

# LECC

Law Enforcement  
Conduct Commission

## Review of NSW Police Force Standard Operating Procedures for strip searches in custody

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January 2020



## Law Enforcement Conduct Commission

Level 3, 111 Elizabeth Street  
Sydney NSW 2000  
Email: [contactus@lecc.nsw.gov.au](mailto:contactus@lecc.nsw.gov.au)

### **Postal address**

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

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# FOREWORD

In 2018, the Law Enforcement Conduct Commission (the Commission) commenced an inquiry into the practices of the NSW Police Force (NSWPF) in relation to the conduct of strip searches.

The Commission's inquiry is ongoing. It includes investigations under Part 6 of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act) into a number of individual strip searches conducted by police, as well as monitoring the way the NSWPF is investigating potential misconduct in a number of strip search incidents.

The Commission's ongoing work in relation to strip searches includes issues such as training, management and supervision, but this report is confined to problems identified in policy, in particular the NSWPF Standard Operating Procedures (SOPs) for custody as they relate to strip searches. The Commission focussed on this policy area as it was clear that clarity, coherence and consistency in the SOPs are essential elements of appropriate management of the power to strip search.

On commencing its review, the Commission found that the number of local SOPs had proliferated, there was a lack of consistency between them, and the instruction they provided police for conducting strip searches was seriously inadequate. The NSWPF had over 100 different SOPs for custody applying in separate local police commands and police stations across the state. The procedures contained references to legislation and policy which were incoherent, out of date or incorrect, did not contain references to important legislative requirements and lacked clear guidance about exercising the powers appropriately.

In July 2019 the Commission provided the Commissioner of Police with a draft report based on its review of the custody SOPs. The review included five recommendations.

On 2 September 2019 the Commissioner of Police advised that the NSWPF supported all of the recommendations or had implemented the recommendations in updated policy.<sup>1</sup> The NSWPF implemented two new policy documents dealing with person searches in custody and in the field: the *NSWPF Charge Room and Custody Management Standard Operating Procedures* and the *NSWPF Person Search Manual 2019*.

The new policies contain many improvements to the clarity and consistency of procedures, including the consolidation of custody procedures into one document and the removal of superseded local policies. However, the Commission has ongoing serious concerns about the instruction and lack of instruction provided to police in certain areas. The revised policies also raised broader legal issues which remain unresolved.

On 13 September 2019 the Commission wrote to the NSWPF highlighting significant gaps in the new policies. This included issues to do with police conducting strip searches by consent and how that consent is obtained, asking persons to move a part of their body, including breasts and genitalia to facilitate the search, the use of force when conducting a search, and the provision of support to young and vulnerable persons during a search. The Commission also raised questions as to the relationship between strip search powers in the *Law Enforcement (Powers and Responsibilities) Act 2002* and powers provided to police by the *Crimes (Forensic Procedures) Act 2000*.

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<sup>1</sup> Letter from Commissioner of Police, NSW Police Force, to Chief Commissioner, Law Enforcement Conduct Commission, 2 September 2019.

These issues are subject of ongoing discussion between the Commission and the NSWPF. The Commission is concerned about a number of key policy positions stated or implied in the new SOP and Manual which the Commission considers to be wrong at law. Uncertainties include permitting the use of force in circumstances where a person has been asked to move a part of their body for the purpose of a search, such as squatting or lifting testicles, but declines to do so, when there are no explicit statutory powers to require the person to comply. It also includes whether thresholds required to undertake strip searches apply where an officer conducts a search by consent. These issues are of significant public interest and will be subject of further analysis as part of the Commission's inquiry into strip search practices. We understand that the NSWPF does not propose to reissue the new policies until it has gathered more feedback from operational police following the current music festival season and the Commission's inquiry.

The Commission considers that until these difficult issues are addressed the revised policies and related training and education as they presently stand must be regarded as interim only and in need of substantial further explication or revision.

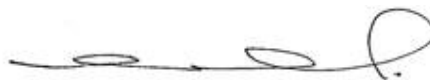
The Commission acknowledges the difficulties faced by police when applying legislation that is open to interpretation and there is a lack of relevant clarifying legal decisions to guide them. The absence of relevant legal authority highlights the importance of developing a corporate policy position, which provides clear practical guidance for operational police. The process of developing such a corporate position needs to be transparently articulated, with the legally arguable outcomes, supported by legal analysis. Moreover it must be clearly set out, to enable relevant stakeholders, including this Commission, to consider the adequacy of the reasoning both as to legal outcomes and appropriate policy. The incidence of unlawful or inappropriate use of strip search powers, particularly on young people, has become increasingly evident to the Commission in the course of its investigations and oversight. It has also become evident that there is a widespread lack of knowledge among operational police as to the legal prerequisites for valid searches. This needs to be addressed by the NSWPF through improved policy, education and training.

This report assesses the NSWPF policies as they were prior to August 2019, the clarity and propriety of the new policies, and the issues the new policies raise.

It will hopefully serve to assist in the ongoing development of clear, consistent and comprehensive guidelines for police in exercising strip search powers lawfully and appropriately.



**The Hon M F Adams QC**  
Chief Commissioner



**The Hon L Drake**  
Commissioner for Integrity

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# 1. INTRODUCTION

This report contains the Commission’s review of the Standard Operating Procedures (SOPs) which were available to NSW Police Force (NSWPF) officers prior to August 2019, and which instructed officers how searches, in particular strip searches, were to be conducted in custodial settings. That is, the policies for searching people who have been arrested and taken to, or are otherwise present in police stations, or for inmates held by Corrective Services NSW who are transferred through police cells.

In September 2018, as part of its inquiry into strip search practices, the Commission requested copies of all SOPs for custody in operation for all police commands, including any locally managed SOPs, across NSW.<sup>2</sup>

The NSWPF provided 113 local custody management SOPs.<sup>3</sup> Some of these SOPs were specific to police area commands (PACs), some relevant to police districts (PDs) which are smaller than commands, and some SOPs were relevant only to specific police stations. Of the six NSWPF regions: Central Metropolitan and South West Metropolitan Regions had custody SOPs which were maintained at the level of PACs; Northern Region, Southern Region and Western Region had different custody SOPs for police districts and police stations, and North West Metropolitan had custody SOPs relevant to all PACs with one SOP relevant to a police station.<sup>4</sup>

The Commission’s review of these SOPs proceeded on the basis that the 113 SOPs provided represented all of the NSWPF custody SOPs in operation.

Across all regions there were considerable discrepancies in the instructions given to police about how to conduct searches. Of significant concern to the Commission was the fact that many SOPs contained incorrect and inconsistent references to both police policy and relevant legislation. Additionally, many SOPs lacked clarity about the extent of police powers and responsibilities in conducting searches, and none provided sufficient guidance as to the procedures that police should follow in conducting those searches, particularly on matters that are not explicit in legislation.

It is obvious that all policies relevant to the exercise of strip search powers should be coherent, uniform and consistent with legislation. When the contents of the Commission’s review were first presented to the NSWPF in July 2019, the NSWPF was advised that any decision not to implement coherent and uniform policy may have been potentially unreasonable conduct, as set out in section 11(1)(b)(i) of the *Law Enforcement Conduct Commission Act 2016*. This must be so even, perhaps particularly, where the legislation is cast in general language. The views of the Commission as to whether any particular procedure or policy position is appropriate, provided it is consistent with legislation will be further determined and addressed as the process of our inquiry into strip search practices unfolds.

The Commission’s review identified the number of SOPs which included, or omitted to include guidance on specific powers and safeguards. The numbers were obtained by conducting key

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<sup>2</sup> Letter from Chief Commissioner, Law Enforcement Conduct Commission to Assistant Commissioner, Professional Standards Command, NSW Police Force, 21 June 2018; Letter from Chief Commissioner, Law Enforcement Conduct Commission to Assistant Commissioner, Professional Standards Command, NSW Police Force, 27 August 2018; Letter from Chief Commissioner, Law Enforcement Conduct Commission to Assistant Commissioner, Professional Standards Command, NSW Police Force, 14 September 2018.

<sup>3</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 12 October 2018; Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 14 August 2018.

<sup>4</sup> NSW Police Force, Quakers Hill Police Area Command, *Riverstone Police Station Standing Operating Procedures Custody and Charge Room*, date of issue 14 September 2018.

word searches of the SOPs documents. The Commission also attempted to capture in each number those SOPs which had text with a similar meaning, but may not have explicitly included the key word. While the numbers may be inexact, it was the view of the Commission that they fairly represented the proportion of SOPs which referred to the issues examined.

In response to the Commission's review, in August 2019, the NSWPF issued two new policies – The Charge Room and Custody Management Standard Operating Procedures ('the Custody SOPs'), and the Person Search Manual ('the Manual'). The Custody SOPs replaced the 113 local custody management SOPs. The Manual is now:

...the principal document for the carrying out of person searches under LEPR. It provides guidance as to when and how personal searches must be carried out, as informed by legislation, the common law, and NSWPF policy.<sup>5</sup>

Chapters 2 to 4 of this report contain the analysis of the 113 local custody management SOPs that were in place prior to August 2019. Chapter 5 contains the conclusions and recommendations of the Commission's review, which have largely been accepted by the NSWPF in the creation of the new Custody SOPs and Manual. These new policies are discussed in Chapters 6 and 7, along with the Commission's observations about issues which remain unclear in those policies or which appear not to conform with the limits of the powers for person searches set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

The introduction of a single policy pertaining to charge room and custody management procedures is a significant improvement on the pre-existing proliferation of incoherent localised policies. Notwithstanding this improvement, the Commission considers it is important to publish the details of the review which led to this reform in the interests of transparency in an area which is of significant public interest. Many of the localised policies had been in place for a considerable time, and the errors and lack of clarity contained within them would not have assisted police in executing their duties. This is of significant concern especially where the relevant duties involve decisions concerning the execution of powers which involve a significant incursion into the liberties and dignity of individuals.

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<sup>5</sup> NSW Police Force, *Person Search Manual*, 20 August 2019.



## 2. LEGISLATION AND POLICE POLICY GOVERNING STRIP SEARCHES

LEPRA sets out the powers for police to conduct searches, including strip searches, of people, both in police stations or other places of detention and in other places, known as searches ‘in the field’.<sup>6</sup>

The sections of LEPRA that relate to person searches have been amended a number of times since the legislation was first introduced. Most significantly, a number of amendments were made in 2014, which changed the levels of searches that police can undertake. Searches changed from a three tiered system (frisk, ordinary and strip searches) to a two tiered system (general and strip searches). Amendments in 2014 also included changes to strip search powers which removed the requirement that ‘the seriousness and urgency of the circumstances’ are needed to render a strip search lawful in a custody setting.

Prior to the creation of the Person Search Manual in August 2019, the primary policy direction for police which explained how police were to exercise their general powers and functions was the *NSW Police Force Handbook* (the Handbook). The Handbook continues to operate as a policy document instructing police about person searches (amongst other things). Until 2018 the Handbook was complemented by the Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)(the Code), which set out police powers to search and detain, seize property, arrest and question suspects. The Code was withdrawn in 2018 and the relevant information was merged into the current iteration of the Handbook.

The Handbook includes guidance on conducting searches in custody with references to many, but not all sections of LEPRA that govern the conduct of strip searches.<sup>7</sup> However, the Commission’s review found that local custody SOPs more frequently referred to the Code than the Handbook.

The Code itself contained outdated information. For example, it referred to the three types of searches that appeared in the legislation before it was amended in 2014. Thirty two of the SOPs (28.3%) incorrectly referred to frisk searches as a level of search available when considering searching a prisoner.

Approximately 38 of the local custody SOPs (33.6%) referred police to the Code in providing guidance on searches. Some SOPs relied on the Code as the sole source of guidance, for example:

Before being placing in a cell [sic], consideration must be given for searching the prisoner, and if a strip search is necessary, then it must be in accordance with the Code of Practice for CRIME.<sup>8</sup>

and:

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<sup>6</sup> Throughout this report, references to legislation are to *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), unless otherwise indicated.

<sup>7</sup> The Handbook refers to ss 31 and 32 and safeguards under Part 15 of LEPRA. It does not refer to s 33 (rules for conduct of strip searches), or s 34 (no strip search of children under 10).

<sup>8</sup> NSW Police Force, Richmond Police District, *Standard Operating Procedures Ballina Police Station Custody & Cells*, date of issue 1 April 2018.

If the custody manager deems it appropriate, the prisoner should be strip searched. At all times, officers are to adhere to the Code of Practice for CRIME.<sup>9</sup>

Only one SOP contained a direct reference to the Handbook in relation to searches.<sup>10</sup>

Twenty nine of the 38 SOPs which referenced the Code were updated in 2018, suggesting they were updated after the Code was superseded, or while that policy was under review, without reflecting the changes or proposed changes to policy. Clearly all SOPs should only refer police to current relevant policy. In addition, the Handbook should contain guidance on all of the relevant parts of LEPR that govern the conduct of strip searches. As at July 2019, the most significant omissions from the Handbook in terms of instructions about strip searches were the rules for conducting strip searches outlined in s 33 and the prohibition on searching children under 10 years of age which is outlined in s 34 of LEPR.

## 2.1.1 INCORRECT OR OMITTED REFERENCES TO THE LEGISLATION

The 113 local custody SOPs provided to the Commission were inconsistent in the guidance they provided police about how to conduct strip searches in custody. There were variations between SOPs as to when, where and why strip searches should be considered, who could authorise the strip search and what rules must be followed when conducting the search. In part, this was because the SOPs failed to adequately refer police to relevant and current provisions of LEPR.

Sixty one of the SOPs (53.9%) contained no explicit reference to LEPR in relation to searching persons in custody. Fifty two SOPs (46.1%) referred to LEPR, however many of these contained references to both current and repealed sections of that Act.

Approximately 38 SOPs (33.6%) contained a reference to s 201. Many of these were similarly worded to the following:

N.B. When you search you must comply with the safeguards in section 201 of LEPR.<sup>11</sup>

Section 201 lists the kinds of powers to which the safeguards set out in Part 15 of LEPR apply. It does not itself contain any safeguards. Therefore the instruction was confusing, and did not assist police to understand what safeguards they must comply with when conducting a search.

The safeguards are set out in Part 15, and this has been the case since amendments to LEPR in 2014.<sup>12</sup> The Handbook correctly states that police must comply with Part 15. However, only four SOPs correctly referred to compliance with Part 15.

## 2.1.2 OTHER INCORRECT GUIDANCE

There are a range of other instructions in the SOPs that were incorrect or confusing.

Two SOPs<sup>13</sup> contained the statement that a strip search may constitute an assault after a four hour period of detention:

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<sup>9</sup> NSW Police Force, Mid North Coast Police District, *Kempsey Police Station Custody Management SOPs*, date of issue 31 August 2018.

<sup>10</sup> NSW Police Force, Auburn Police Area Command, *Auburn Police Area Command Custody Management SOPs*, date of issue 26 September 2018.

<sup>11</sup> NSW Police Force, Tweed-Byron Police District, *Tweed Heads Police Station Custody Management & Cell Evacuation 2018/2019*, [undated].

<sup>12</sup> The Code of Practice for CRIME contained a similar reference to s 201.

<sup>13</sup> Contained in both St George Police Area Command and The Hills Police Area Command SOPs.

Strip searches should be done by the arresting police in the first four hours by themselves or at direction of custody manager pending on bail decision or other actions noticed. Any search after this four hour period including strip search prior to transfer may be considered an assault.<sup>14</sup>

The basis for this guidance was unexplained and is inconsistent with the legislation.

Two SOPs<sup>15</sup> contained incorrect guidance that all prisoners were to be strip searched. For example the following statement relates to 'gaol prisoners':

All prisoners are to be searched (strip search) by cell staff (min of two staff per prisoner).<sup>16</sup>

The clear contradiction between such a direction and LEPPR is obvious, but unexplained.

The Commission understands the term 'gaol prisoners' refers to prisoners from Corrective Services or Juvenile Justice, although this was not specifically defined in the SOPs. Other SOPs the Commission reviewed contained incorrect guidance on the requirement to strip search prisoners on transfer from police custody. For example:

All prisoners being transferred away from Riverstone Police Station to corrective services custody will be handcuffed to the front and will be strip searched prior to being removed from the custody area.<sup>17</sup>

However, the same SOP told police they 'may not strip search as a matter of policy'. This apparent contradiction was not explained. More troubling was the fundamental error of requiring what is plainly an unlawful search.

### 2.1.3 ABSENCE OF ANY GUIDANCE ABOUT STRIP SEARCHES

Thirty two of the SOPs (28.3%) contained no reference to conducting strip searches. A further 16 SOPs (14.1%) which contained a reference to strip searches, included little or insufficient guidance on how to conduct strip searches.

The following was the only guidance provided in one particular SOP:

Strip searches are to be conducted in an appropriate manner, when necessary, away from the charge room and camera areas.<sup>18</sup>

Other SOPs contained vague or non-specific references to policy, for example:

... if a strip search is to be conducted, comply with the SOP's for strip searching prisoners.<sup>19</sup>

It was not clear which SOPs were referred to in this example. It may have been the Handbook, but the lack of a specific reference makes it difficult to be certain.

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<sup>14</sup> NSW Police Force, The Hills Police Area Command, *The Hills Local Area Command Custody Standard Operating Procedures*, date of issue 1 June 2017.

<sup>15</sup> Eastern Suburbs Police Area Command and Riverstone Police Station SOPs.

<sup>16</sup> NSW Police Force, Eastern Suburbs Police Area Command, *Eastern Suburbs Local Area Command Charge Room and Custody Management Standard Operating Procedures*, date of issue 25 February 2017, p 9.

<sup>17</sup> NSW Police Force, Quakers Hill Police Area Command, *Riverstone Police Station Standing Operating Procedures Custody and Charge Room*, date of issue 14 September 2018.

<sup>18</sup> NSW Police Force, South Coast Police District, *Standard Operating Procedures for Moruya Police Station Foyer and Custody/ Charge Room*, date of issue 23 September 2015.

<sup>19</sup> NSW Police Force, Blacktown Police Area Command, *Blacktown Police Area Command Custody Management Standing Operating Procedures*, date of issue 21 September 2018.

### 3. POLICE POWERS TO STRIP SEARCH

A strip search is defined in LEPRA as:

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

- (a) requiring the person to remove all of his or her clothes, and
- b) an examination of the person's body (but not of the person's body cavities) and of those clothes.<sup>20</sup>

A number of SOPs provided guidance as to when a search constitutes a strip search. While 19 SOPs (16.8%) included the definition of a strip search that appears in LEPRA, 17 of these also referred to the now outdated frisk and ordinary searches that were removed from the legislation in 2014.<sup>21</sup> Given an officer may form the requisite suspicion to conduct a strip search after conducting an initial general search, it is important a strip search is defined in context of the parameters of a general search, and not with reference to obsolete types of searches.

Fifteen SOPs (13.2%) provided guidance similar to the following:

Any search that involves the removal of more than outer clothing should be treated as a 'strip search' and carried out accordingly.<sup>22</sup>

Some of these 15 SOPs linked the definition of a strip search to the searching officer's obligations under LEPRA when conducting a strip search. This was helpful guidance which ensured police conducting searches meeting the parameters of a strip search were aware of the additional thresholds and rules that apply under LEPRA.

It is notable that LEPRA is silent on certain practices which commonly occur during strip searches, such as police asking a person to lift genitalia, part buttock cheeks, 'squat and cough', or bend over to facilitate inspection during a strip search. These practices are problematic and may be unlawful. Chapter 6 contains a more detailed discussion of these practices and the Commission's view that there is no legal power that entitles police to *require* a person to actively co-operate in these ways. Additionally, while the legislation includes some safeguards around the dignity of the person being searched<sup>23</sup> it does not specify whether, and if so, in what circumstances police could require a person to remove top and bottom clothing separately in order to preserve the person's dignity.

When the Commission first provided its review of local custody SOPs to the NSWPF in July 2019, it stated that police should have a clear policy position which dictates the parameters of a strip search and the SOPs should clearly articulate to police what those parameters are. The NSWPF policy position on such practices should be responsive to relevant decisions of the courts where questions surrounding the lawfulness of strip searches have been subject to examination. Some of these issues are now addressed in the new Manual and Custody SOPs. Our comments about the way these issues are addressed in those policies are set out in Chapter 6.

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<sup>20</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

<sup>21</sup> Lithgow and Blayney Police Station SOPs do not define strip search and only refer to a frisk search or ordinary search.

<sup>22</sup> NSW Police Force, St George Police Area Command, *St George Local Area Command Standard Operating Procedure*, date of issue 30 May 2016.

<sup>23</sup> In particular, s 32(4), (5) and (6) of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

### 3.1.1 THRESHOLD TO CONDUCT STRIP SEARCHES

Section 31 provides:

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

(a) in the case where the search is carried out at a police station or other place of detention—the police officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search, or

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

The section provides for two different thresholds which must be met in order for police to exercise the power to strip search. The threshold for conducting a strip search in a police station or other place of detention under s 31(a), and the higher threshold under s 31(b), where the search is carried out in another place, which requires a ‘seriousness and urgency’ test. Prior to 2014, all strip searches had to meet the ‘seriousness and urgency of the circumstances’ test. Now LEPR provides the lower threshold for strip searches of persons in custody.

Very few of the local custody SOPs provided guidance on the two thresholds under s 31 and most SOPs which referred to a threshold only referred to the pre-2014 version of LEPR. Twenty SOPs (17.6%) referred to the higher threshold, without reference to the lower threshold required in a police station or place of detention. For example:

A strip search should only be carried out if you suspect 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.<sup>24</sup>

Only four of the SOPs contained reference to the correct thresholds in s 31(a) and (b) for conducting strip searches.<sup>25</sup> It is of concern that approximately 97% of the SOPs did not correctly cite the thresholds for conducting a strip search under the current legislation.

### 3.1.2 WHEN IS A STRIP SEARCH NECESSARY?

A number of SOPs encouraged an officer to consider if a strip search is necessary. Eighteen SOPs (15.9%) contained similar guidance to the following:

Consider strip searching if evidence may be concealed and/or items may be secreted on the prisoner that may endanger others or affect an escape.<sup>26</sup>

This is somewhat consistent with powers of police under s 27 which outlines the grounds upon which a police officer may carry out a search after arrest. The critical absence from the above description is a reference to the essential requirements, as to a *general* search, that the officer must suspect on reasonable grounds that it is *prudent* to conduct the search,<sup>27</sup> and as to a *strip* search, that the officer must suspect on reasonable grounds that the search is *necessary* for the purposes of the search. Furthermore, the use of ‘may’ suggests that the mere *possibility* of

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<sup>24</sup> NSW Police Force, Campsie Police Area Command, *Standard Operating Procedures for Campsie Custody Management*, date of issue 20 July 2018.

<sup>25</sup> Lightning Ridge Police Station, Lithgow Police Station, Blayney Police Station and Chifley Police District SOPs.

<sup>26</sup> NSW Police Force, The Hume Police District, *Yass Police Station Custody Management SOPs*, date of issue 12 March 2018.

<sup>27</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* s 27(1).

concealment or secretion is sufficient to justify a search, which completely undermines the legislative requirements.

One SOP turned an officer's mind to the thresholds required, however it referred to out of date policy:

Consider strip searching a prisoner should suspicion meet the requisite threshold to lawfully justify such a search. Note – there is no general authority to strip search a prisoner, see CRIME – searching p10-11).<sup>28</sup>

Twenty one SOPs (18.5%) contained guidance that 'there is no general authority to strip search', or 'you may not strip search as a matter of policy'. Three SOPs included the further guidance: 'you must be able to justify your decision in each case'.<sup>29</sup>

It is notable that one SOP referred to the potential scrutiny by the Commission as a reason to consider justification to strip search under LEPR:

Strip Searches should only be conducted in limited circumstances and ONLY at the direction of the custody manager where justification is clearly met under LEPR. Unnecessary strip searches are now the focus of LECC.<sup>30</sup>

Police are also required, under s 32(5), to conduct the least invasive kind of search practicable in the circumstances.

Twenty six of the SOPs (23%) instructed police that the search conducted must be the least invasive type of search practicable under the circumstances. General searches may involve running hands over a person's outer clothing, requiring the removal of certain outer clothing, or passing an electronic metal detection device over clothing.<sup>31</sup>

Given s 32(5) requires police to conduct the least invasive search practicable in the circumstances, a general search would ordinarily be conducted in the first instance. Reasonable grounds to suspect that a strip search is necessary could only be reached after consideration of the circumstances of the person's arrest, including any searches already undertaken, the person's behaviour, or credible information about their past behaviour in custody that makes it reasonable to suspect they may be carrying any of the things listed in ss 27(1) and (2) – that is dangerous items, things that may be used to escape for custody, or things related to an offence.

The Commission advised the NSWPF in July 2019 that the SOPs ought to address these issues and provide practical guidance to assist an officer in deciding whether the threshold for conducting a strip search has been met.

### 3.1.3 RECORDING REASONS FOR A STRIP SEARCH

The Handbook requires police to record the reasons for conducting a strip search.<sup>32</sup> The Handbook also states that a custody manager is accountable for ensuring proper custody records are kept.

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<sup>28</sup> NSW Police Force, Coffs-Clarence Police District, *Procedures for Coffs Harbour Police Station Custody & Charge Room*, date of issue 1 January 2019.

<sup>29</sup> Hunter Valley Police District, Oxley Police District and Riverstone Police Station SOPs.

<sup>30</sup> NSW Police Force, Auburn Police Area Command, *Auburn Police Area Command Custody Management SOPs*, date of issue 26 September 2018.

<sup>31</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 30(a)-(b), (d).

<sup>32</sup> *NSW Police Force Handbook*, Chapter C, Custody.

Forty four of the local custody SOPs (38.9%) provided guidance that the reasons for a strip search should be recorded. This was a positive inclusion which served to reduce the risk of unlawful searches in custody. However it is concerning that approximately 60% of the SOPs did not provide this guidance.

While the custody management records on COPS include the capability to record the reasons for a search, it is clear from the Commission's oversight and integrity work that strip searches in custody have been frequently conducted without a custody record being created for the person searched. It is clear that the provision of an electronic field which can be populated with reasons, is not, on its own, sufficient to ensure reasons for searches are recorded.

Recording the number and type of searches conducted on a person in custody is important for the purpose of informing other officers whether any further searching is necessary and providing data that is essential to appropriate supervision and management. Not all SOPs provided this guidance. Of those which did, there was no consistency as to where this information should be recorded.

Approximately 51 local custody SOPs (45.1%) directed that searches should be recorded. Of these, 39 SOPs specified recording the search in the custody management records, five SOPs specified an officer's notebook, and seven SOPs specified either a field arrest form, prisoner admission form, or were non-specific. It is not sufficient to record the search in an individual officer's notebook, or any place which was not readily accessible to police with responsibility for a person in custody, or police supervising the relevant officers.

Seventeen SOPs (15%) helpfully instructed that where a search had been considered and a decision made not to search the person, officers should endorse the custody record 'not searched'. The inclusion of this advice was a positive means of reducing the risk to prisoners of being strip searched repeatedly or without reasonable suspicion.

### 3.1.4 ROLES OF THE ARRESTING POLICE AND CUSTODY MANAGER

There was wide variation in the local custody SOPs about which officer was responsible for deciding whether to conduct a strip search, and to what extent the custody manager was to be involved in making that decision. Across the SOPs it was unclear whether the decision was to be made solely by the custody manager (or, for example, whether the custody manager can direct other officers to conduct a strip search), or in consultation with the custody manager. Where the SOPs inferred there was to be some consultation, it was not always clear what that would involve. The Commission advised the NSWPF that this was likely to create some confusion as to who is required to hold a reasonable suspicion that a strip search is necessary.

The Handbook is clear in its instruction to custody managers:

You are accountable for ensuring the rights of all people in custody are protected.

While this may indicate it is the custody manager's responsibility to ensure police comply with LEPRA rules and safeguards if a person in custody is strip searched, it is not in any sense an indication that it is the role of the custody manager to exercise strip search powers.

Sixty SOPs (53%) stipulated it was the responsibility of the custody manager to authorise the strip search of a prisoner in custody, decide what level of search is conducted, or be consulted by arresting police as to whether a strip search is required. This included guidance for the custody manager about making this decision. For example:

The nature and level of a search of a detained person is at the discretion of the custody manager or custody assistant. Any decision should be made in conjunction with the arresting/ escorting police and any warnings or notifications.<sup>33</sup>

In some cases, the discretion of the custody manager was solely relied on, for example:

If the Custody Manager deems it appropriate, the prisoner should be stripped (sic) searched. At all times, officers are to adhere to the Code of Practice (CRIME.).<sup>34</sup>

Some SOPs instructed an arresting officer that any search (not specifically strip searches) must be authorised by the custody manager:

Immediately upon arrival to the charge room conduct a thorough search of the prisoner (custody manager must be informed and authorisation obtained to carry out that search).<sup>35</sup>

However, 43 SOPs (38%) did not specify any role for the custody manager in relation to conducting searches. In many of these SOPs, the arresting police were given responsibility for searching persons in custody, or ensuring those persons were not carrying weapons when entered into custody.

Sixty nine SOPs (61%) required a 'thorough' search of the prisoner by an arresting officer, either on arrest and/or in custody, or instructed the arresting officer that it was their responsibility to ensure that the prisoner has no weapons or concealed items when in custody. For example, many SOPs included the following:

...it is the responsibility of the arresting police to ensure that prisoners/offenders do not enter custody with weapons or other items concealed on their person'.<sup>36</sup>

Other SOPs separated the responsibilities of arresting and custody police according to whether the person was entering custody on arrest (responsibility of arresting police to consider strip searching), or being received from Corrective Services or Juvenile Justice (responsibility of custody police). For example, on arrival at the station:

It is the responsibility of the arresting police to search the prisoner and locate upon them any items of property / Consider strip searching if evidence may be concealed and/or items may be secreted on the prisoner that may endanger others or affect an escape [emphasis in SOP].<sup>37</sup>

Conversely, on receipt of prisoners from Corrective Services:

It is the responsibility of the custody police to search the prisoner and locate upon them any items of property in the presence of the custody manager.<sup>38</sup>

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<sup>33</sup> NSW Police Force, Port Stephens-Hunter Police District, *Raymond Terrace Police Station Custody Standard Operating Procedures*, date of issue 13 September 2018.

<sup>34</sup> NSW Police Force, Murray River Police District, *Deniliquin Police Station Custody Management Standard Operating Procedures*, date of issue 23 November 2018. Note also the references made to outdated policy.

<sup>35</sup> NSW Police Force, North Shore Police Area Command, *North Shore Police Area Command Custody Management Standard Operating Procedures*, date of issue 7 September 2018.

<sup>36</sup> NSW Police Force, The Hume Police District, *Young Police Station Custody Standard Operating Procedures*, date of issue 14 February 2017.

<sup>37</sup> NSW Police Force, Barrier Police District, *Custody and Charge Room - Wilcannia Police Station*, date of issue 24 September 2018.

<sup>38</sup> NSW Police Force, Barrier Police District, *Custody and Charge Room - Wilcannia Police Station*, date of issue 24 September 2018.



Other SOPs instructed the arresting officer to consider strip searching after introduction to the custody manager without stipulating whether consultation or authorisation was required from the custody manager:

Prisoners are searched by arresting/ conveyed police where reasonable cause exists.

Strip searches should only be conducted where reasonable cause exists and when the seriousness or urgency of the matter warrants it.<sup>39</sup>

In other SOPs arresting police with responsibility to search were required to consult with a custody manager where a strip search was considered necessary:

All searching, photographing, fingerprinting and forensic procedures are to be carried out by the arresting and/or escorting police...If it is considered necessary to strip search a prisoner then the shift supervisors and/or custody manager must be consulted.<sup>40</sup>

Many SOPs gave the arresting police responsibility to ensure a prisoner is 'thoroughly' or 'properly' searched, but where they considered a strip search could be justified they were instructed to either the obtain authorisation of the custody manager, or consult with them. For example:

Conduct a thorough search of the prisoner using the approved method or using the metal detector wand. If you believe that a strip search is justified, consult with the Custody Manager and record the reasons for doing so on the custody records.<sup>41</sup>

In some SOPs however, the custody manager was given responsibility to conduct the search, but in consultation with arresting police:

Conduct a thorough search of the prisoner. The nature of the search will be at the discretion of the custody manager/ assistant in consultation with arresting police.<sup>42</sup>

Confusion may have been compounded by the lack of clarity as to when the introduction to a custody manager occurred. While 75% of the SOPs contained instruction that a person is to be introduced to the custody manager on arrival at the police station, there was no consistency as to whether the person was to be searched before or after this introduction, or both.

Twenty five SOPs (22.1%) specified that a search is only conducted after introduction, and seven SOPs (6.1%) before the introduction. Thirteen SOPs (11.5%) were silent as to whether a search occurred before or after the introduction. Sixty eight SOPs (60.1%) instructed that a search be conducted both before and after the introduction to the custody manager.

In July 2019, the Commission advised the NSWPF that it should clarify the role of the custody manager in deciding whether a general or strip search is necessary in the circumstances and the custody SOPs should provide clear and consistent guidance on this point. It is essential that it be made clear that the requirement of the requisite suspicion is absolutely essential. It follows that directions requiring assurance that the detainee has no concealed weapon or drugs, which depend on mere possibility are unlawful. This is discussed further in Chapter 6.

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<sup>39</sup> NSW Police Force, Newcastle City Police District, *Charging Procedures Newcastle City Police District Charge Rooms SOPs*, date of issue 11 April 2018. Note also the 'seriousness and urgency' threshold no longer applies to strip searches in custody under LEPR.

<sup>40</sup> NSW Police Force, Richmond Police District, *Lismore Police Station Custody Management Standard Operating Procedures*, date of issue July 2018.

<sup>41</sup> NSW Police Force, Murrumbidgee Police District, *Griffith Local Area Command Standard Operating Procedure - Custody Management Griffith Police Station*, date of issue 8 January 2013.

<sup>42</sup> NSW Police Force, Oxley Police District, *Quirindi Police Station Custody Management SOPs*, [undated].

### 3.1.5 POTENTIAL TO ENCOURAGE STRIP SEARCHES WITHOUT REQUISITE SUSPICION

Many of the local custody SOPs instructed police to consider the search of a person on multiple occasions during their time in custody, without clear directions to consider previous searches including whether a strip search had already been conducted. The SOPs might direct police to conduct searches on arrest, on arrival at the police station, on entry into the cell area, and/or on transfer from police custody.

It is concerning that these instructions appear to have encouraged police to conduct multiple strip searches of a person after arrest, which may well have increased the likelihood that a search was conducted in circumstances where the requisite suspicion could not be reasonably formed.

Fifty three SOPs (46.9%) instructed police to conduct a search of the person on arrest in the field, most often stating:

...ensure that you search the prisoner prior to placing them in your police vehicle.<sup>43</sup>

Very few of the SOPs provided further guidance as to the extent of the search police should consider on arrest. However, as discussed above, arresting officers were often directed to ensure a prisoner did not have weapons or concealed items. For example, the Commission found SOPs that listed items police should look for:

... firearms, prohibited weapons/ articles, knives/ blades, flammable/ irritant items or any items which could be used to self-harm, injury police [sic] or damage property.<sup>44</sup>

As the SOPs were primarily about the custody setting, it was not necessarily a concern that the search at the point of arrest was not set out in detail. The Handbook is a more appropriate source for such instruction.

More commonly, the local custody SOPs instructed police to consider strip searching the person on arrival at the police station. Of the 79 SOPs (69.9%) which referred to the arrival of prisoners at a police station, 55 directly referenced strip searching - either advising consideration be given to it, or referring to how it should be conducted.

Forty SOPs (35.3%) provided instruction that further searches be considered again, such as when the prisoner is to be entered into the interview room, charge room or cell area. In approximately four SOPs for example, guidance was given that police should consider strip searching prior to entering the cell area, following previous instructions to consider strip searching upon arrival at the station:

Custody Officer should consider if a strip search is required prior to a custody being placed in the cell complex. In any case, the custody is to be searched prior to being placed in the cell complex.<sup>45</sup>

Presumably the process of considering if a strip search was required prior to a person being placed in the cell complex would include consideration of the extent and nature of any previous search upon arrival at the station. However, this was not explicit in these SOPs.

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<sup>43</sup> Approximately 40 SOPs contain this guidance.

<sup>44</sup> NSW Police Force, Kings Cross Police Area Command, *Kings Cross Police Area Command Standard Operating Procedures for Custody*, date of issue 12 July 2018.

<sup>45</sup> Contained in Murrumbidgee Police District, West Wyalong Police Station, Narrandera Police Station and Hillside Police Station SOPs.

Twenty five SOPs (22%) referred to a further search on transfer to other police stations, courts, Corrective Services or Juvenile Justice. Approximately six of these SOPs specified strip searches, in the context of transferring people into the custody of Corrective Services. Five of these SOPs stated that the prisoner should be strip searched prior to transfer if the custody manager deemed it appropriate.<sup>46</sup>

If a strip search had already been conducted during the person's time in custody, it seems unlikely there could be reasonable grounds for the custody manager to suspect a further strip search was necessary. Two SOPs instructed police to assist Corrective Services in a strip search:

Ask Corrective Services if they require assistance to strip search the prisoner.<sup>47</sup>

It was not clear whether these strip searches would be conducted pursuant to LEPRA or other legislation. Guidance on strip searches in this context was provided in the Police Monthly in June 2016, which stated:

If and when the prisoner is transferred into Corrective Services' custody, it is the responsibility of Corrective Services staff to carry out a strip search in accordance with their powers.<sup>48</sup>

At least one SOP advised the custody manager to:

...ensure the arresting/ escorting police conduct a thorough search of the prisoner, regardless of a field search having already been completed prior to escorting the prisoner.<sup>49</sup>

The extent and nature of any previous search must be a relevant consideration in forming the requisite suspicion for any subsequent search. Advising against consideration of previous searches will very likely increase the risk of multiple, and/or unlawful strip searches.

In 2019 the Commission expressed the view to the NSWPF that, where police are given guidance in SOPs to consider searching a person, particularly strip searching a person, guidance should stipulate that police must give consideration to previous searches already conducted on the person. All SOPs should advise police to record searches, including the type of search, in custody management records and consider those records when deciding whether to conduct further searches.

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<sup>46</sup> Mid North Coast Police District, Murray River Police District, Deniliquin Police Station, Monaro Police District and Jindabyne Police Station.

<sup>47</sup> NSW Police Force, Richmond Police District, *Ballina Police Station Custody & Cells*, date of issue 1 April 2018; NSW Police Force, Richmond Police District, *Lismore Police Station Custody Management Standard Operating Procedures*, date of issue July 2018.

<sup>48</sup> NSW Police Force, 'Operational Corner: Duty officer's advice for frontline police', (2016) *Police Monthly* [SLE].

<sup>49</sup> NSW Police Force, South Sydney Police Area Command, *Botany Bay Police Area Command Custody/Charge Room SOPs/User Guide*, date of issue 6 August 2018.

## 4. GUIDANCE ON THE RULES FOR STRIP SEARCHES AND OTHER SAFEGUARDS

Part 15 of LEPR provides general safeguards related to the exercise of police powers, such as police providing persons subject to those powers with identification information and the reasons for exercising the powers.<sup>50</sup> Sections 32 and 33 in Part 4 provide for the preservation of privacy and dignity for those searched, and the rules of conduct of strip searches. Of concern was that the SOPs contained fewer references to s 32 and s 33 than references to s 201 of Part 15. While 38 SOPs (33.6%) referred to s 201, 22 SOPs (19.4%) referred to s 32 and only seven SOPs (6.1%) referred to s 33.

The Commission accepts some of the SOPs may have referred to responsibilities which are relevant to the legislative obligations under s 32 and s 33, but they did not specifically cite the legislation. The following is a breakdown of the provisions in s 32 and s 33, whether these provisions were represented in the SOPs and how they were represented.

### 4.1.1 PRESERVATION OF PRIVACY AND DIGNITY DURING SEARCHES

Section 32 sets out the requirements for preserving a person's privacy and dignity during a search. The provision must be complied with, as far as is reasonably practicable in the circumstances.<sup>51</sup> Police must inform the person searched whether they will be required to remove clothing during the search, and the reasons why that is necessary.<sup>52</sup> This goes further than the requirement under Part 15, which obliges police to tell a person the reasons for exercising a police power.<sup>53</sup>

The only power to require the person to take positive action in connection with a search concerns the removal of the clothing,<sup>54</sup> opening the mouth<sup>55</sup> and shaking or otherwise moving hair.<sup>56</sup> It is therefore, at least, doubtful that a person can be required to undertake any other physical action, such as squatting or moving breasts or genitalia.

Clearly the safeguard at s 32 is important, not least in reducing the risk of police meeting resistance to the search, or attracting complaint about the search. However only five of the SOPs contained a reference to this safeguard.<sup>57</sup> These five SOPs listed all of the provisions in s 32, either in summary or annexure. Approximately 95 per cent of the SOPs did not instruct police to inform a person whether clothing is to be removed and why.

Section 32(3) provides that the police officer must ask for the co-operation of the person being searched. This requirement was only included in those five SOPs which listed all s 32 provisions.<sup>58</sup> There were no other references to seeking a person's co-operation in the SOPs.

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<sup>50</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 202(1)(b)-(c).

<sup>51</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 32(1).

<sup>52</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 32(2).

<sup>53</sup> Under section 202(1) *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police are required to give their name of the police officer and his or her place of duty and the reason for the exercise of their power.

<sup>54</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 30(b).

<sup>55</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21A.

<sup>56</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 28(1).

<sup>57</sup> Riverstone Police Station, Hunter Valley Police District, Oxley Police District, Walcha Police Station and Quirindi Police Station SOPs.

<sup>58</sup> Riverstone Police Station, Hunter Valley Police District, Oxley Police District, Walcha Police Station and Quirindi Police Station SOPs.

The Commission's review found one SOP that instructed police to be co-operative, but did not instruct police to seek co-operation from the person searched:

...searching must be very particular; be polite and co-operative BUT don't take NO for an answer!  
[sic].<sup>59</sup>

Section 32(4) requires police to conduct the search in a way that provides reasonable privacy for the person searched and as quickly as is reasonably practicable.

Fifty three of the SOPs (46.9%) included a general reference to carrying out a search in a manner that preserves the privacy and dignity of the person being searched. Twenty three of these SOPs included a specific reference to s 32, and/or indicated that s 32 is where the requirements for conducting personal searches is set out. For example:

Any personal search must be carried out in a manner that preserves the privacy and dignity of the person being searching, as far as is reasonably practicable. Section 32 of LEPR sets out the general requirements for conducting personal searches – See Annexure A.<sup>60</sup>

In addition to the five SOPs which listed or annexed all s 32 provisions, only one additional SOP indicated that 'reasonable privacy' should be afforded those searched.<sup>61</sup>

The requirement that the search be conducted as quickly as is reasonably practicable was only included in those five SOPs which listed or annexed the s 32 provisions.

Sixty five of the SOPs (57.5%) instructed police that a 'thorough' search of persons in custody should be conducted, but none of these SOPs explicitly defined what a thorough search meant. This could have created confusion as to what type of search was being undertaken. In the absence of clarifying text, departure from the statutory language was fraught with the risk of illegality.

The SOPs frequently differentiated between a thorough search and a strip search. This might have suggested that a thorough search was more consistent with a general search. For example:

Conduct a thorough search of the prisoner. If you believe that a strip search is justified, consult with the custody manager.<sup>62</sup>

Those SOPs which instructed an officer to conduct a thorough search with an electronic device or under CCTV, also suggested that a thorough search was something different to a strip search. For example:

The arresting/ escorting police must thoroughly search all prisoners in the charge room area, so as the thorough search is recorded on CCTV and include the use of the Garret wand.<sup>63</sup>

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<sup>59</sup> NSW Police Force, Brisbane Water Police District, *Gosford Police Station Standard Operating Procedures for Custody Management*, date of issue 27 February 2018.

<sup>60</sup> NSW Police Force, Quakers Hill Police Area Command, *Riverstone Police Station Standing Operating Procedures Custody and Charge Room*, date of issue 14 September 2018.

<sup>61</sup> NSW Police Force, Newcastle City Police District, *Charging Procedures Newcastle City Police District Charge Rooms SOPs*, date of issue 11 April 2018.

<sup>62</sup> NSW Police Force, St George Police Area Command, *St George Local Area Command Standard Operating Procedure*, date of issue 30 May 2016.

<sup>63</sup> NSW Police Force, Coffs-Clarence Police District, *Procedures for Coffs Harbour Police Station Custody & Charge Room*, date of issue 1 January 2019.

Notably, a general search under s 30 can include passing an electronic metal detection device over or in close proximity to a person's outer clothing.<sup>64</sup> One SOP was clear that a thorough search is preliminary to any consideration of a strip search:

Conduct a thorough search of the prisoner, including a search using a Metal Detector. Consider strip searching a prisoner should suspicion meet the requisite threshold to lawfully justify such a search.<sup>65</sup>

Some SOPs instructed that a thorough search must be conducted by an officer of the same sex, but did not provide further guidance about the limitations LEPR places on the search. For example:

The detained person will be searched thoroughly by an officer of the same sex, (or for a transgender person – the sex that they identify themselves as).<sup>66</sup>

While s 32(7) provides a search must be conducted by an officer of the same sex, s 32(6) provides:

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

Fifteen SOPs (13.2%) contained instructions that searching officers must not search the genital area of the person searched without reasonable grounds. These SOPs provided guidance consistent with the legislation, such as:

You must not search the genital areas, or females' or transgender persons' breasts, unless you believe on reasonable grounds it is necessary to do so.<sup>67</sup>

Some of these 15 SOPs provided this instruction in the context of detailed guidance about searching the genital area without removing clothing, such as:

After the belt area, search the groin and backside by using the hand as a knife edge and adopting a triangular pattern for the upper legs and groin and between the cheeks for the rear. You must not search the genital areas, or females' or transgender persons' breasts, unless you believe on reasonable grounds it is necessary to do so. Finish the search by returning to the crush method working down to the feet.<sup>68</sup>

Three of the SOPs provided a definition of transgender person.<sup>69</sup> The definitions provided were consistent with the definition of transgender person in LEPR.<sup>70</sup>

#### 4.1.2 SEARCHING BY AN OFFICER OF THE SAME SEX

Sections 32(7) and (7A) provide:

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<sup>64</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 30(d).

<sup>65</sup> NSW Police Force, Coffs-Clarence Police District, *Grafton Custody Management SOPs*, [undated].

<sup>66</sup> NSW Police Force, Blacktown Police Area Command, *Blacktown Police Area Command Custody Management Standing Operating Procedures*, date of issue 21 September 2018.

<sup>67</sup> NSW Police Force, Hunter Valley Police District, *Cessnock Police Station Custody Standard Operating Procedures*, date of issue 7 September 2018.

<sup>68</sup> NSW Police Force, Oxley Police District, *Wee Waa Police Station Custody Management SOPs*, date of issue September 2013.

<sup>69</sup> Riverstone Police Station, Quirindi Police Station and Walcha Police Station SOPs.

<sup>70</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3.

(7) A search must be conducted by a police officer of the same sex as the person searched.

(7A) However, if a police officer of the same sex as the person who is to be searched is not immediately available, a police officer may delegate the power to conduct the search to another person who is:

(a) of the same sex as the person to be searched, and

(b) of a class of persons prescribed by the regulations for the purposes of this subsection.

An instruction about the sex of the officer conducting the search was common in the SOPs. Sixty four of the SOPs (56.6%) contained guidance about the gender of the searching officer. Approximately 27 of these SOPs required that a search be carried out by an officer of the same sex without specifying the type of search, for example: 'the detained person will be searched thoroughly by a same sex officer'.<sup>71</sup> Approximately 37 of these SOPs were specific to strip searches, for example: 'Strip searches MUST be carried out by a same sex officer'.<sup>72</sup>

Twenty one of the SOPs which referred to searches being conducted by an officer of the same sex referred to the delegation of the search power to another person of the same sex, for example:

Have the search carried out by an officer of the same sex, or someone else of the same sex acting under the lawful direction of a police officer.<sup>73</sup>

Two SOPs referred to recalling an officer of the same gender to duties where required, for example:

Have the search carried out by an officer of the same sex. If no female police officer is available, the shift supervisor has authority to recall a female officer for up to three hours.<sup>74</sup>

Fourteen SOPs specified that a search carried out by a person of the opposite sex should be recorded, with the reasons:

If a search is carried out by someone of the opposite sex record this fact along with the reason/s.<sup>75</sup>

LEPRA requires that a search must be conducted by a police officer of the same sex.<sup>76</sup> If a police officer of the same sex as the person who is to be searched is not immediately available, a police officer may delegate the power to conduct the search to another person of the same sex, provided the delegate falls within a class identified in the *Law Enforcement (Powers and Responsibilities) Regulation 2016*. The Regulation identifies corrective services officers, juvenile justice officers, ambulance officers and nurses as classes of persons who may be delegated to conduct a personal search.<sup>77</sup>

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<sup>71</sup> NSW Police Force, Hawkesbury Police Area Command, *SOPs for Hawkesbury Local Area Command Custody and Charge Room*, date of issue 22 June 2018.

<sup>72</sup> NSW Police Force, South Sydney Police Area Command, *Redfern Local Area Command Custody Standard Operating Procedures*, date of issue 8 October 2018.

<sup>73</sup> NSW Police Force, Oxley Police District, *Gunnedah Police Station Standard Operating Procedures Custody Management & Prisoner Handling*, date of issue 18 September 2018.

<sup>74</sup> NSW Police Force, Oxley Police District, *Narrabri Police Station Custody Management SOPs*, date of issue September 2018.

<sup>75</sup> NSW Police Force, Oxley Police District, *Wee Waa Police Station Custody Management SOPs*, date of issue September 2013.

<sup>76</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 32(7).

<sup>77</sup> *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) reg 47.

It is essential that policy clearly instructs police that this is a legal requirement, and in any exceptional circumstances where it is not complied with, details as to who conducted the search and why it was not reasonably practicable under the circumstances must be properly recorded. Such records are fundamental to the supervision and oversight of the actions of police, and any lack of appropriate records could lead to questions about the lawfulness of the search.

#### 4.1.3 QUESTIONING DURING SEARCHES

Sections 32(8), (8A) and (11) provide:

(8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.

(8A) Subsection (8) does not prevent the asking of questions that only relate to issues of personal safety associated with the search.

...

(11) In this section—

questioning of a person means questioning the person, or carrying out an investigation (in which the person participates).

Five SOPs contained instruction not to question a person while they were being searched.<sup>78</sup> These five SOPs generally listed all of the provisions in s 32, however they did not include the instruction provided under s 8A, exempting questions that relate to issues of personal safety. All five SOPs provided instructions that any questioning, if not completed prior to a search, should be suspended during the search, and included the legislative definition of questioning a person.

Sections 32(9) and (10) provide:

(9) A person must be allowed to dress as soon as a search is finished.

(10) If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing.

Only three SOPs included instructions that the person searched must be allowed to dress as soon as the search was finished, and if their clothing was seized, must ensure the person was left with or given reasonably appropriate clothing.

However, fourteen of the SOPs provided the following or similar instructions:

If it is necessary to remove someone's clothes, arrange replacement clothing of a reasonable standard (usually arranged through family or friends). Do not allow an interview unless adequate replacement clothing has been offered.<sup>79</sup>

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<sup>78</sup> Riverstone Police Station, Hunter Valley Police District, Oxley Police District, Walcha Police Station and Quirindi Police Station SOPs.

<sup>79</sup> NSW Police Force, Tweed-Byron Police District, *Bryon Bay Police Station Custody Management Standard Operating Procedures*, [undated].



#### 4.1.4 RULES FOR THE CONDUCT OF STRIP SEARCHES

Section 33 sets out the rules for the conduct of strip searches. It canvasses privacy, safeguards for searches involving young people and those with an intellectual impairment, and imposes limits on the extent of visual inspection allowed.

#### 4.1.5 SEARCHING IN A PRIVATE AREA AND WHO MAY BE PRESENT

Section 33(1) provides for the search to be conducted in a private area:

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

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

Seven SOPs referred to conducting a strip search in a private area, five of which included specific reference to s 33. Six SOPs referred to providing persons with reasonable privacy when being searched. Only those SOPs which annexed s 33 contained any instruction that strip searches could not be conducted in the presence or view of a person who is of the opposite sex, or persons not necessary for the purposes of the search.<sup>80</sup>

A number of SOPs referred to conducting strip searches in certain areas for privacy reasons. Fifteen SOPs contained guidance to conduct strip searches in a shower or toilet recess to afford prisoners privacy and ensure the search was not captured on CCTV. For example:

...prisoners to be strip searched will be escorted to a shower recess and positioned (stood) behind the frosted glass to protect their modesty from view of other prisoners, police or CCTV.<sup>81</sup>

It was positive that some local commands considered the practical steps that might need to be implemented to ensure the privacy of the person being strip searched. However, as many of the SOPs did not include any such instruction, it was unclear if this approach was considered acceptable across the NSWPF. The Commission urged the NSW Police Force to implement a consistent approach.

Twenty one of the SOPs which referred to searches being conducted by an officer of the same sex also stipulated that a senior officer, or independent officer be present during the search. For example:

Have the search carried out by an officer of the same sex, or someone else of the same sex acting under the lawful direction of a police officer and where possible in the presence of a senior officer (custody manager, duty officer or supervisor) not connected with the investigation.<sup>82</sup>

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<sup>80</sup> For example Oxley Police District, Walcha Police Station and Quirindi Police Station SOPs annex sections of *Law Enforcement (Power and Responsibilities) Act 2002* (NSW).

<sup>81</sup> NSW Police Force, Bankstown Police Area Command, *Bankstown Police Area Command Custody Area - Standard Operating Procedures*, date of issue 16 April 2018.

<sup>82</sup> NSW Police Force, Oxley Police Area Command, *Gunnedah Police Station Standard Operating Procedures Custody Management & Prisoner Handling*, date of issue 18 September 2018.

One SOP required the name of any senior officer present during the search to be recorded. None of the SOPs provided any guidance about the gender of the senior officer present for the search, or the requirement that a strip search must not be conducted in the presence or view of a person who is of the opposite sex. When the Commission first presented its analysis to the NSWPF it asked for these omissions to be addressed.

#### 4.1.6 CLOSED CIRCUIT TELEVISION AND STRIP SEARCHES

Forty three of the SOPs (38%) contained a reference to CCTV in the context of searching persons in custody. Twenty nine SOPs (25.6%) provided clear instruction directing that strip searches were not to be conducted in view of CCTV surveillance. Many were similarly worded to the following:

Under no circumstances should a strip search be conducted under the view of CCTV.<sup>83</sup>

Ten of the SOPs which contained references to CCTV in the context of searching persons, contained unclear or ambiguous instructions about video recording searches. Three SOPs for example stated the following:

No requirement to video strip searches unless deemed necessary by custody manager.<sup>84</sup>

Other ambiguous SOPs included:

Warn them that they may be searched and will be under CCTV surveillance. (This does not include legal representatives)<sup>85</sup>

Also:

The prisoner will be searched thoroughly by the arresting police in the area between the charge room counter and the cell complex wall (area marked by lines on floor and in view of surveillance cameras).<sup>86</sup>

It was not clear whether this SOP contemplated an evidentiary need to record searches. The Commission advised the NSWPF in July 2019 that SOPs should contain consistent guidance concerning the circumstances in which the NSWPF considers that strip searches should be conducted within view of CCTV or otherwise video recorded, and how that should occur. This should include practical consideration about how to limit who can view any search being recorded by CCTV, including how police were to ensure they complied with the provisions in s 33(1) when a search is recorded by CCTV.

There may be evidentiary reasons to video record searches in custody, and the SOPs should reflect relevant case law on this issue.<sup>87</sup> However there are also privacy concerns surrounding who is able to view that material. The Commission noted that the SOPs for Body Worn Video Camera reflect both the case law and privacy considerations, by requiring any video taken for evidentiary purposes to be filmed at a 45 degree angle from the person searched, to minimise

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<sup>83</sup> NSW Police Force, Tweed-Byron Police District, *Bryon Bay Police Station Custody Management Standard Operating Procedures*, [undated].

<sup>84</sup> NSW Police Station, New England Police District, *Inverell Police Station Standard Operating Procedures Custody Management*, date of issue July 2018.

<sup>85</sup> NSW Police Force, Inner West Police Area Command, *Newtown Local Area Command Custody Standard Operating Procedures*, date of issue 7 July 2016.

<sup>86</sup> NSW Police Force, Hunter Valley Police District, *Cessnock Police Station Custody Standard Operating Procedures*, date of issue 7 September 2018.

<sup>87</sup> *R v Jimenez* [2000] NSWCCA 390.

unnecessary videoing of the person's body parts while still capturing the conduct of the search.<sup>88</sup> We also noted that it may be useful for the custody SOPs to take a similar approach if video evidence of a search is required.

The new Manual and Custody SOPs now make specific reference to the use of Body Worn Video and CCTV when searching, as is discussed in Chapter 6.

#### 4.1.7 STRIP SEARCHING OF CHILDREN OR PEOPLE WITH IMPAIRED INTELLECTUAL FUNCTIONING

Sections 33(3) and (3A) provide:

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

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

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

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

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

Guidance about safeguards for children, including the provision of a support person for a child during a strip search, and the prohibition of strip searches of children under 10 years, was poorly represented in the custody SOPs. The Commission was concerned that only eight of the SOPs (7%) referred to those police obligations when strip searching children.

While s 33(3A) requires police to record the reasons why any search of a child, or person with impaired intellectual functioning, is conducted without the presence of a parent or guardian or other support person, none of the SOPs referred to these requirements.<sup>89</sup> This obligation is not included in the Handbook either. At the time of publication, the Handbook still does not contain an instruction regarding s 33(3A). The new Manual refers to the obligations under s 33(3) without explicitly referring to the need to record the reasons why police might strip search a child, without the presence of a parent, guardian or support person.<sup>90</sup> However, the Custody SOPs now refer to the obligation to record under s 33(3A).<sup>91</sup>

Of the eight local custody SOPs which did refer to the requirement for a support person to be present, only four referred to circumstances which may exempt police from that obligation: two stated that a parent/guardian must be present 'unless safety would be compromised or a

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<sup>88</sup> The *Body-Worn Video Camera Standard Operating Procedure* provides for recording strip searches by a support officer of the same sex, to the rear and at 45 degrees of the person searched.

<sup>89</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(3A).

<sup>90</sup> NSW Police Force, *Person Search Manual*, 20 August 2019, p 12.

<sup>91</sup> NSW Police Force, Communications and Security Command, *Charge Room and Custody Management SOPs*, August 2019, p 24.

parent/support person is unavailable;<sup>92</sup> another two only stated 'unless safety would be compromised.'<sup>93</sup> None of the SOPs referred to the specific grounds set out in s 33(3A).

Only five of the SOPs (4.4%) included any guidance concerning other vulnerable persons, specifically that any strip search of a person with impaired intellectual functioning must be conducted in the presence of a parent/guardian.

There was no guidance about the role of the parent, guardian or independent person. This is a fundamental matter that requires the NSWPF to adopt a corporate position that satisfies the statutory intent and is clearly explained to searching officers.

In addition to setting out the obligations imposed upon police under s 33(3) and (3A), the Commission informed the NSWPF in July 2019 that all custody SOPs should clearly state the grounds that police may rely upon to strip search without a parent, guardian or independent person present. The Commission considers the Handbook should also refer to these obligations.

Section 34 prohibits strip searches of a person who is under the age of 10 years.

Only eight local custody SOPs included guidance that children under 10 years of age must not be strip searched, as well as guidance that any strip search of a child between 10 to 17 years must be in the presence of a parent/guardian.<sup>94</sup> Both the Custody SOPs and the Handbook should clearly state the prohibition on strip searching people under 10 years of age. This instruction is now included in the Manual and Custody SOPs.<sup>95</sup>

#### 4.1.8 PROHIBITION ON SEARCHING BODY CAVITIES OR TOUCHING DURING STRIP SEARCH

Section 33(4) provides:

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

While LEPR prohibits a search of a person's body cavities or an examination of their body by touch during a strip search, not all SOPs which referred to body cavities also referred to examination by touch. Twenty two SOPs stated a strip search may include the examination of a person's body but not of the person's body cavities. Only five of these SOPs also stated a strip search must not involve an examination by touch. No other SOPs referred to the prohibition of examining a body by touch during a strip search.

One SOP which prohibited the search of a person's body cavities placed this in the context of internal searches for concealed drugs: 'in relation to internal searches for concealed drugs, under no circumstances are police to conduct a search of any detained person's cavities'.<sup>96</sup> It is possible that the wording in this SOP could lead to confusion as to whether (and if so, how) an internal search for drugs might otherwise be conducted.

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<sup>92</sup> Riverstone Police Station and Hunter Valley Police District SOPs.

<sup>93</sup> Walgett Police Station and Wilcannia Police Station SOPs.

<sup>94</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 33(3) and 34.

<sup>95</sup> NSW Police Force, *Person Search Manual*, 20 August 2019, p 12; NSW Police Force, Communications and Security Command, *Charge Room and Custody Management SOPs*, August 2019, p 24.

<sup>96</sup> NSW Police Force, Inner West Police Area Command, *Newtown Local Area Command Custody Standard Operating Procedures*, date of issue 7 July 2016.

Procedures for more invasive searches, including those that may involve searching internally nature are dealt with under the *Crimes (Forensic Procedures) Act 2000* (the Forensic Procedures Act). Only three SOPs included a reference to forensic procedures. Two of these were included as part of s 33 in an annexure (s 33 includes a note about the Forensic Procedures Act). Another SOP stated:

All searching, photographing, fingerprinting and forensic procedures are to be carried out by the arresting and/or escorting police<sup>97</sup>

This SOP contained no reference to the Forensic Procedures Act, nor any guidance about carrying out procedures under that Act.

The Commission suggested that the NSWPF provide guidance to police about what to do if a more invasive search is considered necessary, and how to obtain the appropriate authority to do so. The Manual and Custody SOPs do not contain any reference to the Forensic Procedures Act. This is discussed in Chapter 7.

#### 4.1.9 REMOVAL OF CLOTHES AND EXTENT OF VISUAL INSPECTION

Subsections 33(5) and (6) place limits on the amount of clothing that can be removed during a search, and the extent of the visual inspection that can occur during a strip search. Clearly, these limits are a further safeguard upon the privacy and dignity of the person being strip searched. The subsections provide:

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

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

Only four SOPs contained a direction that a strip search must not involve more visual inspection than the searching officer believes on reasonable grounds to be reasonably necessary, consistent with LEPR<sup>98</sup>. Three of these SOPs included this reference within an annexure which quotes from s 32, without further comment or guidance in the body of the SOP.

#### 4.1.10 DIRECTIONS AS TO USE OF FORCE

Section 230 of LEPR provides for the use of force in exercising police powers. It is lawful for a police officer exercising a function under the Act to use such force as is reasonably necessary to exercise the function. Given that this legislation is broad and open to interpretation it is the Commission's view that some training and guidance is required for police as to what constitutes a reasonable use of force when strip searching a person, particularly in the custody setting.

Only a small number of the local custody SOPs considered the use of force when conducting searches of persons in custody. Thirteen of the SOPs (11.5%) contained the following:

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<sup>97</sup> NSW Police Force, Richmond Police District, *Lismore Police Station Custody Management Standard Operating Procedures*, date of issue July 2018.

<sup>98</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(6).

If a detained person is violent and objects to being searched, you may use reasonable force. Do not, however, use restraints which constrict air supply or arteries/veins, such as 'choke holds', neck restraints or pressure point holds applied above the neck. Use restraints in the most humane way possible.<sup>99</sup>

It is appropriate that these SOPs provided guidance as to what actions may constitute a reasonable use of force under the circumstances, particularly where a person is violent. However, it was not made clear at what point the use of force risks becoming unreasonable. A person who has been compliant may object and become violent in circumstances where police have not provided them with adequate information, particularly when conducting invasive procedures such as strip searches. While the SOPs referred to the person objecting to the search, no advice was given about the requirement on police to provide the person with information and seek their co-operation.

When conducting a search, a police officer is required to inform a person whether they will be required to remove clothing and why it is necessary under s 32(2). In addition police officers must ask for a person's co-operation under s 32(3) and must provide reasons for the exercise of the power under s 202(1)(c). Given a strip search may be unlawful if these legislative requirements are not complied with, a use of force under the circumstances could leave officers vulnerable to allegations of criminal assault. The Commission therefore considers it is essential that the SOPs provide consistent guidance about the use of force in this context. It is necessary to provide guidance as to specific circumstances. This is discussed in further detail in Chapter 6.

Eight SOPs referred to persons being handcuffed when consideration is given to conducting searches. Most of these references were in the context of the person being escorted or transferred while in custody. Some of these SOPs specified strip searches:

All prisoners being transferred away from Riverstone Police Station to corrective services custody will be handcuffed to the front and will be strip searched prior to being removed from the custody area.<sup>100</sup>

Aside from the problem that this was a direction, in effect, to conduct illegal searches contrary to LEPRA (and, as has already been seen, far from the only such direction), it is not clear how a person could be required to remove clothing while handcuffed to the front, if that was what was proposed in this SOP. Other SOPs did not specify strip searching but instructed that a search be conducted while handcuffed:

All prisoners are to be handcuffed and searched when being conveyed/transferred unless exceptional circumstances exist.<sup>101</sup>

This may occur on being taken into custody from the courts:

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<sup>99</sup> NSW Police Force, St George Police Area Command, *St George Local Area Command Standard Operating Procedure*, date of issue 30 May 2016. This is included 13 SOPs: St George Police Area Command, Blue Mountains Police Area Command and Campsie Police Area Command; Tweed Byron Police District, Chifley Police District and New England Police District; Tweed Heads Police Station, Lightning Ridge Police Station, Lithgow Police Station, Tenterfield Police Station, Glen Innes Police Station, Wee Waa Police Station and Narrabri Police Station.

<sup>100</sup> NSW Police Force, Quakers Hill Police Area Command, *Riverstone Police Station Standing Operating Procedures Custody and Charge Room*, date of issue 14 September 2018.

<sup>101</sup> NSW Police Force, Sydney City Police Area Command, *Sydney City Police Area Command Charge Room Standard Operating Procedures*, date of issue 1 July 2018.

The prisoner should be handcuffed at the earliest opportunity and escorted to the caged truck. The prisoner is to be searched prior to being placed inside the caged truck and conveyed to Windsor charge room.<sup>102</sup>

Other SOPs were ambiguous as to whether a person is searched while handcuffed:

Ensure prisoners are fully searched and handcuffed if required.<sup>103</sup>

Clearly there needs to be consistent and coherent advice as to the use of handcuffs when conducting strip searches in custody. In addition the SOPs should provide uniform guidance as to when the use of force is appropriate.

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<sup>102</sup> NSW Police Force, Hawkesbury Police Area Command, *SOPs for Hawkesbury Local Area Command Custody and Charge Room*, date of issue 22 June 2018.

<sup>103</sup> NSW Police Force, Northern Beaches Police Area Command, *Northern Beaches Police Area Command: Manly Police Station Custody Standard Operation Procedures*, date of issue June 2018.

## 5. CONCLUSION AND RECOMMENDATIONS OF THE REVIEW

The Commission's review demonstrated there were many significant inconsistencies and deficiencies in the way the custody SOPs that were in place up to August 2019 guided police officers as to how to conduct strip searches, including giving directions which were clearly unlawful.

The Commission's view was that the SOPs should, at a minimum, guide police about their responsibilities as set out in the legislation, and that guidance should be both current and comprehensive. Additionally, the SOPs should be consistent in the way that police are instructed to conduct strip searches. This is particularly important as police commonly change locations in the course of their employment.

The Commission advised the NSWPF to consider more centrally managed custody SOPs, so that changes to legislation and case law could be reflected in the SOPs across all local commands in a timely manner. The Commission acknowledged there may be a need for particular practical or procedural guidance to be included in some local SOPs, such as remote or regional police stations, where staffing arrangements or the nature of the physical environment within a police station requires some variance from the procedures in other locations. However, most of the differences between SOPs related to the underlying obligations on police in conducting strip searches rather than locational differences. Given these obligations are set out in law, guidance provided to police about how to conduct strip searches within a place of detention requires consistency across all commands and police divisions. This has now been accepted by the NSWPF.

Additionally, the SOPs needed to provide police with practical guidance about how they are expected to carry out a strip search, including providing clarity regarding those practices about which LEPR is not explicit, such as the use of force. As indicated above, the legislation is silent on a number of practices which the Commission still understands to be common in the way police conduct strip searches – such as whether police can ask a person to squat during a search or whether police can ask a person to lift their genitalia or bend over during a strip search to make it easier for police to conduct a visual inspection of the genital and anal area. There are other practical matters about which the legislation is not explicit – such as the circumstances in which police should require a person to remove top and bottom clothing separately in order to better preserve the person's dignity during the search.

The SOPs are clearly the place where such practical guidance ought to be set out to ensure consistency in the way police conduct searches, and to ensure that police are clear about what types of practices are considered appropriate and acceptable by the NSWPF.

In July 2019, the Commission made five recommendations as part of this review. These are listed below.

### 5.1 RECOMMENDATIONS

**RECOMMENDATION 1:** The *NSW Police Force Handbook* should be updated to ensure that all references to the conduct of strip searches are current and comprehensive.

**RECOMMENDATION 2:** The NSW Police Force creates one consistent standard operating procedure for conducting strip searches in custody, which includes a current and



comprehensive account of police obligations when conducting strip searches, and removes all incorrect and outdated references to legislation and police policy.

**RECOMMENDATION 3:** The custody SOPs should provide guidance to police about how to form a suspicion on reasonable grounds that a strip search is necessary for the purposes of the search.

**RECOMMENDATION 4:** The custody SOPs should clarify the role of the custody manager in deciding whether a general or strip search is necessary in the circumstances.

**RECOMMENDATION 5:** The custody SOPs should include consistent guidance to police officers about:

- a. whether it is appropriate for strip searches to be filmed by CCTV or other recording equipment;
- b. whether practices such as requiring a person to squat and cough, bend over, lift their genitalia or remove all clothing at once are appropriate;
- c. when it is appropriate to use force in the conduct of a strip search;
- d. the requirements for police to record the reasons for the search;
- e. any other practices, not specifically set out in the *Law Enforcement (Powers and Responsibilities) Act 2002*, that the NSW Police Force condones or considers reasonable for police when conducting strip searches.

## 6. POLICE RESPONSE TO THE COMMISSION'S REVIEW

On 2 September 2019 the NSWPF responded to the Commission's review of the custody SOPs. The Commissioner of Police agreed that the practice of allowing a proliferation of local SOPs was inappropriate and that these SOPs were at times inconsistent and out of date. He stated that standardised guidelines on person searches were required in both custodial and field scenarios, and that guidelines should be supplemented by enhanced education and training. The Commission will further consider the NSWPF education and training for strip searches and report separately on these issues in the course of its Inquiry into Strip Searches.

The Commissioner of Police indicated the NSWPF had updated their guidelines on custody and person searches with the creation of two new policy documents: the *Charge Room and Custody Management Standard Operating Procedures (2019)*, and the *Person Search Manual (2019)*.

While the Commission welcomes these consolidated and updated policies, there remain outstanding issues which require further consideration. These include questions about consent; whether police can ask a person to do things to facilitate a strip search which are not powers explicitly provided for in legislation; whether force can be used lawfully to require a person to do those things and the extent of permissible searching having regard to the provisions of the Forensic Procedures Act.

The NSWPF has obtained an advice from the Solicitor General about the extent of the search powers under LEPR which responds to the questions raised by the Commission in respect of the new Custody SOPs and Manual. This advice is referred to in the course of the ensuing discussion.

### 6.1 SUPPORT FOR RECOMMENDATIONS

The Commissioner of Police indicated that all of the recommendations made by the Commission were either supported or had been implemented by the NSWPF. He stated that relevant amendments to the Custody chapter of the Handbook had been drafted and would be published with additional information on searches included as a discrete chapter in the Handbook. This has now occurred. Links to both new policies, the Custody SOPs and the Manual, have also been included in the Handbook.

In relation to the superseded local custody SOPs, the Commissioner of Police indicated all police commands had been directed to remove localised documents, and to ensure compliance, the Digital Technology and Innovation Command had initiated a program to remove localised documents from the NSWPF Intranet.

The way in which the updated policies address the recommendations made by the Commission and the further issues these policies raise are outlined below.

#### 6.1.1 GUIDANCE AS TO FORMING A SUSPICION TO CONDUCT STRIP SEARCHES

The Commission recommended police be provided with guidance in the SOPs about how to form a suspicion on reasonable grounds that a strip search is necessary for the purposes of the search. Some guidance on the required state of mind for police officers is now provided for in

both the Custody SOPs and the Manual. The amendments to policy made by the NSWPF positively respond to the Commission's recommendation and significantly improve the guidance previously provided.

Both policy documents contain references to the different thresholds required under LEPR for strip searches at a police station and in another location. Both policies provide instruction that any officer who searches a person must hold the state of mind required and include guidance provided by the courts about the state of mind. Under the new policies, police are instructed that a reasonable suspicion involves less than a reasonable belief but more than a possibility,<sup>104</sup> the material or information relied on must have some probative value and must afford the officer reasonable grounds to form the suspicion. It has now been made clear that the person who conducts the search must have the requisite suspicion, so for example, if a male officer asks a female officer to search a person, the male officer must give the female officer enough information for her to independently form the required state of mind. The policies additionally instruct police they should consider if there has been a previous search of the person, the type of search carried out and the results of the search, when determining whether a further search is necessary.

Since a search of the genital area or (in the case of a female or a transgender person who identifies as a female) the person's breasts cannot, by virtue of s 32(6), be undertaken unless the officer 'suspects on reasonable grounds that it is necessary to do so for the purpose of the search', it follows that the reasonable suspicion that provided the basis for the strip search in the first place is insufficient justification for the further genital or breast search, which requires separate and additional justification (see also s 33(6)). Again, the mere *possibility* that something of relevance might be concealed is not sufficient. This requirement is brought to the attention of police in the Manual and the Custody SOPs.

There is a further important issue, which is not referred to in the directions to officers. The power under s 27 to carry out a search applies only to a person who is under arrest. Section 99(1)(a) authorises arrest only when the 'police officer suspects on reasonable grounds that the person is committing or has committed an offence'. (Furthermore, a person can only be arrested when it is intended to charge him or her: *New South Wales v Robinson* [2019] HCA 46.) Such an arrested person is a 'suspect' within s 3 of the Forensic Procedures Act. That Act imposes limits on the permissible searches of a suspect, which impinges on the searches identified above. This issue is discussed in Chapter 7.

#### 6.1.1.1 SERIOUSNESS AND URGENCY OF A STRIP SEARCH IN THE FIELD

Notwithstanding these improvements to policy, the NSWPF should consider issuing further guidance about when circumstances would satisfy the criterion of 'seriousness and urgency' required to conduct a strip search in the field. As to seriousness, a reasonable suspicion that a person may be concealing, for example, a small quantity of drugs may well not suffice. As to urgency, merely for example that the officers have other duties to perform or it is inconvenient to delay a search would not be sufficient: the urgency must relate to the reason for the search. Guidance that adequately informs officers about the statutory preconditions for exercising this power is essential. Mere recitation of the statutory terms will not suffice.

It is significant that, whilst the power of general search provided under s 27 requires only a suspicion on reasonable grounds that it is '*prudent to do so*' (italics added), under s 31 a strip search is justified only where the officer 'suspects on reasonable grounds that the strip search is *necessary*' (italics added). Thus, it is clear that merely prudential strip searches, whether in

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<sup>104</sup> As per Smart AJ's judgment in *R v Rondo* [2001] NSWCCA 540.

the field or in the police station, are unlawful. It is important, in the Commission's view that this point is made clear in the new Manual and Custody SOPs, especially given the common use of language in the superseded material that suggests, and sometimes even requires, that strip searches should be performed for purely prudential reasons. There is no available guidance from case law about the meaning of 'necessary' in this context. While the legislation is open to interpretation, guidance needs to be provided corporately by the NSWPF to ensure that police officers know what is expected, and to provide consistency in the way the decision to strip search in the field is made.

The Commission understands that the NSWPF is drafting standardised operational orders for pre-planned events such as music festivals, which will include specific guidance on what information is required by police to justify the strip search of a person at such an event. The NSWPF advised the Commission it will update the Manual to include additional information about the issue of seriousness and urgency, but this will not occur until the NSWPF gathers further feedback from operational police as the music festival season progresses and after consideration of the Commission's final report.<sup>105</sup>

The Commission also acknowledges that since the commencement of its inquiry into Strip Searches, the NSWPF has introduced a range of initiatives aimed at training police officers (including short online instructional units, and a Mandatory Continuing Police Education unit) and reinforcing legislative requirements (such as state-wide communications referring to LEPR provisions). In September 2019 the NSWPF introduced procedures requiring supervisors to verify any COPS event pertaining to a strip search, and more recently the NSWPF has introduced a triage officer at large events such as music festivals 'to provide an additional layer of oversight when strip search powers are proposed to be used'.<sup>106</sup> The Commission will consider these initiatives in due course.

The Commission will also closely monitor the development of any guidance the NSWPF provides officers about whether the 'seriousness and urgency' threshold applies to strip searches which are conducted in the field by consent. Whether there is any factual basis for the existence of consent is very doubtful where the officer uses language that might reasonably be construed in the circumstances, as a coercive direction.

The Commission's initial view is that police should be satisfied to that threshold even where the strip search is being conducted with the consent of the person searched. It appears that all searches conducted by police under LEPR, except where otherwise provided for, are subject to the provisions for personal searches under Division 4, which includes the threshold tests under s 31 for conducting strip searches, whether consensual or otherwise.<sup>107</sup> This is discussed further at 6.1.4.1.

## 6.1.2 CLARIFY THE ROLE OF THE CUSTODY MANAGER

The Commission recommended that the SOPs should clarify the role of the custody manager in deciding whether a general or strip search is necessary. The Commissioner of Police stated that this recommendation had been implemented in both the new Custody SOPs and the Manual, which clearly detail the role and responsibility of the custody manager and arresting police.

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<sup>105</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 20 January 2020.

<sup>106</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 20 January 2020.

<sup>107</sup> This is explicitly provided for in s 29 of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

Improved guidance in both policy documents, about the requirement for the searching officer to independently form the necessary state of mind to conduct a strip search clarifies some of the confusion created in previous custody SOPs as to the custody manager's role in deciding what type of search is required. The SOPs clarify the roles of arresting police and custody managers in conducting searches, and when the handover of responsibility for the care, control and safety of a person in custody occurs. While noting that the searching officer must hold the state of mind required under LEPRA, police are instructed that they must not carry out a strip search in a police station without first advising the custody manager. It is the role of the custody manager to ensure that the privacy and dignity of persons searched and other obligations under ss 32 and 33 are complied with.

The Commission accepts that the NSWPF have responded to the concerns raised in the review and the revised policy has addressed this recommendation.

### 6.1.3 WHETHER STRIP SEARCHES ARE TO BE FILMED ON CCTV

The Commission recommended the SOPs should include consistent guidance as to whether it is appropriate for strip searches to be filmed by CCTV or other recording equipment. The Commissioner of Police stated this recommendation had been implemented in both the Custody SOPs and the Manual.

These updated policies provide instruction about the filming of strip searches in the field and in custody. Both documents instruct police that ideally all strip searches are to be filmed as evidence of the integrity of the search and include advice about appropriate techniques to record strip searches on Body Worn Video equipment which aim to preserve privacy at the same time as making a record of the search. The Manual notes that the Court of Criminal Appeal has been critical of police not filming a strip search, but does not identify the case.<sup>108</sup> It may assist police to reference the case so they can inform themselves of the relevant points of law, although the Commission accepts it is important to keep the instructions concise for ease of comprehension. The Manual appropriately instructs police to be mindful of CCTV in public places and that an area captured on public CCTV is not a private area as required for strip searches. Overall, this guidance strikes an appropriate balance between the requirement for police under LEPRA to afford a person privacy, while reflecting the relevant case law to record the strip search. Section 33(1)(b) prohibits a strip search being conducted 'in the presence or view of a person who is of the opposite sex to the person being searched'. This is an unconditional prohibition, allowing no exceptions. It follows that, say, a viewing of the search via CCTV by a custody manager or any other police officer of the opposite sex to the person searched is unlawful. If, therefore, a custody manager is required to view the conduct of a strip search, arrangements must be put in place to ensure this is lawful.

The Custody SOPs indicate filming can be done by Body Worn Video or CCTV and a custody manager may view a search on CCTV or Body Worn Video wherever necessary to ensure safety is maintained in the custody area. The instructions indicate this may mean it is not always reasonably practicable to comply with the requirement that a strip search not be conducted in the presence or view of person who is of the opposite sex to the person being searched.

The SOPs indicate the custody manager is to record whether they viewed the search on CCTV in the custody records, and has the responsibility to ensure all reasonable steps are taken to

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<sup>108</sup> The Commission was advised that the case the NSW Police Force refers to is *R v Jimenez* [2000] NSWCCA 390.

ensure CCTV capturing a strip search is not able to be viewed by anyone other than the custody manager.

Section 33(1)(b) states:

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

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

The Commission accepts it may be necessary for a custody manager to view footage of the strip search. The SOPs indicate it is the responsibility of the custody manager to ensure the safety of persons in custody and ensure police comply with their obligations under ss 32 and 33. This is consistent with the statutory role of the custody manager under Part 9 of LEPR, to facilitate the rights of persons in custody and assist vulnerable persons.

It is not clear how effective the custody manager would be in ensuring the safety of persons by watching CCTV or Body Worn Video of the search, or whether these circumstances justify a lack of compliance with LEPR in relation to the gender of persons viewing the search. For that reason the Commission will further consider this issue as part of its broader inquiry into strip search practices.

Under the Custody SOPs, when the custody manager is not present during the search, they would view the footage of the search and make a record of this in the custody management records. Footage from Body Worn Video is to be taken from behind the person searched and at 45 degrees for the purpose of maintaining the person's privacy while meeting evidentiary requirements. The Commission accepts this minimises the intrusion into a person's privacy by having a custody manager of the opposite sex viewing the footage. It is less clear whether in custody CCTV footage would be similarly un-intrusive.

In light of the fact that a custody manager of the opposite sex may view the CCTV footage, the NSWPF should consider including an instruction in the SOPs that the searching officer should, as far as practicable, conduct the search at a similar angle to CCTV cameras as would be filmed on Body Worn Video. The statutory requirement of privacy must be taken seriously and real-time access to a monitor that might show a strip search taking place must be limited to the custody manager.

#### 6.1.4 WHETHER PRACTICES ARE APPROPRIATE, SUCH AS REQUIRING A PERSON TO SQUAT AND COUGH, BEND OVER OR LIFT THEIR GENITALIA

The Commission recommended that the SOPs should include consistent guidance to police about the appropriateness and acceptability to the NSWPF of strip search practices which the Commission understands to be common, such as asking a person to squat and cough or bend over, move genitalia or separate buttock cheeks. The Commissioner of Police stated this had been implemented and instruction in these practices is included in both the Custody SOPs and the Manual.

Police are instructed they can ask a person to do the following things, by way of example, to allow a visual inspection:

- (a) Lift testicles
- (b) Part buttock cheeks
- (c) Spread fingers and toes
- (d) Lift breasts
- (e) Turn their body to face a different direction
- (f) Open their mouth and shake their hair, or
- (g) Squat.<sup>109</sup>

It is an offence under s 546C of the *Crimes Act 1900* for a person to resist or hinder a police officer in the execution of that officer's duty. However, this does not impose a legal obligation on the person to perform an act to assist in the performance of that duty. Such a requirement can only arise from a legislative provision, either explicitly or by necessary intendment. Thus, under s 21A and s 28(1) of LEPRA, police are explicitly given a power to *require* a person to open his or her mouth to enable it to be searched, or shake or otherwise move their hair, s 30 gives a police officer power to '*require* a person to remove [certain items of clothing] ... but not, *except in the case of a strip search*, all of the person's clothes ...' and s 32(2) obliges an officer, where it is reasonably practicable to do so, to inform the person being searched 'whether the person will be *required* to remove clothing during the search' (italics added). Section 32(3) requires a searching officer to 'ask for the person's *cooperation*' (italics added), clearly enough implying that that there is no power to *coerce* cooperation and, by parity of logic, that there is no obligation to cooperate. Except, therefore, for the power to require a person to enable his or her mouth to be searched and to shake or otherwise move their hair, and remove clothes, there is no legislative imposition of any obligation on the searched person to do anything to assist in the search except, as has been mentioned, under the Crimes Act, a prohibition of resisting or hindering police in the execution of their duty. There is no provision requiring a person to comply with any direction to perform other actions to facilitate the search, let alone the listed ones (except as to mouth and hair). Given especially the character of the statutory scheme relating to searches, and strip searches in particular, there is no room for implying that such an obligation exists. Amongst other things, this is consistent with the general rule at common law that a person is not obliged to incriminate him or herself.

The NSWPF sought advice from the Solicitor General on the question whether a person can be asked to move a part of their body for the purpose of a search. Although the answer given is, in substance, that the suspect can be asked to perform these actions, no opinion was provided as to whether the suspect may be *required* to perform them or, whether a request having been made, the suspect is under a legal obligation to comply. Indeed, the opinion conflates the quite distinct notions of *request* and *require*, the distinction which lies at the foundation of the problem.

The Commission considers that there is *no* power reposed in police officers to require a person to actively assist the search, particularly by moving testicles, buttock cheeks, breasts or squatting (although they cannot resist or hinder its execution). At most, police might seek a person's consent to do these things, however, police cannot require a person to comply, and moreover, cannot use force to effect compliance.

Given the specific prohibition on searching a person's body cavities at s 33(4), requests involving the parting of buttock cheeks and squatting for example, require particular consideration.

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<sup>109</sup> NSW Police Force, *Person Search Manual*, 20 August 2019, p 7; NSW Police Force, Communications and Security Command, *Charge Room and Custody Management SOPs*, August 2019, p 22.

#### 6.1.4.1 CO-OPERATION AND CONSENT

Section 32(3) provides that ‘the police officer must ask for the person’s cooperation.’ The SOPs indicate that police ‘must ask for the person’s cooperation’ and that ‘officers can ask a person to do things to allow visual inspections’. If consent were being sought, the way in which such consent can be sought should be clearly explained. In ordinary parlance ‘ask’ or ‘request’ are ambiguous: depending on the circumstances and the manner of the communication, it could well convey a demand or requirement as distinct from seeking voluntary compliance. In this context, there is no room for ambiguity. A suspect is entitled to know whether he or she is being requested to consent to some procedure which they can refuse or is being directed or required to undertake some procedure pursuant to a coercive power. It should go without saying that the officer who proposes to undertake the search should be clear on this point, in particular, whether there is a legal power to give a direction. The failure of the Manual and the Custody SOPs to give this necessary guidance is serious and unjustifiable.

If a search, or part of a search can only be carried out ‘with consent’ police must not use language that could reasonably be understood as compelling the person to submit. It may be that it is not essential that police inform a suspect that they can refuse to submit to a procedure (such as moving their testicles), but it appears to be wrongly assumed that the officer can still use language that amounts to a direction or order even though this is not authorised by the statute. The case that is usually cited in this regard is *DPP v Leonard* (2001) 53 NSWLR 227 but that judgment goes no further than holding that it is not necessary that the person whose consent is in question to know that they have the legal right to refuse consent. It remains a question of fact whether, in the particular circumstances the person did consent and this will depend in large part on the terms used by the police officer in addressing the person. The trial judge in *Leonard*, (James J) referred to a number of authorities in his judgment, in particular to the judgment of Barwick CJ in *Bunning v Cross* (1977-1978) 141 CLR 54, where the Chief Justice explained, uncontroversially –

There is, in my opinion, nothing unlawful in the making of ... a [breath] test with the co-operation of a person *willing without being required or commanded to take it*. [Italics added.] Of course, a fine line divides such a willingness from a willingness the product of coercive conduct: and in deciding whether the willingness was uncoerced, it is proper to remember the apparent authority of a patrolman and the situation of the motorist who has been ‘taken’ to the police station. But, in this case, there is no finding of any coercive conduct on the part of the patrolman or authorized person: nor, in my opinion, ought there to have been. Rather, the impression the magistrate’s notes creates in my mind is that the applicant, confident of his own innocence of wrongdoing, was quite willing if not anxious to take the test which, it seems to me, it was likely that he believed would clear him.

Section 34A of LEPPRA authorises a search ‘with the person’s consent but only if the police officer has sought the person’s consent before carrying out the search’. The issue in any case, therefore, will come down to the circumstances in which it is sought to undertake the search and, in particular, the language used by the searching officer in seeking consent. The communications between the officer and the suspect, in order to comply with the statutory obligation, must unambiguously seek consent (as distinct, for example, cooperation or compliance) and the Manual and the SOPs must require the use of language that does so. The lawfulness of a search, where it is called into question, is for the police to establish. An ambiguous request will not comply with s 34A.

Fundamental rights to personal integrity protected by law should not be undermined by resort to deliberately ambiguous language that might be misunderstood by the ordinary person who is in police custody and subject to police control. The use of language designed to obscure the question of whether the officer is exercising a coercive power or seeking consent would be



either 'unlawful', 'unreasonable', 'unjust', 'oppressive' or 'arise...from improper motives' or all of these, within the meaning of 'agency maladministration' as defined in s 11(1) of the *Law Enforcement Conduct Commission Act 2016* and an officer who used such language would be guilty of 'officer maladministration' under s 11(2) by parity of reasoning.

Any search carried out under LEPR is subject to the rules and safeguards contained in Part 4, Division 4 of the Act.

Section 29 sets out the application of Division 4, and provides:

(1) This Division applies to any search of a person carried out by a police officer under this Act, except as otherwise provided by this Act or the regulations.

(2) This Division also applies to any search of a person that is carried out by a police officer after obtaining the person's consent to carry out the search. In that case—

(a) the purpose of the search is the purpose for which the police officer obtained consent to search, and

(b) a general consent to the carrying out of a search is not consent to carry out a strip search unless the person consents to the carrying out of a strip search.

While it is not entirely clear, this would appear to mean that police are required to comply with the rules and safeguards under s 32 and s 33 of LEPR, when conducting any searches, including searches carried out after obtaining the person's consent. Whether consensual general searches require the existence of the reasonable suspicion under s 21(1) or s 27(1) is doubtful: this also is the view of the Solicitor General although he prefers the construction that a consensual search conducted pursuant to s 34A does not require the officer have a particular state of mind or hold a particular suspicion. There is no doubt, on the other hand that the relevant state of mind must be present for the purpose of conducting a strip search, whether or not consensual. This follows from the terms of s 29(2).

In summary, the Commission considers that the fact that a power is being exercised and the way in which co-operation or consent can be sought should be clearly explained in the policy guidelines, and clearly differentiated, given they are discrete provisions under the Act<sup>110</sup> and fundamental to its lawful exercise.

The Custody SOPs and the Manual also advise police that they cannot examine a person's body by touch. It remains unclear in these policies how this prohibition sits with the use of force which is set out in s 230.

While both the Custody SOPs and the Manual instruct police that they must ask for a person's co-operation when conducting a strip search, police are instructed this is not necessary where it may be unsafe to do so, such as if police suspect the person is carrying a firearm. It may be more helpful to advise police that asking for a person's co-operation is subject to whether it is 'reasonably practicable' in the circumstances, given that this is the statutory provision, and offer the advice regarding firearms as an example of an excusing circumstance.

On a positive note, the updated policy now includes clear instruction that police cannot ask a female to remove a tampon during a strip search. The policy includes the following:

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<sup>110</sup> The policies makes a number of references to asking for a person's co-operation when carrying out a search under s 32(3). Under s 34A police may search a person with the person's consent. However the policies do not appear to distinguish between the provisions.

Can police ask someone to remove their tampon?

No. This practice is not to occur.<sup>111</sup>

The Commission is aware from its investigations and oversight work of complaints about this practice. One police investigation concluded that no breach of LEPRA occurred on the basis that the police request to remove a tampon was voluntarily complied with by the female searched. The inclusion of the new instruction in policy is therefore welcome. It means that in future, requests by police to remove a tampon will be a breach of policy, even if the person searched complies with the request.

## 6.1.5 WHEN IT IS APPROPRIATE TO USE FORCE IN THE CONDUCT OF A STRIP SEARCH

The Commission recommended the SOPs should include consistent guidance about when it is appropriate for an officer to use force in the conduct of a strip search. The Commissioner of Police stated this had been implemented in both the Custody SOPs and the Manual.

Both policy documents contain the following:

Can police use force to carry out a search?

Police must always ask for the person's co-operation when carrying out a search.

Where a person is resisting the lawful exercise of the search, police can use force as is reasonably necessary to allow them to carry out the visual inspection necessary for the purpose of the search (see s.230 of LEPRA).<sup>112</sup>

It should be noted that this somewhat understates the scope of s 230, which permits the use of such force as is reasonably necessary 'to exercise a function'. Thus, in the present context, the question is not whether the suspect is resisting the search but whether force is reasonably necessary, not for the purpose of coercing compliance, but for the purpose of carrying out the search. It is clear that force cannot be used to oblige a suspect to cooperate, since there is no legal obligation to do so (except for the specified matters, as previously discussed). This means, for example, that using the infliction of pain to coerce cooperation is not lawful. However, it might mean that physically spreading toes or even the buttocks or moving testicles or breasts is a lawful exercise of force where a suspect will not voluntarily do so on request. Section 33(4) prohibits the use of force that would amount to 'a search of the person's body cavities or an examination of the body by touch'. The Solicitor General is of the opinion that moving the body to allow a visual inspection would not amount to 'examination of the body by touch', concluding that, in such a case, it is the visualisation and not the touching that constitutes the examination or inspection. This is far from clearly the case. Had it been intended that the phrase should be understood in the proposed sense, the legislation would have provided that there should be 'no examination by touch of the body'. At all events, it is difficult to accept that lifting a breast or moving testicles or separating buttocks or, even for that matter, spreading toes, is not, 'an examination of the body by touch' in ordinary parlance, since in each case it is practically inevitable that the touch informs the search and hence is part of the examination, whether or not this is intended. In allowing that force could lawfully be used in this context, the Solicitor General expresses the opinion that such force might generally be expected to be relatively 'modest'. However, the Commission is aware of at least one incident

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<sup>111</sup> NSW Police Force, *Person Search Manual*, 20 August 2019, p 6; NSW Police Force, Communications and Security Command, *Charge Room and Custody Management SOPs*, August 2019, p 21 [8.3.5].

<sup>112</sup> NSW Police Force, *Person Search Manual*, 20 August 2019, p 6; NSW Police Force, Communications and Security Command, *Charge Room and Custody Management SOPs*, August 2019, p 27 [8.8].

where the force used to obtain an inspection of the suspect's anus was extreme by any standard and the force necessary to induce a squat is most unlikely to be 'modest'. Neither the Custody SOPs nor the Manual deal with this difficult issue. They must.

More generally, it seems problematic on public policy grounds that police might be directed to themselves separate buttocks, lift breasts or move testicles unless it was practically necessary to do so to avoid an actually perceived serious risk of harm. Many officers would rightly have considerable misgivings undertaking such actions on the basis of such a low threshold as 'reasonable suspicion', and even more so in the case of a strip search of a child. However, if it be considered that this could be lawful, the circumstances in which such 'force' might be used must be clearly delineated. It is, at least, reasonably clear that the suspicion that might justify such an invasive (and to some minds, indecent) search would need to be significantly greater than mere speculation.

So far as children are concerned, the use of a sexually invasive search raises distinct and serious questions of welfare, with a concomitant requirement that procedures be put in place to minimise this risk. The presence of a support person, emergencies aside, must be regarded as essential and at a minimum, consideration should be given to requiring the explicit permission of the custody manager before the search of a child is to be undertaken. It is not, however, for the Commission to prescribe procedures in this space. It is essential that the NSWPF does do. Regrettably, this has not occurred.

## 6.1.6 REQUIREMENTS FOR POLICE TO RECORD THE REASONS FOR A SEARCH

The Commission recommended the SOPs include consistent guidance about the requirements for police to record the reasons for a search. The NSWPF has indicated it has implemented this recommendation.

Both new policy documents contain instructions about where to record searches conducted in custody and outside of a police station, and what needs to be recorded. This includes the type of search, reason for the search, officers who carried out the search and whether force was used.

In the case of searches carried out in the field the seriousness and urgency of the circumstances of the search must be recorded. Arresting police must record on electronic Field Arrest Forms details of any search conducted prior to taking a person into custody, and the custody manager has responsibility for electronically updating the custody management record with the details of any search conducted while in custody.

The policies require police to record the reasons if the search of a person under 18 years old is not done in the presence of a parent or guardian, per s 33(3A). However, the Commission considers it important that the new policies also advise officers to record whether the young person was asked if they wanted their parent, guardian or other support person present for the strip search, and if an alternative support person is used, who that is, and whether the young person found that person acceptable.

In addition, it is essential to record the details of all persons present during the conduct of any strip search, together with the particular circumstances which justified the exercise of the powers for each individual. This is required to enable any subsequent scrutiny by supervising officers, or oversight agencies.

It would also be prudent for police to record the actions taken in the search, including the reasons for those actions. For example, police should include whether upper and lower clothing

were removed separately, or whether the person was asked to move their body to facilitate the search (noting the Commission's concerns about this practice detailed above). Clear records detailing this kind of information is important to assist in any subsequent review of a search, whether that be for instructional purposes, for the purposes of complaint investigation or even civil litigation.

While the improvements to policy as far as recording the reasons for a search are welcomed by the Commission, further guidance around what details need to be recorded is required.

### 6.1.7 PROVIDE CONSISTENT GUIDANCE ON OTHER PRACTICES NOT SET OUT IN LEPR

The Commission recommended the SOPs include consistent guidance about any practices which are not specifically set out in LEPR that the NSWPF condones or considers reasonable in the conduct of a strip search. In response the NSWPF highlighted the additional instruction in both the Custody SOPs and the Manual about the use of Body Worn Video.

The Commission welcomes the inclusion of instructions about the use of Body Worn Video in both policy documents. The instructions appropriately balance the need to record a strip search for evidentiary and accountability purposes while meeting requirements to preserve the privacy and dignity of persons searched.

The NSW Coroner made recommendations relevant to the use of Body Worn Video by police when conducting strip searches, as part of the Coroner's findings in the Inquest into the death of six patrons of NSW music festivals.<sup>113</sup> Among other recommendations made to the NSWPF, the Coroner recommended operational guidelines be issued or amended to include the recording of reasons for conducting the search on body worn video before the commencement of the search. The Commission has written to the NSWPF noting that this recommendation sits comfortably within existing policy regarding the use of Body Worn Video.<sup>114</sup> The Commission commented that this practice would provide further accountability for the conduct of strip searches and may assist where evidence of compliance with LEPR is required, such as by the courts, or in responding to complaints about the conduct of police.

The NSWPF acknowledged the Commission's suggestion and has undertaken to consider this as part of its ongoing consideration of the Coroner's findings and recommendations.<sup>115</sup>

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<sup>113</sup> *Inquest into the death of six patrons of NSW music festivals* (2019) State Coroner's Court of New South Wales, p 138.

<sup>114</sup> Correspondence from the Law Enforcement Conduct Commission to the Commander, Education and Training Command, NSW Police Force, 11 November 2019.

<sup>115</sup> Correspondence from the Assistant Commissioner, Professional Standard Command to the Law Enforcement Conduct Commission, 18 November 2019.

# 7. FURTHER ISSUES WITH STRIP SEARCH POLICY

## 7.1.1 IDENTIFYING INTERESTS OF YOUNG AND VULNERABLE PERSONS

The Commission's recent public hearings in Operation Gennaker highlighted a number of concerns with the way police conducted strip searches of young people at a music festival held in 2019. While the Commission will report separately on the outcomes of that investigation, the issues that have arisen in the course of those public hearings should prompt the NSWPF to pay particular attention to the instruction provided to police about their powers and importantly, the safeguards that are set out in LEPR which apply whenever a young person between the age of 10 and 18 is strip searched, whether or not that occurs at a festival, in custody or in another location. These safeguards also apply to the search of a person with impaired intellectual functioning.

Over the course of 2019 there was significant publicity about the numbers of young people who had been strip searched by police in recent years. The media have reported 344 boys between 11 and 18 years old have been strip searched since 2016, and 122 girls.<sup>116</sup> Many of these searches will have occurred in the context of music festivals. It is important, however, that the instructions provided to police about their powers and the relevant safeguards are understood to be applicable in any context in which a search of a young or vulnerable person occurs.

The above discussion highlights many of the relevant issues that police must consider, such as whether a young or vulnerable person can consent to an otherwise unlawful strip search, what are the appropriate ways to seek cooperation from a young person, what are the interests of the young person being searched, and how these interests are to be communicated to the support person present during the strip search (whether they be a parent, guardian or otherwise).

Whether a child or a person who has impaired intellectual functioning can 'consent' to a strip search is a difficult question (upon which the Solicitor General has not given an opinion in his discussion of the issue of consent). There is no explicit reference to this question in LEPR, although it would seem most unlikely that it could be appropriate to seek the consent of a child or a person with impaired intellectual functioning to a strip search, certainly without ensuring that such suspects understood their applicable rights and interests. There is no guidance in the new policies about this issue. This is a significant omission and it is essential that the NSWPF give clear instructions to its officers on this issue.

Where police conduct strip searches of young people in the presence of a support person, who is not that child's parent or guardian, NSWPF policy should be clear about how police select that person. They should take into consideration, as required by s 33(3), whether that person is capable of representing the interests of the child, and whether that person's presence is acceptable to the child.<sup>117</sup> Section 33(3) is a mandatory provision that must be strictly complied with. It is not subject to any allowance for impracticability. The only exception to the requirement is where the delay is 'likely to result in evidence being concealed or destroyed' or 'an immediate search is necessary to protect the safety of a person'. Operational inconvenience

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<sup>116</sup> Michael McGowan, *NSW police strip-searched more than 340 school aged boys in the past three years* (9 December 2019) The Guardian <<https://www.theguardian.com/australia-news/2019/dec/09/nsw-police-strip-searched-more-than-340-school-aged-boys-in-the-past-three-years>>

<sup>117</sup> This is consistent with s 33(3)(b) of LEPR.

to the searching police officer, let alone other officers, caused by any delay, even if thought to be unreasonable, does not provide a basis for searching regardless of the requirement. There is no allowance for waiving the requirement and s 34A does not apply to permit consent as a mode of avoidance.

The independent person must be 'acceptable' to the young or impaired person, a condition which is not subject to any objection being reasonable. Furthermore, although it seems that a parent or guardian need not necessarily be 'capable of representing the interests of the person being searched', this is an essential criterion for choice of an acceptable independent person. It follows that the searching officer must be satisfied, where a parent or guardian is not available or acceptable, that the replacement has the relevant capacity. Guidance must be provided as to how to contact such a person and verify their suitability. The failure of the Custody SOPs and the Manual to deal with these imperative statutory requirements is a serious omission. It is obvious that merely to refer to or even set out the statutory requirements will give inadequate guidance.

Consideration needs to be given to the appropriate form of interaction between the support person and the person to be searched on the one hand, and the searching officer or officers on the other, to enable the support person to undertake the role envisaged by the section. Some communication between the person to be searched and the support person (if they had not been selected by the person to be searched) would be necessary to ascertain whether they were acceptable to the person. The support person might wish to check on the understanding of the person as to what was happening and their reaction to the notion of being searched. It would be appropriate for the support person to inquire of the police as to the justification for the search and how it was proposed to conduct it. Other proper communications can be envisaged. For obvious reasons, these issues need to be the subject of specific guidance. Currently they are not. The NSWPF has advised the Commission it will update its Manual to include additional information about the role of support persons, but this will not occur until the NSWPF gathers further feedback from operational police as the music festival season progresses and after consideration of the Commission's final report.<sup>118</sup>

The Commission points out that commands must have in place arrangements for identification of a list of appropriately qualified persons (voluntary or otherwise) who can be called on to support young or intellectually impaired persons should a parent or guardian be unavailable or unacceptable. Of course, this would be more difficult to arrange for searches in the field but it is nevertheless necessary. An appeal to urgency is unlikely to be regarded as persuasive where the reason for delay is the failure to put in place an appropriate arrangement to have an acceptable support person available.

The Commission further observes that it is a legislative requirement that an officer make a record of the reasons for not conducting the search in the presence of a parent or guardian or support person. Where this record is made should be provided for in policy.

The Commission has been advised that the NSWPF began trialling an information brochure in December 2019, to be issued to support persons present for the strip search of a young person at a music festival. This is a promising development, and the Commission has sought further details about this new approach, and will continue to work with the NSWPF as they refine a process of assisting support persons (and police officers) to understand their role during a strip search.

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<sup>118</sup> Letter from Assistant Commissioner, Professional Standards Command, NSW Police Force to Chief Commissioner, Law Enforcement Conduct Commission, 20 January 2020.

It is concerning that the questions about the interests of young or vulnerable people during a strip search do not appear to have been considered by police in any meaningful way prior to the examinations conducted by the Commission in Operation Gennaker – as is evidenced by the lack of policy or other guidance to officers about these issues. It is essential that the NSWPF now gives serious attention to the issue, and instructs its officers clearly. The Commission’s view is that any failure by the NSWPF to have a clear position in policy and training may constitute a breach of s 11 of the *Law Enforcement Conduct Commission Act 2016*.

## 7.1.2 THE RELATIONSHIP BETWEEN LEPRAS SEARCH POWERS AND INTIMATE FORENSIC PROCEDURES UNDER THE FORENSIC PROCEDURES ACT.

As indicated in 4.1.8, the new Manual and Custody SOPs do not refer to the Forensic Procedures Act despite LEPRAS containing a note under s 33 which indicates that ‘procedures for searches of a more invasive nature are dealt with under’ that Act.

The Commission has sought further information from the NSWPF about how it considers the provisions of LEPRAS and the Forensic Procedures Act sit together. Section 6(2) of LEPRAS provides, in effect, that LEPRAS prevails over any inconsistent provision of any Act or regulation other than those Acts or regulations referred to in s 5(1), which specifies the statutory instruments listed in Schedule 1 (‘Acts not affected by this Act’). The Forensic Procedure Act is listed in Schedule 1 and, hence, is not subordinate to LEPRAS. As has already been pointed out, the search powers reposed in police officers by LEPRAS apply to an arrested person who is also a ‘suspect’ within s 3 of the Forensic Procedures Act. In this respect, therefore, the Acts cover the same ground. Section 32(6) of LEPRAS prohibits a ‘search of the *genital area* of the person searched, or in the case of a female or a transgender person who identifies as a female, the person’s breasts unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search’ (italics added). Section 33(4) prohibits, without exception, a search of a person’s ‘body cavities’ or ‘an examination of the body by touch’. Neither *genital area* nor *body cavity* is defined. They should therefore be understood in their ordinary English meaning.

In s 3 of the Forensic Procedures Act *forensic procedure* is defined as meaning both an intimate and non-intimate forensic procedure. The former includes ‘an external examination of a person’s private parts’, whilst the latter includes ‘an external examination of part of a person’s body, other than the person’s private parts, that requires touching of the body or removal of clothing’. *Private parts* means ‘a person’s genital area, anal area or buttocks and, in the case of a female or transgender person who identifies as a female, includes the person’s breasts’. ‘Genital area’ is not defined and, accordingly, is to be understood in its ordinary English meaning. Section 5 contains a table that ‘shows the circumstances in which a forensic procedure may be carried out on a suspect and shows the provisions that authorise the carrying out of the procedure’. For present purposes it is not necessary to detail these requirements. It is enough to note that, absent ‘informed consent’ an order of a Magistrate or ‘authorised person’ is required where the suspect is an adult, whether under arrest or not.<sup>119</sup> Where the suspect is a child or incapable person, under arrest or not, there must be an order of a Magistrate or an ‘authorised officer’. Section 8 imposes time limits. A non-intimate procedure (i.e., for present purposes, the examination) may only be undertaken where there are reasonable grounds to believe that it might produce evidence tending to confirm or disprove that the suspect has committed the offence for which he or she has been arrested. An intimate forensic procedure requires reasonable grounds to believe the suspect has committed an

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<sup>119</sup> ‘Informed consent’ requires an elaborate procedure which does not need to be set out here.

indictable or prescribed offence and that evidence might be produced tending to confirm or disprove that the suspect committed the offence.

The relevant prerequisites for strip searches under LEPR have been specified above. Amongst other factors justifying a search under s 27(1) is that it is undertaken to 'ascertain whether the person is carrying anything...that will provide evidence of the commission of an offence'. To this extent, at least, there is common ground between the powers of 'search' and the powers of 'examination'.

The question whether there is a conflict between the powers respectively provided by the Acts in their application to this area of apparent common ground is not easy to answer. The Commission recommends that the NSWPF formulates a clear corporate position that reconciles the differing scope of police powers as described by LEPR and the Forensic Procedures Act and provides an adequate basis for its approach to them. It is understood that this process is presently underway.



# LECC

Law Enforcement  
Conduct Commission

Level 3, 111 Elizabeth Street  
Sydney NSW 2000  
Email: [contactus@lecc.nsw.gov.au](mailto:contactus@lecc.nsw.gov.au)

**Postal address**

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