

Report on the Dangers of Wrongful Identification in Custody

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OVERVIEW

- [1] Police officers have special powers to prevent crime and protect the community. These include the power to arrest and detain people.¹
- [2] When this power is used correctly, a person in police custody is lawfully deprived of their liberty.
- [3] If an officer has no lawful justification to detain a person, the person has been unlawfully deprived of their liberty.² This may be a serious criminal offence and may constitute police misconduct.
- [4] A person should not be wrongly detained. It is incumbent on officers to confirm the identity of a person they are taking into custody.
- [5] This report details the Commission's review of, and concerns with, Western Australia Police Force's (WA Police) investigations into an incident of wrongful detention. A man spent a night in police custody after being arrested, charged and denied bail under an incorrect name.
- [6] The man's attempts to correct the officers went unanswered. The issue was only identified the following day, when the man appeared before a Magistrate and confirmed his name. The charges were dismissed, and WA Police commenced action to address any misconduct that contributed to the man's detention.
- [7] The Commission is the oversight body for WA Police, responsible for ensuring WA Police takes appropriate action into allegations of police misconduct.
- [8] It is not possible for the Commission to investigate every allegation of police misconduct. In this instance, the Commission conducted a review of the action taken by WA Police.
- [9] A Commission review is not an investigation. A review examines the action taken by an authority in response to alleged serious misconduct.³ The Commission assesses an authority's actions and considers whether they were adequate, and whether the investigative conclusions were open to be made based on the evidence available.⁴
- [10] WA Police conducted several internal investigations into the matter.

¹ For example, see *Criminal Investigation Act 2006* and *Bail Act 1982*.

² *Criminal Code 1913* (Criminal Code) s 333.

³ Serious misconduct includes police misconduct: *Corruption, Crime and Misconduct Act 2003* (CCM Act) s 3.

⁴ CCM Act ss 40 and 41.

- [11] WA Police's initial investigative actions were non-disciplinary. However, upon identifying the veracity of the incident, WA Police recommended a full disciplinary investigation.
- [12] The subsequent disciplinary investigation resulted in sanctions being issued to three officers for failing to correctly identify the arrested man.
- [13] Both internal investigations were managerial in nature. No criminal investigation was conducted to explore whether a charge of deprivation of liberty was appropriate.
- [14] Following Commission questions, WA Police conducted a criminal investigation and determined there was insufficient evidence for a criminal charge of deprivation of liberty and legal defences were available.
- [15] A person's right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time the law prescribes.⁵ Detaining a person is unlawful unless authorised, justified or excused by law.
- [16] The Commission does not consider the officers initially arrested the man with a purpose to unlawfully deprive him of his liberty. However, due to the officers failing to make adequate and reasonable enquiries after the arrest, the man was unlawfully detained in police custody overnight.
- [17] In July 2024, the Commission provided a draft of this report to WA Police as a matter of procedural fairness.⁶
- [18] In response, WA Police reviewed and reinvestigated the matter.
- [19] During this process, WA Police identified and notified the Commission of a second time the man had been arrested having been mistakenly identified by the same incorrect name. It had occurred three months after the first incorrect arrest, while that arrest was under investigation by WA Police.
- [20] The Commission should have been made aware of this second arrest earlier. The second arrest has now been investigated by WA Police and is included in this report.
- [21] The Commission acknowledges the changes made by WA Police to the criminal investigation outcome in response to the draft of this report.
- [22] This report serves as a reminder for officers to follow due process when identifying people and for WA Police to ensure they appropriately investigate allegations of police misconduct in the first instance.

⁵ *Williams v R* (1986) 161 CLR 278.

⁶ CCM Act s 86.

CHAPTER ONE

The first arrest

- [23] One evening in January 2023, a person called 000 to report a man stealing their boat. Around the same time, the alleged offender, who for the purposes of this report is referred to by the pseudonym 'Marc Smith', also called 000. He stated he felt threatened by the boat owner and requested police assistance.
- [24] The 000 call-taker created a task. In the task they spelt Marc Smith's name incorrectly and attached information associated with a different person named 'Markk Smith'. This included a link to an outstanding breach of bail arrest warrant in the name of Markk Smith.
- [25] The task was allocated to two officers who attended the scene. At the scene, the officers spoke to both the boat owner and to Marc Smith.
- [26] Marc Smith told the officers his full name, including his middle name, multiple times. He also provided his address. This information was not recorded by the officers. They undertook no actions to investigate or confirm these details.
- [27] Instead, the officers searched Marc Smith and his belongings. In his bag they found a SmartRider that belonged to someone else. Marc Smith was subsequently arrested on suspicion of stealing a boat, possessing stolen or unlawfully obtained property in respect of the SmartRider, and for the outstanding arrest warrant.
- [28] At the scene, Marc Smith stated he knew nothing about an arrest warrant. The officers answered that they would clear it up at the police station.
- [29] Marc Smith was conveyed to a police station. One of the arresting officers incorrectly entered Marc Smith into the system as 'Markk Smith'.
- [30] Upon seeing one officer writing his name, Marc Smith told them his first name was spelt with a 'c' not a 'k'. The officer made no enquiries into this.
- [31] During this process, Marc Smith was not asked to confirm any of his other personal details.
- [32] Marc Smith also had his fingerprints taken. It takes approximately ten minutes to confirm whether a person's fingerprints match those already in the system. The officer did not wait for the results. They were not a match.

- [33] While Marc Smith was in custody, the boat owner decided not to make a formal statement. As a result, Marc Smith was not charged over the alleged theft of the boat. He was only charged with possessing stolen or unlawfully obtained property (the SmartRider) and the breach of bail arrest warrant.⁷
- [34] Due to the outstanding warrant, Marc Smith was denied police bail.⁸ He remained in police custody overnight and was conveyed to the Magistrates Court in the morning.
- [35] On appearance, the Magistrate identified the charges had been brought under the incorrect name. Marc Smith had been wrongfully detained.
- [36] The Magistrate dismissed the charges and Marc Smith was released.

⁷ Criminal Code s 417(1) and *Bail Act 1982* s 51(1).

⁸ *Bail Act 1982* ss 6(4)(a) and 16(2)(b).

CHAPTER TWO

WA Police investigations

- [37] WA Police investigations into alleged misconduct can take a variety of forms depending on the perceived seriousness of the alleged behaviour.
- [38] The Police Conduct Investigation Unit (PCIU) is responsible for triaging complaints made to WA Police and provides quality assurance (QA) during and at the completion of investigations.

Initial managerial investigation

- [39] This matter was originally assessed as minor by PCIU and assigned to be dealt with via local management rather than as a disciplinary investigation. A local management investigation makes informal findings, whereas findings in a disciplinary investigation are formally recorded and a range of sanctions can be applied.
- [40] The matter was assigned to the arresting officers' district office for investigation. The two arresting officers were identified as subject officers. Body worn camera (BWC) footage and written statements from the arresting officers were considered as evidence.
- [41] The investigation concluded allegations of breach of procedure and code of conduct were 'accepted' for both officers.⁹ Developmental discussions with the officers were held.
- [42] During the finalisation of the matter, the district office contacted PCIU, recommending a full investigation be completed.
- [43] As a result, the matter was reallocated by PCIU for a disciplinary investigation.

Second managerial investigation

- [44] The matter was allocated to the same district office for the disciplinary investigation.
- [45] The investigation determined '*there was no criminal intent in the actions taken by the subject officers*' and the matter proceeded directly to managerial investigation.¹⁰

⁹ 'Accepted' means the allegations were supported.

¹⁰ WA Police Investigation Report, June 2023.

- [46] A third subject officer was identified in addition to the two arresting officers. This was the call-taker of the 000 call who incorrectly recorded Marc Smith's name.
- [47] This investigation considered a broader range of evidence including: an interview with Marc Smith, information from WA Police systems, BWC footage, statements from officers present at the station at the time Marc Smith was in custody (witness officers) and interviews with the arresting officers.
- [48] In their interviews, the arresting officers recalled Marc Smith giving his full name and address. They admitted they did not conduct enquiries to verify these details.
- [49] One of the arresting officers stated they conducted a check for 'Mark Smith' in police systems. There were two options with slightly different spellings. They chose the profile of the person with the arrest warrant. They stated the photo on the profile 'resembled' the man in custody.
- [50] Another officer, a witness, was responsible for submitting the Incident Report, and advised they knew Marc Smith from a previous encounter, and entered the correct name within the Incident Report.
- [51] An audit of WA Police systems identified that one of the arresting officers viewed both the Incident Report and the correct profile of Marc Smith. However, that officer said they could not remember undertaking these actions.
- [52] The managerial investigation concluded the onus was on the arresting officers to confirm the identity of the suspect. If sufficient enquiries had been conducted, Marc Smith would not have been held in custody overnight.
- [53] WA Police sustained the allegations. The arresting officers were issued with Managerial Notices for failing to adequately investigate and establish Marc Smith's identity.¹¹ The officer who took the 000 call was provided verbal guidance.

Criminal investigation

- [54] In a meeting with WA Police, the Commission queried whether the lawfulness of the detention of Marc Smith had been sufficiently considered.

¹¹ A Managerial Notice is a written record provided to the subject officer outlining the significance of the unprofessional conduct that led to the sustained finding. It is attached to their personnel file.

- [55] Subsequently, WA Police tasked the district office to complete a criminal investigation. The investigation considered the offence of deprivation of liberty.
- [56] As was their right, both officers declined to participate in a criminal interview. Marc Smith was approached and provided a statement for the investigation.
- [57] The remainder of the evidence considered in the criminal investigation had been gathered in the previous managerial investigations. This included statements from both officers.
- [58] WA Police determined the officers had two legal defences available to rely on: mistake of fact and arrest of a wrong person.¹²
- [59] The criminal investigation was closed with no charges preferred and an outcome of 'insufficient evidence' recorded.

¹² Criminal Code ss 24 and 229.

CHAPTER THREE

The Commission's review

- [60] A Commission review is not an investigation. It focuses on the quality of an investigation undertaken by an appropriate authority, and whether the conclusions reached were open on the evidence.
- [61] The Commission reviewed the investigations by WA Police. Several concerns with the investigations were identified.

Managerial investigations

- [62] The Commission considers the initial non-disciplinary process was not appropriate. It is acknowledged WA Police rectified this issue and re-investigated. The re-investigation considered a wider range of evidence than the initial investigation and identified an additional subject officer.
- [63] The Commission considers that, based on the evidence, the conclusions reached in the re-investigation were open to be made.
- [64] It is acknowledged the officers were sanctioned for their omissions. The evidence indicated one of the arresting officers saw the Incident Report that had been placed under the correct name and profile (Marc Smith), which had no links to the warrant. This same officer also accessed the profile of Mark Smith, which had the warrant but no Incident Report.
- [65] WA Police accepted the officer's explanation that they did not remember these accesses. These accesses/enquiries should have prompted Marc Smith being correctly identified and released from custody.

Delayed criminal investigation

- [66] Marc Smith was deprived of his liberty by spending a night in police custody. Unlawful deprivation of liberty may be a criminal offence.
- [67] Initially, WA Police determined a criminal investigation was not required as the arresting officers had no criminal intent in their actions.
- [68] The offence of deprivation of liberty does not require intent.¹³
- [69] The Commission acknowledges that WA Police did undertake a criminal investigation after receiving feedback. A final report was provided for the Commission's review.

¹³ Criminal Code ss 23 and 333.

- [70] The criminal investigation report lacked detail and provided limited information regarding the evidence considered.
- [71] During the review, WA Police confirmed this investigation relied upon the same evidence gathered in the previous managerial investigations, including statements from the subject officers.
- [72] In a criminal investigation, police officers under suspicion can exercise their right to silence. They have the same rights and privileges as any other person.
- [73] When interviewed or directed to provide a statement during a managerial process however, officers are under compulsion to answer questions, even if they incriminate themselves with the answers they give.¹⁴
- [74] Information obtained under compulsion is not considered to be provided of an officer's free will. Officers are advised the information they provide cannot be used against them in a criminal investigation.
- [75] WA Police confirmed the officers' statements were not used against them and only used as intelligence within the criminal investigation. WA Police considered the use of the statements in this manner was acceptable.
- [76] The Commission considers this poor practice. Wherever possible, criminal investigations should be undertaken before managerial investigations.

Incorrect application of legal defences

- [77] A defence may provide a reason for a person to be found not guilty of an offence, even if their actions meet the elements of the offence. WA Police determined the arresting officers had two defences available: arrest of wrong person and mistake of fact.¹⁵
- [78] The Commission considers the arrest of the wrong person was not the relevant issue to consider in the criminal investigation. The issue was the reasonableness of the decision to deny police bail and continue to detain the wrong person relating to the arrest warrant.
- [79] The defence of mistake of fact provides that a person is not criminally responsible if they '*do or omit to do an act under an honest and reasonable, but mistaken, belief*'.¹⁶

¹⁴ *Police Force Regulations 1979* reg 603.

¹⁵ Criminal Code ss 229 and 24.

¹⁶ Criminal Code s 24.

- [80] In the criminal investigation, the officers having exercised their right to silence, there was no admissible evidence as to the officers' belief whether honest or otherwise.
- [81] The officers may have honestly but mistakenly believed that Marc Smith was the same person as named in the warrant. However, in addition to the officers' subjective belief, there must have been reasonable grounds for the officers to have held that belief, based on an objective assessment of the surrounding circumstances which existed at the time.
- [82] The police investigation did not appear to consider this aspect of the legal defence.
- [83] The officers had multiple opportunities to verify Marc Smith's personal particulars to ensure he was the person named in the warrant. They failed to conduct fundamental checks to confirm Marc Smith's identity, such as asking him to spell his name, confirm his date of birth or address, or check for any fingerprint match.
- [84] Marc Smith expressly stated his full name, address and that he had no knowledge of the arrest warrant. The officers ignored this.
- [85] During Marc Smith's time in custody, various documents were prepared under the name of Mark Smith (including prosecution notices and a statement of material facts) with express references to Mark Smith's personal particulars (for example, address and date of birth). At no time did the officers seek to verify that the person named and that the personal particulars contained within those documents were those of Marc Smith.
- [86] The reasonableness of the officers' mistaken belief is ultimately a matter for a court. There may have been grounds for exercise of discretion to prosecute.¹⁷ No grounds were identified, except for lack of intent and mistake.
- [87] WA Police's outcome of insufficient evidence based on the defence of mistake of fact was not open to be made. The criminal investigation is inadequate.
- [88] The detention of Marc Smith for the purposes of the warrant was not lawful.

¹⁷ Office of the Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines* 2022.

CHAPTER FOUR

WA Police's response to this report

- [89] To afford the opportunity for procedural fairness, in July 2024 the Commission provided a draft of this report to WA Police.¹⁸

WA Police reviews the previous investigations

- [90] On receipt of the Commission's draft report, WA Police advised further investigative actions would be undertaken to consider the concerns raised by the Commission.
- [91] The task was assigned to the Internal Affairs Unit (IAU).
- [92] IAU reviewed the previous actions taken and determined the defences cited in the criminal investigation were not appropriate. A prima facie case was established and discretion not to prosecute was applied.
- [93] IAU deemed the outcomes and sanctions reached in the second managerial investigation by the district office were appropriate.
- [94] IAU made one recommendation, that WA Police should conduct a review of agency policy and procedures relating to taking fingerprints. IAU recommended officers should wait for the results of the fingerprint system, even if they feel certain that the detainee's identity is known.

WA Police uncovers a second incident

- [95] While WA Police collated its response to this report, a second incident was identified. Marc Smith had been wrongfully arrested again.
- [96] In April 2023, Marc Smith attended the same police station he was taken to after his first arrest. This time he was seeking assistance.
- [97] The officer at the desk asked him for his name and searched for him on police systems via the incorrect spelling 'Markl Smith'.
- [98] Once again, the officer saw Markl Smith had an outstanding arrest warrant. Additionally, a photo of Marc Smith, taken when he was wrongfully detained in January, was incorrectly on the profile of Markl Smith.
- [99] Marc Smith was promptly arrested on the warrant and taken into the station lockup.

¹⁸ CCM Act s 86.

- [100] He told the officers this was the second time this had happened. On this occasion the officers listened and made further enquiries. They correctly identified Marc Smith and released him unconditionally.
- [101] To ensure this did not happen again, the officers had Marc Smith's photograph removed from Mark Smith's profile.
- [102] No records of the arrest were made on any WA Police system.
- [103] IAU was tasked with investigating this second incident.

WA Police investigates the second incident

- [104] IAU commenced a criminal investigation, considering the offence of deprivation of liberty.
- [105] The investigation deemed the arresting officer was performing their duty *'in good faith... having an honest and reasonable but mistaken belief'* the arrested man was Mark Smith.
- [106] The investigation was finalised with an outcome of 'no offence'.
- [107] WA Police advised the Commission that no managerial investigation was undertaken as there had been no breaches of policy or code of conduct.

CHAPTER FIVE

The Commission's further review

- [108] The Commission reviewed the actions undertaken by IAU. The changes made to the original criminal investigation outcome are acknowledged.
- [109] IAU's final report included pertinent information not previously documented by the district office. For example, IAU cited footage that clearly depicted the efforts of Marc Smith spelling his name to the officers.
- [110] IAU also stated Marc Smith was accompanied to his interview by a carer. This information had not previously been provided to the Commission. There had been no indication he was a vulnerable person.

Review of the second incident

- [111] The Commission referred this second incident to WA Police to action, outlining various issues it sought for WA Police to address. This included the wrongful arrest and detention, as well as policy breaches such as no custody records of the incident or any police conduct report.
- [112] In this second incident, the conclusion of the criminal investigation was open to be made, however WA Police's determination that there had been no breaches of policy or code of conduct is problematic.
- [113] WA Police notified the Commission of this incident in July 2024. The arrest occurred in April 2023. WA Police is obligated to notify the Commission of suspected misconduct in a timely manner.¹⁹ Fifteen months after the incident is not timely.
- [114] There is no record of this arrest on the WA Police custody system. This is contrary to policy.²⁰ Regardless of the short time for which Marc Smith was under arrest, there should be a record of the event.
- [115] The issue of Marc Smith's photo not being removed from Mark Smith's profile after the first arrest was not addressed. It should have been removed following the first investigation and before the second wrongful arrest.

¹⁹ CCM Act s 28(3).

²⁰ WA Police Manual, *LP-04.01, Lockup - Admission and Release - Admissions-General*. (Last amended on 24 October 2018).

CHAPTER SIX

Conclusion

- [116] The Commission considers the WA Police investigations to be inadequate.
- [117] A vulnerable man wrongfully spent a night in police custody. The gravity of this should have been considered appropriately from the start.
- [118] This matter could have been avoided if the officers had undertaken basic checks on the information Marc Smith provided. The failure to follow basic procedure is concerning.
- [119] Once re-investigated, the managerial investigation reached conclusions that were open to be made on the evidence.
- [120] The initial criminal investigation, however, was inadequate. In the Commission's view, the defence of mistake of fact was not available to the arresting officers. As a result, the Commission questions WA Police's conclusion that there was insufficient evidence for a charge of deprivation of liberty.
- [121] There was no legal basis for WA Police to detain Marc Smith overnight. The warrant was not in his name.
- [122] The Commission acknowledges WA Police addressed the deficiencies in the criminal investigation after receiving a draft copy of this report. However, the failure of WA Police's own quality assurance (QA) process in identifying issues with all the investigations into this matter is a concern.
- [123] The WA Police's QA process has been criticised by the Commission in the past and is currently subject to an open recommendation made by the Commission in a previous review.²¹

²¹ Corruption and Crime Commission, *Review of WA Police action into recommendation to improve investigation processes*, 19 December 2024.