

'JUSTICE MUST BE SEEN TO BE DONE': THE INVESTIGATION OF MULRUNJI DOOMADGEE'S DEATH

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I Introduction

Recommendations from the Royal Commission into Aboriginal Deaths in Custody¹ ('RCIADIC') have influenced the structural response to complaints against the Police and investigations into deaths in custody. However the recommendations are not always adhered to by those investigating. Some of the reasons for this are examined in this article.

The Crime and Misconduct Commission ('CMC') is the regulatory body in Queensland responsible for investigating complaints against police, generally referring complaints pertaining to misconduct to the Commissioner of Police while monitoring investigations; itself investigating the more serious matters involving 'official misconduct'.² The CMC also has broader functions of combating major crime, ensuring public sector integrity and protecting witnesses. Some of these functions require working relationships between the CMC and the police. This relationship and the investigation of police by their own have acted to erode public confidence in both the CMC as a regulatory organisation and the police as protectors of all.

The case study of the death in custody of Mulrunji Doomadgee is examined to illustrate the issues of the present regulatory and investigation system in Queensland.

II Background: The Initial Investigation Process

On 19 November 2004, Mulrunji Doomadgee died in the custody of the Queensland Police Service ('QPS') in the Palm Island watch house. Mulrunji was arrested for an alleged public nuisance offence. A violent altercation occurred

between the arresting officer, Senior Sergeant Christopher Hurley, and Mulrunji when Mulrunji was taken into the watch house. Mulrunji died within an hour.

A notification was made internally in regard to the death,³ and a QPS investigation team was sent to Palm Island from Townsville, located 65 km south of Palm Island.

Initially the investigation into the death was handled by local police, including Detective Sergeant Robinson, who was in charge of the Criminal Investigation Branch ('CIB') on Palm Island and was a friend of Senior Sergeant Hurley. There was also a personal relationship between the officer in charge of the investigation⁴ and Senior Sergeant Hurley. Inspector Mark Williams, an Inspector with Ethical Standards Command ('ESC'),⁵ was also informed.

Senior Sergeant Hurley, Sergeant Leafe and Police Liaison Officer Benagroo⁶ discussed between themselves the events leading up to Mulrunji's death. Senior Sergeant Hurley also viewed the video footage of Mulrunji in the watch house before being interviewed.

When the investigation team arrived at Palm Island they were met by Senior Sergeant Hurley, who drove them to the police barracks. After concluding their interviews for the day at 10:30 pm Detective Inspector Webber, Detective Senior Sergeant Kitching, and Detective Sergeant Robinson also ate a meal with Senior Sergeant Hurley at his house.

It was not until 24 November 2004 that Detective Inspector Bemis of the CMC took over the investigation, with Detective Senior Sergeant Kitching and Detective Inspector Webber playing no role after this point.

III Royal Commission into Aboriginal Deaths in Custody Recommendations

The above mentioned events contravene the relevant recommendations from the RCIADIC. RCIADIC recommendation 32 requires the appointment of an officer in charge of the investigation into a death in custody to be made by an officer at the rank of Chief Commissioner, Deputy Commissioner, or Assistant Commissioner, not a Regional Crime Coordinator, as occurred.⁷ However, the QPS Operational Procedures Manual 1.17 provides for the Regional Crime Coordinator to provide direction in relation to investigations of police related incidents, unless they are directed otherwise by the Internal Investigations Branch, ESC, or the CMC. This was also in contrast to recommendation 33 which requires independence in terms of investigators being selected from a QPS Internal Affairs Unit or from another Station.⁸ Palm Island being a small police station meant that police in that station were answerable to those in charge of the Townsville Station and the staff from both stations were generally quite well known to each other.

Recommendation 34 of the RCIADIC provides that officers who are highly qualified as investigators should conduct investigations and be responsible to one senior officer.⁹ It is clear from the above that this was not the case and that those chosen to investigate were chosen because of their proximity to Palm Island.

RCIADIC recommendation 35 provides guidance in regard to considerations for investigating officers, in particular taking the approach that the death may be a homicide.¹⁰

These recommendations are crucial for the preservation of evidence in the earliest stages of an investigation, as well as to assist in portraying independence in the process. At no time was Mulrunji's death treated as a homicide and the credibility of the investigation was undermined from its commencement due to the blatant disregard for any independence or impartiality in terms of those recruited and their actions.

IV The Coronial Inquiries

A post mortem report of 24 November 2004 concluded that Mulrunji died as a result of intra-abdominal haemorrhage

due to, or as a consequence of, a ruptured liver and portal vein.¹¹

Two separate coronial inquiries occurred, although they differed in regard to their findings as to how Mulrunji died. Both coroners voiced a number of criticisms in regard to the police investigation, particularly in regard to the choice of investigative officers, the lack of independence that resulted from this, and their behaviour.¹²

The two coroners agreed that the CMC should play an active role in investigating deaths in police custody from the outset.¹³ This was viewed as essential to the integrity of investigations in the early phases and the immediate preservation of the crime scene.¹⁴

Due to its role as a specialist misconduct and anti-corruption body, Deputy Chief Magistrate Hine concluded that the CMC is in a position to deal with deaths in police custody, such as that of Mulrunji, which may have resulted from police misconduct. Deputy Chief Magistrate Hine made a recommendation to this effect, and that the CMC be resourced and empowered to conduct this role.¹⁵

Deputy Chief Magistrate Hine noted the greatest difficulty in investigating a death in custody as being that the only witnesses are likely to be police officers, who he said may be instilled with the 'Police Code' as labelled by the Honourable Gerald Edward Fitzgerald QC in his landmark report into police and public sector corruption in Queensland.¹⁶

V Queensland Police Service and Crime and Misconduct Commission Reports

Both the QPS and the CMC produced voluminous detailed reports, with the QPS explaining its investigating officers' actions (through investigations by an Internal Review Team ('IRT')) and the CMC responding, damning the QPS reports.¹⁷ The CMC recommended that the QPS provide consideration to disciplinary proceedings against four of the original investigating officers¹⁸ and the members of the IRT and QPS.¹⁹ Deputy Commissioner Kathy Rynders refused to do so.

In their public statement on 17 June 2010, the CMC were scathing of the QPS investigation into Mulrunji's death and the review of that process.²⁰ The comments were reminiscent of those made by Fitzgerald in his investigations into police misconduct in the late 1980s.²¹

VI Investigating Complaints of Police and Deaths in Police Custody

The failure of all the investigations, reports, and legal proceedings to bring about anything that may resemble justice for the family, friends, and community of Mulrunji brings into question the entire process regarding investigations into police conduct/misconduct where a person has died in their custody. Critiques of the QPS and the CMC by the other were unproductive, resulting in blame shifting and defensiveness. However the coronial inquiries, in particular a recommendation by Deputy Chief Magistrate Hine that the CMC take charge of deaths in police custody, were influential. This recommendation prompted a statement from CMC Chairman Martin Moynihan that the CMC would take on primary responsibility for investigating all deaths in police custody under its official misconduct jurisdiction, while assisting the State Coroner who has ultimate responsibility for investigating the deaths. Yet the practical reality of the situation at present is that the CMC has a small investigative staff base. A spokesperson of the CMC acknowledged the capacity issue in carrying out the investigations, saying that the police will probably need to be called upon to conduct the investigations and that someone from the CMC will travel to the scene of the death as soon as possible to supervise the investigation.²²

Fitzgerald identified that police cannot be tasked with the responsibility of investigating each other in regard to complaints.²³ This could extend to include deaths in police custody, where suspicions are raised as to the cause of the death. It is clear that this is how the CMC and many others felt in regard to the initial investigation by the police, including their choice of an investigative team, the IRT, and then QPS Deputy Commissioner Kathy Rynders’ failure to acknowledge these issues and to recommend disciplinary proceedings.

The RCIADIC recommendations were salient in their content, and some²⁴ were incorporated into the QPS Operations Procedural Manual and the State Coroner’s Guidelines. Despite this and the CMC’s role of monitoring investigations, there has been a lack of intent to implement the recommendations, seemingly due to the protective culture of police. It might in fact be impossible for the QPS to effectively implement the recommendations where police behaviour is in question, due to the long identified ‘chronic inability of police to investigate colleagues’.²⁵ Fitzgerald explained that:

An important element of police culture is the unwritten police code, which effectively makes police immune from the law. In conflicts between the code and the law, the code prevails.

Under the code:

- loyalty to fellow police officers is paramount;
- it is impermissible to criticise fellow police, particularly to outsiders;
- critical activities of police, including contact with informants, are exempt from scrutiny;
- police do not enforce the law against, or carry out surveillance on other police; and
- those who breach the code can be punished and ostracised.²⁶

The process in Queensland relies on the involvement of the QPS in investigations. The CMC receives complaints against the police. In deciding whether to refer to the police service or investigate the matter itself, the CMC is required to consider the following principles:

- cooperation;
- capacity building;
- devolution; and
- the public interest.²⁷

The CMC has an overriding responsibility to promote public confidence under this last principle.²⁸ This principle will often be in conflict with the first three principles, which lean strongly toward complaints being referred to the police. The CMC has discretion to refer even the more serious complaints of official misconduct to the QPS for investigation and this seems to be its general approach,²⁹ while retaining the responsibility of monitoring the investigations. RCIADIC recommendation 226(a) states that ‘complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services’.³⁰ The approach of the CMC essentially appears to be administrative and delegatory.

It is difficult, if not impossible to comprehend how the public interest can be served by referring complaints (excepting minor complaints) to the police to investigate, even though the CMC retains the responsibility of monitoring all complaints against the police.

Two issues that arise in regard to the success of a regulatory organisation set up to investigate complaints are independence and adequate resourcing. The broad functions of the CMC³¹ require the CMC to work in partnership with the police, in particular in fighting organised crime. This partnership enables the CMC to delegate (devolve) some of its work in terms of police complaint investigations, saving its limited resources for other functions. These functions are not conducive to the level of separation and independence required for a regulatory body to conduct its work.³² It is this structure, relationship, and lack of resources that inhibit the CMC from being able to take responsibility for investigating deaths in police custody and complaints against police.

Prenzler describes the often poor performance of regulatory organisations as ‘capture theory’, that is, the impartiality and pursuit of the regulator being undermined by techniques emanating from police culture.³³ Capture can occur in numerous ways, from outright improper dealings (bribery, blackmail, etc) to institutional arrangements, such as a police culture, which tend to support more subtle forms of inappropriate influence. This can also include the development of survival mechanisms to maintain the status quo, whether it be for rank and file, the Union, or the Minister.³⁴

Secondment of police to regulatory organisations, such as the CMC, has been identified as an important aspect that favours capture. This form of capture is indirect through structural influences. In Queensland, secondment has occurred notwithstanding the Fitzgerald Inquiry finding against police investigating police, as well as a Criminal Justice Commission³⁵ survey which showed that 87 per cent of Queenslanders were of the view that complaints against the police should be investigated by an independent body, not the police.³⁶

A review by the Australian Law Reform Commission (‘ALRC’) concluded that police investigators tended to be sceptical of those who complained about police and were likely to be softer on police.³⁷ Clearly there might be a reluctance to conduct the investigation in the same manner as would occur with criminal suspects, due to the position and relationship of police officers. This is particularly so, where the conduct under investigation has occurred in the conduct of an officer’s duties. The ALRC said that the model most likely to instil confidence in regard to investigations of police was an external agency which retained as much power and responsibility as possible.³⁸

As a result of concerns regarding police delays in conducting investigations and deficient penalties handed out by police, a former Magistrate was employed in 1993 to review these processes. The former Magistrate reviewed 30 complaints and found that 23 were substantiated, in comparison to the four that the police accepted. Out of these four complaints found to be substantiated by the police, the former Magistrate found that two of the resultant penalties decided by the police were insufficient.³⁹ In another review, a retired Supreme Court Judge examined 180 QPS disciplinary investigations, reporting that 30 had been inadequately investigated. The Judge also said that the police used a protective style of questioning and failed to follow all potential leads or to secure exhibits in a secure manner.⁴⁰

Similar to the above, many of these issues were identified by the CMC⁴¹ in regard to the investigation into Murunji’s death. These included the failure of Detective Inspector Webber and Inspector Williams to question Police Liaison Officer Benagroo with any vigour, having off the record discussions with Senior Sergeant Hurley, failure to pursue other lines of questioning with witnesses, as well as huge deficiencies in regard to the IRT questioning processes.⁴²

Western Australia’s next Governor, Malcolm McCusker QC, warned that their regulatory body, the Corruption and Crime Commission (‘CCC’), being required to work with the police on organised crime creates a danger of a real conflict of interest due to the CCC’s role of investigating the police. McCusker’s view was that the police should investigate organised crime and he went so far as saying that the CCC should only investigate complaints against the police and not other public servants.⁴³ Presently the CMC is required to conduct all of these functions, including investigating organised crime alongside the police.

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 - 1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 67–146.
 - 2 *Crime and Misconduct Act 2001* (Qld) ss 45–6 (‘CM Act’). Official misconduct is defined as a criminal offence or a disciplinary breach which may result in termination of a person’s employment, if proved: *CM Act* s 15.

- 3 The notification was made to Senior Sergeant Hurley’s direct supervisor (District Inspector Gregory Strohfeldt) who then advised the Regional Crime Coordinator for the Townsville District, Detective Inspector Webber.
- 4 Senior Sergeant Kitching who was in charge of Townsville CIB and was appointed as the officer in charge of the investigation by Detective Inspector Webber, who was the Regional Crime Coordinator.
- 5 The Ethical Standards Command is part of the Queensland Police Service.
- 6 These were the officers on duty at the time of Mulrunji’s arrest and death.
- 7 RCIADIC, above n 1, 76.
- 8 Ibid.
- 9 Ibid.
- 10 Ibid, 76–7.
- 11 *Inquest into the death of Mulrunji* (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 25.
- 12 The Acting State Coroner stated that the fatal injuries suffered by Mulrunji were caused by Senior Sergeant Hurley punching Mulrunji after they fell: *ibid* 25–7, 31–2. On 4 May 2010, in the second Coronial Inquest, Deputy Chief Magistrate Hine found that Mulrunji died of fatal injuries resulting either accidentally as Mulrunji and Senior Sergeant Hurley fell into the Palm Island watch house, or by deliberate actions of Senior Sergeant Hurley in the few seconds after they landed: *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010). The criticisms included:
 - the involvement of officers from Townsville and Palm Island in the investigations was inappropriate and undermined the integrity of the investigation;
 - officers investigating the deaths in custody should be selected from a region other than that in which the death occurred;
 - officers who knew Senior Sergeant Hurley personally, or were friends with him, being involved in the investigation of Mulrunji’s death, was inappropriate and compromised the integrity of the investigation; and
 - the conduct of officers meeting and liaising both during and after work hours with Senior Sergeant Hurley while conducting the investigations undermined the investigation’s appearance of impartiality (comment 33), as did the discussion by Senior Sergeant Hurley with Sergeant Leafe and Police Liaison Officer Bengaroo of the death of Mulrunji prior to being interviewed.
- Inquest into the death of Mulrunji* (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 31; *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 122.
- 13 Due to its role of a specialist misconduct and anti-corruption body, Deputy Chief Magistrate Hine concluded that the CMC is in a position to deal with deaths in Police custody: *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 149 [29]; *Inquest into the death of Mulrunji* (Queensland Coroners Court, Acting State Coroner Clements, 27 September 2006) 32 [38].
- 14 *Inquest into the death of Mulrunji* (Queensland Coroners Court, Deputy Chief Magistrate Hine, 14 May 2010) 146 [16].
- 15 *Ibid* 149–50 [29], [31].
- 16 *Ibid* 149 [30].
- 17 In December 2006, the Commissioner of Police formed the IRT to examine criticisms of the QPS and its members arising from the first inquest and its findings, providing a three-volume report to the CMC in November 2008 (*Palm Island Review*). This report was not released to the public. The CMC responded with its own report damning the *Palm Island Review*: Crime and Misconduct Commission Queensland, ‘CMC Review of Queensland Police Service’s *Palm Island Review*’, (June 2010) (‘CMC Review’). The QPS then produced a response, which was over 400 pages, responding to the CMC report that disciplinary proceedings would not occur against the IRT officers: Queensland Police Service, ‘Report in Response to the *CMC Review of the Queensland Police Services Palm Island Review*’ 405 [652].
- 18 These investigating officers being Detective Senior Sergeant Raymond Kitching, Detective Inspector Warren Webber, Inspector Mark Williams, and Detective Sergeant Darren Robinson.
- 19 Martin Moynihan, ‘CMC Chairperson’s Public Statement on the CMC’s Review of the Queensland Police Service’s Palm Island Review’ (Media Release, 17 June 2010) <<http://www.cmc.qld.gov.au/asp/index.asp?pgid=10814&cid=5201&id=1293>>.
- 20 *Ibid*.
- 21 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (1989) (‘*Fitzgerald Report*’).
- 22 Jeff Waters, ‘CMC No Escape From Police Investigating Police’, *The Drum* (online), 19 May 2010 <<http://www.abc.net.au/news/2010-05-19/cmc-no-escape-from-police-investigating-police/832254>>.
- 23 *Fitzgerald Report*, above n 20, 202.
- 24 That is, in relation to investigating deaths in custody.
- 25 Tim Prenzler, ‘Civilian Oversight of Police: A Test of Capture Theory’ (2000) 40 *British Journal of Criminology* 659, 660.
- 26 *Fitzgerald Report*, above n 20, 362.
- 27 *CM Act* s 34.

- 28 Other than the importance placed upon this last principle, there is
no indication as to the weight to be provided to each of the first
three principles.
- 29 *CM Act* s 31(1). On 27 March 2007 the Aboriginal and Torres Strait
Islander Legal Service ('ATSILS') complained to the Queensland
Attorney-General in relation to the initial police investigation.
This complaint was forwarded to the CMC who then forwarded
it to the QPS Investigation Review Team, while monitoring the
investigation.
- 30 RCIADIC, above n 1, 119.
- 31 These include combating major crime, ensuring public sector
integrity and protecting witnesses: CMC, *Our Jurisdiction* (30
November 2011) Crime and Misconduct Commission Queensland
<<http://www.cmc.qld.gov.au/about-us/our-jurisdiction>>.
- 32 Prenzler, above n 24, 672–3.
- 33 Ibid 662.
- 34 Ibid.
- 35 The predecessor to the Crime and Misconduct Commission,
which was combined with the Crime Commission to form the
Crime and Misconduct Commission.
- 36 Prenzler, above n 24, 664.
- 37 Australian Law Reform Commission, *Under the Spotlight:
Complaints Against the AFP and the NCA*, Issues Paper No 16
(1995) 149–50.
- 38 Ibid 149.
- 39 Prenzler, above n 24, 666.
- 40 Ibid 667.
- 41 As well as in both Coronial Inquiries.
- 42 CMC Review, above n 16, 58–9, 90–100, 142–6.
- 43 Debbie Guest, 'Keep Cops and Watchdog Apart, Says Western
Australia's Next Governor', *The Australian* (Sydney), 24 June
2011, 34.