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

No. QUD 533 of 2013

Lex Wotton and Others
Applicants

State of Queensland and Another
Respondents

RESPONDENTS' CLOSING SUBMISSIONS

Filed on behalf of the Respondents

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A. OVERVIEW

1. For ease of reference the respondents' submissions follow the arrangement of the applicants' submissions. The respondents note that not all issues raised by the Third Further Amended Statement of Claim (3rd FASC) arise for present determination (see paragraph 6 of the applicants' submissions for example) and that not all issues pleaded which arise for present determination are pressed (see paragraph 277 of the applicants' submissions for example).

2. These submissions are structured as follows:

   (a) Part A is an overview.

   (b) Part B responds to the applicants' brief discussion of the representative nature of this proceeding.

   (c) Part C responds to the applicants' analysis of some issues which provide background and context to the applicants' claim, including:

      (i) the operation of s.9 of the *Racial Discrimination Act* 1975 **(the RDA)**;

      (ii) Aboriginal deaths in custody and the cultural needs and expectations of the Palm Island community; and

      (iii) the functions and duties of the police.

   (d) Part D responds to the applicants' submissions about the matters pleaded in support of the first claim for breach of s.9 of the RDA, which concern the investigation into Mulrunji's death (the QPS Failures).

   (e) Part E responds to the applicants' submissions about whether the matters in Part D constituted a breach of s.9 of the RDA.

   (f) Part F responds to the applicants' submissions about the matters pleaded in support of the second claim for breach of s.9 of the RDA, which concern policing on Palm Island between 22 and 25 November 2004 (the Further Failures).

   (g) Part G responds to the applicants' submissions in relation to the matters pleaded in support of the third claim for breach of s.9 of the RDA, which

concern the police response to the events on Palm Island on 26 November 2004 (also the Further Failures).

(h) Part H responds to the applicants' submissions about whether the matters in Parts F and G constituted breaches of s.9 of the RDA.

(i) Part I responds to the applicants' submissions on remedies.

3. In this representative proceeding the applicants allege that certain conduct by Queensland police officers was in breach of s.9 of the RDA and was therefore "unlawful discrimination" as defined by the *Australian Human Rights Commission Act* 1986 (**the AHRCA**).

4. Section 3(1) of the AHRCA relevantly defines "unlawful discrimination" as follows:-

> "***unlawful discrimination*** *means any acts, omissions or practices that are unlawful under:*
>
> ...
>
> *(b) Part II or IIA of the Racial Discrimination Act 1975;*
>
> ...".

5. By their originating application filed on 9 August 2013 as further amended on 24 August 2015 (the Further Amended Originating Application) the applicants claim:-

(a) a declaration that the impugned conduct constitutes unlawful discrimination within the meaning of the AHRCA;

(b) an apology from the respondents to be provided and published on such terms as the court directs;

(c) orders under s.46 PO of the AHRCA, including orders that the respondents perform such acts as the court directs including payment of compensatory and/or aggravated and/or exemplary damages to redress any loss or damage suffered by the applicants and group members;

(d) damages;

(e) costs.

6. A summary of the complaint made to the Australian Human Rights Commission and its termination under s.46 of the AHRCA is set out in paragraphs 346-349 of the 3rd FASC.[1]

7. The applicants are related. The first and third applicants are husband and wife and the second applicant is the first applicant's mother.

8. The group members are described as indigenous people resident on Palm Island on 19 November 2004 who remained ordinarily resident on Palm Island until 25 March 2010.[2] The precise number of group members is unknown but is of the order of 1700-1900 people.[3]

9. There is also a sub-group the members of which are persons having a particular connection with what the applicants describe as "the Raids".[4]

10. The first respondent (State of Queensland) and the second respondent (Commissioner of the Queensland Police Service) are alleged to be vicariously liable under s.18A of the RDA for the conduct of police officers.[5] It is not in dispute that all relevant acts by QPS officers occurred in the course of their employment as employees of the State, and that the State is vicariously liable for those acts.[6]

11. The application should be dismissed with costs. It should be found that the conduct complained of was not in breach of s.9 of the RDA and did not constitute unlawful discrimination within the meaning of the AHRCA.

B. REPRESENTATIVE PROCEEDINGS

12. The respondents do not take issue with paragraph 4-8 of the applicants' submissions.

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1 An earlier proceeding based on an earlier complaint to the AHRC was discontinued by leave on 17 July 2009: see *Wotton v State of Queensland* [2009] FCA 758.

2 The date when a complaint was made by the applicants to the Australian Human Rights Commission.

3 Paragraph 1B of 3rd FASC, paragraph 4 of Defence and paragraph 3 of Reply. See also Amended Agreed Statement of Facts (Amended ASF) paragraphs 7 and 8.

4 Paragraph 4 of 3rd FASC.

5 Paragraphs 338-345 of 3rd FASC.

6 Paragraphs 255-258 of Defence.

C. BACKGROUND AND CONTEXTUAL MATTERS

C.1 Section 9(1) of the RDA

13. Sections 9(1) and 9(2) of the RDA provide as follows:-

> "***9 Racial discrimination to be unlawful***
>
> *(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*
>
> ...
>
> *(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention."*

14. Section 9 operates to make unlawful the acts which it describes.[7]

15. Section 9(1) repeats the language of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) which defines racial discrimination as meaning any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect described.

16. The definition of racial discrimination and the terms of s.9(1) make it plain that not all acts involving a distinction based on race are unlawful. Such acts are only unlawful if they have the specified purpose or effect on particular rights. Drummond J said in *Hagan v Trustees of the Toowoomba Sports Ground Trust*[8] that s.9(1):-

> *"is not directed to protecting the personal sensitivities of individuals. It makes unlawful acts which are detrimental to individuals, but only where those acts involve treating the individual differently and less advantageously to other persons who do not share membership of the complainant's racial, national or ethnic group and then only where that differential treatment has the effect or purpose of impairing the recognition etc of every human being's entitlement to all the human rights and fundamental freedoms listed in Article 5 … or basic human rights similar to those listed in Article 5."*

17. It is generally immaterial whether the act in question is lawful or unlawful under some other law. An act which is otherwise lawful under a State law is not for that reason

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7 That being its only operation: *Gerhardy v Brown* (1985) 159 CLR 70 at 92 per Mason J. See also s.26 of the RDA.

8 [2000] FCA 1615 at [38] and see on appeal (2001) 105 FCR 56 at 61 [28].

alone outside the scope of s.9(1).[9] Conversely, an act which is unlawful under a State law is not for that reason alone caught by s.9(1). Any failure to observe police procedures does not, of itself, support an inference of racial discrimination. The acts relied on by the applicants are all acts alleged to have been in breach of some law or obligation: see also paragraph 31 below.

18. As Kiefel J observed in *Sharma v Legal Aid Queensland* [2001] FCA 1699 at [27]:-

> *"It is necessary to bear in mind however that this is not a case involving the application of principles of employment contract law, or procedural fairness. Breaches of this kind do not themselves answer the question whether race operated as a factor in the appointment process. By the same token compliance will not foreclose the possibility that considerations of race were influential in some way."*

C.1.1 Elements of Section 9(1)

19. To succeed, the applicants must establish, for the police officers and the conduct of those officers identified in the 3rd FASC, that:-

(a) the officer did an act;

(b) the act:-

(i) involved a distinction, exclusion, restriction or preference;

(ii) based on race, colour, descent or national or ethnic origin; and

(c) the act:-

(i) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of a right of the applicants;

(ii) which right was a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[10]

20. The acts relied on by the applicants are pleaded in paragraphs 244 and 316 of the 3rd FASC. The first question to be addressed is what acts have been established on the evidence. The second question to be addressed is whether those acts involved a distinction, exclusion, restriction or preference (hereafter shortened to distinction). Only if that question is answered affirmatively for a particular act does the third question arise. The third question is whether an act involving a distinction was based on race, colour, descent or national or ethnic origin (hereafter shortened to race). Only

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9 See *Gerhardy v Brown* (1985) 159 CLR 70 at 93 and 121.

10 *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 at 101-102 [44].

if the third question is answered affirmatively for a particular act does the fourth question arise. The fourth question is whether an act involving a distinction based on race had the purpose or effect of nullifying or impairing (hereafter shortened to impairing) the recognition, enjoyment or exercise on an equal footing of a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life (hereafter shortened to a human right).

21. Section 3(3) of the RDA provides that refusing or failing to do an act is deemed to be the doing of an act, and a reference to an act includes a reference to such a refusal or failure.[11]

C.1.2 Proving the elements of section 9(1)

22. The respondents do not take issue with paragraphs 14-20 of the applicants' submissions.

C.1.3 Burden and Standard of Proof and Inferences

23. Section 140 of the *Evidence Act* 1995 provides as follows:-

> *"**140 Civil proceedings; standard of proof***
>
> *(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
>
> *(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:-*
>
> *(a) the nature of the cause of action or defence;*
>
> *(b) the nature of the subject matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged."*

24. Section 140(2) reflects the common law as stated in *Briginshaw*.[12]

25. The applicants bear the onus of proof and the standard of proof is the civil standard informed by *Briginshaw* to reflect the seriousness of the allegations.[13]

26. The applicants must establish a reasonable and definite inference that the acts complained of were based on race. The applicants have failed to do so. It should be

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11 See also s.3(3) of the AHRCA.

12 *Ashby v Slipper* [2014] FCAFC 15 at [71].

13 *Maiocchi v Royal Australian & New Zealand College of Psychiatrists (No. 4)* [2016] FCA 33 at [337].

concluded that the acts alleged to have been done in breach of s.9(1) were not acts involving a distinction based on race which had a relevant purpose or effect.

27. Conduct should be judged according to knowledge (including reasonable foresight) and circumstances at the time the conduct occurred rather than by reference to subsequent events or information not known to the actor at the time.

28. The respondents do not take issue with paragraphs 21-35 of the applicants' submissions, subject to the following.

29. The applicants rely on the rule in *Jones v Dunkel*. The rule does not operate to require a party to give cumulative evidence. Nor does it operate unless a party is required to explain or contradict something.[14] The rule is that an unexplained failure to call a witness may (not must) in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted a party's case.[15] The rule cannot be used to fill gaps in the evidence or to convert conjecture and suspicion into inference.[16]

C.1.4 Requirement of comparator

30. Section 9(1) does not require a direct comparison to be made to demonstrate discrimination.[17]

31. Nevertheless, the applicants' case is pleaded on the basis of a comparison between policing services provided to the applicants and group members which were not provided to the same standard as elsewhere in Queensland.

C.1.5 Identification of human right or fundamental freedom

32. Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination (**Convention**) refers to a number of rights. The applicants plead five. They are:-

    (a) the Article 5(a) right to equal treatment before the tribunals and all other organs administering justice;

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14 *Cross on Evidence* (9th Aust Ed, 2013) p.40.
15 Cross p.36.
16 Cross p.38.
17 *Baird v Queensland* (2006) 156 FCR 451 at [63]. See also paragraphs 74 and 86 of these submissions.

(b) the Article 5(b) right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) the Article 5(e)(iv) right to enjoyment of the social right to social services;

(d) the Article 5(e)(vi) right to enjoyment of the cultural right to equal participation in cultural activities;

(e) the Article 5(f) right to enjoyment of the right of access to any service intended for use by the general public.

33. Article 5 of the Convention is not an exhaustive list of the rights protected by the RDA.[18] A right must nevertheless be a right described in Article 1(1) of the Convention.[19] The applicants also rely on a number of rights under the following articles of the International Convention on Civil and Political Rights (**the ICCPR**):-[20]

(a) Article 26;

(b) Article 17;

(c) Article 7;

(d) Article 9;

(e) Article 27.

34. The applicants also plead two rights not said to be sourced in an international instrument, described as:-

(a) the right to equality before the law;

(b) the right to go about their affairs in peace under the protection of the police services under the common law.

35. In their further and better particulars filed on 2 September 2015 the applicants abandon reliance on the Article 5(e)(vi) right and the Article 27 right.[21] In their written submissions (paragraphs 277 and 605) the applicants abandon reliance on the Article 5(e)(iv) right.

Article 5(a) Right

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18 *Gerhardy v Brown* at 85 (Gibbs CJ), 101 (Mason J) and 126 (Brennan J).
19 *Maloney v The Queen* (2013) 252 CLR 168 at [34], [145]-[146], [219], [286]-[287] and [336].
20 The ICCPR does not have the direct force of law in Australia.
21 Particulars paragraphs 37, 38, 40 and 61.

36. Article 5(a) of the Convention identifies a right as follows:-

> *"The right to equal treatment before the tribunals and all other organs administering justice."*

37. The applicants' reliance on this right is misconceived. The terms of Article 5(a) are apt to refer to a right of a person to be treated by a tribunal or other adjudicative body, dealing with a matter affecting that person, as that body would treat any other person. Article 5(a) concerns a guarantee of procedural equality, being equality in the application of the law.[22] The Article 5(a) right is akin to the right declared in Article 14 of the ICCPR and is to be understood as a right of equality of access to courts and other adjudicative bodies and in the application of the law by such bodies.[23]

38. None of the QPS Failures are capable of having the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing by the applicants and group members of this right. The applicants do not plead any treatment by an adjudicative body which could contravene s.9(1) of the RDA.

Article 5(b) Right

39. Article 5(b) of the Convention identifies a right as follows:-

> *"The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution."*

40. The applicants' submissions (paragraph 277) abandon reliance on Article 5(b) in relation to the QPS Failures.

Article 5(f) Right

41. Article 5(f) of the Convention is in these terms:-

> *"The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."*

42. It does not seem to be suggested on the applicants' case that the right of access to any place is in issue. The applicants plead that QPS services are a service for use by the general public.[24]

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22 *Maloney* at 227 [151] per Kiefel J and see also at 190 [35] and [36] per French CJ, 248 [215] per Bell J and 275 [287] and 295 [336] per Gageler J.

23 *Maloney* at 248 [215] per Bell J.

24 Paragraph 32(e) of the 3rd FASC.

43. The right of access to a service intended for use by the general public is a right of access to an existing service, not a right to be provided with a service where none previously existed.[25]

44. The applicants' complaint is that the police services accessible to them were provided to a lesser standard than services provided elsewhere.

45. Section 3(1) of the RDA defines "services" as including services consisting of the provision of facilities by way of banking or insurance or of facilities for grants, loans, credit or finance.

46. Section 13 of the RDA deals with the provision of goods or services. The applicants do not allege a breach of s.13. Section 9 does not refer to services. Section 9(4) provides that s.13 does not limit the generality of s.9.

47. Two cases have considered whether conduct by police officers involves the provision of services for the purpose of provisions similar to s.13 of the RDA. In both cases the applicable statutory provisions defined or described services as including the services of, or services provided by, a public authority.

48. In *Farah v Commissioner of Police of the Metropolis* [1998] QB 65 the Court of Appeal held that for the purposes of s.20 of the *Race Relations Act* 1976 (the s.13 analogue) those parts of a police officer's duties involving assistance to or protection of members of the public entailed the provision of services to the public, and fell within the statutory description of services of a public authority.

49. In *Commissioner of Police (NSW) v Mohamed* (2009) 262 ALR 519 the Court of Appeal held that the conduct of police officers with respect to a request for assistance in relation to possible criminal activity, where protection of persons or property may be required, can involve the refusal or provision of services for the purposes of s.19 of the *Anti-Discrimination Act* 1977 (NSW) (the s.13 analogue).

50. It was also held that the detection and prevention of crime as described in s.6(3) of the *Police Act* 1990 (NSW) can constitute services for the purpose of s.19 of the *Anti-Discrimination Act*.

51. Section 7 of the *Anti-Discrimination Act* (defining what constitutes discrimination on the ground of race) and s.19 of that Act (making unlawful discrimination on the

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[25] *Maloney* at 252 [226] and see also at [40]-[41] and *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* [2012] 1 Qd R 1 at 67 [150].

ground of race in the provision of services) referred to a person doing an act and a person affected by that act. The provision of services to those persons fell within ss.7 and 19.

52. In the present case, the applicants apparently treat the acts relied on as constituting a discriminatory provision of police services to the Palm Island community generally rather than to particular persons. In many instances that cannot be sustained because those acts related to specific individuals (eg. notification of the next of kin and the treatment of PLO Bengaroo).

Article 26 Right

53. Article 26 of the ICCPR is in these terms:-

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

54. Article 26 is concerned with obligations imposed on States in relation to their legislation and the operation of that legislation.[26]

55. The applicants' reliance on Article 26 is misplaced. It is not engaged in the circumstances of this case.

56. Article 26 expresses an objective to which the Convention and the RDA are addressed, and that objective cannot itself be a right for the purposes of s.10 or s.8 of the RDA.[27] It is not a sufficient statement of the content of a right protected by s.10 to say that there is a human right to equal treatment before the law regardless of race.[28] To ask whether, for the purposes of s.10, there is by reason of a law unequal enjoyment of a human right to equality before the law or equal protection of the law is to become mired in unproductive circularity.[29]

57. The same reasoning applies to s.9. Section 9 is a means by which the objective expressed in Article 26 is achieved. It is not a sufficient statement of the content of a right protected by s.9 to say that there is a human right to equal treatment before the

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26 *Maloney* at 230 [159]-[160] and 250-251 [220]-[222] and *Aurukun* at 98 [241] and see also paragraph 282 of the applicants' submissions.

27 *Maloney* at 230 [160] per Kiefel J and *Aurukun* at 65 [139] and 67 [147] per Keane JA.

28 *Aurukun* at 65 [140].

29 *Maloney* at 294 [336] and 289 [317] per Gageler J.

law regardless of race. Both ss.9 and 10 are directed to achieving equality before the law.

Article 7 of ICCPR

58. This right is only relevant to the applicants and the sub-group members,[30] being those persons apprehended or arrested by or in the presence of SERT or PSRT officers, or who were present at those arrests, or who otherwise witnessed or who were present during the raids, or who had their homes entered or property interfered with by officers of the QPS during the raids. It is only relevant to the conduct in Parts K4 and K5 of the 3rd FASC.

59. The applicants submit that certain treatment of the first and third applicants constituted degrading treatment within the meaning of Article 7.[31] They say that breaches of the rights of sub-group members cannot presently be established on the evidence adduced, but that findings of law can be made.[32]

60. Article 7 relevantly provides as follows-

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

61. In *Gafgen v Germany*[33] the European Court of Human Rights considered the analogue provision in the European Convention[34] and said:-

(a) in order for ill-treatment to come within the Article it must attain a minimum level of severity, the assessment of which depends on factors such as its duration and effect on the victim and the sex, age and physical and mental health of the victim. Other relevant factors include its purpose and motivation, and the circumstances in which it occurred;[35]

(b) conduct has been found to be "inhuman" where it is premeditated, applied over a period of hours, and results in bodily injury or intense physical and mental suffering. It is "degrading" when it causes fear, anguish, and feelings of inferiority, humiliation and debasement, possibly breaking victims' physical or

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30 Paragraph 320(a) of the 3rd FASC.
31 Applicants' submissions paragraphs 653-655.
32 Applicants' submissions paragraph 616.
33 [2010] ECHR 759.
34 Article 3 which provides "No one shall be subjected to torture or to inhuman or degrading treatment".
35 [2010] ECHR 759 at [88].

moral resistance, or when it causes them to act against their will or conscience.[36]

Article 9 of ICCPR

62. Again, this right is only relevant to the applicants and sub-group members, and again only in relation to the conduct in Parts K4 and K5 of the 3rd FASC.[37]

63. Article 9 contains 5 paragraphs. The applicants rely on the first paragraph[38] which provides:-

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

64. Again, the applicants submit that the first and third applicants' rights under Article 9 were impaired[39] and that breaches of the rights of sub-group members cannot presently be established on the evidence adduced.[40]

Article 17 of ICCPR

65. Again, this right is only relevant to the applicants and sub-group members.[41]

66. Article 17 provides as follows:-

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

Other Rights

67. The applicants plead two other rights, being:-

(a) equality before the law;

(b) a right to go about their affairs in peace under the protection of the police services, under the common law.

68. The source of the first right is not identified. It adds nothing to the pleaded reliance on Article 26 of the ICCPR. There is no such human right.

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36 [2010] ECHR 759 at [89].
37 Paragraph 320(c) of the 3rd FASC.
38 Applicants' submissions paragraph 641.
39 Applicants' submissions paragraph 647.
40 Applicants' submissions paragraph 616.
41 Paragraphs 319 and 320 of the 3rd FASC.

69. The second right is said to be a common law right. How this right has been impaired, or how the conduct complained of has affected this right is unexplained.

70. The respondents do not take issue with paragraphs 37-46 of the applicants' submissions. The respondents question the relevance of paragraphs 47-52 of the applicants' submissions dealing with the source of a right under international law, but nothing appears to turn on this.

C.1.6 Shared "race, colour, descent or national or ethnic origin"

71. The applicants, group members and sub-group members are identified as indigenous people resident on Palm Island at particular times.

72. It is agreed that the applicants and group members were Aboriginals or Torres Strait Islanders.[42] Those terms are defined in s.3 of the RDA.

C.1.7 Act done by a person

73. The respondents do not take issue with paragraphs 58-62 of the applicants' submissions.

C.1.8 Meaning of "distinction, exclusion, restriction or preference"

74. This concept defines discrimination. It requires proof of differential treatment i.e. proof that an act relied on affects a person differently from another person or persons. That other person or persons (the comparator) may be a real life person or a hypothetical person or persons.

75. The terms "distinction", "exclusion", "restriction" and "preference" are not defined in the RDA. They have their ordinary meaning.

76. The respondents agree with the applicants that the determination of whether there has been a "distinction", "exclusion", "restriction" or "preference" must be determined objectively based on an assessment of the evidence.[43]

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42 Amended ASF paragraph 4.

43 *Obieta v NSW Department of Education and Training and Ors* [2007] FCA 86 at [209].

77. The relevant distinction set up by the applicants in relation to the acts complained of is noncompliance with provisions of the OPM and Code of Conduct and other laws. The alleged distinction is that acts done in breach of those provisions fell below the standard of police services that would be provided elsewhere in Queensland to non-Aboriginal communities.

78. The flaw in the applicants' approach is that it sets up a standard of policing applying elsewhere that is utopian, idealistic and unachievable. That standard is one of perfection, involving strict and unwavering compliance with the OPM, Code of Conduct and other laws without any room for mistakes or errors of judgment to be made by the human beings involved.

79. Cases of wilful and deliberate breaches of the OPM, Code of Conduct and other laws can be put to one side. The applicants do not suggest that the alleged breaches can be characterised in that way. They allege a failure to meet standards met elsewhere. Those standards are set too high by the applicants – they do not admit the possibility of mistake or error of judgment, a fact readily acknowledged not only by the QPS but by the CMC.[44]

80. The applicants seek to establish a social context by reference to which a distinction may be established. The difficulty for them is that they attempt to do so at too general a level of abstraction without sufficiently relating that context to the particular impugned conduct.[45]

C.1.9 Meaning of the phrase "based on"

81. An act involving a distinction must be "based on race". That expression has been construed as meaning "by reference to race" rather than the more confined meaning of "by reason of race".[46]

82. Section 18 of the RDA provides that where an act is done for 2 or more reasons and one of the reasons is the race of a person (whether or not it is the dominant or substantial reason for doing the act), then the act is taken to be done for that reason (the race of a person).

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44 See p.178 of the CMC Report pleaded in paragraph 244(i) of the Defence.

45 See *Quebec v Bombardier Inc.* [2015] SCC 39 at [88].

46 *Macedonian Teachers' Association of Victoria Inc v HREOC* (1998) 91 FCR 8 at 30; *Baird v Queensland* (2006) 156 FCR 451 at [48] and *Bropho v Western Australia* (2008) 169 FCR 59 at [68]-[71].

83. Whether an act involving a distinction was done by reference to race is a factual enquiry. Absent an express statement by the actor that the act was done by reference to race (and no such statements are alleged by the applicants), the conclusion that a particular act involving a distinction was based on race must be inferred. It is not necessary that there be an intention or motive to engage in discriminatory conduct.[47] It is not sufficient that the person aggrieved believes an act was discriminatory.

84. The question is whether a racial distinction was a material factor in the performance of the act.[48] The act referred to is the act involving the relevant distinction.[49] There must be a close relationship (but not necessarily a strict causal nexus) between the relevant characteristic (race) and the impugned conduct.[50]

85. The respondents do not take issue with paragraphs 67-73 of the applicants' submissions.

C.1.10 Equal Footing

86. To breach s.9(1) of the RDA, an act involving a distinction based on race must have the purpose or effect of impairing the recognition, enjoyment or exercise "on an equal footing" by people of the same race of any relevant human right or fundamental freedom. The words "on equal footing" direct attention to the footing upon which a relevant right is enjoyed by the community at large. Some comparison is necessarily required.[51]

87. Purpose means the practical purpose sought to be achieved by an act ie. the end in view sought to be accomplished.

88. Purpose is distinct from motive which is the reason for seeking an end rather than the effect sought to be achieved.[52] Nevertheless, consideration of purpose may involve consideration of why a person acted as he or she did.[53]

89. The purpose for which conduct is engaged in is to be ascertained by having regard to direct and indirect evidence of the actual intentions and purposes of the relevant party.

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47 *Macedonian Teachers' Association* at 39.
48 *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 58.
49 *Baird* at [70].
50 *Macedonian Teachers' Association* at 33.
51 *Wilson* at 63B.
52 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18].
53 *Baird* at [54].

Absent evidence from that party, a finding of purpose is an inference to be drawn from all the circumstances.[54]

90. Purpose and effect are different and should not be conflated. Purpose can't be reverse engineered from effect.[55]

91. The element of s.9(1) described by the words "on an equal footing" requires a comparison between the racial group of which the applicants are members and another group without that characteristic.

C.2 Aboriginal deaths in custody and the community

C.2.1 Community needs and expectations

92. Paragraph 32 of the 3rd FASC pleads a number of matters about the needs and expectations of the Palm Island community, treating that community as a homogenous entity with common attitudes.

93. The applicants submit that the concept of community needs and expectations is not alien to the law, and that the respondents' response to paragraph 32 of the 3rd FASC as embarrassing cannot be sustained.[56] It can be accepted that in several areas of the law community standards or expectations are a relevant criterion. But the applicants' pleaded case ascribes to the community of Palm Island various states of mind, described as awareness, proneness to forming a suspicion, being concerned to ensure something, and having a special interest in certain things, and as having cultural needs peculiar to the community. The applicants' pleading treats the community as an organism with a single set of intellectual attributes. The evidence does not support that conclusion.

94. The applicants plead the history of the community on Palm Island as being:-

(a) a matter by reason of which the community was prone to forming a suspicion that the death of Mulrunji in custody was caused by or contributed to by Hurley, and that a fair and impartial investigation of the death would not occur;[57]

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54 *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529.
55 *ACCC v TF Woollam & Son Pty Ltd* [2011] ATPR 42-367 at [63].
56 Applicants' submissions paragraph 79-82.
57 Paragraph 32(b) of the 3rd FASC.

(b) a background circumstance by reason of which the community had cultural needs peculiar to the community.[58]

95. The applicants' further and better particulars summarise what the applicants contend to be the relevant history of the community.[59] The applicants seek to link that history with the cultural needs of the community in the particulars by contending that:-

(a) the community had a poor historical relationship with the authorities in general and the police in particular, and had historically perceived the police to be oppressors and controllers;[60]

(b) in policing the community, the community needed the QPS to take into account the historical experience of the community;[61]

(c) in policing the community, the community needed the QPS to take into account that it was likely that the community would have a negative perception of the police, and be more suspicious and less trusting of the police than would most communities in Queensland.

96. The applicants do not appear to rely on the history of Palm Island as relevant to their case that the acts complained of involved a distinction, exclusion, restriction or preference based on race.

97. In relation to the QPS Failures as described in paragraph 244 of the 3rd FASC, the applicants refer to the paragraph 32 matters as a circumstance in which the QPS circumstances occurred. The distinction pleaded by the applicants is pleaded as follows:-

(a) a standard of policing ordinarily in Queensland is alleged;[62]

(b) the applicants allege that in committing the QPS Failures there was a failure to provide the same standard of policing that was supplied to other residents of Queensland who:-

(i) did not reside in a predominantly Aboriginal community;[63]

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58 Paragraphs 32(c) and 32(f)(iii) of the 3rd FASC.
59 Part A: History paragraphs 1-8.
60 Particulars Part B paragraph 3.
61 Particulars Part B paragraph 7.
62 Paragraphs 246 and 247 of the 3rd FASC.
63 Paragraph 248(a) of 3rd FASC.

(ii) did not reside in a predominantly Aboriginal community that was geographically located in a remote location;[64]

(iii) did not reside in a predominantly Aboriginal community whether or not that community was geographically located in a remote location;[65]

(c) the applicants allege a failure to conduct a thorough and impartial investigation and a failure to ensure the integrity and impartiality of the QPS investigation according to the standards that would have applied if the deceased was not an Aboriginal person residing in a predominantly Aboriginal community;[66]

(d) as a result, the rights and protections applying generally to residents of Queensland not residing in a predominantly Aboriginal community did not apply to the applicants and group members who were provided with a lesser standard of services than were provided to other communities in Queensland.[67]

98. The QPS Failures are alleged to be based on the race of the applicants, group members, Mulrunji and Bengaroo as either:-

(a) Aboriginal persons; or

(b) Aboriginal persons residing in a community predominantly made up of Aboriginal persons; or

(c) Aboriginal persons residing in such a community in a remote location.[68]

99. In relation to the Further Failures, the applicants' pleading is to similar effect.[69]

Dr Kidd's Evidence

100. Dr Kidd's evidence is relied on for the history of the Palm Island community.[70] The history of Palm Island recounted by Dr Kidd is a history from 1918 to about 1991.[71] Dr Kidd does not regard herself as a specialist on Palm Island,[72] and acknowledged

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64 Paragraph 248(b) of 3rd FASC.
65 Paragraphs 248(c)-(e) of 3rd FASC.
66 Paragraphs 248(f)-(g) of 3rd FASC.
67 Paragraph 249 of 3rd FASC.
68 Paragraphs 249(f)-(h) and 250 of 3rd FASC.
69 Paragraphs 308-313 of 3rd FASC.
70 Particulars Part A "History" and Part B "Cultural Needs" paragraph 7.
71 P-444 l.10 (Day 6).
72 P-446 l.8 (Day 6).

that she had no expert knowledge of conditions on Palm Island in the latter half of 2004.[73]

101. It is clear from other evidence that Palm Island in 2004 was a very different place from the Palm Island of the past.

102. The history of Palm Island is relied on by the applicants as relevant to:-

(a) a proneness to forming a suspicion that Mulrunji's death was caused or contributed to by SS Hurley and that a fair and impartial investigation would not occur;[74]

(b) the community's cultural needs.[75]

103. There is nothing in Dr Kidd's report or evidence which would support an inference that members of the Palm Island community were prone to forming the alleged suspicions. Nor is there anything in Dr Kidd's report to support the broader proposition that the Palm Island community was likely to be more suspicious and less trusting of the police than most communities in Queensland.[76]

104. The claimed connection between the history of Palm Island and the cultural needs of the community is expressed in the applicants' further and better particulars[77] by saying that the community of Palm Island at all relevant times:-

(a) had a poor historical relationship with the authorities in general and the police in particular, and had historically perceived the police to be controllers and oppressors;

(b) the community needed the QPS to take into account the historical experience of the community.

105. It should not be inferred that such a connection existed at the relevant time being November 2004 simply because of past circumstances at some unspecified time. Ms Sailor gave evidence of a good relationship between the police and ATSILS.[78]

Professor Altman's Evidence

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73 P-446 l.15 (Day 6).
74 3rd FASC paragraph 32(b).
75 3rd FASC paragraphs 32(c) and 32(f)(iii).
76 Particulars Part B paragraph 9.
77 Particulars Part B "Cultural Needs" paragraphs 3 and 7.
78 P.82, 90 and 95. See also Mrs Agnes Wotton's evidence at P.166.

106. Professor Altman was asked to address the socio-economic circumstances of the Palm Island community. The circumstances relied on by the applicants as relevant to the cultural needs of the community are particularised[79] as:-

(a) that Palm Island was one of the most disadvantaged ATSI communities in Australia;

(b) the community had a median individual weekly income for ATSI people aged over 15 of $216 per week compared with $318 for ATSI people in Queensland generally and $476 for people in Queensland overall;

(c) an unemployment rate of about 17 percent for ATSI residents compared with 13.1 per cent for ATSI people in Queensland generally and 4.7 per cent for people in Queensland overall;

(d) low levels of education;

(e) poor health outcomes and a low life expectancy;

(f) high levels of alcohol abuse;

(g) high levels of convictions for summary offences and of incarceration.

107. The applicants allege that in policing the community on Palm Island, the community needed the QPS to take into account the socio-economic status of the community.[80]

108. There is no evidence relating to the high levels of alcohol abuse or high levels of conviction and incarceration.

109. As to the first matter, Professor Altman referred to a 2009 study by Dr Biddle which ranked Palm Island 475th out of 531 indigenous areas. That study used 9 measures of socio-economic outcomes, which are themselves subject to methodological limitations.[81]

110. The second and third matters are accurate, being sourced from 2006 census data. As Professor Altman notes, the figures say something about relative socio-economic status.

111. Professor Altman said nothing about levels of education or health outcomes or life expectancy.

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79 Particulars Part B "Cultural Needs" paragraph 4.
80 Particulars Part B paragraph 8.
81 See p.23 of the Biddle paper.

112. The applicants have failed to explain how the socio-economic circumstances of the Palm Island community relate to cultural needs of the community (which Professor Altman was not asked to address).[82]

C.2.2 Royal Commission report

113. There is broad agreement about the nature and scope of the RCIADIC report, but its significance is in dispute. The report was published in April 1991, some 13 years and 7 months before November 2004.

(a) Police knowledge of Royal Commission report

114. The applicants point out that Webber, Kitching, Whyte and Dini agreed that they had read at least part of the RCIADIC report before November 2004, and submit that the allegations in paragraph 31 of the 3rd FASC have been established with respect to those officers.[83] So much can be accepted. Whether those officers' awareness of the parts of the report referred to in paragraph 30 of the 3rd FASC and set out in Annexure A and B to the 3rd FASC was not established.

115. For other officers of the types referred to in paragraph 31 of the 3rd FASC the applicants ask the Court infer their knowledge of, or that they ought to have known of, the report and its contents from the 1994 QPS report entitled "Review of Policing on Remote Aboriginal and Torres Strait Islander Committees" (Ex A107).[84] That report was responsive to recommendations 88 and 232 of the RCIADIC report which were directed to resourcing and organisational issues including whether Community Police should be retained in their current form.[85] The QPS report was not concerned with deaths in custody.

116. The inference the applicants ask the Court to draw cannot be drawn from the 1994 QPS report.

117. The applicants refer to the knowledge of the "the police" of the RCIADIC as a contextual factor in deciding whether the QPS Failures involved a distinction,[86] and to Whyte's evidence that having read the RCIADIC report in part he did not review the

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82 P.491 ll.10-15.
83 Applicants' submissions paragraph 85.
84 Palm Island being one such community: see Ex A107 Map 1 and p.1 paragraph 1.4.
85 See Ex A107 p.1 paragraph 1.3 and p.2 paragraphs 1.6 and 1.7. Recommendation 88 is included in Annexure B to the 3rd FASC but not Recommendation 232.
86 Applicants' submissions paragraph 255(d).

report's recommendations when he was on Palm Island.[87] Otherwise, police knowledge of the RCIADIC report is not a feature of the applicants' case.

(b) Community knowledge of Royal Commission report

118. The applicants ask the Court to infer that the community of Palm Island in November 2004 was aware of the existence of the RCIADIC report, the general nature of the matters discussed therein, and the recommendations made therein, from evidence that:-

(a) Mr Wotton actively reviewed the RCIADIC report after Mulrunji's death to ensure the police were following the recommendations;

(b) Mr Wotton spoke at the public meeting on 23 November about the RCIADIC recommendations in relation to Mulrunji's death;

(c) Mrs Agnes Wotton said she had done some work in relation to the RCIADIC in her capacity as a member of ATSIC;

(d) Ms Sailor had a brother who died in custody;

(e) reference was made to the RCIADIC recommendations at the public meeting on 23 November by several community members including the Mayor.[88]

119. That evidence does not support the inference sought to be drawn. At most it shows that some members of the community had some knowledge about some aspects of the RCIADIC report.[89]

120. The evidence relied on in support of the allegation in paragraph 32(b) of the 3rd FASC that the community of Palm Island was, by reason of the circumstances in which Mulrunji was arrested and died and by reason of the community being a predominantly Aboriginal community and by reason of the history of the community, prone to forming a suspicion that the death in custody of Mulrunji was caused by or contributed to by Hurley, and that a fair and impartial investigation would not occur is:

(a) in relation to the history of Palm Island, the contents of Part A of Annexure C to the 3rd FASC headed "History";

(b) an extract from the RCIADIC report;

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87 Applicants' submissions paragraph 373.
88 Applicants' submissions paragraphs 88-90.
89 As admitted in paragraphs 25(a) and (b) of the Defence.

(c) Mr Wotton's evidence and Mr Blackman's evidence that on hearing of Mulrunji's death they expected the police would cover it up.[90]

121. Again, that evidence is insufficient to support the allegation. All that has been shown is that Mr Wotton and Mr Blackman formed a particular view. The only other reference in the applicants' submissions to community interest in the RCIADIC is in paragraph 255(c) where such interest is relied on as a contextual factor in deciding whether the QPS Failures involved a distinction.

C.2.3 Cultural needs peculiar to the community

122. The applicants plead that the community of Palm Island had cultural needs peculiar to the community by reason of the community being predominantly Aboriginal, against the background of the circumstances in which the Aboriginal community came to inhabit Palm Island and the treatment of the community by public officials since that time.

123. They say that they do not propose to restate the expert reports. For the reasons submitted the reports of Dr Kidd and Professor Altman are of little assistance to the applicants' case. Nor, for reasons submitted below, is Dr Eades's report.

C.3 Police duties in the conduct of an investigation

C.3.1 Duties at common law

124. It is uncontentious that in 2004 residents of Queensland were entitled to expect that the QPS would uphold the law. The functions of the QPS are set out in the *Police Service Administration Act* 1990 (the PSA Act).

125. The applicants refer to common law duties, none of which are pleaded and should be ignored. The functions and powers of the QPS have a statutory source. The OPM and HRMM were issued pursuant to s.4.9(1) of the PSA Act.

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90 Applicants' submissions paragraphs 87 and 88.

C.3.2 Duties under the OPM

126. As the applicants submit there is general agreement about the provisions of the OPM and their application. The OPM contains "policy and instructions" in the form of orders, policies and procedures defined as follows:-

> *"**ORDER** an order requires compliance with the course of action specified. Orders are not to be departed from.*
>
> ***POLICY** a policy outlines the Service attitude regarding a specific subject and must be complied with under ordinary circumstances. Policy may only be departed from if there are good and sufficient reason(s) for doing so. Members may be required to justify their decision to depart from policy.*
>
> ***PROCEDURE** A procedure outlines generally how an objective is achieved or a task performed, consistent with policies and orders. A procedure may outline actions which are generally undertaken by persons and organisations external to the Service."*

127. Paragraph 99 of the applicants' submissions misstate the respondents' pleadings. Paragraphs 75(b) and 126(b) of the Defence plead that particular procedures in the OPM did not impose a duty or a requirement having regard to the definition of "Procedure" in the OPM. Paragraph 167 of the Defence responds to paragraph 246 of the 3rd FASC which alleges that ordinarily in November 2004 QPS officers complied with QPS Policy, Orders and Procedures. Paragraph 167 seeks to make the obvious point, reflected in paragraph 244(i) of the Defence that in any large organisation such as the QPS mistakes and errors of judgment will occur.[91] The applicants acknowledge that most if not all of the acts constituting the QPS Failures, when viewed in isolation, could be characterised in terms of paragraph 167(b) of the Defence as honest mistakes or errors of judgment.[92]

128. The applicants' submission[93] that paragraph 167 of the Defence cannot be maintained is at odds with that acknowledgment.

129. The applicants' submission[94] that an obvious corollary to the statement that a Policy must be complied with under ordinary circumstances is that a Policy may only be departed from in extraordinary circumstances is of no assistance. What constitutes ordinary circumstances is plainly a matter on which reasonable minds may differ.

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91 See paragraphs 78-79 of these submissions also about the applicants setting the standard too high.
92 Applicants' submissions paragraph 258.
93 Applicants' submissions paragraph 100.
94 Applicants' submissions paragraph 101.

Good and sufficient reasons for departing from a policy (the language used in the definition of policy) is not synonymous with extraordinary circumstances.

130. As to Procedures, the applicants acknowledge[95] that there is no expressly stated obligation to comply with Procedures, the point made in paragraphs 75(b) and 126(b) of the Defence. They go on to submit that it should be assumed that a Procedure will ordinarily be complied with. That submission should not be accepted. The definition of a Procedure is a general outline, not an exhaustive or exclusive way of achieving an objective or performing a task.

131. The applicants submit that their claim is not a case for an administrative law remedy, and that it is not necessary for the applicants to show that each alleged breach of a Policy or Procedure involved an administrative law error, and it is only necessary to show that conduct complied of amounted to a distinction based on race.[96] That is true, but the applicants' case invites a comparison between the standard of policing ordinarily applied (compliance with Policies, Order and Procedures) and the standard of policing in this case (based on noncompliance with Policies, Orders and Procedures), and says that the different standard is a distinction based on race, not the result of human error or mistaken judgment.

132. Such error or mistake is not relied on by the respondents as relevant to the distinction issue. It is relied on as relevant to the based on race issue. Assuming some noncompliance with provisions of the OPM, it does not follow that the noncompliance is referrable to race – it may be referrable to error or mistaken judgment.

133. Paragraph 105 of the applicants' submissions needs to accommodate the necessity for a relationship between an impugned act and race. An act done because of error or mistake unrelated to race is not an act based on race in the necessary sense.

134. Paragraph 107 of the applicants' submissions does not cavil with paragraphs 167(a) and (e) of the Defence as general propositions, but goes on to say that it is not clear how they are relevant. The point being made may be illustrated by reference to the alleged delay in notifying Mulrunji's next of kin.[97]

135. Paragraph 108 of the applicants' submissions should not be accepted. The onus is on the applicants to establish that an act involves a distinction based on race, not on the

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95 Applicants' submissions paragraph 103.
96 Applicants' submissions paragraph 104.
97 See paragraphs 296-304 below.

respondents to provide a compelling explanation for noncompliance with a Policy or Procedure.

C.3.3 Impartiality and natural justice

136. The applicants plead an "impartiality duty" which they allege obliged QPS officers investigating a death in custody in November 2004 to do certain things.[98] The respondents admit that the investigation team was subject to some of those obligations, being:-

(a) to expeditiously conduct an impartial investigation;

(b) to perform their duties in such a manner that public confidence and trust in the integrity and impartiality of the QPS is preserved;

(c) to perform their duties impartially and in the best interests of the community of Queensland without fear or favour.

137. The applicants no longer press the other obligations in paragraph 108 of the 3rd FASC.[99]

138. The applicants submit, uncontroversially, that an investigation is a fact finding process. They pose a test for deciding whether the impartiality of an investigation has been compromised as follows:-

(a) would a fair minded lay observer reasonably apprehend that a police officer involved in the investigation might not bring an impartial mind to the relevant decisions in the investigation; or

(b) whether the findings of the investigation might not be made as the result of a neutral evaluation of the merits.[100]

139. In *Isbester v Knox City Council* (2015) 89 ALJR 609 the plurality judgment (Kiefel, Bell, Keane and Nettle JJ) said that how the principle respecting apprehension of bias (a reasonable apprehension by a fair minded lay observer of a lack of impartiality with respect to a decision to be made) is to be applied generally depends on the nature of the decision and its statutory context, what is involved in making the decision, and the

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98 Paragraph 109 of applicants' submissions; paragraph 108 of 3rd FASC.
99 Applicants' submissions paragraph 109.
100 Applicants' submissions paragraph 110.

identity of the decision-maker. The analogy with a curial process is less appropriate the further divergence there is from the judicial paradigm, and the content of the test for the decision in question may be different.

140. The investigation carried out in this case was for the purpose of a mandatory inquest.[101] It was a fact finding process to place facts before a coroner for the purpose of the coroner making the findings required by the *Coroners Act*.[102]

D. QPS FAILURES OF 19 TO 24 NOVEMBER 2004

D.1 Compromise of integrity of investigation

141. The applicants submit that the police investigation into Mulrunji's death was severely compromised in its integrity by reason of 11 matters, the subject of headings D1.1 to D1.11.

142. In her report DC Rynders said:-[103]

> *"64. There is no doubt that the investigating officers did not adhere to all of the OPMs and the Code of Conduct (the Commissioner's instructions) in everything they did. As the Prescribed Officer, I need to determine the nature of those failures in an operational environment to make an assessment of their culpability, and to determine the appropriate course of action in consideration of the entire circumstances."*

143. DC Rynders went on to say:-[104]

> *"74. There is no doubt that there were failings in the initial investigation. A number of factors contributed to bring these failings about and these are addressed in my decision. Despite these failings, the evidence demonstrates that the investigators took the investigation seriously. Senior management immediately mobilised a team that included the most senior investigators in the Region and crime scene experts. They arranged a chartered aircraft to expedite their arrival and commenced investigations upon arrival at Palm Island Police Station. The investigators continued well into the night, working to a task rather than a clock, without taking a meal and through the weekend. The evidence obtained by these officers was utilised in the later coronial and criminal proceedings.*
>
> *75. It seems that the conclusion that the investigation was seriously flawed is based more on issues incidental to the investigation than the quality*

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101 Section 27 of the *Coroners Act* 2003 mandates an inquest for a death in custody.
102 Findings how the person died and what caused the person to die: see s.45(2).
103 Ex R31 p.21 paragraph 64.
104 Ex R31 p.24 paragraphs 74 and 75.

> *of information gathered during the investigation. If the post mortem had yielded a result of 'death due to natural causes', I think it highly unlikely that any discussion of discipline proceedings for misconduct or official misconduct would follow. On the alternative, the QPS may have utilised the provisions pursuant to the Discipline Regulations and provided managerial guidance to deal with the matters. The actions of the officers must be viewed objectively, not with the benefit of hindsight. The evidence simply does not support action for misconduct or official misconduct."*

144. The applicants identify for 10 of those 11 matters an act or acts alleged to be in breach of s.9(1) of the RDA.[105] Many acts are relied on far more than one matter. The ultimate question is whether the acts identified and relied on by the applicants breached s.9(1). No act in breach of s.9(1) is alleged in respect of the alleged failure to take statements from police witnesses.[106]

145. The respondents submit that the acts relied on by the applicants did not involve a distinction based on race, and therefore did not have the purpose or effect of impairing a human right relied on by the applicants.

146. A chronology of events on Friday 19 November 2004 is as follows:-[107]

(a) at about 10.20am Hurley arrested Mulrunji, an Aboriginal man, in Dee Street and placed him in the locked area of a police van;

(b) PLO Bengaroo, an Aboriginal person employed in the QPS, was present at the arrest;

(c) upon arrival at the police station Hurley removed Mulrunji from the police van and a struggle ensued;

(d) at the time Hurley removed Mulrunji from the police van:-

(i) Roy Bramwell was inside the police station;

(ii) Penny Sibley was outside the police station in the vicinity of the police van;

(iii) Constable Steadman was standing at the front passenger's side of the police van in a position where he was able to see and did see some of the events after Hurley removed Mulrunji from the police van to the time they entered through the door of the police station;

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105 Applicants' submissions paragraphs 115, 130, 139, 159, 166, 173, 178, 187, 194 and 198.

106 Part D.1.8 (paragraphs 184-185) of the applicants' submissions.

107 See Amended ASF paragraphs 10-24, 127-132, 135, 139, 142, 144-147 (unless otherwise indicated).

(iv) Leafe and Bengaroo were also present in the vicinity;

(e) on the way into the police station Mulrunji and Hurley fell through the rear door of the police station as they were entering it;

(f) after the fall Mulrunji became limp and unresponsive;

(g) Mulrunji was dragged, limp, to a watchhouse cell by Leafe and Hurley at about 10.26am;

(h) at about 11am Mulrunji died in the cell;

(i) at about 11.19am Hurley telephoned for the Queensland Ambulance Service to attend an emergency at the watchhouse;

(j) at about 11.23am Hurley telephoned Senior Sergeant Jenkins at the Townsville District Police Communications Centre and advised that Mulrunji might be deceased;

(k) at about 11.30am Hurley called the Townsville District Police Communications Centre and advised Jenkins of the death in custody;

(l) at about 11.30am Hurley telephoned Inspector Strohfeldt in Townsville and advised him of the death in custody;

(m) at about 11.33am Jenkins telephoned Strohfeldt and advised him of the death in custody;

(n) at about 11.45am Hurley telephoned Robinson in Townsville and advised him of the death in custody;

(o) between 11.40am and noon Strohfeldt notified Webber of Mulrunji's death;

(p) between 11.40am and noon Webber appointed Kitching as the primary investigator into the death, and shortly thereafter Webber appointed Robinson to assist with the investigation;

(q) at about 12.10pm the Ethical Standards Command was notified of the death in custody;

(r) at about 12.20pm Webber notified Inspector Aspinall, the officer in charge of the Coronial Support Unit in Brisbane of the death in custody and the State Coroner was immediately notified of the death;

(s) at about 2.20pm Webber, Kitching, Robinson and scientific officers travelled to Palm Island by a chartered aircraft;

(t) those officers were met at Palm Island airport by Hurley and Leafe with two vehicles;

(u) Hurley drove Webber and Kitching to the police station;

(v) the police officers arrived at the police station at about 3pm;[108]

(w) at about 3.40pm Mulrunji's partner, Ms Twaddle, was notified of Mulrunji's death;

(x) at about 3.55pm Mulrunji's mother and other family members were notified of Mulrunji's death;

(y) between 3.00pm and 3.45pm Kitching viewed the cell video tape;[109]

(z) between 4.04pm and 4.36pm Kitching and Robinson interviewed Hurley;

(aa) between 4.50pm and 5.10pm Kitching and Robinson interviewed Bengaroo;

(bb) between 5.34pm and 5.45pm Kitching and Robinson interviewed Gladys Nugent;

(cc) between 6.58pm and 7.07pm Kitching and Robinson interviewed Patrick Bramwell;

(dd) at about 7.25pm Kitching began preparing the Form 1;[110]

(ee) between 7.50pm and 8.12pm Kitching interviewed Leafe;

(ff) between 8.22pm and 8.35pm Kitching and Robinson interviewed Edna Coolburra;

(gg) at about 10.30pm Webber Kitching and Robinson ate a meal with Hurley at Hurley's residence;

147. The investigators travelled to Palm Island promptly and on short notice. Their priorities were to notify the next of kin, undertake a scientific examination of the scene of death, and gather evidence from witnesses.

148. A chronology of events on Saturday 20 November 2004 is as follows:-[111]

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108 Ex R10 p.2.
109 Ex A44 paragraph 11.
110 Ex A44 paragraph 19.

(a) Kitching and Robinson travelled to Dee Street to locate Roy Bramwell;[112]

(b) between 8.15am and 8.27am Kitching and Robinson interviewed Roy Bramwell;

(c) between 8.27am and 10.52am Robinson prepared a typewritten statement of Roy Bramwell;

(d) at about 9am Kitching and Leafe travelled to the Kidner residence about Mulrunji's activities on 19 November before his arrest. Kitching was advised that Mulrunji had not been in any fights and had no injuries. Kitching interviewed Gerald Kidner at the police station;[113]

(e) at about 10.30am Williams arrived on Palm Island to overview the investigation;

(f) shortly after arriving Williams received a briefing from Webber, Kitching and Robinson, and Williams reviewed the interviews and statements then in existence;

(g) at about 10.52am Williams and Webber conducted a video re-enactment with Roy Bramwell;

(h) at about 11.20am Hurley drove Webber, Williams, Kitching and Tibbey to the arrest site in Dee Street;

(i) after returning to the police station Kitching and Leafe went to the home of Mulrunji's sister where Kitching advised them of the current status and future course of the investigation including that a post mortem would be concluded to attempt to identify the cause of death;[114]

(j) at about 11.27am Robinson attended the Palm Island hospital and assisted in transporting Mulrunji's body to the airport;[115]

(k) at about 11.53am Williams and Webber conducted a video re-enactment with Hurley;

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111 Amended ASF paragraphs 149-160 (unless otherwise indicated).
112 Ex A44 paragraph 21.
113 Ex A44 paragraphs 22-24.
114 Ex A44 paragraph 34;
115 Ex A 46 paragraph 26.

(l) at about 12.10pm Williams and Webber conducted a video re-enactment with Bengaroo;

(m) at about 12.50pm Williams and Webber conducted a video re-enactment with Leafe;

(n) at about 1.10pm Williams and Kitching interviewed Hurley;

(o) Kitching made arrangements to locate Penny Sibley and spoke with her to arrange an interview the following day;[116]

149. On Sunday 21 November Kitching and Williams interviewed Penny Sibley at Ingham.[117]

150. On 23 November an autopsy was conducted at Cairns attended by Kitching.

151. On 24 November the preliminary autopsy report was issued and the CMC assumed responsibility for the investigation.

D.1.1 Drive from the airport with Hurley

152. It is uncontentious that Hurley drove Webber and Kitching from the airport to the police station on 19 November 2004.

(a) Other transport options

153. Webber's evidence was that transport was not considered. The matter was simply overlooked.

(b) Discussions during the drive

154. Webber and Kitching gave evidence about the discussion in the police vehicle while travelling from the airport to the police station. The applicants submit (in paragraph 119) that what was discussed was a discussion "about how the investigation team was going to conduct the investigation" as alleged in paragraph 129 of the 3rd FASC. The evidence relied on by the applicants (paragraph 118 of their submissions) does not support that conclusion.

(c) Knowledge that Hurley was the arresting officer

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116 Ex A44 paragraphs 39 and 40.

117 A transcript of the interview is Ex A37. Ms Sibley's statement is Ex A214.

155. Paragraph 129(b) of the 3rd FASC alleges that at the time Hurley drove Webber and Kitching from the airport to the police station Webber and Kitching knew or reasonably apprehended that Hurley would be a person of interest in the investigation. That allegation is denied in paragraph 83(f) of the Defence.

156. The applicants submit (paragraph 121) that Webber's evidence and Kitching's evidence that they knew very little of what had happened prior to leaving Townsville should be rejected and the Court should find that when they left Townsville they both knew that Hurley had arrested Mulrunji. They submit (paragraph 125) that it is highly improbable that Webber and Kitching had not received information that Hurley was the arresting officer.

157. There is no evidence from which that conclusion can be drawn.

158. It can be accepted that by the evening of 19 November Webber and Kitching knew that Hurley was the arresting officer and was the QPS officer most closely associated with Mulrunji's arrest and subsequent death in custody.[118]

(d) Compromise of integrity of investigation

159. The applicants refer to the evidence of Webber and Kitching accepting that their travelling with Hurley from the airport to the police station created a perception of bias and a lack of impartiality and that this was not something which occurred to them at the time. They submit that it is clear that the integrity of the investigation was not a priority for either officer. That conclusion should not be made.

160. There is no act which involved a distinction based on race. Nor did any of the acts relied on have the relevant purpose or effect on a human right relied on by the applicants.

D.1.2 Dinner with Hurley

161. It is uncontentious that at about 10.30pm on 19 November Webber, Kitching and Robinson ate a meal, prepared by Robinson, with Hurley at Hurley's residence. It is also uncontentious that this compromised the appearance of impartiality of the

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118 Amended ASF paragraph 211.

investigation.[119] It should not be concluded that this conduct involved a distinction based on race which had a relevant purpose or effect.

162. Deputy Commissioner Rynders concluded that:-[120]

> *Webber and Kitching failed to consider whether eating a meal at Hurley's residence would adversely affect the appearance of the impartiality of the investigation. A consideration of the material indicates that, at the time of making this error of judgment, Webber and Kitching had been continually working for fifteen and a half hours under undoubtedly stressful circumstances. During that time they had not eaten. Kitching commented that his first priority when offered a meal was simply to eat it and that his second priority was to stay awake for long enough to do so. It is understandable in these circumstances that Kitching failed to consider the impact his actions might have on public perception. Arguably, more learned men have done so under less arduous conditions.*
>
> *Both Webber and Kitching recognise that their decision to eat at Hurley's residence was sub-optimal; however, for reasons provided above, I do not intend to commence disciplinary action or provide managerial guidance with respect to either officer.*

163. The decision to eat a meal at Hurley's residence was a decision made by tired and hungry officers who made what they now accept was an error of judgment. It was not an act based on race.

D.1.3 Failure to treat Hurley as a suspect

164. This is a complaint about the conduct of Webber, Kitching, Robinson and Williams in failing to treat Hurley as a suspect in a homicide.[121]

165. The following facts about this issue are agreed:-[122]

(a) Section 246 of the *Police Powers and Responsibilities Act* 2000 (PPRA) (Reprint 3R in force between 19 and 24 November 2004) defined "relevant person" as a person "in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence".

(b) Section 263 of the PPRA (Reprint 3R) provided that the questioning of a relevant person must, if practicable, be electronically recorded.

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119 Defence paragraph 150(a).
120 Ex R31 p.96.
121 Paragraphs 218-224 of the 3rd FASC and paragraphs 140-146 of Defence.
122 Amended ASF paragraphs 217-222.

(c) Section 2.14.2 of the OPM was a policy which provided as follows:-

"Interviews of suspects for indictable offences are to be recorded by using electronic recording equipment if practicable."

(d) The discussions that took place when Hurley transported Webber and Kitching from the Palm Island airport on 19 November 2004 and at the visit to the site of the arrest on 20 November 2004 were not electronically recorded;

(e) The conversations during the meal at Hurley's home on 19 November 2004 were not electronically recorded;

(f) Webber, Kitching and Robinson did not treat Hurley as a suspect in a homicide or assault investigation.

166. Paragraph 218 of the 3rd FASC pleads matters by reason of which it is alleged that Webber, Kitching, Robinson and Williams suspected or ought reasonably to have suspected that Hurley had been involved in the commission of an indictable offence, being either homicide or assault.

167. Those matters include factual matters[123] and a presumption.

168. The word "suspect" is not defined in the PPRA. Section 246 of the PPRA indicates it means someone suspected of involvement in a criminal offence. For a person to be a suspect in the relevant sense there must be a suspicion that an offence has been committed and a suspicion that the person was involved in the commission of an offence as a party to that offence, either as a principal or a secondary party.

169. Suspicion is a state of mind, which depends on a factual basis rather than a mere idle wondering. It is a positive feeling of actual apprehension or mistrust, but falling short of a belief.[124] A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

170. The cause of Mulrunji's death was unknown until the first autopsy report was made. Until the cause of death was known, there was no basis for a suspicion that the death resulted from an unlawful killing.

171. Section 16.24.3 of the OPM contained a procedure that the commissioned officer responsible for the investigation of a death in custody should not presume suicide or natural death regardless of whether it may appear likely. That is not a requirement to

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123 As stated in paragraph 137 of the applicants' submissions which are agreed in paragraph 211 of the Amended ASF.

124 *George v Rockett* (1990) 170 CLR 104 at 115-116.

presume or even suspect an unlawful killing in the case of a death in custody. That is confirmed by s.8.4.2 of the OPM which provides that where initial enquiries indicate beyond doubt that no suspicious circumstances surround the death, officers may treat the matter as a routine investigation.

172. What the OPM requires in an investigation of a death in custody is that suicide or natural death should not be presumed, and an investigation made to establish if there are any suspicious circumstances surrounding the death ie. circumstances giving rise to a suspicion that the death is the result of criminal conduct.

173. An investigation was made of the circumstances leading up to the death of Mulrunji. Without knowledge of the cause of death, those circumstances were not necessarily suspicious.

174. Hurley was not treated as a suspect because there were no grounds for so treating him, not because of the race of any person.

(a) First Bramwell interview

175. Roy Bramwell was first interviewed at 8.15am on 20 November by Kitching and Robinson and said that Hurley started punching Mulrunji in the hall. Kitching told the IRT that at the time of the interview he formed the opinion that Mr Bramwell could not have seen what he stated he saw because there was a filing cabinet in his path.[125] That was a catalyst for doing re-enactments.[126]

176. The applicants submit that had the assault allegation been taken seriously the investigators should have immediately sought a response from Hurley.[127] Why that is the next step is not explained by the applicants. Conducting a video re-enactment with Mr Bramwell was an appropriate response to get more detail of the allegation. The criticism of Kitching for pursuing another inquiry[128] is unjustified.

(b) Second Bramwell interview

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125 Ex R31 p.143.
126 Ibid.
127 Applicants' submissions paragraph 146.
128 Applicants' submissions paragraph 147.

177. At 10.52am on 20 November Webber and Williams conducted a video re-enactment with Roy Bramwell. The applicants submit[129] that Mr Bramwell's version of events was unchallenged. That may be so in the sense that his version had not been put to Hurley. The video re-enactment followed Mr Bramwell's interview. The applicants also submit that Mr Bramwell's version of events was broadly consistent with the versions provided by Hurley, Leafe and PLO Bengaroo. It was also inconsistent in significant respects.

178. The applicants' submission (paragraph 150) that a great deal of scrutiny was being applied to Mr Bramwell's version of events is consistent with the allegation of assault being taken seriously and an effort to get as much information as possible. The applicants submit that an inference can be drawn that Webber and Williams were at least dismissive of the allegation and at worst were trying to discredit the allegation. That is not an inference which can be drawn or should be drawn.

(c) Trip to Dee Street

179. The purpose of the trip to Dee Street was to have Hurley, the arresting officer, point out where certain events had occurred and to have Tibbey photograph those locations. There is no evidence that anything was said when travelling to and from the arrest scene which concerned the investigation. There is no evidence that anything was said at the arrest scene concerning the investigation other than identifying locations of interest.

180. The applicants submit (paragraph 151) that any questioning of Hurley as a suspect for assault should have been recorded. That would be correct if any such questioning occurred, but there is no evidence of such questioning.

181. The applicants also submit (paragraph 155) that, contrary to the evidence of Webber and Kitching, it is somewhat unlikely that the death or the investigation was not discussed. There is no basis for not accepting Webber and Kitching in this respect.

182. The applicants submit (paragraph 155) that had Webber and others taken Mr Bramwell's allegations seriously, the trip to Dee Street would not have occurred. Mr Bramwell's allegations related to events at the police station not the arrest scene.

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129 Applicants' submissions paragraph 149.

There was nothing inappropriate about the arresting officer identifying locations of interest at the arrest scene.

D.1.4 Hurley performing duties at the scene

183. This is a complaint about the conduct of Webber and Strohfeldt in failing to take steps to ensure that Hurley did not undertake investigative duties or other duties at the scene. Webber was the regional Crime Coordinator referred to in s.1.17 of the OPM and Strohfeldt was the Regional Duty Officer referred to in s.1.17 of the OPM.

184. It is agreed that neither Strohfeldt nor Webber provided advice or instructions to Hurley not to undertake or continue to perform certain duties associated with the investigative process, or other duties at the scene.[130]

185. Section 1.17 of the OPM contained an order that a regional duty officer is to:-

> *"(v) wherever practicable, ensure that members who are involved in the incident, or who are witness to the incident, do not undertake or continue to perform duties associated with the investigative process, or other duties at the scene."*

186. The applicants refer (in paragraph 158(a)) to the Policy in s.1.17 set out in paragraph 47 of the Amended ASF, but it is directed to a different issue.

187. The applicants do not submit that Hurley performed duties associated with the investigation process.[131] Hurley was the first response officer. He was the senior officer at the scene.[132] The applicants acknowledge that neither Webber nor Strohfeldt was the first response officer.[133] There is no allegation that Hurley, as first response officer, did anything inappropriate.

188. In terms s.1.17 of the OPM imposed a relevant requirement on Strohfeldt, wherever practicable, with respect to the performance of duties at the scene. Strohfeldt was Hurley's direct supervisor.[134] Section 1.17 of the OPM did not impose any corresponding requirement on Webber.

189. The applicants' complaint is not so much that Hurley continued to perform duties but that because of his presence at the police station there was a high probability that

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130 Amended ASF paragraph 239.
131 See applicants' submissions paragraphs 163-164 and 254(e).
132 See s.7(1) of the PSA Act set out in paragraph 6(h)(iv) of 3rd FASC.
133 Applicants' submissions paragraph 161.
134 Amended ASF paragraph 25(b)(i).

Hurley overheard at least some of the interviews and re-enactments and could adapt his version of events accordingly.[135] That is a speculative conclusion unsupported by the evidence.

190. Kitching's evidence is that the recorded interviews were conducted in the CIB interview room with the door locked. That room is remote from Hurley's office. The video re-enactments were necessarily conducted outside that room. There is no evidence that Hurley saw or was in a position to see those re-enactments.

191. The applicants allege a breach of what they call the Integrity Duty and the Reasonable Diligence Duty, not a breach of the OPM. The Integrity Duty and the Reasonable Diligence Duty are artificial constructs created by the 3rd FASC.

D.1.5 Appointment of Robinson to investigation team

192. The applicants allege that Robinson's involvement in the investigation team created a reasonable apprehension of bias, his appointment to the investigation team was not appropriate, and that Robinson failed to advise senior officers of a conflict of interest.

193. The relevant acts for the purpose of s.9(1) relied on by the applicants are:-[136]

(a) the appointment of Robinson to the investigation team;

(b) Robinson's involvement in the investigation;

(c) Robinson's failure to advise senior officers of his conflict of interest.

194. The first act is an act of Webber and Kitching. The second and third acts are acts of Robinson. It should not be concluded that those acts involved a distinction based on race which had a relevant purpose or effect.

195. Robinson was present with Kitching at the interviews conducted on 19 November, except for the interview with Leafe.[137] He took statements from the non-police witnesses following their recorded interviews.[138]

196. Robinson's involvement lessened after the arrival of Williams on the morning of 20 November. His involvement was essentially administrative in nature.[139]

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135 Applicants' submissions paragraphs 163 and 164.
136 Applicants' submissions paragraph 166.
137 Ex A46 paragraph 11.
138 Ex A46 paragraphs 12-18.

197. Robinson was in Townsville when the death in custody occurred. He was scheduled to return to Palm Island in any event. The applicants submit (paragraph 170) that in view of Robinson's prior relationship with Hurley[140] a fair minded lay observer could reasonably have apprehended that Robinson might not have brought a fair and impartial mind to the investigation. That assumes, contrary to the evidence, that Robinson had some decision-making role in the investigation.

198. The applicants also submit that Robinson's involvement in conducting interviews and taking statements likely adversely impacted on the information elicited from those interviews as members of the community would have known that he had an association with Hurley and was stationed in the same police station as Leafe and Bengaroo. This is pure speculation. There is nothing to suggest that the witnesses in question had any such knowledge. What further information might have been elicited is not specified.

D.1.6 Appointment of Kitching to investigation team

199. The appointment of Kitching to the investigation team is alleged to be an act done in breach of s.9(1). The applicants submit that Kitching was from the same police establishment as the officers in whose custody the death had occurred.[141] That is not correct.

200. The applicants also submit that the pre-existing relationship between Kitching and Hurley made Kitching's appointment to the investigation team inappropriate.[142]

201. The CMC Review acknowledged that the appointment of investigating officers from Townsville was appropriate.[143]

202. Webber appointed Kitching as the primary investigator. He was an appropriate choice having regard to his rank and experience. The appointment of Kitching did not involve a distinction based on race.

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139 See Ex A46 paragraphs 22 and 26-29.
140 Paragraphs 225-228 of the amended ASF describe that relationship.
141 Applicants' submissions paragraph 172.
142 Applicants' submissions paragraph 174.
143 Ex A50 p.59 specifically referring to Kitching.

D.1.7 Failure to preserve independent versions of events

203. Paragraph 241 of the 3rd FASC alleges a contravention of s.1.17 by Webber and Strohfeldt in failing to instruct officers not to talk to each other about Mulrunji's death and surrounding events, and a consequent failure to ensure the integrity of independent versions of events was preserved as far as practicable.

204. Section 1.17 contains a policy (Ex A14 p.18) in the following terms:-

> *"Members directly involved in the incident or who are witnesses to the incident should not discuss the incident amongst themselves prior to being interviewed."*

205. The terms of s.1.17 about not discussing an incident are directed to police officers directly involved in an incident or who are witnesses to it, not to the Regional Duty Officer and Regional Crime Coordinator.

206. Section 1.17 also contains a Policy that:-

> *"… regional duty officers and regional crime coordinators should ensure that the integrity of the independent versions of members directly involved and members who are witnesses to a police related incident is preserved as far as practicable."*

207. It is agreed that neither Webber nor Strohfeldt advised or directed Hurley not to discuss the circumstances surrounding the death in custody with other QPS officers.[144] It is also agreed that before the investigation team arrived on Palm Island Hurley, Leafe and Bengaroo discussed Mulrunji's death,[145] and that Kitching took no steps to ascertain what had been discussed by Hurley, Leafe and Bengaroo.[146]

208. The applicants submit that a simple direction to Hurley not to discuss events with other officers might have prevented the discussions, and a query from one of the investigating officers during interviews might have mitigated the impact of such discussions.[147] The applicants do not say what was discussed, and do not allege any effect on the investigation.

209. The applicants submit (paragraph 180) that Hurley was "conferring" with Leafe and Bengaroo and those officers were "ensuring that their stories were consistent". There is no evidence of that and no evidence from which that can be inferred.

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144 Amended ASF paragraph 143.
145 Amended ASF paragraph 133.
146 Defence paragraph 163 admitting paragraph 242 of 3rd FASC.
147 Applicants' submissions paragraph 179.

210. Nor is there any evidence of, or any evidence supporting an inference of, what the applicants submit is an inevitable consequence of Robinson's inclusion in the investigation, that Robinson would discuss the investigation with Hurley.[148]

211. The acts relied on by the applicants[149] were not acts involving a distinction based on race having a relevant purpose or effect.

D.1.8 Failure to take statements from police witnesses

212. In her report Deputy Commissioner Rynders noted that police witnesses typically prepare their own statements and this is both a matter of customary practice and is implied in policy.[150] That is consistent with Kitching's evidence.[151]

213. As noted previously, the applicants do not identify the failure to take statements from police witnesses as an act in breach of s.9(1) of the RDA.[152]

D.1.9 Failure to interview Steadman

214. The applicants allege that Webber and Kitching failed to comply with an obligation under s.2.5.1 of the OPM in not interviewing Constable Steadman.[153] Only the failure of Webber to ensure that Steadman was interviewed as soon as practicable is alleged to be an act in breach of s.9(1).

215. The agreed facts about this issue are that:-[154]

(a) neither Webber nor Kitching interviewed Steadman in the course of their investigation from Friday 19 November 2004 until the CMC took over the investigation on Wednesday 24 November 2004;

(b) after the CMC took over the investigation on 24 November 2004, Steadman was not interviewed until 8 December 2004.

216. The applicants plead that s.2.5.1 of the OPM required QPS officers investigating major incidents to carry out primary investigations as completely as possible,

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148 Applicants' submissions paragraphs 181 and 182.
149 Applicants' submissions paragraph 178.
150 Ex R31 p.201 paragraph 318. The reference to policy is a reference to s.2.13.8 of the OPM.
151 P.1274.
152 See paragraph 144 above and paragraphs 184 and 185 and 254 of the applicants' submissions.
153 Paragraph 204 of the 3rd FASC.
154 Amended ASF paragraphs 195 and 196.

including identification of witnesses and potential witnesses and interviewing and taking statements.[155]

217. That misstates the terms of s.2.5.1. Section 2.5.1 is a Procedure which defines generally how an objective is achieved or a task performed, consistent with Policies and Orders.[156] The relevant terms of s.2.5.1 are pleaded as follows:-[157]

> *"a. It is critical that primary investigations be carried out as completely as possible. Wherever possible, primary investigations should be undertaken by the first response officer.*
>
> *b. Activities undertaken during primary investigations may include:*
>
> *(i) identification of witnesses;*
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> *(ii) identification of potential witnesses;*
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> *(iii) interview of available witnesses;*
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> *(iv) taking of statements from witnesses (suitable for court production);*
>
> *…*
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> *(xiii) identifying and notifying appropriate support groups;*
>
> *(xiv) notifying appropriate specialist groups;*
>
> *…*
>
> *(xvi) arranging for necessary inquiries to be conducted by other members; and*
>
> *(xvii) recording of all activities undertaken and their outcomes.*
>
> *c. Information obtained during the primary investigation will assist in the decision regarding the priority to be given to the investigation. Primary investigators should make recommendations in criminal offence reports for the information of supervisors."*

218. It is common ground that neither Webber nor Kitching interviewed Steadman in the course of their investigation.[158] It is also common ground that the CMC, after it took over the investigation on 24 November 2004, did not interview Steadman until 8 December 2004.[159]

219. Steadman did not approach the investigators.

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155 Paragraph 202 of the 3rd FASC.
156 Paragraph 35(c) of the 3rd FASC.
157 Paragraph 63(b) of the 3rd FASC.
158 Paragraph 195 of the Amended ASF.
159 Paragraph 196 of the Amended ASF.

220. Steadman was visible in the cell video footage at a time after Mulrunji's death. Leafe mentioned Steadman in his interview on 19 November,[160] saying that Steadman came into the station after Leafe found that Mulrunji was deceased, and that Steadman hadn't been in the station before then. At no time was information given to the investigators suggesting that Steadman was present when Mulrunji was taken from the police van to the cell.

221. The investigation was directed to establishing what had occurred from Mulrunji's arrest to the discovery of his death. That is clear from the interviews conducted on 19 and 20 November. Investigators necessarily have to prioritise their investigative tasks. The CMC investigators appear to have approached their investigation in the same way, interviewing persons known to have been present when Mulrunji was taken from the police van to the cell, before interviewing Steadman on 8 December 2004.

222. The sequence of CMC interviews was:-

(a) Roy Bramwell on 26 November on Palm Island between 11.03 and 11.44am;[161]

(b) Edna Coolburra on 26 November on Palm Island between 12.16 and 12.25pm;[162]

(c) Gerald Kidner on 29 November on Palm Island between 11.10 and 11.25am;[163]

(d) Emily Doomadgee on 29 November on Palm Island between 1.46 and 2.18pm;[164]

(e) Ms Sibley on 5 December 2004 at Townsville between 10.40 and 11.09am;[165]

(f) Tonges on 8 December, between 1.26 and 1.35pm;[166]

(g) Leafe on 8 December, between 1.45 and 2.25pm;[167]

(h) PLO Bengaroo on 8 December, between 3 and 3.36pm;[168]

(i) Steadman on 8 December, between 3.55 and 4.21pm;[169]

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160 Ex A30 p.7.
161 Ex A84.
162 Ex A85.
163 Ex A86.
164 Ex A87.
165 Ex A89.
166 Ex A88.
167 Ex A90.
168 Ex A91.
169 Ex A49.

(j) Hurley on 8 December, between 4.34 and 5.47pm,.[170]

223. When interviewed Steadman said that he did not see Hurley strike Mulrunji,[171] that Hurley and Mulrunji fell to the floor at the same time,[172] it appeared as though Hurley landed on top of Mulrunji,[173] and that the fall appeared to be a heavy fall.[174] Steadman's evidence supports Hurley's evidence.

224. In her report Deputy Commissioner Rynders concluded[175]: -

> *319. It is an unfortunate reality that, on occasion, interviews are not conducted or statements gathered as quickly as would be ideal. Investigators necessarily need to prioritise their workload during an investigation. Witnesses whose evidence is peripheral or formal are likely to be given low priority. Steadman's evidence, as apparently understood in the early part of the investigation, would properly fall within the description of peripheral. The CMC investigation appears to have treated the evidence of Steadman in this way. I note that, despite the importance which the CMC Review now attaches to Steadman's evidence, the CMC investigators did not interview him until 15 days after they assumed responsibility for this investigation.*
>
> *320. There is no evidence before me which suggests any impropriety in the failure to interview Steadman. Any suggestion of impropriety would be purely speculative. None of the commentors, including the Acting State Coroner and the CMC Review have suggested any particular impropriety beyond the actual failure to take a statement. The evidence, which might support several reasonable explanations for the failure, does not suggest any nefarious purpose. On the evidence before me, I am not able to identify any failure that might constitute a breach of discipline or misconduct. I do not propose to take any disciplinary or managerial action in relation to the matter.*

D.1.10 Failure of supervision by Williams

225. This is a complaint about Williams who was attached to the Ethical Standards Command based in Brisbane. Williams arrived on Palm Island at about 10.30am on 20 November 2004.

226. The applicants allege that Williams failed to overview, advise on and confer with Webber and the CMC to resolve issues regarding the integrity of the investigation.[176]

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170 Exs A92 and A93.
171 Ex A49 p13.
172 Ex A49 pp 3-6.
173 Ex A49 p9.
174 Ex A49 pp 20-21.
175 Ex R31 p. 201. DC Rynders also noted that the failure to interview Steadman was not a matter raised by Coroner Clements or the IRT: Ex R31 p.200 paragraph 314.

227. Section 1.17 of the OPM contained a policy which provided as follows:-

> *"If, in the opinion of the officer representing the Internal Investigation Branch, Ethical Standards Command, proper investigational or procedural matters are not being adhered to, or there are matters which may adversely effect an impartial investigation, that member should confer with the regional crime coordinator and officers from the Crime and Misconduct Commission in an endeavour to resolve the issue."*

228. On 20 November 2004, after Williams received a briefing from Webber, Kitching and Robinson, Williams was aware that Robinson had been involved in the investigation. Robinson's involvement in the investigation after Williams arrived on Palm Island was minimal.

229. The applicants submit that Williams had actual or constructive knowledge of certain things,[177] many of which were things that had happened before his arrival on Palm Island and his briefing. The applicants do not say what Williams should have done, or what advice he should have given. It should not be concluded that the act relied on was an act involving a distinction based on race having the relevant purpose or effect.

D.1.11 Treatment of PLO Bengaroo

230. The applicants allege that there were two acts in breach of s.9(1) in relation to PLO Bengaroo:-

(a) failure to obtain a statement from him which was as comprehensive as possible;

(b) treating him as inferior to other police officers who were not Aboriginal.[178]

231. The applicants make no submissions about the allegation in paragraph 217(a) of the 3rd FASC that a statement was not taken from PLO Bengaroo at the earliest practicable opportunity.

232. PLO Bengaroo was interviewed twice – once on 19 November 2004 between 4.50 and 5.09pm and again on 20 November 2004 between 12.10 and 12.22pm.

233. Particulars of the first complaint[179] contend that the statement obtained from PLO Bengaroo was not as comprehensive as possible because:-

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176 Applicants' submissions paragraph 194.
177 Applicants' submissions paragraph 190.
178 Applicants' submissions paragraph 198.

(a) he was initially interviewed by and in the presence of Robinson;

(b) he was not asked whether he had discussions with Hurley and Leafe following the death;

(c) he was not taken to the arrest scene;

(d) certain dialogue occurred during his video re-enactment;

(e) the investigators had formed a view that PLO Bengaroo was difficult to understand.

(f) he was not asked about the visible injuries Mulrunji had sustained in police custody.

234. As to the first of these matters, the applicants submit that Robinson's involvement in the interview "likely adversely impacted" on the information elicited, and Robinson was stationed at the same police station as PLO Bengaroo and was his superior officer.[180] There is no evidence to support that conclusion.

235. In relation to PLO Bengaroo's video re-enactment the applicants complain of Webber or Williams not asking PLO Bengaroo what he had been afraid of seeing or why he had been afraid of seeing something.[181] Webber regarded PLO Bengaroo as a reluctant witness and understood what he was saying in the video re-enactment in a particular way.[182] Dr Eades apparently understood it in a similar sense.[183] The applicants submit that the words convey a different meaning - they use the word "afraid", a word not spoken by PLO Bengaroo.

236. There is no substance in this complaint of the applicants.

237. Particulars of the respects in which PLO Bengaroo was not treated appropriately are that:-

(a) Hurley was taken to the arrest scene but PLO Bengaroo was not;

(b) the investigation team and Williams socialised with the non-Aboriginal police officers stationed on Palm Island;

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179 Particulars response 9(a).

180 Applicants' submissions paragraphs 199 and 170.

181 Applicants' submissions paragraph 201 and 202.

182 See p.1032 and see also Ex R31 pp.215-216 and 224-225. Section 1.4.9 of the OPM provides that PLOs are not to be deployed in detaining or removing intoxicated persons to a watchhouse.

183 See paragraphs 252 and 253 below.

(c) the re-enactment conducted with PLO Bengaroo was conducted in the manner pleaded in paragraph 147 of the 3rd FASC;

(d) interviewers were more candid and familiar in their communication style with non-Aboriginal police officers then they were with PLO Bengaroo.[184]

238. The applicants make no submissions about the second and fourth of those matters. As to the first, the applicants submit[185] that the decision to take Hurley to the arrest scene and not Bengaroo indicated that the investigating officers did not accord PLO Bengaroo the same level of respect afforded to Hurley. It is agreed that Hurley was the QPS officer most closely associated with Mulrunji's arrest.[186]

239. It 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. The applicants do not explain what level of respect is involved in taking someone to the arrest scene. This complaint is without foundation.

D.2 Failure to provide support to Aboriginal witnesses

240. This is a complaint about the conduct of the investigation team and Williams in interviewing seven indigenous witnesses (including PLO Bengaroo) and failing to consider their special needs or to ask them whether they would like to have a support person present.[187]

241. The acts in breach of s.9(1) identified by the applicants are:-[188]

(a) a failure to organise for a support person to be available to assist in the interviews if needed;

(b) the conduct of interviews with Aboriginal witnesses in a manner which did not account for the cultural needs of the witnesses.

242. It should be concluded that those acts did not involve a distinction based on race which had a relevant purpose or effect on the rights of the applicants and group members.

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184 Particulars response 10(a).
185 Applicants' submissions paragraph 199.
186 Amended ASF paragraph 211.
187 Paragraph 225 of the 3rd FASC.
188 Applicants' submissions paragraph 206.

243. The following facts about this issue are agreed:-[189]

(a) Webber, Williams, Kitching and Robinson did not ask any of the seven Aboriginal witnesses (PLO Bengaroo, Roy Bramwell, Patrick Bramwell, Penny Sibley, Gladys Nugent, Edna Coolburra and Gerald Kidner) whether they would like to have a support person present at their interviews.

(b) In relation to the interview of PLO Bengaroo, at the time of the interview:-

(i) Kitching formed the opinion that he found PLO Bengaroo difficult to understand, quiet and not very articulate;

(ii) Webber formed the opinion that PLO Bengaroo was at times extremely difficult to understand and comprehend;

(iii) Williams formed the opinion that PLO Bengaroo was a very difficult person to interview, was quietly spoken and was 'for want of a better word terrified'.

244. Section 6.3.6 of the OPM contained a policy as follows:-

> *"Persons of Aboriginal and Torres Strait Islander descent are to be considered people with a special need because of certain cultural and sociological conditions. When an officer intends to question an Aborigine or Torres Strait Islander, whether as a witness or a suspect, the existence of a need should be assumed until the contrary is clearly established using the criteria set out in s 6.3.1: 'Circumstances which constitute a special need' of this chapter.*

245. The applicants complain of a breach of the policy in s.6.3.6 of the OPM in three respects:-[190]

(a) failing to adequately consider or address the Aboriginal witnesses' special needs;

(b) failing to ask any of the Aboriginal witnesses whether they would like to have a support person present at the interview;

(c) in relation to PLO Bengaroo, that Kitching, Webber and Williams each formed a particular opinion about PLO Bengaroo.

246. The special needs of each of the Aboriginal witnesses have been particularised[191] as being:-

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189 Amended ASF paragraphs 223-224.
190 Paragraph 225 of the 3rd FASC.
191 Particulars response 15.

(a) the experience of social disadvantage and the poor historical relationship with the police;

(b) the use of Aboriginal English and of traditional Aboriginal forms of communication such as narratives and silences, and the eschewing of particular times or dates and other specific or numerical information;

(c) the use of a communication style which made a question and answer interview format inappropriate;

(d) the likelihood of their being intimidated by persons in positions of superior power, such as the police.

247. Specific needs are alleged in the case of PLO Bengaroo, Patrick Bramwell and Edna Coolburra.[192]

248. Dr Eades has given an expert report on this issue. Her report does not support the applicants' case.

249. Dr Eades was asked to comment on the interviews of the seven Aboriginal witnesses. She noted that Kitching did not rush the witnesses and on several occasions allowed considerable silences without pressuring the witness.[193] That is consistent with Kitching's evidence to the IRT that his purpose in interviewing the witnesses was to gain information that they may be able to provide, and it was simply an open question for them to tell him what they knew with no pressure or cross-examination.[194] There was little evidence of leading questions that could result in gratuitous concurrence, and many instances of Kitching asking a question by repeating an answer or part of an answer.[195]

250. She identified two features of Kitching's communication style which could have made it difficult for the Aboriginal witnesses to fully participate in the interviews.[196] The first concerned the preliminary part of the interviews and the second concerned clock time. Neither is a matter of any consequence.

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192 Particulars response 15.
193 Ex A6 p.7.
194 Ex R31 p.168.
195 Ex A6 p.8.
196 Ex A6 p.8.

251. Dr Eades considered that three witnesses (Patrick Bramwell, Roy Bramwell and Edna Coolburra) had trouble answering questions about clock time.[197] None of the examples given concerned a matter of any significance to the investigation. Dr Eades also considered that Gladys Nugent appears to have misunderstood two questions and Patrick Bramwell appears to have misunderstood one question.[198] Again, none of the questions were of any significance to the investigation. Dr Eades said it was also relevant to note that the difficulties were attended to by the interviewer.[199]

252. In relation to whether Webber's impression of PLO Bengaroo as a "reluctant witness" was related to PLO Bengaroo's identity as an Aboriginal person, Dr Eades was unable to offer any worthwhile opinion. She said that if he was a reluctant witness this could relate in some way to his conflict of loyalty to his employer and colleagues on the one hand and to his Aboriginal family and community on the other.[200] Without knowing PLO Bengaroo and on the basis of watching the video re-enactment several times Dr Eades did not form the impression that he was a reluctant witness, and was inclined to evaluate him as a careful witness.[201] She also said that she had no knowledge of how grief at the sudden very recent death might have impacted on PLO Bengaroo's participation in the interview.[202]

253. Webber was clearly of the view that PLO Bengaroo was a reluctant witness because of conflicted loyalties. Dr Eades does not discount this, and refers to statements by PLO Bengaroo in the video re-enactment consistent with that view.[203]

254. Finally, Dr Eades was asked whether Roy Bramwell had any difficulties in understanding what he was being asked and communicating his responses in his video re-enactment. She said that she found no evidence that Mr Bramwell had any such difficulties.[204] Nor could she find any evidence to support the possibility that Webber's impression of Mr Bramwell's account as not credible was related to Mr Bramwell's identity as an Aboriginal person.[205]

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197 Ex A6 p.9.
198 Ex A6 p.10.
199 Ex A6 p.10.
200 Ex A6 p.11.
201 Ex A6 p.11.
202 Ex A6 p.11.
203 Ex A6 p.11.
204 Ex A6 p.12.
205 Ex A6 p.12.

(a) Support persons

255. It is uncontentious that none of the seven Aboriginal witnesses were offered a support person at their interviews. The relevant provisions of the OPM (ss.6.2.2 and 6.3.6) do not refer to a support person.

256. The applicants ask the Court to reject Webber's evidence about attempts to involve Legal Aid.[206] There is no reason to reject that evidence. Kitching's evidence was that none of the Aboriginal witnesses appeared to him to be in need of support from another person, he had no difficulty in understanding them, and did not have any impression that he was not being understood.[207]

(b) Cultural and sociological issues

257. The applicants rely on Dr Eades' evidence in relation to socio-linguistic concerns, and refer to potential issues identified by Dr Eades in her report.[208] They submit that Kitching's failure to take into account the inadequacy of a question and answer style interview and that many people would have difficulty with clock time detrimentally affected the interviews of Patrick Bramwell, Edna Coolburra, Gladys Nugent and Roy Bramwell.[209] That submission is entirely unsupported by Dr Eades.

258. The applicants submit (paragraph 212) that Kitching appears to have entirely failed to elicit any information from Patrick Bramwell relevant to the investigation. That is unsupported by any evidence.

D.3 Form 1 and autopsy

259. This is a complaint about the conduct of Kitching and Webber. The applicants recognise that Webber played a minor role in the events concerning the Form 1 and the autopsy, and submit that as the officer in charge of the investigation he was ultimately responsible for ensuring compliance with the procedures in s.8.4.3 of the OPM.[210]

260. The following facts about this issue are agreed:-[211]

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206 Applicants' submissions paragraph 208.
207 P.1150.
208 Applicants' submissions paragraph 210.
209 Applicants' submissions paragraph 211.
210 Applicants' submissions paragraph 235.
211 Paragraphs 202-208 of the Amended ASF.

(a) The Form 1 was completed on the evening of Friday 19 November 2004.

(b) The Form 1 was sent to the coroner at about 7.43am and again at 10.40am on 22 November 2004, the next business day after 19 November 2004;

(c) When the Form 1 was provided to the Coroner and the Government Pathologist it did not include any reference to the allegations of assault by Hurley upon Mulrunji which had been made by Roy Bramwell and Penny Sibley;

(d) Through their involvement in the investigation, when the Form 1 was sent to the coroner and the government pathologist Kitching and Webber were aware of or ought reasonably have been aware that:

(i) when removed from the police van, Mulrunji had been active and aggressive;

(ii) Hurley was alleged to have physically assaulted Mulrunji by two witnesses, independently of each other, during the period between when he was removed from the police van and when he was taken to the cell;

(iii) after the alleged fall, Mulrunji:

(A) had been a 'dead weight';

(B) had been dragged limp to his cell;

(C) was not physically restrained or required to be physically restrained in any way whilst being taken to or placed in the cell;

(D) was not observed by any QPS officer or witness to be active or aggressive prior to his death (other than as recorded on the cell watchhouse video recording);

(E) may have been incapacitated, or suffering from an injury caused by the fall; and

(F) was observed on the watchhouse video to lay on the floor of the cell, intermittently rolling and moving around and apparently making loud noises.

(e) The Form 1 stated that Mulrunji had "laid on the floor of the cell and went to sleep immediately";

(f) No Supplementary Form 1 was prepared to include the allegations of assault made by Roy Bramwell or Penny Sibley;

(g) When present at the inquest by Dr Lampe, Kitching advised Dr Lampe that Mulrunji may have been drinking bleach[212] or sniffing petrol and did not advise Dr Lampe of the allegations made by Roy Bramwell or Penny Sibley that Mulrunji had been assaulted by Hurley.

Coroner's Guidelines

261. Section 14(1)(b) of the *Coroners Act* 2003 provides as follows:-

> *"(1) To ensure best practice in the coronial system, the State Coroner –*
>
> *…*
>
> *(b) must issue guidelines to all coroners about the performance of their functions in relation to investigations generally."*

262. Section 14(3)(a) provides that the guidelines must deal with the investigations of deaths in custody. Section 14(4) provides that when investigating a death, a coroner must comply with the guidelines to the greatest practicable extent.

263. The State Coroner's Guidelines (Ex A15) were made pursuant to s.14(1). The Guidelines are directed to coroners, are concerned with the performance of a coroner's functions relating to investigations generally, and bind coroners to the extent described in s.14(4). The Guidelines are not directed to police officers and do not in terms regulate the conduct of police officers.

264. The duty of police officers to assist coroners in the performance of a coroner's functions is set out in s.447A of the PPRA.

265. The death of Mulrunji was a death in custody under s.10 of the *Coroners Act* and a reportable death under s.8(3)(g) of the *Coroners Act*. Section 27 of that Act requires an inquest to be held for all deaths in custody.

266. The purpose of the Form 1 is explained in the procedure in s.8.4.8 of the OPM as being to assist the coroner in deciding whether an autopsy should be ordered, and to assist the pathologist performing the autopsy to establish the cause of death. An autopsy in the case of a death in custody is standard practice.[213]

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212 Robinson was the source of this information: Ex A46 paragraph 31.

213 Coroner's Guidelines 3.5.1 pp.5.1-5.3.

267. Where an inquest is to be held (as it must be for a death in custody), s.8.4.3(ix) of the OPM contained a policy that the Form 1 be completed as fully as possible. Section 8.4.3(vi) contained a policy that a supplementary Form 1 be completed, where applicable, its purpose being to provide additional information to a coroner.

D.3.1 Delay in sending Form 1

268. The applicants allege that the delay in sending the Form 1 to the coroner was an act in breach of s.8.4.8 of the OPM and in breach of s.9(1).[214] The Form 1 was completed on the evening of Friday 19 November and sent to the coroner on the morning of 22 November.

269. Section 8.4.8 of the OPM contains a procedure that the investigating officer should "complete" the relevant parts of the Form 1 "as soon as possible". The applicants convert this into a requirement that the Form 1 be submitted as soon as possible.

270. The applicants do not allege any consequence flowed from that delay. It is difficult, therefore, to see how it could have had any relevant purpose or effect on any human right relied on by the applicants. In any event, it should not be concluded that it was an act involving a distinction based on race.

D.3.2 Discrepancies in Form 1

271. The applicants submit that the statement in the Form 1 that "the deceased laid on the floor of the cell and went to sleep immediately" is incorrect, and the inclusion of that statement in the Form 1 was an act for the purpose of s.9(1).[215]

272. The words identified by the applicant form part of a larger narrative under the heading "Summary of Incident" on p.8 of the Form 1 (Ex A17) and should be read in that context as well as what is said on p.9 of the Form 1. What is clearly conveyed is that Mulrunji was aggressive when arrested and when removed from the rear of the police vehicle, there was a struggle in which Mulrunji and Hurley fell to the ground following which Mulrunji was dragged to the cell by two police officers and placed in the cell when he laid on the floor and went to sleep immediately.

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214 Applicants' submissions paragraphs 217 and 218.
215 Applicants' submissions paragraph 219 and 222.

273. The applicants' submission that the statement that "Mulrunji laid on the floor of the cell and went to sleep immediately" is misleading and tells a more benign version of events than was in fact the case involves reading those words in isolation and out of context. It is not a statement made by the pathologist in the preliminary autopsy report (Ex A18). In that report the pathologist said:-[216]

> *"According to the Form 1 history, this man was arrested at approximately 10.15am on the morning of 19/11/2004. At that time, he was aggressive. He was restrained, and placed in the rear of a Police vehicle. He was transported to the watch-house. As he was being allowed out of the Police vehicle, he allegedly assaulted a Police officer. He was physically restrained and taken to the rear door of the Police station, where both parties allegedly fell to the ground. After this, he was dragged into the watch-house, and placed into a cell. When checked at 10.55am, he was allegedly asleep and breathing. At 11.23am, he was found deceased. He could not be resuscitated.*
>
> *Further history from DSS Kitching at the time of the autopsy examination alleges that this man was inebriated, and that the deceased man was aggressive up until the time of the fall outside the watch-house; after this fall, he remained quiet and was no longer aggressive. An alleged video supposedly shows him rolling from side to side in the cell until he presumably becomes deceased. It allegedly supports that he was alive when checked at 10.55am. It was also alleged that he may have been sniffing petrol, and may have drunk bleach. There was a solitary step leading up to the door at the back of the watch-house."*

274. Paragraph 221 of the applicants' submissions is contrary to what is stated in the preliminary autopsy report. The applicants' case in this respect is ill-founded.

D.3.3 Failure to include assault allegations

275. It is uncontentious that when the Form 1 was sent to the coroner it did not include reference to the allegations of assault made by Roy Bramwell and Penny Sibley, and that those allegations were known to Kitching at the time the Form 1 was sent to the coroner. It is also uncontentious that no supplementary Form 1 was prepared to include those allegations of assault.

276. The preliminary autopsy report (Ex A18) stated (at p.6):-

> *"I can find no evidence to suggest the use of direct force (such as punching or stomping) to have caused the injuries; this does not exclude that either (or both) of those two possibilities may have occurred at some time prior to death."*

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216 Ex A18 p.5.

277. The applicants submit that the pathologist did not have the benefit of the information that two people had independently made allegations that the deceased was assaulted immediately prior to his death.[217]

278. A second autopsy was conducted on 30 November 2004 in the presence of Dr Ranson and others.[218] By this time the CMC was in charge of the investigation. The autopsy report dated 21 January 2005 refers to police statements having been provided and the pathologist having watched Hurley's video re-enactment.[219] No specific reference is made to statements from Roy Bramwell or Ms Sibley, but reference is made to a statement from Steadman, who was interviewed by the CMC.

D.3.4 Failure to advise pathologist of assault allegations

279. It is uncontentious that at the autopsy Kitching advised the pathologist that Mulrunji may have been drinking bleach or sniffing petrol but did not advise of the allegations of assault made by Roy Bramwell and Penny Sibley.

280. The applicants submit (paragraph 231) 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. That is not correct.

281. Coroner Hine noted that the focus of the inquest he conducted was the incidents from the time the police van arrived at the police station until the time that Mulrunji was placed in the cell.[220] He went on to say[221]:-

> *"94. The crucial time from when Mulrunji was extracted from the back of the police van to the time that he was dragged away from inside the doorway of the police station to the cells was only a matter of tens of seconds. The evidence establishes that there was a backhanded punch thrown by Mulrunji which struck Hurley upon Mulrunji exiting the police van. This was followed by a fairly violent struggle during the number of steps it took to proceed the length of the police van in the confined area, estimated by Sgt Leafe to be one to one and a half meters wide between the police van and the wall of the police station. This struggle culminated in a sudden stumbling fall into the police station. Whilst I recognise that these actions were fast and confusing for the witnesses, my fact finding task has been made more difficult by the fact that not one of the witnesses has maintained a consistent*

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217 Applicants' submissions paragraph 226.
218 Ex A19 p.1.
219 Ex A19 p.9 paragraphs 8 and 10.
220 Ex A96 p.33 paragraph 91.
221 Ex A96 p.34 paragraphs 94-96.

version when interviewed or when giving evidence over the intervening years.

95. The evidence, both from the medical experts and from the eye witnesses, is conclusive that Mulrunji was not suffering from any injury when the police van arrived at the police station.

96. This was a vital baseline for the conduct of the re-opened inquest as it meant that the window of opportunity for the fatal injuries to be inflicted upon Mulrunji was very narrow in both space and time, that is, from the back of the police van to the corridor of the police station – a matter of a few metres in distance and a matter of tens of seconds in time."

282. Coroner Hine went on to say that the medical evidence as to the incapacitating nature of Mulrunji's major injuries is very significant because of the evidence that after the fall Mulrunji was no longer resisting, was a dead weight and needed to be dragged to the cell.[222] He described the medical evidence as a critical element to the resolution of what happened in the corridor to cause Mulrunji's death, and said that the medical evidence was regarded by the Deputy State Coroner, the District Court and the Court of Appeal as "settled and uncontroverted".[223]

283. He then made extensive reference to that evidence, including the following:-

(a) that none of the medical witnesses or any of the parties sought to dispute Dr Ranson's unequivocal rejection of the possibility that the punches described by Mr Bramwell could have caused the fatal injuries;[224]

(b) that Dr Ranson agreed with Dr Lampe that there was no evidence to suggest the use of direct force (such as punching or stomping) to have caused the injuries;[225]

(c) the medical experts agreed that the fractured ribs, liver lacerations and partial vein rupture likely occurred as a result of a single injury, and the medical evidence suggests there were not a number of blows but only a single blow.[226]

284. It is clear that a focus of the investigation carried out on 19 and 20 November was to establish whether Mulrunji was suffering from any injury when he arrived at the police station, a matter of importance. It is also clear that a focus of the investigation was establishing what happened in the short period of time between Mulrunji being taken

222 Ex A96 p.36 paragraph 103.
223 Ex A96 p.37 paragraphs 105 and 106.
224 Ex A96 pp.37-38 and 40-42.
225 Ex A96 p.40.
226 Ex A96 p.46.

from the police van and his being placed in the cell. On 19 and 20 November the investigators interviewed all relevant witnesses able to give evidence about those matters, except for Steadman and Ms Sibley. Ms Sibley was interviewed at Ingham on 21 November. Steadman's presence at the police station before Mulrunji was placed in the cell was not known until later.

285. Medical evidence as to a cause of death was also important. That evidence did not become available until late on 23 November. Following the release of the autopsy certificate and report the CMC took over the investigation. That was done at the request of the Commissioner of Police.[227] Without knowledge of a cause of death, the investigation could not usefully or effectively proceed.

D.3.5 Breaches of duties

286. The applicants submit[228] that there is a clear inference that Kitching was dismissing information which was unfavourable to Hurley and only advising the pathologist of information that was favourable to Hurley. That inference is illogical.[229] Kitching knew that an inquest would be held. He had recorded an interview with Roy Bramwell, and knew that a video re-enactment had been conducted with Bramwell, in both of which allegations of assault were made.

287. The applicants submit (paragraph 234) that the integrity of the autopsy was compromised. It was not. The pathologist found no evidence of the ingestion of caustic substances and no evidence to suggest the use of direct force such as punching or stomping to have caused the injuries.

D.4 Failure to meet the cultural needs and expectations of the community

288. The respondents do not take issue with paragraph 236 and the first sentence of paragraph 237 of the applicants' submissions. The CAU was advised promptly of the death in custody, at 11.50am on 19 November.

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227 See Ex A96 p.148 paragraph 23.
228 Applicants' submissions paragraph 233.
229 See Ex R31 p.155 paragraph 238.

D.4.1 Failure of CAU

289. The applicants allege:-

(a) following notification of the Cultural Advisory Unit, a failure to advise Palm Island officers in relation to cultural issues either at all or appropriately; and if such advice was given a failure to follow it;[230]

(b) the failure of a cross cultural liaison officer to attend Palm Island;[231]

(c) a failure by particular officers to consider cultural needs within the Palm Island community.[232]

290. The failure to utilise the systems in place for advice and support from the CAU is alleged to be an act done in breach of s.9(1). The applicants do not say what advice or support should have been provided. No provision of the OPM requires the provision of advice or support. Advice was provided by the CAU to Senior Sergeant Jenkins in Townsville of the relevant sections of the OPM and that ATSILS needed to be engaged. Without knowing what other advice or support should have been provided it is difficult to determine whether the failure to obtain advice or support from the CAU involved a distinction and whether if it did, it was based on race and had the relevant purpose or effect.

D.4.2 Failure of CCLO

291. The applicants allege that an act in breach of s.9(1) of the RDA was the failure to utilise the systems in place for advice and support from CCLOs.

292. Senior Sergeant Dini was the officer in charge of the Cross Cultural Liaison Unit in Townsville in November 2004. He was sent to Palm Island on the morning of 26 November after returning to work that day from a period of leave.[233] He arrived on Palm Island at about 12.45pm.

293. Again, without knowing what advice or support should have been sought or provided it is difficult to determine whether the failure to do so involved a distinction and, if so,

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230 Paragraph 193 of the 3rd FASC.
231 Paragraph 194 of the 3rd FASC.
232 Paragraph 196 of the 3rd FASC.
233 Ex R15 paragraph 3 and Ex R13 p.1

whether it was based on race and had the relevant purpose or effect. No provision of the OPM requires the provision of advice or support from a CCLO.

D.4.3 Failure to take into account cultural needs

294. The applicants submit that the following are acts for the purpose of s.9(1) of the RDA:-

(a) the failure of the investigation team to keep the community on Palm Island informed of the progress of the investigation;

(b) the failure of the investigation team to appropriately address and respond to the characteristics and cultural needs of the community.[234]

295. The family of Mulrunji was contacted again after they were notified of his death.[235] The extent to which the community generally, as opposed to the family in particular, is to be kept informed of the progress of an investigation is not a matter addressed in the OPM. The applicants do not identify the source of any requirement to keep the community informed as to the progress of the investigation, or identify a cultural need in that respect.

D.4.4 Delay in notification of next of kin

296. This is a complaint about Webber. The complaint is that he contravened s.16.24.3(vi) and s.1.17 of the OPM by not immediately notifying Mulrunji's next of kin of his death.[236]

297. Section 16.24.3(vi) of the OPM relevantly provided that:-

> *"Where responsibility for the investigation of a death in custody … reverts to a commissioned officer pursuant to s.1.17 …. that commissioned officer should, as part of the investigation:*
>
> *(vi) immediately arrange for the next of kin … to be notified."*

298. It is common ground that Mulrunji's partner Ms Twaddle was notified at about 3.40pm on 19 November and Mulrunji's mother and other family members were notified at about 3.55pm on the same day.

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234 Applicants' submissions paragraph 245.
235 See Kitching's evidence at P1152.
236 Paragraph 213 of the 3rd FASC and applicants' submissions paragraph 250.

299. Webber arrived on Palm Island at approximately 2.55pm. He was driven to the police station, a journey of about 6 minutes. The first thing he did was to make arrangements to notify the next of kin.

300. The applicants' complaint is that Webber did not make arrangements for the earlier notification of the next of kin by someone other than Webber.

301. Webber considered it was appropriate for a senior officer to notify the family, that he should do so, and that it was inappropriate for a junior officer or Hurley or PLO Bengaroo to undertake that responsibility.

302. In her report (Ex R31 pp.227-242) Deputy Commissioner Rynders carefully considered the complaint and concluded as follows:-

> *"364. Webber was the person in the best position to reassure the family that the investigation into the death in custody would be conducted appropriately and without bias. Hurley had himself been involved in the detention of Mulrunji. It would be entirely inappropriate for Hurley to deliver the death notice to the family … Any other police officer, present on Palm Island, was a subordinate to Hurley. If any other police officer had notified the deceased's family of his death, it is likely that the family would have been concerned with the manner in which the investigation was to be conducted. The use of a junior officer in those circumstances does not, in my view, accord proper dignity or respect the culture and interests of the person being notified.*
>
> *365. OPM 16.24.3 does not specifically describe the manner of compliance. Webber was required to use his discretion in determining how the objective outlined in the procedure[237] was to be achieved. The circumstances that confronted Webber were unusual. In response to those circumstances he determined that he was the appropriate person to notify Mulrunji's family of the death.*
>
> *366. … Webber was favourably placed to explain to Mulrunji's family the intricacies of the investigation that was to be undertaken. He was in a position to immediately respond to questions raised by the family … it is evident that Webber's decision to personally advise the relatives was based on a rationale that is consistent with the recommendation of the RCIADIC …".*

303. That recommendation was that the notification of the death of an Aboriginal person should be given to the family in a sensitive manner respecting the culture and interests of the persons being notified.[238] That recommendation was recommendation 19 of the RCIADIC report, reproduced in Annexure B to the 3rd FASC.

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237 Section 16.24.3(vi) is a procedure, which generally outlines how an objective is achieved.

238 See Ex R31 p.239 paragraph 360.

304. The failure to arrange for an earlier notification of the next of kin by another officer on Palm Island was not an act involving a distinction based on the race of the applicants and group members or the race of Mulrunji.[239] Nor did it have the relevant purpose or effect on the rights relied on by the applicants.

E. UNLAWFUL RACIAL DISCRIMINATION IN QPS FAILURES

E.1 QPS Failures

305. There is no dispute that the acts pleaded in paragraph 244 of the 3rd FASC are acts within the meaning of s.9(1) of the RDA.

306. The applicants submit that the following acts comprising the QPS Failures have been proven:-

(a) the failure of the QPS to suspend Hurley from duty;

(b) the fact of Hurley continuing to perform operational duties, including in relation to the investigative process;

(c) the fact of Hurley continuing to perform operational duties, including at the scene of the arrest;

(d) the fact of Hurley being present in the police station when the investigation was taking place;

(e) the failures by Webber and Strohfeldt to provide advice or instructions or to take steps to ensure Hurley did not continue to perform duties at the scene;

(f) the failure to treat Hurley as a suspect;

(g) the failure to electronically record the conversation in the police vehicle;

(h) the fact of Hurley collecting the investigation team from the airport;

(i) the failure to electronically record the conversation that took place during the dinner at Hurley's house;

(j) the fact of the dinner at Hurley's house taking place and alcohol being consumed;

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239 See paragraphs 30(a) and 30(b) of the Particulars.

(k) the failure to electronically record the conversation in the police vehicle en route to the site of the arrest;

(l) the fact of the investigation team being driven to the site of the arrest by Hurley;

(m) the fact of the investigation team attending the site of the arrest with Hurley without being accompanied by PLO Bengaroo;

(n) the appointment of Robinson to the investigation team;

(o) Robinson's involvement in the investigation;

(p) Robinson's failure to advise senior officers of his conflict of interest;

(q) the appointment of Kitching to the investigation team;

(r) the failures by each of Webber and Strohfeldt to instruct officers not to talk to each other about Mulrunji's death and the surrounding events;

(s) the fact of officers talking to each other about Mulrunji's death and the surrounding events;

(t) the failure by Kitching to ascertain what had been discussed by witnesses;

(u) the failure of Webber to ensure Steadman was interviewed as soon as practicable;

(v) the failure by Williams to overview, advise on, and confer with Webber and the CMC to resolve issues regarding the integrity of the investigation;

(w) the failure to obtain a statement from PLO Bengaroo which was as comprehensive as possible;

(x) the treatment of PLO Bengaroo as inferior to other police officers who were not Aboriginal;

(y) the failure to organise for a support person to be available to assist in the conduct of interviews if needed;

(z) the conduct of interviews with Aboriginal witnesses in a manner which did not account for the cultural needs of the witnesses;

(aa) the delay in sending the Form 1;

(bb) the inclusion in the Form 1 of the statement that "the deceased laid on the floor of the cell and went to sleep immediately";

(cc) the failure either to amend the Form 1 to include the assault allegations prior to submitting it, or to submit a Supplementary Form 1 containing the assault allegations;

(dd) the failure of Kitching to advise Dr Lampe of the assault allegations during the autopsy;

(ee) the failure to utilise the systems in place for advice and support from the CAU;

(ff) the failure to utilise the systems in place for advice and support from CCLOs;

(gg) the failure of the investigation team to take any reasonable steps in good faith to keep the community on Palm Island informed of the progress of the investigation as it unfolded;

(hh) the failure of the investigation team to appropriately address and respond to die characteristics and cultural needs of the Palm Island community;

(ii) the failure to immediately notify Mulrunji's next of kin of the death.

307. The respondents submit that none of those acts involved a distinction based on race having the relevant purpose or effect, and the applicant's case, so far as it concerns the QPS Failures, has not been established.

E.2 Breach of section 9

E.2.1 Relevant context

308. The contextual factors relied on by the applicants to establish that the above acts involved a distinction are:-

(a) that the residents of Palm Island were overwhelmingly Aboriginal;

(b) the unique history of Palm Island, including the circumstances in which the community were forcibly relocated to Palm Island and the discriminatory treatment to which the community had historically been subjected;

(c) the interest of the community in the RCIADIC;

(d) the knowledge of the police of the RCIADIC.

309. The history of Palm Island is of no contextual significance. The interest of the community and the knowledge of the police of the RCIADIC is of limited contextual significance.[240]

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

310. The applicants plead that the acts comprising the QPS Failures constituted a "distinction, exclusion, restriction or preference" within the meaning of section 9(1) of the RDA, on the basis that the policing services provided to the applicants or the policing services provided on Palm Island were not provided according to the same standard that they were provided in other areas of Queensland or to other communities in Queensland. In that regard, the applicants plead[241] that, in November 2004, the QPS ordinarily complied with Orders, Policies, and Procedures, as well as the provisions of the PSAA, that the QPS ordinarily acted in partnership with the community at large and provided policing services as required by the reasonable expectations of the community or as reasonably sought of officers by members of the community. The respondents rely on paragraphs 78-79 above in response.

311. The respondents note that the applicants acknowledge that, viewed in isolation, most if not all of the acts could be characterised as simply, in the terms of the Defence, "honest mistakes" or "errors of judgment".[242] The applicants go on to submit that, when viewed as a whole, the following inferences can be drawn.

(a) Disregard for impartiality

312. The first inference which the applicants seek to draw is that most of the acts relied on detract in some way from the actual or perceived impartiality of the investigation. The applicants submit that the investigating officers did not once have regard to the appearance of impartiality through the entire investigation.[243] That submission should not be accepted. As Kitching accepted,[244] 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.

(b) Preference for evidence from non-Aboriginal witnesses

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240 See paragraphs 117, 119 and 121 above.
241 3rd FASC 246.
242 Applicants' submissions paragraph 258.
243 Applicants' submissions paragraph 260.
244 P.1162.

313. The applicants submit 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.[245] This is entirely speculative and baseless. So too is the applicants' submission in paragraph 262 about the volume and detail of information elicited from witnesses.

314. The applicants submit (paragraph 264) that information elicited from Aboriginal witnesses was given less weight than evidence elicited from non-Aboriginal witnesses, and refer to the assault allegations made by Roy Bramwell and Penny Sibley. This submission should not be accepted.

(c) Compromise of integrity of investigation

315. The applicants submit that all of the acts constituting the QPS Failures contributed in some way to the overall compromise of the integrity of the investigation, albeit to varying degrees. 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. Mistakes were made, but it should not be concluded that the integrity of the investigation overall was compromised.

(d) Failure to address cultural needs of the community

316. After making some general references to the RCIADIC report, the applicants submit (paragraph 271) that many of the police protocols the applicants allege were breached were enacted because of, or conform with, RCIADIC recommendations. That can be accepted to some extent but many of the OPM provisions referred to (notification of next of kin and a thorough and impartial investigation for example) apply irrespective of race.

E.2.3 Based on race

317. The applicants distinguish between acts involving a preference for the evidence of non-Aboriginal witnesses and the failure to address the cultural needs of the community, and other acts which they submit show a disregard for impartiality and compromise of the integrity of the investigation. The former are said to be self-evidently based on the race of the applicants.

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245 Applicants' submissions paragraph 263.

318. The applicants go on to submit (paragraph 273) that the acts alleged to have compromised the integrity of the investigation in the aggregate were not simply errors occurring as a result of laziness, incompetence or a disregard for procedure, but the errors followed an unmistakable pattern based on assumptions that Hurley had done nothing wrong, the death was from natural causes and the investigators were doing no more than going through the motions of an investigation.

319. That is unsupported by the evidence. The investigation was of a death in custody which must be the subject of a coronial inquest. The Ethical Standards Command was involved in the investigation. The investigators did an enormous amount of work in a relatively short period of time. The investigation was comprehensive. It was taken out of the investigators' hands after the autopsy report and taken over by the CMC.

320. The applicants also submit (paragraph 275) that those assumptions and a failure to consider the needs and expectations of the community are inextricably linked with Mulrunji being an intoxicated Aboriginal man arrested by a white police officer on Palm Island. Again, that is unsupported by the evidence. The 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. The applicants' submission that had the deceased been a non-Aboriginal person in a community which was less remote, better serviced, better educated and more influential, the investigation team would have known they were subject to more scrutiny necessarily involves the assertion that the investigators would have expected more scrutiny from a coroner in the circumstances described. There is no basis for that submission.

321. The investigators gathered as much evidence as they could, on the information known to them. They were awaiting medical evidence about the cause of death. While the investigation was not perfect, it was conducted seriously in difficult circumstances, and was not the product of any preconceived ideas about the outcome of the investigation.

322. The QPS Failures were not acts involving a distinction based on race. They were the result of oversight or insufficient attention to detail or insufficient consideration of the potential implications of conduct as affecting the appearance of impartiality, in the circumstances of an urgent investigation in a remote location undertaken at short notice.

E.3 Breaches of rights

323. The respondents note that the applicants do not press the allegations in relation to rights under Articles 5(b) or 5(e)(iv) of the Convention as a result of the acts comprising the QPS Failures.[246]

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

(a) Nature and contents of right

324. For reasons previously submitted, there is no relevant right under Article 26 of the ICCPR.

(b) Right to protection of police

325. The applicants have pleaded a right to go about their affairs in peace under the protection of the police services, under the common law. The QPS is an organisation created by statute to exercise statutorily prescribed functions and powers.

326. Those functions of the QPS are set out in s.2.3 of the PSA Act and include:-

(a) the preservation of peace and good order in all areas of the State;

(b) the protection of all communities in the State, and all members thereof;

(i) from unlawful disruption of peace and good order that results, or is likely to result from actions of criminal offenders, or actions or omissions of other persons; and

(ii) from commission of offences against the law generally;

(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally;

(f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of:

(i) the provisions of the Criminal Code;

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246 Applicants' submissions paragraph 277.

(ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;

(iii) the powers, duties and discretions prescribed for officers by any Act;

(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are:-

(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community.

327. The applicants' submission that a failure by the police to carry out their prescribed functions constitutes a failure to preserve peace and good order and a breach of the rights of citizens to go about their affairs in peace should not be accepted.

(c) Breach of rights

328. The applicants submit that the investigation was a service provided by the QPS which was required under s.2.3(g) of the PSA Act to be provided "as required of officers under … the reasonable expectations of the community" or as "reasonably sought of officers by members of the community".[247] They also submit that, in conducting the investigation into Mulrunji's death, the QPS was providing a service to the community on Palm Island and rely on a statement in the State Coroner's Guidelines that:-

> *"Deaths in custody warrant particular attention because of the responsibility of the state to protect and care for people it incarcerates, the vulnerability of people deprived of the ability to care for themselves, the need to ensure the natural suspicion of the deceased's family is allayed and public confidence in state institutions is maintained. Further, a thorough and impartial investigation is also in the best interests of the custodial officers."*

329. The statements in the Coroners' Guidelines are directed to coroners and their investigations.

E.3.2 Right to equal treatment before all organs administering justice

330. For reasons previously submitted, Article 5(a) of the Convention is not engaged. The QPS is not an organ administering justice within the meaning of that expression in Article 5(a).

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247 Applicants' submissions paragraph 293.

331. The applicants submit that a coroner is an organ administering justice, and that the failure of the QPS to conduct a thorough and impartial investigation would impact substantially on the ability of the coroner to make findings. That is not what Article 5(a) is directed to. What rights the applicants or group members had to equal treatment before the coroner are not identified.

E.3.3 Right to access services

332. The applicants do not articulate how the right of access to the service they identify (the investigation into Mulrunji's death) was affected by any of the acts relied on. The right of access to a service intended for use by the general public is a right of access to an existing service. It is not a right to be provided with a particular standard of service.

333. The applicants repeat and rely upon their submissions about the right to equality before the law (paragraphs 278-286) in their submissions about Article 5(f). They do not explain how their right of access to the identified service was impaired.

E.4 Common Questions of Fact and Law

334. The respondents do not take issue with the general characterisation of the issues common to the claims of the applicants and the group members in relation to the QPS Failures in paragraphs 310-311 of the applicants' submissions.

F. 22 TO 25 NOVEMBER 2004

F.1 Hurley's Removal from the Island

335. It is not contentious that Hurley was not immediately suspended from duty following the death in custody, that he remained on Palm Island until the afternoon of Monday 22 November and that Whyte took over as the officer in charge of the Palm Island police station on 22 November.

336. The applicants allege that the failure to suspend Hurley from duty before the afternoon of 22 November was an act in breach of s.9(1) of the RDA.

F.1.1 Expectation that Hurley would be Removed

337. The applicants submit that the community on Palm Island was prone to suspicion in respect of deaths in police custody.[248] As previously submitted, there is no evidence to support that submission.

338. On the basis of such a suspicion the applicants submit that it would reasonably be expected that three things would occur:-

(a) information concerning the death would rapidly spread in the community including information that Hurley was the arresting officer and PLO Bengaroo was present during the arrest, and information about the allegations of assault made by Roy Bramwell;

(b) that would lead to substantial anger and suspicion in the community towards the police in general and Hurley in particular;

(c) accordingly, Hurley would be suspended from duty, at least on Palm Island, unless and until he was cleared of any wrongdoing.[249]

339. The first two expectations are presumably expectations of the police, and the third a community expectation. It can be accepted that information of the death in custody had spread through the community over the weekend. The evidence shows that two persons heard of Mr Bramwell's allegations of assault.[250]

340. It can also be accepted that some members of the community were angry about the death in custody, and that Mr Wotton and Mr Blackman were suspicious that there would be a cover-up.[251]

341. The power to suspend a police officer is conferred on the Commissioner by s.6.1(1) of the PSA Act which provides as follows:-

> *"**6.1 Power to stand down and suspend***
>
> *(1) If-*
>
> *(a) it appears to the commissioner, on reasonable grounds that –*
>
> *(i) an officer is liable to be dealt with for official misconduct; or*

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248 Applicants' submissions paragraph 315.
249 Applicants' submissions paragraph 315.
250 Applicants' submissions paragraph 318.
251 See paragraph 120(c) above.

(ii) an officer is liable to disciplinary action under section 7.4; or

(iii) the efficient and proper discharge of the prescribed responsibility might be prejudiced, if the officer's employment is continued; or

(b) an officer is charged with an indictable offence; or

(c) an officer is unfit for reasons of health to such an extent that the officer should not be subject to the duties of a constable;

the commissioner may –

(d) stand down the officer from duty as an officer and direct the person stood down to perform such duties as the commissioner thinks fit; or

(e) suspend the officer from duty."

342. The applicants' particulars contend that Hurley should have been suspended or stood down by the Commissioner, the Commissioner's delegate, Strohfeldt, Webber or Williams.[252] There is no evidence of a delegation of the s.6.1(1) power, and no evidence that Strohfeldt, Webber or Williams had power to suspend or stand down Hurley.

343. It is common ground that Hurley was not immediately suspended from duty following the death in custody.[253] It is also common ground that Hurley was interviewed on 19 and 20 November, had a rostered day off on 21 November, and remained on Palm Island until the afternoon of 22 November.[254]

344. The applicants particularise 9 grounds on which they say Hurley should have been suspended under s.6.1(1)(a)(iii) of the PSA Act.[255]

345. The first is that Mulrunji had been wrongfully arrested by Hurley. This is a matter about which the applicants were refused leave to amend.[256] The applicants should not be permitted to rely on this ground.

346. The remaining grounds rely on other matters pleaded by the applicants and have been discussed elsewhere.

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252 Paragraph 16(a) of Particulars.
253 Paragraph 209(a) of Defence.
254 Paragraphs 247-249 of Amended ASF.
255 Particulars response 16(b).
256 See [2015] FCA 910 at [77], [90], [98] and [100] and see also Order 4 made on 21 August 2015.

347. It 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.

348. The failure to immediately suspend Hurley was not an act involving a distinction based on the race of the applicants and group members as Aboriginal persons. Nor did that failure have the relevant purpose or effect on any of the rights relied on by the applicants.

F.1.2 Confrontation Leading to Hurley's Removal

349. There was a confrontation between a large crowd of Palm Island residents (150-200 people) and Hurley on Monday 22 November. Mr Wotton described it as vocal but not threatening.[257] Later that day Hurley left Palm Island and Whyte commenced duty as the officer in charge of the Palm Island police station. It is reasonable to infer that Hurley was stood down from his position as a result of the confrontation.

F.2 Failure to Communicate with Local Community and Diffuse Tensions

F.2.1 Cultural Needs of the Community

350. The applicants allege[258] that Hurley, Webber, Richardson and Whyte had actual or constructive knowledge that:-

(a) the community of Palm Island or a reasonable proportion thereof held certain attitudes including that they were reasonably likely to be suspicious of the circumstances in which Mulrunji died in QPS custody and may perceive that the QPS would not be held to account for any wrongdoing in relation to the death;

(b) special considerations, efforts and strategic planning would have to be provided as part of QPS services on Palm Island;

(c) the QPS had CCLOs and the CAU to assist in providing culturally sensitive policing.

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257 P.699.

258 Paragraph 294 of 3rd FASC.

351. It can be accepted that Webber, Kitching and Hurley had a discussion about whether there might be any unrest once the news of the death became more widespread.[259] Otherwise, those allegations have not been established.

F.2.2 Police Knowledge of Tensions within the Community

352. It is agreed that QPS officers situated on Palm Island knew that there was a feeling of anger held by some residents of Palm Island over Mulrunji's death in custody, and a perception by some residents that Hurley was not being held to account for that death.[260] The applicants say that they put their case higher,[261] but the difference between the admitted fact and the pleaded case seems to be a difference between the expressions "some residents" and "amongst the residents" in relation to grief and anger, and a difference between the expressions "perception by some residents" and "a widespread perception" in relation to Hurley not being held to account. The significance of the differences is not apparent.

(a) Perception regarding Hurley

353. The applicants submit that the perception that Hurley was not being held to account was widespread because about 150-200 people were present at the meeting on 22 November. It can be accepted that most if not all of those present were aware that that perception was being voiced.

(b) Whyte's credit

354. The applicants' submission (paragraph 334) that Whyte did not reveal himself to be a reliable witness should not be accepted. Whyte was giving evidence of events that occurred more than 11 years ago. So too was Mr Wotton, and Mr Wotton did not always have a good or clear recollection.

(c) Feeling of grief and anger

355. As noted above it is agreed that QPS officers stationed on Palm Island knew that there was a feeling of anger held by some Palm Island residents over Mulrunji's death in custody. The applicants submit[262] that the evidence shows that the QPS officers

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259 See P.905 ll.18-25.
260 Amended ASF paragraph 325.
261 Applicants' submissions paragraph 329.
262 Applicants' submissions paragraph 341.

stationed on Palm Island had actual knowledge that there was a feeling of grief and anger amongst the residents of Palm Island over Mulrunji's death in custody. It is not apparent what, if anything, is in issue in this respect. There were also rocks thrown at the police station and a police vehicle and reports of threats to fire bomb the police station.[263]

F.2.3 Anticipation of Social Disorder

356. It is agreed that:-

(a) the number of QPS officers rostered to perform duties on Palm Island was increased from 7 officers on 19 November to approximately 20 officers by 26 November;

(b) following Mulrunji's death and prior to the Riot Richardson and Whyte considered that there was a risk that peace and good order may not be maintained on Palm Island.[264]

357. There is no evidence about the training of officers sent to Palm Island in what the applicants call "culturally sensitive policing".[265] The applicants' submission that Whyte's training was inadequate (paragraph 351) should not be accepted. His interview on 26 November was at the end of a long and stressful day. Nor should the applicants' submission about Richardson (paragraph 352) be accepted.

F.2.4 Failure to Take Measures to Diffuse Tensions

358. It is agreed that:-[266]

(a) the number of police officers rostered to perform duties on Palm Island was increased after 19 November from 7 officers to approximately 20 officers by 26 November;

(b) QPS officers stationed on Palm Island knew there was a feeling of anger held by some residents of Palm Island that Hurley was not being held to account for the death.

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263 Applicants' submissions paragraph 340.
264 Amended ASF paragraphs 253 and 270.
265 Applicants' submissions paragraph 343(a).
266 Amended ASF paragraphs 324-325.

359. Other agreed events in the period 22 November to 25 November are as follows:-[267]

(a) On 22 November 2004:-

(i) Inspector Richardson, who was then rostered to be Regional Duty Officer, was instructed by Acting Assistant Commissioner Wall to travel to Palm Island to take charge of overall policing on Palm Island, which Inspector Richardson did until 26 November 2004;

(ii) SS Whyte was also flown to Palm Island, and on that day was appointed to act as the Officer in Charge of the Police Station. Whyte continued to act in that role until 26 November 2004, under the command of Richardson.

(b) Richardson was accompanied by nine other police officers who were not ordinarily stationed on Palm Island.

(c) Following the death of Mulrunji the number of QPS officers rostered to perform duties on Palm Island was increased from 7 QPS officers on 19 November 2004 to approximately 20 QPS officers by 26 November 2004.

(d) At 2.30 pm on 22 November 2004, a public meeting occurred in an open area on Palm Island next to the Palm Island Council Chambers. That meeting was attended by Robinson, Richardson and Whyte. At the meeting, some Palm Island community members expressed their dissatisfaction to Richardson, Whyte and Robinson about Mulrunji's death.

(e) At about 10:30 am on 23 November 2004, a public meeting occurred. Senior Sergeant Bennett observed this meeting. At least 150 Palm Island community members attended the meeting.

(f) Over the course of the week between Mulrunji's death in custody on 19 November 2004 and the riot on 26 November 2004, the first applicant made demands to the effect that Hurley be arrested and taken off Palm Island.

(g) Between 22 November 2004 and 24 November 2004, QPS officers stationed on Palm Island received reports from members of the community that other members of the community intended to cause damage to or fire bomb the Police Station and police barracks.

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267 Amended ASF paragraphs 251-268 and 270.

(h) On 22 November 2004 at about 10:30 pm and on 24 November 2004 at about 12:40 am, rocks were thrown at a police vehicle.

(i) On 23 November 2004 at about 2:30 pm, Robinson received a report from a confidential informant that certain persons were going to fire bomb the Police Station and barracks.

(j) On about 23 November 2004, at about 3:20 pm, Wall directed that police officers on Palm Island take their weapons to their sleeping quarters with them.

(k) On 23 November 2004 at about 5:20 pm, Robinson had spoken with Dwayne Blanket and Frank Conway (who were Palm Island residents) about threats to fire bomb the Police Station and police barracks.

(l) On 23 November 2004 at about 5:40 pm, in response to intelligence that there was a threat that the Police Station may be firebombed, police officers on Palm Island arranged for units of the rural fire brigade to be on standby to attend the Palm Island Police Station compound if required.

(m) On 24 November 2004 at about 11:00 pm, bricks were thrown at the Police Station.

(n) The CMC took over the investigation into Mulrunji's death in custody on 24 November 2004.

(o) On 25 November 2004 at about 5:55 pm, Whyte spoke to Ms Denise Geia, who advised him that at that time Mayor Erykah Kyle was inside the Palm Island Council Chambers with members of Mulrunji's family, speaking with the family about the preliminary autopsy report. After speaking with Ms Geia, Whyte reported to Richardson the information Ms Geia had provided to him.

(p) On the evening of 25 November 2004, between 6:05 pm and 6:40 pm, Richardson was advised by Wall in a telephone conversation that the results of the post-mortem examination upon Mulrunji had either been delivered to the family of Mulrunji or was about to be delivered to the family. In response, Richardson warned the QPS members under his direction to 'be on your toes and be on the look out, you know things could turn a bit hostile'.

(q) Richardson and Whyte were not advised or otherwise made aware of:

(i) the injuries Mulrunji had sustained prior to his death whilst in police custody;

(ii) the cause of death, including the fact that Mulrunji's liver had been ruptured;

(iii) the fact that Mulrunji had sustained four broken ribs whilst in QPS custody.

(r) The Coroner's office gave the Preliminary Autopsy Report dated 24 November 2004 to the CMC.

(s) Following Mulrunji's death and prior to the riot Richardson and Whyte considered that there was a risk that peace and good order may not be maintained on Palm Island.

360. Paragraphs 294 to 296 of the 3rd FASC plead a number of vague and imprecise allegations against a number of police officers about police and community relations in the period from 22 November to the riot.

361. Paragraph 294(a) pleads that Hurley, Webber, Richardson and Whyte knew or ought reasonably to have known certain things. Paragraph 294(b) pleads that special considerations, efforts and strategic planning would have to be provided. Paragraph 295 pleads that despite such knowledge, no special measures were put in place by the Commissioner or QPS officers to preserve peace and good order on Palm Island in the period following the death of Mulrunji.

362. What special considerations, efforts and strategic planning was required is unknown. When asked for particulars, the applicants responded by saying:-

> *"The Applicants do not ask the Court to determine precisely which special considerations, efforts and strategic planning would have to be provided … and nor could they. The allegation is that such special considerations, efforts and strategic planning ought to have been provided and were not in fact provided."*[268]

363. What special measures should have been put in place are also unknown. When asked for particulars, the applicants responded by saying:-[269]

> *"The Applicants do not ask the Court to make findings on precisely which special measures ought to have been put in place or undertaken, nor could*

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268 Particulars response 46.

269 Particulars response 48.

they. The allegation is that no special measures were put in place or taken, and that special measures ought to have been put in place or undertaken."

364. This part of the applicant's case is meaningless. Police numbers were increased on Palm Island from 7 officers on 19 November 2004 to approximately 20 officers by 26 November 2004.[270] That is plainly a measure to preserve peace and good order on Palm Island. The Court is not asked to make a finding on what else should have been done. The applicants do not allege what else should have been done.

365. Paragraph 296 is equally vague and imprecise. It relies on the circumstances pleaded in:-

(a) paragraphs 260-261 of the 3rd FASC about public gatherings on 22, 23, 24 and 25 November 2004;

(b) paragraphs 262-264 of the 3rd FASC about community unrest on 22, 23 and 24 November 2004;

(c) paragraphs 265-268 of the 3rd FASC about the release of the preliminary autopsy report on 25 November 2004.

366. Paragraph 296 then alleges that, in those circumstances, police officers had knowledge of certain things and acted in certain ways which amounts to:-

(a) a failure to provide appropriate responsive policing services on Palm Island in accordance with the Commissioner's prescribed responsibility in s.4.8(1) of the PSA Act;

(b) a failure to act in partnership with the community in a way that met or considered the cultural needs which existed in the community as required by s.2.4(2) of the PSA Act.[271]

367. Particulars were sought of various allegations in paragraph 296. The response was generally along the lines outlined above.[272] Again, 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.

(a) Liaison with members of community attending meetings

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270 Paragraph 253 of Amended ASF.
271 Paragraph 296(i) of the 3rd FASC.
272 Particulars responses 49-52.

368. It is not clear what liaison or engagement with members of the community at meetings is alleged to have been required or provided, and was not provided. Whyte and Richardson were invited to and did attend the Monday meeting.[273] There is no evidence that they or any other police officer was invited to attend any other community meeting.

(b) Meetings with Mayor Kyle

369. The applicants accept that Whyte and Richardson met with Mayor Kyle on three occasions, but submit that these meetings did not amount to visible attempts to engage with the community.[274] Again, the applicants are not clear in saying what engagement with the community should have been undertaken. It would reasonably have been expected that the Mayor would keep the community informed of her meetings with police officers.

(c) Autopsy report

370. The applicants allege[275] the following acts in breach of s.9(1) of the RDA:-

(a) the failure to adequately brief Richardson on the contents of the preliminary autopsy report;

(b) the failure of the QPS to conduct strategic planning in response to the intelligence that the autopsy report was to be released to members of the public;

(c) the failure of QPS officers on Palm Island to make special or other arrangements in response to information that the autopsy report was to be released to the community.

371. The applicants do not point to any evidence that police officers were informed that the autopsy report would be released to the community at a community meeting on 26 November or would otherwise be publicly released. It is agreed that the preliminary autopsy report was given by the coroner's officer to the CMC.[276]

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273 See P563 and P700.
274 Applicants' submissions paragraph 359.
275 Applicants' submissions paragraph 364.
276 Paragraph 268 of Amended ASF.

F.2.5 Breach of Prescribed Responsibility

372. The prescribed responsibility in s.4.8 of the PSA Act is a responsibility of the Commissioner of Police for the efficient and proper administration, management and functioning of the QPS in accordance with the law. The prescribed responsibility is an accountability mechanism as s.4.6 of the Act makes plain. It makes the Commissioner accountable to the Minister. It is not a legal responsibility giving rise to obligations which may be breached.

G. EMERGENCY SITUATION

G.1 Public Safety Preservation Act

G.1.1 Structure and Purpose of the PSPA

373. Section 5 of the *Public Safety Preservation Act* 1986 (**PSP Act**), as in force in November 2004, provided as follows:-

> *"(1) Subject to section 6, if at any time a commissioned officer (the "incident coordinator") is satisfied on reasonable grounds that an emergency situation has arisen or is likely to arise the commissioned officer may declare that an emergency situation exists in respect of an area specified by the commissioned officer.*
>
> *(2) The incident coordinator, as soon as practicable after he or she declares that an emergency situation exists, shall issue a certificate to this effect signed by the incident coordinator which certificate shall set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists."*

374. Section 4 defined "emergency situation" as follows:-

> *"(a) any explosion or fire; or*
>
> *(b) any oil or chemical spill; or*
>
> *(c) any escape of gas, radioactive material or flammable or combustible liquids; or*
>
> *(d) any accident involving an aircraft, or a train, vessel or vehicle; or*
>
> *(e) any incident involving a bomb or other explosive device or a firearm or other weapon; or*
>
> *(f) any other accident;*
>
> *that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment, includes a situation arising from any report in respect of any of the matters referred to in paragraphs (a) to (f) which if proved to be correct would cause or may cause a*

> *danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment."*

(a) Definition of "emergency situation"

375. There are three elements of that definition. First, paragraphs (a)-(f) describe an event or a state of affairs (a situation). Second, the definition includes a situation arising from any report in respect of a paragraph (a)-(f) matter. Third, there must be a relevant consequence or effect of such a situation or a situation arising from a report, that being that the situation causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment. As the applicants point out,[277] the short title and the long title of the Act reveal its purpose to be the preservation of public safety and to provide protection for members of the public. It must also be recognised that public safety and public protection may involve protection of life and limb, property and the environment.

(b) Meaning of "any other accident"

376. The applicants submit[278] that paragraph (f) of the definition should be interpreted ejusdem generis with paragraphs (a) to (d) (but not paragraph (e)) which constitute a genus being situations ordinarily described as accidents because they happen by chance or without apparent cause.[279] On the applicants' approach a deliberately lit fire or a deliberately caused explosion could not be an emergency situation.

377. The applicants' approach is too narrow. It relies too heavily on dictionary meanings of "accident", rather than the meaning of "accident" in the context of the PSP Act.

378. In the context in which it appears paragraph (f) of the definition is not a term of limitation, but a term of expansion, intended to capture situations other than those described in paragraphs (a) to (e) which cause or may cause one or more of the specified consequences.

379. In *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 the construction of Article 17 of the Warsaw Convention relating to international carriage by air was in issue. Article 17 provided that:-

> *"the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if*

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277 Applicants' submissions paragraph 376 and 380.
278 Applicants' submissions paragraph 386.
279 Applicants' submissions paragraph 384.

the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

380. The High Court held that an accident for the purposes of Article 17 was the "unfortunate event, disaster or mishap" which caused the injury of which complaint is made.[280]

381. The riot which occurred on 26 November 2004 was an accident in the sense of a disaster or mishap. It was also an accident in the sense of being an unexpected or unusual event or happening.[281]

382. It should be concluded that the riot was an accident which caused a loss of or damage to property and a danger of death, injury or distress to any person.

383. The following facts about the emergency situation are agreed:-[282]

(a) A community meeting was held in the mall on Palm Island on 26 November 2004.

(b) At the meeting Mayor Kyle represented that the preliminary autopsy report stated that:-

(i) Mulrunji's death was caused by an accidental fall;

(ii) there was an accident somewhere around the cell in the police station at 10.40am on 19 November 2004 and Mulrunji was found dead at 11.23am;

(c) Mayor Kyle also represented that the doctor explained that there was a compressive force on Mulrunji's body where four ribs were broken and that caused a rupture in his liver and a lot of bleeding;

(d) During and after the community meeting, the community protested against the death in custody of Mulrunji and the perceived failure of the QPS to hold Hurley to account for that death.

(e) Following the community meeting:-

(i) rocks were thrown at the police station;

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280 223 CLR 189 at 204-205 [34]-[36], 223 [102], 234-235 [145]-[147] and 236 [151].

281 See 223 CLR 189 at 203 [28] and 205 [36].

282 Amended ASF paragraphs 269 and 271-316.

(ii) the police station, court house and police residence of Hurley were set on fire;

(iii) a police vehicle was set on fire;

(iv) some members of the community yelled threats and obscenities;

(v) many members of the community were angry and appeared to believe that Hurley had killed Mulrunji;

(vi) police officers moved from the police compound to the Palm Island Hospital;

(vii) during the riot the first applicant spoke to Robinson, Richardson and Whyte, and told an unknown QPS officer that the police should leave the island within one hour;

(viii) at some time after 3.00 pm the crowd of Palm Island residents outside the hospital dispersed.

(f) On 26 November when the police officers moved from the Police Station to the police barracks during the riot, Constable Craig Robertson took with him from the Police Station a Ruger 'Mini-14' .223 calibre rifle owned by the QPS. Constable Robertson did not have any ammunition or magazines from the Mini-14.

(g) At about 1.00 pm on 26 November when the police officers moved from the police barracks to the Palm Island Hospital, Constable Robertson did not take the Mini-14 with him.

(h) The Mini-14 was subsequently found in the police barracks on or about 8 December 2004.

(i) At all material times Webber was a commissioned officer within the meaning of the PSP Act and was employed under the PSA Act.

(j) At or about 1.45pm on 26 November 2004 Webber orally declared that an emergency situation existed on Palm Island.

(k) Webber later issued a "Certificate relating to the Declaration of an Emergency Situation".

(l) Section 5(2) of the PSP Act (Reprint 1F in force in November 2004) provided that the certificate shall set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists.

(m) The certificate issued by Webber:-

(i) declared an emergency situation to exist for the entire island of Palm Island;

(ii) specified that the emergency situation was declared to exist on 26 November 2004 at 1.45pm;

(iii) specified that the emergency situation was declared for the purpose in paragraph (f) of the definition of "emergency situation" under the Schedule to the PSP Act that is *"any other accident that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment"*.

384. The riot was described by the Court of Appeal (Ex R27) in the following terms:-

> *[3] An Aboriginal man died on 19 November 2004 while in police custody on Palm Island. Over the following week, with increasing tension within the Palm Island community, the police presence there was increased. The riot on 26 November followed a community meeting, attended by up to 300 persons, at which some details from an autopsy report were publicly disclosed by Ms Kyle, the Council chairperson. They included the assertion the death was caused by an accidental fall. Dissatisfied with the disclosure, the crowd became very angry. Some suspected a police officer was responsible for the death.*
>
> *[4] One Wotton led the crowd from the meeting place over a distance of approximately 80 metres to the police station. Abuse and threats were hurled at the police inside, including threats to kill them. Wotton smashed windows and security grilles. Many people threw rocks at the building. The police considered the station building afforded them insufficient protection, and during a lull, fled to nearby barracks. Stones were thrown at them as they ran. The station, the courthouse and the police residence were then set on fire.*
>
> *[5] The crowd descended on the police barracks, where the police were bunkered inside. Threats were shouted at the police officers. Rocks, bricks and pieces of concrete were thrown at the building and at the police officers, especially those attempting to negotiate with the crowd. A number of police officers were injured, one sustaining a fractured rib. The record includes some 60 pages of victim impact statements by police officers who*

describe the terror they experienced, and its aftermath: they feared for their lives, with some telephoning family members to say goodbye. (I return later to these matters.) Wotton threatened the police that unless they left the island within the hour, they would be killed.

[6] During another lull, the police decamped to an area near the hospital. The rioters reassembled at the hospital. There had been an attempt to close the airport and block the road between the airport and the township, to thwart the arrival of police reinforcements. But they eventually got through, joining the police at the hospital. When, after about four hours of turmoil, it was accepted the police were staying put, Wotton directed the crowd to go home, and they did.

385. Dini, Whyte and Webber gave evidence of what they observed during the riot. Mr Wotton's involvement is reflected in the sentencing remarks of Judge Shanahan (Ex A98) who said:-

(a) it was important to realise that the target of the riot was the police service - many of the police officers had only recently been sent to Palm Island and were simply performing their duties as police officers;[283]

(b) the officers on the island were attacked by a large number of people, they were stoned, they were threatened with death and buildings were set alight around them;[284]

(c) the evidence established that Mr Wotton was a major player in the matter and a leader of it – the speech he gave at the public meeting clearly indicated that things were going to burn and Mr Wotton and others would decide when;[285]

(d) Mr Wotton took part in smashing the windows at the police station, personally made threats to police officers, and directed another person to burn the police residence;[286]

(e) Mr Wotton poured petrol onto the police station;[287]

(f) police officers were present in the station and only left to go the barracks after the police station was set alight;[288]

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283 Ex A98 p.4.
284 Ex A98 p.4.
285 Ex A98 p.6.
286 Ex A98 pp.7 and 8 and see also p.12.
287 Ex A98 pp.7 and 8.
288 Ex A98 p.8. See also Dini's evidence in Ex R15 paragraph 12.

(g) Mr Wotton continued to play a leading role, being present at each of the scenes (the police station, barracks and hospital) and was seen by a number of people present as a leader;[289]

(h) in Mr Wotton's favour he made some efforts to lessen the chances of police officers being injured, personally moving the crowed away on two occasions;[290] and negotiated in an endeavour to move police off the island;[291]

(i) the riot was a serious one which went on for three hours – the police were besieged and numerous projectiles were thrown at them, some of them quite large building blocks, and some police officers were hit, [292] but not seriously injured;[293]

(j) the riot was significant, involving a group of people estimated to be up to 300, a number of whom were spectators rather than active participants;[294]

(k) the riot occasioned millions of dollars damage to the infrastructure of Palm Island;[295]

(l) police officers were subject to vile abuse, threats of death and taunts over a substantial period of time – many perceived that they were about to die, and many rang loved ones to say goodbye.[296]

G.1.2 Situation of 26 November 2004 Not "Any Other Accident"

386. The applicants submit[297] that the respondents' pleading that the course of events of 26 November was unexpected or unforeseen and thereby constituted an accident must be rejected for two reasons:-

(a) while the magnitude of those events was unexpected and unforeseen, the occurrences themselves had been expected and foreseen;

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289 Ex A98 p.8.
290 Ex A98 pp.8-9.
291 Ex A98 p.9.
292 Ex A98 pp.9-10.
293 Ex A98 p.10.
294 Ex A98 p.10.
295 Ex A98 p.10.
296 Ex A98 p.11. See also Ex R27 at [29] and [72].
297 Applicants' submissions paragraph 387.

(b) the allegation that the relevant situation was "any other accident" originated with Webber.

387. For the reasons previously submitted, the situation which arose on 26 November was any other accident for the purposes of paragraph (f) of the definition of "emergency situation". The riot on 26 November was an unprecedented and unexpected event, quite different from the anti-social acts earlier in the week.

G.1.3 Webber Not Reasonably Satisfied That an Emergency Situation Had Arisen

388. The applicants submit that the declaration was excessive because it related to the whole of Palm Island and any emergency was confined to the Mission area of Palm Island.[298] This is not pleaded as a ground of unlawfulness of the declaration. The applicants should not now be permitted to raise this issue.

389. The applicants take issue with some of the reasons pleaded by the respondents for Webber's declaration of an emergency situation. In April 2005 Webber made a statement (Ex A81) in which he states why he made the declaration. His evidence on those matters remained firm and should be accepted.

390. The applicants accept (paragraphs 401-402) that if Webber was reasonably satisfied that the Palm Island police station and Hurley's residence had been set on fire, and that police officers were under attack by rocks or fire or otherwise, that could fall within paragraphs (a) and (e) of the definition. A mistake in the source of power to do an act does not invalidate the act if done in accordance with an available power. Contrary to the applicants' submission (paragraph 402) the fire was not under control when the declaration was made and the police continued to be under attack.

G.2 Revocation of the Emergency Situation

391. Webber revoked the declaration because a number of offenders were in custody, there were significant numbers of police on hand to deal with the situation, areas of concern were generally secure, and there had been no further incidents overnight.[299]

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298 Applicants' submissions paragraph 403.

299 Ex A81 p.8.

392. The applicants' submissions that any emergency situation ended when the crowd of protestors dispersed[300] should not be accepted. What occurred was not a protest – it was a riot of an unprecedented scale and severity. There 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.

G.2.1 Evening of 26 November 2004

393. The applicants' submissions depend on acceptance of their proposition that the only possible bases for an emergency situation to have been declared were the existence of a fire and attacks on the police. For reasons previously submitted that is incorrect. While the situation had calmed down after the rioters had dispersed from the hospital, it could not be confidently assumed that there was no further threat to public safety. While police numbers on the island had increased, the police infrastructure had been destroyed and the ability of the police to maintain peace and good order on the island was seriously compromised.

G.2.2 Requirement to Revoke Declaration

394. Section 5(3) of the PSP Act provides that the declaration that an emergency situation exists shall continue until revoked by the incident coordinator. The applicants submit[301] that the declaration must be revoked as soon as practicable after the emergency situation has ended for two reasons:-

(a) the definition of "emergency situation" does not refer to a declaration being made, and a declaration cannot[302] continue to be in place despite the emergency situation having abated;

(b) the s.8 emergency powers are not engaged by reference to a declaration and are only engaged where considered necessary to effectively deal with the emergency situation.

395. The power to make a declaration is conditioned on satisfaction on reasonable grounds that an emergency situation has arisen or is likely to arise. It can be accepted that once

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300 Applicants' submissions paragraph 404.

301 Applicants' submissions paragraphs 409-411.

302 It is assumed in the second last line of paragraph 410 of the applicants' submissions that "can" is meant to be "cannot".

such satisfaction ceases, a declaration should be revoked. While an actual emergency may have abated, an emergency situation exists where there is a situation that may cause a relevant danger or where there is a situation arising from a report which, if correct, may cause a relevant danger.

G.2.3 Respondents' Justification for Failing to Revoke the Declaration

396. Webber's reasons for not revoking the declaration on the evening of 26 November are summarised in paragraph 416 of the applicants' submissions, and his reasons for revoking the declaration on the morning of 28 November are summarised in paragraph 418.[303] Those reasons are legally sufficient reasons for not revoking the declaration until the morning of 28 November. Webber's understanding of the situation on the island was a first hand understanding. His assessment that a high risk situation continued to exist is relevant to that element of the "emergency situation" definition which refers to a danger or potential danger of death, injury or distress to any person or loss of or damage to property.

G.2.4 Requirement to Issue Certificate Declaring Emergency Situation

397. The applicants identify the relevant acts for s.9(1) of the RDA as being:-

(a) the issuing of a certificate in relation to the declaration without providing adequate particulars of the emergency situation;

(b) the failure to issue a certificate as soon as practicable after the emergency situation was declared.

G.2.5 Inadequacy of Certificate

398. The applicants submit that the certificate (A20) was inadequate because it did not set out the nature of the emergency situation in that it did not explain what the emergency situation was.[304] They submit that what was required was an explanation of what the emergency situation was.

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303 See also Ex A81 p.8.

304 Applicants' submissions paragraphs 427-429.

399. The certificate was sufficient to comply with s.5(2) of the PSP Act. The words "the nature of the emergency situation" are apt to refer to a situation described in the terms of the s.4 definition. The requirement that a certificate be issued as soon as practicable after the declaration is made, and not as the prescribed means of making a declaration, strongly suggests that any noncompliance with the form of the certificate is not invalidating.

G.2.6 Delay in Issuing Certificate

400. Section 5(2) of the PSP Act provides for the incident coordinator to issue a certificate "as soon as practicable after he or she declares that an emergency situation exists". The words "as soon as practicable" require consideration of what is practicable in the actual circumstances. "Practicable" means capable of being carried out, effected or done. The expression should be construed in the broader context of the fact that a declaration authorises the incident controller to exercise certain powers to deal with and respond to the emergency situation, and that those matters may have a more pressing claim on the incident coordinator's time and efforts.

401. The police station on Palm Island had been destroyed as had the police communications capability. What was practicable has to be judged in light of those facts and the other calls on Webber's time in dealing with events on Palm Island.

G.3 Deployment of SERT

402. SERT is a specialist police support unit, the primary role of which is set out in s.2.26.1 of the OPM including, relevantly for this case, the provision of specialist police capacity to resolve high risk situations and incidents which were potentially violent and exceeded normal capabilities of the QPS.

403. The applicants do not allege in the 3rd FASC or submit in their written submissions that the deployment of SERT or PSRT was an act done in breach of s.9(1) of the RDA. The Court is not required to make any finding in that regard.

404. Paragraphs 435-438 of the applicants' submissions criticise aspects of Webber's evidence about completing the SERT request forms (Exs A79 and A80). Webber was

being asked details of events, which had occurred more than 11 years earlier. Exhibit A79[305] states that:-

> *"**2. Who or what is the subject of the request?***
>
> ***2.1 Offender / Suspect(s) details:***
>
> *The subject of the request is to assist conventionally equipped police officers to maintain a policing presence on Palm Island and to secure the safety of all Palm Island residents. Assistance is also sought to search for and apprehend persons who took part in the riot and arson of Police property. These persons may be armed with weapons and pose a serious threat to the life and safety of police members.*
>
> *The identity of the individual offenders will be provided on an ongoing basis for operational planning.*
>
> …
>
> ***3. SERT is requested to:***
>
> *☒ Provide a specialist police capability to resolve a high risk situation which is potentially violent and exceed normal police capabilities;*
>
> ***MISSION***
>
> ***4. SERT is requested to:***
>
> *SERT to travel to Palm Island and undertake the following tasks:-*
>
> *(a) To provide security to police members on Palm Island and regain control of public order on the Island.*
>
> *(b) To assist investigators to locate and detain wanted persons and associates by tactical methods.*
>
> *(c) To assist in provision of ongoing policing of Palm Island and to provide security and protection of QPS employees and property on Palm Island."*

405. It can be accepted that Webber may be mistaken in thinking that some of the information included in the request form was known to him at 2pm on 26 November, but that is explicable on the basis of the lapse of time since 26 November 2004. His evidence was that he was monitoring the police radio,[306] and made and received a number of mobile telephone calls while en route to Townsville airport and while in flight to Palm Island.[307] At the time he declared an emergency situation to exist, he believed there was a significant danger of death or injury to police and members of the public both on Palm Island and who might travel to Palm Island.[308]

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305 Page 2 of 4.
306 See Ex R4 for a transcript of radio communications.
307 Ex A81 pp.1 and 2.
308 Ex A81 p.2.

406. Some of the applicants' criticisms involve a misreading of the SERT request form. They misread the request for assistance to search for and apprehend persons as necessarily being something that could only arise after a plan had been formulated, and as not being a basis for requesting SERT assistance.[309] There was information available to Webber which supported a capability of persons on the island to use lethal force.

407. Webber considered that no plans would be made that evening to apprehend any of the rioters. The priority was to establish a visible police presence and to progressively restore law and order.[310]

408. Webber considered that a high risk situation existed and that the lives of conventionally equipped police officers would be endangered while endeavouring to search residences to locate and arrest persons. The considerations he had regard to were:-

(a) that serious offences including arson and riotous behaviour had been committed;

(b) that there had been threats to murder police officers;

(c) that there was ready access to weapons including knives, spears, machetes and other blade type weapons;

(d) a police firearm was missing;

(e) there was a propensity for violence at Palm Island involving the use of weapons;

(f) that the violence appeared to be premeditated and as a result of planned action.[311]

409. Webber considered it appropriate in accordance with the National Guidelines (Ex R8) for members of SERT to be involved to reduce the likelihood of injury to police officers, members of the community and suspects.[312]

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309 Paragraph 437(d) of the applicants' submissions.
310 Ex A81 p.6.
311 Ex A81 p.6.
312 Ex A81 p.7.

410. The criticism of Webber for "backdating" the SERT request form is not well-founded. It is obvious that SERT was deployed to Palm Island on 26 November. SERT does not deploy on its own initiative.[313]

G.3.1 Allegedly "Missing" Firearm

411. The agreed facts about the Mini-14 rifle are as follows:-[314]

(a) On 26 November 2004, when the police officers moved from the Police Station to the police barracks during the riot, Constable Robertson took with him from the Police Station a Ruger 'Mini-14' .223 calibre rifle owned by QPS. Constable Robertson did not have any ammunition or magazines for the Mini-14.

(b) At about 1.00pm on 26 November 2004, when the police officers moved from the police barracks to the Palm Island Hospital, Constable Robertson did not take the Mini-14 with him.

(c) The Mini-14 was subsequently found in the police barracks on or about 8 December 2004.

(a) Rifle not missing

412. The rifle was subsequently found in the barracks on or about 8 December. It was unaccounted for on 26 November and believed to be missing.

(b) Police search for the rifle

413. The relevance of the applicants' submissions on this matter is unclear. No act in breach of s.9(1) is alleged in respect of the missing rifle.

G.4 Unlawful Arrests

G.4.1 Requirements for Lawful Arrest

414. Section 198 of the PPRA, as in force in November 2004, provided as follows:-

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313 McKay's evidence at P1374-1375.

314 Amended ASF paragraphs 278-280.

> *"(1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –*
>
> *(a) to prevent the continuation or repetition of an offence or the commission of another offence;*
>
> *(b) to make inquiries to establish the person's identity;*
>
> *(c) to ensure the person's appearance before a court;*
>
> *(d) to obtain or preserve evidence relating to the offence;*
>
> *(e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;*
>
> *(f) to prevent the fabrication of evidence;*
>
> *(g) to preserve the safety or welfare of any person, including the person arrested;*
>
> *(h) to prevent a person fleeing from a police officer or the location of an offence;*
>
> *(i) because the offence is an offence against section 444 or 445;*
>
> *(j) because the offence is an offence against the Domestic and Family Violence Protection Act 1989, section 80;*
>
> *(k) because of the nature and seriousness of the offence;*
>
> *(l) because the offence is –*
>
> *(i) an offence against the Corrective Services Act 2000, section 103(3); or*
>
> *(ii) an offence to which the Corrective Services Act 2000, section 104 applies.*
>
> *(2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 7."*

415. The applicants allege that at the time of the arrests any actual or potentially unlawful activity being committed by any of the applicants or group members had ended.[315] That appears to be directed at s.198(1)(a).

416. Section 198(2) authorises arrest of a person reasonably suspected of having committed an indictable offence for questioning the arrested person about or investigating the offence under Chapter 7 of the PPRA. Chapter 7 (ss.227-268) gives police officers powers to detain an arrested person for questioning.

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315 Paragraph 302 of the 3rd FASC.

417. An arrest is a deprivation of liberty or freedom by detaining a person or taking them into custody. A person subjected to an unlawful arrest may bring an action for false imprisonment.

418. The use of force in making an arrest is dealt with by s.376 of the PPRA which provides:-

> *"**376 Power to use force against individuals***
>
> *(1) It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power.*
>
> *Example –*
>
> *A police officer may use reasonable force to prevent a person evading arrest.*
>
> *(2) Also, it is lawful for a police officer to use reasonably necessary force to prevent a person from escaping from lawful custody.*
>
> *(3) The force a police officer may use under this section does not include force likely to cause grievous bodily harm to a person or the person's death."*

419. In evaluating police conduct in deciding how to effect an arrest a judgement should be made by reference to the pressure of events and the agony of the moment, not by reference to hindsight. Consideration of how to effect an arrest may depend on the known and apparent disposition of the offender, the need to take measures to avoid the offender escaping or injuring himself or others and other factors. It is unfair to sit back in the comparatively calm and leisurely atmosphere of the courtroom and make minute retrospective criticisms of what an arresting officer might or might not have done or believed in the circumstances.[316]

420. The applicants submit that under s.198 the police officer who effects an arrest must hold the reasonable suspicion referred to in that section.[317] That is true, but the arresting officer may form the necessary reasonable suspicion on the basis of information supplied by another police officer.[318]

G.4.2 Arrests Not Lawful

421. The applicants have pleaded that the following acts or omissions were acts for the purpose of s.9(1) of the RDA:

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316 *Woodley v Boyd* [2001] NSWCA 35 at [37] per Heydon JA, cited with approval in *Carter v Walker* [2010] VSCA 340 at [142].

317 Applicants' submissions paragraphs 456 and 459.

318 *Bulsey v State of Queensland* [2015] QCA 187 at [15].

(a) the arrest of the first applicant;

(b) the arrest of the third applicant;

(c) the formation of an Action Plan which required that Robinson identify the persons to be arrested;

(d) the preparation of a list of persons to be arrested by Miles in Townsville on the night of 26 November 2004;

(e) the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004.[319]

422. The Action Plan[320] had the following elements:-

(a) DS Robinson to identify addresses of interest;

(b) SERT and PSRT officers to acquire addresses of interest;

(c) Robinson to enter residence and identify persons of interest;

(d) Robinson accompanied by SERT and PSRT officers would apprehend the person or persons of interest with minimum force necessary, secure that person and that person would then be taken from the residence;

(e) if doors were locked and secured, SERT would use force to gain entry;

(f) other occupants within the dwellings would not be disturbed, if possible;

(g) team would them move on.

423. The Action Plan was formulated by senior officers on Palm Island including Webber, and was approved by Acting Assisting Commissioner Wall.[321]

(a) Arrest of First Applicant

424. The applicants acknowledge the first applicant's conviction for his conduct on 26 November 2004 and submit that that conviction should have no bearing on the lawfulness of his arrest. That is not disputed, but it does have relevance to his damages claim.

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319 Applicants' submissions paragraph 461. It is agreed that no arrest warrants were obtained: paragraph 314 of Amended ASF.

320 Paragraph 288 of Amended ASF.

321 Paragraphs 288 and 289 of Amended ASF.

425. The applicants submit that Mr Wotton was arrested by Kruger, possibly at the direction of Robinson.[322] That is not correct – he was arrested by Robinson.[323] Robinson was present during the riot and had knowledge of Mr Wotton's involvement in the riot.

(b) Arrest of Third Applicant

426. The third applicant was arrested according to the applicants' submissions (paragraphs 469-470) even though it is not alleged in the 3rd FASC that she was arrested. It can be accepted that the third applicant's liberty of movement was restrained for a short period of time.

G.4.3 Not Conducted with Minimum Force Necessary

427. The applicants have pleaded that the following acts or omissions were "acts" for the purpose of s.9 of the RDA:

(a) use of more force than was necessary in the arrest of the first applicant;

(b) use of more force than was necessary in the arrest of the third applicant;

(c) subjection of the first applicant to violence including the use of a taser;

(d) holding of the first applicant at gunpoint whilst he was unarmed;

(e) holding of the third applicant at gunpoint whilst she was unarmed;

(f) forcing of the first applicant to lie face down with guns pointed at him;

(g) forcing of the third applicant to lie face down with guns pointed at her.[324]

(a) Force used to arrest the third applicant

428. For the reasons submitted above there was no arrest of the third applicant. There was no physical force used against the third applicant.

(b) Force used to arrest the first applicant

429. The first applicant was tasered and handcuffed. The circumstances in which he was transported by helicopter to Townsville is not pleaded in the 3rd FASC.

(c) Force necessary to arrest the first applicant

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322 Applicants' submissions paragraph 466.
323 Kruger in Ex R19 paragraph 11 and at p.1660-1661 and McKay at p.1427 l.30 and 1454 l.32.
324 Applicants' submissions paragraph 472.

430. The use of a taser on Mr Wotton was not an application of unreasonable force in the circumstances. A judgment about this matter should be made by reference to the pressure of events and the agony of the moment, not hindsight. SERT officers are trained to identify threat cues.[325] McKay interpreted Mr Wotton's actions as involving threat cues.[326] So did Kruger.[327]

G.5 Unlawful Entries

431. The applicants identify the following acts or omissions as "acts" for the purpose of s.9 of the RDA:

(a) the entry and search by SERT officers of the dwelling of the first and third applicants on 27 November;

(b) the entry and search by SERT officers of the dwelling of the second applicant on 27 November;

(c) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the first and third applicants;

(d) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the second applicant.[328]

432. Section 8(1)(f) and (g) of the PSP Act provided as follows:-

> *"8 **Powers of incident coordinator***
>
> *(1) Where during the period of and in the area specified in respect of an emergency situation the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation he or she (and any other police officer acting on his or her instructions) may –*
>
> *…*
>
> *(f) enter or cause to be entered (using such force as is necessary for that purpose) any premises;*
>
> *(g) search or cause to be searched (using such force as is necessary for that purpose) any premises and anything found therein or thereon;*
>
> *…"*

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325 P.1497.
326 P.1497.
327 P.1623 and 1670-1671.
328 Applicants' submissions paragraph 489.

433. If it is concluded that the declaration of an emergency situation was not lawfully made, then the s.8 powers were not available for exercise. That does not answer the question whether the acts relied on were done in breach of s.9(1).

434. Section 19 of the PPRA relevantly provided as follows:-

> *"**19 General power to enter to arrest or detain someone or enforce warrant***
>
> *(1) A police officer may enter a place and stay for a reasonable time on the place –*
>
> *(a) to arrest a person without warrant; or*
>
> *…*
>
> *(2) If the place contains a dwelling, a police officer may enter the dwelling without the consent of the occupier to arrest or detain a person only if the police officer reasonably suspects the person to be arrested or detained is at the dwelling.*
>
> *…"*

G.5.1 Invalid Use of Emergency Powers

435. The applicants submit that the entry and search of dwellings by SERT officers was not authorised by s.8 of the PSP Act and were unlawful.[329] This issue turns on whether there was an emergency situation at the relevant times. If s.8 was not engaged, the SERT officers nevertheless believed that they were acting in accordance with that power. The entries and searches were undertaken in that mistaken belief, and were not an act involving a distinction based on race.

G.5.2 Not Justified Under PPRA

436. The applicants submit that the entry and search of dwellings was not authorised by s.19 of the PPRA and were unlawful.[330] The basis of the submission is that under s.19(2) a police officer may only enter a dwelling to arrest or detain a person if the officer has the specified suspicion, and s.19(2) does not authorise other officers, who do not hold the relevant suspicion, to enter the dwelling.

437. It can be accepted that there is no evidence of the required reasonable suspicion in the case of the entries into the homes of the first and third applicants. In the case of the

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329 Applicants' submissions paragraphs 490-502.

330 Applicants' submissions paragraphs 503-506.

second applicant, Richard Poynter was identified as a target at that address and was arrested at that address. Those entries were not acts involving a distinction based on race. It was based on a belief that there may be other persons to be arrested at those homes, or in some cases on the usual SERT operational methodology of securing premises by ascertaining that there were no other threats within the house.[331]

G.5.3 Unnecessary Disturbance of Occupants

438. The applicants identify the following acts or omissions as "acts" for the purpose of s.9 of the RDA:

(a) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the first and third applicants;

(b) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the second applicant;

(c) the ransacking of the home of the first and third applicants;

(d) the damage to property in the home of the second applicant.[332]

439. Those acts did not involve a distinction based on race. They were based on the usual SERT operational methodology. The evidence of the ransacking of the first and third applicants' house is equivocal.[333] Mrs Wotton did not complain of any damage to Robinson on 27 November.

G.6 Other Police Conduct During Emergency

G.6.1 Evacuation of Residents

440. The complaint about evacuations of residents is twofold. First, the applicants complain that a perception was created that non-Aboriginal employees of service providers were being removed from the island whilst the Aboriginal members of the community were being left on the island under "quasi-martial law". That perception is said to have been created by the evacuation of the majority of the teachers and other

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331 See, for example, McKay at P.1433 and Kruger at P.1675, 1676 and 1677.
332 Applicants' submissions paragraph 517.
333 See P.341.

public sector employees.[334] Second, the applicants complain that all flights and ferry services were suspended, meaning that none of the applicants and group members were permitted to travel to or leave Palm Island.[335]

441. The applicants allege that on or about 26 November 2004 the QPS evacuated the majority of the teachers and other public sector employees from Palm Island.[336] They also allege that over the course of the emergency situation (ie. from 1.45pm on 26 November 2004 to 8.10am on 28 November 2004) the applicants and group members were not permitted to travel to or leave Palm Island otherwise than in police custody as all flights and ferry services were suspended.[337]

442. It is agreed that:-[338]

(a) on 26 November the QPS arranged for a ferry to be available from Palm Island to Townsville. Some teachers and service providers left Palm Island on this ferry;

(b) on 26 November the QPS arranged for the evacuation of some patients (including some Indigenous patients) from the Palm Island Hospital to Townsville by Queensland Emergency Services helicopter;

(c) between 1.45pm on 26 November and 1.30pm on 27 November all commercial flights to and from Palm Island were suspended and during that period all people on Palm Island were unable to leave Palm Island on commercial flights.

443. A ferry left Palm Island at 6.11pm on 26 November[339] carrying 30 people being school staff and children. Ferry services resumed on the afternoon of Sunday 28 November.[340]

444. The restriction on flights was in force for just under 24 hours. It was regularly reviewed on the morning of 27 November.[341]

445. By the afternoon of Saturday 27 November Webber considered the risk to aircraft travelling to Palm Island was minimal, and at 1.33pm the NOTAM was lifted.[342]

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334 Paragraph 291 of the 3rd FASC.
335 Paragraph 292 of the 3rd FASC.
336 Paragraph 291 of the 3rd FASC.
337 Paragraph 292 of the 3rd FASC.
338 Amended ASF paragraphs 320-322.
339 Ex A41 (MIR Running Sheet) Item 58.
340 Ex A41 Items 309 and 326.
341 Ex A41 Items 160 (9.30am), 182 (11am), 186 (11.15am) and 194 (12.10pm).

446. The applicants allege that the conduct described above was done in breach of several parts of s.10.14 of the Code of Conduct which is headed "Performance of Official Duties". They do not allege that police officers exceeded or misused their authority, but complain about the manner in which official duties were performed. The acts relied on as acts in breach of s.9(1) of the RDA did not involve a distinction based on race.

447. The rights of the applicants and group members alleged to have been impaired by the conduct are pleaded in paragraph 316 of the 3rd FASC. The applicants do not allege that any rights of the sub-group as set out in paragraph 320 of the 3rd FASC were impaired by the conduct.

448. It is impossible to see how any of the acts complained of, as set out in paragraph 524 of the applicants' submissions, could have had the relevant purpose or effect on any of those rights.

(a) NOTAM

449. The applicants submit that Palm Island residents were stranded in Townsville over the period of the NOTAM. The evidence relied on refers to one resident.[343]

450. The applicants submit (paragraph 530) that it is appropriate to infer that the police were concerned at leaving non-Aboriginal civilians at the airport because they considered that Aboriginal people on Palm Island were dangerous and violent and posed a threat to anyone who was not Aboriginal. That inference is not open on the evidence. Dini explained why he allowed the aircraft to leave with the civilians, for reasons which are unrelated to race

(b) Ferry to Townsville

451. The applicants rely on a number of entries in the MIR Running Sheet (Ex A41) and submit that the QPS made a decision to disrupt the ferry's ordinary service such that the ferry only took passengers selected by the QPS.[344] They say there is a strong inference that the ferry was organised to take non-indigenous service providers from the island. That inference cannot be drawn. There is nothing in the relevant entries in the log which indicates that non-indigenous service providers were the only persons of

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342 Ex A81 p.7 and Ex A41 Item 208.
343 Applicants' submissions paragraph 525.
344 Applicants' submissions paragraph 540.

concern to the police. Nor is there any basis to reject Dini's evidence that he would not have turned away any indigenous persons had they asked to board the ferry.[345]

(c) Failure to comply with Code of Conduct

452. The applicants' submission[346] that the issue of the NOTAM and the organising of the ferry to remove school staff and other service providers from Palm Island was in breach of certain provisions of s.10.14 of the Code of Conduct should not be accepted.

G.6.2 School Bus

453. There was no "commandeering" of the school bus. It is an agreed fact that a QPS officer took possession of the bus with the agreement of the school principal.[347] It was made available for QPS use by the principal of the school following a request by SS Dini.[348] The applicants' submission that the bus was seized unlawfully (paragraphs 547 and 552) is contrary to the agreed fact. In any event it is difficult to see how the alleged conduct involved a distinction based on race or had the relevant purpose or effect on any of the rights identified by the applicants.

G.6.3 Damage to Property

454. The applicants plead in paragraph 290(b) of the 3rd FASC that property was damaged in their homes. The third applicant gave evidence that, during the raid on her home SERT officers "tipped everything upside down" with no apparent purpose. When read in context it is not clear that the third applicant was saying that her house was ransacked, the ransacking of her home being the act in breach in s.9(1) relied on. The third applicant did not complain of any damage to Robinson on the following day. The second applicant advised Robinson the day after the raid on her home that her shower curtain had been damaged, and SERT recorded that her bathroom door was damaged.

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345 Applicants' submissions paragraph 540.
346 Applicants' submissions paragraph 543.
347 Amended ASF paragraph 317.
348 Dini's evidence at P.764-765 and 788.

G.6.4 Visible Presence, Militaristic Conduct, Other Disrespectful and Intimidatory Behaviour

455. The applicants identify the following acts or omissions to act as "acts" for the purpose of section 9 of the RDA:-

(a) the pointing of guns at the children of the first and third applicants;

(b) the forcing of the children of the first and third applicants to lie face down with guns pointed at them;

(c) the commandeering of the St Michael's school bus;

(d) the establishment by the QPS on Palm Island of a visible and militaristic presence;

(e) the behaviour by QPS members in a disrespectful and intimidatory manner.[349]

456. The QPS did establish a visible presence throughout the island. Police numbers were increased following the riot. That was an appropriate reaction to an unprecedented riot[350] in which police officers were given an hour to leave the island or be killed. The functions of the QPS included the preservation of peace and good order and the protection of communities from unlawful disruption of peace and good order: see s.2.3(a) and (b) of the PSA Act. The particulars of this allegation are that SERT officers armed with assault rifles and dressed in black uniforms patrolled up and down streets in unison and with no apparent purpose other than making their presence felt. It is an agreed fact[351] that over the course of the emergency situation and in the days after it was revoked the QPS established a visible presence throughout the island by patrolling the island. That was not done by patrolling the streets in unison.

457. The applicants' reference to a militaristic presence is explained in paragraph 558 of their submissions in terms which characterise certain things as "quasi-military duties", whatever that may mean. Mr Koch's evidence is irrelevant.

(a) Arbitrariness of SERT raids

458. The applicants submit that the SERT raids were carried out in an entirely arbitrary fashion in which residences on Palm Island could be entered at will and every

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349 Applicants' submissions paragraph 557. The conduct is alleged in paragraph 556 to be a breach of s.10.14 of the Code of Conduct.

350 See the evidence of Dini and Whyte.

351 Amended ASF paragraph 319.

occupant treated as a dangerous criminal.[352] The SERT raids were targeted at particular residences pursuant to the Action Plan.

459. The applicants submit that the arbitrary manner in which the SERT raids were conducted was solely or substantially based on the race of the applicants and group members because the SERT tactics were calculated by reference to a number of wholly unfounded and racially based assumptions about the nature of the Aboriginal community on Palm Island in general and the persons targeted for arrest in particular.[353]

460. That submission should be rejected. The SERT raids were conducted in accordance with and having regard to operational considerations, informed by advice from Robinson about local issues of concern regarding the likely presence of women and children, the possible use of weapons, and the transient nature of some people.

(b) SERT methodology

461. The applicants submit that it should be inferred that the SERT raids were conducted deliberately in order to terrify the applicants and group members.

462. That inference should not be drawn. The SERT raids were conducted at a time and in a manner intended to secure the arrest of suspects safely with least risk to the suspects and police officers and to cause minimal disruption to the broader community.

463. The applicants refer to what they describe as five unexplained, contradictions in the manner in which the raids were conducted[354] which gives rise to the inference. There are no unexplained contradictions, but rather interpretations of the evidence by the applicants which are speculative.

(c) Dismissal of community concerns

464. The applicants submit that the police operation caused significant alarm and discontent amongst the community, that those concerns were reported to the police and the concerns were ignored.[355] The applicants do not identify any evidence of community alarm or discontent when the raids were conducted. There were expressions of discontent after the raids, generally about the increased police presence on the island and how long they would remain.

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352 Applicants' submissions paragraph 559.
353 Applicants' submissions paragraphs 560 and 565.
354 Applicants' submissions paragraphs 570 and 571-575.
355 Applicants' submissions paragraph 576.

(d) Failure to comply with Code of Conduct

465. The applicants allege that the visible militaristic presence and other disrespectful and intimidatory conduct breached s.10.14 of the Code of Conduct. That allegation has not been substantiated.

H. UNLAWFUL DISCRIMINATION IN FURTHER FAILURES

H.1 Further Failures

466. There is no dispute that the acts pleaded in paragraph 309 of the 3rd FASC are "acts" within the meaning of s.9(1) of the RDA.

H.1.1 22 to 25 November 2004

467. The applicants submit[356] that the following acts comprising the Further Failures and occurring between 22 to 25 November 2004 have been proven:

(a) the failure to suspend Hurley from duty before the afternoon of 22 November 2004;

(b) the failure to put in place or undertake special measures to preserve peace and good order on Palm Island in the period following the death of Mulrunji;

(c) the failure of the QPS to provide appropriate responsive policing services on Palm Island;

(d) the failure of the QPS to act in partnership with the community in a way that met or considered the cultural needs which existed within the community;

(e) the increase of the police presence on the island with officers who were not appropriately trained in culturally sensitive policing;

(f) the failure of QPS officers stationed on Palm Island to take steps to diffuse the community's grief and anger;

(g) the failure of QPS officers stationed on Palm Island to provide responsive and culturally sensitive policing in the community;

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356 Applicants' submissions paragraph 584.

(h) the failure to send a Cross Cultural Liaison Officer to Palm Island to assist the QPS in managing obvious tensions within the community which had arisen since the death of Mulrunji, until at or about midday on 26 November 2004;

(i) the failure of QPS officers stationed on Palm Island to liaise with the members of the community who attended public meetings and were apparently dissatisfied with the death of Mulrunji in police custody and the subsequent police investigation;

(j) the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an apology for Mulrunji's death or an expression of regret or remorse for the death having occurred in police custody;

(k) the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an explanation of the investigation into Mulrunji's death and the procedure that would then be followed;

(l) the failure to make visible attempts to engage with the Aboriginal community on Palm Island in order to adequately address concerns amongst the community which had arisen since the death in custody of Mulrunji;

(m) the failure of Richardson to engage with the Palm Island Council or the community in a culturally appropriate and sensitive way;

(n) the failure to adequately brief Richardson on the contents of the Preliminary Autopsy Report;

(o) the failure of the QPS to conduct strategic planning in response to the intelligence that the autopsy report was to be released to members of the public which took into account the fact that Mulrunji had sustained four broken ribs and his liver had been ruptured at or about the time of his death;

(p) the failure of the QPS officers on Palm Island to make special or other arrangements in response to the information that the autopsy report was to be released to the community.

468. Other than the acts in (a), (h) and (j), the respondents submit that those acts have not been proven. The respondents agree that the occurrence or non-occurrence of those acts are questions of fact common to the applicant and the group members.

H.1.2 On and After 26 November 2004

(a) Acts relating to Applicants and Group Members

469. The applicants submit[357] that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

(a) the declaration of an emergency situation;

(b) the issuing of a Certificate in relation to the Declaration of an Emergency Situation without providing adequate particulars of the emergency situation;

(c) the failure to issue a Certificate in relation to the Declaration of an Emergency Situation as soon as practicable after the emergency situation was declared;

(d) the failure to revoke the declaration of an emergency situation on the afternoon of 26 November 2004 after any emergency situation that may have been in existence had ended;

(e) the QPS officers on Palm Island proceeding to act as though an emergency situation was lawfully in place after any emergency situation that may have been in existence had ended on the afternoon of 26 November 2004;

(f) the commandeering of the St Michael's school bus;

(g) the establishment by the QPS on Palm Island of a visible and militaristic presence;

(h) the behaviour by QPS members in a disrespectful and intimidatory manner;

(i) the evacuation of teachers and other public sector employees from Palm Island on 26 November 2004;

(j) the suspension of ferry services on Palm Island over the course of the purported "emergency situation";

(k) the suspension of flights to and from Palm Island over the course of the purported "emergency situation";

(l) the failure to permit the applicants or group members to travel to Palm Island or to leave Palm Island over the course of the purported "emergency situation".

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357 Applicants' submissions paragraph 586.

470. Other than the act in (a) and the suspension of ferry services and flights over the course of the emergency situation, the respondents submit that those acts have not been proven. The respondents agree that the occurrence or non-occurrence of those acts are questions of fact common to the applicants and group members.

(b) Acts relating to Applicants and Sub-Group

471. The applicants submit[358] that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

(a) the formation of an Action Plan which required that Robinson identify the persons to be arrested;

(b) the preparation of a list of persons to be arrested by Miles in Townsville on the night of 26 November 2004;

(c) the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004.

472. The respondents agree that the acts in (a) and (c) have been proven, being admitted facts. The respondents also agree that the occurrence or non-occurrence of those acts are questions of fact common to the applicants and the sub-group members.

(c) Acts relating to applicants only

473. The applicants submit[359] that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

(a) the entry and search by SERT officers of the dwelling of the first and third applicants on 27 November 2004;

(b) the entry and search by SERT officers of the dwelling of the second applicant on 27 November 2004;

(c) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the first and third applicants;

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358 Applicants' submissions paragraph 588.
359 Applicants' submissions paragraph 590.

(d) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the second applicant;

(e) the ransacking of the home of the first and third applicants;

(f) the damage to property in the home of the second applicant;

(g) the arrest of the third applicant;

(h) the use in the arrest of the first applicant of more force than was necessary;

(i) the use in the arrest of the third applicant of more force than was necessary;

(j) the subjection of the first applicant to violence including the use of a taser;

(k) the holding of the first applicant at gunpoint whilst he was unarmed;

(l) the holding of the third applicant at gunpoint whilst she was unarmed;

(m) the forcing of the first applicant to lie face down with guns pointed at him;

(n) the forcing of the third applicant to lie face down with guns pointed at her;

(o) the pointing of guns at the children of the first and third applicants;

(p) the forcing of the children of the first and third applicants to lie face down with guns pointed at them.

474. The respondents agree that the acts in (a), (b), (f) and (g) have been proven.

H.2 Breach of Section 9

H.2.1 Relevant Context

475. The applicants rely on the same contextual factors relied on in relation to the QPS Failures.[360] The relevance of the RCIADIC to the Further Failures is not explained by the applicants. The respondents repeat their submissions in paragraphs 113-121 above.

H.2.2 Distinction, Exclusion, Restriction or Preference Based on Race

476. The applicants repeat their submission that there was a distinction because the policing services provided on Palm Island were not provided to the same standard as they were

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[360] Applicants' submissions paragraph 592, presumably referring to paragraph 255.

provided for other areas of Queensland or to other communities in Queensland.[361] They submit that the evidence establishes the inferences discussed under subheadings (a) to (e) below.

(a) Failures to comply with laws, police obligations, and police procedures

477. The applicants repeat their submission that failures to comply amounted to a distinction on the basis that the Court should assume that laws and obligations are ordinarily adhered to.[362] The respondents repeat their submissions in paragraphs 78-79, 127-133 and 310-311 above.

(b) Failures to meet the cultural needs and expectations of the community

478. The applicants repeat their submissions about the QPS Failures in submitting that the Further Failures amount to a distinction within the meaning of s.9(1) of the RDA.[363] The respondents repeat their submissions in paragraphs 127-133 and 310-311 above.

(c) 22 to 25 November 2004

479. The applicants submit that the police operation on Palm Island between these dates was a distinct operation which was not in accordance with ordinary procedure.[364] They do not identify what that ordinary procedure is. Even assuming that the manner in which policing was conducted on Palm Island was distinct from the manner in which policing was conducted elsewhere, that is not a distinction within the meaning of s.9(1). It is merely a difference based on different circumstances.

(d) Conduct during emergency situation

480. The applicants submit that the police conduct would not conceivably have occurred in the majority of communities in Queensland.[365] They make a comparison with a western Brisbane suburb which is not a remote island community like Palm Island. Comparison with a substantially different comparator is of no assistance.

(e) SERT raids

481. The applicants submit that divergence from ordinary SERT protocols amounted to a distinction based on race. There was no divergence from ordinary SERT protocols. If

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361 Applicants' submissions paragraph 593.
362 Applicants' submissions paragraph 595.
363 Applicants' submissions paragraph 596.
364 Applicants' submissions paragraph 597.
365 Applicants' submissions paragraph 599.

there was a distinction it was one based on operational circumstances unrelated to race.

H.2.3 Based on Race

482. The applicants submit[366] that the failure to cater to the cultural needs of the community was self-evidently based on the race of the applicants. They otherwise rely on what they call the "racially prejudiced nature"[367] of the QPS conduct and emphasise the following:-

(a) the matters in relation to the removal of Hurley submitted above in relation to the QPS Failures;

(b) the use of the terms "ATSI" and "civilian" in the running log;

(c) that the vehicles seized from Q-Build were returned after the emergency situation was revoked, but the St Michael's school bus was not returned;

(d) the following matters evidencing a racially prejudiced view of Aboriginal people on Palm Island as violent and dangerous and an apparent propensity to resort to the use of force in order to attempt to calm the unrest within the community, rather than doing so through engagement with the community or its leadership:

(i) the direction that police officers take guns to their sleeping quarters;

(ii) the comments made by Richardson to Mr Flynn, such as that throwing rocks at police was a "culture" on the island;

(iii) that SERT were deployed to apprehend the persons suspected of being involved in the events of 26 November 2004;

(iv) the briefings provided by Robinson to SERT officers prior to the raids;

(v) the manner in which the raids were conducted and, in particular, the manner in which innocent bystanders, including women, children and the elderly, were treated;

(vi) that SERT were sent to apprehend a 13 year old child;

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366 Applicants' submissions paragraph 604.

367 A matter not pleaded as such and a conclusionary characterisation which does not answer the question whether an act involving a distinction was based on race.

(vii) the duration of the declared emergency situation;

(viii) that non-Aboriginal people were apparently encouraged to leave the island during the declared emergency situation because of supposed fears for their safety, whilst Aboriginal people were not permitted to leave the island;

(e) the disregard for the community's concerns in relation to the death of Mulrunji shown by Richardson and Whyte;

(f) the disregard for the community's concerns in relation to the emergency situation and the SERT raids shown by Dini and Kachel in the meeting with the Council on the Saturday and shown by Webber after his conversation with Brad Foster that night; and

(g) the disregard shown by Robinson for the concerns of the persons whom he interviewed in relation to the SERT raids.

483. The police response to the riot was the performance of the QPS functions to procure peace and good order, to protect communities from the unlawful disruption of peace and good order, to detect offenders and bring them to justice, and to render help in an emergency.[368] It was not based on race.

H.3 Breaches of Rights: Group Members

484. The respondents note that the applicants no longer rely on Article 5(e)(iv) of the Convention.

H.3.1 Right to Equality Before the Law and Equal Protection of the Law

485. For reasons previously submitted there is no autonomous right under Article 26 of the ICCPR. For reasons previously submitted there was no impairment of the right of access to a service intended for use by the general public.

(a) 22 to 25 November 2004

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368 See PSA Act ss.2.3(a), (b), (d) and (g).

486. The applicants single out acts in this period which concerned the investigation into Mulrunji's death and rely on their submissions about the QPS Failures.[369] It is unclear what those acts which concerned the investigation are.

(b) On or after 26 November 2004

487. The applicants submit that the acts which occurred on and after 26 November were only feasible as a result of the unique circumstances of Palm Island as an isolated and disempowered Aboriginal community.[370] The applicants ignore or give insufficient weight to the occurrence of the riot, the threats to the life of police officers, the destruction of property, the complete breakdown of peace and order, and the need to restore peace and order and to detect offenders and bring them to justice as relevant considerations.

H.3.2 Right to Equal Treatment before All Organs Administering Justice

488. For reasons previously submitted Article 5(a) of the Convention is not engaged.

H.4 Breaches of Rights: Sub-Group

489. The respondents note that the applicants do not allege that breaches of the rights of the sub-group can be established based on the pleaded facts and the evidence adduced at trial. However, as the SERT raids were conducted systematically and with a consistent methodology, the applicants submit that the Court's findings of law in relation to the particular circumstances of the applicants will be common to the claims of the sub-group. The individual facts of each sub-group member's case will then need to be considered and determined. Subject to clarification as to what those issues of law are, the respondents do not take issue with this.

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369 Applicants' submissions paragraph 608.
370 Applicants' submissions paragraph 611.

H.4.1 Right Not to be Subjected to Unlawful Interference

490. The applicants submit that the Further Failures impaired their rights under Article 17 of the ICCPR, to enjoy their property under the common law, and to go about their affairs in peace under the protection of the police services under the common law.[371]

(a) General right to enjoy property

491. The applicants refer to unpleaded rights under two Articles of the ICJ Statute and the right under Article 5(d)(v) of the Convention.[372] They should not be permitted to depart from their pleaded case. It is not clear that any property beyond their homes is alleged to have been interfered with,[373] in which case reference to these unpleaded rights is unnecessary as well as irrelevant.

(b) Article 17 of the ICCPR

492. The respondents do not dispute that the dwelling of the first and third applicants was their "home" within the meaning of Article 17 of the ICCPR, and that the dwelling of the second applicant was her home.[374] Similarly, the family members present in the dwellings of the applicants at the times of the SERT raids were "family" within the meaning of that provision.

493. Whether there has been any impairment of the Article 17 right depends on whether the entries and searches of those homes amounted to arbitrary or unlawful interference with those homes.

494. The respondents do not take issue with paragraphs 633-636 of the applicants' submissions about the meaning of "arbitrary" in this context.

H.4.2 Right to Liberty and Security of Person

495. The applicants allege that the Further Failures impaired their right under Article 5(b) of the Convention which is a right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution and Article 9 of the ICCPR which is a right not to be

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371 Applicants' submissions paragraph 617.
372 Applicants' submissions paragraphs 618 and 619.
373 Applicants' submissions paragraph 623.
374 Applicants' submissions paragraph 629.

subjected to arbitrary arrest or detention. They submit that the first and third applicants were subjected by the state to violence.[375]

496. The arrest of Mr Wotton was not arbitrary. Mrs Cecilia Wotton and Mrs Agnes Wotton were not arrested. The force used in Mr Wotton's arrest was reasonable. No physical force was used against Mrs Cecilia Wotton.

H.4.3 Right not to be Subjected to Inhuman or Degrading Treatment

497. The applicants rely on a decision of the European Court of Human Rights on the meaning of "inhuman" and "degrading" in the corresponding provision in the European Convention on Human Rights, and submit that the first and third applicants were subject to treatment which constituted degrading treatment.

498. The treatment of the first applicant said to be degrading was being tasered, being handcuffed with his hands behind his back in circumstances where he had previous shoulder injuries, being handcuffed and shackled and made to sit in extreme discomfort in a helicopter without a life jacket. As previously noted, there is no allegation in the 3rd FASC about Mr Wotton's transport by helicopter to Townsville.

499. The reasons why Mr Wotton was tasered have been dealt with earlier. SERT officers including Kruger were tasered during their training.

500. The treatment of the third applicant said to be degrading is her treatment by SERT officers in the presence of her children in her home.

501. The 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.

H.4.4 Rights to Equal Protection Under the Law and Equal Treatment Before All Organs Administering Justice

502. For reasons previously submitted there is no relevant right under Article 26 of the ICCPR, and Article 5(a) of the Convention is not engaged.

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375 Applicants' submissions paragraph 648.

I. RELIEF SOUGHT

I.1 Declaratory Relief

503. The declarations sought by the applicants are declarations that "the respondents"[376] have committed various acts of unlawful discrimination on the basis of acts of particular QPS officers. The preferable course, if any declarations are made, is to declare what acts by what persons constitute unlawful discrimination. The first respondent (State of Queensland) is vicariously liable for any such acts. The second respondent (Commissioner of the Police Service) is not.[377]

I.2 Damages

504. There are three claims for damages made in the 3rd FASC. First, the applicants and some or all of the group members claim that as a result of the breaches of s.9 relating to the impugned conduct between 19 and 24 November 2004 they:-

(a) experienced emotional distress and psychological harm;

(b) felt humiliated and degraded;

(c) were fearful for their safety and the safety of their families;

(d) were caused to feel as though they were not entitled to the same legal protections as other Australians.[378]

505. Second, the applicants and some or all of the group members claim that as a result of the breaches of s.9 relating to the impugned conduct from 22 November 2004 they:-

(a) experienced emotional distress and psychological harm;

(b) felt humiliated and degraded;

(c) were fearful for their safety and for the safety of their families;

(d) were caused to feel as though they were not entitled to the same legal protections as other Australians.[379]

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376 Applicants' submissions paragraphs 662-664.
377 See Defence paragraph 257(b).
378 Paragraph 255 of the 3rd FASC.
379 Paragraphs 318 and 324 of the 3rd FASC.

506. Third, the applicants and members of the sub-group claim that as a result of the breaches of s.9 by the QPS officers who conducted the raids they:-

(a) experienced intense physical and/or mental suffering;

(b) experienced feelings of fear, anguish and inferiority; and or alternatively

(c) experienced emotional distress and psychological harm;

(d) were made to feel humiliated and degraded;

(e) were fearful for their safety and for the safety of their family; and or alternatively

(f) had their rights to enjoy their property interfered with.[380]

507. Section 46PO(4)(d) of the AHRCA provides:-

> *"If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders … as it thinks fit, including any of the following orders or any order to a similar effect:*
>
> *(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent."*[381]

508. There is no claim for physical injury or economic loss.

509. The applicants only presently seek orders for damages in respect of the applicants.[382]

I.2.1 General Approach to Damages

510. The respondents do not take issue with paragraphs 666-672 of the applicants' submissions.

I.2.2 Causation and Remoteness

511. The respondents do not take issue with paragraphs 673-682 of the applicants' submissions. Section 46PO(4)(d) provides for damages to be assessed as compensation for loss or damage suffered because of the conduct of the respondent. The conduct referred to is that identified in the introductory words of s.46PO(4),

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380 Paragraphs 321 and 322 of the 3rd FASC.

381 By s.46PO(5) the reference to an applicant in s.46PO(4) includes a reference to each person who is a group member.

382 See paragraph 726 of the applicants' submissions.

namely, unlawful discrimination. In other words, compensatory damages are restitutionary in nature, their purpose being to put an applicant in the position he or she would have been in if the unlawful discrimination had not occurred.

I.2.3 Quantum

512. The respondents do not take issue with paragraphs 683-687 of the applicants' submissions.

I.2.4 Aggravated Damages

(a) Availability

513. The respondents do not dispute that aggravated damages, being compensatory in nature may be awarded under s.46PO(4)(d).

(b) General Principles and Purpose

514. The applicants (but not the group members or sub-group members) claim aggravated damages.[383] The conduct relied on in relation to aggravated damages is identified under the following headings:-

(a) inquest;[384]

(b) failure to discipline QPS officers.[385]

515. The conduct relied on by the applicants is conduct occurring after November 2004. The applicants do not plead a claim for aggravated damages on the basis of the manner in which the acts complied of were done or the motives for doing those acts, or on the basis of the manner in which the proceedings were defended.

Inquest

516. The following facts about this issue are agreed:-[386]

(a) On 27 September 2006 Acting State Coroner Clements delivered her report[387] of her inquest into the death of Mulrunji in which she concluded that the actions of Hurley caused Mulrunji's fatal injuries.

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383 Paragraphs 325 and 326 of the 3rd FASC.
384 Paragraphs 327-330 of the 3rd FASC.
385 Paragraphs 331-337 of the 3rd FASC.
386 Amended ASF paragraphs 331-336.

(b) On 16 June 2009 the Queensland Court of Appeal set aside the whole of the finding of Acting State Coroner Clements as to how Mulrunji died on the basis that her finding was not reasonably open on the evidence, and ordered that the inquest be reopened by another coroner.

(c) On the reopened inquest on 14 May 2010 the coroner (Deputy Chief Magistrate Hine) found that Mulrunji died of fatal injuries which resulted from some force to the abdomen of Mulrunji either accidentally as Mulrunji and Hurley fell into the police station or by deliberate action of Hurley in the few seconds after they landed, but it was not possible to ascertain whether the force was deliberately inflected or accidentally suffered.[388]

(d) On 19 December 2006 in response to the Acting State Coroner's comments the Commissioner of Police formed an Investigation Review Team (IRT) to examine in detail any criticism of the QPS and its members arising from the inquest and the Acting State Coroner's findings.

(e) The Commissioner of Police also requested the CMC to review the internal investigation.

(f) The purpose of the review conducted by the IRT was:-

(i) to examine and report on adverse comments made by the Acting State Coroner in her inquest findings dated 27 September 2006, other than comments regarding responsibility or misconduct for the death of Mulrunji;

(ii) to make recommendations.

(g) In November 2008 the QPS delivered the three volume report of its internal investigation, entitled "Palm Island Review",[389] to the CMC.

Failure to Discipline

517. The following facts about this issue are agreed:-[390]

(a) No member of the QPS other than Hurley was charged with a criminal offence in relation to Mulrunji's death or the subsequent investigation;

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387 Exhibit A95.
388 Exhibit A96 p.140.
389 Exhibit A21.
390 Amended ASF paragraphs 337-355.

(b) Hurley was charged with manslaughter and common assault on 5 February 2007, and was acquitted by a jury of those charges in June 2007;

(c) The CMC review concluded that there was insufficient evidence to support consideration of any criminal prosecution proceedings;[391]

(d) As at 5 February 2007 when Hurley was charged, the charges against some of the persons arrested for offences relating to the Riot had been discontinued or had been finalised, while the charges against others of the persons arrested for offences relating to the Riot were still ongoing;

(e) On 3 November 2008 Robinson was awarded the Queensland Police Service Valour Award, the highest commendation the QPS can bestow on an officer for acts of bravery in hazardous circumstances, for his conduct in responding to the riot;

(f) In June 2010 the CMC handed down a report entitled "CMC Review of the Queensland Police Service's Palm Island Review";

(g) The CMC review recommended that consideration be given to commencing disciplinary proceedings for misconduct against Webber, Kitching, Robinson and Williams;

(h) The CMC Review recommended that the QPS initiate management action to address the performance of Webber, Kitching, Robinson and Williams;

(i) The CMC Review required the Commissioner of Police to report in writing to the CMC within 14 days the outcome of the Commissioner's consideration of the CMC's recommendations, and if the CMC was not satisfied it would assume responsibility for the matter and make application to QCAT to commence disciplinary proceedings;

(j) On 19 August 2010 the Supreme Court of Queensland declared that the Commissioner of Police was disqualified from giving any personal consideration to commencing disciplinary proceedings but was not prevented from delegating such consideration to a prescribed officer as defined by s.7.4 of the PSA Act;

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391 Exhibit A50 p.164. The CMC also noted that neither coroner had referred any information to the DPP for consideration of criminal proceedings.

(k) The Commissioner delegated to Deputy Commissioner Rynders the task of considering the recommendations in the CMC Review and determining any disciplinary issues;

(l) By letter dated 10 September 2010 to the Commissioner of Police, the CMC advised that the matter was considered appropriate for consideration at the Deputy Commissioner level;

(m) On 7 January 2011, DC Rynders handed down a 405 page report entitled 'Report in Response to the CMC Review of the Queensland Police Services Palm Island Review' (**Rynders' Report**);[392]

(n) In the Rynders' Report, DC Rynders:-

(i) expressed her view that Kitching and Webber should be given managerial guidance in respect of Robinson's involvement in the investigation (paragraphs 123 and 124 of the report);

(ii) expressed her view that Webber and Kitching should be given managerial guidance in respect of their failure to ascertain the content of conversations between Hurley, Leafe and PLO Bengaroo (paragraph 198 of the report);

(iii) stated that Kitching would be given managerial guidance in respect of his failure to inform Dr Lampe of the alleged assaults (paragraph 249 of the report);

(iv) stated that Webber would be given managerial guidance in respect of Webber's failure to ensure that a Supplementary Form 1 was submitted (paragraph 254 of the report);

(v) stated that Williams should be reminded of his supervisory responsibilities as an ESC officer by way of managerial guidance in relation to Robinson's involvement in the investigation (paragraph 380 of the report);

(vi) stated that Williams should be reminded of his obligations by way of managerial guidance in relation to his failure to ascertain the content of

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392 Ex R31.

conversations between Hurley, Leafe and PLO Bengaroo (paragraph 410 of the report);

(vii) considered that Williams should be provided with managerial guidance in respect of a failure to ensure the Supplementary Form 1 was submitted (paragraph 449 of the report);

(viii) otherwise concluded that no disciplinary action should be taken against Webber, Williams, Kitching or Robinson.

(o) The CMC did not appeal against the findings of DC Rynders in the Rynders' Report;

(p) The CMC did not assume responsibility for or take any disciplinary against Webber, Williams, Kitching or Robinson.

518. Webber, Williams and Kitching were given managerial guidance in respect of aspects of their conduct referred to in the preceding paragraph.[393]

I.2.5 Exemplary Damages

(a) Availability

519. Exemplary damages are not compensatory but punitive in nature. Section 46PO(4)(d) of the AHRCA authorises an order to pay damages by way of compensation for any loss or damage suffered. The applicants did not claim exemplary damages in their complaint to the AHRC.

520. While s.46PO(4) provides that the court may make such orders as it thinks fit, including any of the orders stated in paragraphs (a) to (f) or any order to similar effect, that should not be construed to confer jurisdiction to order the payment of exemplary damages.

521. In *Qantas Airways Ltd v Gama*[394] French and Jacobson JJ said that damages under s.46PO(4) are entirely compensatory. In *Richardson v Oracle Corporation Australia Pty Ltd*[395] Kenny J said that the power conferred by s.46PO(4) to award damages is broad, "limited only by need for such damages to be by way of compensation".

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393 See Exs A63 and 66 (Webber), A62 and A65 (Williams) and A64 and 67 (Kitching).
394 (2008) 167 FCR 537 at [94].
395 (2014) 223 FCR 334 at 366 [115].

(b) General Principles

522. The applicants submit (paragraph 699 of the applicants' submissions) that the list of orders in s.46PO(4) is not exhaustive as demonstrated by the use of the words "including" and "as the court sees fit". The actual wording of the introductory part of s.46PO(4) is "the court may make such orders … as it thinks fit, including any of the following orders or any order to a similar effect". The words "any orders to a similar effect" cannot be ignored. Properly construed, s.46PO(4) authorises the making of an order of a kind described in the following paragraphs or an order to a similar effect, as the Court thinks fit. An 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.

523. The respondents agree with the applicants that exemplary damages go beyond compensation and are awarded as a punishment to deter similar actions or decisions in the future. They are not compensatory in nature, and are therefore also distinct from aggravated damages which are compensatory in nature.

I.2.6 Quantum of Damages Claim

(a) Ordinary damages

524. Only the damages claims of the applicants are necessary to decide at present. In their Reply, the applicants say that particulars of the group members' damages claims will be provided after the determination of the common issues.[396] The only expert evidence about damages was given by Mr Ralph and Dr Reddan. Only the third applicant was considered to have suffered any psychological or psychiatric disorder.

525. Mr Ralph's report does not attribute any psychological harm or other consequence to what are called the QPS Failures relating to the investigation. His instructions were to assess any harm resulting from the arrest and events which followed.[397]

526. In relation to the first applicant, Mr Ralph says that he has experienced high levels of psychological distress following his arrest, and reported experiencing periods of depression, anxiety and chronic sleep problems up until his release from prison in

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396 Reply paragraph 78. See also paragraph 726 of the applicants' submissions.
397 P.616 l.42 – P.617 l.5.

2010.[398] Mr Ralph was unable to reliably conclude that the first applicant suffers any form of psychopathology, and said that the first applicant had responded to the adversity and hardship he has faced with limited residual psychological effects.[399] He is likely to continue to experience some degree of anxiety and sleep problems, and it is likely that those effects will diminish over time.[400] No treatment or rehabilitation was recommended.[401] There is no suggestion of any impairment of the first applicant's daily living activities.

527. In relation to the second applicant Mr Ralph reported that she experienced depression and anxiety in the years between 2004 and 2010.[402] Mr Ralph was unable to conclude that she suffers from any form of psychopathology.[403] She is unlikely to benefit from any counselling or therapy at this late stage of her life.[404]

528. The second applicant suffers from a number of medical conditions.[405] She felt that her son's arrest was wrong because he didn't do anything wrong but only spoke at the meeting.[406] The reality is quite different as the first applicant's sentencing remarks[407] show. She felt that the police had picked on the first applicant.[408] The depression and anxiety she experienced was due to her concern for the first applicant and his family and what they had to endure.[409] That distress was alleviated to some extent following the first applicant's release from prison in 2010.[410]

529. The second applicant's psychological state after November 2004 is not attributable to any act or acts of unlawful discrimination, but rather is attributable to her concerns for the first applicant and his family following his arrest until his release from prison. She was affected by the first applicant's involvement in the criminal justice system which she believed (contrary to the reality) to be unfair, not by the acts alleged to have been in breach of s.9(1) of the RDA. Her claim for damages should not be accepted.

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398 Ex A9 p.6.
399 Ex A9 p.8.
400 Ex A9 pp.8-9.
401 Ex A9 p.9.
402 Ex A9 p.16.
403 Ex A9 p.16.
404 Ex A9 p.17.
405 Ex A1.
406 P.160 l.25 and P.162 ll.18-30.
407 Ex A98.
408 P.162 ll.30-35.
409 Ralph Report Ex A9 p.15.7.
410 Ex A9 p.16.5.

530. In relation to the third applicant, Mr Ralph considered that she displayed a range of symptoms consistent with post-traumatic stress disorder. Dr Reddan disagreed with that diagnosis but ultimately nothing turns on how her symptoms are described. Mr Ralph considered that the third applicant would be likely to benefit from a referral to the Social and Emotional Well-Being Service. He described her as a stoic.[411] The third applicant gave evidence of some other unspecified stressor affecting her, which she didn't mention to Mr Ralph and which is unrelated to the subject of those proceedings.[412]

531. The applicants submit that an amount of $200,000 for each applicant would be a suitable amount for general damages. That fails to have regard to differences in their symptoms, the effect of those symptoms and their ages and different circumstances.

532. If the applicants have made out a case for damages an appropriate award would be $20,000.00 for the first applicant and $20,000.00 for the third applicant.

(b) Aggravated damages

533. The applicants submit that the conduct of the QPS during November 2004 provides a substantial basis for an award of aggravated damages.[413] That is not the applicants' pleaded case, and the applicants should not be permitted to depart from their pleaded case in their final submissions. No award of aggravated damages should be made.

534. Paragraph 722 of the applicants' submissions relies on what is said to be the "wilful blindness" of the respondents represented by their defence of these proceedings and requiring the applicants and their witnesses to "relive their trauma" in a public forum, and unspecified evidence from the applicants that their suffering has been compounded by the ongoing lack of accountability for the actions of the police.

535. None of these matters are pleaded. They should be ignored. They do not reflect the applicants' pleaded case.

536. As to the particular conduct relied on in paragraph 721 of the applicants' submissions:-

(a) it is difficult to see how the conduct of the second inquest is conduct attributable to the respondents;

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411 P.618 l.40.
412 P.426 l.40 – P.427 l.10.
413 Applicants' submissions paragraph 720.

(b) the CMC did not recommend disciplinary action, but only that consideration be given to commencing disciplinary action.[414] The CMC is not a respondent. The Commissioner's delegate (Deputy Commissioner Rynders) did give consideration to commencing disciplinary action;

(c) the lack of publicity that Webber, Kitching and Williams were given managerial guidance cannot have aggravated the applicants' loss – they were unaware of it;

(d) while no member of the QPS other than Hurley was charged with a criminal offence, the applicants have not alleged that any other QPS officer should have been charged with a criminal offence,[415] and the CMC Review concluded that in the CMC's view the evidence was insufficient to support consideration of any criminal prosecution proceedings;[416]

(e) Robinson's award of a bravery medal was not something identified by any of the applicants as having been known to them or as having affected them;

(f) similarly, awards to other officers for meritorious service was not something that the applicants gave evidence about;

(g) the timing of the arrest and charging of Mr Wotton and Mrs Agnes Wotton and the charging of Hurley was not something the applicants gave evidence about.

537. As to the exemplary damages claim, this fails for the reasons submitted above. The applicants' submissions (paragraph 724) forget that the claim for exemplary damages is based on alleged breaches of s.9(1) by the QPS officers who conducted the raids and alleged breaches of s.9(1) relating to the Further Failures.[417] Paragraph 724 of the applicants' submissions refer to criticism by the CMC and coroners. Such criticisms related to the investigation, what the applicants call the QPS Failures, not the conduct pleaded as entitling them to exemplary damages.

538. The applicants do not identify what pleaded conduct alleged to give rise to an entitlement to exemplary damages is relied on, and why it should be the subject of an award of exemplary damages.

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414 Ex A50 pp.166 (Webber), 167 (Kitching), 168 (Robinson), 169 (Williams) and see also p.170 recommending that the QPS institute management action against those officers.

415 See Particulars 65(a).

416 Ex A50 p.164.

417 Paragraph 325 of 3rd FASC.

I.3 Apology

539. Section 46PO(4)(b) of the AHRC Act gives the Court power to make an order requiring a respondent to perform any reasonable act to redress any loss or damage suffered by an applicant.

540. Prima facie, ordering a person to make an apology is a contradiction in terms.[418]

541. The terms of an apology sought include an acknowledgment that the applicants and group members were required to pursue this litigation because of "wilful blindness" of the respondent for over 11 years.[419] There is no basis for a finding to that effect, let alone an order requiring the respondents to acknowledge that. Otherwise, the terms of the apology sought require a recognition of the findings of the court and a statement that the residents of Palm Island were entitled to appropriate levels of protection as other citizens living in Queensland subject to the actions of the QPS. There appears to be no element of apology in those terms, but only publicising the Court's findings (in the ways described in paragraphs 730 and 731 of the applicants' submissions).

542. Mr Ralph's evidence does not suggest that an apology would have any tangible benefit.[420] His report only referred to an apology in Mrs Agnes Wotton's case, and his oral evidence suggested that an apology in terms embracing conduct beyond the scope of these proceedings would be beneficial.[421]

Mark Hinson QC **Scott McLeod** **Steven Forrest**

Counsel for the Respondents
26 April 2016

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418 *Jones v Scully* (2002) 71 ALD 567 at 627 [245].
419 Applicants' submissions paragraph 729.
420 See P.633-636.
421 See P.635 ll.5-22.