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Rethinking Strip Searches by NSW Police

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Executive Summary

Strip searches require the removal of clothing without consent and enable inspections of the naked body that can be intrusive, humiliating and harmful. Strip searches are a significant violation of the person in circumstances where the person searched is also stripped of agency and control. Yet, strip searches are on the rise in New South Wales. Data put on the public record in 2019 shows that strip searches increased by 46.8 percent over four years and on average, found nothing 64 percent of the time.¹

Strip search practices raise major issues of police accountability. There is little public information about how and when police use strip searches, or the reasons why. At the time of the release of this report, the Law Enforcement Conduct Commission (LECC) is conducting an investigation into strip search practices by the NSW Police Force (NSW Police). The current Coronial Inquest into the deaths of six young people at music festivals in New South Wales is asking questions about the use of strip searches by police.² In June 2019, an internal police analysis reportedly disclosed concerns about the unlawful conduct of strip searches and the lack of clarity around key legal provisions.³

The power to strip search is one that ought to be exercised in exceptional and serious circumstances only, consistent with international human rights standards and social policy goals such as harm reduction. However, the strip search experiences of those people brought to public attention through media reporting reveal urgent questions about the legality, fairness and harmful effects of strip searches in New South Wales.

ABOUT THIS REPORT

This report investigates the adequacy of the law regulating strip searches conducted by NSW Police. It provides a legal study of police strip searches in the field in New South Wales and a comparative review of personal search powers, case law and record-keeping across Australia. It sets out how the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), which regulates police powers in New South Wales, was intended to guide police to use strip searches as a last resort in serious and urgent circumstances. The report assesses New South Wales law against guiding principles that should protect civil liberties and give police clear and objective criteria for the exercise of their powers. The law on strip searches must be precise, proportionate, fair and have a clear purpose.

The findings of this study also draw on the limited data available on the public record, new data obtained under freedom of information, and illustrative case studies provided by the report's advisory group to assess aspects of how the law operates in practice. The advisory group's clients' experiences of being strip searched at festivals, train stations, in the street, in the back of police wagons and in custody highlight instances of poor, abusive and potentially unlawful police practices. This is not to suggest that all strip searches being conducted are unlawful. No doubt there are instances of legitimate police uses of strip search in serious and urgent circumstances where the legal criteria have been met. However, this research is not an empirical study of police strip search practice. The limited available data and the lack of transparent information does not make a comprehensive study of this kind possible. The NSW Police are able to record and release comprehensive data on the use of strip searches, and it is in the public interest that they do so.

HOW ARE STRIP SEARCHES BEING USED IN NSW?

Key facts

Increase in strip searches

- Strip searches were used 277⁴ times in the 12 months to 30 November 2006 compared to 5,483⁵ in the 12 months to 30 June 2018, an almost 20 fold increase in less than 12 years.

Reasons for strip searches

- Police suspicion that a person possesses prohibited drugs accounts for 91 percent of all recorded reasons why police conduct a strip search (financial year 2018-2019). Police suspicion that a person has engaged in drug supply is not recorded as a category of reason for conducting a strip search.

Criminal charges from strip searches

- 30 percent of all strip searches conducted in the field result in charges (2017-2018).
- Almost 82 percent of all charges arising from strip searches are for offences of drug possession. 16.5 percent of all charges arising from strip searches result in charges of drug supply. Less than 1.5 percent of charges arising from strip searches result in charges of possession/use of an unauthorised weapon (financial years 2016-2017 to 2018-2019).

Strip searches of young people

- Almost 3 percent of all recorded strip searches in the field are of children under the age of 18 (financial year 2017-2018). 45 percent of all recorded strip searches are of young people aged 25 years and younger (financial year 2017-2018).

Strip searches of Aboriginal and Torres Strait Islander people

- 10 percent of all recorded strip searches in the field are of Aboriginal or Torres Strait Islander people (financial years 2016-2017 to 2017-2018).
- 22 percent of all recorded strip searches in custody are of Aboriginal or Torres Strait Islander people (financial years 2016-2017 to 2018-2019).

PROBLEMS WITH STRIP SEARCH PRACTICE AND LAW IN NEW SOUTH WALES

Key findings

A number of systemic problems with police practice are outlined in this report.

1 Imprecise legal thresholds

The only specific guidance the statute provides to the police in the field is that an officer must have reasonable grounds to suspect that a strip search is necessary for the purpose of the search and that serious and urgent circumstances make it necessary. At a police station, officers only need to have regard to whether the strip search of a person in custody is necessary for the purpose of the search. The purpose of strip searches is to avert emergencies or imminent risks of serious harm. Parliament's intent was that strip searches be used as a last resort and in exceptional circumstances. The current broadly-defined thresholds in LEPR do not provide police with clear guidance on the objective reasons for which a strip search should be conducted, and greater clarity is required.

2 Unlawful strip searches are potentially widespread

The available evidence suggests that police are not always meeting the legal criteria for using strip searches.

- Police data** shows that routinely, strip searches are not being used in serious and urgent circumstances, indicating widespread contravention of the law. Police suspicion of drug possession accounts for the vast majority of strip searches, but mere possession of a prohibited drug alone does not legally justify a strip search. There are no "drop-down box" reasons in the police data entry system (COPS) that require police to indicate why the legal thresholds to conduct a strip search have been met.

- The New South Wales Courts** have found that police are not turning their minds to the legal requirements for conducting a strip search, as set out in the statute. When strip searches are conducted in the absence of legal justification, they are carried out by police for a range of non-legal purposes, including punishment and humiliation. A key legal protection from arbitrary searches is that the police must first have "reasonable grounds to suspect" a person has committed or is about to commit an offence. In both general and strip search matters the police have been found by the courts to rely on a range of factors that do not constitute reasonable suspicion including nervous demeanour, being in a high crime area, and the time.

Civil payouts including exemplary damages for unlawful police strip searches do not appear to be resulting in any changes to police practice, given that successful litigation against the police for unlawful strip searches continues. Instead of increased costs to the taxpayer through foreseeable litigations, accountability for police search practices must be more carefully crafted in the law authorising strip searches.

- Case studies** provided by lawyers suggest that strip searches are being conducted at music festivals and other sites such as railway stations in relation to often lower-level drug offences (such as possession of a small quantity of drugs for personal use), in circumstances where there is no immediate, serious threat to personal safety.

In non-festival settings, people are being strip searched in circumstances where it is not clear why a strip search is necessary, or why the circumstances are serious and urgent. For example, where a person is suspected of shoplifting or stealing a car.

Aboriginal and Torres Strait Islander people are being strip searched in circumstances where there is an absence of the necessity for the search and of serious and urgent circumstances. Aboriginal and Torres Strait Islander people routinely experience searches, including strip searches, in public places. Personal and strip searches reported to lawyers by Aboriginal and Torres Strait Islander people are often not recorded by police. Searches often fail to result in charges being laid and are not challenged in court or otherwise placed on the public record.

3 Drug Detection Dogs and the lack of reasonable suspicion for a search may be propelling unnecessary strip searches

Case studies, police data and information on the public record suggest a systemic practice where an indication from a Drug Detection Dog alone is being used to justify the use of strip searches. The available evidence suggests that police escalate to a strip search immediately, and also after failing to find anything in a general search on the basis of a positive indication from a dog. This practice does not meet the legal criteria required for a strip search. Approximately 20 percent of all strip searches in 2017 occurred as a result of a positive indication from a Drug Detection Dog (2017 figure), but the law and the NSW Police Special Operating Procedures require police to have a reasonable suspicion based on more than just a positive indication from a dog before a person is searched on suspicion of drug offences.

4 Some strip searching practices go beyond law

The deeply humiliating police practices of requiring a person to squat and cough, or to bend over, are not authorised by law. Police have previously advised the NSW Ombudsman that the technique is used to avoid close inspection of a person's body cavities. However, such practices are in reality a cavity search and should be expressly prohibited for use as a strip search by police.

5 Definition of a strip search is too vague

Police are given far less legal direction on what a strip search is than a general search. The definition of a strip search is that it "may include requiring the person to remove all of his or her clothing and an examination of the person's body (but not of the person's body cavities) and of those clothes". In practice, a strip search can involve a range of directions from police, including to remove some (but not all) items of clothing or to lift up a shirt. The police practice of pulling out a person's outer clothing such as pants, to look down at underwear or unclothed genital areas is also a strip search. A holistic reading of LEPPRA and the police policy manual indicates these practices are intended to be strip searches. However, they are not expressly included in the definition of strip search in LEPPRA and police may wrongly believe that such practices constitute a general search.

6 Strip searches cause harm

Strip searches are an inherently humiliating and degrading violation of a person's right to bodily integrity. International research highlights that strip searches cause significant psycho-social harms and some judicial authorities have recognised

that strip searches can re-traumatise victims of sexual assault. Young people and children are particularly vulnerable and at risk of serious harm from being strip searched. The global body of evidence justifies reinforcing in law the principle that strip searches be used a last resort, and only in exceptional circumstances after all available alternatives have been explored.

7 Children should be protected

Currently, the police must apply exactly the same legal tests for adults and children when deciding whether to strip search a child in the field. The legal thresholds are not designed to protect children. The only protection for children currently in the law is the prohibition against strip searching a child under 10 and the requirement that a child be accompanied by an independent adult during a search. But LEPPRA allows for an independent adult to be dispensed with if it is not reasonably practicable in the circumstances for police to locate an appropriate adult.

8 Accountability and reporting deficits

Lawyers indicate that not all strip searches are being recorded in the police database (COPS) as strip searches. In part, this may be a product of poor police understanding of what a strip search is, and the broad, undefined scope of key provisions in LEPPRA. There is also no legislative requirement that police must record the reasons for strip searches and why the legal thresholds have been met in the COPS events records or the Body Worn Video (BWV) (if available). Police Standard Operating Procedures on BWV require strip searches be recorded but gives police discretion as to when and if to turn on the cameras. Although the filming of strip searches can compound the humiliation and voyeuristic elements of the search, recording is a critical accountability measure, and clarity is required around police requirements to record strip searches.

9 Legislation in other states provide clearer protections

The legal frameworks across Australia for regulating strip searches are diverse. Some states' laws are just as, or more permissive of police as the law in New South Wales and do not effectively guide police discretion as to when a strip search can be conducted. Other states provide some clearer protective elements and guidance for police. No single framework of best practice exists in any one state. However, New South Wales can draw from elements of the law across different jurisdictions that, in combination, limit the use of strip searches.

LEGISLATIVE CHANGE IS NEEDED IN NEW SOUTH WALES

The report concludes that our laws are not strong enough to protect the public from unnecessary strip searches and do not provide clear guidance to police. Reform of the law is needed to ensure that police have the powers they need, but that strip searches are only used when truly necessary and for urgent and serious reasons.

Legislative reform has benefits for guiding police practice, police accountability and protecting the public. Police training and internal policy change is important, but change in accountability practices must be driven by clear, objective legal criteria, not internal police guidance. Policy and training manuals must flow from legal requirements and not create new rules independent from the law.

The recommendations outlined below seek to maintain a high threshold for the use of strip searches and

invest real meaning into concepts such as 'necessary for the purpose' and 'serious and urgent'. To this end, we have recommended limiting the types of offences for which strip searches may be used to those that may pose an immediate and serious risk to personal safety such as possession of a weapon like a firearm, and some drugs supply offences. Moreover, we do not recommend the approach taken in some jurisdictions requiring authorisation from a senior officer before a strip search can occur. Rather, we propose modest and minimal reforms that emphasise the requirement that all police officers turn their minds properly to the legal thresholds limiting strip searches, mandate that decision-making processes are comprehensively and accurately recorded, and enable greater transparency and accountability.

This report provides detailed proposals for workable reforms to LEPRA to spell out more clearly when strip searches can be used and the decision-making processes the police should undertake.

Recommendations

We recommend the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) be amended as follows:

1 The law must be clearer on what a strip search is

The definition of a strip search should specify that it is a visual search only. It should expressly prohibit police touching a person's body and visual examination of a person's genital area, including ordering someone to lift their testicles or breasts and the practice of requiring a person to contort their body or squat and cough. If an officer believes that a person has unlawful items secreted inside their body then a court order should be obtained in accordance with s138 LEPRA and s5 of the *Crimes (Forensic Procedures) Act 2000*.

The definition of strip search should be amended to include practices such as a police officer pulling back, rearranging or lifting up a person's clothing and inspecting any area of the body unclothed or in underwear.

2 The law must be clearer on when police can conduct a strip search in the field

Strip searches in the field should be limited to circumstances where:

- a. There are reasonable grounds to suspect a person possesses a dangerous weapon, and
- b. Following a personal search there are reasonable grounds to believe the person is concealing a weapon, and
- c. There are reasonable grounds to believe that a strip search is necessary to prevent an immediate risk to personal safety or to prevent an immediate loss or destruction of evidence, and
- d. The reasons for conducting the search are recorded on Body Worn Video before the search commences.

In order to address the current practice of police strip searching for possession of drugs, strip searches should be limited in the field to circumstances where:

- a. There is a reasonable suspicion that the person has committed or is about to commit an offence of supply a prohibited drug, and

- b. This suspicion is not formed solely on the basis of an indication from a drug detection dog, or the failure of a personal search to yield any prohibited substances, and
- c. There are reasonable grounds to believe that the strip search is necessary to prevent an immediate risk to personal safety or to prevent the immediate loss or destruction of evidence, and
- d. The reasons for conducting the search are recorded on Body Worn Video before the search commences.

3 The law must be clearer on when police can conduct a strip in police stations

To ensure that strip searches in police stations are not carried out as a matter of routine, the law should specify that the purpose of a search is to ensure the detained person's safety or to preserve evidence (s28A).

Strip searches in police stations must only be conducted if:

- a. A general search has been conducted first, and
- b. There are reasonable grounds to suspect that a strip search is necessary for the purposes of the search in s28A (to ensure the detained person's safety or to preserve evidence), and
- c. The search is subject to the rules in sections 32 and 33, and
- d. The reasons for conducting the search are recorded on Body Worn Video before the search commences.

4 It should be made explicit that strip searches are not to be undertaken if there is a less invasive alternative

Police are presently not required to conduct the least invasive search necessary if it is not reasonably practicable to do so. The law needs to be clear that strip searches are not to be undertaken if there is a less invasive alternative. An officer must conduct the least invasive kind of search necessary.

5 The general powers that give rise to personal searches should be limited in law to ordinary searches in order to guide police against strip searches as a first resort

Key personal search powers should be limited to a general search unless the thresholds for a strip search are met, in order to guide police against strip searches as a first resort.

6 The rule that police cannot search a person's genitals or breasts during any personal search, unless police consider it necessary requires clarification

The law should be amended to specify that such a search is only necessary in limited and exceptional circumstances, namely:

- reasonable suspicion that the person has a dangerous weapon on their person or suspected of supply prohibited drugs, and
- is conducted exclusively by way of a clothed, general search only applying the 'crush method'.

7 The rules for the conduct of strip searches should be mandatory

Section 33(1) should be amended to remove the words "reasonably practicable in the circumstances".

8 Examples of private places should be clearly specified

Section 33(1)(a) should be amended to provide express examples in the section of private places, including a police vehicle or enclosed area shielded completely from public view.

9 Preferences to be sought regarding the gender of searching officers

The current requirement is that a search must not be conducted of a person of the opposite sex, only if 'reasonably practicable'. Police should be required to ask all people their preference regarding the gender of the officer conducting strip and personal search procedures in order to protect the rights of transgender, intersex and gender diverse people. These preferences should be adhered to unless an immediate search is necessary in an emergency situation where a person has a concealed firearm or bomb on their body, as is the case in Queensland (amend ss32(7), (7A), 33(1)(b), (1)(c)).

10 Police should not be able to carry out strip searches by consent

The law should be amended so that police must be able to justify a strip search in accordance with the legal criteria in all cases.

11 Searches of children should be conducted in accordance with child protection principles and prohibit strip searches of children in the field unless obtained through a court order

Personal searches and strip searches of children under 18 must adhere to child protection principles in legislation, policy and institutional governance procedures. Children under 18 must not be strip searched unless for genuine child protection grounds, specifically in exceptional circumstances to protect a child from harm. Authorisation must be obtained from a court, and a record must be made of the reasons why a child was strip searched on child protection grounds. It should be mandatory for an adult independent from police or other state agencies to be present during the search.

12 Accountability, record keeping and external review

- NSW Police policies and Standard Operating Procedures should be developed or amended to emphasise the exceptional nature of strip searches and the potentially harmful impacts of them. All internal policies regulating strip searches should be public documents.
- Mandatory record-keeping by the NSW Police should be set out in LEPR, including recording the reasons for exercising all personal search powers and what other alternatives to strip searches were considered.
- Reviews of personal searches be conducted by the Law Enforcement Conduct Commission every two years.
- Annual, public reporting on all personal search statistics by the NSW Bureau of Crime Statistics and Research.
- New South Wales explore uniform data collection for police powers with the states and territories, for instance, through the Ministerial Council for Police and Emergency Management or the Council of Attorneys-General.

Introduction

CASE STUDY: EMMA'S STORY

In 2018, 'Emma', a young woman in her late teens, attended a music festival with some friends. Upon entry at the festival, a group of male officers with drug dogs came up to her. One of the dogs sniffed her but did not stop or sit down and indicate. Emma was taken by two male officers to a back area of the festival. She was escorted towards some cubicles where two female officers were waiting.

She was asked by a female officer why the dog followed her. She said she didn't know. There was a table in the room. She was asked to put her phone on the table and they searched her small side bag and jacket. Nothing was found.

The police officers then told Emma to take off all her clothes and put her hands on the table. She was not told she was going to be strip searched nor that it should occur in private.

Police officers continued to question Emma while she was being strip searched, which is not lawful. Nothing was found. After the search, Emma was told to keep her hands together and the police continued to question her. The police then confiscated Emma's concert ticket, escorted her out of the premises and instructed her to go home.

Emma says: "I don't tell many people about what happened because I feel very vulnerable, embarrassed and get teary. Over a year ago, I was sexually assaulted and when I was being strip searched, I felt the same feelings I felt during that assault."

Emma is just one of the thousands of young people who have either experienced or witnessed strip searches being undertaken in recent years. Like Emma, a number of women have come forward to the media to report traumatic experiences of strip search that reproduce the dynamics of sexual assault.⁶ Strip searching is acknowledged to be a humiliating, highly intrusive and harmful state practice. Police have a legal power to strip search only as a last resort, where there are serious and urgent circumstances to justify that a strip search is necessary. However, there is limited oversight and monitoring of police strip searching practices to determine if they are being used lawfully. Despite requirements that the police record the use of strip searches, detailed data about the extent and outcomes of strip searches are not readily available

on the public record, and the experiences of people like Emma are rarely litigated.

Nevertheless, it is clear there has been a considerable increase in the use of strip searches 'in the field' by NSW Police. Strip searches in the field are searches which occur before or on arrest anywhere except police stations, which are a distinct category. Data obtained by New South Wales Greens MP David Shoebridge in December 2018 indicated that the number of strip searches in New South Wales conducted in the field increased from 3,735 in 2014-15 to 5,483 in 2017-18, a 46.8 percent increase in 4 years.⁷ This trend is not replicated nationally. In Queensland, for example, strip searches on the "roadside or from executing a search warrant" declined from 457 in 2016 to 353 in 2018.⁸ Significantly, the majority of strip searches in New South Wales are not yielding evidentiary results. The data obtained by David Shoebridge reveals that between 2014 and 2018, nothing related to criminal offences was found in 12,014 (64 percent) of the 18,756 strip searches conducted. No data is publicly available on how many convictions resulted from the 6,042 prosecutions commenced following the 6,742 strip searches where something related to a criminal offence was found. Nor is it known the extent to which police have imposed penalty notices (on-the-spot fines) for drug possession offences⁹ after conducting a strip search.

Further data obtained by Redfern Legal Centre and the authors from NSW Police through freedom of information requests¹⁰ in May and July 2019 provides reasons why strip searches were conducted and the charges laid. This data is analysed in detail in section 3. Community legal organisations such as the Redfern Legal Centre and the Aboriginal Legal Service have also received increasing numbers of complaints from people subjected to strip searches that raise serious concerns over whether the legal requirements enabling and regulating such searches have been satisfied.

Many of these complaints have arisen from music festivals or highly visible police sniffer dog operations at sites such as railway stations. The extended use of drug detection dogs at music festivals has attracted recent media attention and intersects with wider political debates about pill-testing, the extension of on-the-spot fines for drug possession and drug decriminalisation. However, there are also indications that strip searches may be a routine form of personal search undertaken by police on Aboriginal and Torres

Strait Islander peoples. For example, there have been reports of Indigenous children between the ages of 10 and 14 in Western New South Wales being unlawfully strip-searched in public view,¹¹ and of an Indigenous elder being strip searched in public view on Glebe Point Road in Sydney's inner west.¹² The Aboriginal Legal Service also raises concerns that the repeated and disproportionate use of highly intrusive strip searches causes social harms for Aboriginal young people in particular, including disrupting self-regulation and poor health outcomes.¹³

The level of concern about strip-searching was reflected further by the decision in October 2018 of the NSW Law Enforcement Conduct Commission (LECC), the body responsible for oversight and investigation of NSW police practices, to initiate an inquiry into the use of strip searches.

In December 2018, the Redfern Legal Centre initiated the Safe and Sound Campaign to highlight the extent and negative impacts of strip searching, and to campaign for improved police practices in relation to personal searches. One of the concerns of Safe and Sound is the apparent tension between police search practices and the legal constraints on strip searches in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). There seems to be some acknowledgment of that inside NSW Police, although the concerns have not been placed on the public record.¹⁴

This report was commissioned by Redfern Legal Centre to help inform the Safe and Sound Campaign and focuses on personal searches conducted without a warrant in the field, largely prior to arrest, but excluding searches related to terrorism offences.

SCOPE OF THE REPORT

This report aims to:

- Provide a comparative overview of police personal search powers and record keeping across Australia
- Examine relevant case law in New South Wales and other Australian jurisdictions
- Provide case studies that highlight weaknesses in the current legislative framework that allow poor and abusive police practices
- Make recommendations for reform

The report is structured around five key research questions:

- 1 What are the laws and regulations governing personal searches in New South Wales and other Australian jurisdictions?

- 2 What data is available about searching practices across Australia?
- 3 What level of record keeping/transparency exists in New South Wales?
- 4 Is there a body of 'best practice' that can be distilled?
- 5 How do NSW police search powers and practice compare to other Australian jurisdictions and what reforms might be required or recommended?

METHODOLOGY

In order to answer the research questions, the report analyses relevant legislation and common law in New South Wales and other Australian jurisdictions. It also draws on a range of policy documents, internal police guidance (much of which is not readily available in the public domain) and existing secondary research.

The fact that neither the NSW Police nor the Bureau of Crime Statistics and Research publishes regular and meaningful data about the exercise of personal search powers presents a significant obstacle to informed public debate. This is not unique to New South Wales – freedom of information requests lodged for this report in New South Wales, Victoria, Queensland, the ACT and South Australia yielded limited, inconsistent and in many cases no data about strip search practices. The lack of publicly available data reflects a wider lack of transparency regarding the exercise of police powers and an institutional unwillingness to challenge police narratives of their activities. Nevertheless, the data that has been used in this report raises doubt about the efficacy and legality of strip search practices in New South Wales.

In developing its analysis, the report also draws on case studies provided by the Redfern Legal Centre, the Aboriginal Legal Service and other lawyers and legal agencies associated with the Safe and Sound campaign. These studies were compiled by lawyers in accordance with legal profession ethics requirements and have been anonymised. The case studies illustrate situations where police have not adhered to legislative requirements and highlight apparent problems with how police apply the law, as well as indicating problems with the law itself. These case studies are not relied upon to make generalisable or representative findings, and the self-selecting nature of these accounts is acknowledged. However, while most of the case studies are based solely on the accounts of the people searched, the consistency of these accounts, combined with the findings in cited cases and the experiences of advocates working in the area, requires they be taken seriously.

FINDINGS AND RECOMMENDATIONS

Writing this report was a collaborative process. Drafts of the report were discussed, and its recommendations agreed at three advisory roundtable discussions convened by the Safe and Sound Campaign. A list of the lawyers and agencies who participated in the roundtables appears in the inside cover of this report.

The report does not purport to provide comprehensive answers to the research questions. The lack of readily accessible data and inconsistent legal regimes across Australia inevitably limited our ability to provide a complete overview. However, the report does identify important issues which we believe ought to be the subject of serious public concern and debate. As such, we hope it provides a foundation for informed discussion, further research and proposals for reform

Table 1: Key search provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002 NSW*

3	Definition of a strip search: 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. 'Body cavities' do not include the person's mouth.
21	Power to search persons and seize and detain things without warrant.
21A	Ancillary power to search persons mouth and hair.
23	Power to search persons for dangerous implements without warrant in public places and schools.
27	Power to carry out search on arrest.
28	Ancillary power to search person's mouth and hair on arrest.
28A	Power to carry out search of person in lawful custody after arrest.
29	Purpose of a search by consent is the purpose for which officer obtained person's consent to search; general consent to a search is not consent to a strip search – unless person consents to a strip search.
30	Searches generally – definition of a search.
31	Strip searches may be carried out (a) in police station if officer suspects on reasonable grounds that a strip search is necessary for purposes of search: or (b) in any other place, if officer suspects on reasonable grounds strip search is necessary for the purposes of the search and the seriousness and urgency of the circumstances make it necessary.
32	Rules for preservation of privacy and dignity during search.
33	Rules for conduct of strip searches.
34	No strip searches of children under 10 years.
34A	Searches carried out with consent.
87K	Special powers to prevent or control public disorders; power to search persons.

1 Law and practice on personal searches in New South Wales

This section sets out the key provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) that authorise and regulate the conduct of personal searches. All references to sections are to LEPRA unless otherwise specified. The context and purpose of personal searches, including strip searches, are considered in light of statutory interpretation, case law, police guidelines and secondary research.

1.1 POLICE POWERS TO STOP, SEARCH AND DETAIN WITHOUT A WARRANT

Police may stop, search and detain a person without a warrant before arrest, upon arrest and after an arrest.¹⁵ This section focuses on the police power to search a person before they are arrested.

Before a person has been arrested for an offence, police can only search a person in three circumstances:

- 1 If an officer suspects on reasonable grounds that a person possesses prohibited drugs, or anything stolen/unlawfully obtained, or a prohibited or 'dangerous article' that was used or will be used in the commission of (or connected to) an indictable offence (s21). Dangerous articles are firearms, prohibited weapons, a spear gun or any device that can discharge irritant chemicals, liquids etc., any substance capable of causing bodily harm, or a fuse/detonator (s3).
- 2 If an officer suspects on reasonable grounds that a person in a public place or school has a 'dangerous implement', or a laser pointer in their custody (s24). A dangerous implement can be a knife or anything made/adapted for causing injury or anything intended to be used to menace or injure a person or damage property, or a laser pointer. The definition of a dangerous implement is also inclusive of 'dangerous articles', outlined above.
- 3 Police are empowered to use drug detection dogs in certain places (near public transport, in or outside pubs, clubs, bars, sports grounds, theatres, concert venues, dance parties and any public place in Kings Cross) (s148). However, contrary to NSW police practice, an indication from a drug dog alone does not automatically provide

police with sufficient grounds for conducting a search in accordance with s146(1). The relevant NSW Police Standard Operating Procedures state that police can only rely on an indication from a drug detection dog if they otherwise have reasonable suspicion to conduct the search.¹⁶

Reasonable grounds to suspect

Police must have a 'reasonable grounds to suspect' someone has something unlawful on them, before they can exercise their discretion to conduct personal searches. The requirement that police must hold a reasonable suspicion is one of the primary legal protections citizens have against arbitrary police searches and arrests. Yet, in practice, reasonable suspicion is a malleable threshold deployed by police with very different interpretations of, and approaches to, the legal tests.

The leading authority on what constitutes reasonable suspicion in New South Wales remains *R v Rondo*,¹⁷ in which Justice Smart set out the following propositions regarding the threshold:

- a. A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
- b. Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
- c. What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

In sum, reasonable suspicion is a subjective suspicion held by an officer that is more than a possibility and must be based on objective, reasonable grounds with some factual basis. There is judicial authority in New South Wales that reasonable suspicion is not lawfully raised by:

- Presence in a high crime area¹⁸
- The time of day, or the day of the week¹⁹
- Refusing to cooperate with police or lawful resistance²⁰
- Staring at police²¹
- Avoiding eye contact with police or looking nervous²²
- The existence of prior criminal conduct, on its own²³
- Driving an expensive car that the driver does not own²⁴
- Belonging to a class of persons (e.g. hire car drivers or transport users).²⁵

Under LEPR, “the fact that a person is present in a location with a high incidence of violent crime” can only be taken into account by an officer in determining whether there are reasonable grounds for suspicion in relation to the power to stop and search a person because they have a dangerous implement (other than a laser pointer)(s23(3)).

By contrast, the NSW Police Force’s *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (“CRIME Manual”) potentially conflicts with the above legal framework by advising officers that they should consider all the circumstances, “including: the nature of the article, the time and location, the behaviour and actions of who you want to search and antecedents if known (not to be used as the sole grounds)” when determining whether there are reasonable grounds to suspect a person is carrying a prohibited article.²⁶

In a radio interview in June 2019, NSW Police Commissioner Fuller articulated NSW Police’s commitment to meeting legal thresholds for conducting strip searches. Commissioner Fuller stated:

So, if you think about the test, it’s about the reasonable grounds, it’s not ‘beyond a reasonable doubt’ type of test... and we take into account the time and location. Is this a location where there has been an increase in street robberies? Has there been an increase in cars broken into? We obviously assess the individual and we assess the way that they are acting when we attend the scene.²⁷

The Commissioner is correct that reasonable suspicion does not need to meet the standard of a belief grounded in evidence – it is “less than a belief but more than a possibility”. Crime mapping of

suburbs or streets for trends in crime incidents are recognised as legitimate data tools for assisting in crime prevention. However, the fact that a person of interest is simply in an area where there has been an increase in robberies generally is not sufficient for a reasonable suspicion that the person has committed an offence; nor is the time of night nor appearing nervous when approached by police (see above). Reasonable suspicion must be particular to the person and the specific factual context.

Any gap between how police understand reasonable suspicion and the relevant legal standards warrants ongoing discussion and training within NSW Police. Lawful application of reasonable suspicion is a critical first step for the lawful use of strip search powers, as discussed in section 2.

1.2 WHAT IS THE PURPOSE OF A PERSONAL SEARCH?

Search powers have distinct legitimate purposes at the different stages of the criminal process (before arrest, on arrest and after arrest). In most Australian jurisdictions, the purposes of personal searches are discernible in the structure and language of the legislation regulating police search powers, which under established common law principles, must be strictly construed.²⁸

The normative purpose of searches at each stage of the criminal process is summarised below:

Table 2: The purpose of personal searches

Reasonable Suspicion is required in all circumstances

Before arrest, the purpose of a search in the field is an investigative tool to obtain evidence in respect of charges not yet laid.

On arrest, the purpose of a search differs because the officer has already satisfied strict arrest criteria and cannot arrest for the purpose of investigation, including for the purposes of search. The purpose of search is if it is prudent to ascertain whether the person has evidence of the offence they were arrested for, or they have something that is a danger to them or that may help them escape lawful custody.

After arrest, and in a police station, the purpose of a search should be in clear circumstances that it is necessary to ensure the detainee’s safety. Personal searches must not occur in police custody as a matter of routine and safety concerns should, at minimum, be based on a reasonable suspicion.

Guiding principles

The requirement that searches must have a clearly defined purpose derives from common law and is a fundamental principle of international human rights instruments, alongside a range of other guiding principles and standards with which search laws must comply.²⁹

Principle of legitimate purpose

Personal searches are a significant intrusion on civil liberties, including rights to personal liberty, integrity and dignity, privacy and freedom of movement. Accordingly, laws providing for personal searches that interfere with these rights must have a defined purpose. This is to ensure the discretion conferred on officers to choose who to search is sufficiently circumscribed, to protect individuals from unlawful or arbitrary searches and discriminatory practices.

Principle of legality

All search powers and practices must be authorised by law and be accessible and precise.

Principle of necessity and proportionality

Searches must be necessary (not simply reasonable, or advisable) and serve a legitimate purpose. Searches must also be proportionately applied to an individual in accordance with objective criteria set out in legislation.

Principle of reasonableness

Searches should be exercised with restraint and used in specific and particular circumstances. This principle requires that authorising legislation is not overly broad or vague. Legislative provisions may be considered unreasonable if they leave police with an overly wide margin of discretion that may lead to abuse.

Principle of equality and non-discrimination

For limitations on individual liberties to be lawful, search laws and practices must not discriminate and must be applied equally.

1.3 TYPES OF PERSONAL SEARCH

LEPRA first envisaged three categories of search: frisk, ordinary and strip searches. In 2016, LEPRA was amended to collapse the frisk and ordinary search categories into one general definition of a search.

Section 30 (searches generally) now provides that:

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

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

As we discuss below, s30 provides police with considerable scope for personal searches, and, in practice, has been interpreted by police in ways that blur the distinctions between personal and strip searches.

2 Strip searches in New South Wales

2.1 DEFINITION OF A STRIP SEARCH

A strip search is defined in s3 LEPR as:

...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.*

While strip searches should only be visual examination of the body (s33(6)), this is not made clear in the definition of strip search.

Body cavities, as defined in s3, do not include a person's mouth. Beyond that qualification, there is a lack of clarity over the lawful scope of a strip search, for example, in situations where:

- There is a removal of clothing in the form of pulling it away from the body without removing it altogether
- There is a partial removal of clothing
- A person is required to squat and cough, bend over or lift their testicles or breasts.

Section 4.2 of this report outlines gaps in the definition of a strip search and makes recommendations on strengthening the definition so that it is consistent with parliament's intent.

2.2 THE HARMS OF STRIP SEARCHES

Before considering the purpose of strip searches and when they can be lawfully conducted, we review the established harms of strip searches. Strip searches are an "inherently humiliating and degrading" violation of the right to bodily integrity for any person, and have been recognised as such by the Courts.³⁰ Strip searches have been characterised as an "enforced nudity" by the state³¹ and may be experienced as a form of sexual assault.³² The Canadian Supreme Court in the landmark decision of *Golden* noted that "women and minorities in particular may have a real fear of strip search and may experience such a search as equivalent to a sexual abuse".³³

Police are legally empowered to use "reasonable force" in conducting strip searches. Moreover, strip searches may be experienced as a form of violence

because of their coercive nature and the power imbalance between state and citizen. Strip searching as a process makes those subject to it vulnerable and fearful, regardless of whether the officer is acting with respect and in accordance with the law.

Strip searches carry foreseeable risks of harm to those searched. Risks of harm are particularly heightened in relation to children, women and vulnerable people including First Nations peoples and people with mental and cognitive disability. Strip searching has been found to trigger prior experiences of trauma and abuse and can generate harmful psychological conditions including PTSD. For young people and those who have suffered trauma, the long-term impacts of strip searching on identity formation and wellbeing can be significant.

Peta Malins' recent qualitative study of 22 people's experiences of being searched after indication by drug detection dogs at or near music festivals across Australia found that strip searches had the potential to cause lasting trauma and impacts on emotional and social well-being.³⁵ People who had been strip searched reported significant short and long-term mental health concerns including anxiety and distress and feeling disempowered and de-humanised. The study documents the re-traumatisation of women. Malins' findings also confirm previous research establishing drug detection dogs operations are ineffective and increase rather than decrease a range of harms through adaptive responses to police search practices, including increased risks of overdose, stigma and trauma. The interaction between the harms of drug detection dogs and strip searching is significant. We explore the role of drug detection dog operations as a driver for increasing unlawful strip searches in section 3.3.

Strip searches re-traumatise those who have been subject to sexual and other assaults, and traumas, especially women given the high numbers who have been subject to sexual assault.³⁶ The powerlessness, humiliation and helplessness in the strip search process are identified as key aspects that reproduce the dynamics of sexual assault and re-traumatise victims.³⁷ The inherent harms of strip searching women have been recognised by correctional authorities, for example in Western Australia.³⁸ There is increasing recognition after the Royal Commission into Institutional Responses to Child Sexual Abuse of

the extent to which young men have been the victims of sexual abuse and the high representation of those who have experienced trauma in custodial settings.³⁹

Research on people in custodial settings across Australian states finds that high rates of trauma have been experienced, including child sexual abuse, and are a significant factor in pathways to offending.⁴⁰ For example, across different studies, the prevalence figures of sexual victimisation of those in prison are between 57 and 90 percent.⁴¹ Interconnectedly, poverty and social disadvantage are recognised as key variables in offending pathways.⁴² Baldry et al identify that “(m)any Aboriginal people who end up in the criminal justice system have early lives marked by poverty, instability and violence, without access to good primary health care or early childhood education”.⁴³ The particular impacts of strip searching on Aboriginal and Torres Strait Islander peoples would require consideration in the context of ongoing intergenerational trauma caused by colonisation.

Most studies on the harms of strip searches have focused on the systematic and routine use of strip searching in prisons, rather than in police custody (whether it be in the field, in police vehicles or stations). Internationally, research indicates that strip searches in prison that are procedural, rather than applied using discretion and against objective criteria, are ineffective, have very low hit rates in detecting contraband, and are used to humiliate, control and dehumanise detained people.⁴⁴ A number of reports document the use of strip searches as extra-judicial punishment or control, including as a form of sexual humiliation for “breaking down the resistance of detainees”.⁴⁵ The 2019 report by the Western Australian Inspector of Custodial Services into strip searches concluded that “strip searches cause harm”, are being used as a form of behaviour management, and that the practice needs to be severely curtailed and alternatives such as electronic scanning used.⁴⁶

Moreover, in recognition of the known harms, the United Nation’s Bangkok Rules require that in custodial settings for women:

Alternative screening methods, such as scans, shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches (Rule 20).⁴⁷

The Bangkok Rules also apply to women in police detention, but it is not clear if Australian police forces have considered the application of Rule 20 in relation to strip search practices in custody. Arguably, the same UN principle of requiring alternatives to *replace* the strip search should be applied to police custody whether in the field, paddy wagon or in the station.

Trauma-informed care

There is a recognised conflict between strip searching and best practice around trauma-informed care⁴⁸ and gender-responsive frameworks.⁴⁹ Trauma-informed care originated in mental health care. It includes understandings that trauma is integral to offending pathways and treatment needs, and that the impacts of trauma need to be part of correctional and policing policy and practice.⁵⁰ Gender-responsive policies and programs in criminal justice are directed to safety and respect, recognise criminal justice as gendered, and require adaptations to practice in recognition of the interconnection between victimisation, structural socio-economic marginalisation, trauma and offending.⁵¹

There are indications that some corrections departments are moving towards recognising the harms of strip searches,⁵² although the possibility of trauma-informed care in prisons is disputed as structurally misaligned.⁵³ While not new concepts, ‘trauma-informed policing’ and ‘public health policing’ are still developing fields and are being explored by some state police departments across the United States,⁵⁴ Scotland,⁵⁵ and England.⁵⁶ Public health is concerned with addressing the social determinants of health and attends to the needs of population groups rather than individuals. Similarly, public health approaches to policing are attentive to reducing harm across a whole population group. Police agencies recognise that most police work relates to issues of vulnerability and people with complex needs. While police are not able to address root causes, a harm reduction approach recognises that “the work of policing impacts directly and indirectly on health and health conversely impacts both directly and indirectly on policing”.⁵⁷

It is unclear to what extent police forces across Australia engage with trauma-informed approaches in the field and in custody. The NSW Police CRIME Manual and Police Handbook do not outline protocols or principles in relation to conducting searches with persons who may have experienced trauma. Institutional efforts by NSW Police to engage in public health or trauma-informed approaches would be a positive step, consistent with its orientation to promote evidence-based, innovative and problem-oriented policing and its mission to protect the public. To be consistent with a public health, trauma-informed approach, NSW Police should focus on the potentially harmful impacts of strip searching in general, rather than on identifying individuals who may have experienced trauma, requiring a more fundamental set of restrictions on the use of strip searches.

Policing studies have also identified the harms of increasing the use of stop and search on overpoliced

and marginalised young people in the field. Experiences of being targeted for personal searches generate social exclusion through experiences of disproportionate targeting, and the role of stop and search in enmeshing young people in criminal justice systems is well recognised.⁵⁸ There is a large body of international, survey-based empirical research focused on the negative effects of stop and search on procedural justice and fairness. Some of this research has been conducted in partnership with, and with the support of, police agencies. This literature finds that egregious forms of policing understood by the public to be unfair have a negative effect on police legitimacy and police-community relations.⁵⁹

Overall, the research on the individual and collective harms associated with the overuse of strip searches justifies careful consideration. Moreover, given the disputed efficacy of strip searches measured in terms of ‘hit rates’ of prohibited items (see section 3.2 below), the recommendations in this report are directed to better refining the law and existing protections to meet the objective of harm reduction in the use of strip searches.

2.3 LEGAL THRESHOLDS

Strip searches must be a last resort

There are several provisions in LEPR which, properly interpreted, require that police only conduct strip searches as a matter of last resort.

First, the existence of a hierarchy of personal searches makes it clear that “the level of invasiveness of a search is proportionate to the reasons for a search”.⁶⁰ A police officer must first consider whether running his or her hands over the person’s outer body or removing their outer clothing is sufficient. Alternatives to strip searches, such as scanning with an electronic detection device, must also be considered.⁶¹ Whether police record the use of such devices separately is unknown.

Second, the two-step, mandatory legal threshold for conducting a strip search clearly envisages it as a last resort. In the field, a strip search must be necessary for the purpose of the search, *and* the circumstances must be sufficiently serious and urgent to necessitate the strip search.

Third, the officer must have the required state of mind (reasonable suspicion) to justify the existence of the above reasons for the strip search.

Finally, the surrounding rules set out in ss32 and 33 below make it clear that strip searches were intended by parliament to be a last resort. These include the requirement in s32(5) that police should conduct the least invasive search necessary.

A two-step threshold

The thresholds for conducting a strip search are set out in s31 LEPR:

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.

Initially, LEPR made searches in custody subject to the higher threshold now limited to s31(b). However, the NSW Ombudsman’s 2009 review of LEPR recommended that the purpose of searches in custody should be to ensure the safety of the person and of police. LEPR was amended in 2011 to remove the seriousness and urgency requirement for strip searches conducted in police custody.

For a strip search in the field, a two-step threshold must be met. First, the strip search needs to be “necessary for the purposes of the search”, and second, the circumstances must be so serious and urgent as to make the strip search necessary.

What is meant by “necessary for the purpose of the search” and ‘the seriousness and urgency of the circumstances’?

In relation to strip searches conducted by police in the field, LEPR is silent on what conditions or purposes would give rise to a reasonable suspicion that would make a strip search necessary, and on what circumstances would be so serious and urgent as to necessitate it. As a matter of statutory construction, the differing thresholds for, and purposes of, a strip search pre-arrest, on arrest and in custody, indicate that police should consider the application of both thresholds.

First, “necessary for the purpose of the search” requires the officer to have a *bona fide* belief that the strip search is needed to achieve the objective of the search power being relied upon.⁶³ This requires a number of steps in the reasoning process. For example, if exercising a s21 pre-arrest search power the initial questions for a police officer are:

- On what basis do I hold reasonable suspicion that this person possesses something related to a relevant offence and is it necessary to conduct

a personal search in order to investigate my reasonable suspicion?

- An officer who decides to proceed with a personal search is then required by s32(5) to conduct the least invasive search.
- Before proceeding to a strip search under s31, the threshold of “necessary for the purpose” therefore requires the officer first to consider alternatives to a strip search. Necessity, in this context, is tied to the reasonable suspicion of the object possessed. Any removal of clothing must be justifiable on the basis that there is a reasonable suspicion the relevant item is concealed by the particular piece of clothing. It cannot be speculative or have any other purpose.

On this basis, the second threshold of “seriousness and urgency of the circumstances” has important work to do. A strip search in the field cannot be justified, for example, on the basis that despite an ordinary search not detecting any items, the officer still maintains a reasonable suspicion that the person is in possession of drugs. Serious and urgent circumstances must exist in addition to the reasonable suspicion of possession of a relevant item, not as a default rationale for continuing to

a strip search because nothing initially is found. There is no judicial guidance on the meaning of these threshold concepts in New South Wales and we recommend that s31 be amended to provide objective criteria that must be met to satisfy the serious and urgent test (see 2.4 below). These criteria should make it clear that to give terms like “serious” and “urgent” their ordinary meaning requires reasonable suspicion of an immediate danger to personal safety, like the concealment of a weapon and the reasonable possibility that it could be used, or the possession of a significant quantity of dangerous drugs and the reasonable possibility they could be consumed in the absence of an immediate strip search. The existence of such suspicion may well already constitute grounds for arrest under s99 LEPR and enable the use of restraints such as handcuffs while the person is transported safely to a police station. Therefore, properly applied, the seriousness and urgency test should limit strip searches in the field to exceptional circumstances.

By contrast, the following case studies provided by lawyers indicate that police conduct strip searches in circumstances where no apparent seriousness or urgency exists.

CASE STUDIES

Chris, 36 years-old

‘Chris’, a gender non-conforming person, described being stopped while walking to Chris’s partner’s apartment. At the time of the stop, Chris acknowledges being visibly high. A frisk search was conducted, which included inappropriate touching, including of Chris’s genitals. Nothing was discovered during the frisk search. Chris was then instructed to get into the back of a police wagon for a strip search. The police searched Chris’s pants after Chris complied with an instruction to remove them. No drugs were found during the strip search, but an item of property identified as not belonging to Chris was found in Chris’s possession, and a Court Attendance Notice was issued. Chris noted the experience was strongly negative, and that the remarks made by the police after Chris identified to them as a gender non-conforming person were overly rough, and derogatory. No record of the strip search was entered into the COPS database.

Penny, 19 years old

‘Penny’ was stopped at the entrance to a festival by police claiming that a drug detection dog had indicated near her (although Penny was unaware that this had occurred). After stopping Penny, the police stated they had “got another one” and immediately took Penny to a separate room where a female officer asked her first to remove her shoes and shake out her hair, and then to remove her clothes, and whilst completely naked, to squat and cough. Penny’s bag was also searched. Nothing was found during any of the searches and Penny was allowed to re-dress, and told she could leave. As she exited, she was stopped by an officer from the strip search operation area who briefly interviewed her. Penny did not indicate in the interview that she had been drinking or taking drugs, and there was nothing found during the strip search, or the search of her belongings. She was issued a 6-month banning notice from Sydney Olympic Park, and her ticket was destroyed.

CASE STUDIES

Shirley, 20 years old

'Shirley' was also stopped whilst entering a festival, after being followed by a drug detection dog (the dog did not sit, the usual indication method). The male officer requested she accompany him to an area at the back of the event, where two female officers asked if she had any illegal substances. Shirley denied having any drugs, stating she did not know why the dog would have indicated. At that point, she was asked to remove her jacket, shoes, socks, top, pants and underwear. While naked, police instructed Shirley to squat and cough, during which time police observed a string, which Shirley had to explain was her tampon. This was a particularly traumatic and humiliating experience for Shirley.

The door of the room where Shirley was strip searched was not completely closed and passers-by could see into it. Shirley was then asked to face the corner whilst her belongings were searched. The police found nothing during search of Shirley's person or belongings but nevertheless instructed her to move on from Olympic Park to "make an easier process". She was then escorted out of the festival by police.

Nadia, 53 years old

Police attended an address where Nadia was present after her friend called them with concerns for Nadia's welfare following a sex work engagement. Nadia met police in the lobby of the building, where her bag was searched. Nothing was found at this point, but Nadia was asked about her immigration status. The police were not satisfied with Nadia's answers and she was placed under arrest. Nadia was taken outside, where she was instructed to stand against the police car. The female police officer in attendance lifted Nadia's shirt slightly, pulled the waistband of her pants out and peered down. A male police officer was present, although not performing the search. Even though Nadia required an interpreter, her friends were not allowed to be present for the search of her bag or person. She was later released without charge.

2.4 CASE LAW ON LEGAL THRESHOLDS

The New South Wales courts have found strip searches unlawful because police have failed to consider the threshold requirements of s31, as well as the mandatory requirements of ss32 and 33 for the conduct of a strip search. Cases, such as those cited below, suggest police may not be turning their minds to why a strip search is legitimately needed.

In *Attalla*,⁶⁴ the plaintiff was successful in a civil action against NSW Police for unlawful arrest, assault and battery and awarded over \$112,000 damages. Steven Attalla was sitting on a stone ledge outside a church at 3am on a Tuesday while texting on his phone when approached by three officers who sought to search him for possession of prohibited drugs. Mr Attalla refused to submit and was arrested for hindering police. While under a wrist lock in handcuffs, Mr Attalla was searched, and no drugs were found. Police then took him to Kings Cross Police station, where he was required to remove his pants and underpants, lift his genitals to allow inspection and squat whilst naked. No drugs were found.

The court found that the initial ordinary search was unlawful because there was no reasonable suspicion to conduct the search (s21) and the search was not conducted by an officer of the same sex in contravention of s32(7). The court concluded that "an almost reckless indifference [was manifested] by the officers to the statutory safeguards attaching to these invasive powers" (par.126).

The officers' grounds for reasonable suspicion were: Mr Attalla was in an area known for drug crime at a suspicious time of day and day of the week; he maintained a fixated watch on police; and that he became more aggressive when speaking with the police. Partway through the trial, the state pleaded that Mr Attalla had the appearance of being under the influence of drugs. The court found no evidence of the claim and did not believe the police. In respect of the other alleged grounds, the court found that they did not raise a reasonable suspicion. The search and handcuffing were found to be an unlawful assault. Shortly before the trial, the State admitted that the strip search conducted at the police station was unlawful. The court accepted the officer told Mr Attalla:

You see, if you just did what we asked you to do, we – this could have all been avoided. (par. 91).

The court took these comments as recognition of the hurt and embarrassment the officer caused Mr Attalla and "an assertion, wrongly as I have found, that he, not her was responsible for all those unlawful and damaging events" (par.92). Further,

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

The court found no evidence that police explained the purpose and need for the strip search or “whether alternatives to this invasive procedure were considered” (par.95). In particular, the officer who directed the strip search was not aware that an ordinary search had first been conducted and did not take steps to authorise an ordinary search first (par.100). The officer who conducted the search admitted a lack of familiarity with s31 and did not give evidence of knowledge of a number of the preconditions required in s32 during the conduct of the search.

The court concluded that:

The State’s concession in relation to the strip search illustrates that the police officers have used a most invasive power without the slightest justification. None of the several requirements in ss 31 and 32 of LEPR were the subject of evidence or submissions. The grievous nature of the offensive conduct might be mitigated **in circumstances of urgency or turmoil**, but here the admitted worst offence, the strip search, **was done in the relative peace of the police station**, where there was no resistance from Mr Attalla. Even this did not produce any consideration of the requirements of the law governing strip searches by any officer, apparently because Officer Cruikshank had some time ago determined to proceed with the strip search. I am not persuaded that she retained a bona fide belief in the need for the strip search to locate the once suspected drugs (par.118) (emphasis added).

Of note, the court also concluded that the reason why the officer conducted the strip search was in response to Mr Attalla’s questioning of the basis for the search:

The decision to compel a strip search appeared to be a response to Mr Attalla’s lack of submission at the scene. In my view, it warrants a significant award of exemplary damages (par.119).

Police are offering justifications for strip searches that do not meet the requisite reasonable suspicion and fail to consider the threshold requirement of s31 to first conduct the least invasive search. In *Fromberg*,⁶⁵ the NSW District Court upheld an appeal against a conviction for possession of 2.5g of methamphetamine found in the appellant’s underpants. Daniel Fromberg had been pulled over by police while riding his motorbike without having his helmet strap done up. The officer, basing his suspicion on Fromberg’s appearance, a prior conviction for drug possession and the fact Fromberg was on bail, decided to search him as follows:

The search commenced with the officer and another police officer going through the pockets of the appellant’s jacket. At the same time other

police officers searched his bag that he had been wearing across his body.

The officer then asked the appellant to unbuckle his belt, so that the officer could make sure there was nothing behind his belt or in the lining of his jeans. The officer then reached to feel inside the appellant’s jeans with the intention of searching around the elastics of his underwear. The footage depicts the officer extending his hand quickly towards the appellant’s genital area... the appellant pulled back from the officer and said, “No, fuck off, you can’t do that”. The officer took hold of the appellant’s arms at the wrist. As result of the appellant pulling away, the officer believed the appellant had something down his pants. The officer said to the appellant, I have every right to search down there.

The appellant was then handcuffed to the rear. With 3 other officers in close proximity the officer then reached into the appellant’s pants and pulled out his jeans and underwear. He observed the plastic bag containing the drugs sitting above the appellant’s penis, inside his underwear... (pars. 9-11).

The District Court found that “the officer thought he had the power to do what he did, which clearly he did not” (par.48). There was no evidence of a requisite suspicion to conduct the strip search “and it would not have been reasonable for him to hold that suspicion”, given the reasonable suspicion asserted was the appellant insisting on his legal rights and pulling away during an attempted search. The court found that the officer did not conduct a frisk search and that if one had been conducted it was likely that it would have detected the drugs, and this may have amounted to a reasonable suspicion to conduct a strip search (par.40). The court concluded: “The gravity of the contravention is significant. The extent to which the officer departed from the requirements of LEPR is disturbing” (par.48).

While the court made no specific assessment as to whether the circumstances were “urgent and serious” and “necessary for the purposes of the search”, His Honour determined that the drugs found were of a small quantity and for personal use. The court’s conclusion that “the offence is not a particularly serious one” (par.47) is directly relevant to whether reasonable suspicion of drug possession alone, is an unlawful basis for conducting a strip search. Like *Fromberg* – as discussed in section 3 – when drugs have been found by police after a strip search, police decisions are being made in circumstances where an ordinary search would have revealed the drugs; where the drugs are a small quantity for personal use; and in circumstances where there has not been any danger to police or the accused.

2.5 PARLIAMENT'S INTENTION ON THE PURPOSE OF STRIP SEARCHES

When the LEPR Bill was introduced into Parliament in 2001, the Attorney-General made it clear the Bill was consolidating, rather than extending, the regulation of personal searches.⁶⁶ Search powers were “significantly simplified without reducing or increasing existing powers, so that police are able to readily understand the types of searches they may undertake, and the community can understand more readily the powers that police have in this respect”.⁶⁷ While the expectation was that frisk and ordinary searches would be the norm except in “serious and urgent circumstances”, existing powers within s357E *Crimes Act* and s37(4) *Drugs Misuse and Trafficking Act* (DMTA) were “not made subject to explicit statutory safeguards or restrictions”.⁶⁸ That is, there was no express contemplation by Parliament about the relationship of strip searches to suspected drug offences and what “serious and urgent” means in relation to drug offences, especially possession.

More broadly, LEPR was introduced in response to the Wood Royal Commission into Police Corruption to prevent police misconduct. The Attorney-General specifically noted that the personal search provisions were a response to the Commission’s objectives to “help strike a proper balance between the need for effective law enforcement and the protection of individual rights”.⁶⁹ The Commission’s key objectives also included preventing the abuse of police powers, and this goal remains implicit in the Explanatory Notes.

2.6 NON-STATUTORY GUIDANCE TO POLICE

According to the Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME, February 1998) that accompanied the new Act, strip searches could only be justified on “rare” occasions,⁷⁰ but this left almost total discretion to the police as to what “rare” might mean. The 2012 CRIME Manual no longer explicitly requires that strip searches be rare, but still makes it clear to police that strip searches are not a first resort:

Generally, conduct a frisk search only. A strip search cannot be conducted unless clearly justified under section 31 of LEPR, taking into account the object you are searching for.⁷¹

The CRIME Manual provides an implicit engagement with the first limb of s31 – that the strip search is “necessary for the purposes”, but the guidance here is vague and indirect. No guidance is provided regarding the “object” being searched for, but the CRIME Manual implies that the nature of the object (and thus the alleged offending) is relevant, as per the first limb of the test. Yet, beyond a restating of the

second test in LEPR – that an officer must have a reasonable suspicion of the seriousness and urgency of the offence – no guidance is provided to police by way of examples:

Section 31 of LEPR limits the occasions on which a strip search can be conducted...

You may not strip search as a matter of policy. You must be able to justify your decision in each case...

A strip search is justified only when you suspect on reasonable grounds that it is necessary to conduct a strip search **for any of the purposes indicated in the dot points above** and that the seriousness and urgency of the circumstances require the strip search to be carried out (emphasis added).⁷²

However, there are no dot points indicating “purpose”. The only prior dot points to this statement simply outline what a strip search may include:

- Requiring the person to remove all of his or her clothes, and
- An examination of the person’s body (but not of the person’s body cavities) and of those clothes.⁷³

LEPR should be amended to include clear examples of a necessary strip search as contemplated by s31. As we explore in sections 2.3 and 2.4, “necessary for the purposes” imposes a mandatory requirement on an officer to have a *bona fide* belief that the strip search is needed for the object of the search power being relied upon. We outline in section 4 our proposals for legislative changes to properly limit police discretion so that strip searches are not a first resort.

Overall, the legislative framework and guidance to police supports the approach that strip searches are intended to be a last resort for use in exceptional circumstances. However, there is ambiguity and police practice has evolved in ways that depart from parliament’s intent that strip searches be a last resort and only in serious and urgent circumstances; particularly in relation to policing suspected drug possession. The CRIME Manual does not provide any additional clarity for police to assist in interpreting the requirements of s31. However, greater explanation in non-statutory guidance notes is no replacement for clarity in the statute itself.

2.7 STATUTORY RESTRICTIONS AND SAFEGUARDS

Once the thresholds of s31 have been met, ss32-34 LEPR set out a series of restrictions, requirements and rules for conducting personal and strip searches.

Preservation of privacy and dignity during search

Section 32 sets out the mandatory requirements police must comply with, where reasonably practicable in the circumstances, for all personal searches, including strip searches. Police must:

- Inform the person whether they will be required to remove clothing during the search and why it is necessary to remove the clothing
- Ask for the person's co-operation
- Conduct the search in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable
- Conduct the least invasive kind of search practicable in the circumstances
- 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 officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search
- Conduct the search by an officer of the same sex as the person searched. If an officer of the same sex is not immediately available, an officer can delegate a search function to a person of the same sex, under their direction.
- Not search a person while they are being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out. Police can ask questions relating to personal safety.
- Allow the person to dress as soon as a search is finished
- Ensure the person searched is left with or given reasonably appropriate clothing if their clothing is seized.

In drawing attention to s32, the NSW Police Standard Operating Procedures (SOPs) on Drug Detection Dogs, remind officers "to make all attempts to ensure the person's privacy is maintained and any possible embarrassment to a person being searched is limited".⁷⁴ However, as the case studies in section 3 illustrate, this advice often does not appear to be informing police practice.

Rules for conduct of strip searches

Section 33 sets out mandatory "rules for the conduct of strip searches" which an officer must comply with, as far as is reasonably practicable in the circumstances. A strip search:

- Must be conducted in a private area

- Must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched
- Must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search. Exceptions to this are made for a parent, guardian or personal representative of the person being searched who may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present
- Must not involve a search of a person's body cavities or an examination of the body by touch
- 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
- 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
- May be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

Section 33 provides that a strip search of a child between the ages of 10 and under 18, or a person with "impaired intellectual functioning", must be conducted:

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

These provisions do not apply if an officer suspects on reasonable grounds that delaying the search is likely to result in evidence being concealed or destroyed, or that an immediate search is necessary to protect the safety of a person. The officer must make a record of the reasons for not conducting the search in the presence of a parent, guardian or another person capable of representing the interests of the person being searched.⁷⁵

Record keeping and video-recording of searches

Beyond such specific requirements to record reasons, there is no general legislative requirement to record either the reasons for, or the conduct of a strip search in the field. This could be remedied by amendments

to ss32 or 33 or Part 15 (see below) and might go some way to ensuring that officers focus more closely on the reasons for conducting a strip search. We make recommendations around statutory duties on reporting and broader accountability measures in section 4.5.

A further issue in relation to ss32 and 33 is the increased use of Body Worn Video (BWV) cameras,⁷⁶ which “should be used by police who have undertaken relevant training”.⁷⁷ Fully disclosed video footage would assist greatly in identifying improper and unlawful police practices in relation to personal and strip searches. Presently, video footage is destroyed after six months unless it is “tagged” as evidence. A requirement that strip search footage be stored on the same basis as evidence, should be considered. However, video recording of personal searches can increase the level of intimidation involved in a search and be a significant invasion of privacy. As noted by the Aboriginal Legal Service and Redfern Centre in a 2018 submission to the NSW Department of Justice:

Of particular concern is the potential impact on vulnerable individuals, including the homeless, who are at greater risk of privacy-related harms from recording devices remaining on at all times in public places... However, in our view, on balance, the use of this technology is better capable of achieving greater transparency and accountability through continuous recording, than recording at the discretion of police officers...

It is important to acknowledge the specificity of the experience of Aboriginal and Torres Strait Islander people and their relationship with police... In our view, removing the discretion of police to activate BWCs and providing, instead, for continuous recording is likely to improve transparency and accountability... It is possible... that continuous recording could lead to a reduction in racial profiling in the exercise of police powers, such as stop and searches.⁷⁸

Current police guidance enables – but does not require – the use of BWVs for strip searches. According to the Standard Operating Procedure:

A person’s privacy is not a sufficient reason to cease filming a strip search conducted in the lawful execution of an officer’s duty. Particular care is required to ensure the person’s privacy is adequately protected by ensuring the footage cannot be viewed by people without a lawful reason to do so...

The searching officer is to ensure, if they are wearing a BWV camera, that it is turned off during the conduct of a strip search. The support officer is to record the search using a BWV camera. During the strip search, compliance is required with all relevant provisions of LEPR.⁷⁹

Criminologists have warned that BWV is “not a panacea for poor policing”.⁸⁰ Accordingly, the focus of this report is with strengthening the legal criteria authorising strip searches. However, tighter and clearer regulation of police personal search powers should certainly include closer consideration of whether and how personal and strip searches should be video recorded. In a number of recommendations in this report we suggest that, at the very least, the reasons for the officer’s strip search decision be recorded contemporaneously on BWV, before the search is conducted.

Part 15 safeguards

Part 15 of LEPR provides additional safeguards. When exercising a search power or issuing a direction, the police officer must provide certain information to the person subject to the power, including:

- Evidence that they are a police officer (unless the police officer is in uniform)
- Their name and place of duty, and
- The reason they are using the power (s202(1)).

This information needs to be provided to the person subject to the power as soon as reasonably practicable, or, in the case of a direction, requirement or request, before giving or making the direction, requirement or request (s202(4)). If a person subject to the power asks for this information it must be given (s202(5)). The failure to provide name and place of duty will not ordinarily render the search power or issuing of a direction invalid.

New South Wales courts have found strip searches to be unlawful where police have not followed the mandatory rules set out in LEPR. Reported cases include: where a member of the opposite sex has conducted a strip search;⁸¹ and where the least invasive search necessary has not been conducted.⁸²

The courts have not, however, provided guidance regarding vague terms and concepts in ss32 and 33, such as:

- The meaning of a “private area” for conducting a search
- The meaning of a search of genital area and body cavities, and
- Reasonably practicable in the circumstances

Recommendations to address this lack of clarity are discussed in 4.3 below.

3 The increased use of strip searches in New South Wales

3.1 HOW EXTENSIVE ARE STRIP SEARCHES?

Almost all data already on the public record in New South Wales comes from answers to questioning in the state parliament by Greens MP David Shoebridge⁸³ and older statistics from the NSW Ombudsman. This data has been supplemented with freedom of information requests to NSW Police made by Redfern Legal Centre and the authors.

Data put on the public record in December 2018 indicates that strip searches in the field increased by 46.8 percent between 2014-2015 and 2017-2018. The broader trend reveals an almost 20 fold increase in strip searches conducted in the field between 2006 and 2018. While the data in the table below is incomplete, strip searches conducted in police stations had spiked by 2016-2017, before dropping

back in 2018-2019 to almost the 2006 level (see Table 3 below).

The lack of readily available public data regarding the use of strip searches in New South Wales and other Australian jurisdictions makes drawing national comparisons difficult. However, the scale and substantial increase in the use of strip searches in New South Wales may not reflect a uniform trend. In Queensland, for example, between 2015 and 2018, recorded strip searches in the field decreased. In relation to strip searches in the field:

- Queensland strip searches its population at a per capita rate of seven per 100,000 people
- New South Wales strip searches its population at a per capita rate of 68 per 100,000; almost ten times the rate that Queensland does (see Table 4 below).

Table 3: Number of strip searches conducted in NSW

TYPE OF SEARCH	*2006	2014-15	2015-16	2016-17	2017-18	2018-19
^ Strip searches in the field	277	3,735	5,082	4,456	5,483	–
+ Strip searches in police custody in stations	6,841	–	–	9,469	9,381	6,827
Total strip searches	7,118	–	–	13,925	14,864	–

Sources:

* All 2006 data (1 December 2005 to 30 November 2006) is from NSW Ombudsman 2007, *Issues Paper: Review of Certain Functions Conferred on Police Under the Law Enforcement (Powers and Responsibilities) Act 2002*, p.19.

^ Remaining field data obtained from David Shoebridge MP, NSW Legislative Council, 18 December 2018, Questions & Answers Paper No 186 .

+ Remaining custody data obtained by the authors under freedom of information

Table 4: Number of personal and strip searches conducted in Queensland⁸⁴

TYPE OF SEARCH	2015	2016	2017	2018
All searches on roadside or from executing search warrant	13,910	13,419	10,727	9,671
All searches in police custody	110,987	117,517	103,505	99,423
Total searches	124,897	130,936	114,232	109,094
Strip searches on roadside or from executing search warrant	429	457	381	353
Strip searches in police custody	8,857	9,234	7,998	8,129
Total strip searches	9,286	9,691	8,379	8,482

Source: Queensland Police Service, 25 June 2019, freedom of information obtained by authors.

^ Corresponds to available data for "in the field".

* 'Police custody' refers to searches in a police station. Figures are inclusive of every time a detained person changed their clothing, and not only strip searched. These figures will therefore be inflated.

In response to a freedom of information request from the Redfern Legal Centre, further data was provided in May 2019 for strip searches conducted in the field during the financial years 2016-2017 and 2017-2018.⁸⁵ The key statistics include:

Table 5: Total strip searches in the field by gender in NSW

	2016-2017	2017-2018
Female	1,084	1,387
Male	3,356	4,064
Total	4,440	5,451

Table 6: Total strip searches conducted on children, young people and adults in the field aged 10-30 in NSW⁸⁶

AGE	2016-2017	2017-2018
10		1
12	2	1
13	8	4
14	13	9
15	20	29
16	45	39
17	46	79
18	174	240
19	217	315
20	229	329
21	227	320
22	222	297
23	237	278
24	188	294
25	167	277
26	199	222
27	170	226
28	146	171
29	142	181
30	145	156

Table 7: Suburbs/towns in NSW where 20 or more strip searches were conducted

SUBURB	2016-2017	2017-2018	TOTAL
Sydney Olympic Park	212	524	736
Sydney (inc Haymarket and The Rocks)	264	406	670
Moore Park and Centennial Park	217	341	558
Surry Hills and Paddington	169	204	373
Taree	115	156	271
Wollongong (inc W.Wollongong, Warilla, Warrawong, Lake Illawarra, Dapto, Figtree, Oak Flats and Port Kembla)	115	120	235
Glebe, Pyrmont and Ultimo	91	133	224
Nowra (inc Bomaderry, S.Nowra and Worrigea)	116	105	221
Wooyung	25	136	161
Goulburn	64	96	160
Darlinghurst and Potts Point	70	84	154
Camperdown, Chippendale, Enmore and Newtown	60	80	140
Parramatta	49	79	128
Forster	80	40	120
North Sydney	45	73	118
Bondi, Bondi Beach and Bondi Junction	50	57	107
Randwick and Maroubra	56	47	103
Orange	54	55	99
Penrith	26	69	95

SUBURB	2016-2017	2017-2018	TOTAL
Cabramatta and Cabramatta West	62	27	89
Redfern and Waterloo	36	17	53
Campbelltown and Ingleburn	45	53	98
Cessnock	39	41	80
Coffs Harbour	35	37	72
Gosford and Kariong	35	36	71
Mudgee	36	29	65
Tuncurry	38	25	63
Liverpool	28	33	61
Marrickville and Dulwich Hill	18	42	60
Junee	19	36	55
Moree	31	19	50
Dubbo	15	31	46
Byron Bay	3	37	40
Walgett	10	10	20

The available data has limits. There are some variations across the data provided, as well as gaps and ambiguities. For example, the Redfern data does not include strip searches where the police have not recorded personal details such as the age and gender of the person searched, or strip searches conducted “as part of arrest and custody procedures”.

Nevertheless, two significant trends are apparent. The first is the surge in the use of strip searches. During the 2016-2017 and 2017-2018 financial years, strip searches rose by 18.5 percent. During the 2014-2015 and 2017-2018 financial years they rose by 46.8 percent.⁸⁷

The second significant trend is the disproportionate numbers of young people subjected to strip searching. In both 2016-2017 and 2017-2018, approximately 3 percent of those searched were under the age of 18. However, the percentage spikes sharply if the entire category of young people (those aged 25 and under) is considered. During 2016-2017, approximately 40 percent of strip searches were conducted on young people, rising to 45 percent in 2017-2018. As is discussed below, the targeting of young people correlates with the police emphasis on drug possession. It also points to the potential vulnerabilities of those young people being searched. As was highlighted in the recent NSW Parliamentary Inquiry into the Prevention of Youth Suicide,⁸⁸ and by the less-acknowledged proliferation of Indigenous young people committing suicide,⁸⁹ young people who are already socially marginal and known to state child protection agencies and the police are amongst those most at risk of self-harm and suicide.

3.2 WHAT DO STRIP SEARCHES FIND?

The data provided by NSW Police to the Redfern Legal Centre did not include a detailed breakdown of exactly what was found in these searches or whether successful prosecutions ensued. Rather, NSW Police provided an unquantified list of all the types of items found in relation to strip searches, which included: drug, drug implement, bicycle, stamp/coin collection, office equipment, sport equipment, clothing, gardening equipment, tobacco, art, prohibited article, firearm, knife, liquor and book.

While some of these items could readily be secreted on a person, it is difficult to envisage how this might apply to a bicycle. Moreover, suspicion of possession of many of the items on the list is unlikely to sustain the requirement that a strip search be conducted due to the seriousness and urgency of the circumstances (see 4.2 and 4.3 below). For example, the Aboriginal Legal Service reports that one young client was strip searched on the grounds that they were suspected of stealing a car.⁹⁰

Further data obtained from NSW Police in July 2019⁹¹ revealed the recorded reasons for strip searches conducted during the financial years 2015-2016, 2016-2017, 2017-2018 and 2018-2019 (see Table 8 on the following page).

Based on the data in Table 8, reasons appear to be given for the majority of strip searches in 2016-2017 and 2017-2018. Police are required under LEPRA to provide reasons for the exercise of their strip search to every person searched, but it is unclear from this data whether there are multiple reasons attached to a specific individual.

Table 8: The reasons recorded for all strip searches in the field

Note from NSW Police: “The reasons listed are chosen by police officers from a drop-down option list and do not capture all the reasons for any specific strip search and of themselves do not necessarily capture the full context that gave rise to strip search.”

REASON FOR PERSON SEARCH	2015-2016	2016-2017	2017-2018	2018-2019
Ensure cannot escape custody	40	21	24	15
Ensure does not harm self or others	58	48	47	27
Firearm Prohibition Order	5	2		3
Intoxicated person	15	12	17	19
Knife/Weapon Used/Intended to be used	53	37	43	34
Other	40	30	35	24
Possess dangerous implement in place/school	3	3	1	6
Possession of firearm/explosives	30	26	11	9
Possession item in connection with an offence	201	185	205	152
Possession of property stolen/unlawfully obtained	174	113	123	96
Suspected possession of drug implement	70	79	51	53
Suspected possession of illegal drug	4359	3868	4897	4930
Suspected possession/use of laser pointer	1	1	3	2
Tool/Implements used/intended to be used	27	30	22	8
Total strip searches (reasons recorded)	5076	4454	5479	5378

Table 9: Strip searches in the field where nothing was found⁹²

	2014-2015	2015-2016	2016-2017	2017-2018
Total searches	3,735	5,082	4,456	5,483
Nothing found	2,400	3,336	2,843	3,435
Percentage where nothing found ⁹³	64.26	65.64	63.80	62.65

For each strip search, police should also be recording in the narrative, free text entry field on COPS precisely how they met the legal thresholds for conducting each strip search (i.e. how it was necessary for the purpose of the search, and what made it serious and urgent so as to make the search necessary). Access to this data would make it possible to determine the lawfulness of each strip search. This kind of assessment could be conducted by NSW Police and the Law Enforcement Conduct Commission.

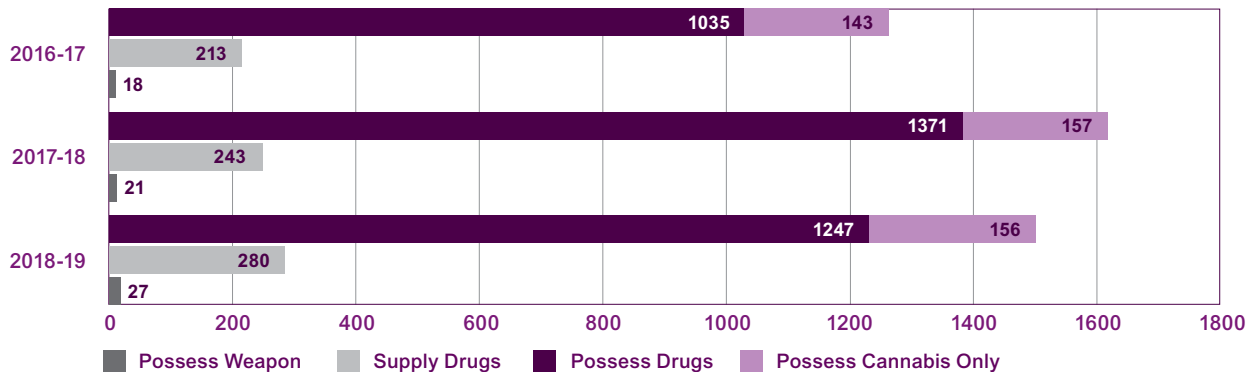
It is clear from this rudimentary data that suspected drug possession constitutes the major basis for the police deciding to strip search, and was the official reason for 91 percent of all strip searches in 2018-2019. Of note, there is no “drop-down option list” reason for conducting a strip search on the basis that police suspect a person for engaging in drug supply. The implications of this are discussed in 3.3 below.

However, as is also illustrated by the Table 9 data obtained by David Shoebridge MP, a high percentage of strip searches yield nothing of evidentiary value.

Further, for the period July-November 2018, 67.59 percent of strip searches found nothing.⁹⁴

In June 2019, NSW Police Commissioner Fuller identified that in approximately one third of all strip searches dangerous weapons and/or drugs are found;⁹⁵ consistent with the data below indicating that strip searches find something unlawful between 32 to 37 percent of the time. No data is publicly available on how many strip searches resulted in charges for drug possession, drug supply and possession of a dangerous weapon and the nature of the weapon. However, the data provided to the authors by NSW Police under freedom of information in July 2019 revealed that across all 4,455 charges made for the three financial years between 2016-2017 to 2018-2019:

- Possession of a prohibited drug made up 82 percent of all charges
- Supply of a prohibited drug made up 14 percent of all charges
- Possession or use of a prohibited weapon made up less than 1.5 percent of all charges.

Figure 1: Strip searches in the field resulting in charges⁹⁶

The data for possession of “cannabis only” excludes charges for multiple drug types. Over the three year period this category consists of 456 searches where other non-drug related possession charges may also have been laid, and 311 searches where no charges other than possession of cannabis were laid.

Only 26.7 percent of the strip searches recorded by the police as undertaken for the reason of drug possession resulted in criminal charges for possession of drugs (2016-17 to 2018-19). It is important to note in relation to this statistic that without another reason, suspected possession of a drug alone would not satisfy the serious and urgent criteria necessary for a strip search to be lawful.

3.3 STRIP SEARCHES AND DRUG DETECTION DOGS

While it is not explicit, it can be inferred from the Redfern data showing the locations where strip searches are most common, that part of the overall increase in the use of strip searches is attributable to the use of drug detection dogs, particularly at festivals.

Drug detection dogs are widely used in Australian jurisdictions.⁹⁷ In New South Wales, the general authority for the police to use drug detection dogs for the purpose of detecting a drug offence is provided in s146(1) LEPR:

(1) If a police officer is authorised to search a person for the purpose of detecting a drug offence, the officer is entitled to use a dog for that purpose.

Police need to be satisfied that they have a power to search a person under ss21 or 27 of LEPR. A dog can be used to conduct a personal search, but **before** the personal search powers can be exercised a police officer must have a reasonable suspicion the person has committed a drug offence. This is made clear in the NSW Police Standard Operating Procedures (SOPs) for Planned Drug Detection. Dog Operations, which advise police officers:

A drug detection dog indication alone does not suffice in providing police with enough information to “suspect on reasonable grounds” that the person is in possession of a prohibited drug. Many

drug detections, including numerous stemming from drug detection dog indications have been dismissed in the courts due to police being unable to prove sufficient information existed to “suspect on reasonable grounds”.

It is for these reasons that following a drug detection indication, investigating police need to make their own assessment. This can include observations, asking questions, intelligence received, etc, in effort to build sufficient information to “suspect on reasonable grounds”. Once this is achieved, police are able to exercise their powers pursuant to section 21 of LEPR.⁹⁸

This advice is reiterated in at least three sections of the SOPS.⁹⁹ Nevertheless, in practice, police appear to be using a positive indication from a dog as the sole basis for the reasonable suspicion required under ss21 and 30 to conduct personal and strip searches. Reportedly, this has been acknowledged internally by the police, although there has been an unwillingness to place this analysis on the public record.¹⁰⁰ Moreover, as Table 10 shows, the use of drug detection dogs has coincided with a decline in the number of personal searches and an increase in the number of strip searches (see Table 10 on page 30).

This trend has continued, with data from searches conducted between January and May 2018 showing that 17 percent of personal searches following a positive drug dog indication were escalated to a strip search.¹⁰¹ Further, the 1,124 strip searches conducted following a dog indication in 2017 represents approximately 20 percent of all strip searches for that year. As the case studies in this report illustrate, it appears that if a dog gives a positive indication, police will conduct a personal search, followed by a strip search if nothing is found. Police may also proceed immediately with a strip search on the assumption, reasonable or not, that drugs must be secreted somewhere on the person. A major explanation for why police might suspect drugs are

Table 10: Total personal searches following a positive drug dog indication compared with total strip searches following a positive drug dog indication by calendar year¹⁰²

	2009	2010	2011	2012	2013	2014	2015	2016	2017
Personal	17,321	15,779	18,281	16,184	17,746	9,518	12,893	9,497	10,224
Strip	556	773	725	712	735	624	629	590	1,124
Ratio	3%	5%	4%	4%	4%	7%	5%	6%	11%

being secreted is that the use of drug detection dogs at festivals is motivating young people to conceal them in their body cavities to avoid being caught.¹⁰³

Conversely, there have been examples of the police using the unreliability of dogs as part of the rationale for conducting a strip search when, despite no clear indication from the dog, the police still believe, reasonably or not, that a person may be in possession of illicit drugs.¹⁰⁴

Whether an indication from a dog, even in combination with other factors, is sufficient to justify a reasonable suspicion must be questioned given the long-standing concerns that drug detection dogs do not reliably identify that a person is in possession of prohibited drugs. In 2006, the NSW Ombudsman published a review of the first two years of the use of drug detection dogs, noting that a primary objective for the introduction of these dogs was to assist police identifying persons in possession of drugs, especially for the purposes of supply. For the two-year period, the Ombudsman concluded “we were only able to identify 141 events (1.38%) of all indications where a prescribed ‘deemed supply’ quantity of a prohibited drug was located as a result of a drug dog indication”. Moreover, the “successful prosecutions for supply represent[ed] 0.19% of all drug dog indications for the review period”.¹⁰⁵

While the Ombudsman focused on whether traffickable quantities of drugs were found, data obtained by David Shoebridge MP shows that in relation to possession of drugs generally:

- In 2010, 15,799 personal searches were conducted after a police dog identification, of which 11,694 (74 percent) resulted in no drugs being found
- Between January and September 2011, 14,102 personal searches were conducted, of which 11,248 (80 percent) resulted in no drugs being found. In

2013, nearly 17,800 people were searched, with no drugs found in 64 percent of searches.¹⁰⁶

More recent data confirms these percentages (see Table 11 below).

The Ombudsman’s 2006 review recommended that drug detection dogs no longer be used. However, despite the recommendation and the statistics confirming the high percentages of “false positives” arising from drug dog indications, the use of drug dogs was extended in 2012. Under s148 LEPRA, general drug dog detection operations can now be undertaken at premises used for the consumption of liquor, public sporting or entertainment events such as music festivals, on any public passenger vehicle or station across the Sydney public transport network, at tattoo parlours and any public place within the Kings Cross precinct.

These expanded powers allow for set-piece, high-profile, public drug detection operations targeting specific locations, such as railway stations or large-scale events like music festivals. These operations typically involve the use of screens such as those erected in April and May 2019 at Central Railway Station, or tents at major music festivals, where personal and strip searches can be conducted. This suggests strongly that the threshold of “seriousness or urgency” required to enable a strip search is being pre-determined at a low level to include suspected possession of small quantities of drugs for which the penalty may be a caution or an on-the-spot fine.

There is also concern that the choices taken by the police in setting up drug detection dog operations reflect preconceived perceptions of suspicion based on particular localities and communities, or the nature of specific events. Thus, in 2014, it was reported that “people at Redfern train station (adjacent to a sizeable

Table 11: Strip searches following drug detection dog indications¹⁰⁷

	Strip searches following indication	Strip searches resulting in finding an illicit substance	Percentage of strip searches where nothing was found
2017	3,735	5,082	4,456
1/1 – 7/6 2018	2,400	3,336	2,843

Indigenous community) [were] 6.5 times more likely to be searched than those at Central or Kings Cross stations, even though Redfern searches are less likely to identify drugs".¹⁰⁸ In February 2019, the NSW government, while maintaining steadfast opposition to pill-testing and other harm minimisation measures, released a list of "high risk" music festivals, subject to a special licensing regime, and the focus of detection dog operations.¹⁰⁹

Not only does this suggest that suspicion is being cast on all of the mostly young people in attendance, but in such public places it increases the possibility that someone being stopped and detained for the purposes of a search will be viewed by others. Moreover, being subjected to a strip search inside a temporary secluded environment such as a tent or booth may well increase the intimidation, humiliation and sense of vulnerability being felt by the person being searched. It appears that general deterrence through the use of dogs is becoming a driver of personal searching operations, rather than the lawful pre-conditions of reasonable suspicion and, for strip searches, urgency and necessity. This is despite the potential personal harms associated with strip searches and encounters with sniffer dogs,¹¹⁰ the fact that some young people have been known to take fatal overdoses of drugs in their possession at festivals rather than risk detection by dogs,¹¹¹ the absence of evidence that drug detection dogs are reducing illicit drug use at festivals,¹¹² and recommendations that the use of drug detection dogs be abandoned or at least reviewed.¹¹³

3.4 POLICING OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

While much of the public attention to the issue of strip searches has focused on the relatively-recent use of drug detection dogs and the policing of music festivals, there are longstanding concerns raised by advocates from within Indigenous communities about the disproportionate use of strip searches to intimidate and control Indigenous people. According to the NSW Police data, approximately 10 percent of the documented strip searches in the field were conducted on Aboriginal and Torres Strait Islander peoples. Further, approximately 22 percent of the documented strip searches in police stations were conducted on Aboriginal and Torres Strait Islander peoples (see Table 12 below).

The disproportionate numbers of strip searches conducted on Indigenous people reflects wider discriminatory and harmful impacts of the criminal justice process. The full implications of this cannot be explored in detail here, but it is clear that the use of strip searches on Indigenous people cannot be separated from the impacts of policing on Indigenous communities and the disproportionate numbers arrested and taken into police custody. Here, we focus on strip searches of Aboriginal and Torres Strait Islander peoples conducted in the field.

Table 12: Total number of Aboriginal and Torres Strait Islander peoples strip searched in New South Wales¹¹⁴

	2016-2017	2017-2018	2018-2019
Total strip searches in the field	4,440	5,451	–
ATSI people searched in the field	483	535	–
ATSI % of total strip searches in the field	10.8	9.8	–
Total strip searches in police stations	9469	9381	6827
ATSI people searched in police stations	2141	2081	1583
ATSI % of total strip searches in police stations	22.6	22.1	23.1

CASE STUDY

12 year-old boy strip searched outside supermarket

'Zac', a 12-year-old boy in a regional town, approached his school principal crying and upset. He reported to her that he had been stopped by police outside a local supermarket while in the company of school friends. He was made to pull down his pants and stand in his underwear in full view of his friends

and passers-by. Nothing was found. Zac found this embarrassing and humiliating but did not wish to pursue a complaint. The principal raised the issue with the Aboriginal Legal Service as neither she nor Zac was aware of the boy's rights in this situation.

One of the concerns raised by this episode was that it normalised this type of police response in the eyes of the boy and his friends. In some regional towns, there are also concerns that a police culture of routine strip searching in the back of police vehicles is becoming entrenched. This is occurring post-arrest, and often in circumstances where the reasonable suspicion underpinning the arrest does not extend to legally justify the strip search. Initially, those reporting being searched in this way were adults, but some teenage males have recently reported similar searches and described being told to lift their scrotum and part their buttocks. Some of these cases currently are being investigated by the Law Enforcement Conduct Commission.

Other concerns consistently raised about the policing of Indigenous people included:

- Indigenous people routinely experience stop and search (including strip searches) in public places
- Such searches often fail to result in any charges being laid and thus do not get challenged in court or otherwise placed on the public record
- Personal and strip searches reported to lawyers by Indigenous people are often not recorded by the police
- Police are not complying with existing safeguards in LEPRA, such as having an adult present when a juvenile is searched or explaining the reasons for the search or the extent of it
- Police are not turning their minds to what constitutes “serious and urgent” for the purposes of a strip search
- Personal searches and strip searches form part of a pattern of aggressive, pro-active policing of inner-city areas and regional towns with heavily-policed Indigenous communities
- As part of this pattern, those being stopped often are subject to Suspect Target Management Plans (STMPs)¹¹⁵ and are being searched for the purposes of surveillance rather than on the basis of reasonable suspicion
- Little heed is taken by the police of the harmful and abusive impacts of strip searching.

CASE STUDY

Personal search at a rural show

‘Paul’, a 35-year old Aboriginal man, was attending the annual country show in a small regional town, accompanied by his wife and two of their five children. Whilst lining up to buy tickets for rides for his son, a drug detection dog sat down beside Paul. Paul looked around and saw two male uniformed police officers standing on either side of him. He was asked by one of the officers whether he had drugs on him and whether he used needles. Paul replied “no”. The two officers then steered Paul to the empty space between two side show vans. There were no tarps or other screens strung up for privacy, and many members of the public were walking past on both sides of the vans.

At the time, Paul was wearing a collared T-shirt with a jacket, track pants with only a pair of footy shorts underneath (he was not wearing any underwear) and socks and shoes. The officers asked Paul to turn out his pant pockets. The only item in his pocket was a cigarette lighter. Next, he was told to take off his jacket and one of the officers went through the pockets, finding nothing. After that Paul was told to remove his shoes and socks. One of the officers turned his socks inside out and shook out his shoes. Next the officers told Paul to “take your pants off”. Paul replied “I can’t do it cause I’ve only got footy shorts on

and nothing else underneath”. The officer replied “what do you mean by that?”. Paul explained that he wasn’t wearing any underwear and that his footy shorts were essentially his underwear. The officer said “show me”, so Paul pulled down his tracksuit pants down to about his knees. The officer then made him pull out the waist band of his footy shorts. The officer looked down his shorts, checking out what was down them. Paul was then allowed to pull his tracksuit pants back up, before the officer patted Paul down all over his body. During the pat down the officer felt inside the waist band of Paul’s shorts. Paul was then allowed to get dressed and leave.

After being searched Paul went back to his wife and two young children who had been standing nearby. Feeling embarrassed, ashamed and scared by the search the family left the show grounds immediately. In the days after the search, several of Paul’s acquaintances and friends made comments to him about his being searched at the show, as they had heard about it from people who had witnessed it. This embarrassed Paul further. Paul was particularly angered by the fact that he saw other non-Aboriginal people, including carnies, being searched after the drug detection dog sat beside them and they were only asked to empty their pockets and patted down.

CASE STUDY

Indigenous man publicly strip searched in a regional town

'Tim', a 50-year-old man, walked across town to visit a family member, who gave him \$50. Tim commenced walking home, stopping to purchase a box of syringes (lawfully) for another family member who uses drugs. After purchasing the box of syringes Tim continued home, but a passing police car performed a U-turn and stopped him. Two officers got out of the vehicle and approached Tim. One of the officers told Tim that there had been lots of break-ins in the area and they wanted to check whether he was one of the people responsible.

One of the officers patted down Tim's pockets and then picked up the bag Tim had been carrying. The officer asked what was in the bag and was told about the box of syringes. The officer then searched the bag, finding the syringes and \$30. Tim explained the syringes had come from a hospital and were for a family member. The officer asked Tim if he was using ice and he said no. The officer then placed his hands inside Tim's pockets without consent. The officer pulled out Tim's house keys and \$20 and asked Tim if he had anything else underneath. Tim said he had on a pair of shorts and underpants underneath.

Tim was then told to pull his pants and shorts down to his knees, leaving him standing in the street in his underpants with cars passing by. During the course of the search, Tim was asked constantly why he had \$50 in his possession. Nothing else was found in Tim's possession and he was eventually allowed to continue on his way without further action being taken. Another police vehicle followed him home.

Indigenous elder publicly strip searched in Glebe

In January 2019, video footage (taken by a passer-by) was released on social media showing an Indigenous man being strip searched by two plain clothes police officers in broad daylight outside a popular bookshop on Glebe Point Road in Sydney's Inner West. The man was forced to strip down to his underpants, handcuffed and then forcibly pushed up against the wall of the shop. The male officer then ran his fingers around the inside of the man's underwear while the female officer watched. The man was then instructed to sit down. When he refused, he had his legs dragged out from underneath him and he banged his head as he was forced to the ground. He was then questioned about a box of syringes found in the gutter nearby. The man told the police he was returning them to a clinic.

After about five minutes, the man was allowed to pull his shirt back on over his head. The police informed the man he was not under arrest but continued to detain him unlawfully for about 15 minutes because the two officers did not have a key to the cuffs and were waiting for third officer to arrive to unlock them. The male officer, without specifying reasons, told the man he was going to be moved on, and the man eventually walked away after the third officer arrived and removed the cuffs.

During the course of his detention, the man reportedly said to the police: "This is the way you've treated black fellas for hundreds of years... For years you've been treating my people like this. This is genocide, mate."¹¹⁶

This case only came to light as a result of a passer-by being willing to film it on her phone in defiance of unlawful police attempts to prevent her from so doing. It is unclear whether the matter will be litigated.

The feedback we received from lawyers was that where clear breaches of LEPPRA have been identified that prosecutions will be withdrawn, or civil actions settled. One civil action that did proceed, resulting in the award of \$376,350 in damages to the collective plaintiffs, was the case of *Rose*.¹¹⁷

CASE STUDY

Marjorie Rose and family

In July 2008, after a search warrant was issued by telephone, 13 armed police officers wearing bulletproof vests and accompanied by a drug detection dog forcibly entered a house in Bourke on the basis that it was occupied by a person suspected of supplying illicit drugs. The police were aware before entering that the house was occupied by an extended Indigenous family, including the “target’s mother and his young children”. The police also decided prior to entering the premises to strip search any adult present. Ten people were present and all still in bed when the police entered the house at 7am. All were detained for approximately four-and-a-half hours and denied access to the toilet for lengthy periods. Five people, including a 16-year-old boy, were stripped searched and forced to stand in the cold. Two girls aged 14 and 12, respectively, were subjected to intrusive personal searches. A 7-year-old girl was not searched but awarded damages for apprehension that she would be

touched. A 23-month-old toddler was not searched but awarded damages for the distress of being separated from her mother while she was being searched. Part of what occurred was filmed until the camera battery “ran flat”. The officer who obtained the warrant told the Court that sniffer dogs are “not 100 percent accurate” and that the fallibility of the dogs weighed heavily on the decision to conduct strip searches” (par.41). No evidence relating to the supply of illicit drugs was found during the searches. The Court held that the warrant was executed unlawfully; that with the exception of the “target” there were no reasonable grounds for conducting personal searches on the others present, particularly in the absence of a positive indication of the sniffer dog; and that there were multiple breaches of the LEPRA requirements for personal and strip searches, such as not having a responsible adult present when the 16 year-old boy was searched.

The Court reiterated the key LEPRA principle that the “police officers were required to make a decision about searching each person not as a matter of policy but as a result of suspicions based on reasonable grounds, and only if the seriousness and urgency of the circumstances required the search” (par.69).

The family’s evidence, largely accepted by the Court, also highlighted the abusive nature and harmful impacts of the strip searches:

- The first plaintiff, a 73-year-old woman who had lived in the house for 50 years, described feeling cold and humiliated, particularly as the search was being filmed. She said she felt imprisoned in her own home and since the day of the search she “has not liked to be on her own, even when she is in Dubbo”, where she moved after the incident (pars 98-100)
- The third plaintiff said “(s)he was reluctant to be searched because she was not sure what was going to happen but said that ‘I just obeyed the rules, sort of, like a dog with his master. So I just thought, well I better obey because they’re wearing guns’... It was her evidence that she felt horrible and agitated about taking off her clothes, particularly as she had been sexually assaulted in 1979 and it was ‘like rape all over again with a camera right directly on my body’. She further said that when she was required to take off her underwear she turned away so that she could fold it so the camera would not film her sanitary pad. She said that ‘this did not sit right with her’ and she thought it was ‘degrading and humiliating’. She said that she was busting to go to the toilet but could not do so, and that caused her stress and pain (pars135-136)”

- The seventh plaintiff said she “was angry and humiliated about what was happening... that she was scared because it was ‘as if they owned us and we had to do what they told us to... I thought they looked down as if we were animals. They had full control over everything. It was just like we meant nothing to them. I feel ashamed, knowing that they stood in front of me recording me. Very humiliating, stressed, angry” (par.183)
- The fourth plaintiff, a 16-year-old boy, told the Court “I don’t want to let people know what happened to me”. The Court found that the video footage of the search showed the boy to be “clearly nervous, shocked and embarrassed at being made to take off his clothes... He looked very young and vulnerable”. Moreover, he was “never asked his age nor if he wished to have an adult present, nor told why he was being searched” (pars.153-156).

The personal searches conducted on the three girls were also highly intrusive, involving touching and other physical contact:

- According to the Court, the fifth plaintiff, aged 12, was “not invasively strip searched”. However, the officer conducting the search “placed her hands inside the waistband of her trousers and around the outside of her pants”. The girl also complied with a request to remove her shoes. She said: “I was scared, I didn’t want to get searched because I didn’t know what was going on”... [I] didn’t want to be around the police because I was scared and everything” (pars.165-169)

- The sixth plaintiff, aged 14, said that after the police entered the house, “she was not allowed to go anywhere including the toilet, and she had to “stay in that spot”. She said she was “scared, afraid of what they was going to do, behind the doors”. After being told to take her jacket off, her headphones were taken away. The officer “looked like she was wild... she just wanted to do another search right around... her hands were in my shirt”. This made her feel uncomfortable. She said she was scared and humiliated because of the camera and “I just felt that it was wrong for what they’s done” (pars.173-174)
- The ninth plaintiff, aged 14, “said that she felt nervous and scared whilst the others were being searched and recalled being really scared when she was being patted down because ‘I didn’t like people touching me then. Felt real frightened, thought she was going to strip search me and all this’. She recalled having to stand for hours out the back of the house and that it was very cold. She said that when she thinks back on what happened, she feels disgusted”. As she was being searched, she “held her hands up at right angles to her body and the police officer felt around the area of her bra

band from the outside of her three quarter length top... around the inside of [her]waistband... and around her legs”. (pars. 207-210).

The searches of the three girls illustrate that ‘ordinary’ searches can involve a level of contact that is both intrusive and intimidating and provide a strong argument for expanding the definition of strip searches to include intimate contact of this sort (see 4.4 below). This case is an example of policing that not only egregiously breached LEPR but is consistent with the wider evidence of the destructive policing of Indigenous communities.

3.5 ESCALATION, INTIMIDATION AND HUMILIATION

A recurrent theme raised by advocates and the case studies above is that the aggressive conduct of personal searches, combined with the failure to comply with requirements such as police officers identifying themselves and explaining the purposes and nature of the search, can have an escalating effect, generating “trifecta”-type situations.¹¹⁸

CASE STUDIES

Personal search upon entering a prison

‘Sharon’, a 26-year-old woman, attended a prison to visit an inmate on two consecutive days. On the first day, prior to being allowed to attend the visit, Sharon was strip searched by two female corrective officers without anything being found. On the second day, after placing her bag in a locker and signing in, she was approached by one male and one female police officer who told Sharon they had intelligence that she was bringing drugs into the prison. She was taken to a separate room where two male corrections officers were also present. While the female police officer was doing the talking, Sharon found the presence of three males very intimidating. The female officer told Sharon to remove her jumper, but Sharon said she did not want to be searched while the three male officers were in the room. The female officer responded that the men were there for their colleague’s safety and directed Sharon to take off her shoes. Sharon removed one shoe, but thinking she was about to be strip searched in front of three males she threw the shoe into the female officer’s chest. At this point, another male officer was entering the room. He yelled “assault officer” and he and the males already in the room tackled Sharon to the ground. Ultimately, nothing was found on Sharon’s person, although a small amount of cannabis was found in her bag in the locker. She was subsequently charged with assaulting police, resisting arrest and other offences.

Personal searches at Vivid Festival event

‘Andy’ and ‘Brian’, two 20-year-old males, and a group of their friends, attended a music event during the 2019 Sydney Vivid Festival. The whole group had been drinking prior to entering and Andy and some others in the group had “pre-loaded” some drugs. The event was heavily policed, with the whole group having to pass sniffer dogs prior to entry. Once inside, Andy and Brian became separated from the main group and Andy, began sniffing a Vicks stick. At this point, an unknown male grabbed Brian from behind in a bear hug and swung him round. Brian instinctively pushed back at his assailant, who turned out to be a plain clothes police officer. The officer then grabbed Brian, swung him around and pushed him face-first against a wall. He told Brian to “shut the fuck up” and threatened to cuff his hands behind his back if he didn’t hold still. Brian co-operated for fear that he would be kicked out of the venue. The officer then frisk-searched Brian, went through his pockets and ran his fingers around the inside of his collar and trousers. Andy was subjected to a similar search by two female officers in plain clothes. Nothing was found on either of the two young men, both of whom were allowed to remain at the venue.

In both these scenarios, the conduct of the searches reflected a physically aggressive assertion of police authority with the potential to escalate the situation rather than a careful application of the protective principles supposedly enshrined in LEPRA. In practice, police can use strip searches to intimidate targeted groups in the knowledge that there is rarely a serious sanction in the event of an unlawful or improper exercise of power. Damages such as those awarded in *Rose* can be absorbed into operational budgets and in recent years have not been an obstacle to the extension of police powers in important areas such as arrest (s99 LEPRA) and move-on directions in relation to protests (ss197-200 LEPRA).¹¹⁹

The case study below provides a recent example of the use of strip searches in relation to political protests.

Leaving aside whether there was any lawful basis for arresting and detaining the two women, the decision to strip search them in the police station reflects the broad power to search a person in custody provided in s28A LEPRA. Personal searches conducted on arrest are regulated by s27 LEPRA, which requires there be reasonable grounds for believing a range

of circumstances apply before a search can take place. However, s28A LEPRA, which came into effect in 2016, confers a broad power on a police officer to search a person in lawful custody, and is unrestricted by the requirements of s27. Ostensibly, this was to enable searches of detainees for their own and other's safety.¹²⁰ However, in this case, both Clare and Sarah understood that they were strip searched, intimidated and humiliated in order to discourage their political dissent. The case also raises concerns about strip searches in police stations being used as a matter of routine. This not only contravenes the common law,¹²¹ but risks entrenching a culture of strip searching within wider police practice and enabling systemically abusive practices to develop. Police need to have a clearly defined and restricted purpose for strip searches in custody, as discussed in 4.3 below.

Clare and Sarah felt humiliated, fearful and distressed at their treatment by police in circumstances where they were lawfully exercising their rights to protest. Complaints about the humiliating and potentially voyeuristic dimensions to personal searches have long been voiced¹²² and continue to be commonly raised.

CASE STUDY

Strip search of pro-refugee activists in police station

'Clare' and 'Sarah' participated in a protest against the Australian government's treatment of refugees and asylum seekers. About an hour into the peaceful street march police blocked the protest. Clare was grabbed by police and physically forced into the back of a paddy wagon. She reached out and handed her megaphone to her friend, Sarah. Moments later, Sarah was also pushed into the same vehicle and they were eventually taken to a police station. Clare and Sarah were told they were going to be taken out of the vehicle one at a time. They were separated, taken into different holding cells and each subjected to a strip search.

Sarah was directed by two female officers to remove her shoes and socks, followed by her t-shirt and bra. The officers inspected the garments closely and returned them to her. Sarah was then directed to remove her jeans and underpants, turn around and squat down. The door of the cell remained open and Sarah was aware of male officers being in close proximity and was fearful they could see the search taking place.

Clare was directed to remove each item of her clothing one at a time, including her bra. After police examined Clare's naked torso, they directed her

to remove her underwear. When Clare asked why police were doing this to her an officer said that they needed to check if she had anything sharp under her clothing. When Clare asked to see the policy authorising the police to do this, one of the officer's police responded: "I can bring the inspector in to explain". Clare found this to be threatening as it was a suggestion to bring a male officer into the room where she was half naked.

During the search, Clare noticed a camera in the corner of the room and asked the officers if they were recording and whether her consent should be obtained. The officers refused to tell her whether or not the search had been recorded.

Clare and Sarah were not charged with any offence, nor were they told at the time of their arrest and detention why they were being arrested. After being strip searched, Sarah was told by police that she was arrested for "breach of the peace" but would be let go without charge. Clare was informed when taken to the station that she was arrested for failing to move on. However, the police can only move on protestors in very limited circumstances and Clare had not received a move-on direction.

CASE STUDIES

Ben, 54 years old

'Ben' was engaged by the police while standing on a nature strip outside a train station with his dog, smoking. He was asked to empty his pockets, which contained some cash. He was then frisked by officers who made joking comments to each other about Ben. An officer eventually pulled out the waistband of Ben's shorts and underpants and shone a flashlight down the front. At this point, the searching officer made a joke to the effect of "nothing here at all", which was met with further laughter from the other officers. No illicit materials were found during the search.

Marie, 48 years old

'Marie' was pulled over by police while driving without a P plate. Police searched her car for 30 minutes, after which she was asked to place her hands on the boot of the car. She was then frisk searched by a female officer, who proceeded to pull Marie's bra strap outwards and view her breasts, and then pull the sides of her pants, and look in. Nothing was found. This search was conducted entirely on the side of a public street.

As the above case studies illustrate, NSW Police are conducting personal searches that do not require the person being searched to remove clothing but still enable the police to conduct an inspection of the person's body. As set out in 4.3 below, such methods of searching should be explicitly included in an expanded definition of strip searches and regulated accordingly, given that the scope for humiliation and other forms of harm is the same during these searches as it is in searches where clothing was completely removed.

4 How does New South Wales compare with other Australian jurisdictions?

4.1 THE LACK OF STANDARD STATUTORY FRAMEWORKS

There are some common characteristics but also important variations in police powers and practices relating to strip searches in Australian jurisdictions. In most Australian jurisdictions, police powers are embedded in several pieces of legislation rather than a consolidating Act like LEPPR, supplemented by guidance in the form of Statutory Regulations and Codes of Practice, Standard Operating Procedures, Manuals and other internal police guidelines. Typically, it is these less-accessible non-statutory documents that provide important detail as to how police ought to interpret the statutory thresholds for – and restrictions on – the conduct of strip searches. The lack of standard statutory frameworks and the opaque nature of internal guidance, combined with the general difficulties in regulating police discretion prior to charges reaching a court, makes identifying systemic patterns regarding strip search practices across Australia more difficult. However, it is important to compare key features of the different Australian strip search regimes as a first step to considering possible reforms in New South Wales.

4.2 LEGAL THRESHOLDS

In all jurisdictions, with some narrow exceptions, reasonable suspicion operates in common law and statute as the initial threshold for conducting a personal search in the field without a warrant and before arrest. However, the suspected offences for which personal searches can be conducted vary.

Table 13: Personal search power before arrest if officer has reasonable suspicion of the following offences

NSW	Possession of stolen or unlawfully obtained goods, indictable offences, relevant offences (dangerous substances, weapons, firearms, explosives), and prohibited drugs (s21 LEPPRA).
VIC	Prohibited drugs, volatile substances, weapons and graffiti implements. ¹²³ NB: if a search is conducted in a designated area under ss10D and 10E <i>Control of Weapons Act</i> , no reasonable suspicion is required.
SA	Possession of a controlled substance; ¹²⁴ possession of stolen goods; possession of an object that constitutes an offence, or evidence of the commission of an indictable offence. ¹²⁵
QLD	Possession of unlawful dangerous drugs, knives and weapons, commission of a summary offence and consorting. ¹²⁶
TAS	Hawking, stolen goods, anything intended for use in committing an indictable offence, poisons or liquor, controlled substances, firearms and objects related to family violence. ¹²⁷
ACT	Drug offences, if police have consent of the person <i>or</i> if taken into lawful custody, <i>or</i> under a warrant <i>or</i> in circumstances of seriousness and urgency <i>or</i> under a court order; ¹²⁸ Possession of anything relevant to a serious offence or something stolen or otherwise unlawfully obtained, and the personal search is necessary to prevent the thing from being concealed lost or destroyed and it is necessary to exercise the search without a search warrant because the circumstances are serious and urgent. ¹²⁹ NB: this later provision of the <i>Crimes Act</i> only authorises frisk or ordinary searches.
WA	Possession or control of anything relevant to any offence. ¹³⁰
NT	Carrying anything connected with an offence or possession/conveyance of a dangerous drug. ¹³¹

The **Australian Capital Territory** is the only jurisdiction which sets out additional conditions for the exercise of search powers, as well as requiring reasonable suspicion of a specified offence.

Differences in the definition of a strip search

In most Australian jurisdictions, there are distinctions between (variously defined) basic, ordinary, frisk or pat-down searches, which are limited to touching or seeking the removal of outer clothing, and full, intimate or strip searches involving the removal of some or all of a person's under-clothing. Across all jurisdictions, the person's cooperation should also be sought, but in the event of it being declined, police can use "reasonable force" to conduct the search. Intrusive intimate or cavity searches, which require either a warrant or the authorisation of a senior police officer, and typically involve some closer inspection and/or touching of the anus or vagina, can also be conducted if carried out by a registered medical professional.

- In **Queensland**, while searches are defined to include a frisk search, there is no specific definition of a strip search. Rather, a police officer conducting a lawful search under the relevant Act "may require a person to remove all items of clothing or all items of outer clothing from the upper or lower part of the body".¹³²
- Likewise, in the **Northern Territory**, the statutory power regarding personal searches is structured around the right of the police to search someone's 'person' and his/her clothing without distinguishing the types of searches. A category of 'non-intimate procedure' includes, "examining a part of the body other than genitals, anal area, buttocks or breasts" on approval of a superintendent or higher, and does not prohibit touching. "Intimate procedures" requiring a court order include "examining the body either internally or externally".¹³³
- **South Australia** defines an "intimate" (strip) search more expansively than **New South Wales** to include touching: "...a search of the body that involves exposure of, or contact with the skin of, the genital or anal area, the buttocks or, in the case of a female, the breasts" and falls short of an intrusive search requiring a medical practitioner. As discussed below, police may only perform an intimate search when a person is in lawful custody on a charge.

Victoria, the **Australian Capital Territory**, **Western Australia** and **Tasmania** all have standalone, similar definitions limited to visual inspection:

- **Victoria**¹³⁴ and the **Australian Capital Territory**¹³⁵ define strip searches in an identical manner to **New South Wales**.
- **Western Australia**¹³⁶ and **Tasmania**¹³⁷ use a similar definition to that of **New South Wales**. Albeit framed in different language (for example, in

Western Australia, "search the person's external parts, including his or her private parts") like **New South Wales**, these are only visual searches, and exclude visual inspection of body cavities.

Notwithstanding definitional distinctions, there is a common principle across all states that personal searches should be no more intrusive than is necessary for the purpose of investigating evidence on or in the control of the person in relation to the suspected offence. Moreover, strip searches should be conducted as a last resort and, in most (but not all) jurisdictions, only when required by the seriousness and urgency of the circumstances.

Thresholds for strips searches

Nationally, the two key differences in strip searching laws are the circumstances required to justify a strip search, and whether they are authorised to be used in the field and in police stations, or only post-arrest in police stations.

In the field: expansive approaches

In **New South Wales**, as discussed at 2.3 above, strip searches that are not conducted in police stations or places of detention should only occur when "the seriousness and urgency of the circumstances make the strip search necessary" (s31(b) LEPPRA). However, as discussed at 3.1 above, it is clear that strip searches are increasingly being conducted at music festivals and other sites such as railway stations, often in relation to lower-level drug offences (such as possession of a small quantity of drugs for personal use), and in circumstances where there is no immediate, serious threat to personal safety. In effect, the combination of a drug detection dog's reaction and the 'positive' outcome of a strip search are being used routinely to constitute the reasonable suspicion required as an initial threshold for an arrest under s99 LEPPRA for offences that may also be dealt with by way of a caution or on-the-spot fine.

Strip searches in the field are also enabled for drug and other offences by the legislation in **Queensland**, the **Northern Territory**, **Western Australia** and **Tasmania**. In each of these jurisdictions, the power is broadly defined and vested largely in the exercise of police discretion. Moreover, there is no consistent threshold across these states for when a strip search may be conducted.

In **Queensland**, a strip search can be conducted where "necessary" in relation to a "prescribed circumstance" such as the possession of "an unlawful dangerous drug".¹³⁸

In the **Northern Territory**, police can conduct personal searches of a person or their clothing if there is reasonable suspicion that the person is carrying anything connected with an offence or

possesses a dangerous drug, and the seriousness and urgency of the circumstances warrants the search.¹³⁹ In addition, a “non-intimate” procedure (an examination of the body except for genitals or breasts) can be authorised by a Superintendent who reasonably suspects the person has committed a crime, or if they are in custody charged with an offence punishable by imprisonment.¹⁴⁰

In **Western Australia**, a strip search can be conducted if there is reasonable suspicion a person possesses anything in relation to an offence.¹⁴¹ No other thresholds are set out in the legislation.

Offence based/post arrest strip searches: Victoria, South Australia and the Australian Capital Territory

In diverse ways and to varying degrees, the legislation in **Tasmania, Victoria, South Australia** and the **Australian Capital Territory** takes a less expansive approach to strip searches in the field.

In **Tasmania**, either a “basic” (ordinary search) or a strip search can be conducted if a police officer has a “reasonable belief” the person possesses a prohibited drug.¹⁴² Notably, if the officer has a reasonable suspicion the person has drugs concealed in their body cavities, the strip search power is not to be used. Instead, police must bring the person before a magistrate to determine if a medical practitioner will be authorised to examine the person.¹⁴³ The other circumstance where strip search may be used is on execution of a search warrant of a place, after a person has been arrested for an offence.¹⁴⁴

Victoria

In Victorian legislation, “full” (strip) searches in a police vehicle or other private area are limited to situations where a person is reasonably suspected of possessing a weapon and if, after a personal search, there are reasonable grounds for **believing** the person is concealing the weapon on their person, and there are reasonable grounds for **believing** that the seriousness and urgency of the circumstances requires a strip search to be carried out.¹⁴⁵

It is noteworthy that both the Victorian and Tasmanian thresholds for strip searches (reasonable grounds to believe) are higher than the reasonable suspicion required in New South Wales.¹⁴⁶

According to the Victoria Police Manual (VPM), “full” (strip) searches should “only be considered and approved when authorised by legislation or where there are reasonable grounds to believe that a pat-down search may not reveal all available evidence or other things” (emphasis added).¹⁴⁷ In relation to a “large number of persons at an entertainment or similar venue”, approval from a Superintendent to conduct a strip search is required. The considerations

to be taken into account by a Superintendent outlined in the manual are: the degree to which the person should be searched; the nature of the offence and the circumstances of the arrest; the demeanour, recent behaviour and prior history of the person being searched; whether there are reasonable grounds for conducting the search; and whether the overarching principles (see below) have been considered.¹⁴⁸

The VPM states that all personal searches are subject to an overarching principle that when “considering whether to search a person [police officers] must balance: the possible infringement of the individual’s rights against any perceived security risk; and the necessity of the search against the degree of forced used, the difficulty of the search, the inconvenience caused by the search, and the advisability of continuing the search in these circumstances”.¹⁴⁹ This overarching principle must be taken into account with the factors outlined above before a full (strip) search can be authorised but does not appear to be stipulated in any legislation.

While the *Control of Weapons Act* outlined above provides the only explicit authorisation in law for the use of strip searches in Victoria, the extent to which police exercise their discretion to conduct strip searches and apply the strip search policy principles is unclear. As in New South Wales, the scope of personal searches for drugs has expanded considerably through the use of sniffer dogs (Passive Action Detection Dogs) “in street areas where (the police believe) there are high levels of open-air drug trafficking”,¹⁵⁰ in high profile policing exercises such as Operation Safelight, launched in April 2017, and at large events such as music festivals. Anyone seeking to enter events covered by s90 *Major Events Act 2009* can also have their bags searched and be required to turn out their pockets without a requirement of reasonable suspicion. Reported amendments to the legislation extending this power to music festivals have failed to eventuate thus far.¹⁵³

Two jurisdictions largely limit strip searches to after a person has been arrested and taken into police custody.

In **South Australia**, intimate (strip) searches by a police officer and intimate intrusive searches by a medical practitioner can only be conducted on a person taken under arrest into police custody.¹⁵⁴

Similarly, in the **Australian Capital Territory**, strip searches are limited to those persons under arrest and brought to a police station. The one exception to this is an “emergency” situation where it is considered reasonably necessary to conduct a personal search to prevent the concealment, loss or destruction of anything connected with a drug-related offence and in circumstances of such seriousness and urgency to

require the power to be exercised without a warrant. Such a search may include the removal of any clothing that the person is wearing.¹⁵⁵

Once an arrested person is brought to a police station, a strip search may be conducted if there are reasonable grounds for suspecting a person possesses evidence of an offence or a seizable item, that inspection of a person's body will provide evidence of a person's involvement in an offence, and that it is reasonably necessary for the purposes of recovering the thing or discovering the evidence.¹⁵⁶

In general, once a person is taken into police custody, there are few restrictions of the type of offence for which a strip search can be conducted. However, the norm across Australian jurisdictions is that reasonable suspicion is still required and that some clear evidentiary or personal safety purpose needs to be served for a strip search to be lawful. It cannot be conducted as a matter of routine.¹⁵⁷

4.3 LESSONS FOR LAW REFORM IN NEW SOUTH WALES

Our analysis concludes that there is no template for reform operating within a single Australian jurisdiction. Whatever the legal framework, decisions to conduct personal or strip searches rely heavily on police discretion and a commitment to comply with statutory restrictions. Moreover, the reform of strip searching laws is not isolated from other potential criminal justice reforms such as the decriminalisation of recreational drug use or the reassertion of harm minimisation as the animating principle for responding to illicit drug use. However, aspects of the various personal search regimes do offer some practical guidance for reform in New South Wales, especially in relation to the maintenance of strict legal thresholds that limit the circumstances in which strip searches may be conducted and extend protections for those subjected to them.

An expanded and clearer definition of a strip search

The minimalist and discretionary formulation of the current definition of a strip search in LEPR (see 2.1) is unclear. The definition states that a strip search "may" include removal of clothing, but strip searching is intended to cover a range of police directions short of removing clothing that exposes a naked body. The NSW Police Force CRIME Manual is explicit that removing any clothing other than outer clothing is a strip search¹⁵⁸ and as we explain below, a reading of ss32 and 33 support the need for a more complete and inclusive definition.

NSW Police Commissioner Fuller has also highlighted concerns with definitional clarity, citing that police categorise the removal of shoes and socks as

strip searches,¹⁵⁹ in spite of their designation as a general search in s30 of LEPR. Concerns with the uncertainty of the definition of a strip search are not limited to the question of shoes and socks.

LEPR prohibits absolutely a search of body cavities and any search by touching the body (s33(4)). It also prohibits, in relation to searches generally, search of "the genital areas or a person's breasts" *unless* the officer suspects on reasonable grounds it is necessary for the purposes of the search (s32(6)). But the meaning of a search of body cavities and a search of genitals and breasts is unclear. In the context of a diverse range of reported search practices, clarity in both the definition of strip search and the meaning of s32(6) is required to protect the searched person's rights.

The NSW Ombudsman's 2009 report considered police searches where people are directed to squat, bend over or to spread their buttocks:

While it is less clear whether a search within these categories would necessarily constitute a search of the person's genital area, the incidence of these types of searches indicates how varied a search of a person's "genital area" can be in the absence of any clear definition or guidelines.¹⁶⁰

The Ombudsman recommended a clear definition of "genital area" in LEPR: a recommendation the government declined to implement.

The problem, however, lies not in the absent definition of genital area, but in the current minimalist definition of strip search and the broad discretion given to police in s32(6) (see 4.4). "Examination" of a person's body is not further defined in LEPR, although parliament's intent is clearly that "the strip search is a **visual** search and not an examination of the body by touch" (emphasis added).¹⁶¹ The mandatory safeguards in s33(4), (5) and (6) give some further implicit guidance on the definition, but these concepts are not included in the definition itself. To reiterate, the safeguards provide that a strip search:

- Must not involve a search of a person's cavities or an examination of the body by touch (s33(4))
- Must not involve removal of more clothes than the officer believes on reasonable grounds to be reasonably necessary for the search (s33(5))
- Must not involve more visual inspection than the officer believes on reasonable grounds to be reasonably necessary for the search (s33(6)).

Each of these elements should be expressly incorporated into the definition of strip search. Humiliating practices that are not authorised by law, such as police requiring a person to bend over and part their buttocks, should be prohibited in a clearer definition to guide police.

Pre-arrest, it is difficult to imagine circumstances giving rise to a level of public emergency that requires someone to bend over or part their buttocks in order to allay that emergency. Post-arrest and in police custody, where the purpose of a strip search in custody is to prevent a serious harm to the detained person, a visual inspection of a person's anus or vagina is clearly a visual search of body cavities in breach of LEPR, and should be unlawful. These practices should be expressly prohibited as a personal search power, and permissible only as forensic procedures undertaken by a medical professional and requiring an order of a court in accordance with s138 LEPR and the regulation and safeguards prescribed in s5 *Crimes (Forensic Procedures) Act 2000*. This is consistent with the approach in the Tasmanian legislation described above, that if an officer has reasonable grounds to suspect a person has drugs secreted inside their body a court order for a forensic procedure conducted by a medical professional is required. If properly applied, such a provision would prevent the use of unauthorised procedures such as squat and cough in New South Wales.

“Squat and cough”

There is no power provided in LEPR for police to require a person to squat and cough, and no lawful authority for squat and cough set out in the statutes of any other Australian jurisdiction.

The NSW Ombudsman's 2009 report found that police directing people to squat circumvented the prohibition on searching body cavities while still achieving a search of those areas. This practice “allows them to see if the person is secreting anything in their groin area without touching or even visually inspecting that area directly, as the action of squatting would cause items to fall to the ground”.¹⁶² The report continued:

If Parliament is of the view that such search practices assist in reducing embarrassment by minimising direct visual observation, while ensuring that the person is not secreting evidence or items that could be used to harm themselves, clear guidance must be provided to ensure the proper conduct of this search practice. If left unregulated, practices such as these have the potential to compromise the dignity of a person.

The Ombudsman recommended:

Parliament consider reviewing the police practice of asking people to squat in order to search for secreted items and determine what if any further safeguards are required to regulate this practice if not adequately covered by existing safeguards.¹⁶³

Regardless of whether requiring a person to squat and cough involves less of a visual search than

some other kinds of police-directed contortions, squatting still constitutes a search of a person's genitals and body cavities and clearly is degrading and humiliating. As discussed in 4.2 above, the Tasmanian approach is preferable. If police believe a person has unlawful items secreted inside their body, a court order for a forensic procedure should be obtained. Like police directions to bend over or to part buttocks, squat and cough should not be permissible as part of a strip search

Pulling away items of clothing from the body

Legal services report many instances where police have pulled out a person's pants or stockings, including underpants, and visually inspected the person's genital area during the conduct of a search. This was a common feature in many of the case studies provided by lawyers and suggests that police routinely conduct what they consider to be ordinary searches in this way.¹⁶⁴ The effect of not considering such searches as a strip search is that police are not considering the thresholds required for a lawful strip search and the mandatory rules for carrying them out.¹⁶⁵

The intention of LEPR was that any police practice which enables officers to visually inspect any part of a person's body – whether partly unclothed or in underwear – constitutes a strip search, with a clear prohibition on visually searching a person's genital area, unless necessary. As discussed in 2.4, the NSW District Court in *Fromberg* found that pulling away the applicant's jeans and underwear was a strip search. The Canadian Supreme Court in *Golden*, has also determined that pulling the applicant's pants and underwear away from his body to look down was a strip search. The Court provided the following helpful re-statement of a strip search:

[T]he removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female) or undergarments.¹⁶⁶

The Court went on to say that this definition reflected not only the intent of statutory definition in Canada, but listed a range of other jurisdictions with consistent definitions, including the Australian Commonwealth's *Crimes Act* definition, upon which LEPR was modelled.

To provide greater clarity, the definition of a strip search should include rearrangements of clothing so that the parting of clothing from the body enables visual inspection, including requiring someone to lift their shirt or pull aside a bra: not only the removal of clothing.

RECOMMENDATIONS

The law must be clearer on what a strip search is:

- The definition of a strip search should specify that it is a visual search only. It should expressly prohibit police touching a person's body and visual examination of a person's genital area, including ordering someone to lift their testicles or breasts and the practice of requiring a person to contort their bodies or squat and cough. If an officer believes that a person has unlawful items secreted inside their body then a court order should be obtained in accordance with s138 LEPRA, and s5 of the *Crimes (Forensic Procedures) Act 2000*.
- The definition of a strip search be amended to include practices such as a police officer pulling back or lifting up a person's clothing and inspecting any area of the body unclothed or in underwear.

Giving clarity to the s31 thresholds for strip searches in the field by limiting to weapons and drug supply

A major concern identified in this report is the broad interpretation given by NSW Police to the legal requirements that strip searches may only be conducted if “necessary for the purpose of the strip search” and if the circumstances are so “serious and urgent” as to necessitate the search (see 2.3-3.2 above). There is a need to clarify these concepts so that strip searches in the field are genuinely conducted as a last resort and in circumstances where there is a serious and immediate risk to personal safety.

Our analysis of law across Australia concludes that the available options are to either reserve strip searches to post-arrest and at the station, or to connect strip search criteria to the most serious offences. Lawyers consulted for this research expressed concern that confining strip searches in New South Wales statutorily to post-arrest may incentivise police to find creative means to arrest for the purpose of conducting a search. While the common law¹⁶⁷ and the arrest power in s99 LEPRA prohibit such a practice, this is a genuine concern, particularly in relation to young or otherwise vulnerable arrestees.

Our recommendation is to anchor the strip search thresholds to particular serious offences – possess or use a prohibited weapon, and supply a prohibited drug – in order to provide objective criteria to guide police discretion better. Limiting strip searches to

drug supply and weapons offences gives concrete meaning to the two current thresholds in s31: necessary for the purpose of the search, and serious and urgent circumstances. Below, we set out below the objective criteria needed to reform s31.

RECOMMENDATIONS

Strip searches in the field should be limited to circumstances where:

- a. There are reasonable grounds to suspect a person possesses a dangerous weapon, and
- b. Following a personal search there are reasonable grounds to *believe* the person is concealing a weapon, and
- c. There are reasonable grounds to *believe* that a strip search is necessary to prevent an immediate risk to personal safety or to prevent an immediate loss or destruction of evidence, and
- d. The reasons for conducting the search are recorded on Body Worn Video (BWV) before the search commences.

In order to address the current practice of police strip searching for possession of drugs, strip searches should be limited in the field to where:

- a. There is a reasonable suspicion that the person has committed or is about to commit an offence of supply a prohibited drug, and
- b. This suspicion is not formed solely on the basis of an indication from a drug detection dog, or the failure of a personal search to yield any prohibited substances, and
- c. There are reasonable grounds to believe that the strip search is necessary to prevent an immediate risk to personal safety or to prevent the immediate loss or destruction of evidence, and
- d. The reasons for conducting the search are recorded on Body Worn Video (BWV) before the search commences.

This recommendation is consistent with, and promotes best practice in, investigative policing for drug supply. A reasonable suspicion that a person is engaged in drug supply may involve observations that a person is engaging in conduct indicative of supply, and may rely on all the police investigative techniques used to disrupt drug trafficking including network analysis and surveillance. Strip searching is not legally intended to be used as a routine investigative practice, nor is it effective for that purpose, as the police data in 3.2 above shows.

The purpose of strip searches post-arrest in custody

As highlighted in 3.4 above, NSW Police have wide discretion to conduct strip searches in police stations. Unlike most other Australian jurisdictions, s28A LEPRA (which provides for personal searches in lawful custody after arrest) does not specify the general purpose for which personal searches may be conducted in custody. This is despite recommendations by the NSW Ombudsman in 2009 that parliament “clarify the purpose of a search in custody... for the purpose of applying the threshold test of necessity to conduct a strip search under section 31”.¹⁶⁸

Drawing on the common law¹⁶⁹ and legislative provisions in other Australian jurisdictions on the purpose of search in custody after arrest the explicit purpose of s28A personal searches should be to protect the safety of the person in custody or to preserve evidence once a person has been charged. However, there is a risk that amending s28A to make this clear may have an unintended consequence of entrenching routine strip searches in NSW police stations. The common law requires that police still need to have a reasonable suspicion before conducting a personal search and they should not be a matter of course.¹⁷⁰

RECOMMENDATIONS

To ensure that strip searches in police stations are not carried out as a matter of routine, the law should specify that the purpose of a search is to ensure the detained person’s safety or to preserve evidence (s28A).

Strip searches in police stations must only be conducted if:

- a. A general search has first been conducted
- b. There are reasonable grounds to suspect that a strip search is necessary for the purposes of the search in s28A (to ensure the detained person’s safety or to preserve evidence), and
- c. The search is subject to the rules in ss 32 and 33, and
- d. The reasons for conducting the search are recorded on Body Worn Video (BWV) before the search commences.

4.4 RULES FOR CONDUCTING PERSONAL SEARCHES

The mandatory rules under New South Wales law to protect the privacy and dignity of the person being strip searched are largely reproduced in all Australian states and territories. We identify examples of state provisions which provide clearer or enhanced protections for the searched person than the current New South Wales provisions.

The rule for the least invasive search

In New South Wales, the least invasive search “practicable in the circumstances” must be conducted (s32(5) LEPRA). No advice is provided to police, either in the statute or in policy, about the circumstances which ought to inform what is or is not “practicable”.

Western Australia and **Queensland** both have a higher threshold than New South Wales. The Western Australian statute requires that a search “must not be any more intrusive than is reasonably *necessary* in the circumstances”¹⁷¹ while the relevant provision in Queensland states “unless an immediate and more thorough search of a person is *necessary*, restrict a search of the person in public to an examination of outer clothing”.¹⁷²

The NSW Ombudsman concluded in its 2009 review of LEPRA that:

While “necessity” may provide a stronger safeguard, it is not evident that amending LEPRA in this respect would result in substantial changes to police searching practices, **nor is it evident that police are currently conducting searches that exceed the level necessary to carry out their work.** Consequently, based on the available information, the requirement that police conduct the least invasive search practicable in the circumstances appears to be a reasonable safeguard and no practical difficulties have been identified during the review (emphasis added).¹⁷³

The substantial increase in the number of strip searches since the Ombudsman’s review ten years ago suggests that stronger legislative protections to direct police are required to ensure strip searches are not carried out unnecessarily. The distinctly ambiguous concept of “practicable in the circumstances” does not assist police in turning their mind to the “necessity” of their actions, consistent with parliament’s intention that strip searches be a last resort.

RECOMMENDATIONS

Police are not presently required to conduct the least invasive search necessary if it is not reasonably practicable to do so. The law needs to be clear that strip searches are not to be undertaken if there is a less invasive alternative. An officer must conduct the least invasive kind of search necessary.

Key personal search powers (ss21, 27) should be limited to a general search unless the thresholds for a strip search are met, in order to guide police against strip searches as a first resort.

RECOMMENDATION

The rule that police cannot search a person's genitals or breasts during any personal search unless police consider it necessary, needs clarification. The law should be amended to specify that such a search is only necessary in limited and exceptional circumstances, namely:

- Reasonable suspicion that the person has a dangerous weapon on their person or is suspected of supply prohibited drugs, and
- Only applies to the conduct of clothed, general searches applying the "crush method", and not to a strip search.

The rule for "no search of genital area...unless"

s32(6) provides that police:

[M]ust not search the genital area of the person searched or in the case of a female or transgender person who identifies as female, the person's breasts, unless the officer suspects on reasonable ground that it is necessary to do so for the purposes of the search (emphasis added).

What is a search of a genital area? The provision is in interpretive conflict with the requirement to conduct the least invasive search, and in relation to strip searches, the prohibitions against touching and/or searching body cavities.

Presumably, the intention of s32(6) is captured in the following "notes for guidance" to police in the CRIME Manual, in relation to how to conduct an ordinary search:

Start your search at the top of the head using the crush method. Move down through the collar, back, chest and belt areas. After the belt area, search the groin and backside 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 area or female 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 the feet. Beware of syringe needles etc. which might be secreted in clothing.¹⁷⁴

The guidance note to police demonstrates how invasive an ordinary search can be, and the level and degree of touching of the genital area that is envisaged. The s32 rules apply to all personal searches, including strip searches. It is confusing to police, who should be turning their mind to the s31 thresholds if they are considering a strip search.

Rules for the conduct of strip search only if "reasonably practicable in the circumstances"

The mandatory rules for conducting a strip search in section 33 LEPRA do not need to be complied with if they are not "reasonably practicable in the circumstances". This contrasts with best practice in other Australian states and, as illustrated by these key examples, reduces these critical, mandatory rules to discretionary ones.

Example 1: Police discretion to afford privacy

Lawyers report that their clients are being strip searched in public view. LEPRA provides for privacy only where "reasonably practicable in the circumstances" (33(1)(a)). The comparable provisions in the **Commonwealth, Australian Capital Territory** and **Queensland** legislation require that a strip search must be conducted in a private area *without exceptions*.¹⁷⁵

In 2009, the NSW Ombudsman recommended that:

The NSW Police Force ensure that all officers are aware of and understand their obligations in relation to the protection of privacy under Part 4, Division 4, in particular

1. Examples of locations where strip searches may be conducted in order to fulfil the "private area" requirement in section (1)(a) both in the field and while in custody
2. Factors to consider in assessing the reasonable practicability of conducting a search in a private area
3. Measures that police can take to ensure that strip searches are not conducted in the presence or view of people who are not necessary to the search.¹⁷⁶

Beyond restating the LEPRA provisions, the current 2016 CRIME Manual and the 2019 Police Handbook do not address any of these factors.

RECOMMENDATIONS

The rules for the conduct of strip searches should be mandatory. Section 33(1) should be amended to remove the words “reasonably practicable in the circumstances”.

Examples of private places should be clearly specified. Section 33(1)(a) should be amended to provide express examples of private places, including a police vehicle or enclosed area shielded completely from public view

Example 2: Search by an officer of the same sex

Again, s33(1) LEPRA requires that a search must not be conducted in the presence/view of a person of the opposite sex, but only if it is “reasonably practicable in the circumstances”. **Queensland** has one of the most stringent same-sex search requirements: the person conducting the search must be of the same sex “unless an immediate search is *necessary*”. The section embeds an example of when an immediate search may be necessary, namely, “because the person searched may have a bomb strapped to his or her body or has a concealed firearm”.¹⁷⁷

Sections 32 and 33 do not adequately protect the rights of transgender, intersex and gender diverse people. In contrast, the **Australian Capital Territory** and **Victoria** make specific provisions. For example, the *Control of Weapons Act* in Victoria requires that:

The strip search must be conducted by a police officer, or a person under the direction of a police officer, who is of—

- a. unless paragraph (b) applies, the same sex as the person being searched; or
- b. if the person being searched identifies as a member of a particular gender, that gender.¹⁷⁸

RECOMMENDATION

Police should be required to ask all people their preference regarding the gender of the officer conducting strip and personal search procedures in order to protect the rights of transgender, intersex and gender diverse people. The current requirement is that a search must be conducted of a person of the opposite sex, only if “reasonably practicable”. These preferences should be adhered to unless an immediate search is necessary in a genuine emergency situation (amend ss32(7), (7A), 33(1)(b), (1)(c)).

Rule against strip search by consent?

Section 29(2)(b) of LEPRA provides that general consent to being searched is not consent to strip search unless the person does consent to a strip search. However, the coercive and exceptional nature of strip searches makes ‘consent’ to strip searches untenable, particularly when such consent would not require police to turn their minds to the legal thresholds.

RECOMMENDATIONS

Strip searches should not be able to be carried out by consent. The law should be amended so that police must in all cases be able to justify a strip search in accordance with the legal criteria.

4.5 CHILDREN UNDER 18

LEPRA expressly prohibits the strip searching of a child under 10 – a practice reproduced in every Australian jurisdiction. However, the strip searching of a child between 10 and 17 ought to be subject to child protection principles, in particular, the 10 “keeping children safe” principles outlined by the NSW Office of the Children’s Guardian:¹⁷⁹

- 1 Child safety is embedded in institutional leadership, governance and culture
- 2 Children participate in decisions affecting them and are taken seriously
- 3 Families and communities are informed and involved
- 4 Equity is upheld, and diverse needs are taken into account
- 5 People working with children are suitable and supported
- 6 Processes to respond to complaints of child sexual abuse are child-focused
- 7 Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training
- 8 Physical and online environments minimise the opportunity for abuse to occur
- 9 Implementation of the Child Safe Standards is continuously reviewed and improved
- 10 Policies and procedures document how the institution is child safe.

These principles should be considered by NSW Police and embedded in policy, governance and training regarding the personal searches and detention of children. It is unclear how the provision in s33(1) that the mandatory rules in relation to children (s33(3), (3A)) can be dispensed with if not “reasonably practicable in the circumstances” can be child safe. In particular, the discretionary nature of the police obligation to ensure a strip search is conducted in the presence of a parent or guardian warrants an assessment of child safety.

Serious consideration should be given to legislatively curtailing the strip search of children, as is done in other states. In the **Australian Capital Territory**, a child between the ages of 10 and 17, and a person incapable of managing their affairs can only be strip searched if the person has been arrested and charged with an offence, or if a court orders that a strip search be conducted. The **Commonwealth** has the same provision.¹⁸⁰

There are concerns that, if such an approach was adopted in New South Wales, police may arrest and charge children with offences in order to strip search in a police station. An alternate approach to that in the **Australian Capital Territory/Commonwealth** would be to define “necessary for the purpose of the search” and “serious and urgent” in relation to children, according to child protection principles. This approach would prohibit strip searching of all children unless there were grounds to suspect the child had something concealed on their person, which posed a risk to their safety, such as a weapon.

RECOMMENDATIONS

Personal searches and strip searches of children must adhere to child protection principles in legislation, policy and institutional governance procedures.

Children under 18 must not be strip searched unless on genuine child protection grounds, specifically in exceptional circumstances to protect a child from harm. Authorisation must be obtained from the court and a record must be made of the reasons why a child was strip searched on child protection grounds before the search is conducted. It should be mandatory for an adult independent of police or other state agencies to be present during the search.

4.6 ACCOUNTABILITY AND TRANSPARENCY

This section has focused on reforms to LEPR, which we see as essential to consolidate the regulatory foundations that are then enforced through every aspect of police practice, including policy formation, training and application. However, by itself, amending LEPR does not guarantee the better application of legislative principles by the police, nor does it increase police accountability. Accountability and transparency require a more holistic approach, incorporating record keeping, reporting, consolidated policy and training and regular external review.

The lack of publicly-available data on strip searches and personal searches, and on the exercise of police powers more broadly, is a barrier to public accountability not only in New South Wales but across Australia. Even under freedom of information legislation, access to strip search data was not possible in most states because the data was not collected in the first place. In part, the NSW Police data was limited due to the prohibitive costs of the processing fees to access full data sets, estimated to be in the thousands of dollars.

All internal police policies and operational guidelines on strip searching should be made public. While the CRIME Manual and Police Handbook address strip searches and are publically available documents, there are reportedly other guidelines in existence.¹⁸¹

RECOMMENDATIONS

- NSW Police policies and any Standard Operating Procedures be developed or amended to emphasise the exceptional nature of strip searches and their potentially harmful impacts. All internal policies regulating strip searches should be public documents.
- Mandatory record-keeping by the NSW Police should be set out in LEPR, including recording the reasons for exercising all personal search powers and what other alternatives to strip searches were considered.
- Reviews of personal searches be conducted by the Law Enforcement Conduct Commission every two years.
- Annual, public reporting on all personal search statistics by the NSW Bureau of Crime Statistics and Research.
- New South Wales explore uniform data collection for police powers with the states and territories, for instance, through the Ministerial Council for Police and Emergency Management or the Council of Attorneys-General.

5 Reforming law and practice in NSW

The previous section outlined proposed amendments to LEPRA to ensure it better reflects the key principles governing the authorisation and regulation of strip searches. These amendments aim to provide greater clarity about when a strip search should be used, improve the transparency of the decision-making processes leading to strip searches and increase police accountability.

Strip searches require the removal of clothing without consent and enable inspections of the naked body that can be intrusive, humiliating and harmful. They constitute a significant violation of the person in circumstances where the person searched is also stripped of agency and personal control. The power to strip search is one that ought to be exercised in exceptional circumstances only, consistent with international human rights standards and social policy goals such as harm reduction.

This does not appear to be the basis upon which police are conducting strip searches in New South Wales. Rather, the data and case studies discussed in this report indicate that strip searches in the field have become increasingly normalised, particularly in relation to young people under 25 years of age, and are being used in intimidating and abusive ways.¹⁸² Both the NSW Police and the state government are aware of this trend but justify it on the basis that strip searches are a necessary tool for identifying people in possession of illicit drugs or other illegal items. Whether or not strip searches are effective in these terms is debatable given the substantial percentage of searches that yield nothing of evidentiary value. Moreover, while it is not possible to quantify the purported deterrent effect of strip searches, evidence to the current inquest into the deaths of six young people at music festivals in New South Wales between December 2017 and January 2019 has highlighted that harmful practices, such as the potentially fatal pre-loading of drugs, are occurring in response to police searching tactics.¹⁸³

Therefore, reforming one aspect of policing such as strip searching inevitably raises questions about the recent evolution of policing methods, such as the high visibility use of Drug Detection Dogs, and more opaque strategies such as the use of Suspect Target Management Plans.¹⁸⁴ In both contexts, the exercise of police powers has been shaped largely by the police themselves, and practices such as strip searches extended with minimal formal oversight. There is a pressing need for greater transparency in the form of publicly-available, consistent data

regarding the use of strip searches, and greater accountability through regular reviews by the Law Enforcement Conduct Commission.

Implementing reforms of this kind also raises significant questions about the nature of the criminal law being enforced. While it is beyond the scope of this report, it is clear that reforming the laws in relation to illicit drugs for example, by decriminalising possession and focusing on harm minimisation measures such as pill testing at festivals, would remove much of the impetus for current strip-searching practices. It would also prevent the normalisation of armed police with dogs patrolling densely-populated public spaces and the routine stop and search of young people attending otherwise normal leisure activities.

However, it is heavily policed Indigenous communities – particularly in regional New South Wales, far-removed from the festivals and the other sites where strip searches have attracted media attention – that bear the brunt of NSW Police practices such as strip searching. Reducing the disproportionate numbers of Indigenous people subjected to strip searches should be central to the public discussion of strip searching and the attempts to change current practices. As the Aboriginal Legal Service noted in its recent submission to the NSW Parliamentary Inquiry into the adequacy of youth diversion programs:

Aboriginal and Torres Strait Islander People are over-policed relative to non-Indigenous people. Recent research by the Bureau of Crime Statistics and Research found that in NSW, Aboriginal and Torres Strait Islander People are six times more likely to be arrested for any offence than non-Indigenous Australians. Aboriginal young people are also significantly overrepresented as targets of the NSW Police Suspect Targeting Management Plan (STMP). Young people targeted on the STMP experience a pattern of repeated contact with police in confrontational circumstances such as through stop and search, move on directions and regular home visits.¹⁸⁵

In this context, reducing strip searches in Aboriginal communities requires consideration be paid to strategies aimed at reducing the levels of police contact with, and disproportionate criminalisation of, Aboriginal people.

We hope this report will contribute to developing such strategies and informing a wider community discussion about the reform of strip searching practices.

Endnotes

- 1 Data obtained by David Shoebridge MP. NSW Legislative Council, *Questions & Answers Paper No 181*, 14 November 2018 [2517] and NSW Legislative Council, *Questions & Answers Paper No 186*, 25 February 2019 [3202]–[3203].
- 2 Michael McGowan, 'Festival Deaths Inquest: Police Pushed to Release Protocols after "Unconscionable" Searches', *The Guardian* (Online, 18 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/18/music-festival-deaths-inquest-police-to-be-pushed-to-release-strip-search-protocols>>.
- 3 Angus Thompson, 'NSW Police Admits Breaching Strip-Search Laws', *The Sydney Morning Herald* (Online, 23 June 2019) <<https://www.smh.com.au/national/nsw/nsw-police-admits-breaching-strip-search-laws-20190620-p51zny.html>>.
- 4 NSW Ombudsman, *Issues Paper: Review of Certain Functions Conferred on Police Under the Law Enforcement (Powers and Responsibilities) Act 2002* (Issues Paper, 2007) 19 <https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/6048/Law-Enforcement-Act-Parts-1-3.pdf>.
- 5 Data obtained by David Shoebridge MP. NSW Legislative Council, *Questions & Answers Paper No 181*, 14 November 2018 [2517] and NSW Legislative Council, *Questions & Answers Paper No 186*, 25 February 2019 [3202]–[3203].
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- 8 Data provided to the authors by Queensland Police Service, 25 June 2019.
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- 10 *Government Information (Public Access) Act 2009* (NSW).
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- 12 Paul Gregoire, 'Aboriginal Elder Strip Searched on Busy Sydney Road', *Sydney Criminal Lawyers* (Blog, 18 January 2019) <<https://www.sydneycriminallawyers.com.au/blog/aboriginal-elder-strip-searched-on-busy-sydney-road/>>.
- 13 Paul Gregoire, 'NSW Police are Illegally Strip Searching Aboriginal Kids', *Sydney Criminal Lawyers* (Blog, 22 November 2018) <<https://www.sydneycriminallawyers.com.au/blog/nsw-police-are-illegally-strip-searching-aboriginal-kids/>>.
- 14 Angus Thompson, 'NSW Police Admits Breaching Strip-Search Laws', *The Sydney Morning Herald* (Online, 23 June 2019) <<https://www.smh.com.au/national/nsw/nsw-police-admits-breaching-strip-search-laws-20190620-p51zny.html>>.
- 15 Police also have special powers to search a person to control public disorder (s87K) and in relation to terrorism (*Terrorism (Police Powers) Act 2002* (NSW) s17).
- 16 *Standard Operating Procedures: Planned Drug Detection Dog Operations*, NSW Police Force, SPG Dog Unit (July 2008).
- 17 *R v Rondo* [2001] NSWCCA 540. This case, which predated LEPPRA, considered the search power in *Crimes Act 1900* (NSW) s 357E (now repealed).
- 18 *R v Fortescue, Michael* [2010] NSWDC 272.
- 19 *Streat v Bauer; Streat v Blanco* (Unreported, NSWSC, 16 March 1998); *Attalla v State of NSW* [2018] NSWDC 190.
- 20 *Streat v Bauer; Streat v Blanco* (Unreported, NSWSC, 16 March 1998); *Le v State of New South Wales* [2017] NSWDC 38.
- 21 *Attalla v State of NSW* [2018] NSWDC 190.
- 22 *Streat v Bauer; Streat v Blanco* (Unreported, NSWSC, 16 March 1998); *R v Yana Orm* [2011] NSWDC 26.
- 23 *Moses v State of New South Wales* (No 3) [2010] NSWDC 243.
- 24 *R v Rondo* [2001] NSWCCA 540.
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- 26 *Code of Practice for CRIME* (Custody, Rights, Investigation, Management and Evidence), NSW Police Force (January 2012) 98.
- 27 'Police Commissioner Says Strip Search Powers are Here to Stay', *Sydney Live* with Ben Fordham (2GB 873, 4 June 2019) <<https://www.2gb.com/policecommissioner-says-strip-search-powers-are-here-to-stay/>>.
- 28 Mann CJ in *Henderson v O'Connell* [1937] VLR 171 cited with approval by McHugh J in *Coleman v Power* [2004] HCA 39; 220 CLR 1 [118]–[129].
- 29 The summary of principles is drawn from the *International Covenant on Civil and Political Rights*, and adapted from guidance notes in the Office of the United Nations High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Professional Training Series No 9, 2003) and, Working Group on Protecting Human Rights while Countering Terrorism, *Basic Human Rights Reference Guide: The Stopping and Searching of Persons* (CTITF Publication Series, 1 ed, September 2010).
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- 31 Jude McCulloch and Amanda George, 'Naked Power: Strip Searching in Women's Prisons' in Phil Scraton and Jude McCulloch (eds), *The Violence of Incarceration* (Routledge, 2009) 107.
- 32 Cathy Pereira, 'Strip Searching as Sexual Assault', *Hecate* (2001) 27(2) 187.
- 33 *R v Golden* [2001] 3 SCR 679 [90].

- ³⁴ Pereira (n 32).
- ³⁵ Peta Malins, 'Drug Dog Affects: Accounting for the Broad Social, Emotional and Health Impacts of General Drug Detection Dog Operations in Australia' (2019) 67 *International Journal of Drug Policy* 63.
- ³⁶ Mary Stathopoulos et al, *Addressing Women's Victimization Histories in Custodial Settings* (ACSSA Issues No 13, 2012) 12. <<https://aifs.gov.au/sites/default/files/publicationdocuments/i13.pdf>>.
- ³⁷ Ibid 12–13.
- ³⁸ Government of Western Australia, Office of the Inspector of Custodial Services, *Strip Searching in Western Australian Prisons* (March 2019) iii <<https://www.oics.wa.gov.au/wp-content/uploads/2019/04/Strip-Searches-Review.pdf>>.
- ³⁹ For a discussion, see *ibid*.
- ⁴⁰ For a discussion, see Stathopoulos et al (n 36) 4–10.
- ⁴¹ Ibid 5.
- ⁴² Developmental Crime Prevention Consortium, *Pathways to prevention: Developmental and early intervention approaches to crime in Australia* (1999) Canberra: Australian Government Publishing Service. <<http://www.ag.gov.au/agd/WWW/ncphome.nsf/Page/Publications>>
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- ⁴⁴ Government of Western Australia, Office of the Inspector of Custodial Services (n 38); Stathopoulos et al (n 36); Deb Wybron and Kiri Dicker, *ACT Women and Prisons – Invisible Bars: The Stories Behind the State* (Women's Centre for Health Matters Inc, May 2009); Steven Shatz, Molly Donovan and Jeanne Hong, 'The Strip Search of Children and the Fourth Amendment' (1991) 26(1) *University of San Francisco Law Review* 1; William J Simonitsch, 'Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment' (2002) 54(3) *University of Miami Law Review* 665.
- ⁴⁵ Physicians for Human Rights (2005) cited in McCulloch and George (n 31).
- ⁴⁶ Government of Western Australia, Office of the Inspector of Custodial Services (n 38). For an earlier iteration in Queensland, see Anti-Discrimination Commission Queensland, *Women in Prison* (March 2006) 75.
- ⁴⁷ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)*, (A/65/457, A/RES/65/22, 22 December 2010) Rule 20.
- ⁴⁸ Government of Western Australia, Office of the Inspector of Custodial Services (n 38) 2.
- ⁴⁹ Stathopoulos et al (n 36) 15–17.
- ⁵⁰ Ibid 17.
- ⁵¹ Ibid 18–19.
- ⁵² Government of Western Australia, Office of the Inspector of Custodial Services (n 38) iii.
- ⁵³ See the discussion in Stathopoulos et al (n 36) 15–16.
- ⁵⁴ See, eg, the following example featuring Philadelphia Police: Vera Institute, 'Trauma-Informed Policing: Interview with Captain Altovise Love-Craighead', *Strategies for Policing Innovation* (Interview) <<http://strategiesforpolicinginnovation.com/resources/trauma-informed-policing>>.
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- ⁵⁷ Ibid 6.
- ⁵⁸ See, eg, Ben Bowling and Coretta Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Stop and Search' (2017) 70(6) *Modern Law Review*, 93; Joel Miller, et al *The Impact of Stops and Searches on Crime and the Community*, Police Research Series Paper 127, London: UK Home Office; Ben Bowling and Leanne Weber (2011). 'Stop and search in global context: An overview' (2011) 21(4) *Policing and Society*, 480.
- ⁵⁹ See, eg, Jason Sunshine and Tom Tyler 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing', 37 *Law and Society Review* 513 (2003); Ben Bradford, Jonathan Jackson and Betsy Stanko 'Contact and Confidence: Revisiting the Impact of Public Encounters with the Police', (2009), 19(1) *Policing and Society*, 20; Lorraine Mazerolle et al (2013) 'Shaping citizen perceptions of police legitimacy: a randomized field trial of procedural justice', (2013) 51(1) *Criminology*, 33.
- ⁶⁰ NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)* (2013) 25 <<https://www.parliament.nsw.gov.au/la/papers/DBAssets/tailedpaper/webAttachments/12580/LEPRA%20Review%201.pdf>>.
- ⁶¹ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss30(d), 32(5). See also *Attalla v State of NSW* (2018) NSWDC 190 [95].
- ⁶² NSW Ombudsman, *Review of Certain Functions Conferred on Police Under the Law Enforcement (Powers and Responsibilities) Act 2002: Personal Searches, Crime Scenes, Notices to Produce* (February 2009) 63 <https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/6048/Law-Enforcement-Act-Parts-1-3.pdf>. See also discussion of s28A in 3.4.
- ⁶³ *Attalla v State of NSW* [2018] NSWDC 190. See 2.4.
- ⁶⁴ *Attalla v State of NSW* [2018] NSWDC 190.
- ⁶⁵ *Fromberg v R* [2017] NSWDC 259.
- ⁶⁶ New South Wales, *Hansard*, Legislative Assembly, 17 September 2002, [4846–4849] (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts); Gareth Griffith, 'Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001' (Briefing Paper No 11/2001, NSW Parliamentary Library Research Service, August 2001).
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- ⁶⁸ Griffith (n 66) 17.
- ⁶⁹ New South Wales, *Hansard* 2002 (n 66).
- ⁷⁰ Griffith (n 66) Annexure A, 17.
- ⁷¹ *Code of Practice for CRIME* (n 26) 100.

- ⁷² Ibid 152.
- ⁷³ Ibid 151.
- ⁷⁴ *Standard Operating Procedures: Planned Drug Detection Dog Operations* (n 16).
- ⁷⁵ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 33(3A).
- ⁷⁶ See *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (NSW).
- ⁷⁷ *Body-Worn Video Camera Standard Operating Procedure*, NSW Police Force (November 2018) 6. Obtained by Redfern Legal Centre under freedom of information.
- ⁷⁸ Aboriginal Legal Service and Redfern Legal Centre, Submission to NSW Department of Justice, *Review of the Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (14 June 2018) 4-5 <<https://rlc.org.au/sites/default/files/attachments/Department-of-Justice-NSW-Surveillance-Device-Amendment-Act-14-June-2018.pdf>>.
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- ⁸⁰ Emmeline Taylor, 'Body-Worn Cameras are not a Panacea for Poor Policing', *The Conversation* (Online Article, 27 October 2016) <<https://theconversation.com/body-worn-cameras-are-not-a-panacea-for-poor-policing-67242>>.
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- ⁸² Ibid; *Fromberg v R* [2017] NSWDC 259.
- ⁸³ Most of this data can be found on the Sniff Off Facebook site. See 'Sniff Off', Facebook (Profile Page) <<https://www.facebook.com/sniffoff>>.
- ⁸⁴ Data provided by Queensland Police Service, 25 June 2019. Total searches are based on searches of the following types: roadside/executing search warrant – frisk, basic, specific, pat-down, unclothed and where the type not specified; police custody – frisk, pat-down and unclothed. The data is preliminary and subject to change.
- ⁸⁵ Data provided by NSW Police Force, 16 May 2019. Data current at 29 April 2019.
- ⁸⁶ No figure provided for 11-year-olds.
- ⁸⁷ This takes into account the small variation in total strip searches in Tables 4 and 8.
- ⁸⁸ NSW Parliament Committee on Children and Young People, *Inquiry into Prevention of Youth Suicide* (2019) <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2447>>
- ⁸⁹ Isabella Higgins, 'Suicide at "Crisis" Levels among Aboriginal Children as Leaders Fear it Will Become "Normal"', ABC News (Online, 19 February 2019) <<https://www.abc.net.au/news/2019-02-17/indigenous-suicide-rates-at-crisis-levels-communities-say/10814874>>.
- ⁹⁰ Gregoire, 'NSW Police are Illegally Strip Searching Aboriginal Kids' (n 13).
- ⁹¹ Data provided by NSW Police Force in response to freedom of information requests, 25 July 2019.
- ⁹² Data provided by David Shoebridge and Sniff Off, 16 May 2019. Based on questions asked in NSW Legislative Council. See NSW Legislative Council, *Questions & Answers Paper No 181*, 14 November 2018 [2517] and NSW Legislative Council, *Questions & Answers Paper No 186*, 25 February 2019 [3202]–[3203].
- ⁹³ 'Nothing was found' refers to things that are not in relation to: "drug detection; goods in custody/receiving; intention offences (armed with intent and possess implements) and person searches where any of the following items were found: drug implement, firearm, firearm accessory/attachment, prohibited article and sharp/cutting instrument".
- ⁹⁴ Data provided by David Shoebridge and Sniff Off, 16 May 2019.
- ⁹⁵ 'Police Commissioner Says Strip Search Powers are Here to Stay' (n 27).
- ⁹⁶ Data provided by NSW Police Force in response to freedom of information requests, 25 July 2019.
- ⁹⁷ See, eg, Elizabeth Henson, 'SA Police Reveal New Drug Detection Dog Recruits', *The Advertiser* (Online, 29 January 2018) <<https://www.adelaidenow.com.au/news/law-order/sa-police-reveal-new-drug-detection-dogrecruits/newsstory/07fc6c27f9d3dfc155747429d34d6ed9>>.
- ⁹⁸ *Standard Operating Procedures Planned Drug Detection Dog Operations* (n 16).
- ⁹⁹ See also *ibid* 3, 16.
- ¹⁰⁰ Thompson, 'NSW Police Admits Breaching Strip-Search Laws' (n 14).
- ¹⁰¹ Data provided by David Shoebridge and Sniff Off, 16 May 2019.
- ¹⁰² Ibid.
- ¹⁰³ Angus Thompson, "'Climate of Fear': Strip Searches Compare to Sexual Assault", *The Sydney Morning Herald*, (Online, 19 July 2019) <<https://www.smh.com.au/national/nsw/climate-of-fear-strip-searches-compared-to-sexual-assault-20190719-p528r8.html>>. See also Malins (n 35) 66.
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- ¹⁰⁹ 'High Risk Festivals Revealed By NSW Government In Late-Night SMS To Organisers', *The Music* (Online, 23 February 2019) <<https://themusic.com.au/article/SttQW1cX14/nsw-government-names-high-risk-festivals-subject-to-licensing-changes/>>.
- ¹¹⁰ See, eg, Evidence to Parliament of Victoria Law Reform, Road and Community Safety Committee, *Inquiry into Drug Law Reform*, 4 September 2017 (Dr Peta Malins).
- ¹¹¹ See, eg, the findings of the WA Coroner in 2013 in the *Inquest into the Death of Gemma Geraldine Thoms*, Coroner's Court of Western Australia, 2/13, 29 January 2013 (Dominic H Mulligan, Coroner); and Lisa Whitehead, 'Father Devastated by Son's Overdose Angered by Online Marketplace for Drugs', ABC News (Online, 14 October 2013) <<https://www.abc.net.au/news/2013-10-14/family-devastated-by-drug-death/5021162>>.

- ¹¹² Caitlin Elizabeth Hughes et al 'The Deterrent Effects of Australian Street-Level Drug Law Enforcement on Illicit Drug Offending at Outdoor Music Festivals' (2017) 41 *International Journal of Drug Policy* 91; Jodie Grigg, Monica J Barrett and Simon Lenton, 'Drug Detection Dogs at Australian Outdoor Music Festivals: Deterrent, Detection and Iatrogenic Effects' (2018) 60 *International Journal of Drug Policy* 89; Peta Malins, 'Drug Dog Affects: Accounting for the Broad Social, Emotional and Health Impacts of General Drug Dog Detection Operations in Australia' (2019) 67 *International Journal of Drug Policy* 63.
- ¹¹³ See, eg, the recommendation of the 2018 Parliament of Victoria Law Reform, Road and Community Safety Committee Inquiry into Drug Law Reform, that the 'Victoria Police commission an independent evaluation of the use of drug detection dogs at music festivals and other public spaces to determine their effectiveness in deterring the use and trafficking of illicit substances, and any unintended consequences or risks of harms resulting from this strategy.' Victoria Law Reform, Road and Community Safety Committee, *Inquiry into Drug Law Reform* (March 2018) rec 50.
- ¹¹⁴ NSW Police Force data, 16 May 2019. This is likely to be a national trend, given the disproportionate criminalisation of Indigenous people. For example, in Queensland, the only jurisdiction for which we could obtain comparable data, between 2015 and 2018, approximately 37% of all strip searches, including in police custody, were conducted on Indigenous people. Data provided by Queensland Police Service, 25 June 2019.
- ¹¹⁵ Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Youth Justice Coalition NSW, 2018) <<http://www.yjc.org.au/resources/YJC-STMP-Report.pdf>>.
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- ¹¹⁷ *Marjorie Rose and Ors v State of New South Wales* (Unreported, NSWDC, 17 February 2016).
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- ¹²⁰ In response to the NSW Coroner's recommendations in the *Inquest into the Death of Jason Lee Plum*, Local Court of NSW Coronial Jurisdiction, 2011/00390317, 16 May 2013 (Hugh CB Dillon, Deputy State Coroner).
- ¹²¹ See, eg, *De Reus and Ors v Gray* [2003] VSCA 84.
- ¹²² See, eg, the accounts by Vietnamese background young people of public stop and search practices in Cabramatta in the 1990s, in Lisa Maher et al, *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing* (UNSW Faculty of Law Monograph Series, 1997) 36–37.
- ¹²³ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss60, 82; *Control of Weapons Act 1990* (Vic) s10; *Graffiti Prevention Act 2007* (Vic) s13.
- ¹²⁴ *Controlled Substances Act 1984* (SA) s52.
- ¹²⁵ *Summary Offences Act 1953* (SA) s68.
- ¹²⁶ *Police Powers and Responsibilities Act* (Qld) 2000 ss29, 30
- ¹²⁷ *Police Offences Act 1935* (Tas) ss57A, 58, 58A, *Misuse of Drugs Act 2001* (Tas) ss29, 30, *Firearms Act 1996* (Tas) s135, *Family Violence Act 2004* (Tas) s10.
- ¹²⁸ *Drugs of Dependence Act 1989* (ACT) s184. See also s188 on search power for drugs in emergency situations.
- ¹²⁹ *Crimes Act 1900* (ACT) s207.
- ¹³⁰ *Criminal Investigation Act 2006* (WA) s68.
- ¹³¹ *Police Administration Act 1978* (NT) ss119, 120C.
- ¹³² *Police Powers and Responsibilities Act 2000* (Qld) s629.
- ¹³³ *Police Administration Act 1978* (NT) s4.
- ¹³⁴ *Control of Weapons Act 1990* (Vic) sch 1 cl 7. The same definition of strip search is also deployed in the *Terrorism (Community Protection) Act 2003* (Vic) sch 1 cl 1, and in the *Children, Youth and Families Act 2005* (Vic) s488AC (although described in that Act as an 'unclothed search').
- ¹³⁵ *Crimes Act 1900* (ACT) s185; *Corrections Management Act 2007* (ACT) s107.
- ¹³⁶ *Criminal Investigation Act 2006* (WA) s64.
- ¹³⁷ *Police Powers (Public Safety) Act 2005* (Tas) s22.
- ¹³⁸ *Police Powers and Responsibilities Act 2000* (Qld) s624.
- ¹³⁹ *Police Administration Act 1978* (NT) s119.
- ¹⁴⁰ *Police Administration Act 1978* (NT) s145A.
- ¹⁴¹ *Criminal Investigation Act 2006* (WA) s68.
- ¹⁴² *Misuse of Drugs Act 2001* (Tas) s29.
- ¹⁴³ *Misuse of Drugs Act 2001* (Tas) s30(2)(d).
- ¹⁴⁴ *Misuse of Drugs Act 2001* (Tas) s33.
- ¹⁴⁵ *Control of Weapons Act 1990* (Vic) s10G, sch 1 cl 7.
- ¹⁴⁶ Office of Police Integrity, *Review of Victoria Police use of 'Stop and Search Powers'* (May 2012) <https://www.parliament.vic.gov.au/file_uploads/VPARL2010-14No128_bJxK7r5D.pdf>.
- ¹⁴⁷ VPM Policy Rules, Searches of Persons 3.3.
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- ¹⁵⁵ *Drugs of Dependence Act 1989* (ACT) ss 188, 189.
- ¹⁵⁶ *Crimes Act 1900* (ACT) s 227.
- ¹⁵⁷ *De Reus and Ors v Gray* [2003] VSCA 84.
- ¹⁵⁸ *Code of Practice for CRIME* (n 26) 150.
- ¹⁵⁹ 'Police Commissioner Says Strip Search Powers are Here to Stay' (n 27).
- ¹⁶⁰ NSW Ombudsman, *Review of Certain Functions Conferred on Police Under the Law Enforcement (Powers and Responsibilities) Act 2002* (n 62) 106.

- ¹⁶¹ New South Wales, Hansard, Legislative Assembly, 17 September 2002, 4847 (Bob Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).
- ¹⁶² NSW Ombudsman, *Review of Certain Functions Conferred on Police Under the Law Enforcement (Powers and Responsibilities) Act 2002* (n 62) 111–12.
- ¹⁶³ *Ibid* 112.
- ¹⁶⁴ It is worth noting that the Court also interpreted such searches as 'ordinary' in *Marjorie Rose and Ors v State of New South Wales* (Unreported, NSWDC, 17 February 2016). See 3.3 above.
- ¹⁶⁵ *Fromberg v R* [2017] NSWDC 259.
- ¹⁶⁶ *R v Golden* [2001] 3 SCR 679 [47].
- ¹⁶⁷ *DPP v Carr* [2002] NSWSC 194.
- ¹⁶⁸ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (n 106).
- ¹⁶⁹ See, eg, *De Reus and Ors v Gray* [2003] VSCA 84.
- ¹⁷⁰ *R v Boekeman* [2011] NSWDC 126.
- ¹⁷¹ *Criminal Investigation Act* (WA) s70(3)(b).
- ¹⁷² *Police Powers and Responsibilities Act* (QLD) s624(1)(c).
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- ¹⁸⁴ Sentas and Pandolfini (n 116).
- ¹⁸⁵ Aboriginal Legal Service (NSW/ACT), Submission to Portfolio Committee on Law and Safety, Parliament of NSW, *NSW Parliamentary Inquiry into the Adequacy of Youth Diversion Programs* (13 February 2018) <<https://www.alsnswact.org.au/wp-content/uploads/2018/02/ALS-Youth-Diversion-Inquiry-submission.pdf>>.

