Federal Court of Australia
District Registry: Queensland
Division: General Division

No. **QUD 535 of 2013**

Lex Wotton and Others
Applicants

State of Queensland and Another
Respondents

APPLICANTS' CLOSING SUBMISSIONS IN REPLY

Filed on behalf of the Applicants

Prepared by Daniel Meyerowitz-Katz and Benjamin Brady, Levitt Robinson Solicitors and Chris Ronalds SC and Joshua Creamer of Counsel

T (02) 9286 3133; E dmkatz@levittrobinson.com

Level 6, 162 Goulburn Street, Sydney (East) NSW 2010

CONTENTS

OVERVIEW **5**

C.1.5 IDENTIFICATION OF HUMAN RIGHT OR FUNDAMENTAL FREEDOM **5**

ARTICLE 26 RIGHT 5

RIGHT TO EQUALITY BEFORE THE LAW 6

ARTICLE 5(F) RIGHT 6

C.1.8 MEANING OF "DISTINCTION, EXCLUSION, RESTRICTION OR PREFERENCE" **8**

C.3.2 DUTIES UNDER THE OPM **8**

C.2.1 COMMUNITY NEEDS AND EXPECTATIONS **11**

C.2.3 CULTURAL NEEDS PECULIAR TO THE COMMUNITY **12**

C.3.1 POLICE DUTIES AT COMMON LAW **13**

D.1.3 FAILURE TO TREAT SS HURLEY AS A SUSPECT **14**

D.1.4 SS HURLEY PERFORMING DUTIES AT THE SCENE **15**

D.1.5 APPOINTMENT OF DS ROBINSON TO INVESTIGATION TEAM **16**

D.1.11 TREATMENT OF PLO BENGAROO **16**

D.2 FAILURE TO PROVIDE SUPPORT TO ABORIGINAL WITNESSES **18**

(B) CULTURAL AND SOCIOLOGICAL ISSUES 18

D.3.1 DISCREPANCIES IN FORM 1 ..... **19**

D3.4 FAILURE TO ADVISE PATHOLOGIST OF ASSAULT ALLEGATIONS **19**

D.4.1-2 FAILURES OF CAU AND CCLO **20**

E.2.2 DISTINCTION, EXCLUSION, RESTRICTION OR PREFERENCE BASED ON RACE **21**

(A) DISREGARD FOR IMPARTIALITY 21

(B) PREFERENCE FOR EVIDENCE FROM NON-ABORIGINAL WITNESSES 21

(C) COMPROMISE OF INTEGRITY OF INVESTIGATION 22

(D) FAILURE TO ADDRESS CULTURAL NEEDS OF THE COMMUNITY 22

E.2.3 BASED ON RACE 22

E.3.3 RIGHT TO ACCESS SERVICES 24

F.1.1 EXPECTATION THAT SS HURLEY WOULD BE REMOVED 24

F.2.2 POLICE KNOWLEDGE OF TENSIONS WITHIN THE COMMUNITY 24

F.2.4 FAILURE TO TAKE MEASURES TO DIFFUSE TENSIONS 25

G.1.1 STRUCTURE AND PURPOSE OF THE PSPA 27

MEANING OF "ANY OTHER ACCIDENT" 27

USE OF INADMISSIBLE EVIDENCE 28

G.2 REVOCATION OF THE EMERGENCY SITUATION 28

G.2.1 EVENING OF 26 NOVEMBER 2004 28

G.3.1 ALLEGEDLY "MISSING" FIREARM 29

G.4.2 ARRESTS NOT LAWFUL 29

(A) ARREST OF FIRST APPLICANT 29

(B) ARREST OF THIRD APPLICANT 31

G.4.3 NOT CONDUCTED WITH MINIMUM FORCE NECESSARY 31

(A) FORCE USED TO ARREST THE THIRD APPLICANT 31

(B) FORCE USED TO ARREST THE FIRST APPLICANT 31

G.5.1 INVALID USE OF EMERGENCY POWERS 32

G.5.2 NOT JUSTIFIED UNDER PPRA 32

G.5.3 UNNECESSARY DISTURBANCE OF OCCUPANTS 33

G.6.2 SCHOOL BUS 34

H.3.1 RIGHT TO EQUALITY BEFORE THE LAW AND EQUAL PROTECTION OF THE LAW 35

(A) 22 TO 25 NOVEMBER 2004 35

H.4 BREACHES OF RIGHTS: SUB-GROUP 35

H.4.1 RIGHT NOT TO BE SUBJECTED TO UNLAWFUL INTERFERENCE 35

(A) GENERAL RIGHT TO ENJOY PROPERTY 35

H.4.3 RIGHT NOT TO BE SUBJECTED TO INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 36

I.1 DECLARATORY RELIEF 36

I.2.4 AGGRAVATED DAMAGES 37

I.2.5 EXEMPLARY DAMAGES 39

I.2.6 QUANTUM OF DAMAGES CLAIM 41

Overview

1. These submissions are in reply to the Respondents' Closing Submissions, dated 26 April 2016 and filed on 27 April 2016. These submissions are not intended to be an exhaustive response to the Respondents' submissions. Where portions of the Respondents' submissions are not specifically referred to in this document, the Applicants rely on the Applicants' Closing Submissions dated 11 April 2016 and filed on 12 April 2016, including the Annexure to those submissions in relation to the findings of fact which the Applicants invite the Court to make, and their oral submissions.

2. The headings in these submissions correspond with the headings in the Applicants' submissions in chief and the Respondents' submissions.

3. It appears that the Respondents no longer dispute the facts of any of the acts comprising the QPS Failures.[1] It is noted that, despite discussion at trial regarding the preparation of an annexure to the parties' closing submissions,[2] the Respondents have not filed any such document. Accordingly, whilst the Respondents apparently dispute the facts of a number of the acts comprising the Further Failures,[3] in many cases it is not clear on what basis they do so.

C.1.5 Identification of human right or fundamental freedom

Article 26 Right

4. The Respondents contend that "Article 26 [of the *International Covenant on Civil and Political Rights*[4] (***ICCPR***)] expresses an objective to which the Convention and the RDA are addressed and that objective cannot itself be a right for the purposes of s10 or s8 of the RDA".[5] That submission overlooks the issue that these proceedings concern section 9 of the *Racial Discrimination Act* 1975 (Cth) (***RDA***) and not section 10. The difficulty in applying Article 26 to claims under section 10 results from the fact

---

[1] Respondents' Submissions (**RS**): 306-307.

[2] See, T1367-1369, T1636.34–T1637.46 and T1753.

[3] RS: 467-474.

[4] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[5] RS: 56.

that section 10 is in substantially the same terms as Article 26.[6] That is not the case in relation to section 9.

5. In any event, it is "well established" that Article 26 provides an independent and autonomous guarantee of non-discrimination.[7] The *travaux préparatoires* of the ICCPR record that the underlying purpose Article 26 is "to establish 'freedom from discrimination' as a *free-standing right* and not merely as a general principle governing the enjoyment of other rights recognised in the ICCPR".[8] Similarly, in *Kuyken v Chief Commissioner of Police*,[9] Garde J held that "Article 26 is an autonomous human right. It operates independently according to its own terms. It is not a mere accessory to other recognised human rights."[10]

Right to equality before the law

6. In relation to the customary right to equality before the law, the Respondents submit that "the source … is not identified."[11] This is simply not the case. The Applicants identify the source as customary international law.[12] It is noted that the Respondents question the relevance of the Applicants' submissions in relation to the sources of human rights under international law.[13]

Article 5(f) Right

7. The Respondents submit that in "many instances", the acts relied on by the Applicants as constituting a discriminatory provision of police services to the Palm Island community in general "cannot be sustained because those acts related to specific individuals".[14] Three such instances have been identified—notification of the next of

---

[6] *Maloney v the Queen* (2013) 252 CLR 168 at 294 [336] (Gageler J).

[7] Pobjoy, Jason, "*Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection*" [2010] MelbULawRw 6; (2010) 34(1) Melbourne University Law Review 181 citing the landmark text by Professor Nowak, *UN Covenant on Civil and Political Rights* (2nd revised ed) at 604, 628.

[8] *Maloney v the Queen* (2013) 252 CLR 168 at 270-271 [280] (Gageler J), see also, at 250 [222] (Bell J).

[9] [2015] VSC 204.

[10] [2015] VSC 204 at [33] and [35] (citations omitted); see further, AS: 278-286.

[11] RS: 67 and 66.

[12] Applicants' Submissions (**AS**): 286, see also, at 46-52.

[13] RS: 70.

[14] RS: 52.

kin,[15] the treatment of then-Police Liaison Officer (***PLO***) Bengaroo[16] and the failure to provide support to Aboriginal witnesses,[17] although the latter was not referred to in the Respondents' closing submissions. In the event that any other instances are relied on, they have not been identified.[18]

8. In identifying whether "services" have been provided by the police, in the context of the RDA, the Court should adopt a "broad and purposive" approach, because "[a] narrow construction of the word 'services' would frustrate the intended operation of the Act which is not penal but educative, compensatory and ameliorative in character".[19] The identification of the relevant services and whether those services related to the Applicants is a question of fact.[20] The scope of the services should generally be determined with reference to the particular facts of the case and not in the abstract.[21]

9. In the Applicants' submission, the investigation by the QPS into Mulrunji's death in custody was the provision of a service to the community on Palm Island[22] and should have been conducted in accordance with the Royal Commission into Aboriginal Deaths in Custody (***RCIADIC***) recommendations.[23]

10. As the Respondents observe, the scope of "services" provided by police under racial discrimination laws analogous to or derived from Article 5(f) of the CERD was considered by the UK Court of Appeal in *Farah v Commissioner of Police of the Metropolis*[24] and by the NSW Court of Appeal in *Commissioner of Police (NSW) v Mohamed*.[25]

11. The Court in *Farah's* case found that services provided "to the public" extend to "those parts of a police officer's duties involving assistance to or protection of members of the public".[26] The Applicants submit that the investigation into Mulrunji's

---

[15] RS: 52.

[16] RS: 52.

[17] T45.12

[18] *Cf,* T31.39-46.

[19] *IW v City of Perth & Ors* (1997) 191 CLR 1 at 72-73 (Kirby J), see also at 23 (Dawson and Gaudron JJ).

[20] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 404 (McHugh J).

[21] *Cf, Commissioner of Police v Mohamed* (2009) 262 ALR 519 at [45] (Basten JA, Spiegleman CJ agreeing)

[22] AS: 288-295.

[23] AS: 86-90, 268-271, 296.

[24] [1998] QB 65; RS: 48.

[25] (2009) 262 ALR 519; RS: 49.

[26] *Farah v Commissioner of Police of the Metropolis* [1998] QB 65 at 78 (Hitchison LJ); followed by the High Court of Australia in *IW v City of Perth & Ors* (1997) 191 CLR 1 at 14, 23, 29, 44, 74.

death involved assistance to or protection of members of the Palm Island community.[27]

12. The Court in *Mohamed's* case found that "the investigation of an alleged criminal offence by members of the New South Wales Police Force" was a "service" provided to "person or persons who are treated less favourably … in relation to the provision or refusal to provide the services and need not be limited to the person or persons reporting an event relating to an alleged criminal offence."[28] The Applicants submit that the same principles apply in relation to an investigation of a death in custody.

13. Accordingly, the notification of the next of kin was not a service provided only to the next of kin. The entire community had an interest in being notified about the death. Until the next of kin were notified, the community could not be or was not notified. Hence, there was a broader interest within the entire community that that part of the police services be delivered promptly.[29] Further, the notification requirements conformed with the RCIADIC recommendations.[30] In relation to the acts complained of in the treatment of PLO Bengaroo[31] and the failure to provide support to Aboriginal witnesses,[32] these impaired the integrity and impartiality of the investigation.[33] The conduct of a thorough and impartial investigation, in accordance with the RCIADIC recommendations was a service provided to the community. The Respondents' submissions that those acts were not done in the provision of services to the community should be rejected.

C.1.8 Meaning of "distinction, exclusion, restriction or preference"
C.3.2 Duties under the OPM

14. The Respondents observe that the Applicants rely on "noncompliance with provisions of the OPM and Code of Conduct and other laws" in order to establish the existence of a "distinction, exclusion, restriction or preference" within the meaning of

---

[27] *Cf*, AS: 268-271, 297.

[28] *Commissioner of Police (NSW) v Mohamed* (2009) 262 ALR 519 at 532 [49] (Basten JA, Spiegleman CJ agreeing).

[29] *Cf*, AS: 317-318.

[30] ASF: 210.

[31] AS: 198(a) and (b)

[32] AS: 206(a) and (b)

[33] AS: 202, 204, 261-267.

section 9 of the RDA.[34] The Applicants acknowledge that this is one of the grounds relied on in order to establish a relevant distinction, albeit not the only ground.[35]

15. The Respondents contend in that regard that the Applicants are attempting to impose a standard of policing that is "utopian, idealistic and unachievable" and, incorrectly,[36] that the Applicants "do not admit the possibility of mistake or error of judgment".[37] However, the Respondents later state that "[s]uch error or mistake is not relied on by the respondents as relevant to the distinction issue. It is relied on in relation to the race issue."[38] Accordingly, the purpose of the Respondents' submissions regarding the supposed "utopian, idealistic and unachievable" standard of policing being imposed is not readily apparent. The Respondents appear to concede that noncompliance with provisions of the OPM, the Code of Conduct, or other laws, can in fact amount to a "distinction". Further, the relevant standard of policing is not imposed by the Applicants, it is imposed by the Commissioner pursuant to section 4.9(1) of the *Police Service Administration Act* 1990 (Qld) (***PSAA***).[39] The Court should not lightly accept that compliance with the procedures imposed on the QPS by the Commissioner pursuant to statute are "utopian, idealistic and unachievable".

16. In any event, in the Applicants' submission, the mere fact of an act resulting from an honest error or mistake is not a defence to section 9 of the RDA. It is well established,[40] and the Respondents have accepted,[41] that the term "based on" in section 9 does not require an intention or motive to engage in discriminatory conduct and there is no "reasonable justification" defence to section 9(1).[42] To the extent that the Respondents have sought to rely on a number of purported honest mistakes or errors of judgment in justification of some of the acts of which the Applicants have complained,[43] their submissions must be rejected. Section 9 of the RDA does not only

---

[34] RS: 77.

[35] AS: 257-271, 593-603.

[36] AS: 105-106.

[37] RS: 78-79.

[38] RS: 132.

[39] ASF: 9(g).

[40] AS: 67-73.

[41] RS: 85.

[42] See, *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 33-34 (Weinberg J).

[43] RS: 163, 315, 319, 430, 435, 437.

prohibit conduct which can be described as "dishonest". Honest errors and mistakes can be based on race.

17. Further, the Respondents' attempt to rely on the Applicants' acknowledgement that, viewed in isolation, most of the acts comprising the QPS Failures could be viewed as honest mistakes or errors of judgment[44] is misplaced. That acknowledgement was made in the context of the Applicants' submission that the relevant acts should not be viewed in isolation.[45] Many of the seemingly benign explanations for various acts provided by the Respondents fall away when these acts are viewed as a whole.

18. By way of example, with respect to Senior Sergeant (**SS**) Hurley driving the investigation team from the airport, the Respondents rely on the lack of information that the investigating officers had when they landed on Palm Island.[46] That does not explain the officers' conduct that evening or the next morning, when they had more information.[47] Similarly, in order to explain the decision to eat dinner at SS Hurley's house, the Respondents submit that the officers were tired and hungry.[48] That does not explain the drive from the airport or the trip to Dee Street.

19. As to the discussions during those three incidents, it may be plausible that at any one of them the investigation was not discussed. However, the more time that the investigation team spent with SS Hurley over the course of the investigation outside of formal interviews, the less likely it is that the investigation was not discussed. Add to this the fact that the trip to Dee Street occurred after Roy Bramwell had made allegations that SS Hurley had assaulted Mulrunji and before SS Hurley had given a contrary version of events on the record, and the picture is darkened considerably.

20. Where errors occur as a result of ordinary human error, such as carelessness or lack of attention to detail, they have random and varied outcomes. Where errors are consistently made in an identifiable trend or pattern, it is likely that there is a cause beyond mere human error. In the Applicants' submission, the errors made by the investigation team fall into the latter category.[49]

---

[44] RS: 127, 311.

[45] AS: 258.

[46] RS: 153-154.

[47] *Cf,* RS: 155-157, 163, 172, 179.

[48] RS: 155-157, 163.

[49] See further, Exhibit A109 at 3.1.2-3.1.3 (pp 49-52).

C.2.1 Community needs and expectations

21. The Respondents mischaracterise the Applicants' pleadings in relation to the cultural needs and expectations of the community.[50] The Applicants have not sought to ascribe to the community its own independent legal personality or corporate personhood, they have alleged that the community was comprised of persons with common characteristics, including needs, interests and expectations.

22. That a community can have common interests is well recognised in the law. For example, the defence to defamation of "qualified privilege" relies on a publication being made to a person or a group of persons with an interest in the contents of the publication. In that context, the High Court unanimously declared in *Lange v Australian Broadcasting Corporation*[51] that:

> *each member of the Australian community has an interest* in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[52]

23. It could hardly be said that the entire Australian community is a homogenous entity. The interest declared by the High Court in *Lange* must be shared between members of the Australian community who are voracious consumers of political commentary and those who are not engaged in the political process at all.

24. The Applicants submit that the interests of the Palm Island community in policing services and the other matters pleaded in paragraph 32 of the 3FASC are analogous to the interests of an electorate in the context of a publication of political material concerning candidates and their policies. The members of the community on Palm Island, regardless of whether they attended any public meeting or otherwise consistently scrutinised the QPS investigation into Mulrunji's death, had an interest in the investigation being conducted thoroughly and impartially.

25. Further relevant principles can be drawn from the laws concerning criminal sentencing, where it is well established that a serious crime is a wrong committed against not just the victim, but the community at large.[53] In the Applicants' submission, the

---

[50] RS: 92-93.

[51] (1997) 189 CLR 520.

[52] (1997) 189 CLR 520 at 571 (emphasis added); see also, *Roberts v Bass* (2002) 212 CLR 1 at 29 [73] (Gaudron, McHugh and Gummow JJ), at 12 [11] (Gleeson CJ), at 76-77 [218]-[224] (Hayne J); *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211 at 263 (McHugh J).

[53] *R v Palu* (2002) 134 A Crim R 174 at 183-184 [37] (Howie J; Levine and Hidden JJ agreeing).

community on Palm Island looked to law enforcement agencies for protection from deaths in custody in the same manner that the community in Sydney was held by Street CJ in *R v Hayes*[54] to look to those agencies for protection from burglary.[55] The Applicants' pleaded allegations to that effect cannot properly be described as "embarrassing".

C.2.3 Cultural needs peculiar to the community

26. The Respondents submit that "the reports of Dr Kidd and Professor Altman are of little assistance to the applicants' case".[56]

27. With respect to Dr Kidd's report, the Respondents submit that "[i]t is clear from the evidence that Palm Island in 2004 was a very different place from the Palm Island of the past". No evidence is cited in support of that proposition. In fact, Professor Altman's report shows that Palm Island in 2004 remained one of the most socio-economically deprived Aboriginal communities in Queensland, in circumstances where Aboriginal communities are far more deprived on average than the general population.[57] The Respondents' submissions with respect to the "methodological limitations" of Professor Altman's analysis[58] should be rejected. Professor Altman's credentials are not in question and the Respondents have adduced no evidence to contradict his opinions.

28. The Respondents further submit that there is nothing in Dr Kidd's report or evidence to support an inference that the community on Palm Island were more prone to suspicion in relation to the police than were other communities in Queensland. The Applicants submit that such an inference can and should be drawn.

29. As the RCIADIC noted, "[h]istorically the police have acted as the most consistent point of Aboriginal contact with colonial power. This is pertinent to present situations, for past history relating to police action is very much alive in the minds of Aboriginal people."[59] In 1994, the QPS acknowledged in its own review of policing in Queensland's Aboriginal communities that, because "there are still a significant

---

[54] [1984] 1 NSWLR 740.

[55] [1984] 1 NSWLR 740 at 742 (Street CJ).

[56] RS: 123.

[57] See generally, Exhibit A3.

[58] RS: 109.

[59] Exhibit A108 at 10.5.1 (p183), see generally at Ch 1.4-1.5 (pp 24-27), Ch 10 (pp 172-197), and Ch 21.2 (pp 505-513); see also, Exhibit A109 at Ch 2.2 (pp 41-47).

number of Aboriginal and Torres Strait Islander people who have been directly affected or had relatives affected" by the visible role of the police in enforcing "what is perceived by some as largely oppressive legislation which infringed upon fundamental civil and political rights", it was "not surprising that a significant number of Aboriginal and Torres Strait Islander people today remain fearful and mistrusting of the police".[60] In the Applicants' submission, Dr Kidd's report establishes that such observations were especially apt in relation to the community on Palm Island, which was subject to particularly egregious oppression and subjugation, even in comparison to most other Aboriginal communities in Queensland.[61]

30. The Respondents rely on Ms Sailor's evidence that she had a good working relationship with the police in 2004 in support of the submission that there is no connection between the history of Palm Island and the cultural needs of the community.[62] The Applicants do not understand the relevance of that evidence to that submission.

31. The Respondents correctly observe that Professor Altman did not address the issue of high levels of alcohol abuse or high levels of conviction and incarceration within the Palm Island community.[63] The RCIADIC canvassed those issues extensively.[64] The Applicants submit that the Court can take judicial notice of the fact that the disproportionate levels of alcoholism and incarceration in Aboriginal communities such as Palm Island were not resolved between when the RCIADIC report was handed down and 2004 (and, for that matter, remain unresolved today).

C.3.1 Police duties at common law

32. The Respondents submit that the common law duties referred to by the Applicants[65] are not pleaded and "should be ignored".[66] This is incorrect. The Applicants have pleaded that the police were subject to duties at common law.[67]

---

[60] Exhibit A107 at 2.1-2.3.

[61] See generally, Exhibit A2.

[62] RS: 105.

[63] RS: 108.

[64] *Cf*, Exhibit A108, Ch 5-9 (pp 132-161).

[65] AS: 94-97.

[66] RS: 125.

[67] 3FASC: 115; AS: 96.

33. In any event, as the Respondents recognise, the functions of the QPS are set out in the PSAA.[68] As the Applicants have submitted, those functions echo the functions of the police at common law.[69] Accordingly, the Applicants' submit that any analysis of the QPS functions under the PSAA must necessarily involve a consideration of the analogous common law principles.

D.1.3 Failure to treat SS Hurley as a suspect

34. The Respondents submit that "until the cause of death was known, there was no basis for a suspicion that the death resulted from an unlawful killing".[70] Even if that submission is accepted (which is denied),[71] the Applicants' allegation is that SS Hurley ought to have been treated as a suspect in a homicide or an assault.[72] The cause of death is irrelevant to the existence or otherwise of an assault.

35. The Respondents further submit that "Hurley was not treated as a suspect because there were no grounds for so treating him".[73] However, the Applicants have made detailed submissions regarding the grounds that existed for treating SS Hurley as a suspect[74] and the Respondents have failed to engage with those submissions in a meaningful way. Instead, the Respondents appear to focus on trying to provide benign explanations for the various acts of the investigation team relied on by the Applicants in establishing that the investigating officers were not treating SS Hurley as a suspect and the effects of their failure to do so.[75]

36. In relation to Roy Bramwell's allegations that SS Hurley assaulted Mulrunji, the Respondents submit that Mr Bramwell's version of events was "inconsistent in significant respects" with the versions provided by SS Hurley, then-Sergeant (***Sgt***) Leafe and PLO Bengaroo on the previous day.[76] Those respects have not been identified and the submission should be rejected.

---

[68] RS: 124.

[69] AS: 288-289.

[70] RS: 170.

[71] See generally, AS: 137-155.

[72] AS: 138.

[73] RS: 174.

[74] AS: 140-155.

[75] RS: 175-182.

[76] RS: 177.

37. The Respondents further submit that the fact that a great deal of scrutiny was applied to Roy Bramwell's version of events by Detective Inspector (***DI***) Webber and then Inspector (***Insp***) Williams during his video re-enactment "is consistent with the allegations being taken seriously and an effort to get as much information as possible".[77] The Applicants' submission was not simply that a great deal of scrutiny was applied to Mr Bramwell's version of events, but that DI Webber and Insp Williams "were applying a great deal more scrutiny to Mr Bramwell's version of events than to any of the police witnesses".[78] The Respondents have failed to engage with that submission.

D.1.4 SS Hurley performing duties at the scene

38. The Respondents submit that "[t]here is no allegation that Hurley, as first response officer, did anything inappropriate".[79] That submission is disingenuous. Actually, the Applicants deny that SS Hurley was the first response officer.[80]

39. The first response officer had obligations to "wherever practicable, ensure that members who are involved in the incident, or are witnesses to the incident, do not undertake or continue to perform duties associated with the investigative process, or other duties at the scene", and to "assume command and control of the incident scene", "contain and preserve the scene" and "take possession of or safeguard exhibits".[81] The latter three obligations are plainly "duties associated with the investigative process, or other duties at the scene". It would be an absurd reading of the OPM if SS Hurley, as first response officer, was obligated to ensure wherever practicable that he did not undertake or continue to perform the duties of a first response officer.

40. In any event, the Applicants have alleged in the alternative that, if SS Hurley was the first response officer, he should not have been performing duties at the scene,[82] as he was in fact doing.[83] In the event that the Court finds that SS Hurley was the first response officer, the Applicants' allegation should be accepted.

---

[77] RS: 178.

[78] AS: 150; note that DI Webber remained disparaging of Mr Bramwell at trial: T981.11.

[79] AS: 187.

[80] Reply: 33(b).

[81] ASF: 48.

[82] Reply: 33(c).

[83] AS: 156-164.

D.1.5 Appointment of DS Robinson to investigation team

41. The Respondents submit that it is "contrary to the evidence" to assume that then Detective Sergeant (***DS***) Robinson "had some decision-making role in the investigation". The evidence supposedly contradicting that proposition has not been identified by the Respondents and the Respondents have failed to engage with the Applicants' submissions on that point.[84]

42. The Respondents submit that there is "nothing to suggest" that the witnesses being interviewed by DSS Kitching and DS Robinson would have known that he had an association with SS Hurley and was stationed in the same police station as Sgt Leafe and PLO Bengaroo. That submission should be rejected.

43. DS Robinson and SS Hurley had been stationed on Palm Island together, living and working in close proximity, for about two years.[85] The residential areas of Palm Island are small and most, if not all, of the residents know the officer-in-charge of the police station and the officer-in-charge of the Criminal Investigation Branch. As the Third Applicant stated, "everybody knows when a new detective coming to Palm, and everybody know who the person is and what their role is in the community".[86] Further, DS Robinson was certainly known by most of the Applicants' witnesses.[87] In the Applicants' submission, the Court should infer that the witnesses who were interviewed by DSS Kitching and DS Robinson would have known or been aware of DS Robinson and his relationship with SS Hurley.

D.1.11 Treatment of PLO Bengaroo

44. The Respondents contend that the Applicants have made no submissions about the allegation in paragraph 217(a) of the 3FASC that a statement was not taken from PLO Bengaroo at the earliest practicable opportunity.[88] That is incorrect.[89]

---

[84] See, AS: 168-169.

[85] AS: 167.

[86] T429.35-37.

[87] See, Andrea Sailor at T92.3-10; Agnes Wotton at T156.32-35 and T162.46; Mersane Oui at T218.12-17; John Clumpoint at T259.12-21; Cecilia Wotton at T341.10-14, T418.28-35 and T429.34-46; Jacinta Barry at T482.5-10; Lex Wotton at T561.30-35 and T731.10-25.

[88] RS: 231.

[89] AS, Annexure: Disputed Facts at 198 and 208.

45. The Queensland Regional Report of the RCIADIC identified the need for statements to be prepared and signed "as soon as possible to avoid any suspicion of collusion, collaboration or fabrication".[90] That was not done with respect to PLO Bengaroo, and the Applicants' contention in that regard should be accepted.

46. The Respondents submit that there is no evidence to support the conclusion that DS Robinson's presence in the interview of PLO Bengaroo likely adversely impacted on the information elicited.[91] That submission should be rejected. DS Robinson was not merely a passive observer of the interview. He actively questioned PLO Bengaroo throughout the interview.[92] On the agreed facts, DS Robinson been stationed on Palm Island for two years.[93] He was PLO Bengaroo's superior officer and had a close connection with SS Hurley, who was also PLO Bengaroo's superior officer. PLO Bengaroo would have known that, whilst DSS Kitching would be going back to Townsville the next day, DS Robinson and SS Hurley would remain on the island. DS Robinson's presence in the interview was patently inappropriate.

47. The Respondents submit that "[i]t is difficult to see how taking the arresting officer to the scene and not taking a police witness to the arrest is a failure to accord PLO Bengaroo the same level of respect afforded to Hurley".[94] The investigating officers had, at that time, heard several conflicting versions of what occurred during Mulrunji's arrest.[95] Two officers had been present at the arrest, one of whom had been accused, not two hours earlier, of assaulting the deceased.[96] The Applicants submit that it would clearly have been more appropriate for PLO Bengaroo to be the officer accompanying the investigating officers to the arrest scene. The fact that he was not chosen indicates that the investigation team had more respect for SS Hurley's views than for those of PLO Bengaroo.

---

[90] Exhibit A109 at p48.

[91] RS: 234.

[92] Exhibit A27, lines 404-426, 493-506.

[93] ASF: 226-227.

[94] RS: 239.

[95] See, T1223.20-1225.32.

[96] AS: 152-153; T1225.33-45.

D.2 Failure to provide support to Aboriginal witnesses

(b) Cultural and sociological issues

48. The Respondents contend that the features of DSS Kitching's communication style which Dr Eades identified as making it difficult for the Aboriginal witnesses to fully participate in the interviews, being his manner in the preliminary part of the interviews and in relation to clock time, are not of any consequence.[97] This overlooks the following remarks made by Dr Eades:

> Interviewers' questions structure the information provided, and can also limit the information provided. When Aboriginal people provide accounts (or tell about something that happened), there is typically much detail about people and their relationships, and about place. There is not nearly the same focus on time as is found in police interviews. *Thus when a police interview focuses on clock time in the elicitation of accounts from Aboriginal people, it may result in missed opportunities for interviewees to provide other detail*.[98]

49. Further, in the interview with Patrick Bramwell, DSS Kitching's poor communication in the preliminary stages of the interview meant that Mr Bramwell was entirely unaware of the purpose of the interview and, accordingly, the interview was essentially a useless exercise,[99] except insofar as it gave DS Robinson an opportunity to interrogate Mr Bramwell with respect to "sly grogging".[100]

50. The Respondents submit that the Court should accept DSS Kitching's evidence to the effect that none of the Aboriginal witnesses appeared *to him* to be in need of support from another person, *he considered* he had no difficulty in understanding, them and *he* did not have any impression that he was being misunderstood.[101] The Applicants do not dispute that this is probably an accurate reflection of DSS Kitching's subjective state of mind. Objectively however, the Applicants submit that the evidence establishes that DSS Kitching knew little about the cross-cultural communication issues that arise when interviewing Aboriginal witnesses, and his assumption that he had a

---

[97] RS: 250.

[98] Exhibit A6, p23.

[99] AS: 212.

[100] T1250.28.

[101] RS: 256.

"good communication style"[102] with Aboriginal witnesses was pure hubris and without foundation.

D.3.1 Discrepancies in Form 1

51. In relation to the statement in the Form 1 that "Mulrunji laid on the floor of the cell and went to sleep immediately", the Applicants have submitted that this was "misleading and tells a more benign version of events than was in fact the case".[103] In response, the Respondents rely on an excerpt from the preliminary autopsy report.[104] That excerpt does not state that Mulrunji laid on the floor of the cell and went to sleep immediately. It in fact states that "[a]n alleged video supposedly shows [Mulrunji] rolling from side to side in the cell until he presumably becomes deceased". In the Applicants' submission, the excerpt from the preliminary autopsy report supports the Applicants' case and not the Respondents'.

D3.4 Failure to advise pathologist of assault allegations

52. The Respondents submit that it is not correct that "as a result of the failure to bring the assault allegations to the pathologist's attention, the results of the autopsy were not the results of a neutral evaluation of the merits".[105] There are two apparent bases for that submission. First, that Dr Lampe stated in his preliminary autopsy report that he had found no evidence of assault.[106] Secondly, that knowledge of the allegations would not have affected the ultimate outcome of the autopsy.[107]

53. In relation to the first basis, the fact that Dr Lampe apparently considered the possibility of assault despite not being told of the allegations is fortuitous and to his credit, but does not remedy the failure of the QPS to advise him that they had been made. It can reasonably be assumed that Dr Lampe would have made more careful and detailed findings in relation to the possibility of assault had he known of the allegations.[108] The second basis relies on *post hoc* theorising. The Court cannot know with

---

[102] T1243.5-30.

[103] AS: 221.

[104] RS: 273-274.

[105] RS: 280.

[106] RS: 276.

[107] RS: 281-283.

[108] Compare the detail of Dr Lampe's findings regarding the possibility of assault with those regarding the possibility of Mulrunji ingesting "caustic substances": Exhibit A18, pp 3 and 6.

any certainty what findings Dr Lampe would have made had his examination been based on all of the facts available, or how those findings would have affected the investigation.

54. The Respondents further submit that "[m]edical evidence as to a cause of death was also important" and "[w]ithout knowledge of a cause of death, the investigation could not usefully or effectively proceed."[109] Those matters do not assist the Respondents' case. If anything, they make the failure to advise Dr Lampe of the assault allegations more serious. Clearly it was vital to the investigation that the pathologist was fully informed. As a direct result of DSS Kitching's failings, he was not.

D.4.1-2 Failures of CAU and CCLO

55. The Respondents submit that because the Applicants "do not say what advice or support should have been provided" to the QPS officers by the CAU or CCLO, "it is difficult to determine whether the failure to do so involved a distinction and, if so, whether it was based on race and had the relevant purpose or effect".[110]

56. The Applicants have alleged a number of failures by the QPS to meet or to consider the cultural needs of the community in the conduct of the investigation.[111] The CAU and the CCLO were services put in place by the QPS, pursuant to the recommendations of the RCIADIC, to ensure that such cultural needs were adequately addressed.[112] Those systems were not utilised. In the Applicants' submission, had they been utilised, it is likely that the investigating officers would have taken some care to ensure that the community's cultural needs were catered for. It is neither necessary nor appropriate for the Applicants to ask the Court to make findings on how the CAU or the CCLO ought to have performed their roles had they been consulted.[113]

57. D.4.3 Failure to take into account cultural needsContrary to the Respondents' submissions,[114] the Applicants have identified a number of cultural needs.[115]

---

[109] RS: 284-285.

[110] RS: 290, 293.

[111] AS: 203-212, 244-252.

[112] AS: 237; RS: 288.

[113] See paragraphs 74 to 78 below.

[114] RS: 295.

[115] See, eg, 3FASC, 32(d), 32(e), 32(f)(i), 32(f)(ii); also note that the RCIADIC stated that the need for assurance that the circumstances of death will be thoroughly and fairly investigated "is not limited

E.2.2 Distinction, exclusion, restriction or preference based on race

(a) Disregard for impartiality

58. The Respondents submit that the Court should reject the Applicants' contention that the investigating officers did not once have regard to the appearance of impartiality throughout the entire investigation,[116] on the basis that "[a]s Kitching accepted, there needs to be a balance between the appearance of impartiality and the speed with which an investigation into a death in custody is considered".[117] However, the requirement for balance between speed and impartiality does not explain the lack of impartiality in the investigation. Most of the factors identified by the Applicants as adversely affecting the perceived partiality of the investigation[118] would not have impacted on the speed with which the investigation was conducted. Further, both DI Webber and DSS Kitching conceded that, at various points, they were not giving adequate regard to the impartiality of the investigation.[119] The Respondents' submission should not be accepted.

(b) Preference for evidence from non-Aboriginal witnesses

59. The Respondents submit that the it is "speculative and baseless" to allege that the failure to provide support to the Aboriginal witnesses resulted in the loss for all time of evidence that would otherwise have been provided.[120]

60. In her report, Dr Eades stated in relation to the format of the interviews of the Aboriginal witnesses that: "when a police interview focuses on clock time in the elicitation of accounts from Aboriginal people, it may result in missed opportunities for interviewees to provide other detail"[121] and that "It is quite possible that a different kind of investigation would have produced more information, if the witnesses' ac-

---

to the family of the deceased" — Exhibit A108, Ch 4 (introduction, p88), see also, at 4.6.1 (p119) and 4.7.2 (p127); see further, Exhibit A109 at Ch 3 (pp 47-52).

[116] See, AS: 259-260.

[117] RS: 312. Note that DSS Kitching further accepted that "it is important not to give speed more importance than the perception of impartiality": T1162.15-17.

[118] See, AS: 259.

[119] See, eg, AS: 128, 154, 171, 195.

[120] RS: 313.

counts had not been limited and structured by the interview format."[122]Accordingly, the Applicants' submission is neither speculative nor baseless. It is grounded in the Applicants' expert evidence and should be accepted.

(c) Compromise of integrity of investigation

61. The Respondents submit that "it should not be concluded that the integrity of the investigation overall was compromised", because whilst "mistakes were made", the QPS investigation "was an incomplete one, without knowledge of a cause of death, the CMC taking over responsibility from 24 November after the cause of death was known".[123]

62. It can be accepted that the CMC took over responsibility of the investigation from 24 November 2004. The CMC later found the investigation to be "seriously flawed, its integrity gravely compromised in the eyes of the very community it was meant to serve".[124] In the Applicants' submission, the Court should make similar findings.

(d) Failure to address cultural needs of the community

63. The Respondents note that many OPM provisions referred to by the Applicants in relation to the cultural needs of the community "apply irrespective of race".[125] This can be accepted. However, the Applicants submit that the applicability of the provisions irrespective of race has no bearing on the fact that the provisions were introduced as a result of the RCIADIC.

E.2.3 Based on race

64. The Respondents submit that "[t]he investigation team knew that they would be subject to significant scrutiny through the involvement of the Ethical Standards Command and because an inquest was mandated".[126] No evidence is cited in support of that assertion and the Applicants submit that there is in fact no evidence to support it.

---

[122] Exhibit A6, p24.

[123] RS: 315.

[124] Exhibit A50, page xxiv.

[125] RS: 316.

[126] RS: 320.

65. The Respondents further submit that the QPS Failures "were not acts involving a distinction based on race" but were "the result of oversight or insufficient attention to detail … in the circumstances of an urgent investigation in a remote location undertaken at short notice."[127] That submission must fail for the following reasons.

66. First, that acts involve matters such as "insufficient attention to detail" or "insufficient consideration of the potential implications of conduct as affecting the appearance of impartiality" does not mean that the acts were not distinctions based on race. As submitted above, an act can be an honest mistake or error of judgment and still breach section 9 of the RDA.[128]

67. Secondly, as also submitted above, many of the flaws in the investigation cannot be excused or explained by its urgency or the fact that it was undertaken at short notice.[129] The Court can presume that most investigations into a death in custody are undertaken urgently and at short notice. The fact of urgency does not abrogate the requirement for due care and diligence in the conduct of the investigation.

68. Thirdly, there is no evidence to support the assertion that the remoteness of Palm Island excuses or explains the QPS Failures. Neither DI Webber nor DSS Kitching sought to rely on the remoteness of the location as a justification for their actions.

69. Fourthly, the remoteness of Palm Island was not a coincidence. Palm Island is an artificial remote community, created by the First Respondent through decades of racist policies. It was this remoteness that caused Queensland's then "Chief Protector of Aboriginals", John Bleakley, to describe Palm Island in 1916 as an ideal place to confine "the individuals we desire to punish",[130] and to commence the systematic forcible removal and confinement to Palm Island of Aboriginal people by the State of Queensland, which would continue for most of the 20th century.[131] In the Applicants' submission, the Court should not allow the Respondents to rely on that same remoteness to justify the failure to provide services to Aboriginal people on Palm Island in 2004.

---

[127] RS: 322.

[128] See paragraphs 14-19 above.

[129] See paragraphs 58-58 above.

[130] Exhibit A2 (Dr Kidd report) at 3.1.6.

[131] See, Exhibit A217, pp 5, 10; Exhibit A2 at 3.1-3.2; Exhibit A216, pp16-19; T149.29-41; T166.15-31; T182.1-31.

E.3.3 Right to access services

70. The Respondents submit that "[t]he right of access to a service intended for use by the general public is … not a right to be provided with a particular standard of service".[132] That submission can be accepted, so far as it goes. However, the Applicants do not allege their rights to access policing services was *denied*. The allegation is that the acts of the QPS nullified or impaired the recognition, enjoyment or exercise of those rights by the Applicants *on an equal footing*. The Applicants submit that, if the services are provided to the general public at a certain standard and to the Applicants at a lower standard, then the Applicants are not accessing those services "on an equal footing".

F.1.1 Expectation that SS Hurley would be removed

71. The Respondents submit that "[i]t should be concluded that there was no proper basis to suspend or stand down Hurley in the period between the death in custody and the confrontation which occurred on Monday 22 November".[133] The Applicants note that the Respondents now concede that "[i]t is reasonable to infer that Hurley was stood down from his position as a result of the confrontation",[134] although they had, until their final submissions, disputed both that the confrontation had occurred and that it was the basis for SS Hurley's removal from the island.[135]

72. The Respondents have not provided an explanation as to why it was appropriate to remove SS Hurley from the island after the confrontation had occurred, rather than removing him before his presence on the island fostered discontent to such a degree that he was confronted by hundreds of residents demanding that he leave the island. His continued presence on the island after the investigation team had left achieved nothing except to enrage the community and foster a perception that he was not being held to account for Mulrunji's death.

F.2.2 Police knowledge of tensions within the community

73. In relation to the feeling of anger held by residents of Palm Island regarding Mulrunji's death and the perception that SS Hurley was not being held to account, the Re-

---

[132] RS: 332.

[133] RS: 347.

[134] RS: 349.

[135] 3FASC: 256-257; Defence: 175-176.

spondents take issue with the Applicants distinguishing between the language in the Applicants' pleadings and the language in the agreed facts.[136] If the Respondents are correct in submitting that there is no real difference between the two positions, it begs the question of why they did not simply admit the Applicants' allegations.[137]

F.2.4 Failure to take measures to diffuse tensions

74. The Respondents submit that the allegations in paragraphs 294 to 296 of the 3FASC are "meaningless"[138] because the Applicants allege that the Respondents should have taken measures of a certain type,[139] but "the respondents are left in the dark as to what it is alleged that they ought to have done, and the Court is not asked to make findings on what should have been done".[140]

75. As the Respondents identify,[141] the Applicants gave particulars of various allegations to the effect that the Applicants do not ask the Court to determine precisely what measures should have been taken, and nor could they. Rather, the Applicants allege that measures of a certain type should have been taken and that no such measures were taken. The Applicants submit that this position is correct as a matter of law.

76. It is well established that the Court cannot assume the functions of the executive arm of government. As Mason J held in *Minister for Aboriginal Affairs v Peko-Wallsend*,[142] "It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion".[143]

77. In *Bare v Independent Broad-Based Anti-Corruption Commission*,[144] the Victorian Court of Appeal considered whether section 109(6) of the *Police Integrity Act 2008* (Vic) prohibited the Court from ordering the Director of the Commission to conduct an inves-

---

[136] RS: 352.

[137] *Cf*, 3FASC: 296(a)(i); Defence: 212.

[138] RS: 364.

[139] See, AS: 354.

[140] RS: 367.

[141] RS: 362-367.

[142] (1986) 162 CLR 24.

[143] (1986) 162 CLR 24 at 40-41.

[144] (2015) 326 ALR 198.

tigation that had been suspended, or to carry out an investigation when none had been initiated. In determining that it it was the former, Tate JA stated:

> It is difficult to envisage otherwise why it would be that there was a need for an express prohibition against a court from making an order compelling an investigation to be carried out. *If no investigation had been on foot, a court compelling an investigation (absent the prohibition) would need to define prospectively what the purpose and scope of the proposed investigation would be. That is an executive function that would sit uneasily with the adjudicative role of a court,* even under State law. For the legislature to have created an express prohibition on a court compelling the Director to carry out an investigation indicates that the subject-matter of the proceeding before the court was much more likely to have been an existing investigation, properly defined as to its scope, that the Director had determined to put on hold.[145]

78. The allegation in paragraph 295, which the Respondents allege to be "meaningless", can be summarised as that, in relation to the aftermath of Mulrunji's death in custody, the QPS knew that the community on Palm Island was a racial or ethnic group requiring certain protections in order to ensure that they equally enjoyed human rights and fundamental freedoms, and should have taken special measures for the purpose of providing such protections.

79. In the circumstances, the range of such measures which could have been taken is extremely broad.[146] Deciding which measures to take is a matter of police discretion. In the Applicants' submission, that is an "executive function that would sit uneasily with the adjudicative role of the Court".[147] The Applicants submit the Court can determine *that* the discretion should be exercised, but not *how* it should be exercised. That is what the Applicants have asked the Court to do. The Respondents' submission that this is "meaningless" should be rejected.

80. It is also noted that the Respondents have made no submissions in relation to the acts relied on by the Applicants in this portion of the claim which are not subject to the Respondents' objection regarding lack of particularity.[148]

---

[145] (2015) 326 ALR 198 at 300 [367] (Tate JA) (emphasis added).

[146] Although, contrary to the Respondents' submission, the increase in the number of police was not one of them—RS: 364.

[147] *Cf, Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 326 ALR 198 at 300 [367] (Tate JA).

[148] See, AS: 584(e), (j), (k).

G.1.1 Structure and purpose of the PSPA

Meaning of "any other accident"

81. In relation to the meaning of "any other accident" in the definition of "emergency situation" under the *Public Safety Preservation Act* 1986 (Qld) (***PSPA***), the Respondents submit that "[o]n the applicants' approach a deliberately lit fire or a deliberately caused explosion could not be an emergency situation".[149] That is incorrect.

82. The Applicants' approach is that the definition of emergency situation distinguishes between "incidents" involving "weapons", which are deliberately caused, and "accidents", which are without apparent cause.[150] The Applicants have expressly recognised that the fire on 26 November 2004 could have constituted either a "fire" within the meaning of sub-paragraph (a) of the definition or an "incident" involving "any other weapon" within the meaning of sup-paragraph (e).[151]

83. The Respondents note that the High Court held in *Povey v Qantas Airways Limited*[152] that an "accident" in the context of the *Warsaw Convention* was the "unfortunate event, disaster or mishap" which caused an injury. However, the decision in *Povey* assists the Applicants' case and not the Respondents'. Gleeson CJ, Gummow, Hayne and Heydon JJ held in relation to "the 'accident', in the sense of 'an unfortunate event, a disaster, a mishap'" that "[i]t may be accepted that its happening was not intended. In that sense, what is alleged to have happened may be described as 'accidental'".[153]

84. The Respondents continue to maintain that there was violence on 26 November 2004 which was "premeditated and as a result of planned action".[154] In other words, the Respondents submit that an "accident" occurred which was not accidental. That should not be accepted.

---

[149] RS: 376.

[150] AS: 384-386.

[151] AS: 403.

[152] (2005) 223 CLR 189.

[153] (2005) 223 CLR 189 at 205 [34]; see also, Kirby J at 234-235 [145] and 236 [149]-[151]; *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 527 (Wilson, Deane and Dawson JJ).

[154] RS: 408(f).

Use of inadmissible evidence

85. In support of their submissions regarding the existence of an emergency situation, the Respondents cite a number of findings made by de Jersey CJ in *R v Poynter, Normann & Parker*[155] and made by Shanahan DCJ in his remarks on sentencing in the First Applicant's criminal trial.[156] Those findings were admitted into evidence subject to section 91 of the *Evidence Act* 1995 (Cth), which provides that evidence of a finding of facts in another proceeding is not admissible to prove the existence of those facts.

86. Accordingly, the findings of de Jersey CJ and of Shanahan DCJ are admissible only as evidence of what was found, and not of the truth of the findings. In the Applicants' submission, the fact that certain findings were made by de Jersey CJ and by Shanahan DCJ is irrelevant to the existence of an emergency situation on 26 November 2004 and cannot be relied on by this Court to make any factual findings. Further, many of the relevant findings which were critical of the First Applicant were not put to him in cross-examination and concern issues which were not pleaded and otherwise have not previously been raised in these proceedings. The Respondents should not be permitted to ambush the Applicants by raising those issues in their closing submissions.

G.2 Revocation of the Emergency Situation

G.2.1 Evening of 26 November 2004

87. The Respondents submit that it should not be accepted that the emergency situation ended when the crowd of protesters dispersed, because "[t]here could be no confidence that there would be no further outbreaks of riotous behaviour and no confidence that peace and good order had been restored."[157] The Respondents have failed to explain in any way how those matters relate to the definition of "emergency situation" under the PSPA. The Applicants submit that they do not.

88. Even if an "outbreak of riotous behaviour" amounts to an "emergency situation" under the PSPA (which is denied), a lack of confidence that further emergency situations will not occur does not mean that a previous emergency situation is still in effect.[158] Likewise, there is nothing in the PSPA to suggest that an emergency situation

---

[155] [2006] QCA 517 (Exhibit R27); cited at RS: 384.

[156] *R v Wotton* (District Court of Queensland, unreported, 10 November 2008) (Exhibit A98); cited at RS: 385.

[157] RS: 392-393.

[158] AS: 422.

remains in place until the incident coordinator is "confident that peace and good order has been restored". The Court should accept that no emergency situation existed after the crowd dispersed on 26 November 2004.

G.3.1 Allegedly "missing" firearm

89. The Respondents submit that the relevance of the Applicants' submissions in relation to searches conducted by the police for the allegedly missing firearm is "unclear" because "no act in breach of s.9(1) is alleged in respect of the missing rifle".[159] That submission is disingenuous and should be rejected.

90. The spectre of the missing rifle was raised in paragraph 205(c)(iv) of the Defence as a justification for DI Webber considering that a "high-risk situation" existed. The Respondents continue to rely on it in that regard.[160] The existence of a high-risk situation is particularly important to the Applicants' case because, as the Respondents recognise, it is the necessary precondition for the deployment of SERT.[161] A substantial portion of the acts in breach of section 9(1) alleged by the Applicants are as a result of SERT being deployed. It would have been remiss of the Applicants not to make submissions in relation to the allegedly missing rifle. The proposition that those submissions are irrelevant cannot be sustained.

G.4.2 Arrests not lawful

(a) Arrest of First Applicant

91. The Respondents submit that Mr Wotton was arrested by DS Robinson, and that DS Robinson was "present during the riot and had knowledge of Mr Wotton's involvement in the riot".[162] Those submission should be rejected.

92. The Respondents' pleaded case with respect to the selection of persons to be arrested is that "the list of persons to be apprehended on the morning of Saturday 27 November 2004 was developed by DSS Campbell in consultation with DSS Miles".[163] The Respondents have not previously propounded a positive case that Mr Wotton's ar-

---

[159] RS: 413,

[160] RS: 408(d).

[161] RS: 408-409.

[162] RS: 425.

[163] Defence: 201(a).

rest was lawfully conducted by DS Robinson pursuant to section 198 of the *Police Powers and Responsibilities Act* 2000 (Qld) (***PPRA***) because Mr Robinson had the requisite reasonable suspicion that Mr Wotton had committed or was committing an offence. They should not be permitted to do so in their closing submissions.

93. A reasonable suspicion is a condition of mind and is required to be pleaded and adequately particularised.[164] The Respondents did not plead any allegations in relation to DS Robinson's state of mind, and neither did they adduce evidence to indicate that he had a reasonable suspicion that Mr Wotton had committed or was committing an offence. They could have done so,[165] and given his centrality to the Applicants' entire claim, his absence at trial is quite remarkable.

94. In any event, DS Robinson did not arrest Mr Wotton. In support of the allegation that he did, the Respondents cite then Senior Constable (***SC***) Kruger's 12 March 2005 statement, in which SC Kruger said that he heard DS Robinson tell Mr Wotton that he was under arrest before SC Kruger directed Mr Wotton to get on the ground.[166] That should not be accepted. It conflicts with SC Kruger's evidence at trial and with the other accounts given at trial of Mr Wotton's arrest.[167]

95. The Respondents also cite SS McKay's evidence that "we didn't arrest anyone. Darren Robinson arrested the people that were to be arrested".[168] However, as SC Kruger explained in his evidence, in SERT terminology there is a distinction between the officer who "apprehends" a person and the officer who "arrests" the person.[169] That distinction does not exist at law. As the Respondents recognise, an arrest is "a deprivation of liberty or freedom by detaining a person or taking them into custody".[170] In *Wilson v New South Wales*,[171] Hodgson JA (Young and McColl JJA agreeing) held that the requirements for an arrest are "(1) communication of intention to make an arrest, and (2) a sufficient act of arrest or submission".[172] It follows that the person who arrested Mr Wotton was the person who communicated an intention to make an arrest

---

[164] FCR 16.43(a).

[165] T670.45-671.35.

[166] Exhibit R19 at [11]-[18].

[167] Summarised in AS: 475-478.

[168] T1427.30-31; T1454.32.

[169] T1660.14-1661.10.

[170] RS: 417; see also, AS: 455.

[171] (2010) 207 A Crim R 499.

[172] (2010) 207 A Crim R 499 at 525 [59].

and then caused Mr Wotton to submit to his arrest. That person was SC Kruger, not DS Robinson.

96. It is also noted that the Respondents have made no submissions in relation to the allegation that the First Applicant was tasered for "resisting arrest".[173] The Respondents declined to particularise the allegation when requested, and they have now failed to come up to proof. That allegation was scandalous. It accused Mr Wotton of a crime which he never committed and for which he was never charged.[174]

(b) Arrest of Third Applicant

97. The Respondents submit that it is not alleged in the 3FASC that the Third Applicant was arrested, although they accept that her "liberty of movement was restrained for a short period of time"[175] and that the act of her arrest has been proven.[176] Paragraph 300 of the 3FASC alleges that "[i]n the circumstances pleaded in paragraphs 283 to 288 above, the arrests conducted in the course of the Raids" were not conducted lawfully. Paragraph 288(b) alleges that the Third Applicant was forced by SERT officers to lie face down with guns pointed at her. That is the act of arrest of the Third Applicant upon which the Applicants rely.[177]

G.4.3 Not conducted with minimum force necessary

(a) Force used to arrest the Third Applicant

98. The Respondents submit that "[t]here was no physical force used to arrest the third applicant".[178] That submission is disingenuous and must be rejected. Holding a person at gunpoint is clearly the use of force.[179]

(b) Force used to arrest the First Applicant

99. The Respondents submit that the circumstances in which the First Applicant was transported by helicopter to Townsville is not pleaded in the 3FASC.[180] That can be

---

[173] Defence: 203(h).

[174] *Cf*, *Criminal Code* 1899 (Qld) ss 199, 340(b).

[175] RS: 426.

[176] RS: 473(g), 474.

[177] AS: 469.

[178] RS: 428, 496.

[179] *Cf*, OPM s 14.3 (Exhibit A14, pp 65-65B).

accepted, however it is pleaded that his arrest was not conducted with the minimum force necessary.[181] The details of the helicopter trip were included in Mr Wotton's original Outline of Anticipated Evidence filed on 22 April 2015[182] and his amended Outline filed on 16 September 2015.[183] The Respondents cannot claim that they did not know the case against them. Further, the Respondents' failure to call the officers accompanying Mr Wotton on the helicopter, Insp Richardson or DS Richardson, cannot be explained by the omission of the helicopter incident from the pleadings. Mr and Mrs Richardson were material witnesses to many other issues which are in dispute.

G.5.1 Invalid use of emergency powers

100. The Respondents submit that whether or not SERT officers were authorised under section 8 of the PSPA to enter and search dwellings "turns on whether there was an emergency situation at the relevant times".[184] The existence of an emergency situation is the first element that the Respondents must establish in that regard. They must also establish that:[185]

a. the incident coordinator is satisfied that the entry and search is necessary to effectively deal with the emergency situation;

b. the incident coordinator is so satisfied on reasonable grounds; and

c. the officers conducting the entry and search were acting on the incident coordinator's instructions.

101. The Applicants submit that none of the requisite elements have been established.[186]

G.5.2 Not justified under PPRA

102. The Respondents have accepted in their closing submissions, and contrary to the case they previously sought to run,[187] that there is no evidence of the reasonable suspicion

---

[180] RS: 429.

[181] 3FASC: 300.

[182] At 8.17-8.21.

[183] At 8.17-8.21.

[184] RS: 435.

[185] RS: 493.

[186] AS: 387-408; 490-502.

required under section 19 of the PPRA "in the case of the entries into the homes of the first and third applicants".[188] The Court must now accept that the entry into the home of the First and Third Applicants was unlawful. The Applicants note in that regard that if the QPS officers who entered the home of the First and Third Applicants did not reasonably suspect that a person to be arrested was inside, it is difficult to conceive of how DI Webber could have been reasonably satisfied that for them to enter and search that dwelling would be necessary to effectively deal with the emergency situation.

103. With respect to the entry into the home of the Second Applicant, the Respondents submit that the entry was justified under section 19 of the PPRA because "Richard Poynter was identified as a target at that address and was arrested at that address".[189] This applies *ex post* reasoning to an *ex ante* test.[190] The question is not whether a person was in fact arrested at the dwelling, it is whether, prior to the entry into the dwelling, the officers suspected on reasonable grounds that a person to be arrested was inside the dwelling. There is no evidence that any officer held a suspicion that Richard Poynter was in the Second Applicants' home when it was entered and searched and neither is there any evidence of any reasonable grounds for such a suspicion. That Mr Poynter was in fact present at the dwelling does not assist the Respondents.

G.5.3 Unnecessary disturbance of occupants

104. The Respondents submit that the acts relied on by the Applicants to establish the unnecessary disturbance of the occupants of their homes were "based on the usual SERT operational methodology".[191] That submission should be rejected. The methodology employed by SERT during the raids was not standard, it was a methodology peculiar to the operation on Palm Island which was devised based on a number of assumptions about the Aboriginal residents of the island.[192]

---

[187] Defence: 220(b).

[188] RS: 437.

[189] RS: 437.

[190] *Cf, Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584 at 604 [52] (Allsop CJ).

[191] RS: 439.

[192] AS: 559-575; and see, RS: 460.

105. The Respondents submit that the evidence of the ransacking of the First and Third Applicants' house is "equivocal", and note that the Third Applicant "did not complain of any damage to Robinson on 27 November".[193] It is true that Mrs Wotton did not complain about any damage during her recorded interview with DS Robinson. More accurately, DS Robinson asked, "And do you agree that we know nothing was damaged inside your house?" and Mrs Wotton responded "Yeah" before he had finished asking the question.[194] This was a clear example of gratuitous concurrence and should not be given any weight.

106. Further, in that recording, DS Robinson says that he had "just spent a couple of minutes with [Mrs Wotton's children] and explained what we um why we did it and so forth".[195] Mrs Wotton's evidence was that he had said "Come here and sit down. I need to talk to you about your father. What did your father do? Do you know what he did?"[196] In the recording, DS Robinson was entirely dismissive of Mrs Wotton's concerns. It cannot be inferred from her failure to raise a complaint about the ransacking of her home in that context that such ransacking had not in fact occurred.

G.6.2 School bus

107. The Respondents submit that the Applicants' submission that the St Michael's School bus was unlawfully seized is "contrary to agreed facts", on the basis that the parties agree that a QPS officer took possession of the bus "with the agreement of the school principal".[197] However, the principal agreed to surrender the bus to SS Dini in circumstances where SS Dini was purporting to exercise emergency powers which he had no authority to exercise.[198] There is no inconsistency between the principal agreeing to surrender the bus in those circumstances and the unlawfulness of SS Dini taking control of the bus.

---

[193] RS: 439.

[194] Exhibit A205 at 0:44.

[195] Exhibit A205 at 01:25.

[196] T343.5-8.

[197] RS: 453; referring to ASF: 147.

[198] AS: 546-549.

H.3.1 Right to equality before the law and equal protection of the law

(a) 22 to 25 November 2004

108. The Respondents submit that it is unclear which acts occurring between 22 and 25 November 2004 concerned the investigation into Mulrunji's death.[199] The Applicants do not press that submission.

H.4 Breaches of rights: Sub-Group

109. The extent to which the Court's findings in relation to the breaches of the Applicants' rights will be common to the claims of the Sub-Group members is difficult to determine prior to those findings being made. The Applicants propose to make further submissions on this issue after a decision in this part of the proceedings has been handed down.

H.4.1 Right not to be subjected to unlawful interference

(a) General right to enjoy property

110. The Respondents submit that "[t]he applicants refer to unpleaded rights under two Articles of the ICJ Statute and the right under Article 5(d)(v) of the Convention. They should not be permitted to depart from their pleaded case."[200] The Articles of the ICJ Statute referred to are Articles 38(1)(b)-(c). Those Articles are not rights, they are sources of international law.[201] Further, the reference in the Applicants' submissions to Article 5(d)(v) of the CERD was not an attempt to rely on that right, it was in support of the existence under customary international law of a right to the enjoyment of property without unlawful interference.[202] It is noted that the Respondents question the relevance of the Applicants' submissions in relation to the sources of rights under international law.[203]

---

[199] RS: 486.

[200] RS: 491.

[201] See, AS: 46-52.

[202] AS: 619.

[203] RS: 70.

H.4.3 Right not to be subjected to inhuman or degrading treatment or punishment

111. In relation to the treatment of the Third Applicant by SERT, the Respondents submit that "[t]he treatment complained of was not degrading in the relevant sense. It was of short duration, and was not undertaken for improper purposes or motivated by improper purposes."[204] In the Applicants' submission, this is a disingenuous and extremely distasteful attempt to downplay the significant trauma to which the Third Applicant was subjected.[205]

I.1 Declaratory relief

112. The Applicants seek declarations that the Respondents have committed various acts of unlawful racial discrimination.[206] The Respondents appear to take issue with the Applicants' submissions in relation to declaratory relief on the basis that "[t]he preferable course, if any declarations are made, is to declare what acts by what persons constitute unlawful discrimination" and that the Second Respondent is not vicariously liable for the acts of the relevant police officers.[207]

113. The Court's power to make declarations of unlawful racial discrimination is derived from section 46PO(4)(a) of the *Australian Human Rights Commission Act* 1986 (Cth) (***AHRCA***) where it is clearly set out. The Court also has an inherent discretionary power to award declaratory relief which it is "neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise".[208] It follows that the Court's power to make declarations is broad and can extend to declarations beyond the terms of section 46PO(4)(a).

114. The declarations sought by the Applicants are within the terms of section 46PO(4)(a) and it is submitted that they are appropriate declarations for the Court to make. In particular, Applicants submit that it would not be appropriate to make declarations only with respect to the First and not the Second Respondent.

---

[204] RS: 501.

[205] See, AS: 469; AS, Annexure: Disputed Facts at 345, 347.

[206] See, AS: 662-664.

[207] RS: 503.

[208] See, for example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

115. It is agreed that the Second Respondent was responsible for the efficient and proper administration, management and functioning of the QPS in accordance with the law.[209] In the event that the Court finds for the Applicants, the impugned conduct would necessarily have involved a substantial failing on the part of the Second Respondent. In the Applicants' submission, it is essential that the Commissioner is declared to have committed unlawful racial discrimination, and not just the State. This would ensure that there is a sufficient public record of the way in which the Applicants' application was resolved and would assist in redressing the harm done by the contravening conduct.[210]

I.2.4 Aggravated damages

116. The Respondents acknowledge that aggravated damages, as they are compensatory in nature, are available to the Applicants pursuant to section 46PO(4)(d) of the AHRCA.[211]

117. The Respondents observe that the Applicants rely on conduct occurring after November 2004 in respect of their claim for aggravated damages.[212] The Applicants do so on the basis that aggravated damages may be awarded where an applicant's distress and hurt is exacerbated by the conduct of a respondent occurring after the relevant racial discrimination.[213]

118. The Respondents submit that the Applicants should not be awarded aggravated damages with respect to the post-November 2004 conduct, on the basis that the Applicants did not give evidence of the specific pleaded matters affecting them.[214] However, the Applicants' case is not put that way. Paragraph 326 of the 3FASC alleges that a series of events aggravated the damages of the Applicants. Those events, which are particularised in paragraphs 327 to 337, reflect the QPS consistently failing to hold any of its members to account for the events the subject of the Applicants' claim and showing an utter lack either of recognition of the Applicants' suffering or of contrition with respect to the impact on the Applicants of the impugned conduct.

---

[209] AFS: 9(a).

[210] *Cf*, *Eatock v Bolt (No 2)* (2011) 284 ALR 114 at 116 [5]-[6] (Bromberg J).

[211] RS: 513.

[212] RS: 515.

[213] AS: 692-694.

[214] RS: 536.

119. The First Applicant gave evidence that he continues to see the investigation and the subsequent police conduct as a cover-up[215] and he still considers it unfair or unjust that no one has been held to account for the death of Mulrunji.[216] It is also noted that in this litigation the Respondents made the scandalous and unfounded allegation that Mr Wotton was tasered because he was "resisting arrest", only to apparently abandon it in their closing submissions.[217] Then, in the Respondents' written submissions, they have sought to ambush Mr Wotton by relying on findings critical of Mr Wotton's conduct made in other proceedings, which concerned matters that were not once raised in these proceedings, were not put to Mr Wotton in cross-examination, and to which he has otherwise had no opportunity to respond.[218]

120. Mr Ralph noted the manner in which the Second Applicant's hurt and suffering was exacerbated by the various court hearings and inquiries which were held in the years after 2004.[219] The impact of those matters on her several years later was recorded in her speech outside the courthouse in Townsville.[220]

121. Mr Ralph also noted the manner in which the response of the police and the justice system to Mulrunji's death has exacerbated the Third Applicant's pain and suffering, with specific reference to the disparity between the public findings of the Coronial inquests and the lack of disciplinary action against the police officers involved.[221] As Mrs Wotton told the Court, she has been waiting for 10 years to receive an apology from the government and see justice happen.[222] Further, Mr Ralph concluded his report by identifying the specific matters that the Wotton family had experienced.[223] It is also noted that, in their closing submissions, the Respondents make an insulting and insensitive attempt to downplay the trauma that Mrs Wotton suffered.[224]

122. Accordingly, the allegations supporting the claim for aggravated damages in paragraph 326 of the 3FASC have been made out.

---

[215] T733.20-31.

[216] T734.1-5.

[217] See paragraph 96 above.

[218] See paragraphs 91-92 above.

[219] Exhibit A9, p28.

[220] Exhibit A215 at 25:47

[221] Exhibit A9, pp24-25.

[222] T430.27-33.

[223] Exhibit A9, p35.

[224] See paragraph 117 above.

123. The Respondents have sought to limit the aggravated damages available to the Applicants to matters concerning the conduct of the Respondents after November 2004, on the basis that this is how the Applicants' case was pleaded.[225] That submission should not be accepted. As the High Court unanimously held in *New South Wales v Ibbett*, aggravated damages are not a distinct class of damages, but are "a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing."[226]

124. The Applicants seek compensation for loss and damage which has led to feelings of "intense physical and/or mental suffering",[227] feelings of "fear, anguish and inferiority",[228] humiliation and degradation,[229] and fear for their safety and the safety of their family.[230] The evidence establishes that they suffered such loss and damage.[231] That damage was caused by deliberate acts of the QPS, which were conducted with an utter lack of regard for the rights of the Applicants or for their safety and wellbeing.[232] The quantum of any compensation must take into account the nature and severity of the police conduct.[233]

I.2.5 Exemplary damages

125. The Respondents note that the Applicants did not claim exemplary damages in their complaint to the AHRC.[234] The Applicants acknowledge that this is the case, however it is submitted that it was not necessary for the Applicants to do so. Section 46PO(3) of the AHRCA provides that the unlawful discrimination alleged in an application under section 46PO must "be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint" or "arise

---

[225] RS: 533.

[226] (2006) 229 CLR 638 at 646-647 [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

[227] 3FASC: 322(a).

[228] 3FASC: 322(b).

[229] 3FASC: 255(b), 322(d), 324(b).

[230] 3FASC: 255(c), 322(e), 324(c).

[231] AS, Annexure: Disputed Facts at 341-347.

[232] See, AS: 556-582.

[233] *Cf*, *Bulsey v State of Queensland* [2015] QCA 187 at [104]-[113] (Fraser JA), [127]-[129] (McMeekin JA). Note that *Bulsey* was decided in the context of the *Civil Liability Act* 2003 (Qld), which imposes restrictions on the power of the Court to award damages which are not imposed in relation to orders under section 46PO(4) of the AHRCA.

[234] RS: 519.

out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint." There is no requirement that the same relief must be sought.

126. The Respondents submit that exemplary damages are not available under section 46PO(4) of the AHRCA.[235] That submission should be rejected.

127. As the Respondents acknowledge,[236] the terms of section 46PO(4) indicate that the Court is not limited to making orders of the types referred to in subsections (a) to (f), but can make any other order "to a similar effect".[237] In interpreting that provision, the Court must have regard to the remedial purpose of the legislation.[238]

128. The Respondents submit that, "[a]n award of exemplary damages serves a different purpose to an award of compensatory damages, and is not an order to a similar effect as an award of compensatory damages."[239] This can be accepted, and it follows that exemplary damages cannot be awarded under subsection 46PO(4)(d).

129. However, whilst subsection 46PO(4)(d) permits the award of compensatory damages, other subsections go beyond contemplating compensatory orders. The Applicants submit that section 46PO(4) has clearly been drafted in order to expand the Court's ordinary powers to grant relief to an applicant and to permit the grant of relief which provides applicants with forms of redress going beyond mere compensation.

130. The Respondents rely on the following remarks of French and Jacobson JJ in *Qantas Airways Limited v Gama*:[240]

> The damages which can be awarded under s 46PO(4) of the HREOC Act are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory.[241]

131. In the Applicants' submission, whilst their Honours referred to section 46PO(4), it is clear that their Honours were only considering an award of damages under subsection (d), as that subsection is quoted directly and the balance of the provision is not

---

[235] RS: 519-523.

[236] RS: 522.

[237] See, AS: 671.

[238] See, AS: 672.

[239] RS: 522.

[240] (2008) 167 FCR 537.

[241] (2008) 167 FCR 537 at 568 [94].

referred to. Their Honours' statement should not be taken as authority that the power of the Court under section 46PO(4) to grant orders "to a similar effect" excludes non-compensatory damages. Similarly, the statement by Kenny J in *Richardson v Oracle Corporation Australia Pty Limited*[242] on which the Respondents rely was explicitly directed to subsection 46PO(4)(d) only.

132. Section 46PO(4) is a remedial provision giving the Court the power to make a broad range of orders to provide redress to persons who have suffered unlawful discrimination. The provision does not narrow the Court's powers, it expands them. Nothing in the wording of the section indicates that it was intended to impose a limit on the kinds of orders that the Court can make. The Respondents' submission that section 46PO(4) narrows the Court's power to grant relief should be rejected.

133. Further, the Applicants submit that where, as in this case, Respondents have committed acts of unlawful racial discrimination showing "a conscious and contumelious disregard for the [applicant's] rights",[243] and have subsequently conducted themselves without contrition or remorse, it is open to the Court to order that the Respondents pay damages to teach the Respondents that unlawful racial discrimination "does not pay".[244] In fact, doing so would be entirely consistent with the objects and purposes of both the RDA and the AHRCA. An award of exemplary damages should be made against the Respondents in favour of the Applicants.[245]

I.2.6 Quantum of Damages Claim

134. In relation to the quantum of damages that should be awarded to the Applicants, the Respondents arrive at a figure of $20,000 for each of the First and Third Applicants.[246] No authorities are cited in support of that sum. The Respondents also do not appear to have suggested an appropriate quantum in relation to damages to be awarded to the Second Applicant.

135. In their submissions on damages, the Respondents appear to have approached the Applicants' claim as though it were a claim for personal injury under the law of neg-

---

[242] (2014) 223 FCR 334 at 366 [115].

[243] *XL Petroleum (NSW) Pty Limited v Caltex Oil (Australia) Pty Limited* (1985) 155 CLR 448 at 471 (Brennan J).

[244] *Cf*, *Cassell & Co v Broome* [1972] AC 1027 at 1130 (Lord Diplock).

[245] AS: 700-712, 724-725.

[246] RS: 532.

ligence.[247] That is not the case. The Applicants are claiming compensation for the hurt and suffering to which they were subjected as a result of acts of unlawful racial discrimination by the Respondents. The medical consequences of the Respondents' conduct must be considered in assessing quantum, but it is only one of a number of relevant considerations.[248] In particular, the Applicants should be compensated for the insult and humiliation which they have suffered.[249] Further, many of the violations of the Applicants' rights are closely analogous to direct torts, such as assault, false imprisonment and trespass to person and property. The award of damages must take into account not only the medical injuries suffered by the Applicants, but also "the seriousness and impact of the wrong" done to them.[250] The Respondents have entirely overlooked those requirements.

Chris Ronalds SC **Joshua Creamer**

Counsel for the Applicants
3 May 2016

---

[247] RS: 524-530.

[248] See, AS: 686.

[249] See, AS: 683-685.

[250] *Bulsey v State of Queensland* [2015] QCA 187 at [108] (Fraser JA); see also *NSW v Ibbett* (2006) 229 CLR 638 at 646-647 [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).