucking prick." When **SAN1C** asked **Officer SAN2**, "How do you want me to do that when you have got my hands tied behind my back?", in response to being directed to get in the back of the police vehicle, she responded, "I don't give a shit, crawl in."

83 And when **Officer SAN2** directed **SAN1C** out of the police van, and **SAN1C** asked, "How am I supposed to do that, you have the handcuffs so tight on my wrist", as well as mentioning a knee injury he had suffered previously, **Officer SAN2** said, "That's your fucking problem, not mine. Crawl out." It also records **Officer SAN2** saying at the police station, "Are you a faggot?", "Look at your boobs", and other comments.

84 I accept that the language was forceful by the police, although the insulting language of which **SAN1C** gave evidence was not initially pleaded and was not referred to in submissions. Yet there was no contrary evidence from **Officer**

⁵² Exhibit J.



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SAN2 and I would accept, in those circumstances, that **Officer SAN2** did voice insulting language to **SAN1C**. But I do not find it as especially significant in aggravating his damages, for the reasons I have just noted.

- 85 There is no evidence of long term consequences to **SAN1C**, no evidence of any physical or psychological disabilities occasioned by the assaults, or by other events on the day.
- 86 The assaults were aggravated by being done by those in authority and by the forceful language.
- 87 The assault by **Officer SAN4** was never justified on the pleadings and yet **SAN1C** was again obliged to give evidence of it and to prove it in court. That is also aggravating conduct, increasing the hurt and damage to **SAN1C**.
- 88 I note that all of the statements I have referred to from **Officer SAN2** were not just accompanying the assault of **Officer SAN4**, but from the time police officers arrived at the scene in Bourke Street, until after the arrival at the Kings Cross Police Station.
- 89 I would award \$6,000 for the assault by **Officer SAN4**, and \$3,000 for aggravated damages.

(d) The strip search

- 90 **SAN1C** was forced to undertake the degrading experience of removing his pants and underwear, displaying his genitals, lifting up his genitals to display that area of his body behind them, and squat in that state of nakedness. This was done at the direction of **Officer SAN1** in front of two male officers. The State, though not **Officer SAN1**, conceded it to be unlawful, and conceded it to be the most serious of the conduct about which **SAN1C** complained.
- 91 **SAN1C** gave evidence that after this ordeal, **Officer SAN1** said, "[Y]ou see, if you just did what we asked you to do, we - this could have all been avoided."⁵³ **Officer SAN1** accepted that this may have been said, saying, "[I]t's quite possible that I did."⁵⁴

⁵³ T94/29.

⁵⁴ T345/36.



92 I find that this statement was made by Officer SAN1. The statement implies recognition in Officer SAN1 of the hurt and embarrassment she had caused SAN1C, and an assertion, wrongly as I have found, that he, not her, was responsible for all those unlawful and damaging events.

93 It also indicates that, at least by that stage and perhaps from much earlier, Officer SAN1 no longer suspected that SAN1C possessed prohibited drugs. There was no suggestion, in her comment, of surprise that nothing had turned up on SAN1C, even less that what had occurred was an unfortunate mistake.

94 The State's schedule of damages referred to the humiliation of SAN1C from this and other unlawful conduct, but, in my view, grossly understates the appropriate level of damages.

95 SAN1C's damages for the strip search were aggravated by the absence of any evidence explaining the purpose and need for the strip search. Whilst it might be possible that a strip search could reveal drugs on SAN1C's person that might not have been revealed by an ordinary search, that was not explained. There was no evidence as to whether alternatives to this invasive procedure were considered.

96 Requirements in respect of searches, generally, and strip searches, in particular, are imposed in ss 31 and 32 of LEPRA.

97 Section 31 of LEPRA provides:

"31 Strip searches

A police officer or other person who is authorised to search a person may conduct a strip search of the person if the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out."

98 Section 32 provided:

"32 Preservation of privacy and dignity during search

(1) A police officer or other person who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.



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(2) *The police officer or other person must inform the person to be searched of the following matters:*

(a) *whether the person will be required to remove clothing during the search,*

(b) *why it is necessary to remove the clothing.*

(3) *The police officer or other person must ask for the person's co-operation.*

(4) *The police officer or other person must conduct the search:*

(a) *in a way that provides reasonable privacy for the person searched, and*

(b) *as quickly as is reasonably practicable.*

(5) *The police officer or other person must conduct the least invasive kind of search practicable in the circumstances.*

(6) *The police officer or other person must not search the genital area of the person searched, or in the case of female or a transgender person who identifies as a female, the person's breasts unless the police officer or person suspects on reasonable grounds that it is necessary to do so for the purposes of the search.*

(7) *A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned.*

..."

99 **Officer SAN1** admitted a lack of familiarity with the requirements of s 31. The pre-requisites in s 32(2), (3), (4), (5), (6), and (7) were not established on the evidence. Yet the State, to the conclusion of submissions, maintained that the strip search was only a technical breach. Neither of the two male police officers who conducted the strip search gave evidence of a suspicion on reasonable grounds that it was necessary to search the genital area of **SAN1C** for the purposes of the search, as s 32(6) requires. Though apparently acting at the direction of **Officer SAN1**, it seems that there nevertheless remained (unlike in s 99(2) in respect of an arrest) a statutory obligation on the police officers who actually conducted the search to be satisfied of the items in s 32 of LEPPRA, even if that satisfaction arises from information supplied by the directing police officer in s 32(7).

100 Furthermore, it appears that **Officer SAN1** directed that a strip search be conducted after an ordinary search had been conducted that **SAN1C** did not observe. An ordinary search had been conducted at the scene, but **Officer SAN1** gave evidence that she was unaware of it. She



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~~was thus unfamiliar with what steps had already been taken to check for drugs~~
in **SAN1C**'s possession. There was no satisfactory explanation of why **SAN1C**
Officer SAN1, in that belief, did not then direct that an ordinary search be first
undertaken. There was no evidence that she or anyone else gave any attention
to the matters in s 32 of LEPR.

101 **SAN1C** described his humiliation. He said he felt, "*Absolutely disgusted. It was outrageous. It was something that I thought I'd never ever be in a position to be treated in such a humiliating fashion*".⁵⁵

102 These contraventions of the requirements of ss 31 and 32 of LEPR are matters of aggravation, increasing the humiliation of **SAN1C**.

103 The State points to the following factors in **SAN1C**'s conduct in mitigation. That he:

- (a) "*chose not to permit the search*" (which must be a reference to the initial search);
- (b) "*became aggressive towards the officers who were simply performing their duties*";
- (c) "*chose to continue to refuse a search*" after being told it was an offence; and
- (d) "*chose to resist*" the handcuffing.⁵⁶

104 None of these matters are mitigating factors on the damages to be awarded.

The officers were acting unlawfully, not "*simply performing their duties*", and **SAN1C** was entitled to resist the unlawful assault and arrest.

105 The State also referred, in respect of aggravated damages, to the absence of "*members of the public*" and "*friends or colleagues*". I accept this as a matter of relevance to the award of damages, and that it tends to reduce the amount of damages.

106 The State also said that the force applied during the arrest was minimal, and that there was no evidence of physical or psychiatric injury. The latter point is correct and I take it into account. The former is not, and I reject it. The wrist lock involved significant force and pain, and to a lesser extent, so did the

⁵⁵ T93/31-32.

⁵⁶ Defendant's submissions, 13/3/18, at [72].



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handcuffing of **SAN1C** behind his back. I have taken into account **SAN1C**'s inability to discuss the matter with his girlfriend for two weeks, a matter accepted by the State.

- 107 The State also concedes that the strip search was "*humiliating*" and "*difficult*". The State accepted that the lack of an apology may increase the ordinary compensatory damages.
- 108 I would assess damages for this at \$20,000 for the strip search, and a further \$10,000 for aggravated damages.

I. Exemplary damages

- 109 Exemplary damages go beyond compensation, and are a punishment to deter similar future conduct, reflecting the Court's detestation of the conduct.⁵⁷ An award of exemplary damages generally requires "*conscious wrongdoing in contumelious disregard of another's rights*",⁵⁸ although, "[c]onduct may be high handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing".⁵⁹
- 110 The State submits that an award of exemplary damages should not follow where their failure is non-compliance with the strict requirements of LEPRA.
- 111 **SAN1C** resisted the description that the unlawfulness of the police officers' conduct was a minor non-compliance, and referred to the concession that the continued detention was unlawful, so for that reason alone the subsequent strip search was unlawful.
- 112 **SAN1C** gave evidence that whilst at Bourke Street, **Officer SAN1** required him to submit to a strip search. This was alleged to be after a short conversation where **SAN1C** had directly answered **Officer SAN1**'s questions and was not "*observed...to engage in any behaviour that was even vaguely unlawful*".⁶⁰ However, I do not find that **Officer SAN1** proposed a strip search at the outset, at least to occur in Bourke Street, a matter of which

⁵⁷ See *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 at 8, *State of NSW v Abed* [2014] NSWCA 419 at [232].

⁵⁸ *Gray v Motor Accidents Commission (Gray v MAC)* (1998) 196 CLR 1 at [14]; [1998] HCA 70, *Abed* at [232].

⁵⁹ *State of New South v Riley* (2003) 57 NSWLR 496 at [138]; [2003] NSWCA 208, *Abed* at [233].

⁶⁰ Outline of Plaintiff's submissions, 21/3/18, at [20].



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SAN1C testified but which was not put to either Officers SAN1 or SAN3.

113 SAN1C also referred to the indefensible approach of Officer SAN1 that SAN1C needed to be strip searched, when he had already been subject to a search by Officer SAN4. Officer SAN1 had not observed the search by Officer SAN4, and had not asked Officer SAN4 about it. I accept SAN1C's submission that these matters indicate that Officer SAN1 had resolved to transport SAN1C to the police station, and have him strip searched, regardless of the existence and outcome of the previous search.

114 This conclusion is supported by Officer SAN1's statement to SAN1C blaming him for the ordeal, quoted earlier, and her lack of familiarity with the restrictive requirements on strip searches imposed by ss 31 and 32 of LEPR.

115 I accept SAN1C's submission, as I have found above, that the officers forced "a 53 year old man to strip to a naked state, squat and expose his genitals" in the absence of any consideration of the pre-conditions in ss 31 and 32 for the use of this extremely invasive power.

116 SAN1C referred to *New South Wales v Ibbett*.⁶¹

"An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government."

117 These considerations apply at least as strongly in respect of trespasses to the person. The plurality of the High Court in *Ibbett*⁶² endorsed what was said in *Adams v Kennedy*⁶³ in relation to the quantum of exemplary damages:

"The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."

118 The State's concession in relation to the strip search illustrates that the police officers have used a most invasive power without the slightest justification. None of the several requirements in ss 31 and 32 of LEPR were the subject

⁶¹ (2006) 229 CLR 638 at [38]; [2006] HCA 57.

⁶² At [54].

⁶³ (2000) 49 NSWLR 7.



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of evidence or submissions. The grievous nature of the offensive conduct might be mitigated in circumstances of urgency or turmoil, but here the admitted worst offence, the strip search, was done in the relative peace of the police station, where there was no resistance from **SAN1C**. Even this did not produce any consideration of the requirements of the law governing strip searches by any officer, apparently because **Officer SAN1** had some time ago determined to proceed with the strip search. I am not persuaded that she retained a *bona fide* belief in the need for the strip search to locate the once suspected drugs.

119 The decision to compel a strip search appeared to be a response to **SAN1C**'s lack of submission at the scene. In my view, it warrants a significant award of exemplary damages.

120 The State referred to the decision of *Moses v State of New South Wales (No. 3)*.⁶⁴ In that case, Gibson DCJ awarded exemplary damages of \$15,000 for unlawful conduct of the police, which was described thus:⁶⁵

"[315] Mr Kawenga got out of the car to go to the help of his friend, only to be pursued, arrested, taken to the police station, strip searched and subjected to a completely unnecessary police interview where he was not asked about the offences the police were investigating. He was upset by being asked questions about his racial background by the police, and is upset that he was asked this question again in interrogatory 19 (T 93). He is a young man of 23 who found the procedure of a record of interview and a strip search frightening, not least because he had no prior criminal record or experience of the police of any kind.

[316] As set out above, I have awarded Mr Kawenga \$35,000 general damages. Mr Kawenga should be awarded a further \$10,000 for aggravated compensatory damages and \$15,000 exemplary damages, making a total of \$60,000."

121 Although the "strip search" in that case might have been of the same nature as that to which **SAN1C** was subjected, it was not described in any detail, nor was there any reference to the provisions in ss 31 and 32. Because the decision was not subject to appeal, it does not have the force of a decision approved by the Court of Appeal.⁶⁶ These matters are mentioned not to

⁶⁴ [2010] NSWDC 243.

⁶⁵ [315]-[316].

⁶⁶ Cf *Walter Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 at [93]-[95].



indicate a doubt about the decision in *Moses*, but a doubt about the applicability of the amounts awarded in that case to the present matter.

- 122 The decision in *Moses* is in respect of conduct in 2008, some seven years before the present assault and is the subject of a judgment eight years ago. I am not satisfied I am limited to \$15,000 for exemplary damages.
- 123 **SAN1C** submitted that the exemplary damages of \$15,000 awarded in *Moses* can be presumed not to have produced any change to the State's training and procedure in dealing with strip searches, for some seven or eight years later **SAN1C** was strip searched and no regard was paid to the restrictions on this power in ss 31 and 32 of LEPR.
- 124 I accept that one of the purposes of exemplary damages awards is to bring home to the State the egregious conduct of its officers that needs correction. However, I do not think that the judgment in *Moses* indicates that I should raise the level of exemplary damages on the basis merely that another instance of an illegal strip search has occurred some years ago.
- 125 I recognise that some of the matters to which references have been made in respect of exemplary damages have also been referred to in respect of compensatory damages, including aggravated damages. But the purpose of exemplary damage is to focus on the position of the State and its officers, not on the damage done to **SAN1C**.
- 126 In all the circumstances, I would award the sum of \$35,000 for exemplary damages, principally in respect of the strip search, but also partly in respect of the wrongful arrest, continued detention and the unjustified ordinary search. These matters manifest an almost reckless indifference by the officers to the statutory safeguards attaching to these invasive powers.

127 Thus, the amount of damages comprises:

Head of damage	General	Aggravated	Exemplary
Assaults/Batteries on Bourke St	\$7,000	\$3,000	



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Wrongful Arrest/False Imprisonment (from arrest)	\$15,000	\$10,000	
False imprisonment (after arrest)	\$10,000		
Assault/Strip Search	\$20,000	\$10,000	
Combined Exemplary damages			\$35,000

128 This produces compensatory damages, including aggravated damages, of \$75,000, and total damages of \$110,000.

J. Costs

129 The parties accepted that costs should follow the event subject to any further application.

K. Interest

130 Interest was sought, although it was not the subject of submissions. I would allow interest at 1% per annum on the compensatory component of damages, for the reasons I gave in *Shalhoub v State of New South Wales*,⁶⁷ namely that the rate should be the difference between the return on a secure investment and the inflation rate.⁶⁸

131 The interest on \$75,000 from 24 March 2015 to 29 May 2018 is \$2,387.67.

L. Orders

132 The orders of the Court are therefore:

- (1) Judgment for the plaintiff in the sum of \$112,387.67.
- (2) Defendant to pay the plaintiff's costs.
- (3) Liberty to either party to make application to amend order (2), including to seek a special costs order, by notification by email to my associate within 14 days.

⁶⁷ [2017] NSWDC 363 at [184].

⁶⁸ MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657 at 666; [1991] HCA 3 at [13].



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Operation Sandbridge

Report pursuant to s 132

Law Enforcement Conduct Commission Act 2016

May 2020

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