REPORT TO PARLIAMENT ON A MATTER ARISING UNDER SECTION 195(1)(C) OF THE *CORRUPTION, CRIME AND MISCONDUCT ACT 2003*

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003* (WA)

8 February 2022

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1. EXECUTIVE SUMMARY

This report is made pursuant to my functions in section 195(1) of the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) to report and make recommendations to either House of Parliament and to the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC).

The report addresses an issue of which I became aware in the course of exercising my function in section 195(1)(c) of the CCM Act, and a summary of the relevant case was included in my 2020-2021 Annual Report. The purpose of the present report is to provide additional detail on the matter.

The matter came to my attention via the JSCCCC, which received correspondence from the complainant in connection with its Inquiry into the Corruption and Crime Commission's oversight of police misconduct investigations, particularly allegations of excessive use of force. The resulting report, *If Not the CCC…then where? An examination of the Corruption and Crime Commission's oversight of excessive use of force allegations against members of the WA Police Force* was tabled in Parliament on 24 September 2020.

The complainant's correspondence to the JSCCCC related to her arrest in early 2020 and her treatment by the arresting officers. On receiving it the JSCCCC referred the matter to my office, and I dealt with it pursuant to section 195(2)(d) of the CCM Act.

I do not propose to identify the police officers who arrested the complainant. Like the Corruption and Crime Commission (Commission) itself, I am subject to statutory restrictions on disclosing official information and although I am empowered to disclose such information in particular circumstances, including when reporting to the Parliament or the JSCCCC, I do not consider it necessary to name the officers for the purpose of the present report.

For the reasons set out below, I have not been able to assist the complainant to secure an alternative outcome. However, my concerns about the circumstances of her arrest have prompted me to draw this matter to the attention of the Parliament, and to recommend that amendments to relevant provisions of the *Criminal Investigation Act 2006* (CIA) be considered.

2. MISTAKEN IDENTITY AND ARREST

The complainant in this matter was at the time 51 years old. She has severe arthritis, for which she requires the assistance of walking aids or a motorised scooter, and she is in receipt of the disability pension.

Shortly after 9 pm on 23 March 2020 two police officers attended the complainant's place of residence and, after a brief discussion, arrested her on suspicion of stealing a few boxes of hair dye from a local pharmacy five days earlier.

The precise value of the goods that had been taken from the pharmacy is not clear, but the BOLO ('Be on the Lookout') flyer generated by police stated that the suspect 'removed several boxes of hair dye…and placed them down her top'. This description would suggest that relatively few goods were taken. A box of hair dye typically retails in

Western Australian pharmacies for between $7 and $20 per box. At its highest, then, it seems the offence related to goods of a value below $100.

The two officers who arrested the complainant did so following an anonymous tip-off as to the suspect's name and address. No efforts were made by those officers to establish the identity and bona fides of the alleged eyewitness who had nominated the complainant as a suspect. However, the complainant's driver's licence photograph was obtained and compared to CCTV stills from the pharmacy on the day of the theft.

The CCTV stills were contained in a case file. When the officers visited the complainant's home to speak to her about the offence, the case file was left at the station. Therefore, on meeting the complainant, the officers were not able to compare her appearance to the CCTV stills while at her place of residence. Had they been able to do so, they would have immediately become aware that the suspect in the stills had one leg while the complainant had two; was of a different physique; and used a wheelchair rather than a mobility scooter. They would have realised that the complainant could not possibly be the suspect and would not have arrested her. However, despite not having the CCTV stills, the officers chose to arrest the complainant for stealing the hair dye products.

Following her arrest, the complainant was taken to the police station in the rear unit of a police vehicle, which was very uncomfortable for her given her disability. Upon her arrival at the station, it very quickly became apparent to the officers that she was not the woman captured in the CCTV stills from the pharmacy. The officers apologised to the complainant. They then transported her home, again in the rear unit of the police vehicle. She was not invited to sit in the police vehicle itself or offered alternative transportation.

The complainant raised this matter with the WA Police Force (WAPF), which notified the Commission in accordance with section 28 of the CCM Act and simultaneously began conducting its own investigation. The Commission referred the matter back to the WAPF for action and elected to monitor and review the action taken. The police, and the Commission, ultimately concluded that although the arresting officers' conduct had been unsatisfactory, the arrest had not been unlawful under the CIA.

As a result of her complaint to the WAPF, the complainant received a written apology from the relevant Police Superintendent for the arresting officers' conduct. She was also formally advised that the officers had been disciplined and that all record of her nomination as a suspect in the shoplifting matter had been removed from police records. Nevertheless, she was left profoundly shaken following the incident. She remains in fear of police and is still undergoing counselling as a result. The complainant also suffered a shoulder injury in entering and exiting the rear unit of the vehicle. I understand that the police contacted her late last year and undertook to reimburse her for her out of pocket medical expenses in connection with her shoulder injury, but apparently this did not eventuate as her costs had already been covered by Medicare.

The complainant remained unhappy about her treatment by police and what she considered the lack of appropriate consequences for the arresting officers. Accordingly, when she became aware of the JSCCCC's Inquiry into the Commission's oversight of allegations regarding the use of force by police, she wrote to the then Chair about the circumstances of her arrest.

When I received the complaint's correspondence from the JSCCCC, I obtained the Commission's file and considered it. I then wrote to the Commission to express my view that the complainant's arrest had been not only unnecessary but unlawful. The basis for my conclusions in this regard is set out below.

3. ARREST WITHOUT A WARRANT

The complainant was arrested without a warrant pursuant to section 128(2) of the CIA. This section provides that an officer may arrest a person for a 'serious offence' if he or she 'reasonably suspects that the person has committed, is committing, or is just about to commit, the offence'. Section 128(1) of the CIA defines 'serious offence' to mean, among other things, an offence in respect of which the statutory penalty is or includes imprisonment for five years or more or life.

Where an offence does not meet the definition of 'serious offence' in section 128(1), additional restrictions apply. Thus in these circumstances, section 128(3) of the CIA provides that an officer may only arrest a person without a warrant if the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the offence; and that if the person is not arrested it will not be possible, in accordance with law, to obtain and verify the person's name and other personal details; or the person will continue or repeat the offence; or the person will commit another offence; or the person will endanger another person's safety or property; or the person will interfere with witnesses or otherwise obstruct the course of justice; or the person will conceal or disturb a thing relevant to the offence; or the person's safety will be endangered.

None of these circumstances were applicable to the complainant in this instance. Therefore, her arrest could only have been lawful if the offence for which she was arrested was 'serious' within the definition in section 128(1) of the CIA and, just as importantly, if the arresting officers reasonably suspected her of committing it.

Section 4 of the CIA provides that 'a person reasonably suspects something at a relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if they are subsequently found to be false or non-existent), when judged objectively, are reasonable'.

The Commission had concluded that the arrest was lawful. As to the first requirement in section 128(2) of the CIA, it noted that the offence of stealing is 'serious' as it carries a statutory penalty of seven years' imprisonment under section 378 of the *Criminal Code*. That is, given the statutory penalty for stealing includes imprisonment for five years or more, the complainant's supposed offence was considered 'serious' in accordance with section 128(1) of the CIA. As to the second requirement, the Commission was of the view that the arresting officers 'reasonably suspected' the complainant of having committed the offence, noting that the officers relied on an anonymous tip-off, the presence of a mobility device in the complainant's driveway, and perceived similarities between her driver's licence photo and the woman pictured in the CCTV stills.

The Commission's conclusion that the offence for which the complainant was arrested was 'serious' follows from the plain words of the CIA. However, I remain troubled by its broader implications. If any charge of stealing under section 378 of the *Criminal Code*,

no matter how trivial, is 'serious' under the definition set out in section 128(1)(a) of the CIA and thus authorises arrest without a warrant in accordance with section 128(2), this gives police very wide powers of arrest. Further, these powers may be exercised in respect of offences that are obviously minor in real terms.

The variation in the degree of culpability involved in stealing offences is reflected in the terms of section 426 of the *Criminal Code*, which provides for summary conviction penalties for particular stealing offences. Notably, section 426(4) provides that for an offence under section 378 where the value of the property in question does not exceed $1000, the applicable summary penalty is a fine of not more than $6000 with no provision for imprisonment.

Given that in this instance the complainant was alleged to have stolen no more than a few boxes of hair dye, it appears likely that the above penalty would have been applicable. Certainly, it would be fanciful to suggest that the arresting officers thought there was even a remote possibility that the complainant – or any other person – would be sentenced to five years' imprisonment for the theft of several boxes of hair dye. This conclusion is supported by the fact that, when located, the actual offender was not arrested and instead received an infringement notice.

4. A REASONABLE SUSPICION

In my letter to the Commission, I contended that it was extremely doubtful that section 128(2) of the CIA could be said to authorise the complainant's arrest on the basis of the officers' 'reasonable suspicion'.

As noted previously, had the arresting officers brought the case file to the complainant's home, she would not have been arrested due to the obvious physical differences between her and the suspect. In my view a reasonable observer would conclude that, once the officers realised that they were not in possession of the case file, they should have returned to the police station to retrieve it to ensure that their suspicions were well-founded. This is particularly the case given that 'police officers are expected to be circumspect in exercising powers of arrest': *Perrin v Jackson* [2008] WASC 77 at [79].

There was no urgency that compelled the officers to carry out the arrest, and nothing to suggest any impediment to their simply going back and checking the case file before proceeding. It was a two-minute journey from the complainant's home to the local police station and the theft of which the complainant was accused was, on any view, at the lowest end of the scale.

In my letter to the Commission, I suggested that a failure to inform oneself of available facts, consciously or unconsciously, could not mean that whatever is in an officer's mind will meet the requirement of 'reasonably suspects' in section 128(2) of the CIA. Despite the fact that the police officers were responding to an anonymous tip-off as to the complainant's name and address, there were specific features of the offender in this matter that could very easily have been identified if the officers had undertaken even the most cursory examination of the CCTV footage stills before making an arrest.

Relevantly, I referred to the case of *R v Nguyen* (2013) 117 SASR 432, which was referred to in *Labriola v Morgan* [2017] WASC 256. *Nguyen* concerned police officers' powers

to search persons and detain and search a vehicle under sections 52(6) and 52(9) of the *Controlled Substances Act 1984* (SA), which also use the term 'reasonably suspect'. In *Nguyen*, the court observed at [22] that 'a suspicion that a fact exists, in the context of an investigation of the truth of that fact, is a working hypothesis for which there is some supporting material'. At [23] it continued:

> The additional element of reasonableness means that the information or material from which the suspicion arises must not only rationally produce a suspicion in the mind of the police officer, but it must also engender that suspicion in the mind of a person thinking reasonably about the information … It is not reasonable to suspect the existence of facts on flimsy material or by a process of reasoning which relies on tenuous, albeit rational, connections

Obviously, the most important and, indeed, determinative 'supporting material' – the CCTV stills contained in the case file – were not referred to or relied upon at the time of the arrest. In essence, the facts and circumstances relied upon to justify the arresting officers' suspicion (the apparent tip-off) were founded on 'tenuous…connections'.

5. RESPONSE FROM THE COMMISSION

My letter to the Commission was sent on 16 December 2020. On 17 December 2020 the Acting Commissioner acknowledged receipt of my correspondence. He noted that the matters raised required careful consideration and undertook to respond in due course once this had taken place.

On 12 April 2021 the Acting Commissioner advised that the Commission maintained its view that the complainant's arrest was not unlawful, but that the arrest was considered oppressive and unreasonable. Consequently, the arresting officers' conduct constituted reviewable police action pursuant to section 3 of the CCM Act. The Acting Commissioner noted as follows:

- At the time of the arrest, the officers suspected the complainant of committing an indictable offence pursuant to section 378 of the *Criminal Code*.

- Although sections 3 and 5 of the *Criminal Code* provide a process by which some indictable offences may be dealt with summarily and the summary penalty imposed, the summary penalty only becomes applicable if the prosecuting authorities decide to charge the accused in a summary court and the accused is then convicted of the offence. Until the charges are actually preferred in the summary court, the charge may be dealt with by way of indictment and the charge remains an indictable offence. Further, even if a charge for the offence is laid in a summary court, the court may decide that the charge should not be dealt with summarily in which case, the summary penalty is not applicable.

- It follows that the offence was an indictable one for the purpose of determining whether the power to arrest under section 128(2) of the CIA was enlivened. The summary penalty provision for the charge was irrelevant for that purpose.

- At the time of arresting the complainant, the relevant officers had information upon which to form a reasonable suspicion that she was the offender. Specifically,

the officers had undertaken a comparison of a still photograph from CCTV footage and the complainant's motor vehicle licence photo, which presented some resemblance, and had been told the offender used a mobility scooter which she had in her driveway.

- Most importantly, an informant had identified the complainant by name as the relevant offender. Based on the officers' knowledge at the time of arrest, it was not unreasonable for them to have formed a reasonable suspicion that the complainant had stolen the hair products.

- While the power to arrest under section 128(2) of the CIA was therefore enlivened, the decision whether or not to arrest a person is a matter of discretion. Rather than issue a summons to the complainant, who has a fixed place of abode, and also has disabilities and severe arthritis, to attend court on the charge of stealing, the relevant officers chose to arrest her. They did so five days after the offence, despite the low value of the stolen items. The arrest was unreasonable and oppressive in the Commission's view, although it was not unlawful.

- The WAPF investigation concluded that the arresting officers failed to ensure they had appropriate information and evidence before them to assess whether they had a reasonable suspicion to arrest the complainant. Both officers were served managerial notices as a result.

On 19 April 2021 I wrote to the Acting Commissioner to thank him for his letter. I advised that I remained of the view that the complainant's arrest was unlawful. However, I acknowledged that it would not be constructive to continue debating this question. Ultimately, this was a situation in which the Commission had reached a conclusion with which I disagreed but which was, arguably, open to it in all the circumstances. Finally, I advised that although I had exhausted my functions in relation to the complaint, I intended to raise my concerns with the JSCCCC and the Attorney General.

On 19 April 2021 I wrote to the complainant, summarised the response provided by the Commission, and explained that my file on her complaint was now closed.

On 2 June 2021 I wrote to the Attorney General on the matter and respectfully requested that he consider amending the powers of arrest in the CIA. On 4 June 2021 I sent a copy of that correspondence to the newly reconstituted JSCCCC.

On 7 September 2021 the Attorney General wrote to me to advise that my correspondence had been forwarded to the Minister for Police for his consideration and that he had instructed his Department to assist in the event that the Minister decided to consider possible amendments to the CIA.

On 15 September 2021 I tabled my office's Annual Report for the 2020-2021 financial year. The report included a summary of the complaint discussed here.

At the time of writing, I have not received any correspondence from the Minister for Police in response to the issues raised.

6. BACKGROUND TO THE *CRIMINAL INVESTIGATION ACT 2006*

My purpose in tabling this report is not to assert that the police and the Commission have erred in their interpretation of the CIA. The plain wording of the relevant provisions enables a police officer to arrest a person without a warrant for even a trivial offence, provided that the statutory penalty is not less than five years' imprisonment *and* the arresting officer held a reasonable suspicion that the accused person had committed the alleged offence.

However, although this outcome emerges from the text of the CIA, it appears inconsistent with that Act's overall intent. I do not propose here to canvass the history and antecedents of the CIA in any detail, but it is instructive to note that it formed part of a broader process of reforming and updating police legislation in Western Australia. One of the purposes of this reform process, and of the CIA itself, was to implement recommendations made by the Law Reform Commission of Western Australia (LRCWA) in its 1992 report on *Project No 85: Police Act Offences.*

Relevantly, the LRCWA observed that concerns had frequently been expressed about the use of arrest in preference to summons, and that the National Report of the Royal Commission into Aboriginal Deaths in Custody[1] had recommended that all police services adopt the principle of arrest being the sanction of last resort.[2] The LRCWA recommended that arrest powers be re-framed so that arrest could be used only in situations where proceeding by way of a summons would not achieve specified purposes.[3]

The Second Reading Speech on the Criminal Investigation Bill 2005 included the following explanation of its approach to police powers of arrest:

> The bill will clarify the police power of arrest to apply to offences. The proper exercise of that power will depend on the relevant circumstances, so that it is not abused when arrest is not necessary or appropriate. Under clause 126,[4] officers will be able to arrest a person without a warrant for an offence only if it is reasonably necessary to do so in order to obtain the person's personal details, to stop an offence, to stop another person from being endangered, to stop the person from interfering with the course of justice or from compromising evidence, or to stop the person from endangering himself or herself. Otherwise, officers must proceed to lay charges without arresting the suspected offender. This limitation will not apply to serious offences.[5]
>
> … This provision provides clarity that has been absent until now for simple offences such as disorderly conduct. The clause accords with the Law Reform Commission's preferred approach by requiring an officer to consider alternatives to arrest unless certain criteria exist. This will ensure that police exercise the power to arrest only if reasonably necessary. [6]

[1] (1991) Vol 3 42.
[2] Law Reform Commission of Western Australia, *Police Act Offences,* Project 85, 1992, p. 169
[3] Ibid, p. 171.
[4] As it then was.
[5] Mr J Kobelke MLA, Leader of the House (23 November 2005). 'Criminal Investigation Bill 2005: Introduction and First Reading, Second Reading'. *Parliamentary Debates (Hansard)* Western Australia: Legislative Assembly, p. 7640.
[6] Ibid, p. 7643.

The purpose of this distinction between 'serious' and other offences, and the requirements imposed on arresting officers, were clearly of some importance. The Bill's changes to powers of arrest were also the subject of discussion during debate in the Parliament. For instance, the then Attorney General explained that the Bill sought 'to encourage the police not to arrest for minor offences but simply to charge without arrest'.[7] A Government representative in the Legislative Council characterised this aspect of the Bill as:

> a first attempt in legislation to place some impediment on the number of arrests that are made. "Impediment" is too strong a word; it is an attempt to put a bit of a brake on the arresting powers. We believe that we are using the powers of arrest too often, and this was certainly identified as an issue in the deaths in custody review. It is about avoiding the incarceration of people, if possible. A person does not need to be arrested if, for example, the officer knows who he is and he is not posing any particular threat...This is the first time that this brake on the capacity, or the need to arrest a person, has been implemented.[8]

The overall policy intent of the relevant sections of the CIA, then, was to confine police powers of arrest. In my respectful view, this purpose is undermined if any minor offending can be said to be serious, and to therefore justify arrest without a warrant, on the basis of a statutory penalty that in practice will never be imposed.

7. CONCLUSION

My role and functions are prescribed in the CCM Act, and I report to the JSCCCC and the Parliament on the operation of that Act, rather than other legislation. Certainly, I have no role in reviewing the CIA. However, I remain concerned about the circumstances of the complainant's arrest in this matter and the conclusion that the arrest was lawful under the CIA. I have taken the opportunity to provide this report for two reasons.

First, I have done so because this matter came to my attention in the course of exercising my function under section 195(1)(c) of the CCM Act. In addition to the case discussed here, two other complaints that have come before me since I commenced in my role also involved the use of arrest in circumstances where a summons would very plainly have been more appropriate. In all three cases, the fact of the arrest was a cause of considerable distress for the persons concerned.

Second, I raise this matter due to the significance of police powers of arrest and the impact they may have on ordinary citizens. It has long been accepted at common law that the power to arrest a person should only be exercised where it is necessary, and not merely convenient, to do so. The common law has of course been varied by statute across Australian jurisdictions, but the principle that arrest should not be used arbitrarily remains fundamental. Justice Deane's words in *Donaldson v Broomby* (1982) 60 FLR 124 at 126 bear repeating:

> Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a

[7] Hon J McGinty MLA, Attorney General (9 May 2006). 'Criminal Investigation Bill 2005: Consideration in Detail'. *Parliamentary Debates (Hansard)* Western Australia: Legislative Assembly, p. 2405.
[8] Hon K Chance MLC, Leader of the House in the Legislative Council (24 October 2006). 'Criminal Investigation Bill 2005: Committee'. *Parliamentary Debates (Hansard)*Western Australia: Legislative Council, p. 7431.

> hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable.

It is my view that, for the reasons outlined in this report, the relevant provisions of the CIA do not presently meet these criteria.

Prior to being tabled, this report was sent to the Commission and the WAPF for comment. The Commission declined to make a submission, but the Commissioner of Police commented briefly on both the circumstances of the complaint discussed here and the framing of powers of arrest in the CIA.

As to the complaint itself, the Police Commissioner advised that both arresting officers had been provided with additional training in Frontline Investigation, Custodial Care and the use of *Criminal Code* infringement notices. The Police Commissioner reiterated a view previously expressed by the WAPF that the actions of the arresting officers were, whilst unsatisfactory, lawful. However, for the reasons expressed earlier in this report, my view is that the arresting officers were not sufficiently possessed of grounds that gave rise to the reasonable suspicion demanded by section 128(2) of the CIA before an arrest could be lawfully made.

Of some relevance to the 'reasonable suspicion' requirement, the Commission's letter to me dated 12 April 2021 (referred to on pages 7 and 8 of this report) noted that the WAPF investigation of the arresting officers' conduct concluded that they failed to ensure they had appropriate information and evidence before them to assess whether they had a reasonable suspicion to arrest the complainant. To my mind, that concession entirely supports the conclusion reached by me that the arrest was unlawful.

As regards the powers of arrest in the CIA, the Police Commissioner agreed that changes were required but expressed a preference for a recommendation made in a statutory review that was concluded in 2018. That review strongly recommended that the distinction between serious and other offences in the CIA remain in place. However, it also recommended that the WAPF consider amending section 128(1) of the CIA by either lowering the statutory threshold of five years' imprisonment in paragraph (a) of the definition of 'serious offence' or by enabling the prescription of offences for the purpose of the definition of 'serious offence'. I thank the Police Commissioner for his input but respectfully disagree with the proposed amendment, which would enlarge the scope of police powers of arrest rather than ensuring that arrest is used as a last resort.

Determining policy and amending legislation are matters for the Parliament to undertake once it has carefully weighed all competing considerations. Accordingly, I do not propose any specific amendments to the CIA. However, I do note that some other jurisdictions – both in Australia and further afield – have taken a different approach to arrest powers.

In England and Wales, for example, a police officer's power of summary arrest can only be exercised if the officer has reasonable grounds for believing that it is necessary to make the arrest.[9] Within Australia, the relevant Commonwealth legislation explicitly provides that arrest should only be used if proceeding by way of a summons would not achieve

[9] Section 24(4) of the *Police and Criminal Evidence Act 1984* (UK).

one or more of a list of prescribed purposes.[10] Similarly, in New South Wales a police officer may arrest a person without a warrant if the officer suspects on reasonable grounds that the person is committing or has committed an offence, *and* the officer is satisfied that the arrest is reasonably necessary for one or more of a set of prescribed reasons.[11]

One of the prescribed reasons for making an arrest in New South Wales is 'because of the nature and seriousness of the offence'. In this way, the legislation appropriately acknowledges that these factors are relevant to police powers of arrest and enables officers to take them into account. However, this is done in a manner that is more flexible than the equivalent provisions in the CIA, which simply differentiate between 'serious' and other offences based on a statutory penalty that more often than not bears no relationship to the specific circumstances.

I acknowledge that the work performed by police officers is necessary and challenging, and I do not seek to undermine the important role that the police force plays in our society. I appreciate that it is important to provide police with a measure of discretion in exercising their powers, including those that relate to arrest. I submit, however, that as demonstrated by the case discussed here, the current parameters of this discretion are broader than is reasonably required for the performance of their duties.

I leave this matter for the Parliament to consider.

MATTHEW ZILKO SC
PARLIAMENTARY INSPECTOR

[10] Section 3W(1)(b) of the *Crimes Act 1914* (Cth). This restriction does not apply to terrorism offences.
[11] Section 99(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).