



## Strip Searches, Police Power and the Infliction of Harm: An Analysis of the New South Wales Strip Search Regime

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### Abstract

Police misuse of strip search powers at music festivals, at train stations, in police vehicles and at other locations has been subject to sustained public attention in recent years. This article traces the evolution of strip search practices in New South Wales, explores the legal and policy context in which they have developed, highlights the individual and social harms arising from them and discusses the need for fundamental law reform. We argue that recent controversies regarding police strip searches and drug detection dog operations in New South Wales show policing to be simultaneously a law-making and a law-abusing power. By examining concepts concerned with how police construct their own working rules, police data and testimony provided to the Law Enforcement Conduct Commission (LECC), we explain how police justify conducting strip searches that should otherwise be considered unlawful.

### Keywords

Strip searches; Drug detection dogs; Police powers; Reasonable suspicion.

*Please cite this article as:*

Grewcock M and Sentas V (2021) Strip searches, police power and the infliction of harm: An analysis of the New South Wales strip search regime. *International Journal for Crime, Justice and Social Democracy* 10(3): 191-206. <https://doi.org/10.5204/ijcjsd.1665>

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ISSN: 2202-8005



## Introduction

The police officer then told me take everything off, including my underwear. At that point, I realised I was going to have to get naked in front of this police officer. I could not believe that this was happening to me. I could not stop crying. I was completely humiliated.

I removed all my clothing, although I kept my shoes on. I had a panty liner on my underwear, and the police officer asked me to remove it so that she could look at it.

When the police officer had finished searching my underwear and leotard, she told me to squat on the ground. I squatted down in front of her. She then squatted down and looked underneath me.

I found my friend waiting in the festival. I was extremely upset. I was sobbing. I sat with my friend, trying to calm down. I did not stop crying for approximately 20 minutes (*Evidence of 16 year-old girl, BRC, LECC 2019a: 10–11*).



He was asked to lift his shirt and show his armpits, then to remove his socks and shoes. Lastly, he was asked to pull his pants down, and the officer told him to:

“Hold your dick and lift your balls up and show me your gooch.”

The young person then lifted up his testicles, and the officer bent down to have a look, approximately one metre away from him.

GEN13C said that he was so nervous he was shaking. He was asked by police whether that was because he had drugs on him, and he explained that no, it was because he was nervous and hadn't been in this situation (*Evidence relating to 15 year-old boy, GEN13C, LECC 2019b: 12–13*).

In October 2018, the NSW Law Enforcement Conduct Commission (LECC)<sup>1</sup> initiated a systemic inquiry into the use of strip searches by NSW Police, including five separate investigations into potential police misconduct. The inquiry held two public hearings into the policing of two music festivals—Splendour in the Grass at Byron Bay in July 2018 and Lost City at Homebush in December 2019. Together, these hearings examined the individual complaints by four children of unlawful police conduct. A further three people (two adults and one child) made complaints heard through private LECC hearings. In June 2020, the LECC released its findings into the five investigations and concluded that all of the complainants were unlawfully strip searched (LECC 2020).

Although the LECC Inquiry into the use of strip searches by NSW Police is ongoing,<sup>2</sup> the evidence arising from individual investigations confirms longstanding concerns that the NSW Police are increasingly and systemically engaging in unlawful strip searching practices, often enforced with the extensive use of drug detection dogs, since 2012. These concerns were first raised by the NSW Ombudsman in 2007 (NSW Ombudsman 2007) and have consistently been brought to public attention in the NSW parliament by Greens MP, David Shoebridge.<sup>3</sup> The Aboriginal Legal Service and community legal services, themselves pursuing complaints against the police, have also experienced increasing numbers of clients reporting questionable strip searching practices. 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 (see <https://www.safeandsound.org.au>). To help inform that campaign, the authors of this article were commissioned to write a public report

examining the legal regimes governing strip searches in New South Wales and other Australian jurisdictions, highlighting examples of unlawful police practices and making recommendations for reform (Grewcock and Sentas 2019). The report met with a hostile response from the NSW Police Commissioner, who attempted to deny the data provided by the NSW Police upon which it was based and to reassert the lawfulness of current strip searching practices (see below). Despite objections from the NSW Police, the report was admitted into evidence by the NSW Deputy Coroner as part of her critical findings into the role of over-policing in the drug-related deaths of six young people at recent New South Wales music festivals (Coroners Court of NSW 2019). While the NSW Police and NSW Government rejected the Coroner's recommendations to limit the use of strip searches, mounting criticism of strip search practices and significant media coverage have led to a public debate on the need for greater transparency and practical change.

This article traces the evolution of strip search practices in New South Wales, explores the legal and policy context in which they have developed, highlights the individual and social harms arising from them and discusses the need for fundamental law reform. We argue that recent controversies over police strip searches and drug dog operations, and the fierce institutional police defence, expose some of the enduring features of policing as a simultaneously law-making and law-abusing power. Drawing on critical police study concepts outlining how police construct their own working rules, we describe how police justify conducting strip searches that should otherwise be unlawful. The primary conceptual finding of our analysis is that through strip searching, police are actively engaged in enlarging the scope of the criminal law and regenerating its purpose. This article contributes to the literature focussed on police powers by arguing that police are central to making and re-making criminal law and that this idea challenges the assumption of many law reform efforts that police can simply be made to follow the law. This leads us to conclude that, due to overriding political and internal police expectations, tensions between legal restrictions on police powers and how police power is exercised cannot simply be resolved through more law, better training or clearer guidelines.

### **The Legal Regime and Police Working Rules**

Strip searches are intimidating, highly intrusive, and would constitute an assault—potentially a sexual assault—if in the absence of any legal justification. As a result, both common law and the various statutory frameworks for the regulation of police powers have limited their lawful use to one of last resort, albeit within the permissive domain of police discretion. Here, we focus on strip searches in the field, occurring prior to a person being arrested and taken to a police station.

In New South Wales, strip searches are regulated through the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).<sup>4</sup> Under s 21 of LEPRA, a police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the officer suspects on reasonable grounds that any of the following circumstances exist:

- a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained
- b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence
- c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence
- d) the person has in his or her possession or under his or her control, in contravention of the *Drug Misuse and Trafficking Act 1985*, a prohibited plant or a prohibited drug.

In New South Wales, the leading authority on what constitutes reasonable suspicion is *R v Rondo* (2001), in which Justice Smart advanced the following propositions (in his words) regarding the threshold:

1. 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 s 357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
2. 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.
3. 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.

The common law requirements that reasonable suspicion must be individual, specific and based on objectively reasonable facts are in conflict with practical police action designed to prevent, detect and reduce crime. Legal considerations of reasonable suspicion do not feature strongly in police decision-making (Alpert, MacDonald and Dunham 2005; Quinton 2011; Fagan 2016) and do not act as rules inhibiting police action. However, as accounts of the interactions between law and policing over the last six decades attest, the law also enables minimally fettered police discretion, so that reasonable suspicion (and the law more broadly) operates as a police resource for solving particular problems, reasserting police authority, imposing order and disciplining particular social groups (Bittner 1967; Dixon 1997; Reiner 2000). As Robert Reiner put it, '[l]egal rules are neither irrelevant to nor completely determining of police practice' (2000: 86). We discuss sociolegal and criminological critiques of police suspect formation to help us understand why the legal criteria for strip searching are systematically and institutionally abused by police.

Shaping the early policing literature, Skolnick's influential 1966 work on suspicion as the defining feature of police personality, understands 'suspiciousness' as constitutive of the police mandate. Police suspicion has been variously read as symbolic association with respectability, a process for ensuring social order and a technique for shaping processes of social categorisation and marginalisation (Brogden, Jefferson and Walklate 1988; McConville, Sanders and Leng 1991; Reiner 2000). Police target 'the usual suspects' (Matza 1969) or 'symbolic assailants' (Skolnick 1966) based on their own informal 'recipe rules' (Ericson 1981) or 'working rules' (Smith and Gray 1985). Working rules are those internalised by police such that they become the effective guiding principles for intervention (Smith and Gray 1985) and structure police discretion 'on the ground' (McConville, Sanders and Leng 1991: 22). Adopting the relational approach to policing, law and social order pioneered by these scholars, working rules are shaped by and characterised with implicit racial, class- and gender-based presuppositions and stereotypes. These rules also reflect the socio-economic and political conditions that shape institutional police norms and bureaucratic expectations. 'Inhibiting rules' are those adhered to by police because they have a deterrent effect and are understood by police to be enforceable. 'Presentation rules' are those that provide the ideological basis and legitimise force in action that would otherwise be contested (Smith and Gray 1985). Legal thresholds, such as reasonable suspicion, may be used in the presentational sense by police rather than functioning as either established internalised working or inhibiting rules (Smith and Gray 1985). Reasonable suspicion, as an *a priori* consideration used to identify the suspect, is a legal fiction. Police decide what they want to do and then fit their legal powers to the decision (Bittner 1967). In doing so, reasonable suspicion in practice is assembled after the police encounter (Dixon et al. 1989).

Reasonable suspicion as doctrine originally developed in common law to protect police from liability for intentional torts. Smith (2002) maps its evolution from an implicit 'balancing role' (public interest vs individual rights) between the 18<sup>th</sup> and the early 20<sup>th</sup> centuries, where reasonable suspicion definitively evolved for the purpose of protecting suspects rights and requiring police to justify interventions into an individual's liberty. Despite the limited practical effect of this ideology and the marginal role of the courts

in regulating police discretion, formal judicial limits have been placed on some of the routine police working rules for exercising stop and search actions. The Court record in New South Wales demonstrates that police decision-making concerning what is suspicious is elusive, elastic, contradictory and often unlawful. Moreover, there is substantial judicial authority in New South Wales that reasonable suspicion is not established *prima facie* in law by a number of police working rules, including presence in a high crime area, the time of day or day of the week, refusing to cooperate with police or lawful resistance, staring at police, avoiding eye contact with police or looking nervous, the existence of prior criminal conduct, driving an expensive car that the driver does not own, or belonging to a class of persons such as hire car drivers or transport users (Grewcock and Sentas 2019: 13–14). However, in other circumstances, a combination of these factors has been found by the courts to provide a lawful basis for reasonable suspicion.<sup>5</sup>

### What is a Strip Search?

If reasonable suspicion is established, a police officer may conduct a general search in accordance with s 30 of LEPR, which enables an officer to: quickly run his or her hands over the person's clothing, require the person to remove his or her jacket or similar article of clothing and any gloves, shoes, socks and hat, examine anything in the possession of the person, pass an electronic metal detection device over the person their outer clothing or anything removed from them and do any other thing authorised by the Act for the purposes of the search.

Police interpretations of the Act and s 30 raise issues concerning the definition of, and blurred distinctions between, personal and strip searches through practices such as pulling away clothing and 'having a look' at naked parts of the body. Such practices arguably constitute a strip search, which under s 3 may include:

- a) requiring the person to remove all of their clothes
- b) an examination of the person's body (but not of the person's body cavities) and of those clothes.<sup>6</sup>

These distinctions are blurred further by routine police practices, such as requiring a naked person to squat and cough or to contort in a way that allows an officer to visually examine the anogenital region. Police have no lawful authority to require a person to squat and cough, which in effect, enables a visual body cavity search, which is prohibited under s 33(4) of LEPR (Grewcock and Sentas 2019).

The failure to find anything during the course of a general search does not constitute grounds for progressing to a strip search in the hope of finding something is secreted on the person. An officer can only proceed to a strip search under s 31(b) if the officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search. This can be established if there is both a reasonable suspicion that something is actually secreted and because of the 'seriousness and urgency' of the circumstances. As discussed below, the evidence strongly suggests NSW Police routinely ignore or misapply this two-stage test and move directly to strip searches in circumstances where neither the requisite reasonable suspicion nor seriousness and urgency exist.

A further concern, highlighted by the LECC's inquiry, is that the mandatory requirements for the conduct of all personal searches in s 32 and rules for the conduct of strip searches in s 33 are not being followed. Of particular concern to the LECC is the failure to meet the s 33 requirement that a parent or appropriate independent adult is present when a child is strip searched. At the Lost City Music Festival, of a possible 39 strip searches of children under 18, police records indicate that adults were present on only five occasions (LECC 2019b). Moreover, at both Splendour in the Grass and Lost City, no adequate arrangements for the provision of suitable independent adults were made by the police beforehand, notwithstanding they were expecting to conduct strip searches as part of their drug detection dog operations.

A further concern is that the requirement under s 32(5) of the Act to conduct the least invasive form of search practicable in the circumstances is not being met. This not only occurs in circumstances that fail to meet the requirements of the two-stage threshold but also when police remove or open clothing on a purely speculative basis or use tactics including squat and cough to humiliate or intimidate those being searched. In this context, the NSW Police Commissioner's comment defending strip searching in November 2019 that a 'little bit of fear aids law enforcement' (Daily Telegraph 2019) was more than just rhetorical—fear and humiliation is constitutive of the power to strip search as a practice. The desired crime-deterrent effect of fear (the extra-judicial punishment) becomes the institutionally endorsed reason for the exercise of power. The conflict between the legislative purpose of the strip search power (investigation in circumstances of urgency) and the preventive rationale of policing (incapacitation; assertion of authority) is productive for considering the scale, efficacy and purpose of strip searching.

### **The Scale of Strip Searching**

There is a lack of consistent, publicly available data on the scale and reasons for strip searching. Moreover, as the LECC hearings confirmed, the records of searches contained in the NSW Police database, COPS (Computerised Operational Policing System), are often incomplete and do not provide an accurate, if any, account of the reasons for a strip search (LECC 2019a, 2019b). Searches that find nothing may often not be recorded at all, suggesting that the number of strip searches is understated.

Neither the NSW Police nor the NSW Bureau of Crime Statistics and Research regularly publish strip search data. Data that have been published originates from three main sources: data provided by NSW Police to the NSW Ombudsman, answers to questions asked by David Shoebridge MP in the NSW parliament, and data provided to Redfern Legal Centre and the authors by NSW Police in response to freedom of information requests. Obfuscations, gaps and inconsistencies notwithstanding, it is clear there has been an exponential increase in the use of recorded strip searches in the field over the past ten years.

The Safe and Sound report, published in August 2019 (Grewcock and Sentas 2019: 4–5), revealed that:

- strip searches were used 277 times in the 12 months to 30 November 2006, compared to 5,483 in the 12 months to 30 June 2018; an almost 20-fold increase in less than 12 years
- three per cent of strip searches during the 2017–2018 financial year were of children under 18, and 45 per cent were of young people aged 25 or under
- Ten per cent of strip searches during the 2016–2017 and 2017–2018 financial years were of Aboriginal or Torres Strait Islander people.

Central to the concerns regarding strip searches is the extent to which they are an effective investigative tool, which is their only statutory purpose, or, as the available data, evidence to the LECC Inquiry and the recent comments by the NSW Police Commissioner cited above suggest, they are used for other purposes including general deterrence, intimidation or a public display of police authority and power.

Over 60 per cent of strip searches yield nothing of evidential value. Table 1 shows data provided by NSW Police revealed (Grewcock and Sentas 2019: 27-28):

**Table 1. Strip searches in the field where nothing was found**

	2014–2015	2015–2016	2016–2017	2017–2018
<b>Total strip searches</b>	3,735	5,082	4,456	5,483
<b>Nothing found</b>	2,400	3,336	2,843	3,435
<b>Percentage where nothing found</b>	64.26	65.64	63.80	62.65

The data for the two music festivals investigated by the LECC were, therefore, typical. At Splendour in the Grass, 512 personal searches, including 143 strip searches, were conducted. Only 125 (24%) of all searches resulted in items being found. Additionally, only 12 (8.4%) strip searches resulted in items found (LECC 2019a). At the Lost City Music Festival, an under 18 event, of a possible 39 strip searches, drugs were found on only one occasion (LECC 2019b).

The Safe and Sound report also revealed that for the 2017–2018 financial year, only 30 per cent of strip searches resulted in criminal charges being laid. Across the 4,445 charges laid during the three financial years between 2016–2017 and 2018–2019:

- 82 per cent were for possession of a prohibited drug
- 14 per cent were for the supply of a prohibited drug
- Under 1.5 per cent were for possession or use of a prohibited weapon (Grewcock and Sentas 2019: 28).

It can be inferred from these data that the strip search regime is primarily being used for the enforcement of the summary offence of drug possession, rather than the serious indictable offences for which the power to strip search was envisaged. Without another reason, suspected possession of a drug alone would not satisfy the serious and urgent criteria necessary for the lawful conduct of a strip search. Indeed, since January 2020, the ability of police to impose on-the-spot fines for possession of small quantities of drugs undermines the proposition that simple possession is serious and urgent.<sup>7</sup> Moreover, during the 2016–2017 and 2017–2018 financial years, only 26.7 per cent of the strip searches recorded by the police as undertaken for the reason of drug possession resulted in criminal charges for the possession of drugs (Grewcock and Sentas 2019: 29), further suggesting that the initial threshold of reasonable suspicion is not being met.

A potential explanation for the escalating numbers of strip searches and the focus on drug possession is the extended use of drug detection dogs. Under s 146 of LEPPRA, police are empowered to use a drug detection dog for the purposes of a search for prohibited drugs. However, contrary to NSW Police practice and the relevant NSW Police Standard Operating Procedures, an indication from a drug dog alone does not automatically provide police with sufficient grounds for conducting a search in accordance with s 146 (see further below).

An initial review of the first two years' use of drug detection dogs conducted by the NSW Ombudsman in 2007 noted that while the stated objective for introducing drug detection dogs was to assist police in identifying persons in possession of drugs, especially for the purposes of supply, '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' (NSW Ombudsman 2007). The Ombudsman's finding

reflected a wider failure of drug detection dogs to reliably identify those in possession of prohibited drugs. Data provided to David Shoebridge MP (Legislative Council 2019) demonstrate that less than one-quarter of personal searches conducted following a drug dog indication result in drugs being found and that subsequent successful prosecutions for indictable (supply) offences are negligible (see Tables 2 and 3).

**Table 2. Personal searches following a drug dog indication where illicit drugs were found**

Financial year	Number of searches where illicit drugs found	Percentage of total searches
2011–2012	2574	17.85
2018–2019	2757	23.9

**Table 3. Successful prosecutions for indictable offences under the *Drugs Misuse and Trafficking Act* following drug dog indications**

Financial year	Number of prosecutions	Percentage of searches following drug dog indications
2011–2012	50	0.34
2018–2019	98	0.849

Despite these trends, and contrary to recommendations from the Ombudsman, the sites where drug dogs can be used were extended in 2012. Under s 148 of LEPR, police are now empowered to use drug detection dogs across the public transport network, in or outside licensed premises not primarily serving food, entertainment venues (including sports grounds, music festivals, theatres) and any public place in Kings Cross, Sydney. This allows for set-piece, high profile public drug detection operations such as the music festivals currently under investigation by the LECC and those attended by the six young people whose deaths were investigated by the State Coroners Court of NSW (2019). It has also enabled sniffer dog patrols at railway stations (sometimes accompanied by the setting up of screens behind which searches may be conducted), smaller venues such as the Enmore Theatre and many pubs, clubs, bars, even including Sydney Harbour pleasure cruise boats (Agnew-Pauley and Hughes 2019).

The proliferation of sniffer dog use suggests that the NSW Police are using drug dogs to target particular forms of leisure activity associated mostly with younger people in the expectation that drug-taking, as opposed to significant supply, may be taking place. Arguably, this activity has now reached the point where young people, many of whom have not previously experienced regular contact with the police and do not fall within popular constructions of the usual suspects, expect to be confronted by sniffer dogs if they attend any sort of public entertainment event.

However, the increased visibility of dog operations and the media focus on music festivals shield less visible, routine strip searching practices. Approximately 10 per cent of strip searches in the field are conducted on Indigenous peoples (who represent 3.4% of the population of NSW, see Table 4), and there are longstanding concerns raised by advocates within Indigenous communities that such disproportionate use of strip searches is being used to intimidate and control those communities (Grewcock and Sentas 2019: 25–31). It is only since these practices have been more widely recognised in the wider public domain that increased scrutiny has been applied. However, the racialised dimensions of how and why Indigenous peoples are strip searched is beyond the scope of this paper and is subject to ongoing research.



**Table 4. Total number of Aboriginal and Torres Strait Islander peoples strip searched in the field in New South Wales**

	2016–2017	2017–2018
Total strip searches	4,440	5,451
ATSI people searched	483	535
ATSI % of total	10.8	9.8

### Systemic Unlawfulness

The systemic unlawfulness of strip searching practices manifests in two fundamental ways: as breaches of the requirements imposed by LEPPRA; and as non-compliance with internationally recognised human rights standards, including the principles of legitimate purpose, legality, necessity and proportionality, reasonableness and of equality and non-discrimination (Grewcock and Sentas 2019: 15).

As an institutional practice, the use of sniffer dogs appears to be expanding police perceptions of reasonable suspicion. Evidence given to the LECC by police officers who conducted strip searches at the two music festivals made it clear that officers working alongside dog teams expected strip searches to be undertaken following positive indications from a dog and demonstrated little if any knowledge of the legal requirements regarding reasonable suspicion, seriousness and urgency. For example, the following exchange occurred during the evidence of Officer BR3, in relation to searches at Splendour in the Grass:

Q. [*Counsel assisting*] Was there ever a case where there was a drug dog indication and you did not conduct a search?

A. I can't recall.

Q. Would you agree it is very likely that a search was conducted in every case following a drug dog indication?

A. Yes.

Q. Were all of those strip searches?

A. I couldn't confirm 100 per cent on that.

Q. I want to suggest to you that following a drug dog indication, you did not conduct any pat-down searches and leave the search at that. Is that correct?

A. Yes, then...

[The officer then agrees he conducted 19 strip searches at the festival]

Q. What, in those 19 searches, justified it on the basis of first, seriousness, and secondly, urgency?

A. In relation to urgency, I believe that fears for their safety in relation to items that may be secreted that could cause harm.

Q. [*The Chief Commissioner*] I see. This would be secreted in their body cavities, would it?

A. Yes.

Q. Well, you can't search those.

A. No, exactly.

Q. So a search is not going to help there, correct?

A. Yes.

Q. So we can discount the body cavity reason for urgency, can we not?

A. Mmm, yes...

Q. So that reason couldn't make it urgent. What other reason would make it urgent, the search?

A. I can't think of anything, sir...

Q. I take it, until we have had this exchange now, that particular issue had never really ...come across your radar as something you needed to think about when you were doing a field search; is that fair to say?

A. Yes, that's fair to say, sir. This has been a massive learning experience for me.

[The questioning by the Chief Commissioner then moves onto the issue of seriousness]

Q. Where drugs are an issue, will they always be serious?

A. Depends on the type of drugs and the amount.

Q. Right. But you don't know that until after the search?

A. That's correct.

Q. But it seems to follow that the only way one can sensibly apply that test is 'potentially serious' because you are never going to know.

A. Certainly, sir.

Q. And then the question is: how do you measure that potential? Is there a slight chance? A real chance? A substantial chance? And so on. It is a matter of fact and degree in each case?

A. Yes, I agree.

Q. So am I right in saying that again, in your training, there is no real attention given to what might constitute seriousness?

A. Yes, I agree (LECC 2019a: 123–128).

Beyond the immediate focus of its investigation, the LECC Inquiry, and in particular the public hearings, provided a valuable snapshot of police strip searching practice and its relationship to the law. This is especially important given the relative paucity of judicial oversight of policing in the courts, either because searches are not leading to contested criminal charges or because magistrates are not closely scrutinising the basis on which searches are being conducted (see, for example, the successful appeal in *Fromberg v R* [2017]).

The frontline officers who gave evidence at the LECC public hearings displayed a profound lack of understanding of the law (especially LEPR), reflecting an absence of training and supervision. This was reflected in the strong focus of the LECC's recommendations across its five individual investigations and in its final report.<sup>8</sup> However, the LECC investigations also revealed that the officers attending the festivals, many of whom came from other area commands, were simply conducting strip searches as an expectation when attending a festival, or as they normally would as general duties officers, albeit less frequently. It is reasonable to conclude, therefore, that police practice was shaped by the specific institutional norms governing policing and drug dog operations. The repetitive nature of police practice conditions a categorical approach whereby the informal working rule (e.g., that young people likely secrete drugs at festivals is serious, thereby justifying blanket strip searches) supersedes the individual, factual considerations and contexts required by reasonable legal suspicion. The police working rule that blanket strip searches are a legitimate response to the presumption that young people may have items secreted in their bodies has been consolidated into an institutional response, distorting the additional legal obligation under s 31 of LEPR to consider individually the seriousness and urgency of the circumstances before conducting a strip search. Thus, the Submissions of the Commissioner of Police to the NSW 'Ice Inquiry',<sup>9</sup> justifying current strip search practices, stated (at para. 38): 'It cannot be said that, if a police officer suspects that a person is internally secreting drugs, that the circumstances would not be both serious and urgent' (NSW Police 2019). Despite the implication in this submission that strip searches are concerned with avoiding harm, the LECC hearings demonstrated that concerns about the harmful impacts of strip

searches are absent from either police working, inhibiting or even presentational rules governing strip searches.

### **Rolling Back Strip Searches?**

The social harms associated with the use of strip searches compel debate regarding whether police should have the power to strip search at all, beyond merely whether existing protections and safeguards are adequate. While police are legally empowered to use 'reasonable force' in conducting strip searches, whether the inherent degradation, humiliation and violence of strip searches can ever be reasonable, regardless of whether the officer is acting with respect and in accordance with the law, remains to open question. Strip searches in custodial settings have been found to be used for the purposes of punishment and humiliation (Office of the Inspector of Custodial Services 2019: iii). The significant psychosocial harms of strip searches documented in both police custody and prison include triggering psychological conditions such as post-traumatic stress disorder (Pereira 2001), the re-traumatisation of those who have experienced sexual violence (particularly women) (Stathopoulos et al. 2012; *R v Golden* 2001) and the disruption of identity formation and long term well-being for young people (Malins 2019). As such, strip searches are fundamentally a violent state power. Understood as a process of subjugation, the intended violation of a person's bodily integrity through strip search is aimed at producing vulnerability and fear. The LECC's abandoning of public hearings into the harmful impacts of strip searches (AAP 2020) missed the opportunity to shape the parameters of the ongoing debate on the societal effects of the abuse of police power as a state responsibility. This was particularly important given that, unlike Canada and other jurisdictions where there has been important case law on these issues (see, for example, *R v Golden* 2001), there is an absence of human rights legislation in NSW or at the Commonwealth level through which to challenge systemic human rights breaches by the state.

To date, public discussion of harm has largely been framed around the issue of pill testing at music festivals and dangerous practices such as pre-loading of drugs to avoid drug dog detection. In her report on the deaths of six young people at music festivals delivered in November 2019, NSW Deputy Coroner Grahame placed a considerable focus examining the evidence that coercive and high visibility police approaches to music festivals in NSW were at odds with a harm minimisation approach and are harmful in themselves (NSW Coroners Court 2019: 94–104). The Coroner went on to recommend to the NSW Government that it permits and facilitates pill testing at festivals and to the NSW Police Force, and:

1. That, given the evidence of a link between the use of drug dogs and more harmful means of consumption (including panic ingestion, double dosing, pre-loading, and insertion in a vaginal or anal cavity), the model of policing at music festivals be changed to remove drug detection dogs.
2. In order to address the harm potentially caused by the current practice of police strip searching for possession of drugs (including more harmful means of consumption and secretion and adversely affecting the relationships between patrons and police meaning it may be less likely that patrons will seek help from police), the NSW Police Commissioner issue an operational guideline or amend the relevant police handbook such that strip searches should be limited at music festivals to circumstances where:
  - a. There is a reasonable suspicion that the person has committed or is about to commit an offence of supply of a prohibited drug
  - b. 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
  - c. The reasons for conducting the search are recorded on Body Worn Video before the search commences
  - d. No less invasive alternative is appropriate in the circumstances (NSW Coroners Court 2019: 137–138)

Both the NSW Government (NSW Government 2019) and the NSW Police (Smith 2019) rejected the key recommendations concerning pill testing and drug detection dogs, committing only to the introduction of drug amnesty bins near the entrances to festivals and reasserting the perils of consuming illicit drugs and the efficacy of drug detection dogs. Similar proposals made by the Ice Inquiry in February 2020 were likewise rejected by the NSW Government.<sup>10</sup>

### **Police Power, the War on Drugs and Law Reform**

The responses of the NSW Government and NSW Police to the cumulative criticisms of strip searching practices and the Coroner's recommendations reflect the longstanding authoritarian drift in criminal justice policy and highlight the significant challenges to achieving meaningful law reform.

In their analysis of the legislative expansion of police powers in New South Wales in 2017–2018, Sentas and Grewcock (2018), drawing on the work of Dubber, argue that New South Wales criminal law is, in two senses, increasingly shaped by a police power model. First, the capacity of the police to initiate and effectively shape the content of criminal law, and second, these particular criminal laws themselves resemble pre-emptive executive police power. However, the rise of strip searches is not facilitated by new legislation. Instead, we are confronted with a significant shift in police operational practice facilitated by the expansion of drug detection dog powers in 2012 but rooted in longstanding statutory capacities to conduct personal and strip searches since 2005. LEPR expanded the common law approach from fundamentally limiting police power protecting individual liberty to a 'balancing' between individual rights and crime control. The surge in strip searches rests upon, and in turn shapes, institutionalised police interpretations of vaguely worded legal powers that authorise broad police discretion. Rather than acting as the detached enforcers of the law, the police are active agents in its construction, regenerating the purpose and enlarging the scope of the law.

Thus, the NSW Police and, in particular, the NSW Police Commissioner Mick Fuller have been publicly proactive in defending and justifying current strip searching practices, attacking critics (see 2GB Radio 2019; ABC Drive 2019), opposing recommendations for reform from the Safe and Sound report, the NSW Ombudsman, the NSW Coroner and the Ice Inquiry. In so doing, NSW Police appear to have the support of the state government, which, by its relative silence, appears content for the Commissioner to take the lead on this. The actions of sections of the tabloid media, which have denigrated critics and launched a pre-emptive attack on Coroner Grahame after her draft report was leaked, resulted in threats of violence being made against her (Thompson and Visentin 2019).

At one level, this is the latest iteration of an established cycle of law and order policing in New South Wales (Brown and Hogg 1996). However, this also reflects a highly visible assertion of police authority and control over public space and 'the usual suspects' being enabled by the war on drugs. Drug detection dog laws extend traditional forms of police surveillance (Marks 2007) and offer police the capacity to physically enter and intrude on personal privacy in public spaces in ways not previously possible. The normalisation of drug detection dogs in venues such as railway stations, licensed premises and music festivals works to extend the violence of the police power to search while also operating as a vector of legitimate police force.

The practical elision of drug dog indication and strip searches, and the intimidation and abuse enabled by it, is shielded further by the relative non-justiciability of police powers—an instance of law passively enabling poor police working rules. Routine encounters between the police and the policed typically exist in a realm beyond the formal record (Dixon 1997). Poor and inconsistent police record-keeping practices operate as a convenient form of denial in the event of formal complaints. The use of cautions and on-the-spot fines divert police searching practices from the possibility of judicial scrutiny, while guilty pleas, particularly in the context of the deeming provisions for drug supply (see below), offer an incentive not to challenge police evidence. The capacity to make formal complaints is also constrained by the flawed

system of police investigating themselves, the limited resourcing of the LECC to conduct independent investigations and the inclination of the police to settle civil actions, thus avoiding further scrutiny.

Accepting the centrality of police power to making and re-making criminal law challenges assumptions that the police can simply be made to follow the law. Criminal law, in the form of police powers, is dynamic, interpretive and embedded in the structural conditions of its existence. There is a constant tension between the formal restrictions on police power imposed through mechanisms such as LEPRA and practice on the street. These tensions are not fundamentally resolved through better training or clearer guidance on the exercise of police powers, as useful as they might be in individual cases. There are larger political and internal police expectations that strip searching reduces and deters personal drug use; the use of key performance indicators and other target-based systems of accounting for internally measuring and encouraging their use and the practical reality that individual officers conducting strip searches are rarely held to account. While beyond the scope of this article, critical assessment of the LECC declining to make findings of individual or systemic serious police misconduct in four out of five of its individual investigations to date is warranted. It is hard to believe that such structural drivers do not significantly impact police decision-making, the exercise of discretion, and police constructions of threshold concepts such as reasonable suspicion discussed above.

There is, however, some momentum for reform of the personal search provisions in LEPRA, not least from the LECC Inquiry and its final report to come. In the Safe and Sound report, we outlined four major areas of reform: clarifying the definition of a strip search to include pulling clothing away from the body and prohibit practices such as squat and cough, limiting the concepts of seriousness and urgency to prevent them from being used for suspected drug possession, prohibiting the strip searching of children without a court order and mandatory reporting.

While such reforms might reduce the escalation of strip searches, a major hurdle to law reform in relation to strip searches is its close relationship to drug prohibition. As evidenced by its refusal to implement the Coroner's recommendation to introduce pill testing at music festivals and its response to not adopt the recommendations of the Ice Inquiry to decriminalise personal drug use, the current NSW Government appears committed to maintaining its war on drugs. As a matter of public policy, personal drug use appears destined to remain a criminal justice issue rather than one of public health for the foreseeable future.

Moreover, the proliferation of strip searching is sustained in law by the construction of 'supply' within the *Drugs Misuse and Trafficking Act* (DMTA). The deeming provisions in s 29 of the DMTA, which create a legal burden on an accused in possession of scheduled trafficable quantities to rebut a presumption of supply, encourage police to use reasonable suspicion of possession as reasonable suspicion of potential supply and to maintain a misleading public narrative that strip searching targets supply. Thus, the Commissioner of Police's submissions to the Ice Inquiry argued (para. 34):

To require police to further establish a reasonable suspicion that a person has or is about to supply a prohibited drug is impracticable. It is impracticable for police to formulate any suspicion as to the amounts of drugs a person may be in possession of. It is also important to note that a supplier can be in possession of a large amount of drugs or may be in possession of and supply one single pill (NSW Police 2019).

While such premises underpin police practice, the impact on strip searching of any move towards the decriminalisation of personal possession may not be significant in the absence of the repeal of the deemed supply provisions.

## Conclusion

There is little indication the NSW Police intend to scale down the use of strip searches or that the NSW Government is inclined to consider meaningful law reform. Nevertheless, the extent of strip searching and the visibility of drug detection dogs, combined with the growing number of first-hand accounts being

placed on the public record by those subjected to searches, suggests the issue is unlikely to be readily sidelined. How to build the momentum for the reform of strip search laws is beyond the scope of this article. Nevertheless, it is important that public debate about strip searches goes beyond individual cases that can be described as exceptional to consideration of the systemic drivers of current practices. We have argued that the police working rules that purport to justify strip searches also re-make the criminal law in aid of police imperatives.

Attention to police processes matters. Strip searches are inherently invasive and easily deployed by police as a mechanism for intimidation and abuse. While notionally conducted in private, they operate as visible assertions of police power in the public domain through the use of tents and search booths and their association with drug detection dogs. This is occurring in the context of a replenished political commitment by the NSW Government to the policing of personal drug use and an ongoing assertion by the NSW Police of its central role in defining the practice of drug laws. As the LECC public hearings illustrate, there is a pressing need for transparency regarding police conduct of strip searches. This extends from proper record keeping of the scale of, and rationales for, strip searches through to informed interrogation of those with operational responsibility. Some of these aims may be achieved through ongoing monitoring by the LECC and by more rigorous judicial scrutiny. However, fundamental change is unlikely in the absence of law reform designed to limit strip searches to genuinely exceptional circumstances by restricting the scope of the power currently enabled through LEPPRA, abandoning current approaches to drug prohibition and reducing the capacity of the police to shape the law in practice. Not only is a holistic approach to law reform required, but a critical appraisal of the conditions of policing that law reform is able to regulate is also needed, given the executive power wielded by police.

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<sup>1</sup> The Law Enforcement Conduct Commission was established in 2017 as the body responsible for overseeing, investigating and monitoring serious misconduct and mal-administration in the NSW Police Force and NSW Crime Commission. See <https://www.lecc.nsw.gov.au>; and *Law Enforcement Conduct Commission Act 2016*.

<sup>2</sup> This article was written prior to the release of the final report in December 2020. The report, including a separate review by LECC in January 2020 of NSW Police Standard Operating Procedures for the Conduct of Strip Searches, will be the subject of further analysis by the authors. The reports can be found at: <https://www.lecc.nsw.gov.au/investigations/past-investigations/investigation-reports-from-2020/review-of-strip-search-sops>; and <https://www.lecc.nsw.gov.au/news-and-publications/publications/final-report-an-inquiry-into-nsw-police-force-strip-search-practices-15-december-2020.pdf>.

<sup>3</sup> David Shoebridge MLC has been one of the very few NSW MPs prepared to consistently raise issues of concern around the exercise of police powers. See: <https://www.parliament.nsw.gov.au/members/Pages/member-details.aspx?pk=55>.

<sup>4</sup> Under Australia's federated structure, police powers are state responsibilities.

<sup>5</sup> See *R v Rondo* [2001] NSWCCA 540; *R v Fortescue, Michael* [2010] NSWDC 272; *Attalla v State of NSW* [2018] NSWDC 190; *Le v State of New South Wales* [2017] NSWDC 38; *R v Yana Orm* [2011] NSWDC 26; *Moses v State of New South Wales* (No 3) [2010] NSWDC 243; *Black v R* [2017] NSWDC 326.

<sup>6</sup> A cavity search can only be conducted by a medical practitioner in accordance with the Crimes (Forensic Procedures) Act 2000 (NSW)

<sup>7</sup> See Criminal Procedure Regulation 2017, Schedule 4

<sup>8</sup> See footnote 2.

<sup>9</sup> NSW Department of Premier and Cabinet, The Special Commission of Inquiry into the Drug 'Ice', <https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/the-special-commission-of-inquiry-into-the-drug-ice/>

<sup>10</sup> See <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/01-Interim-NSW-Government-response-to-the-Special-Commission-of-Inquiry-into-the-Drug-Ice.pdf>

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