

# JUSTICE TALK: LEGAL PROCESSES AND CONFLICTING PERCEPTIONS OF JUSTICE ABOUT A PALM ISLAND DEATH IN CUSTODY

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## I Introduction

In November 2004, Mulrunji,<sup>1</sup> a 36 year old Palm Island Aboriginal man, died in police custody. His death triggered a chain of events including community riots, the invocation of emergency powers and evacuation of white workers from the Island, and suicides by the deceased man's teenage son and a key witness.<sup>2</sup> These events in turn sparked intense activity from both the criminal justice and civil justice systems in Queensland, along with a great deal of political and media attention. That level of attention has been sustained over the past four years, with the death in police custody and the subsequent sequence of events being subjected to several different forms of legal or quasi-legal inquiry. This has included (as detailed further below) a coronial inquiry, a Director of Public Prosecutions ('DPP') decision not to lay charges, an independent review of that decision by Sir Laurence Street, a Supreme Court trial for manslaughter and assault, three separate applications for judicial review of administrative decision-making related to the events, Crime and Misconduct Commission ('CMC') reviews of the Queensland Police Service investigation of the death and of the policing of Indigenous communities generally, and civil action for damages by Mulrunji's family. Most recently there have been calls for a Royal Commission into the death, though these have been rejected.<sup>3</sup> To date, the police officer who made the initial arrest has been acquitted of criminal charges, reinstated into the police service and fully compensated for property losses sustained in the subsequent riots, as have other police officers then on the Island. On 18 December 2008 his application to overturn the coronial verdict was upheld in the Queensland District Court.<sup>4</sup> Thirty-four police officers who were sent to Palm Island to restore order after the riots were presented with bravery awards, four days before one of the rioters, Lex Wotton, was sentenced. Several Palm

Islanders, including Wotton, have been tried and have served periods of imprisonment related to the riots. Mulrunji's family are still awaiting the outcome of their civil claim for compensation for his death, and several investigations of ensuing events are also outstanding. The family also intend appealing the decision to overturn the Coroner's finding.<sup>5</sup>

All of the inquiries resulting from the death occurred in highly charged public, media and political contexts. All had different purposes, used different processes, relied on different evidence and reached different outcomes. These variations in legal proceedings around the same set of circumstances caused public and media confusion over which inquiry 'got it right' and which delivered the most, or best, 'justice'. For example, the DPP decided against laying charges related to the death, yet the independent review recommended charges for manslaughter and assault. The Coroner, whose inquest has now been overturned, found the investigating officer caused the death; the criminal trial found he was not criminally responsible for this event. What much of the accompanying media and public debate has difficulty in understanding is that the different outcomes are to a large extent predicated by the different processes of inquiry: that is, the same set of factual events is interpreted differently by coroners, criminal courts, civil courts and the CMC because they are looking for different issues and have widely varying rules constraining how they proceed.<sup>6</sup>

In this paper we aim to explore the different forms of inquiry that Mulrunji's death and associated events have been subject to, with the objective of illustrating how different legal and quasi-legal processes interpret events and legal rules and reach varying outcomes. But we also want to address this against broader questions of justice. Which, if any, of the processes best deliver justice for those affected by Mulrunji's

death? In fact, in this deeply contested environment, what does justice mean? So our paper also discusses how the legal system perceives and communicates justice, and how this varies across the different types of inquiry. We suggest that justice was more easily delivered to the police officer who arrested Mulrunji than to Mulrunji's family, because his claims were framed in terms recognised and accepted by the Australian liberal legal system, which has much more difficulty in affording justice to 'outsiders' such as Palm Island residents.

The paper begins by establishing the sequence of events surrounding and following the death of Mulrunji. This is followed by a discussion of justice and its delivery via the legal, political and administrative system. We then examine in detail what happened in several of the different inquiries, and conclude with an analysis of what type of justice they delivered, and to whom, and how perceptions of justice were communicated and received through their processes.

## II The Death, Subsequent Inquiries, and their Outcomes

Events began on 19 November with a common occurrence on Palm Island: a police officer being asked to intervene in a domestic dispute. Senior Sergeant Chris Hurley was asked to help a local woman retrieve medication from a residence after she was assaulted by her de facto husband. The arrest of a family member by Hurley and an accompanying Police Liaison Officer was witnessed by Mulrunji, who challenged and swore at the Liaison Officer for helping police to lock up his own people.<sup>7</sup> Hurley arrested Mulrunji, who was intoxicated at the time, charged him with a public nuisance offence related to the swearing, and took him to the police station. It was here that a scuffle occurred, leading to both Hurley and Mulrunji falling to the floor. The ensuing events are both numerous and complex, so for clarity and ease of reference we have summarised key events in Table 1.<sup>8</sup>

**Table 1: Timeline of Events Around and Following Mulrunji's Death**

<b>Date</b>	<b>Event</b>	<b>Outcome</b>
19 November 2004 – 9:20 am	Gladys Nugent asks Hurley to go with her to Bramwell house to retrieve medication after being assaulted by her de facto Roy Bramwell.	Patrick Bramwell arrested at the house for verbally abusing Hurley and Police Liaison Officer Lloyd Bengaroo.
19 November 2004 – 10:15 am	Mulrunji, who is intoxicated, challenges Bengaroo.	Hurley decides to arrest Mulrunji.
19 November 2004 – 10:26 am	Mulrunji is charged with public nuisance and taken to the Palm Island police station. He resists being removed from the police vehicle and strikes Hurley on the jaw with his fist.	Hurley punches Mulrunji and a struggle ensues. Both parties fall to the floor of the police station. Mulrunji is dragged by Hurley and another officer into the cell.
19 November 2004 – 11:20 am	Sgt Leafe checks cells and finds Mulrunji unresponsive with no pulse.	Ambulance and doctor called. Mulrunji pronounced dead.
19 November 2004 – 12:30 pm	Coronial Support Unit in Brisbane and State Coroner notified of death in custody. DSS Kitching (Townsville CIB) and DS Robinson (Palm Island CIB) appointed to investigate. Neither is from Homicide.	They are picked up at the airport by Hurley and have dinner with him at his home. They discuss the death 'off the record'. Robinson is Hurley's colleague, and has investigated and cleared him of prior allegations.
22 November 2004	Report of death sent to Coroner by DSS Kitching, which makes no mention of the physical altercation or assault allegations against Hurley.	Information relating to the scuffle as possible cause of injuries is not provided to the pathologist at the time of the first autopsy.
23 November 2004	Initial autopsy carried out by Dr Guy Lampe at Cairns Base Hospital Mortuary.	Finds Mulrunji's liver was completely ruptured causing internal bleeding. Finds death consistent with a fall.

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<u>Date</u>	<u>Event</u>	<u>Outcome</u>
24 November 2004	Queensland Police Service Commissioner requests the CMC take full charge of the investigation into the death.	Officers from CMC travel to Townsville.
26 November 2004	Riots occur on Palm Island after the autopsy results are released, as residents claim a government and police conspiracy to cover up the real cause of death. The police station, Hurley's house and court house are burned down.	CMC team removed from Palm Island after witnessing riot. Government invokes emergency powers, flies in 80 extra police officers (including armed riot squad), and evacuates contractors, teachers and public servants. Twenty-three residents are charged with various offences.
29 November	Another CMC team appointed to investigate.	CMC begins review of initial police investigation of the death in custody.
30 November 2004	Second autopsy conducted in Brisbane by Associate Professor David Ranson and others.	Cause of death found to be bleeding, but that severe compressive force (possibly from a knee) would be necessary to cause the injury.
10 December 2004	Hurley claims compensation of \$102 955 from Queensland Police Service for personal property destroyed in the riots.	Claim is paid in full on 11 February 2005.
28 February 2005	Coronial inquest into Mulrunji's death begins.	State Coroner Michael Barnes stands down after claims of bias on 4 March 2005. Second inquest begins 30 March 2005.
31 July 2006	Mulrunji's teenage son hangs himself on Palm Island.	
27 September 2006	Acting State Coroner hands down findings of inquest into Mulrunji's death. Makes 40 recommendations criticising policing and investigation methods. Hurley found to have caused Mulrunji's death.	Queensland Attorney-General refers findings to DPP to consider if charges should be brought.
28 September 2006	Hurley removed from operational duty, given desk job.	On 7 October 2006 Hurley stands down on full pay.
14 December 2006	DPP finds evidence not capable of proving Hurley criminally responsible for the death and decides not to lay charges. Calls death a 'tragic accident'.	Government pressured into organising independent review of material presented during inquest. DPP regards this as an infringement of her independence.
4 January 2007	Sir Laurence Street retained to review information considered by the DPP, evidence given to the inquest and the inquest's findings. Street to determine if enough admissible evidence exists to support criminal proceedings against anyone connected with the case and whether any reasonable prospect of a conviction exists.	On 25 January 2007 Street finds that there is admissible evidence to support criminal proceedings against Hurley and that there is a reasonable prospect of jury conviction.
16 January 2007	Mulrunji case witness Patrick Bramwell hangs himself.	
26 January 2007	Queensland Attorney-General Kerry Shine decides to pursue charges against Hurley.	Hurley is suspended from his position with Queensland Police Service.
1 February 2007	Attorney-General instructs CMC to inquire into policing in Indigenous communities.	Ongoing. Issues paper published in April 2007. Report still outstanding.

Date	Event	Outcome
5 February 2007	Hurley charged with manslaughter and assault.	Queensland police march on State Parliament in support of Hurley.
22 March 2007	Palm Island residents Blackman, Clumpoint, Blanket and Poynter found not guilty of rioting by Supreme Court.	
8 May 2007	Palm Island resident Kidner pleads guilty to rioting.	Sentenced to 16 months jail.
31 May 2007	Alleged ringleader Wotton pleads not guilty to rioting at Brisbane District Court.	Found guilty following a trial which began in Brisbane on 6 October 2008 and which lasted 18 days. Sentenced on 7 November 2008 to several years jail with a non-parole period of 2 years.
12 June 2007	Hurley case begins in Townsville Supreme Court.	Hurley acquitted of all charges by jury on June 20.
November / December 2007	Widow and sisters of Mulrunji begin legal action against Queensland Government and Hurley for \$900 000 damages.	Ongoing.
May 2008	Queensland Police Service begins internal inquiry into Hurley's compensation after discovering he also received an insurance payout for riot losses.	Ongoing.
9 September 2008	Hurley asks District Court to set aside Coroner's findings and re-open inquest with new Coroner.	On 18 December 2008, District Court Judge Pack finds in favour of Hurley, setting aside Coroner's findings and ordering a new inquest be conducted. Mulrunji's family announce their intention to appeal.
3 November 2008	Thirty-four police officers are presented with bravery awards for their role in responding to the Palm Island riots on 26 November 2004.	

The table is organised into events and outcomes, to show how one event led to another, and how some issues have been resolved while others remain outstanding several years after the relevant occurrence. Most strikingly, Senior Sergeant Hurley received considerable compensation for the loss of his personal property in the riots within two months of that occurring, while the family is awaiting the outcome of a civil trial to receive any damages for Mulrunji's death. Further, the CMC investigation into the alleged 'double dipping' by Hurley, who also received an insurance pay-out for property damage, is still proceeding. The CMC and Queensland Police Service are also still to release a review of the initial police investigation into the death, including the appointment of Hurley's friend and colleague Robinson as a member of the team, and the team's apparently compromised conduct in having dinner at Hurley's home and discussing the case with him off the record.<sup>9</sup> The CMC report on policing in Indigenous communities is also still outstanding at the time of writing this paper.

What conclusions can be drawn from the matters which have and have not been resolved? The legal processes all involved considerable delay, with the Coroner's inquiry, for example, concluding nearly two years after the death, and Hurley's trial finishing another nine months after that. As a result of the District Court decision to order the re-opening of the coronial inquiry, and the family's intention to appeal that order, finalisation of these matters is likely to take some time yet. By comparison, the trials of those arrested after the riots were quicker, most finishing within eight months of the events. The last person to be sentenced for the riots, after being found guilty following a trial which lasted 18 days, was Lex Wotton. His trial was originally delayed by interlocutory proceedings, including a successful application to change the trial venue from Townsville to Brisbane, because of the apparent racial bias of the Townsville community from which a jury would be drawn.<sup>10</sup> The delays in the initial coronial inquest were partly caused by the standing down of the State Coroner, judicial review proceedings throughout

the inquiry regarding the evidence which could be accepted by the Coroner, mourning periods following the death of Mulrunji's son, and the general difficulties in investigating such a contested death in an Indigenous community. These delays will be exacerbated further by the ordered re-opening of the coronial inquiry. The delay in Hurley's trial is explained by the DPP's decision not to lay charges, and the need for the subsequent independent review of this decision. The trials of those involved in the riot proceeded more quickly because they were not subject to any of these factors, or perhaps because the Indigenous defendants, apart from Wotton, were unable or unwilling to raise issues likely to cause delays.

One outstanding matter is awaiting a civil hearing, namely the family's damages claim. The delay here can be substantially explained by waiting lists in the civil courts, and the exigencies of evidence-gathering for civil claims; that is, delays of this nature are not unusual for such claims.

It is harder to explain the other outstanding matters, being the three CMC/Queensland Police Service reviews of the initial death investigation, Hurley's compensation claim, and policing in Indigenous communities. The reason proffered for delays in the first two matters is that no material should be released publicly while any legal proceedings are still pending.<sup>11</sup> Given that the circumstances of the investigation and of the insurance claim have no apparent relevance to either: the civil claim for wrongful death, or the Coroner's findings about Hurley's actions, there seems no reasonable way either review could adversely affect civil claims, neither of which involves a jury. A more likely explanation for the delay in all three reports is a desire not to revive and possibly reignite earlier criticism of police and government responses to the death, or alternatively that the CMC and police have afforded the issues a low priority.

### III Justice?

What then, of justice? Which of the participants have received it and which have not? And what version of justice is being delivered through these processes?

Liberal legal systems such as Australia's are premised on the notion of justice, based on principles of fairness, equality of treatment, proportionality and respect for individual rights.<sup>12</sup> This can be perceived of formally, as simply requiring due process, or more substantively, where just outcomes must

also be achieved.<sup>13</sup> Such outcomes may involve ideas of justice as equality, desert or rights. In any liberal conception, justice is seen as a universal ideal available to all individuals within a society in equal measures. Indeed, for Rawls, justice is equality.<sup>14</sup>

However, Barbara Hudson suggests that in contemporary liberal societies such

theories and practices of justice are found wanting because they do not meet the political challenges of our times and also because they are founded on unsatisfactory philosophical grounds.<sup>15</sup>

For her, traditional liberal notions of justice are of little help in answering critical questions such as 'who is included in and who is excluded by the social contract' on which liberalism is founded,<sup>16</sup> particularly in societies based on the benefits of imperialism and the suppression of minorities. In other words, justice may work very well for 'insiders' whose interests can be fitted easily into preconceived ideas and systems. It is much harder to fit marginalised and excluded 'outsiders' into either formal or substantive ideas of justice, not because they lack merit but because the system was not designed with them in mind.

In fact, as Derrida suggests,<sup>17</sup> for such groups law can be an instrument of violence and force used to subjugate threatening and negative 'others' – those who do not fit the idealised liberal individual. At the best of times, 'law' and 'justice' are not principles that necessarily coincide, but for outsiders, law may be used to actively defeat their just claims. This could be because they lack resources or access to law, but it may also be that marginalised groups lack faith that the legal system can deliver a form of justice suited to their needs and position in society. By contrast, insiders can use their resources to manipulate an unequal and disproportionate share of justice in their favour.

We suggest that these ideas about the shortcomings of liberal notions of justice are illustrated by the events surrounding Mulrunji's death. In order to develop that argument, we use the next section of this paper to give a detailed account of how different aspects of the justice system have dealt with those events, before discussing our conclusions.

#### IV The Coroner's Inquest

According to s 37 of the *Coroners Act 2003* (Qld), the Coroner's Court is not bound by the rules of evidence, 'but it may inform itself in any way it considers appropriate'. The provision allows for a Coroner's Court to subpoena a person to appear as a witness in an inquest, though by virtue of s 39 any testimony which is given and which may incriminate a witness cannot be used in other proceedings, apart from a proceeding for perjury. These powers were conferred on 1 December 2003 and were operating at the time Acting State Coroner Christine Clements conducted the inquiry into the death of Mulrunji. The fact that witnesses were bound to give testimony, despite the possibility of them incriminating themselves, was a departure from the previous process governing coronial inquests in Queensland. This particular new power is an important one in terms of explaining the discrepancies that occurred between Clements' findings in the inquest and the eventual acquittal of Senior Sergeant Chris Hurley at trial.

In conducting the inquiry into the death of Mulrunji, Clements was seeking to determine 'what happened to cause ... [Mulrunji] to end up dead on the concrete floor of the watch house'.<sup>18</sup> In making her findings, Clements applied a civil standard of proof.<sup>19</sup> The facts surrounding the occurrences on the day Mulrunji died (as are outlined above) were unclear, and there were many questions surrounding the treatment of Mulrunji once the police van transporting him arrived at the Palm Island police station. For these reasons the Acting State Coroner focused much of her attention on those facts and on the medical reports submitted to explain the cause of death. Two autopsies had been performed, one four days after Mulrunji had died and another 11 days after the death. As the Coroner stated, '[b]oth autopsies concluded that the cause of death was intra-abdominal haemorrhage, due to the ruptured liver and portal vein', and that there had been a 'severe compressive force applied to the upper abdomen, or possibly the lower chest, or both together', which had caused the fatal injury.<sup>20</sup>

Throughout the police and CMC investigations into the death, and at the coronial inquest, Senior Sergeant Hurley maintained that he did not know how the injury had been sustained, and that when Mulrunji and he fell upon entering the police station, he had fallen to the left of Mulrunji.<sup>21</sup> He did acknowledge at the inquest that the medical evidence would suggest that he had possibly fallen on top of Mulrunji

rather than to the left of him, but when asked to reiterate his recollection of the fall, Hurley responded by saying that he believed he had landed to the left of Mulrunji.<sup>22</sup> As a result of s 39 of the *Coroners Act*, Coroner Clements gave a direction that the evidence of Hurley was inadmissible in any other proceedings, except for a prosecution for perjury.

Coroner Clements ultimately decided that, '[d]espite a steady demeanour in court, Senior Sergeant Hurley's explanation [did] not persuade [her] he was truthful in his account of what happened'.<sup>23</sup> Instead, the Coroner accepted the evidence of Roy Bramwell, another Palm Island resident who had been arrested for assaulting his de facto partner and her sisters and who, at the time of Mulrunji's arrival at the police station, was seated on a chair inside the police station. Bramwell gave evidence that he had seen Hurley's elbow going up and down three times while Mulrunji was lying on the floor, which he thought looked like Hurley punching Mulrunji. Due to where Bramwell was sitting, he could not fully see what was happening between Mulrunji and Hurley. In accepting this evidence, Coroner Clements rejected Hurley's explanation of what Bramwell saw, which was that he had been trying to pick up Mulrunji after his fall by grabbing his shirt, which kept ripping.

Almost two years after Mulrunji's death, Coroner Clements found that 'Sergeant Hurley hit Mulrunji whilst he was on the floor a number of times in a direct response to himself having been hit in the jaw and then falling to the floor'.<sup>24</sup> In making this finding the Coroner had also considered evidence given at the inquest which supported allegations of assault levelled against Hurley by other Palm Island residents. Under the powers conferred on her by the *Coroners Act*, while Coroner Clements was not able to include in any final statement that a person was guilty of a criminal offence, she *was* able to comment on anything that was connected to the death and that related to 'public health and safety; the administration of justice; or ways to prevent deaths happening in similar circumstances in the future'.<sup>25</sup> In her findings, at the conclusion of the inquest, the Coroner made a series of recommendations according to the powers conferred on her by s 46(1) of the *Coroners Act*. The recommendations focused on police procedures during and after arrest, the necessity for cultural awareness training for police officers working in Indigenous communities, the need for alternatives to police custody for people arrested due to drunkenness, and the importance of ensuring investigations into deaths in custody be impartial and maintain a high degree of integrity.<sup>26</sup>

The then Queensland Attorney-General, Linda Lavarch, referred the matter to the DPP to determine whether any charges should be laid against Hurley. News reports released immediately after the Acting State Coroner's findings were issued focused not only on the misconduct of Hurley in caring for Mulrunji while in custody, but also on the general recommendations made by Coroner Clements to reform police practices in relation to the incarceration of Indigenous people for drunkenness, to reform the offences of public drunkenness and public nuisance, and to maintain the integrity of police investigations.<sup>27</sup> The general view in news reports, including those issued in Townsville, a population which was found in a poll conducted by AECgroup to hold predominantly negative views of Palm Islanders,<sup>28</sup> was that the residents of Palm Island were finally getting justice: 'That first big wheel of justice had turned and found in their favour'.<sup>29</sup> A few news reports focused on the Queensland Police Union and government support for Hurley, reporting that the Union considered the coronial inquest a 'witch-hunt' and that the Queensland Premier and Police Minister supported the decision not to suspend Hurley since he had done nothing wrong.<sup>30</sup>

## V The DPP's Decision

When the Attorney-General referred Coroner Clement's findings to the then DPP, Leanne Clare, it was on the basis that Clare determine whether

as a matter of law the evidence available to her office was strong enough to present a reasonable prospect of a criminal conviction based on the criminal standard of proof – beyond reasonable doubt.<sup>31</sup>

Clare decided that the answer to that question was that the evidence was 'not capable of proving Senior Sergeant Hurley was criminally responsible for Mr Doomadgee's death'.<sup>32</sup> The DPP placed more reliance on the fact that the testimony of some of the key witnesses had changed over time and that the only conclusion able to be drawn from the medical evidence was that Mulrunji's death had occurred from a 'complicated fall'.<sup>33</sup> It was ultimately concluded by the DPP that the death had been an accident.

Mackenzie, Stobbs and Thomas noted in their comparison of the decision-making processes of the coronial inquest and the Office of the DPP that Clare had overstepped her role by concluding that the death was an accident, because she

had made a determination reserved for a coroner, not for an administrator.<sup>34</sup> Questions were also raised about the DPP's emphasis on the changing nature of the statements of some key witnesses and not on the fact that Hurley's statements had also been inconsistent over time.<sup>35</sup> Although doubt remained over how the fatal injuries were in fact inflicted, with Clare disagreeing with Coroner Clements' finding that they may have been as a result of Mulrunji being punched by Hurley while he was lying on the floor of the police station, critiques emphasised that such questions should be left for a jury to answer.<sup>36</sup>

While initially it appeared that the Queensland Government supported the DPP's decision, it was not long before the then Premier, Peter Beattie, and Attorney-General Kerry Shine requested the DPP review her decision.<sup>37</sup> The news media reported how Clare was ignoring such requests and how the Indigenous community had 'reacted with outrage' at her defiant stance.<sup>38</sup> Claims were made that Premier Beattie had bowed to the pressure of the Queensland Police Union by initially accepting Clare's decision not to prosecute and by urging the Palm Island community to accept the decision.<sup>39</sup> As one might expect, the Police Union supported the DPP's decision claiming they 'always believed in Chris Hurley's innocence'.<sup>40</sup>

## VI Sir Laurence Street's Review of the DPP Decision

After the DPP found that there was not enough evidence to issue an indictment against Hurley, the Queensland Government eventually bowed to public pressure and engaged Sir Laurence Street, a former Chief Justice of the New South Wales Supreme Court, to review the DPP's findings. Street reviewed the material which had been before the DPP, the evidence which had been given to the Coroner and the findings of the coronial inquest.<sup>41</sup> Street's brief was to determine:

1. Whether sufficient admissible evidence exists to support the institution of criminal proceedings against any person with respect to the death of Mulrunji; and
2. Whether a reasonable prospect of conviction before a reasonable jury exists in the event a prosecution is brought against any person.<sup>42</sup>

Street, like Coroner Clements and the DPP, was not empowered to determine whether or not Hurley was

guilty. He was simply to decide whether or not there was sufficient evidence to support Hurley being put to trial for manslaughter (which, due to a lack of intention on the part of Hurley, was considered to be the appropriate charge).

In his report, Street focused on the medical evidence presented at the inquest; the evidence of Bramwell; and the evidence of Florence Sibley, who was at the police station to see the Police Liaison Officer and who gave evidence at the inquest that Hurley had punched Mulrunji on the right side of his body, near his hip, while Hurley was getting Mulrunji out of the police van. Street found that the evidence as a whole encompassed

a related sequential series of events manifesting an increasing degree of physical conflict between Senior Sergeant Hurley and Mulrunji culminating in the death of Mulrunji.<sup>43</sup>

Based on such evidence, Street concluded that a jury could find that

the only rational inference ... as to the fatal injury [was] that it was inflicted by Senior Sergeant Hurley deliberately kneeing Mulrunji in the upper right abdominal area immediately after the fall while Mulrunji was lying on the concrete floor.<sup>44</sup>

He acknowledged that a jury could at the same time conclude that the injury inflicted by Hurley was in fact an accident. However, Street did make the point that, if the injury had been caused by Hurley kneeing Mulrunji accidentally when they both fell on the concrete floor, Hurley would have known that fact.<sup>45</sup> Therefore, Street concluded that there was sufficient evidence to support the commencement of criminal proceedings against Hurley and that there was a reasonable prospect of a conviction.<sup>46</sup> Just prior to Street delivering his decision, Patrick Bramwell, who had been sharing the cell with Mulrunji when he died, hanged himself and a few months earlier Mulrunji's teenage son had also hanged himself.

The relief and hope generated by Street's decision in the Indigenous community was widely reported,<sup>47</sup> as was the outrage on the part of the Queensland Police Union, which threatened strike action.<sup>48</sup> There was therefore a varied reaction in media coverage, with some news reports drawing attention to the fact that Hurley had changed his story throughout the investigation,<sup>49</sup> while others focused

solely on the Police Union response.<sup>50</sup> Terry O'Gormarn, the then President of the Australian Council for Civil Liberties, was quoted as saying, that the Police Union's response was 'utterly childish',<sup>51</sup> and that 'the DPP's office in Queensland on a daily basis runs cases through to jury verdict that are factually much weaker than Sergeant Hurley's case appears to be'.<sup>52</sup>

## VII Supreme Court of Queensland Trial

As a result of Street's decision, the Queensland Attorney-General instructed the Crown Solicitor to issue an *ex officio* indictment charging Hurley with manslaughter. It was the first time in Australian history that a police officer had been charged over an Indigenous death in custody.<sup>53</sup> A few days later, the Attorney-General also instructed the CMC to conduct an inquiry into policing in Indigenous communities. That inquiry is still ongoing.

A special prosecutor, Peter Davis SC from the private bar, was appointed to Hurley's case by Premier Beattie, since DPP Clare had previously made it clear that no-one from her office would conduct the prosecution.<sup>54</sup> The trial commenced in the Townsville Supreme Court on 12 June 2007. In his opening address, the Crown Prosecutor made it clear to the jury that his aim was to prove that the fatal injuries inflicted on Mulrunji were by Hurley and they were deliberate because Hurley was angry after being punched by Mulrunji when getting out of the police van.<sup>55</sup> He also conceded that the evidence was purely circumstantial since no one had witnessed Hurley inflicting the fatal injuries. The defence, on the other hand, told the jury that Hurley had accidentally killed Mulrunji when he fell on top of him in the police station and that Hurley had been mistaken when he had previously told investigating officers that he had not fallen on Mulrunji.<sup>56</sup>

Aside from Hurley changing his version of what happened during the fall, the other evidence prominent at the trial was the medical evidence given by two pathologists who had conducted autopsies on Mulrunji's body. Both pathologists gave evidence that the liver injuries suffered by Mulrunji were more commonly seen 'in high speed road accidents, plane crashes, [and] falls from heights'.<sup>57</sup> Although Hurley weighed more than 115 kg, compared to Mulrunji's weight of 74 kg, both pathologists agreed that it was unlikely that such injuries would have been inflicted by a simple fall unless Hurley's knee had struck Mulrunji in the abdomen.



Neither pathologist was prepared to say whether, had the injuries been caused by a knee, they were caused deliberately or accidentally. They did rule out the possibility that the injuries had been caused by punches since there was no bruising to support such a claim.<sup>58</sup> There was a suggestion that Mulrunji's intoxicated state may have contributed to his death since 'alcohol relaxes the muscle's tone and that can make a person less conscious of the need to protect themselves in a fall'.<sup>59</sup>

After a seven-day trial and just over three hours of deliberation, a jury of eight women and four men, all of whom were non-Indigenous, found Hurley not guilty.<sup>60</sup> Ultimately, the jury was unable to say beyond reasonable doubt that the injuries had been deliberately, as opposed to accidentally, inflicted. Immediately after the verdict, Premier Beattie urged all parties to calmly accept the decision.<sup>61</sup> Indigenous leaders and activists were understandably disappointed and shocked with the decision and saw it as a 'major setback for race relations in Australia',<sup>62</sup> whereas the Police Union called into question the role of government in prosecutions.<sup>63</sup>

### VIII Justice Talk

That justice is a contested concept is clear from reported comments by many participants involved in this case. This was very evident at the conclusion of the coronial inquiry. The response of the President of the Queensland Police Union indicated justice had been usurped by a Coroner biased in favour of Palm Island residents:

[The Deputy Coroner] has conducted a witch-hunt. From the start it's been designed to pander to the residents of Palm Island rather than establishing the facts.<sup>64</sup>

This can be contrasted with the reported views of some of the residents, who perceived the Coroner's findings as an unusual, if not unprecedented, delivery of justice for them. As Chloe Hooper wrote:

On 27 September ... [the Deputy Coroner] handed down her findings ... [F]our armed police officers stood outside the small courtroom, and one armed officer waited inside with a gun, pepper spray, handcuffs: the full utility belt. Many Palm Islanders had travelled to Townsville to hear the findings, but there was only seating for 20. They were not feeling optimistic. ...

As one lawyer said, 'You got the sense it was the only time in a courtroom anything had ever gone their way.' ...

[One Palm Island woman said] 'We were releasing all our hurts, all our pains, thanking God for Justice.'<sup>65</sup>

An article in *The Australian* at the time reported:

the findings [from the Coroner] have already had an effect on the community; most residents tell *The Australian* they feel justice has been delivered after almost two years of waiting.<sup>66</sup>

Prominent Aboriginal health figure Gracelyn Smallwood was quoted as saying:

There's never been any person in authority charged with any murder of all deaths in custody ... we are very pleased with the outcome and we now want justice to be done.<sup>67</sup>

Residents' perceptions of justice were challenged when the QPS refused to stand down Hurley pending the DPP's decision on whether to charge him:

They say they are giving Hurley due process, but where is the fairness in that?<sup>68</sup>

And:

Nobody will be happy until the cuffs are on his wrist and he's led to the cells.<sup>69</sup>

After Hurley's eventual acquittal of the charges of manslaughter and assault, differing visions of justice again appeared in the public debate, with the Premier Peter Beattie saying:

The rule of law has prevailed here and it's important that we accept the decision of the jury and we move on.<sup>70</sup>

This contrasted with the view of many Palm Island residents:

There were men present who had protested over Mr Doomadgee's death by rioting and had spent months in jail for it. One of the alleged rioters, Lex Wotton, said, 'Justice has a colour, and it's white.'<sup>71</sup>

An AAP report quoted the Doomadgee family's solicitor:

While Mr Hurley is entitled to enjoy his presumption of innocence, there has to be recognition of the immeasurable grief this has caused to this family and to the islander community.<sup>72</sup>

A Palm Island leader and relative of Mulrunji stated:

There's no justice for indigenous people and Townsville is a redneck town. ... We've known that all our lives but we try and have a bit of faith in the justice system but there is no justice for indigenous people in this country. Everybody knows that now.<sup>73</sup>

Some media commentators tried to have it both ways, suggesting both the Street review and the criminal proceedings had delivered justice, despite their different outcomes. An editorial in *The Australian* stated:

A trial, made possible by the findings of a review of Ms Clare's decision by Sir Laurence, was necessary to restore faith in the Queensland justice system. Given the lack of vigour shown by police in investigating Doomadgee's death from the outset it was crucial for the reputation of the Queensland justice system for the case to be heard in court. ....

Palm Island residents had every right to be suspicious of Ms Clare's decision not to recommend charges be laid. As Sir Laurence found, there were clear grounds for the matter to be put before a jury. Rather than diminishing the case for a trial, Sergeant Hurley's acquittal demonstrates that, allowed to run its course, the system works. If the trial serves as a warning to police to exercise more care when dealing with prisoners, it has been worthwhile. Aboriginal communities everywhere must have confidence that the law applies equally to them, both for protection and prosecution.<sup>74</sup>

Finally, after it was revealed that Hurley had been so quickly compensated for his lost property in the riot, Palm Island Mayor Alf Lacey commented:

If the Queensland Police Service or the Queensland government is going to pay Chris Hurley \$100 000, are they willing to also compensate the people at Palm Island for the trauma and the damage that the riot squad did to their homes?<sup>75</sup>

## **IX Conclusion: Legal Processes and Conflicting Perceptions of Justice**

In the earlier sections of this paper we described the events surrounding and ensuing from the death of Mulrunji on Palm Island in 2004. We also briefly discussed concepts of justice, and posed the question of who was included and excluded from receiving justice by the various legal and quasi-legal processes following the death. This was followed by a detailed analysis of those processes and the differences between them, directed at finding out how they were able to reach such different results. We also examined how different participants expressed their perceptions of the forms of justice delivered by the main forms of legal inquiry, using their reported comments.

In this final section of the paper we return to issues of justice, and to our primary question – how do participants involved in various legal processes understand and communicate ideas of justice, particularly in relation to excluded or marginalised 'outsiders'?

The perceptions of justice discussed in the earlier section show two recurrent themes. In many of the comments from sources such as the President of the Police Union, the Premier, and some of the media commentators, there is a strong emphasis on notions of formal justice, through use of terms such as 'establishing the facts',<sup>76</sup> 'the rule of law',<sup>77</sup> 'presumption of innocence',<sup>78</sup> and the 'equal application of law'.<sup>79</sup> For these participants in the legal and political process, justice clearly operates within a traditional liberal context, and in that context it is trusted to deliver fair and equitable outcomes. Any departures from such outcomes are due to the personal failings of key players (for example, the Coroner and her 'witch-hunt'),<sup>80</sup> they do not indicate that there is anything wrong with the justice system itself.

For Palm Island residents, justice has quite different connotations. The physical presence of law is seen through its use of force, first in the use of heavily armed riot police in residents' homes,<sup>81</sup> and then at the delivery of the Coroner's findings, where police were again present with guns, pepper spray and handcuffs. Only a token number of residents were permitted to witness the findings being delivered.<sup>82</sup>

The response of Palm Island residents to the Coroner's findings was one of welcome surprise and a perception that justice would now be done.<sup>83</sup> This is clearly a reference to

substantive justice in the guise of desert – that some form of punishment or statement of responsibility would be exacted for a wrongful death.<sup>84</sup>

Responses to later events indicate both disillusionment with this initial view, and to some extent a rejection of the idea that liberal justice can apply equally to Indigenous people. Most telling is Wotton's comment that '[j]ustice has a colour, and it's white'.<sup>85</sup> For him, it is not a matter of an individual having got things wrong. Instead, liberal justice simply cannot accommodate Indigenous experiences. This was borne out by other comments, including the statement that 'there's no justice for indigenous people in this country. Everybody knows that now'.<sup>86</sup>

We argue that this discussion illustrates and substantiates Hudson's claim<sup>87</sup> that liberal justice involves insiders and outsiders. Regardless of the correctness of the eventual decisions reached by each of the inquiries we have analysed, the ultimate outcome for the Indigenous participants is a denial of their claims to be heard in the allocation of justice. Legal and quasi-legal inquiries need to be reconstituted to expressly include Indigenous visions of justice, rather than resting on formal notions of equality and the rule of law. How that can be achieved is an issue that needs urgent attention.

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1 Cameron Doomadgee's tribal name.

2 See timeline in the next section of this paper for more details.

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4 See 'Hurley Wins Palm Is appeal', *ABC News* (online), 18 December 2008 <<http://www.abc.net.au/2008/12/18/2450064.htm>> at 23 January 2009.

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6 See the discussion of differing procedural requirements in the various Mulrunji inquiries in Jennifer Corrin and Heather Douglas, 'Another Aboriginal Death in Custody: Uneasy Alliances and Tensions in the Mulrunji Case' (2008) 28(4) *Legal Studies* 531.

7 *Inquest into the Death of Mulrunji* (Unreported, Queensland Coroner's Court, Acting State Coroner Clements, 27 September 2006) 2–3 <<http://www.courts.qld.gov.au/mulrunji270906.pdf>> at 23 January 2009.

8 This timeline has been developed based on the findings of the coronial inquiry and the report of Sir Laurence Street, and on the numerous media reports that have been referenced elsewhere in this paper.

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23 *Ibid* 26.

24 *Ibid* 27.

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