

# CRIME AND MISCONDUCT COMMISSION

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**IN-CONFIDENCE**

14 March 2011

Mr R Atkinson APM  
Commissioner  
Queensland Police Service  
GPO Box 1440  
**BRISBANE QLD 4001**

Dear Mr Atkinson

**RE: DEPUTY COMMISSIONER RYNDERS' DECISIONS AND REASONS**

This letter is in response to the receipt on 7 January 2011 of the report by Deputy Commissioner Kathy Rynders (DC Rynders) in relation to proposed disciplinary proceedings against certain police officers [the Palm Island police investigation].

The CMC takes DC Rynders' report to be the Queensland Police Service's (QPS) final decision on the Palm Island police investigation, and that the QPS in effect considers its investigation into the conduct of the police and consideration of disciplinary proceedings now closed.

Before informing you of my intentions with regard to the QPS decision in this matter, I would like to restate why I believe a just resolution of the proposed disciplinary recommendations is of the greatest importance to the community and is in the interests of the QPS, the Crime and Misconduct Commission (CMC) and the people of Queensland, particularly the Doomadgee family and the people of Palm Island.

Over six years ago, in 2004, an Indigenous man, Mulrunji, who "was not suffering from any injury when the police van arrived at the police station" died of "a massive compressive force to the front of his body" sustained after Senior Sergeant Hurley fell on to him<sup>1</sup> while in the custody of police in the Palm Island police station. His family and the wider community had the right to expect that the Queensland Police Service would investigate his death rigorously, impartially and thoroughly.

I believe there is general acceptance that the investigation of a police-related death is one in which the QPS and its officers must be held to the highest standards of accountability. In such cases they must expect to be subject to rigorous independent scrutiny. This is especially true in a case like the present in which two judicial officers have independently found the police investigation into the death was not thorough, competent nor impartial.

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<sup>1</sup> Brian Hine, Deputy Chief Magistrate, Finding of Inquest into the death of Mulrunji, 14 May 2010, page 34 paragraph 95, page 51 paragraph 129 and page 134 paragraph 353

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**IN-CONFIDENCE**

In June 2010, after careful consideration of the evidence, the CMC recommended that the QPS consider disciplinary action against six of its officers who were involved in two investigations relating to Mulrunji's death.

### **The disciplinary framework**

The purpose of any disciplinary system is to be protective and remedial rather than to punish individual officers.

Under the legislative framework established by the *Crime and Misconduct Act 2001* (CM Act) you, as Commissioner of Police, are primarily responsible for police misconduct (subject only to the CMC's monitoring role). You are also responsible for any complaint of official misconduct referred to you by the CMC. In both cases the conduct must be dealt with as misconduct under the *Police Service Administration Act 1990* (PSA Act).

In the case of police misconduct, the CMC's power to monitor includes a power to appeal to QCAT from any determination of a disciplinary charge (including the determination of a sanction), but it does not include a power to appeal to QCAT from a decision not to commence disciplinary proceedings against an officer.

In the case of official misconduct, the CMC can exercise power to institute disciplinary proceedings in QCAT's original jurisdiction even if the QPS had decided not to commence disciplinary proceedings.

Official misconduct is the most serious form of misconduct, based on the commission of a criminal offence, or on conduct analogous in seriousness to a criminal offence and which provides reasonable grounds for dismissal. Although we believe there is evidence of official misconduct in this matter, independent legal advice is that that evidence is not sufficient to commence proceedings for official misconduct before QCAT.

### **DC Rynders' decision and reasons**

The CMC recommended that consideration be given to disciplinary action for police misconduct against:

Detective Inspector Warren Webber  
Detective Senior Sergeant Raymond Kitching  
Inspector Mark Williams  
Former Detective Sergeant Darren Robinson.<sup>2</sup>

The CMC publicly reported on the reasons for this recommendation and has provided QPS with all relevant information.

In considering DC Rynders' reasons and decision, I note that the definition of 'misconduct' (under the PSA Act) establishes the grounds upon which an officer is liable to disciplinary action as follows:

- conduct that is disgraceful, improper or unbecoming an officer; or
- shows unfitness to be or continue as an officer; or
- does not meet the standard of conduct the community reasonably expects of a police officer.

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<sup>2</sup> The Commission notes that Detective Sergeant Darren Robinson retired from QPS since the date of the CMC report. DC Rynders finds that no action should be taken against Robinson and decided not to pursue a disciplinary declaration under s7A.2 PSAA.

These grounds cover a wide range of conduct. I note that DC Rynders accepts that the conduct of Webber, Kitching and Williams failed to comply with the OPMs or was such that the integrity of the investigation was not "maintained" or was compromised.

Some examples of DC Rynders' acceptance of these failings from her report include:

- that by Webber and Kitching including Robinson in the investigation team they "did not from the outset place sufficient importance to ensure the integrity of the investigation was maintained by removing obstacles that could bring about the perception of bias" (paragraph 121) and
- that Kitching breached the OPM by his failure to inform Dr Lampe of the assault allegations and "had the potential to seriously compromise the investigation and did reflect poorly on the investigation" (paragraph 248).
- that in relation to Williams "there was an expectation that he would undertake some inquiries to satisfy himself there was no conflict of interest by Robinson's involvement" (paragraph 380).
- that Webber and Kitching did not ascertain what contact and conversations particular witnesses had with Hurley, Leafe and Bengaroo immediately following the death in custody prior to their arrival in Palm Island when interviewing them (paragraphs 197 & 198).
- that Webber breached the OPM when he failed to ensure a supplementary Form 1 was sent to the Coroner (paragraph 252).

In the CMC's view, these examples alone demonstrate that the officers' actions failed to meet the standards the community reasonably expects of the QPS i.e. that officers will follow its own policies and conduct investigations with integrity. The logical consequence of these findings, viewed in aggregation, is that disciplinary proceedings should be commenced against the subject officers. Instead DC Rynders finds extenuating circumstances and therefore proposes not to commence any disciplinary proceedings against any of the named police officers. In declining to commence disciplinary proceedings she has both diminished the seriousness of the conduct and prevented the CMC seeking an independent review of her decision by QCAT.

As noted above, the CMC has no legislative power to review a failure to commence disciplinary proceedings for police misconduct. DC Rynders' decision is therefore not subject to independent review. In effect, the QPS has circumvented the independent review process of disciplinary decisions which we believe to have been the intent of the legislation. In the CMC's view it is not acceptable for the QPS to have complete discretion to dismiss allegations of police misconduct in a serious case such as this without the possibility of independent review.

The CMC disagrees with the decision not to commence any disciplinary proceedings against any of the named officers.

The CMC believes there is sufficient evidence before DC Rynders to have decided to commence disciplinary proceedings against the named police officers for misconduct. Quite apart from the CMC report, two independent coronial inquiries found the police investigation was not competent, thorough or impartial. Deputy Chief Magistrate Hine's comments reiterated many of the criticisms made by Acting State Coroner Clements about the police investigation. In particular the comments made by Deputy Chief Magistrate Hine at paragraph 334 of his decision are critical of the police investigation as the conduct of the investigators compromised the ability of the Coroner to reach a clear finding as to the cause of death.

I believe that QPS's failure to find that there is evidence to commence any disciplinary proceedings against any of the named police officers is not a responsible resolution of the complaints about the police investigation. That the QPS does not see fit to even initiate a disciplinary process against these officers is regrettable and in the CMC's view is one that is unlikely to enhance public confidence in the QPS.

In relation to the members of the Internal Review Team (IRT), the CMC stands by its concerns as set out in its Palm Island Report which recommended QPS consider disciplining the members of this team. The Commission is particularly concerned that although the IRT recognised the failings of the QPS investigation as serious ones, it recommended only managerial guidance as the appropriate response to the officers' conduct.

### **Misconduct function principles**

For the past 10 years, in performing its misconduct functions the CMC has been governed by the principles stated in section 34 of the CM Act. These principles are:

- cooperation
- capacity building
- devolution and
- public interest.

Guided by these principles, the CMC refers misconduct matters back to QPS and respects its right to make decisions about discipline, subject to our oversight powers. However s. 34 states that the CMC has an overriding responsibility to promote public confidence in the way in which misconduct is dealt with. Overall s.34 is about striking the right balance between QPS autonomy and the public interest. In retrospect, it is arguable that when decisions were made in this matter, the public interest should have been given more weight and the CMC should have taken full control of the review of the initial investigation and completed its work without delay. The outcome in this matter demonstrates that, in future, in the investigation of police-related deaths, in weighing QPS autonomy against the public interest the decision must favour the public interest. In the CMC's view the public interest demands that decisions made in cases such as this must be open to being independently reviewed.

In light of the CMC's concerns about the way the QPS has dealt with this matter and the absence of independent review, it may be necessary for the CMC to reconsider the terms of the proposed Memorandum of Understanding (MOU) to regulate the investigation of deaths in police custody. This was negotiated between our agencies and the Coroner prior to the CMC receiving the decision of DC Rynders.

### **Conclusion**

The CMC has now completed its monitoring role in this matter to the extent of its legislative powers. Accordingly, the determinations required for the performance of the CMC's monitoring role as set out in the letter from the then Acting CMC Chairperson to you dated 4 January 2011, have been complied with and are no longer necessary. The directions made pursuant to s.48(3) are also no longer necessary and I now withdraw those requirements. Accordingly, the CMC must now allow the QPS to deal with this investigation by finalising it, as required under s42 of the *Crime and Misconduct Act 2001*.

For the reasons referred to above, the CMC intends to seek legislative changes to ensure that all QPS discipline decisions are potentially subject to independent review. The CMC will make it clear that the catalyst for seeking these proposed changes to the law is the failure on the part of QPS to take disciplinary proceedings against its officers for their conduct in the investigation of the death of Mulrunji. In addition, given that the draft MOU referred to above is currently with being considered at Ministerial level, I will raise the CMC's concerns about the terms of that agreement with the Attorney-General.

The CMC stands by its Palm Island Report and its views on the conduct of the officers involved. The Palm Island community were entitled to expect that the officers who investigated Mulrunji's death in custody

would perform their investigations to the highest standards. The CMC has done everything in its power to ensure that those responsible for the serious failures in the police investigation were held accountable by the QPS. It is now up to the QPS to explain to the community its reasons for taking no action against these officers.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martin Moynihan', with a long horizontal stroke extending to the right.

MARTIN MOYNIHAN AO QC  
Chairperson