CITATION:	*The Queen v Rolfe (No 5)* [2021] NTSCFC 6
PARTIES:	THE QUEEN v ROLFE, Zachary
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE of Questions of Law Reserved for the Full Court of the Supreme Court
FILE NO.:	FSC 3 of 2021 (21942050)
DELIVERED:	13 August 2021
HEARING DATE:	28 July 2021
JUDGMENT OF:	Southwood, Kelly and Blokland JJ, Mildren and Hiley AJJ

CATCHWORDS:

CRIME – Murder – Relationship between defences under ss 48BD and 208E of the *Criminal Code* and s 148B of the *Police Administration Act* – Good faith – Self-defence – Reasonable conduct

STATUTORY INTERPRETATION – Subsequent legislation – Multiple statutory defences – Two discrete statutes – No implied repeal – No inconsistency – Legislative intention

Criminal Code 1983 (NT) s 28, s 43AA, s 43BD, s 156, s 160, s 161A, s 208E
Correctional Services (Related and Consequential Amendments) Act 2014 (NT) s 57

Food Act 2004 (NT) s 37, 130
Fisheries Act 1988 (NT) s 7, s 33
Fisheries Amendment Legislation 2016 (NT) s 33, s 33A, s 33B, s 33C
Gaming and Betting Act 1912 (NSW) s 19
Gaming Control Act 1993 (NT) s 28, s 68, s 79
Interpretation Act 1978 (NT) s 17, s 62A, s 62B
Landlord and Tenant (Amendment) Act 1948 (NSW) s 62
Liquor Act 2019 (NT) s 23, s 142, s 155, s 156, s 157, s 212
Meat Industries Act 1996 (NT) s 9, s 62
National Security Act 1939-40 (Cth) s 13
Police Act 1990 (NSW) s 80
Police Act 1988 (SA) s 45, s 65
Police Administration Act 1978 (NT) s 5, s 25, s 26, s 34G, s 43BD, s 94, s 123, s 124, s 132, s 138B, s 147FA, s 147FR, s 148A, s 148B, s 148F, s 161, s 162, s 163,
Police Administration Amendment Act 2016 (NT) s 7
Police Administration Amendment (Powers and Liability) Act 2005 (NT) s 10, s 27
Private Security Act 1995 (NT) s 35, s 59
Road Traffic Act 1961 (SA) s 47
Sentencing Act 1995 (NT) s 43
Statute Law Revision Act 2005 (NT) s 35
Supreme Court Act 1979 (NT) s 21,
Terrorism (Emergency Powers) Act 2003 (NT) s 16, s 17, s 18, s 19, s 20, s 35
Territory Parks and Wildlife Conservation Act 1976 (NT) s 93, s 110
Tobacco Control Act 2002 (NT) s 47, s 56

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; *Associated Minerals v Wyong Shire Council* [1974] 2 NSWLR 681; (1974) ALR 353; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538; *Blackpool Corporation v Starr Estate Co.* [1922] 1 AC 27; *Butler v Attorney General (Vic)* (1961) 106 CLR 268; *Commissioner of Police (New South Wales) v Eaton* [2013] HCA 2; (2013) 252 CLR 1;*"CMS" (A Child) v Giacomini* [2003] WASCA 42; *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30; (2013) 250 CLR 135; *Federal Commissioner of Taxation v Comber* (1986) 10 FCR 88; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *Fonteio v Morando Bros Pty Ltd* [1971] VR 658; *Goodwin v Phillips* (1908) 7 CLR 1; *Hamilton v Halesworth* (1937) 58 CLR 369;

Hayward-Jackson v Walshaw [2012] WASC 107; 223 A Crim R 489; *Innes v Weate* (1984) 12 A Crim R 45; *Lacey v Attorney General (Qld)* (2011) 242 CLR 573; *Little v The Commonwealth* (1947) 75 CLR 94; *Lumsden v Police* [2019] SASC 178; *Masson v Parsons* (2019) 266 CLR 554; *Maybury v Ploughman* (1913) 16 CLR 468; *McLean v Kowald* (1974) 9 SASR 384; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409; *Mangurra v Rigby* [2021] NTSC 6; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *Proudman v Dayman* (1941) 67 CLR 536; *Re: K* (1993) 46 FCR 336; *Rice v Connolly* [1966] 2 QB 414; *R v Whittington (No 2)* (2007) 19 NTLR 83; *Saraswati v R* (1991) 172 CLR 1; *Sarris & Guise v Penfolds Wines Pty Ltd* [1962] NSWR 801; *Seward v The Vera Cruz* (1884) 10 App Cas 59; *Spargo v Repatriation Commissioner* (2001) 116 FCR 304; *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140, 174; *Theobald v Crichmore* (1818) 1 B & Ald 227 [106 ER 83]; *The Ombudsman v Laughton* (2005) 64 NSWLR 114; *Thiess v Collector of Customs* (2014) 250 CLR 664; *Thomson v C* (1989) 95 FLR 116; *Webster v Lampard* (1993) 177 CLR 598; *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288, referred to

Debates 2 December 2004, Hansard
Macquarie Dictionary (5th ed, 2009) 'function' (def 1)
Northern Territory, *Gazette*, No S 80, 9 September 2014
Pearce and Geddes *Statutory Interpretation in Australia (7th Edition)*

REPRESENTATION:

Counsel:

Crown:	P Strickland QC with him S Callan QC
Defendant:	D Edwardson QC with him A Allen QC

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Tindall Gask Bentley

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IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Rolfe (No 5) [2021] NTSCFC 6
No. FSC 3 of 2021 (21942050)

BETWEEN:

THE QUEEN
Crown

AND:

ZACHARY ROLFE
Defendant

CORAM: SOUTHWOOD, KELLY and BLOKLAND JJ, MILDREN and HILEY AJJ

REASONS FOR JUDGMENT

(Delivered 13 August 2021)

SOUTHWOOD J AND MILDREN AJ

Introduction

[1] The defendant is a member of the Northern Territory Police Force. He is charged with murder contrary to s 156 of the *Criminal Code Act 1983* (NT) ("*Criminal Code*") on an indictment dated 25 July 2021. In the alternative, he is charged with manslaughter contrary to s 160 of the *Criminal Code*; and in the further alternative, with engaging in a violent act which caused the death of the deceased, contrary to s 161A(1) of the *Criminal Code*. He has pleaded not guilty to all counts.

[2] The defendant's trial before a jury is to commence on 18 August 2021. The trial Judge, Mildren AJ, has heard a number of voir dires to make necessary rulings before the trial commences. In the course of that process, on 22 July 2021, his Honour referred the following three questions to the Full Court under s 21 of the *Supreme Court Act 1979* (NT).

> Question 1
>
> Does s 148B of the *Police Administration Act 1978* (NT) apply to acts or omissions done or made, or purported to have been done or made, by a police officer *only* if the police officer is acting in the capacity of a public official under an authorising law?
>
> Question 2
>
> Having regard to s 148A of the *Police Administration Act 1978*, and based upon the assumed facts attached (*) hereto, is a police officer who acts or purportedly acts in the exercise of a power or performance of a function under the Act, acting in the capacity of a public official under an authorising law?
>
> Question 3
>
> Based upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, was he acting in the exercise, or purported exercise, of a power, or the performance, or purported performance, of a function under the *Police Administration Act 1978*, such that s 148B of that Act arises for the jury's consideration?

[3] On 26 July 2021, Mildren AJ referred the following *further* question to the Full Court.

> Question 4
>
> The accused, Zachary Rolfe, is charged with murder, contrary to s 156 of the *Criminal Code Act 1983* (NT). In the alternative, the accused is charged with reckless or negligent conduct causing death, contrary to s 160 of the *Criminal Code*. In the further alternative, he is charged with engaging in a violent act which caused the death of the deceased contrary to s 161A(1) of the *Criminal Code*. In the circumstances, is a defence under s 148B of the *Police Administration Act 1978* potentially

> open in the light of s 208E of the *Criminal Code*, and in the circumstances where the accused has raised the defence raised by s 43BD of the *Criminal Code*.

[4] The referred questions are primarily concerned with the following issues. *First*, are the protective provisions of s 148B of the *Police Administration Act 1978* (NT) ("*Police Administration Act*") available to the defendant as a defence if the defendant was acting in defence of a fellow police officer at the time he fired the second and third shots. *Second*, does s 5 of the *Police Administration Act* impose functions on individual members of the police force; and, *third*, does s 208E of the *Criminal Code* operate as a proviso and limit the operation of s 148B.

[5] Attached to the questions referred to the Full Court on 22 July 2021 was a document headed "Assumed Facts" which has the following annexures. Annexure A, a Warrant for Breach of Order Suspending Sentence issued for the apprehension of the deceased for breach of a suspended sentence prior to his death. Annexure B, a map of Yuendumu Community. Annexures C and D, electronic copies of the audio-visual recordings of the shooting and arrest of the deceased prior to his death made by the body worn cameras of the defendant and police officers Eberl and Hawkings, and transcripts thereof. Annexure E, a photograph of the scissors used by the deceased to stab the defendant before the defendant shot him.

[6] The contents of the assumed facts and annexures do not constitute concluded facts. Nor do they constitute admissions made by the parties or agreed facts.

However, the documents do contain some facts not in dispute, some facts the Crown will seek to prove at trial, and some facts the defence will press. The Court received the documents to provide a context for the resolution of the referred questions. They were received on a similar basis to that approved by the High Court in *Director of Public Prosecutions (Cth) v JM*.[1] The issues of law raised by the referred questions are concerned with how the law applies to the facts of this particular case. While the referred questions are contingent on facts yet to be established, the materials provided to the Court demonstrate that the referred questions are not hypothetical nor academic questions.

The assumed facts

[7] The assumed facts can be summarised as follows.

[8] The defendant has the rank of Constable. In 2016 he was posted to Alice Springs. In November 2017 he became a member of the Alice Springs Immediate Response Team which provides additional general duty support and can immediately respond to "high risk" incidents.

[9] On 26 June 2019, Judge Birch convicted the deceased of aggravated assault, assault police and other offences. Judge Birch sentenced him to 16 months imprisonment, suspended after eight months and backdated to 22 February 2019. Judge Birch imposed 10 conditions on the suspended part of the deceased's sentence including: (a) wearing an approved electronic

1 [2013] HCA 30; (2013) 250 CLR 135 at [14] – [34].

monitoring device; and (b) completing the residential rehabilitation program provided by the Central Australian Aboriginal Alcohol Program Unit ("CAAAPU") in Alice Springs.

[10] On 21 October 2019, the deceased was released from the Alice Springs Correctional Centre, fitted with an electronic monitoring device and entered CAAAPU. In the early hours of 29 October 2019, he removed his electronic monitoring device and left CAAAPU. These acts constituted a breach of conditions of his suspended sentence.

[11] On 5 November 2019, a warrant issued for the arrest of the deceased for breach of conditions of his suspended sentence. The warrant issued under s 43 of the *Sentencing Act 1995* (NT).

[12] On 6 November 2019, Senior Constable First Class Christopher Hand and Senior Constable Lanyon Smith attended House 577 at Yuendumu to arrest the deceased for breach of his suspended sentence. The deceased armed himself with a small axe, threatened the police officers with the axe and fled. A body worn camera captured the incident. If proven, the incident amounts to the criminal offence of assault police.

[13] At 3 pm on 7 November 2019, Sergeant Evan Kelly briefed his patrol group including the defendant about the deceased and told them he was an arrest target. On the same day, the defendant viewed the body worn video of the axe incident several times.

[14] On 9 November 2019, following a request by Sergeant Julie Frost, the Officer in Charge of the Yuendumu police station, the defendant, Senior Constable Anthony Hawkings, Constable Adam Eberl, and Constable James Kirstenfeldt travelled to Yuendumu. On the same day Senior Constable Adam Donaldson, a member of the police dog operation unit, also travelled to Yuendumu.

[15] At 7:06 pm on 9 November 2019, the four police officers from Alice Springs and Senior Constable Donaldson left the Yuendumu police station and attended at House 577. Persons at that house told them that the deceased left a few minutes earlier and went towards House 511.

[16] Annexures C and D to the assumed facts contain electronic copies of the film taken by the police body worn cameras of their attendance at Houses 577 and 511.

[17] When the police officers arrived at House 511 the defendant and Constable Adam Eberl entered the house and arrested the deceased. The two other officers remained outside. During the course of the arrest, the deceased stabbed the defendant with a pair of scissors and the defendant shot him three times with his police issue handgun. If proven, the stabbing of the defendant would constitute a serious criminal offence.

[18] The details of the shooting incident are as follows. At 7:21:50 pm, the defendant said to the deceased, “Just put your hands behind your back”. The deceased produced a pair of scissors and stabbed the defendant in his left

shoulder before the defendant fired the first shot. At 7:22:01, the defendant fired the first shot from close range into the middle-right region of the deceased's back. The shot was not fatal.

[19] For the purposes of this reference, the Crown accepts that the defendant fired the first shot in the course of arresting the deceased.

[20] At 7:22:04, the defendant fired a second shot. He fired the shot into the deceased's left torso. At 7:22:05, the defendant fired a third shot. He fired the third shot into the deceased's left torso. 2.6 seconds passed between the first shot and the second shot. 0.53 seconds passed between the second shot and the third shot. The second and third shots were fired at a distance of no more than 5 cm from the deceased. Either the second or the third shot was fatal.

[21] As at 7:23:10 pm, the police had successfully applied handcuffs to the deceased who was still alive. He was under control and he was becoming compliant. The police transported him to Yuendumu police station and administered first aid. He died at 9:28 pm.

A preliminary issue

[22] At the beginning of the hearing before this Court, the defence submitted that, with the exception of question 1 (which the defence accepted was a pure question of law), the Full Court should not answer the other three referred questions. This was because each of those questions necessarily involved a secondary factual dispute that could not be resolved at this stage

of proceeding. The last three questions were questions of mixed fact and law. In particular, counsel for the defence submitted that the defendant's state of mind was an issue for each of the three defences that were potentially available to him, respectively under s 148B (good faith) of the *Police Administration Act*, s 43BD (self-defence) and s 208E (reasonable conduct) of the *Criminal Code*.

[23] The defence submitted that the issue of the defendant's state of mind could only be resolved once the Supreme Court received all of the evidence. It will be necessary to have regard to all of the Crown's evidence, the relevant circumstances and, if the defendant gives evidence, his evidence too. Questions 2, 3 and 4 remained hypothetical. The trial judge could only instruct the jury at trial about the law which applied to the facts of the case. The defence said it was not possible to do that now because the Crown's case was incomplete, and it had not been determined whether the defendant would, or would not, give evidence.

[24] The defence raised these concerns because of the Crown's major contention in its written submissions was a contention of fact. The Crown submitted that the defence under s 148B of the *Police Administration Act* was not available to the defendant. Without conceding the validity of the defence, the Crown contended that the defendant's only possible defence was self-defence under s 43BD of the *Criminal Code*. This was because of the explanation the defendant gave Constable Eberl for shooting the deceased immediately after he fired the second and third shots. The Crown says that

the audio/visual recordings made by the police body-worn cameras, record the defendant as stating that he fired the second and third shots in defence of Constable Eberl. He was no longer in the process of arresting the deceased. He was not exercising a power or function under the *Police Administration Act*. The Crown took these points in its written submissions in answer to both referred questions 3 and 4. However, the defence says that there is a factual dispute about what the police body-warn cameras recorded and the defendant's state of mind when he fired the second and third shots.

[25] The defence objections to the Court dealing with referred questions 2, 3 and 4 were resolved on the following basis.

1. The parties agreed that the answer to both referred questions 1 and 2 is "No".

2. Both referred questions 1 and 2 are questions of law. Question 2 was simply the mirror image of question 1.

3. Referred question 3 did raise issues of mixed fact and law but its ultimate determination depended upon how the Court ultimately framed and analysed the question. Some aspects of question 3 were quintessentially matters for the jury. However, the scope and operation of s 5 of the *Police Administration Act*, the relationship between s 5 and s 25 of the Act, and the scope and content of police powers and functions "under this Act" (see the text of s 148B(1) of the *Police Administration Act*) raised important questions of law. It was necessary

to resolve those matters prior to trial for the trial Judge to instruct the jury about the defence provided by s 148B of the *Police Administration Act*. They were not hypothetical matters.

4. Question 4 is a question of law. The Crown's factual contentions did not alter the nature of the question. Both parties agreed that the provisions of s 148B, s 43BD and s 208E are not inconsistent. Subject to the jury's findings of fact at trial, all three defences were potentially available to the defendant. Section 208E and s 43BD of the *Criminal Code* did not operate as provisos to s 148B of the *Police Administration Act*.

Part VIIA and s 148A and s 148B of the *Police Administration Act*

[26] Until 20 April 2005, there was no specific provision for protection of members of the police force against civil and criminal liability in the *Police Administration Act*. Protection for members from civil and criminal liability depended on members acting within the scope of their powers, certain provisions of the *Criminal Code*, and the common law. The only relevant provisions in the *Police Administration Act* were s 161, s 162 and s 163. Section 161 provided protection for members from liability for executing warrants that contained irregularities and defects. Section 162 specified a time limit for the commencement of actions against members. Section 163 provided for the vicarious liability of the Crown for the acts and omissions of members. Subsection 163(1) stated:

> Subject to subsection (3), the Crown is liable in respect of a tort committed by a member in the *performance of his duties as a member* in the like manner as a master is liable in respect of a tort committed by his servant in *the course of the employment* of that servant and, shall in respect of such tort, be treated for all purposes as a joint tortfeasor with the member.

[27] Things changed upon the enactment of Part VIIA of the *Police Administration Act*. Part VIIA**,** including s 148A and the original s 148B, was inserted in the Act by s 10 of the *Police Administration Amendment (Powers and Liability) Act 2005* (NT) which commenced on 20 April 2005. When first enacted, Part VIIA was only concerned with protection of members from civil liability, the vicarious liability of the Territory and the procedure for making claims for police torts. Importantly, Division 3 of Part VIIA provides that claims are to be commenced against the Territory not members of the police force.

[28] The provisions in the *Police Administration Act* dealing with vicarious liability are important. There was an established doctrine at common law which was specifically applied to constables of police making arrests, namely: the doctrine that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he or she may commit in the course of his or her office and for such acts the government or body which he or she serves or which appointed him or her incurs no vicarious liability.[2]

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2 *Little v The Commonwealth* (1947) 75 CLR 94 at 114.

[29] During the second reading speech[3] for the Bill that became the *Police Administration Amendment (Powers and Liability) Act*, the Minister for Police, Fire and Emergency Services stated:

> The bill seeks to amend the *Police Administration Act* in a number of ways. Primarily, this bill will put into place a new regime dealing with *claims of alleged tortious acts* by members of the police force.
>
> […]
>
> […] this bill does more than introduce a new vicarious liability scheme; it also makes several other substantial reforms.
>
> […]
>
> In relation to the amendments to section 163 of the Act, it is intended to repeal and replace the scheme for claims against police. The proposed scheme is substantially the same as the *Police Legislation Amendments (Civil Liability) Act 2003* (NSW), which commenced on 1 January 2004.
>
> As I noted in my response to the house on 5 October 2004, this is a complex area of law. It is made more difficult by the fact that members of the police force are not 'employees'. Vicarious liability is a common law doctrine relating to the issue of an employer's liability for the actions of their employee. Generally speaking, the Crown cannot be vicariously liable for the actions of *an independent statutory officeholder such as a member of the police*. It is for this reason that section 163(1) of the Act makes the Crown liable for members' torts in the like manner as a master is liable for the torts committed by a servant in the course of employment.
>
> Another problem is the interaction of sections 162 and 163 of the Act. Section 162 provides a limitation period of two months in which a plaintiff has to commence an action against a member for anything 'done pursuant to this Act... and not otherwise'. Unfortunately, the court is not in the position to be able to make a determination about the limitation, or the vicarious liability of the Crown, until all evidence has been presented to it. This places the member in the position of being weighed down with an action that may have little prospect of success. This is an unfair burden on the member. The courts have interpreted section 162 as meaning the two-month limitation period only applies where the member acted in good faith in the course of the member's duties. Where the member's actions were serious or wilful, the two-month limitation period does not apply. If the member's conduct is not

3 Debates 2 December 2004, Hansard at 8396.

in this category, then not only will the limitation not apply, the Crown will not be liable.

[…] As it currently stands, a [person] seeking to sue a member of the police force for an alleged tort may sue the member personally. There is no requirement for him to join the Crown to the proceedings. Subsection 163(3) enshrines the public policy that the Crown is not liable to pay damages in the nature of punitive damages, as the court will only award those damages to punish or deter the defendant for their conduct. The experience in the Territory is that, in most cases where the court finds for the plaintiff, the court has not awarded punitive damages. In those circumstances, the Crown meets the payment of the damages, even though the Crown may not have been party to the claim. However, there have been two cases where punitive damages were awarded against police.

The threat of an action and the stress of ongoing court proceedings places an un-deserved heavy toll on members whose job of policing has its own inherent difficulties. We intend on rectifying this by ensuring a plaintiff cannot directly sue a police officer for a police tort claim. A police tort claim means a claim for damages, including punitive damages for a tort allegedly committed by a member or a former member in *the performance or purported performance of their duty*. This does not, of course, prevent claims against police officers alleging that the negligence occurred other than in the course of their duties.

Under the proposed scheme, a person can only initiate a claim in the name of the Territory and the Territory must, as a result, make an election whether or not it would be vicariously liable in any award of damages. If the Territory denies it would be liable, then the court must make any orders it considers appropriate to enable the plaintiff to amend the existing originating process in joining the member. The plaintiff only has two months from the date of the order to amend the originating process, otherwise the plaintiff will be barred from doing so.

In relation to a claim for punitive damages, the plaintiff is unable to seek this remedy without the leave of the court. If the court grants leave, the plaintiff may join the member.

The proposed section 148G provides that the vicarious liability provisions do not affect a person’s rights they would otherwise have but for these provisions.

These amendments will apply to a tort committed or allegedly committed prior to the commencement of the new scheme, but only where any legal proceedings have not commenced at the time of the commencement of the legislation.

The new scheme is intended to regulate the manner in which a person can sue a member of the police force. By virtue of their powers, members of the police force may be required to perform functions and exercise powers under other Acts, often in the capacity of a public official. There are a large number of Acts that give police additional powers or functions. Some of those Acts also contain protection from liability provisions that apply both to employees of the relevant agency and police alike. Unfortunately, not all the protection from liability provisions are identical, so each provision needs to be addressed based on the protection it provides.

[…]

Ancillary amendments have been made to ensure the new regime *does not unintentionally affect existing rights, liabilities or procedures*.

[30] Sections 148A and 148B of the *Police Administration Act* are respectively in Divisions 1 and 2 of Part VIIA of the Act. The heading of Part VIIA is "Protection from liability of members, Territory's vicarious liability and legal proceedings for damages for certain torts by members". Division 1 is headed "Preliminary". Division 2 is headed "Protection from liability and vicarious liability of the Territory".

[31] Section 148A states:

Part applies to duties of member as a public official

(1) *For this Part*, an act done or omission made, or purported to have been done or made, by a member in the capacity of a public official under an act or regulations (the "authorising law") is taken to have been done or omitted to have been done by the member *in the performance or purported performance of duties as a member*.

(2) For subsection (1), a public official is a person appointed or authorised under the authorising law to perform *inspection, investigation or other enforcement functions* under that law for the Territory, an Agency or another Territory authority.

(3) This Part *applies despite* a provision of the authorising law providing for *the protection from civil liability* of a member (regardless of whether it also provides for protection from criminal liability) for an act done or omitted to be done in the exercise or

> purported exercise *of a power, or the performance or purported performance of a function, under the law*.

[32] Acknowledging that when Part VIIA was first enacted headings to sections were not part of an Act, the heading to s 148A misleadingly appears to raise a constructional choice. On one interpretation, the heading evinces an intention to limit the application of Part VIIA to circumstances where a police officer is acting in the capacity of a public official under another Act or regulation only. On another interpretation, the heading evinces an intention to expand the application of Part VIIA to include circumstances where a police officer is acting in the capacity as a public official. Under the latter interpretation, Part VIIA applies both to members of the police force performing their duties as members of the police force, and to members acting in the capacity of a public official. But no such choice arises from the text of s 148A(1). The correct interpretation of the subsection is the latter interpretation of the heading. This is so for the following reasons. The heading to Division 1 of Part VIIA is “Preliminary” not “Application of this Part”. The text of s 148A(1) commences with the words “For this Part”, not “This Part applies”. The words “For this Part” are expansive words not limiting words. Subsection 148A(1) is simply a deeming provision. It deems acts done or omitted by a police officer in the capacity of a public official to be taken to have been done by a member of the police force in the performance of his or her duties as a member of the police force.

[33] The words “performance of duties as a member” in s 148A(1) and elsewhere in Part VIIA of the *Police Administration Act* have been carried forward from repealed s 163(1). They are reflective of the tortious and vicarious liability matters dealt with in Part VIIA. They are equivalent words to the words “in the course of employment” which are commonly used in matters involving the vicarious liability of employers for employees. The Legislature used the words “performance of duties as a member” because members of the police force are independent statutory office holders. They are not employees. However, the Territory is vicariously liable for police torts committed by members of the police force *in the performance of their duties as members*.

[34] An important effect, of the deeming provision of s 148A(1), plus the definition of “police tort claim” in s 148D, and the provisions of s 148F(1), is to make the Territory vicariously liable for a police tort committed by a member in his or her capacity as a public official under an authorising law. Those provisions also require a claimant to sue the Territory and not the police officer. The statements made in the second reading speech quoted at [29] above support this interpretation.

[35] Originally, the deeming effect of s 148A(1) of the Act had two purposes. *First*, to protect members from civil liability, not only for acts done or omitted in the performance or purported performance by a member *of duties as a member* of the police force, but also acts done or omitted by members as public officials under an authorising law. *Second*, to make the Territory

vicariously liable and provide a single procedural regime for claimants to make claims for damages against the Territory for police torts committed by a member of the police force. The procedural regime applies to both torts committed by members in the performance of duties as a member of the police force, and to torts committed by members in the capacity of a public official.

[36] Subsection 148A(2) of the *Police Administration Act* limits the functions of public officials to inspection, investigation or other enforcement functions. It is not necessarily every function of a police officer under an authorising law which is deemed to be taken to have been done by the member in the performance or purported performance of duties as a member. For example, if a member was given a license issuing function that function would not fall within the deeming provisions of s 148A(1).

[37] Subsection 148A(3) provides that Part VIIA applies despite a provision of the authorising law providing for *the protection from civil liability* of a member for an act done or omitted in the exercise or purported exercise *of a power, or the performance or purported performance of a function, under the law*. The purpose of s 148A(3) is to make it clear that, within the ambit of its provisions for protection from civil liability, Part VIIA of the Act, in particular the vicarious liability and procedural provisions, is to apply despite any protective provisions for civil liability in authorising statutes. The words “regardless of whether it also provides protection from criminal liability” in parentheses in s 148A(3) have no operational effect. They do

not mean that s 148A has any application to protection from criminal liability. The words simply make it clear that the provisions of Part VIIA apply to protection from civil liability regardless of whether the authorising law provides for protection from criminal liability also.

[38] Originally, s 148B stated:

> **Protection of members from civil liability**
>
> (1) This section applies to a person who is or has been a member.
>
> (2) The person is *not civilly liable* for an act done or omitted to be done by the person in good faith *in the performance* or purported performance of *duties as a member*.

[39] The protection provided by s 148B of the Act when first enacted only applied to past or present members of the police force. The section protected members who were acting in good faith from civil liability only. The subject matter of s 148B was acts done or omitted, or purported to be done or omitted, by a member in the performance of *duties as a member* and that phrase appeared in both s 148A(1) and s 148B(2) of the Act. As originally enacted, the protection provided by s 148B extended to protection for acts done or omitted by a member acting in the capacity of a public official.

[40] Section 35 of the *Statute Law Revision Act 2005* (NT) amended s 148B of the *Police Administration Act* to correct the spelling of the word "performance".

[41] Section 7 of the *Police Administration Amendment Act 2016* (NT) repealed s 148B and the whole of the original Division 2 of Part VIIA of the *Police*

Administration Act and inserted a new Division 2 which is comprised of a new s 148B. The newly inserted provisions commenced on 28 September 2018. The repeal and replacement of Division 2 of Part VIIA coincided with the enactment of Division 7AA of Part VII of the *Police Administration Act*. Division 7AA established disease-testing regimes and enacted provisions for the taking and testing of blood samples by persons who were not members of the police force. Some of those provisions give functions and powers under the *Police Administration Act* to persons who are not members of the police force. For example, s 147R(3) of the Act requires a medical practitioner, nurse or qualified person to take a blood sample from a person in accordance with a disease test authorisation.

[42] In addition to Division 7AA of Part VII of the *Police Administration Act*, there are also other provisions in the Act that give powers and functions to persons who are not police officers.

[43] Section 148B of the *Police Administration Act* now states:

> **Protection from liability**
>
> (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.
>
> (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
>
> (3) In this section:
>
> **exercise**, of a power, includes purported exercise of a power.
>
> **performance**, of a function, includes purported performance of a function.

[44] As currently enacted, s 148B of the Act provides protection to a person from *civil and criminal liability* for an act done or omitted to be done by the person in good faith in the exercise of a power or the performance of a function[4] under the *Police Administration Act*. The section differs from the repealed section in a number of important respects. *First*, protection, under the section, is for both civil and criminal liability. The protection is no longer limited to civil liability. *Second*, the protection is for acts done, or omitted, in the exercise of a power or the performance of a function. It is not for acts done or omitted in the performance of duties as a member. *Third*, the relevant powers and functions are powers and functions under the *Police Administration Act*. There is no reference in the text of s 148B to public officials, authorising laws or "the performance of duties as a member" which appear in s 148A.

[45] Consequently, there is a question as to whether s 148A now has any application to s 148B. Section 148A remains unamended. When enacted, s 148A applied in a part of the Act that only provided protection for members from civil liability. As s 148A has not been amended and the words "performance or purported performance of duties" remain in the section, and as those words no longer appear in s 148B, there is nothing to suggest that the application of s 148A extends to the protection of members from *criminal liability*. This interpretation is reinforced by the following considerations:

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4 Or purported exercise of power or purported performance of a function.

(a) s 148B was repealed and re-enacted, not simply amended;

(b) for good reason, the Legislature makes a distinction between the "performance of duties as a member" and the "exercise of a power or the performance of a function" by a member;

(c) s 148B(1) states that it applies to acts done or omitted by a person "under this Act", that is, the *Police Administration Act*; and

(d) s 148A still has work to do, it applies to the provisions for vicarious liability and procedures for making a claim for police torts.

[46] Further, the authorising laws themselves commonly provide protection from civil and criminal liability for acts done or omitted by public officials under those Acts in similar terms to s 148B(1) of the *Police Administration Act*. Consequently, further protection under the *Police Administration Act* would seem to be unnecessary, and there is no reason to differentiate between the protection provided for the acts done or omitted by police officers as public officials, on the one hand, and other persons as public officials on the other hand.

[47] Following are two examples of the protective provisions of authorising statutes.

[48] Subsection 9(3) of the *Meat Industries Act 1996* (NT) provides that every member of the Police Force is an inspector for the purposes of this Act.

[49] Section 62 of the *Meat Industries Act* states:

Where an inspector does an act or makes an omission in good faith:

(a) in the exercise or purported exercise of a power; or

(b) in the performance or purported performance of a function,

under this Act, no action, claim or demand, either civil *or criminal*, in respect of that act or omission lies, or shall be commenced or allowed, against the Territory, the Chief Inspector or an inspector.

[50] Subsection 47(3) of the *Tobacco Control Act 2002* (NT) states that a member of the Police Force is an authorised officer.

[51] Section 56 of the *Tobacco Control Act* states:

Legal immunity

(1) This section applies to a person who is or has been:

[…]

(c) an authorised officer

(2) No civil or criminal proceedings lie against a person to whom this section applies in relation to an act done or omission made in good faith in the exercise or purported exercise of a power or the purported exercise of a power or the performance or purported performance of a function *under this Act* or the Regulations.

(3) Subsection (2) does not affect any liability that the Territory would, but for that section, have for an act or omission.

(4) This section has effect subject to Part VIIA of the *Police Administration Act 1978* to the extent it relates to civil liability of an authorised officer who is or has been a member of the Police Force.

[52] In both of the above examples, the Legislature makes it plain that it intends to confine the protection from liability provided by each Act to acts done or omitted *under the relevant Act*. It has done so by the use of the words "under this Act". Likewise, we infer that by the use of the same words in the *Police Administration Act*, the Legislature intends to limit the application of s 148B to acts done or omitted by members under the provisions of the

Police Administration Act or under those provisions in the sense that the immediate source of conferral is delegated legislation.[5] The Legislature does not intend the ambit of the protection provided by s 148B to extend to acts done or omitted by police officers as public officials.

[53] In the circumstances, the protection provided by s 148B under the *Police Administration Act* no longer applies to members acting in the capacity of public officials under authorising laws or regulations. We agree with the Crown's submissions that the repeal and re-enactment of s 148B narrowed and expanded the section's operation. Its current application is limited to acts done or omitted by a person in good faith in the exercise of a power or the performance of a function under the *Police Administration Act*, not under an authorising law. Its application now extends to both civil and criminal liability, and to other persons who too perform functions and exercise powers under the *Police Administration Act*.

[54] Section 148A of the Act still has work to do under Division 3 of Part VIIA of the *Police Administration Act*. By virtue of the deeming effect of s 148A(1), the Territory is vicariously liable for torts committed by police officers in the performance of their duties as members and as public officials. Further, the procedures for police tort claims in Division 3 apply likewise. This is confirmed by provisions such as s 56(3) and (4) of the *Tobacco Control Act*.

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5 *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 per Gummow J at 442; *Lumsden v Police* [2019] SASC 178 per Stanley J at [25].

Questions 1 and 2

[55] We accept the Crown's submissions about the interpretation of s 148A and s 148B of the *Police Administration Act* and the answers to referred questions 1 and 2. In the context of what we have stated at [26] to [54] above, we have largely adopted the Crown's submissions in what we state below about questions 1 and 2.

[56] Subsection 148A(1) of the *Police Administration Act* creates a fictional state of affairs, namely: that when a member of the police force is acting as a "public official" under an "authorising law" he or she "is taken to be" acting *in the performance of their duties as a member*. Section 148A does not limit Part VIIA of the *Police Administration Act* to instances of members acting as "public officials" under an "authorising law". Rather, its purpose is to extend the application of Division 3 of Part VIIA of the Act so the Territory is also vicariously liable for police torts committed by members acting as public officials, and claims for those torts too are against the Territory, not the member of the police force. This is evident from the text of s 148A, the relationship between s 148A and the provisions in Division 3 of Part VIIA and the legislative context and history of s 148A.

[57] Section 148A does not apply to s 148B of the *Police Administration Act*. Section 148B of the *Police Administration Act* applies (but is not limited) to members of the police force to protect them from civil and criminal liability for an act done or omitted in good faith in the exercise of a power or performance of a function under the *Police Administration Act*.

[58] The central focus of statutory construction is on the text of a provision in context. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[6] Hayne, Heydon, Crennan and Kiefel JJ stated:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. [...] The language [...] in the text of legislation is the surest guide to legislative intention.

[59] Subject to limited exceptions, the meaning of a statutory provision must be reasonably open on the natural and ordinary meaning of the words read in the context in which they appear.[7] By itself, the meaning of the words used in the text does not determine the meaning of a legislative provision. It is necessary to consider the context of the text. In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*,[8] after citing the above passage from *Alcan*, the High Court stated:

> The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

[60] When considering the context of a legislative provision, statute and common law require consideration of the purpose of the provision. As the High Court

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6 (2009) 239 CLR 27 at 46 [47].

7 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11] (French CJ, Kiefel and Bell JJ) and *Masson v Parsons* (2019) 266 CLR 554 at 572 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

8 (2012) 250 CLR 503 at 519 [39].

stated in *Thiess v Collector of Customs*,[9] "[o]bjective discernment of statutory purpose is integral to contextual construction".

[61] Section 62A of the *Interpretation Act 1978* (NT) ("*Interpretation Act*") states:

> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

[62] The purpose is to be objectively identified, and "may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials".[10]

[63] However, extrinsic materials can only be used to confirm that: *"the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act*;[11] and to determine the meaning of a provision where the provision is *"ambiguous or obscure"* or the ordinary meaning produces a result that is *"manifestly absurd"* or *"unreasonable"*.[12] However, extrinsic

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9 (2014) 250 CLR 664 at 672 [23].

10 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

11 *Interpretation Act*, s 62B(1)(a).

12 *Interpretation Act*, s 62B(1)(b).

materials cannot be used to displace the ordinary meaning of a provision, which appears from its text.[13]

Section 148A

[64] The *Police Administration Act* establishes the Police Force of the Northern Territory (see Part II), a scheme for determining the conditions of service of members of the Police Force (see Part III), a disciplinary regime (see Part IV) and an appellate system in relation to promotions and disciplinary matters (see Part VI). The Act also regulates the use of dangerous drugs for use in training (see Part VIA), prescribes the powers of police (see Part VII), establishes a regime for legal proceedings for damages for certain torts committed by members, provides some protection for members from civil and criminal liability (see Part VIIA), and prescribes offences in relation to the Police Force (see Part VIII).

[65] A key phrase in s 148A(1) is: *"is taken to have been"*. To understand that phrase, it is helpful to consider the context and history of s 148A of the *Police Administration Act*.

[66] When the *Police Administration Amendment (Powers and Liability) Act* commenced in 2005, there were a number of Territory Acts that authorised members of the police force to execute powers and perform functions under

13 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (the Court).

those laws.[14] Those Acts included provisions protecting members from civil and criminal liability for acts done under those laws. For example, see the provisions of, the *Tobacco Control Act* at [51] above.

[67] The second reading speech to the Bill introducing the *Police Administration Amendment (Powers and Liability) Act* (see [29] above) makes it clear that the Legislature sought to establish a regime addressing legal proceedings for alleged police torts by members of the police force that operated in harmony with existing protections for members acting as "public officials" under "authorising laws".

[68] Other provisions of the *Police Administration Amendment (Powers and Liability) Act* confirm that Part VIIA is to operate alongside provisions protecting "public officials" under "authorising laws". In particular, the *Police Administration Amendment (Powers and Liability) Act* amended other Acts to make it clear that those Acts had effect subject to Part VIIA of the *Police Administration Act*.[15] For example, s 56(4) of the *Tobacco Control Act*. Other Acts also had provisions similar to s 56(4) of the *Tobacco*

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14 See: s 7(3) of the *Fisheries Act 1988* (NT); s 9(3) of the *Meat Industries Act*; s 47(3) of the *Tobacco Control Act 2002* (NT); s 37 of the *Food Act 2004* (NT); s 35(4) of the *Private Security Act 1995* (NT); and s 93(b) of the *Territory Parks and Wildlife Conservation Act 1976* (NT) (see cl.24). See also various provisions of the *Gaming Control Act 1993* (NT) which confer functions on "a member of the Police Force" (see, for example, ss 28(3), 28(4) and 68); various provisions of the *Liquor Act 2019* (NT) which impose functions on a "police officer" (see, for example, ss 142, 155, 156, 157 and 212); and various provisions of the *Terrorism (Emergency Powers) Act 2003* (NT) which impose functions on a "police officer" (see, for example, ss 16-20, Part 2A and Part 2B).

15 *Police Administration Amendment (Powers and Liability) Act 2005,* s 27.

Control Act inserted, which authorised members of the police force to execute powers and perform functions under those laws.[16]

[69] In light of the legislative background, it is clear that the phrase "*is taken to have been"* in s 148A(1) operates as a deeming provision. It creates a deemed state of affairs upon which a court is to proceed when applying certain provisions of Part VIIA, namely that a member acted as a member in the performance of duties as a member under the *Police Administration Act*, even though he or she was, in fact, acting as a "public official" under an "authorising law".

[70] This interpretation of s 148A(1) of the *Police Administration Act* has important implications.

[71] *First*, s 148A(1) does not confine the application of Part VIIA of the *Police Administration Act* to acts done or omitted by members in the capacity of a public official under an authorising law. Rather, s 148A extends the application of Part VIIA of the *Police Administration Act* so that it not only applies to acts done or omitted by members in the performance of duties as a member under the *Police Administration Act*, but where provided also

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16 *Police Administration Amendment (Powers and Liability) Act 2016* inserted s 33(12) into the *Fisheries Act* (see cl 20), s 130(4) into the *Food Act* (see cl.21), s 79(2) into the *Gaming Control Act* (see cl 22), s 23(2) into the *Liquor Act* (see cl.23), s 59(4) into the *Private Security Act* (see cl 24), s 110(2) into the *Territory Parks and Wildlife Conservation Act* (see cl 24) and s 35(3A) into the *Terrorism (Emergency Powers) Act* see cl 25. Some of these provisions have since been amended. For example, s 33(12) of the *Fisheries Act* was replaced by ss 33-33C of the *Fisheries Act* see cl 20 of the *Fisheries Amendment Legislation 2016* (NT). Nonetheless s 33B(3) is in almost identical terms to s 33(12) before its repeal.

applies to acts done or omitted by a member in the capacity of a "public official" under an "authorising law".

[72] *Second*, s 148A does not mean that an act done or omitted by a member in the performance of duties as a member under the *Police Administration Act* is "taken to have been done" by the member as a "public official" under an "authorising law". That is not the deemed state of affairs created by s 148A.

[73] Subsection 148A(1) of the *Police Administration Act* uses a drafting technique a preliminary stage for economy of expression. The use of the technique avoids repetition. In subsequent sections of Part VIIA, it is unnecessary for the Legislature to state that the section applies to both: (i) acts done or omitted by a member performing duties as a member of the police force, and (ii) to acts done or omitted by a member in the capacity of a "public official" under "an authorising law".

[74] To understand how s 148A operates as a deeming provision, it is helpful to consider how it applies to subsequent provisions in Part VIIA.

[75] Subsection 148A(1) plainly applies to a section in Part VIIA of the Act if the section contains the phrase "by a member in the performance or purported performance of duties as a member". Accordingly, it applies to the sections in Division 3 of Part VIIA of the Act. Section 148A(1) expands the definition of "police tort claim" in s 148D to include a tort committed by a member in the capacity of a "public official" under an "authorising law". This has flow on consequences for the application of s 148F(1), s 148F(2)

and s 148F(3) which use the term "police tort claim". The result is that, subject to the provisions of s 148F and s 148G, the Territory is vicariously liable for police torts committed by members regardless of whether they were acting under the *Police Administration Act* at the time or as a public official under an authorising law. Further, in respect of all such torts, subject to certain qualifications, the Territory, not the tortious member, is to be the defendant named in the claim.

[76] As is apparent from the second reading speech, the Legislature saw the enactment of Division 3 of Part VIIA of the Act as a fundamentally important part of the 2005 amendments.

The interpretation of s 148B

[77] Questions 1 and 2 draw particular attention to the meaning of "person" in s 148B of the *Police Administration Act*. There is nothing in the immediate context of s 148B(1) to suggest that "person" should be limited to "members" (as that term is defined in the *Police Administration Act*). If the Legislature wished to confine the application of s 148B to members it would have used the term "members" as it did in the repealed s 148B.

[78] Members of the police force are not the only persons who exercise powers or perform functions under the Act. The Act confers powers and functions on various persons. They include: a person appointed to the Appeal Board (s 94(2)); a health practitioner attending to a person held in custody (s 132); a correctional officer assisting a member in the exercise or performance of

the member's functions under Division 6A of Part VII (s 138B); a medical practitioner; and, a nurse or qualified person who conducts blood testing for infectious diseases (see s 147FA and s 147FR).

[79] Section 148B, in its current form, was inserted in the Act by s 7 of the *Police Administration Amendment Act 2016*. A focus of the amending Act was to introduce amendments about the power of police, medical practitioners, nurses and "qualified persons" (see s 147FA) to take forensic samples, while protecting those persons from the risks associated with blood or bodily fluids. There is no mention of s 148B of the Act in the second reading speech for the Bill that introduced the *Police Administration Amendment Act 2016*. However, the Explanatory Statement confirms that a broad reading should be given to the term "person".

[80] The Explanatory Statement states:

> New s 148B provides protection from liability so a person is not civilly or criminally liable for an act done or omitted [...] in good faith in the exercise of a power or performance of a function under the Act. This section reflects changes so as to include people acting under the new provisions of this Bill (i.e. medical practitioners, nurses and qualified persons).

[81] A narrow reading of "person" to be only a "member" would exclude all of the other persons who exercise powers and perform functions under the Act from the protection provided by s 148B. The Explanatory Statement does not support such an interpretation. The current s 148B is plainly different to the

repealed s 148B of the *Police Administration Act*, which only applied to members of the police force and was limited to civil liability.

[82] Referred questions 1 and 2 also draw attention to the meaning of "under this Act" in s 148B(1). The natural and ordinary meaning of the words "this Act", together with immediate context in which they appear, plainly indicate that "this Act" is a reference to the *Police Administration Act* only. Further, there is nothing in the broader legislative context that suggests otherwise. It can be inferred that the purpose of s 148B(1) of the *Police Administration Act* is to protect a person from civil and criminal liability for an act done or omitted by the person in good faith in the exercise of a power or performance of a function under the *Police Administration Act*.

The relationship between s 148A and s 148B

[83] Section 148A does not apply to s 148B of the *Police Administration Act* for the reasons given at [26] to [82] above and for the following reasons.

[84] *First*, the difference in the language used in s 148A and s 148B is the clearest indication that s 148A does not apply to s 148B. By its terms, s 148A applies to "members" and to provisions containing the phrase "the performance or purported performance of duties as a member". These words are absent from s 148B of the *Police Administration Act*. In contrast, s 148B(1) of the Act uses the terms "person" as opposed to "member" in s 148A(1), and "function" as opposed to "duties" in s 148A(1). This contrast is starker when regard is had to s 148D and s 148G(1)(f) of the Act which

use the same phrase and terms as are used in s 148A. It might be expected that the Legislature would have used the same phrase or terms in s 148B as used in s 148D and s 148G(1)(f) if it had intended s 148A to apply to s 148B in the same way that it applies to s 148D and s 148G(1)(f).

[85] *Second*, the application of s 148A to s 148B would produce results inconsistent with the text of s 148B. Any attempt to use s 148A(1) to limit the protection from liability in s 148B(1) to a member when acting as a "public official" under an "authorising law" would be inconsistent with the language of s 148B(1), which refers to *"an act done or omitted … in the exercise of a power or performance of a function under this Act"*.

[86] Further, construing s 148A(1) as limiting the protection from liability in s 148B(1) to a member (and only if the member is acting in the capacity of a "public official" under an "authorising law") is inconsistent with the term "person".

[87] *Third*, the application of s 148A to s 148B is inconsistent with the purpose of s 148B, which is to protect a person from civil and criminal liability for an act done or omitted while executing a power or performing a function under the *Police Administration Act*. Applying s 148A to s 148B such that s 148B applies to a member *only* if the member is acting in the capacity of a "public official" under an "authorising law" is inconsistent with the broader protection that s 148B is intended to provide to the various persons who execute powers or perform functions under the *Police Administration Act*.

Such an interpretation is not supported by the purpose of s 148B(1) identified in the Explanatory Statement.

[88] *Fourth*, s 148A is a deeming provision. A deeming provision should be construed to have legal operation only as far as is necessary to achieve the purpose of the provision. In *Federal Commissioner of Taxation v Comber*,[17] Fisher J made the following comments about deeming provisions:

> In my opinion deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to: *Re Levy; Ex parte Walton* (1881) 17 Ch D 746 per James LJ at 756. It is improper in my view to extend by implication the express application of such a statutory fiction. It is even more improper so to do if such an extension is unnecessary, the express provision being capable by itself of sensible and rational application. This is precisely the position in the section in question.[18]

[89] More recently, in *Wellington Capital Ltd v Australian Securities and Investments Commission*,[19] Gageler J observed that the clauses of a company constitution that the Court was asked to construe used phrases such as "*as though* it were" and *"as if* [it] *were …"* and said:

> That is the language of a legal fiction. Ordinarily, a legal fiction is not construed to have a legal operation beyond that required to achieve the object of its incorporation. That general observation applies as much to the construction of a deed of trust, as it does to the construction of a statute (citations omitted)

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17 (1986) 10 FCR 88 (Full Court) at 96.

18 This passage has been approved in a number of subsequent cases. See, for example, *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1998) 191 CLR 140, 174 (McHugh J) and *Spargo v Repatriation Commissioner* (2001) 116 FCR 304, [14] (the Court).

19 (2014) 254 CLR 288 at 315 [51].

[90] The purpose of s 148A(1) of the *Police Administration Act* is to ensure that a reference to an act done or omitted by a member *in the performance of duties as a member* includes an act done or omitted by the member in the capacity of a "public official" under "an authorising law". As there is such a clear difference in the language of s 148A and s 148B, the application of s 148A to s 148B is contrary to the purpose of s 148A. However, the application of s 148A to Divisions 3 of Part VIIA achieves the purpose of the section.

[91] *Fifth*, the legislative history of s 148A and s 148B of the *Police Administration Act* supports the view that s 148A does not apply to s 148B in its current form. With one minor exception,[20] the Legislature has not amended s 148A since 2005 and it still has work to do in the operation of the regime dealing with claims of alleged tortious acts by members of the police force. While s 148B was repealed and re-enacted in completely different terms.

Conclusions on Questions 1 and 2

[92] For the reasons set out above, s 148A of the *Police Administration Act* does not apply to s 148B. Section 148B of the *Police Administration Act* is to be construed according to its terms. Section 148B of the *Police Administration Act* does not apply to acts done by a member *only* if the member is acting as a "public official" under an "authorising law".

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20 A typographical error appeared in the *Police Administration Act* as amended by the *Police Administration (Powers and Liabilities) Amendment Act 2005*. The error was corrected by s 35 and Part 1 of Schedule 4 to the *Statute Law Revision Act 2005* (NT).

[93] We would answer to Question 1: “No”.

[94] However, the protection provided by s 148B only applies to acts done or omitted by a person (including a police officer) in good faith in the exercise of a power or performance of a function under the *Police Administration Act*. The protection provided by s 148B does not extend to acts done or omitted by police officers acting as public officials under an authorising law.

[95] As to Question 2, the effect of s 148A(1) of the *Police Administration Act* is that an act done or omitted by a member as a “public official” under an “authorising law” is taken to have been done or omitted by the member in the performance (or purported performance) of duties as a member. The subsection does not have the reverse effect, namely that an act done by a member under the *Police Administration Act* is taken to have been done by the member in the capacity of a “public official” under an “authorising law”. A member who acts under the *Police Administration Act* is not under s 148A of the *Police Administration Act*, or otherwise, acting in the capacity of a “public official” under an “authorising law”.

[96] We would answer Question 2: “No”.

Question 3

[97] The Crown submits that the answer to referred question 3 turns on whether the defendant fired the second and third shots (one of which was fatal) in good faith “in the exercise, or purported exercise, of a power or the

performance, or purported performance, of a function under the [*Police Administration Act*]". We agree with the Crown's starting proposition.

[98] However, the Crown also submits that a succession of High Court authorities on similar provisions establish that s 148B of the *Police Administration Act* would only apply if the defendant genuinely believed that firing the second and third shots was *done under his power to arrest the deceased*. Further, the Crown says that on the Assumed Facts, and by the defence invoking self-defence under s 43BD of the *Criminal Code*, when he fired the second and third shots, the defendant was not exercising or purporting to exercise any power or function under the *Police Administration Act*. Nor is there any evidence to suggest that was the defendant's genuine belief.

[99] The Crown's third proposition raises mixed issues of law and fact that can only be resolved after all of the evidence is before the jury. To avoid dealing with issues of fact, the Court has redrafted referred question 3 as follows:

> Redrafted Question 3
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> Based upon the assumed facts, at the time the accused fired the second and thirds shots resulting in the deceased's death, would it be open to the jury to find that the accused was acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act*, such that s 148B of the Act arises for the jury's consideration?

[100] The Act contains various provisions that confer powers and functions on various persons. To answer redrafted question 3 it is necessary to consider

the powers and functions that members of the police force have "under the Act".

[101] In assessing the powers and functions members of the police force have, it is useful to keep in mind the constitution of the Police Force, and that members of the police force are statutory office holders. They are required to make an oath, before they can exercise or perform any of the powers, functions or duties conferred or imposed on a member of the Police Force by a law of the Territory.

[102] Division 1 of Part II of the *Police Administration Act* provides for the establishment of the Police Force of the Northern Territory. Section 6 of Division I states:

> The police force shall consist of a Commissioner *and other members appointed and holding office* under and in accordance with this Act.

[103] Section 26(1) of the *Police Administration Act* states:

> A person shall not exercise or perform any of the powers, functions or duties conferred or imposed upon a member of the Police Force by a law of the Territory unless he or she has taken and subscribed an oath in the form in the Schedule.

[104] The form of the oath is as follows:

> I _____ [*promise/ swear etc as required by Oaths, Affidavits and Declarations Act 2010*] that I will well and truly serve Her Majesty, Queen Elizabeth the Second, Her Heirs and Successors as a member of the Northern Territory Police Force without fear or favour, affection or ill-will from this day and until I am legally discharged from that Force; that I will see and cause Her Majesty's peace to be kept and preserved, that I will prevent, to the best of my powers, all offences against Her

> Majesty's peace and against all laws in force in the Northern Territory of Australia and that, while I remain a member of the Northern Territory Police Force, I will, to the best of my skill and knowledge, faithfully discharge all my duties according to law. *[So help me God! or as appropriate]*

[105] A number of sections of the *Police Administration Act* confer functions on the police force and on members of the police force. Subsection 5(2) of the Act states:

> The core functions of the Police Force are:
> (a) to uphold the law and maintain social order; and
> (b) to protect life and property; and
> (c) to prevent, detect, investigate and prosecute offences; and
> (d) to manage road safety education and enforcement measures; and
> (e) to manage the provision of services in emergencies.

[106] Section 25 of the *Police Administration Act* is headed "Functions of members" and states:

> Subject to this act, a member shall perform the duties and obligations and have the powers and privileges as are, *by any law in force* in the Territory, *conferred or imposed* on him.

[107] In our opinion, by virtue of the oath members of the police force take, and the fact that the police force can only act through its members, members are under an obligation and have a duty to carry out the core functions stipulated in s 5 of the Act. In *Rice v Connolly*,[21] Lord Parker CJ said:

> It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting

21 [1966] 2 QB 414 at 419.

> property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.

[108] There is nothing in the *Police Administration Act* to exclude the common law duties of police officers from applying in this case. Such an interpretation of the Act is consistent with s 25 of the Act, which is headed "Functions of members" and refers to duties, obligations, powers and privileges conferred or imposed on him "by any law in force in the Territory", which includes the common law and statutory law.

[109] *Rice v Connolly* was followed and applied by Angel J in *Thomson v C*,[22] a decision of this Court, where his Honour said, after quoting the passage from *Rice v Connolly* referred to above:

> As Cosgrove J said in *Innes v Weate* (supra),[23] the duty of a police officer cannot be stated in other than general terms, as the range of circumstances in which there is a duty to act is so wide, so various, and so difficult to anticipate. I agree.

[110] To the same effect is the decision of the Full Court of the Federal Court in *Re: K*,[24] where the Court followed and applied *Rice v Connolly* and *Thomson v C* as expressing the duties of a police officer at common law. The Court concluded, after examining a number of other English and Canadian authorities that:

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22 (1989) 95 FLR 116 at 117.

23 (1984) 12 A Crim R 45 at 51.

24 (1993) 46 FCR 336, at 339-341. See also *Hayward-Jackson v Walshaw* [2012] WASC 107; 223 A Crim R 489, at 495 per Heenan J; *Mangurra v Rigby* [2021] NTSC 6 at [34] per Kelly J.

> The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease acting therein.

[111] The argument of the defence was that s 5 of the *Police Administration Act* confers functions on individual members of the police force. There is no definition of "functions" in the Act. The Macquarie Dictionary defines "function" as "the kind of action or activity proper to a person, thing, or institution".[25] In our opinion, the functions of a member of the police force include their duties. The argument of the Crown was that s 5 confers functions on the Police Force as an institution, and was irrelevant. Although the Police Force may be an institution or a body, it is not a corporation; it is comprised of the Commissioner and other members holding office under and in accordance with the Act,[26] and it acts through its members. We consider that s 5, when considered in the light of s 25 of the Act, and the oath of office taken by a member, makes it part of a police officer's functions and duties, amongst other things, to protect life and prevent offences. The same approach was taken by Murray J and Burchett AUJ in *"CMS" (A Child) v Giacomini*,[27] where their Honours said:

> It is a central function of the office of a police constable to preserve the peace and public order. That is so at common law and, for example, by

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25 *Macquarie Dictionary* (5th ed, 2009) 'function' (def 1).

26 *Police Administration Act*, s 6.

27 [2003] WASCA 42 at [66].

Police Act, s 7(1)[28]. It is central to the oath of engagement taken by a police officer…

[112] Indeed, s 28(e) of the *Criminal Code* provides:

> In the circumstances following, the application of force that will or is likely to kill or cause serious harm is justified provided that *it is not unnecessary force*:
>
> (e) ... in the case of a police officer, or a person acting by his authority, when attempting to prevent a person committing or continuing the commission of an offence of such a nature as to cause the person using the force reasonable apprehension that death or serious harm to another will result...

Although that provision does not apply to provide a defence to Schedule 1 offences,[29] it is still relevant to offences that are not Schedule 1 offences, and is illustrative of the point.

[113] Part VII of the *Police Administration Act* is headed "Police powers". There is specific provision in the Divisions of Part VII for the following police powers: use of dogs and horses; use of electronic drug detection systems; search and entry; dangerous drugs; arrest; apprehension without arrest; taking person into custody for infringement notice offences; notice to appear before the Local Court; furnishing of name and address; bringing detained persons before court and obtaining evidence after taking into custody;

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28 Section 7(1) provided at that time: The Commissioner of Police may appoint so many non-commissioned officers and constables of different grades as he shall deem necessary for the preservation of peace and order throughout the said State, subject, however, to the approval of the Governor: and such non-commissioned officers and constables shall have all such powers and privileges, and be liable to all such duties and obligations as any constable duly appointed now or hereafter may have, or be liable to, either by the common law, or by virtue of any statute law now or hereafter to be in force in the said State.

29 *Criminal Code*, s 43AA(3).

recording of confessions and admissions; and forensic examinations. The powers are extensive.

[114] Of particular relevance to referred question 3, are the powers of arrest contained in s 123 and s 124 of the *Police Administration Act*. Section 123 states:

> A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

[115] Section 124 states:

> (1) A member of the Police Force may, without warrant, arrest and take into custody any person who the member has reasonable cause to believe is a person for whose apprehension or committal a warrant has been issued by any Supreme Court Judge, Local Court Judge or justice of the peace.
>
> (2) Where a member arrested person under subsection (1), the member shall, as soon as reasonably practicable thereafter, produce or cause to be produced to the person the warrant authorising his apprehension or committal, where the person has been apprehended in pursuance of a warrant authorising his apprehension, and the person shall be charged with the offence specified in the warrant.

[116] The Crown says that the relevant statutory provision was the power to arrest the deceased, and, on the Agreed Facts, the defendant was not purporting to exercise that power at the time he fired the second and third shots. His purpose and intent was to defend Constable Eberl.

[117] Before further considering the Crown's submissions, we note the following assumed facts. They do not appear to be controversial. The defendant,

Senior Constable Anthony Hawkings, Constable Adam Eberl, and Constable James Kirstenfeldt went to Yuendumu to arrest the deceased. A warrant for his apprehension for breach of a suspended sentence was outstanding and on 6 November 2019, the deceased assaulted two police officers who were attempting to arrest him by threatening them with a small axe. After the police officers arrived at House 511 at Yuendumu, the defendant and Constable Eberl went into the house to arrest the deceased. They spoke to him and he gave them a false name. The police identified the deceased by reference to a digital picture of him on a mobile telephone and they proceeded to arrest the deceased. The deceased resisted arrest. He stabbed the defendant and attempted to stab Constable Eberl and the defendant shot him three times. There was 3.13 seconds between the first shot and the third shot. The deceased did not die immediately. He continued to resist and threaten the police. The police eventually handcuffed the deceased and placed him inside the cage at the rear of the police van. The police body-worn cameras recorded most of these actions. The deceased died approximately two hours after his arrest.

[118] The Crown submits that there must be evidence capable of showing there was a reasonable possibility that when the defendant fired the second and third shots he genuinely believed he did so in the exercise, or purported exercise, of *his power of arrest under s 124* of the *Police Administration Act*. Otherwise, the Crown says that the defendant cannot rely on s 148B of the Act as a defence. The Crown accepts that when the defendant entered

House 511 to arrest the deceased, he genuinely believed he was exercising the power of arrest under the *Police Administration Act*, and also there is a temporal connection between the defendant entering the house to arrest the deceased and the discharge of the second and third shots. However, the Crown contends that circumstances materially changed between the firing of the first and second shots. The firing of the last two shots was unnecessary or unreasonable. The defendant fired the second and third shots, not to effect an arrest of the deceased, but on the defence case, to prevent death or serious harm to Constable Eberl. The Crown says that the record of the defendant's statements to Constable Eberl before they handcuffed the deceased support this contention.

[119] In our opinion, these are matters for the jury. The facts illustrate that incident occurred very quickly. The defendant fired the second shot only 2.6 seconds after the first shot, and the third shot only 0.53 seconds after the second shot. The Crown's submissions overlook the fact that at the relevant time the defendant may have been exercising his power of arrest and simultaneously performing his functions of preventing an offence and protecting the life of Constable Eberl. The police officers completed the arrest of the deceased. They placed him in the police van and took him to the police station. The defendant may give evidence at the trial about his state of mind when he fired the second and third shots. It may be that when he fired the second and third shots the defendant was intending to both arrest the deceased and defend Constable Eberl. It would be open to the

defendant, if he gives evidence, to state as much. There is nothing in the *Police Administration Act* to prevent a police officer from exercising multiple powers and performing multiple functions during the course of a single incident.

[120] In any event, it is our opinion, that if the second and third shots can be isolated, and the defendant fired those shots to defend Constable Eberl, those acts fall within the protection of s 148B of the Act so long as he genuinely believed it was necessary to fire the second and third shots to do so. The defendant was under a duty to prevent an attack on Constable Eberl and save his life.

[121] The Crown referred the Court to a number of authorities[30] that, it was put, showed, provisions such as s 148B of the *Police Administration Act* are expressly confined by the provisions which creates or defines the section to acts having the designated connexion with the specified powers and functions under the Act. In this case, the defendant must have genuinely and honestly acted in pursuance or purported pursuance of a power of arrest under the Act. As the defendant was not attempting to arrest the deceased when he fired the second and third shots, the protection provided by s 148B was not available to him.

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30 *Webster v Lampard* (1993) 177 CLR 598; *Lumsden v Police* [2019] SASC 178; *Little v The Commonwealth* (1947) 75 CLR 94; *Hamilton v Halesworth* (1937) 58 CLR 369; *Fox v Coates* [2010] NTSC 46; *R v Whittington* (2007) 19 NTLR 83.

[122] In *Webster v Lampard*[31] the plurality of the Court stated at 605:

> Each of the statutory defences upon which Sergeant Lampard relies is expressly confined, by the provisions which creates or defines it, to acts having a designated connexion with the actual or intended course of official duty. Thus, the defence under s 47A of the Limitation Act is only available in the present case if the acts alleged against Sergeant Lampard were, in the words of the section, "done in pursuance or execution or intended execution of any Act, or of any public duty or authority". Similarly, the defence under s 138 of the Police Act is only applicable if the alleged acts were in the words of par, H, "done ... in carrying the provisions of [the Police] Act into effect again[st] ... parties offending or suspected of offending against the same.

[123] We accept that those principles apply to s 148B of the *Police Administration Act*. However, the defendant's powers of arrest are not his only power and function under the Act. For the reasons given, it is our opinion that, on the Assumed Facts, it is open to the jury to find that the defendant was acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act*, and s 148B of the Act arises for the jury's consideration. It is also important to note, that the plurality in *Webster v Lampard* also stated:[32]

> ... it should now be accepted as settled "that there must be some factual basis for the belief, and while the actual facts known to the defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds".

[124] In support of its case that the defendant was not acting pursuant to his powers of arrest the Crown also placed significant reliance on Dixon J's

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31 (1993) 177 CLR 598.

32 *Webster v Lampard* (1993) 177 CLR 598 at 607-608.

reasons for decision in *Little v The Commonwealth*.[33] The case concerned a claim for damages by Mr Little against the Commonwealth for false imprisonment. An important issue was whether the police officers who arrested the plaintiff were entitled to the protection of s 13(3) of the *National Security Act 1939-40* (Cth). That section stated:

> No action shall lie against the Commonwealth, any Commonwealth officer, any constable or any other person acting in pursuance of this section in respect of any arrest or detention in pursuance of this section but if the Governor-General is satisfied that any arrest was made without any reasonable cause, he may award such compensation in respect of what he considers reasonable.

[125] During the course of his reasons for decision in *Little v The Commonwealth*, Dixon J made the following statements of principle.[34]

> Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties authorities arising from the enactment. Lord Kenyon CJ said:
>
> > It has been frequently observed by the Courts that the notice, which is directed to be given to justices and other officers before action is brought against them, is of no use to them when they have acted within the strict line of the duty, and is only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it.
>
> See, too, *Theobold v Crichmore*:
>
> > There can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe they were acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act.
>
> […]

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33 (1947) 75 CLR 94.

34 Ibid at 108-109; 112; 113.

> The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.
>
> […]
>
> For the reasons I have indicated, I think that the words "any arrest or detention in pursuance of this section" occurring in s 13(3) of the *National Security Act 1939-1940* cover an arrest or detention by a constable who with some facts to go upon honestly thinks that what he has found or suspects is an offence against the Act committed or about to be committed by the person whom he arrests or detains notwithstanding that the arrest and detention are not actually justified and that his error or mistake is in whole or in part one of law. This being the operation of sub-s (3) of s 13, the circumstances of the arrest of the plaintiff on 8th June and his detention until 19th June 1942 appear to me to make it inevitable that I should hold that the inspector and, in giving effect to his orders, Detective Raetz, acted in pursuance of s 13 and that, accordingly, it was an arrest and detention in pursuance of that section and so not actionable.

[126] In our opinion, these principles apply to this case and, on the "Assumed Facts", it is open to the jury to find that the defendant honestly engaged in a course of action that falls within the defendant's powers, functions and duties under the *Police Administration Act*. As we have stated, the defendant's powers of arrest were not his only powers and functions under the Act.

[127] We would answer redrafted Question 3 (see [99] above): "Yes".

Question 4

[128] At the outset, it is necessary to refer briefly to the *Criminal Code Act 1983* (NT) ("*Criminal Code*") to make sense of the issues that arise in this question. The original *Criminal Code*, which came into force on 1 January 1984, was based on the Queensland ("Griffith") Code. The *Criminal Code* was amended by the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*, which came into force on 20 December 2006. This established a different regime for dealing with criminal responsibility for Schedule 1 offences and declared offences, largely based on the *Criminal Code Act 1995* (Cth). Thus, in its present form, the *Criminal Code* has provisions that apply only to Schedule 1 and declared offences as contained in Part IIAA, while the original provisions, including the provisions of Part I and Part II, still operate for all other offences. Importantly, subsections 43AA(2) and (3) exclude certain (but not all) of the provisions of Part I and Part II from applying to Part IIAA offences. This mixture of the two codes is at times confusing.

[129] In these circumstances, the question raised is whether s 148B applies to this case in light of s 208E of the *Criminal Code*; in other words, is s 208E a special provision that covers the field and is intended to operate as a proviso to all later provisions of the law that provide authorisation, justification or excuse for similar conduct.

[130] The *Criminal Reform Amendment Act (No. 2) 2006* inserted s 208E in the *Criminal Code*. That Act came into force on 19 September 2006. The

offences of murder (s 156), reckless or negligent conduct causing death (s 160) and engaging in a violent act causing death (s 161A(1)) are all in Part VI of the *Criminal Code*, and are all Schedule 1 offences. Section 208E is also in Part VI. As originally introduced, s 208E provided:

> **Law enforcement officers**
>
> (a) person is not criminally responsible for an offence against this Part if:
>
> the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer; and
>
> (b) the conduct of the person is reasonable in the circumstances for performing that duty.[35]

[131] Section 208E was amended by s 57 of the *Correctional Services (Related and Consequential Amendments) Act 2014*, which came into force on 9 September 2014,[36] and now provides:

> **Law enforcement officers**
>
> A person is not criminally responsible for an offence against this Part if:
>
> (a) the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and
>
> (b) the conduct of the person is reasonable in the circumstances of performing that duty.

[132] Section 43BE of the *Criminal Code* provides:

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35 *Criminal Code* (NT), s 208E, as at 20 December 2006.

36 Northern Territory, *Gazette*, No S 80, 9 September 2014.

Lawful authority

A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law.

[133] Neither the *Criminal Code* nor the *Interpretation Act 1978* define the word "law", although s 17 of the latter Act does define "law of the Territory". We consider that the word "law" would at least include another Northern Territory Act, so that s 148B of the *Police Administration Act* is such a law.

[134] Subject to the Crown's view of the defendant's state of mind when he fired the second and third shots, both the Crown and the defence, accept that s 148B of the *Police Administration Act* establishes a discrete defence that is available to the defendant. The Crown also agrees that s 208E of the *Criminal Code* does not operate as a proviso to s 148B of the *Police Administration Act*. Subject to the evidence at trial, the Crown accepts that the defendant can rely on defence of another under s 43BD of the *Criminal Code*, as well as the defences provided by s 208E of the *Criminal Code* and s 148B of the *Police Administration Act* to the charges brought against him. Both parties submitted that there was no inconsistency between s 208E of the *Criminal Code* and s 148B of the *Police Administration Act*.

[135] The differences between s 208E of the *Criminal Code* and s 148B of the *Police Administration Act* are:

(1) Section 208E of the *Criminal Code* applies where the police officer is acting in the course of his duty. Whereas, s 148B is available if the police officer has done (or purported to do) or omitted to do an act in

the exercise of a power or performance of a function under the *Police Administration Act*. There may not be any practical difference in many cases, except that s 148B specifically covers a failure to act.

(2) Section 208E applies only to offences that fall within Part VI of the *Criminal Code*.

(3) In order to succeed under s 208E, the police officer must act reasonably in the performance of his duty. That calls for an objective evaluation of his conduct. A defence under s 148B requires that he or she must have been acting in good faith, or, in other words, honestly.

[136] There is a line of authority that discusses the circumstances where there are two provisions, either in the same Act, or in different Acts, which cover either wholly or partially the same ground. The answer as to which of two or more provisions is to apply is encapsulated in the maxim *generalia specialibus non derogant*. This principle of construction applies especially if the more general provision comes into force after an earlier but limited provision. Thus in *Sarris & Guise v Penfolds Wines Pty Ltd*,[37] Penfolds, the landlord of certain premises, served a notice to quit under s 19 of the old *Gaming and Betting Act 1912* (NSW) on Sarris and Guise as tenants, on the ground that Penfolds had reasonable grounds to suspect that the tenants were using the property in contravention of that Act, which then empowered the company to serve the notice to quit. Sarris and Guise relied upon the old

37 [1962] NSWR 801.

Landlord and Tenant (Amendment) Act 1948 (NSW), which placed restrictions on the giving of a notice, and provided (by s 62(2)) that "a notice to quit given in contravention of this section shall not operate to terminate the tenancy…". The defendants argued that the later *Landlord and Tenant* (*Amendment) Act* impliedly repealed s 19 of the former Act. The Full Court held that there was no implied repeal unless there was such repugnancy that the two Acts could not be reconciled, and found that there was no repugnancy between the two provisions, which could readily stand and operate together. In holding that the notice to quit was validly given, Sugerman J (with whom Collins and Jacobs JJ concurred) referred to the speech of the Earl of Selborne, LC in *Seward v The Vera Cruz*:[38]

> …[W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of an intention to do so.

His Honour also referred to the speech by Viscount Haldane in *Blackpool Corporation v Starr Estate Co.*:[39]

> …[W]herever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specifically declared.

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38 (1884) 10 App Cas 59, at p 68.

39 [1922] 1 AC 27, at 36.

[137] In *McLean v Kowald*,[40] the Full Court of the Supreme Court of South Australia considered the position of a defendant who had pleaded guilty to driving under the influence of intoxicating liquor contrary to s 47 of the old *Road Traffic Act 1961* (SA). This was the defendant's second offence. The Act provided that in such a case, a penalty of imprisonment for not less than one month nor more than six months, and a licence disqualification of not less than six months, was required. The magistrate sentenced the defendant to imprisonment for 10 weeks with hard labour and disqualified him from driving for three years. The defendant appealed his sentence. He argued that his sentence of imprisonment could have been suspended under the *Offenders Probation Act Amendment Act 1969*, which came into force after s 47 of the *Road Traffic Act 1961*. After referring to the maxim *generalia specialibus non derogant*, Bray CJ said: "There are many cases in which the width of the language of a later general statute has been held not to affect a prior special enactment in the absence of express language or necessary implication". His Honour, after referring to a number of cases (including *Seward v The Vera Cruz* and *Blackpool v Starr Estate Co*.) said:[41]

> Section 4(2a) of the Offenders *Probation Act* lays down a general rule about the mitigating power of a court of summary jurisdiction. Parliament had previously provided in s 47(4) for the special case of sentences on person convicted for the second time of the offence of driving under the influence. There is nothing in the general language of sub-s (2a) to express an intention to rip up what had been provided by s 47(4). Words directing that its provisions should apply notwithstanding any other enactment are conspicuously lacking. Nor,

40 (1974) 9 SASR 384.

41 At p 388.

> in my view, can such an intention be found by implication. It is, in my view, nothing to the point to say that sub-s (2a) can be read as making the power to suspend a sentence an exception to the prohibition against reduction or mitigation contained in s 47(4). Of course it can be so read. The question is, ought it to be so read? Or is not the proper inference that in the absence of any express words it was not intended to draw a distinction between the powers of mitigation after conviction conferred by the original provisions of the Offenders Probation Act and those conferred by the amending provisions. Nothing in s 2a indicates that is was intended to be an exception from the other Acts mentioned in s 47(4).

In the result, he found that the *Offenders Probation Act* did not apply. Bright and Jacobs JJ agreed.

[138] In *Commissioner of Police (New South Wales) v Eaton*,[42] the High Court considered whether the Commissioner of Police's power to dismiss a Probationary Constable without giving reasons by virtue of s 80(3) of the *Police Act 1990* (NSW) was subject to a merits review under Part 6 of Ch 2 of the *Industrial Relations Act*. The Court held that the general provisions of the *Industrial Relations Act* did not apply in the face of the special, and inconsistent, terms of s 80(3) of the *Police Act*. Crennan, Kiefel and Bell JJ said,[43] after referring to Lord Wilberforce's speech in *Associated Minerals Consolidated Ltd v Wyong Shire Council*:[44]

> Lord Wilberforce went on to observe that discussion of these matters commonly involves consideration of the rule of construction [expressed in the maxim *generalia specialibus non derogant*] which presumes that a later, general enactment is not intended to interfere with an earlier, special provision unless it manifests that intention very clearly. Even

42 [2013] HCA 2; (2013) 252 CLR 1.

43 Ibid at [46].

44 [1975] AC 538 at 553-554.

> so, the question as to the operation of statutes remains a matter to be gleaned by reference to legislative intention. That intention is to be extracted "from all available sources".

[139] Counsel for the Crown submitted that as a matter of statutory construction there is no impediment to a defendant relying upon both s 208E of the *Criminal Code* and s 148B of the *Police Administration Act* if the circumstances engage the requirements of both provisions. There is nothing in the terms of s 208E to suggest that it is the only defence open to a police officer charged with an offence against part VI of the *Criminal Code*. Nor is there anything in the legislative history to suggest that s 208E is the only defence available for offences against Part VI. Further, there is nothing in the terms of s 148B of the *Police Administration Ac*t or elsewhere in the *Police Administration Act* to indicate that s 148B is not available to an offence under Part VI, or that s 148B is unavailable if a defence under s 208E of the *Criminal Code* is available. Counsel for the defence made similar submissions. He referred to the approach taken by Stanley J in *Lumsden v Police*,[45] where his Honour held that the police officer in that case was entitled to rely on a defence under s 45(4a) of the *Police Act 1988* (SA). That section provided the defence of honest and reasonable mistake of fact as the defendant believed them to be, notwithstanding that the officer failed on the *Proudman v Dayman*[46] defence, because the prosecution had

45 [2019] SASC 178 at [55].

46 (1941) 67 CLR 536.

disproved the reasonableness of the defendant's mistake; reasonableness in that situation meaning objectively reasonable.

[140] We agree with the contentions of counsel. There is nothing to suggest that s 148B repealed s 208E or that s 208E operates as a proviso to s 148B. There is nothing unusual about different defences being available to a defendant facing a criminal trial. Section 43BE of the *Criminal Code* specifically recognises such a possibility. The text of s 148B is not in terms that would make s 208E redundant. For the reasons discussed above, the two provisions may well be different in their application to the facts of a particular case.

[141] We would answer Question 4: "Yes".

KELLY and BLOKLAND JJ and HILEY AJ:

[142] The accused, Zachary Rolfe, is charged with murder, contrary to s 156 of the *Criminal Code Act 1983* (NT) ("*Criminal Code*"). In the alternative the accused is charged with reckless or negligent conduct causing death, contrary to s 160 of the *Criminal Code*; and in the further alternative, with engaging in a violent act which caused the death of the deceased, contrary to s 161A(1) of the *Criminal Code*. All of these sections occur in Part VI of the *Criminal Code*: Offences against the person and related matters.

[143] On 9 November 2019, the accused and a number of other police officers were deployed to Yuendumu from Alice Springs following a request by the OIC of the Yuendumu police station to assist in the arrest of the deceased Kumanjayi Wilson. (There had been trouble at Yuendumu. Clinic staff had

left the community as a result of a number of break ins and on 6 November the deceased had threatened police officers with an axe as they tried to arrest him.) On 9 November 2019, the accused and Constable Eberl entered House 511 for the purpose of arresting the deceased. However, he resisted and stabbed the accused in the left shoulder with a pair of scissors. The accused then fired three shots into the body of the deceased as a result of which the deceased died several hours later. The accused has been charged with murder on the basis of the firing of the second and third shots.

[144] An issue has arisen as to whether the immunity from criminal liability under s 148B of the *Police Administration Act 1978* (NT) ("PAA") conferred on a person exercising a power or performing a function under the PAA (or purporting to exercise or perform such a function or power) in good faith, has application in the circumstances of this case. Accordingly, the trial judge has referred the following questions of law for the consideration of the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT) ("*Supreme Court Act*").

> ***Question 1:***
>
> Does s 148B of the *Police Administration Act 1978* (NT) apply to acts or omissions done or made, or purported to have been done or made only if the police officer is acting in the capacity of a public official under an authorising law?

> ***Question 2:***
>
> Having regard to s 148A of the *Police Administration Act 1978* (NT), and based upon the assumed facts, is a police officer who acts or purportedly acts in the exercise of a power of performance of a function

under the Act, acting in the capacity of a public official under an authorising law?

Question 3:

Based upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, was he acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act 1978* (NT), such that s 148B of the Act arises for the jury's consideration?

Question 4:

The accused, Zachary Rolfe, is charged with murder, contrary to s 156 of the *Criminal Code Act 1983* (NT). In the alternative the accused is charged with reckless or negligent conduct causing death, contrary to s 160 of the *Criminal Code*. In the further alternative, the accused is charged with engaging in a violent act which caused the death of the deceased, contrary to s 161A(1) of the *Criminal Code*. In these circumstances, is a defence under s 148B of the *Police Administration Act 1978* (NT) potentially open in the light of s 208E of the *Criminal Code*?

[145] As a consequence of the course taken by argument on the hearing of the reference, the Court determined to amend the form of Question 3 to the following:

Amended Question 3:

Based upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, would it be open to the jury to find that the accused was acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act* 1978, such that s 148B of the Act arises for the jury's consideration?

[146] A preliminary issue arose on the hearing of the reference, Defence counsel contending that the questions ought not be answered. We have had the benefit of reading the reasons of Southwood J and Mildren AJ at [22] to [25]

in relation to that preliminary issue. We agree with the conclusions stated in [25] of their Honours' reasons.

Questions 1 and 2:

[147] Both parties are agreed that PAA s 148B applies according to its terms and that its scope is not limited by s 148A. We agree.

[148] The heading to s 148A says, "Part applies to duties of member as public official" which might, at first glance appear to be an indication that the sections which follow, including s 148B, were only intended to apply when a member of the police force is performing duties as a public official. However, such a construction cannot stand in light of the plain words in s 148B.

The original sections 148A and 148B

[149] Sections 148A and 148B of the PAA were initially introduced by the *Police Administration Amendment (Powers and Liability) Act 2005* (NT) (No 11 of 2005). Section 10 of that Act introduced a new Part VIIA into the Act. As enacted these sections were as follows:

> **PART VIIA – PROTECTION FROM LIABILITY OF MEMBERS, TERRITORY'S VICARIOUS LIABILITY AND LEGAL PROCEEDINGS FOR DAMAGES FOR CERTAIN TORTS BY MEMBERS**
>
> ***DIVISION 1 – PRELIMINARY***
>
> **148A. PART APPLIES TO DUTIES OF MEMBER AS PUBLIC OFFICIAL**
>
> (1) For this Part, an act done or omission made, or purported to have been done or made, by a member in the capacity of a public

official under an Act or regulations (the "authorising law") is taken to have been done or omitted to be done by the member in the performance or purported performance of duties as a member.

(2) For subsection (1), a public official is a person appointed or authorised under the authorising law to perform inspection, investigation or other enforcement functions under that law for the Territory, an Agency or another Territory authority.

Examples of a public official for subsection (2) –

1. A Fisheries Officer within the meaning of the Fisheries Act.

2. An inspector within the meaning of the Meat Industries Act.

3. An authorised officer within the meaning of the Tobacco Control Act.

(3) This Part applies despite a provision of the authorising law providing for the protection from civil liability of a member (regardless of whether it also provides for protection from criminal liability) for an act done or omitted to be done in the exercise or purported exercise of a power, or the performance or purported performance of a function, under the law.

DIVISION 2 – PROTECTION OF MEMBERS FROM CIVIL LIABILITY AND TERRITORY'S VICARIOUS LIABILITY

148B. PROTECTION OF MEMBERS FROM CIVIL LIABILITY

(1) This section applies to a person who is or has been a member.

(2) The person is not civilly liable for an act done or omitted to be done by the person in good faith in the performance or purported performace (sic) of duties as a member.[47]

[150] The purpose of these amendments was "to repeal and replace the scheme for claims against police".[48] The second reading speech contained the following explanation seemingly about s 148A:

> The new scheme is intended to regulate the manner in which a person can sue a member of the police force. By virtue of their powers, members of the police force may be required to perform functions or exercise powers under other acts, often in the capacity of a public official. There are a large number of Acts that give police additional

47 Section 148B was amended by the *Statute Law Revision Act* 2005 No 44 of 2005 s 35 and Schedule 4 to correct a spelling error "performace" to "performance".

48 Second reading speech.

powers or functions. Some of those Acts also contain protection from liability provisions that apply both to employees of the relevant agency and police alike. Unfortunately not all of the protection from liability provisions are identical, so each provision needs to be addressed based on the protection it provides.

[151] The second reading speech does not go on to spell out what the amendments propose doing about this – but it appears that the remedy was s 148A and s 148B. Section 148B provided an immunity from civil liability for an act done or omitted to be done by the person in good faith in the performance or purported performance of duties as a member (i.e. a member of the Police Force); and s 148A extended the immunity from civil liability conferred by s 148B to acts done by members of the Police Force in their capacity as public officials under other legislation – regardless of the form of the protective provisions in the other acts (the non-uniformity of those protective provisions being the mischief referred to in the second reading speech).

The new section 148B

[152] Section 148B was amended again by the *Police Administration Act Amendment Act* No. 30, 2016, s 7 which replaced the old s 148B with the following (ie the present provision).

DIVISION 2 PROTECTION FROM LIABILITY AND VICARIOUS LIABILITY OF THE TERRITORY

148B PROTECTION FROM LIABILITY

(1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.

> Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
>
> In this section:
>
> "exercise", of a power, includes the purported exercise of the power.
>
> "performance", of a function, includes the purported performance of the function.

[153] On a literal reading, s 148B gives complete immunity from civil or criminal liability for acts or omissions done by a person in good faith in the exercise of a power or performance of a function under the PAA (or purported exercise or performance of such).

[154] The Crown made a further submission, not strictly relevant to either questions 1 or 2, to the effect that since the 2016 amendment to s 148B, s 148A no longer applies to extend the protection conferred by s 148B to acts of members of the Police Force performing functions under other Acts.

[155] The Crown points out that PAA s 25 (headed Functions of Members) provides:

> Subject to this Act, a member shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on him.

[156] The Crown also says that the majority of those duties, obligations, powers and privileges are in Part VII of the PAA which is titled "Police Powers". The Crown submitted that "it is clear from s 25 that a member will only have a duty, obligation, power or privilege if it is conferred or imposed on them by a law."

[157] Mr Strickland SC for the Crown contended that the protection of the new s 148B extends only to situations in which the person is exercising a power or performing a function under the PAA, whether it be under Part VII or another Part of the Act. The contention is that s 148A no longer extends the protection afforded by s 148B to circumstances in which a police officer is performing a duty under another Act.

[158] Mr Strickland pointed to the change in wording from the old s 148B (as enacted in 2005) and the new s 148B which replaced it in 2016. He submitted that the new s 148B broadened the protection it offers in some respects, namely that it applies to "persons", not just "members", and it now extends to criminal as well as civil liability. However, he submitted that the protection extended by the new s 148B is narrower in another respect in that the old s 148B applied where the person was performing any duties as a member of the Police Force; whereas the protection afforded by the new s 148B extends only to acts or omissions done in the exercise of a power or the performance of a function under the PAA. No similar amendment was made to s 148A, as a result of which the Crown submitted that s 148A no longer applies to extend the protection afforded by s 148B to situations in which a member of the Police Force is performing enforcement duties under other Acts.

[159] In answer to questions from the bench, Mr Strickland said that s 148A still had work to do under such a construction, for example by extending the

restrictions in s 148F upon police torts claims to situations in which police perform duties under other acts, such as the *Fisheries Act*.

[160] It is not necessary to determine this issue in order to answer the Questions referred to the Full Court by the trial judge. Further, it is apparent that the answer can have no bearing on the outcome of this trial as there is no suggestion that in doing the acts said to constitute the offence of murder (i.e. firing the second and third shots), the accused was acting in the capacity of a public official performing duties under an Act other than the PAA. It is therefore a hypothetical question and we decline to deal with it.

[161] Southwood J and Mildren JA have expressed the view, that s 148A has no application to s 148B and that the protection given to the police (and others) under s 148B is confined to acts done and omitted while police officers (and others) are acting under the PAA: it does not extend to acts done or omitted by police officers as public officials under authorising laws. Southwood J and Mildren AJ have also expressed the view that s 148A applies to civil liability only, which would also mean that the protection from criminal liability afforded to members of the Police Force by s 148B would not extend to situations in which members of the Police Force are performing enforcement duties under other Acts. This is the position adopted by the Crown.

[162] While there are respectable arguments to support those views, we do not necessarily agree with those conclusions and do not consider that the present case is a suitable vehicle to determine those questions.

[163] There are also respectable arguments for the contrary view - that s 148A still has the effect of extending the operation of the protective provision in s 148B (criminal as well as civil) to the activities of members referred to in s 148A. First, the second reading speech on the introduction of s 148A in 2005 implies that the purpose of s 148A was to apply s 148B to situations in which members of the Police Force are performing functions under other Acts in order to ensure uniformity of the protective provision applying to members. It is arguable that this purpose has not been affected by the amendment to s 148B.

[164] Second, PAA s 25 set out above, obliges a member of the Police Force to perform the duties and obligations imposed on the member by any law in force in the Territory. That suggests that, in performing duties under another Act, the member is also performing a duty, or function, imposed on the member by PAA s 25. Section 25 also provides that a member shall have the powers and privileges conferred on the member by any law in force in the Territory so that, by the same reasoning, it may be said that a member of the Police Force exercising a power under another Act is also exercising a power conferred on the member by PAA s 25.

[165] Third, it is not clear that a purpose of the 2016 amendment to s 148B was to narrow the protection offered by the section in the way suggested by the Crown. The evident purpose of the change in wording from "performing duties as a member" to "exercising a power or performing a function under" the PAA, like the change from "member" to "person" was to extend the protection in s 148B to other people performing a range of functions under the PAA. It is not obvious that it was intended to narrow the protection conferred on members of the Police Force by that section.

[166] Fourth, s 148A begins with the words, "For this part": that is, it is expressed to apply to the whole of Part VIIA of the Act, which includes s 148B.

[167] Although there is a somewhat confusing difference in terminology (s 148A refers to the performance of duties as a member, and s 148B refers to a person performing a function or exercising a power under the PAA), it is at least arguable that the purpose and effect of s 148A remains as it was when enacted, to extend the protection afforded by s 148B to situations where a member of the Police Force is performing an "inspection, investigation or other enforcement function" as authorised under another law of the Territory.

Answers to Questions 1 and 2:

[168] The answers to questions 1 and 2 are as follows.

Question 1:

Does s 148B of the *Police Administration Act 1978* (NT) apply to acts or omissions done or made, or purported to have been done or made only if the police officer is acting in the capacity of a public official under an authorising law?

No. Section 148B applies according to its terms, that is to say, to a person performing a function or exercising a power under the PAA (or purporting to do so).

Question 2:

Having regard to s 148A of the *Police Administration Act 1978*, and based upon the assumed facts, is a police officer who acts or purportedly acts in the exercise of a power of performance of a function under the Act, acting in the capacity of a public official under an authorising law?

It is not necessary to answer Question 2 in light of the answer to Question 1. However, if it was necessary to answer that question we would answer it "No".

Question 3

[169] The Crown argues that, on the assumed facts, the defence under s 148B is not available because, at the time of firing the second and third shots which form the basis of the charge of murder, the accused was not performing a function or exercising a power under the PAA but was (on the defence case) acting in defence of another person.

[170] The major focus of the Crown case was on the exercise of the power to enter a house for the purpose of arresting a person pursuant to an arrest warrant, and the exercise of the power to effect the arrest. Details of the parties' contentions in relation to the exercise, or purported exercise of the power of

arrest will be considered below. First, consideration must be given to the effect of PAA s 5.

[171] Defence counsel submits that in the circumstances, on the assumed facts, the accused was performing a number of functions simultaneously; attempting to arrest the deceased [PAA s 24]; protecting the life of Constable Eberl [PAA s 5(2)(b)] and attempting to prevent a crime, namely the stabbing of Constable Eberl by the deceased [PAA s 5(2)(c)].

[172] The Crown submits that the accused's use of a firearm was not an act done in the exercise of the "power" to protect life, under PAA s 5(2).

[173] The first thing to say about that submission is that it misstates the defence contention. The Crown, throughout its submissions focuses on "the exercise of powers" or "duties, obligations, power and privileges" (See for example Crown Submissions [89]). Section 148B gives an immunity from civil or criminal liability for an act done (or omitted) in good faith in the exercise of a power or the performance of a function under the PAA. The heavy emphasis by the Crown on the exercise of powers and performance of duties ignores (or at least fails to give adequate weight to) the words in s 148B "or the performance of a function under this Act".

[174] Section 5(2) sets out the "core functions" (not powers) of the Police Force. They are set out below. The first contention by the Crown is that s 5(2) sets

out the core functions of the Police Force not the powers or functions of members.[49]

[175] Mr Strickland for the Crown submitted that for the defence in s 148B to apply, the power or function in question must be sourced in a particular provision relating to powers or functions conferred on individual members of the Police Force (or subgroups such as Ethical and Professional Standards Command referred to in PAA s 34G) under the PAA and not to some other general power conferred on police by another Act or the common law or by a general provision of the PAA such as s 5.

[176] We do not accept that distinction. PAA s 6 sets out the composition of the Police Force. It provides:

> The Police Force shall consist of a Commissioner and other members appointed and holding office under and in accordance with this Act.

"Member" is defined in PAA s 4 as a member of the Police Force. It follows that the functions of the Police Force are functions of its members.

[177] The "core functions" of the Police Force, and hence the members of the Police Force, under PAA s 5(2) are:

(a) to uphold the law and maintain social order; and

(b) to protect life and property; and

(c) to prevent, detect, investigate and prosecute offences; and

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49 Actually it doesn't set out the <u>powers</u> of the Police Force either.

(d) to manage road safety education and enforcement measures; and

(e) to manage the provision of services in emergencies.

The Crown accepts that all of these functions must be performed by individuals, as a "corporate entity" cannot perform physical actions, but maintains the distinction between the general functions of the Police Force and particular functions conferred on members of the Police Force (and others) under the PAA.

[178] While some of the core functions in s 5(2) are apt to be performed at an organisational level, for example (a), (d) and (e), some of those functions can only be performed by individual members of the Police Force. This includes what are arguably two of the most important of the core functions set out in s 5(2); the function of protecting life and property [s 5(2)(b)] and the function of preventing, detecting, investigating and prosecuting offences [s 5(2)(c)].

[179] In oral argument, Mr Strickland for the Crown conceded that preventing crime was an important function of individual members of the Police Force, but contended that the source of that power was not PAA s 5 which merely serves to confer that function on the Police Force as a "corporate entity". When pressed, Mr Strickland was unable to nominate an alternative source of the conferral of that function on individual members but did not concede that the source was the PAA.

[180] In our view, the protection afforded by s 148B does extend to the performance of the functions in PAA s 5. We are fortified in this conclusion by the South Australian case of *Lumsden v Police*[50] in which Stanley J considered the effect of s 65 of the South Australian *Police Act* which is in very similar terms to s 148B.[51] Stanley J held that the protection offered by s 65 extended to acts done in the performance of the functions set out in a very similar provision to PAA s 5 which recited the "purpose" of SA Police. That purpose included the provision of services to "uphold the law", "preserve the peace" and "prevent crime". In considering these provisions Stanley J said:[52]

> Section 65 confers on a member of SA Police an immunity from civil and criminal liability for acts or omissions performed in the exercise or discharge, or the purported exercise or discharge, of a power, function or duty conferred or imposed on a police officer by or under, inter alia, the *Police Act*. Section 65 is a beneficial provision. I see no justification for reading down its terms. When identifying a function or duty conferred or imposed on a police officer under the Police Act, s 5 provides an obvious touchstone for identifying those functions and duties.

[181] In our view, the same can be said of PAA s 5. It can hardly be doubted, for example, that s 148B was intended to apply to provide immunity from criminal liability for an act done by a member of the Police Force in good faith in the performance of the function of investigating an offence, or trying to prevent a crime.

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50 [2019] SASC 178 in which Stanley J considered the effect of s 65 of the South Australian *Police Act*.

51 Section 65 of the *Police Act* is somewhat wider than s 148B in that it extends to acts or omissions under "this Act or any other Act or law".

52 at [15].

[182] In the same way, the function of protecting life is one which is most apt to be (and will almost always be) performed by an individual member of the Police Force – often in an emergency situation when a police officer sees a life or lives in danger. How can it be doubted that s 148B was intended to apply to a member of the Police Force engaged in performing such an important core function?

[183] Further support that s 5 confers on members of the Police Force the functions set out in that section comes from the fact that members of the Police Force are required to take an oath. Section 26(1) provides:

> **Members to take oath**
>
> (1) A person shall not exercise or perform any of the powers, functions or duties conferred or imposed upon a member of the Police Force by a law of the Territory unless he or she has taken and subscribed an oath in the form in the Schedule.

[184] The form of oath set out in the Schedule is as follows:

> FORM 1
>
> FORM OF OATH TO BE TAKEN BY MEMBERS
>
> I, _____ *[promise/ swear etc. as required by Oaths, Affidavits and Declarations Act 2010]* that I will well and truly serve Her Majesty, Queen Elizabeth the Second, Her Heirs and Successors as a member of the Northern Territory Police Force without fear or favour, affection or ill-will from this day and until I am legally discharged from that Force; that I will see and cause Her Majesty's peace to be kept and preserved, <u>that I will prevent, to the best of my powers, all offences against Her Majesty's peace and against all laws in force in the Northern Territory of Australia</u> and that, while I remain a member of the Northern Territory Police Force, I will, to the best of my skill and knowledge, faithfully discharge all my duties according to law. *[So help me God! or as appropriate]* (emphasis by underlining added)

[185] The Crown does not accept that the combination of s 5, the requirement for a member to take the oath, and the content of the oath mean that the function of preventing offences was one that was conferred on members of the Police Force by the PAA. We disagree, but it doesn't really matter one way or the other: s 148B does not refer to performance of a function conferred on an individual person under the Act, it simply refers to "performance of a function under this Act". A member of the Police Force doing an act to protect life or prevent a crime is performing a function under the PAA whether the functions in s 5 are conferred on the Police Force as a "corporate entity" or on individual members or (which we hold to be the correct view) on both.

[186] The Crown objected that one cannot pick and choose the functions in s 5 to which s 148B has potential application: it must apply to all or to none. So much may be granted. The Crown then placed reliance on the remarks of Dixon J in *Little v The Commonwealth.*[53] Speaking of protective provisions like s 148B, Dixon J quoted from *Theobald v Crichmore*:[54]

> There can be no rule more firmly established, than that of parties bona fide and not absurdly believe that they are acting in pursuance of Statutes and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act.

[187] His Honour continued:

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53 [1947] 75 CLR 94 at 109.

54 (1818) 1 B & Ald 227 [106 ER 83].

> It has, however, been found not easy to define the exact conditions which must be fulfilled to qualify for protection. Bona fides has been regarded as indispensable. But the difficulty has been to give such provisions an operation which, on the one hand, will not be so narrow that it goes little, if at all, beyond what is authorized by the substantive parts of the enactment, and, on the other, will not be wide enough to cover wrongful acts so outside the scope of the authority given by the statute that it can hardly be supposed that it was intended to protect those responsible. In *Cann v. Clipperton* Williams J. said:—"It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute."

[188] Mr Strickland for the Crown contended that if s 148B were held to apply to performance of the functions set out in s 5, this would be to give s 148B such a broad scope of operation that it would extend to situations to which it can hardly be supposed it was intended to apply. He gave, as an example, a hypothetical case of a police officer going to absurd lengths to "maintain social order" and committing an offence in the process.

[189] While there is some force in that argument, in our view, the plain words of s 148B compel the conclusion that the protection from criminal and civil liability conferred by that section does extend to acts done (or omitted) in the performance of the functions in PAA s 5.

[190] Extreme hypotheticals like the one offered by Mr Strickland, although they can be useful aids to analysis, are not always good guides. Although it must be so that if s 148B extends to acts done in the performance of some of the functions in s 5, it must apply to all of them, some of the functions are such

that the performance of them are unlikely to involve a real risk of unlawful conduct (for example road safety education). The requirement that the person be acting in good faith further restricts the potential for s 148B to extend to absurd or extreme cases.

[191] Mr Strickland for the Crown conceded, fairly, that if s 148B applied to acts done in the performance of functions under s 5, then the Crown's position that Question 3 should be answered no was untenable. Nevertheless, it is necessary to consider the arguments of both parties in relation to the contention by the Defence that the defence under s 148B would be available to the accused because, at the time he did the acts said to constitute the offence (ie firing the second and third shots), he was exercising the power of arrest pursuant to a warrant under s 124 of the Act.

[192] The assumed facts include body worn camera footage from the accused, Constable Eberl and Constable Hawkings – along with transcripts from the audio from that footage. The assumed facts include the following:

> 19. At 7:21:50pm, the accused stated to the deceased, "Just put your hands behind your back." The deceased then retrieved a secreted pair of scissors and stabbed the accused in the left shoulder before the first shot was fired.
> 20. At 7:22:01pm, the accused fired one shot into the middle right region of the deceased's back. This shot was fired at close range.
> 21. Dr Marianne Tiemensma, a specialist forensic pathologist, undertook a post mortem examination of the deceased. She concluded that this shot was not fatal.
> 22. The accused fired a shot at 7:22:04pm into the deceased's left side torso (2.6 seconds after the first shot).

23. At 7:22:05pm, the accused fired another shot into Walker's left torso (0.53 seconds after the second shot).
24. Balistic evidence indicates the second and third shots were fired at a distance of no more than five centimetres from the deceased.
25. Dr Marianne Tiemensma's conclusion from the post mortem examination is that the fatal shot was either the second or third shot.
26. At 7:23:10 pm, handcuffs had been successfully applied to the deceased.

[193] The body worn footage shows a confused, not clearly visible, struggle during and after the above, and the transcript of the accused's body worn footage contains the following dialogue after the shots were fired and before the handcuffs were successfully applied:

ROLFE: You good?

EBERL: Yeah mate. Oi, don't fuck around! I'll fucking smash you mate.

….

ROLFE: Give me your arm. Give me your arm.

EBERL: Did you? Fuck!

ROLFE: That's me. It's all good. He was stabbing me. He was stabbing me.

EBERL: Okay brus.

ROLFE: It's all good. He's got scissors in his hand. He was stabbing me. He was stabbing you.

EBERL: Alright brus.

ROLFE: He's got scissors right here! He's got scissors right here! Let go of the scissors! Let go of the scissors!

EBERL: Drop the scissors.

……..

EBERL: Let go of the scissors!

WALKER: I'm gonna kill you mob (inaudible) ahhhh!

EBERL: I've got it off now mate.

……

EBERL: Just make sure the cuffs are on properly.
WALKER: Leanne, Leanne.
ROLFE: Fuck, I'm (inaudible).
EBERL: You alright bro?
ROLFE: His shirt, his shirt …
EBERL: Have you locked 'em?
ROLFE: No, cause his shirt –
EBERL: That's okay, take your time.
ROLFE: Alright, we need to get your cuff there.

[194] The body worn footage shows that after the shots were fired, the deceased continued to struggle; the accused and Constable Eberl continued to try to subdue him and put handcuffs on him; the deceased had scissors in his hand; and the accused and Constable Eberl kept trying to get the scissors away from him.

[195] The Crown concedes "that s 148B would apply if the accused genuinely believed that the 'acts' (firing the second and third shots) were done 'under' his power to arrest the deceased."[55] However, the Crown characterises the defence case as being that the accused had a lawful justification for the acts of firing the second and third shots pursuant to s 43BD of the *Criminal Code* – namely that he believed the acts were necessary to defend Constable Eberl from the risk of death or serious harm. That is to say, the shots were not fired in order to effect the arrest of the deceased: they were fired (on the accused's case) to defend Constable Eberl.

55 Crown's written submissions at [72].

[196] The Crown accepts for the purposes of this hearing that there is a temporal connection between the accused entering House 511 to arrest the deceased and the discharge of the second and third shots, but contends that by the time the accused discharged the second and third shots, the circumstances had materially changed. On the accused's version of events, he fired those shots because he had a genuine belief that Constable Eberl was at risk of serious harm or death, and not to effect the arrest of the deceased. The Crown says that there is a fundamental distinction between the accused purporting to exercise a power to arrest the deceased, and shooting the deceased with intent to kill him or cause him serious harm in order to defend Constable Eberl. Because of this, the Crown contends that, on the assumed facts, there is no material on which a jury could conclude that the second and third shots were fired in order to arrest the deceased.

[197] The defence contends that the Crown's submission rests on a flawed assumption that a person can have only one purpose or intention at a time, and that an intention to defend Constable Eberl could not co-exist with a continuing intention to arrest the deceased. Mr Edwardson for the Defence submitted that the proposition that a belief that Constable Eberl was at risk of serious harm or death somehow takes away the continuation of the power of arrest cannot withstand sensible legal analysis.

[198] Defence counsel submitted that there was one continuous transaction from the moment the accused asked the deceased to put his hands behind his back, to the deceased's response of deploying the scissors and stabbing the

accused then turning his attention to Constable Eberl, right through to the deceased being secured in handcuffs. Mr Edwardson for the Defence submitted that it was evident from the video footage that the deceased was continuing to resist throughout the whole process and continued to have possession of the scissors during that process until they were taken from him.

[199] Defence counsel submitted that everything that was done during that process, including the firing of the shots in question, was part and parcel of the process of arresting the deceased and done pursuant to the power to arrest in PAA s 124.

[200] Defence counsel pointed out that the Defence position at trial might well be that the accused was doing both things at once – trying to arrest the deceased and acting to protect Constable Eberl, both of which are inextricably linked because of the conduct of the deceased which ultimately forced the hand of the accused. He said that the accused might say, for example, "I was trying to arrest him. He was violently resisting. He had already stabbed me. He had turned his attention to my partner and was seeking to deploy the same potentially lethal weapon on him, and in those circumstances, I was trying to achieve two purposes, one the arrest and restraint of Mr Walker, and two to ensure that my partner was not stabbed by him like me."

[201] We agree that the (assumed) fact that at the time he fired the second and third shots, the accused was trying to defend Constable Eberl, does not mean that, ipso facto, he was not also exercising, or purporting to exercise his power to arrest the deceased. On the assumed facts, it would be open to the jury to find that at the time he fired the second and third shots, the accused was acting with the dual purpose of attempting to arrest the deceased who was violently resisting and trying to defend Constable Eberl.

[202] The Crown submits that there is a logical inconsistency between an intention to kill someone and an intention to arrest them in order to charge them with an offence and/ or bring them before a court; but there is no logical inconsistency between an intention to cause someone serious harm and an intention to arrest them for those purposes.

[203] Ultimately, the question of what the accused's intention was (or his intentions were) will be a matter for the jury. The question of whether the accused was performing a function under the PAA (the function of preventing the commission of an offence, and/or of protecting life and/or some other function) or exercising a power under that Act (either the power of arrest or some other power) will likewise be a matter for the jury after they have heard all of the evidence.

Answer to Question 3:

[204] The answer to Question 3 is as follows:

(a) The protection from criminal and civil liability conferred by s 148B of the PAA extends to acts done (or omitted) in the performance or purported performance of functions in s 5 of that Act.

(b) On the assumed facts it would be open to the jury to find that at the time he did the acts which are the subject of the charge (ie firing the second and third shots) the accused was performing or purporting to perform the function of preventing the commission of an offence by the deceased (ie the stabbing of Constable Eberl) and/ or the function of protecting life (that of Constable Eberl) and/ or that he was exercising or purporting to exercise a power under the PAA (the power to arrest the deceased under PAA s 124).

(c) The question whether the accused was in fact acting in the exercise or purported exercise of a power, or the performance or purported performance of a function under the PAA is a question of fact for the jury to determine after they have heard all of the evidence.

(d) The separate question of whether, at the time he performed the relevant acts, the accused was acting in good faith is likewise a question of fact for the jury to determine after they have heard all of the evidence.

(e) Once all of the evidence is in, it will be a matter for the trial judge to direct the jury on the matters they need to be satisfied of to determine whether, as a matter of fact, it is reasonably possible that:

(i) the accused was performing or purporting to perform and/ or exercising or purporting to exercise a power under the PAA; and

(ii) the accused was doing so in good faith.

Question 4:

[205] Defence counsel contended that the answer to Question 4 should be yes. The Crown contended that the answer should be no, but only because they contended that the answer to Question 3 should be no. Both counsel were agreed that there was no inconsistency between s 208E of the *Criminal Code* and PAA s 148B. We agree.

[206] During the hearing of this reference, there was some discussion about the possibility of incompatibility between s 208E of the *Criminal Code* and PAA s 148B.

[207] Section 208E provides:

> 208E LAW ENFORCEMENT OFFICERS
>
> A person is not criminally responsible for an offence against this Part if:
>
> (a) the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and
>
> (b) the conduct of the person is reasonable in the circumstances for performing that duty.

[208] The Explanatory Statement on the Bill introducing s 208E of the *Criminal Code* states:

> As Part II of the *Criminal Code* will not apply to scheduled offences, this provision is necessary to provide a defence for police and prison officers in circumstances involving a scheduled offence.
>
> Currently, section 28 of the *Criminal Code* would apply.

[209] There are several principles of statutory construction dealing with possible inconsistency between legislative provisions which may possibly be applicable.

[210] Where a later legislative provision is inconsistent with an earlier one, then it may be inferred that the later statute was intended to repeal the earlier, or where there is partial inconsistency, that the later statute was intended to prevail to the extent of any inconsistency in their application to particular cases. This is summed up in the maxim *leges posteriores priores contrarias abrogant*: later Acts repeal earlier inconsistent Acts. In *Goodwin v Phillips*,[56] Griffith CJ referring to a particular provision in Victorian legislation, and said:

> The effect of that provision is this: so far as possible the Acts are to be read together and as forming one document, and so far as there is anything in a later Act inconsistent with the provisions of the earlier Acts the later Act must be read as a proviso or exception to the former, if possible, but if the provisions are quite inconsistent the later must necessarily operate as a repeal of the earlier.

His Honour went on to say:

> That proposition is only an instance of a more general rule, that is, that where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act

56 (1908) 7 CLR 1 at 7.

> is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are accepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

[211] However, this principle of statutory interpretation will only be applicable where the two statutory provisions under consideration are genuinely inconsistent. In *Goodwin v Phillips*, Barton J said:

> Before coming to the conclusion that there is a repeal by implication "The Court must," to use the words of *Hardcastle* in his work on the Interpretation of Statutes (*Craies on Statute Law*, 4th ed., p. 303) "be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, i.e., the repeal must, if not express, flow from necessary implication." If, therefore, there is fairly open on the words of the later Act, a construction by adopting which the earlier Act may be saved from repeal, that construction is to be adopted

[212] In *Saraswati v R*[57] Gaudron J expressed the same cautious note:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other. See *Butler v. Attorney-General (Vict.)* [1961] HCA 32; (1961) 106 CLR 268, per Fullagar J. at p 276, and per Windeyer J. at p 290. More particularly, an intention to affect the earlier provision will not be implied if the later is of general application (as is the provision by which indecent dealing is constituted an offence under the Act) and the earlier deals with some matter affecting the individual (as does the

57 (1991) 172 CLR 1 at 17.

limitation provision in s.78). Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation. The position was stated by Lord Selborne in *Seward v. The "Vera Cruz"* (1884) 10 App Cas 59, at p 68, as follows:

> *"where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so".*

[213] Another way of expressing the same caution is to say that there is a strong presumption that the legislature does not intend to contradict itself, but intends both legislative provisions to operate within their own sphere.[58]

[214] Inconsistency between statutory provisions is dealt with differently where the earlier provision is a special provision and the later provision is a general one. Those circumstances may call for the application of the maxim *generalia specialibus non derogant*: a general provision does not impliedly repeal a specific provision. The principle was explained by Barton ACJ in *Maybury v Ploughman*[59] in the following terms:

> The judgment under appeal turns on the application of the principle involved in the maxim *generalia specialibus non derogant* to cases in which the legislature, after having dealt specially with a particular matter, has afterward passed an enactment in general terms wide enough to repeal, or supersede, or qualify the original provision ….. I wish to quote a passage from the judgment of Wood V-C in *Fitzgerald v Champneys* 2 J & H 31 at 54 quoted by Sterling J in *Re Smith's Estate; Clements v Ward* (1887) 35 ChD 589 at 595. 'The reason in all these cases is clear. In passing the special Act, the legislature had their

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58 *Butler v Attorney General (Vic)* (1961) 106 CLR 268 at 276 per Fullagar J.at [7]; Fullagar J also said, st [6]: "I would say that it is a very rare thing for one statute in affirmative terms to be found to be impliedly repealed by another which is also in affirmative terms."

59 (1913) 16 CLR 468 at 473-4.

> attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having done so, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special Act, they had thus carefully supervised and regulated.

[215] With this maxim, too, before the principle can be called into operation it must be shown that there is an irreconcilable conflict between the relevant provisions. It must be shown that the two provisions cannot stand together.[60]

[216] In our view, there is no call for the application of either principle of construction because s 208E of the *Criminal Code* and PAA s 148B are not inconsistent: there is no irreconcilable conflict between the two provisions. (Nor is either provision inconsistent with s 43BD.)

[217] Both s 148B and s 208E provide partial immunity from criminal liability or responsibility to police officers in the areas specified in each section. Their areas of operation are not the same, but they overlap. Section 148B applies to all criminal and civil liability and s 208E applies only to offences under Part VI of the *Criminal Code*; s 148B applies a person performing a function or exercising a power under the PAA and s 208E applies to police officers, correctional services officers and other law enforcement officers acting in the course of their duty.

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60 Pearce and Geddes *Statutory Interpretation in Australia (7th Edition)* p 271 at [7.20]; *Fonteio v Morando Bros Pty Ltd* [1971] VR 658; *Associated Minerals v Wyong Shire Council* [1974] 2 NSWLR 681; (1974) ALR 353; *The Ombudsman v Laughton* (2005) 64 NSWLR 114.

[218] The area of overlap – ie the sphere in which both sections can potentially operate – consists of acts done in the exercise of a power or performance of a function under the PAA[61] (a subset of acts done in the performance of a person's duty as a police officer, corrections officer or other law enforcement officer) which are offences under Part VI of the *Criminal Code* (a subset of all civil and criminal liability).

[219] The two sections apply different standards for the operation of the immunities they confer. The protection against civil or criminal liability conferred by s 148B applies where a person does or omits to do a relevant act (ie one within the scope of the section) in good faith. For the immunity from criminal responsibility in s 208E to apply, the relevant conduct of the person (ie that falling within the scope of the section) must be "reasonable in the circumstances for performing that duty".

[220] Although the two sections apply different standards for the immunity they confer, that does not mean that they are inconsistent within the sphere in which they both potentially operate. Distilling the different standards down to their essentials, s 208E provides that a person to whom the section applies will not be criminally responsible if their conduct is reasonable for performing the given duty; s 148B provides that a person to whom the

61 or the purported exercise of a power or performance of a function.

section applies will not be criminally liable if they are acting in good faith – that is to say, honestly.[62]

[221] The two expressions *"is not criminally responsible if the conduct is reasonable"* and *"not criminally liable if they are acting in good faith"* are not logically or necessarily inconsistent.

[222] Starting with the proposition in s 208E, *"a person will not be criminally responsible if the conduct is reasonable":* this proposition tells you nothing about when a person will be criminally responsible, and it tells you nothing about any other circumstances in which the person may not be criminally responsible. In particular, you cannot infer from the proposition *"a person will not be criminally responsible if the conduct is reasonable"* that the converse is true – namely that *"a person **will** be criminally responsible if the conduct is **not** reasonable."*[63]

[223] Because you cannot infer from the proposition *"a person will not be criminally responsible if the conduct is reasonable"* that a person **will** be

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62 In *R v Whittington (No 2)* (2007) 19 NTLR 83, the Court of Criminal Appeal considered the meaning of the term "in pursuance of" in PAA s 162 a protective provision which provides a two month time limit for all actions and prosecutions against any person for anything done "in pursuance of" the PAA. The Court said, at pp 86 – 87 para [15]: "A succession of High Court authorities plainly establishes that provisions such as s 162(1) apply if the unlawful act is committed by a person who genuinely believes that the act was done in the proper execution of that person's duties: *Hamilton v Halesworth* (1937) 58 CLR 369 at 374 and 380; *Little v Commonwealth* (1947) 75 CLR 94 at 108; *Webster v Lampard* (1993) 177 CLR 598 at 605 and 619.

63 This is commonly known in logic as "the converse fallacy". It is behind such gems of logical reasoning as the following by conspiracy theorists.

Premise 1: If there were a conspiracy, the government would deny it.

Premise 2: The government is denying it.

Conclusion: Therefore there is a conspiracy!

criminally responsible if their conduct is **not** reasonable, the statement *"a person will not be criminally responsible if the conduct is reasonable"* is not logically or necessarily inconsistent with the statement *"a person will not be criminally liable if they are acting in good faith".* There is no irreconcilable conflict between the two provisions. They are not so inconsistent that they cannot stand together.

[224] It would be different if s 208E said that the people to whom the section applied *"will not be criminally responsible **only** if the conduct is reasonable"*. It would not be a logical fallacy to infer from that proposition that the converse is true: *"if the conduct is **no**t reasonable the person **will** be criminally responsible".* A section so worded would be relevantly inconsistent with the proposition *"a person will not be criminally liable if acting in good faith".* (The word "only" would exclude the application of any other protective provision which applied an alternative test. A person acting in good faith would *only* not be criminally liable if they were also acting reasonably. Section 208E would override s 148B to the extent of the inconsistency in application in any given case.)

[225] That is not the case with s 208E and s 148B as they are worded. It doesn't matter that in practical terms s 208E will probably not be applied in circumstances where s 148B also applies (or for that matter where the self-defence provision in s 43BD also applies). Section 208E still has work to do, for corrections officers and other law enforcement officers and even for police officers in the (theoretically possible if practically very narrow) area

where they are acting in the course of their duty but not exercising a power or performing a function under the PAA.[64]

[226] If s 208E and s 148B were necessarily inconsistent, application of either maxim would not necessarily lead to the result that s 208E applies to the extent of any inconsistency between the two sections.

[227] Section 208E was introduced in 2006; s 148B in its current form in 2016. If the two were necessarily inconsistent, then application of the maxim *leges posteriores priores contrarias abrogant* would lead to the result that s 148B would prevail to the extent of any inconsistency unless it could be said that s 208E is a specialist provision and s 148B a later, more general provision such that the maxim *generalia specialibus non derogant* would apply.

[228] It is far from clear that s 208E is a specialised provision and s 148B a later, more general provision. Sections 208E and 148B each have a respectable claim to be the "special" provision. Section 148B of the PAA gives a wide exemption from criminal or civil liability but only when the person has done or omitted to do an act (in good faith) in the performance of a function or exercise of a power (or purported exercise of a power or performance of a function) or under that Act. To that extent, it is a specialised provision

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64 This may be so even if the protection afforded by s 148B extends to the areas referred to in s 148A. Section 148A applies where an act is done by a member in the capacity of a public official under "an Act or regulations ('the authorising law')" [s 148A(1)] where the person is authorised to perform inspection, investigation or other enforcement functions" under the authorising law, which may leave open common law duties and/ or non-enforcement type functions.

dealing only with those people tasked with performing functions and exercising powers under the PAA and doing so or purporting to do so.

[229] Section 208E of the *Criminal Code* is a more general provision than PAA s 148B in several respects.

(a) It applies to a potentially wider class of people - not only to police officers, but also to correctional services officers and other law enforcement officers.

(b) Those entitled to the protection of that section need only be acting (reasonably) in the course of their duty as police officers, correctional services officers or other law enforcement officers, which, even in the case of a police officer, is potentially wider than exercising a power or performing a function under the PAA, even if one includes the extended definition in s 148A.

[230] However, s 208E is a more specialised provision than s 148B in one important respect: it only applies in relation to offences against Part VI of the Code: "Offences against the person and other related matters", including murder. The protection under s 148B applies to <u>any</u> civil or criminal liability.

[231] It seems to us that on a reasonable reading of both sections, both can be said to be, in some sense, specialist provisions: s 208E of the Code might be said to be a "special" provision applying to offences under Part VI of the *Criminal Code* and PAA s 148B to be a "special" provision applying to

people tasked with performing functions and exercising powers under the PAA when they are doing so or purporting to do so.

[232] In our view, however, the answer is that, since the two sections are not logically, or necessarily inconsistent, the legislative intention was for both protective provisions to apply. Nor is there a necessary inconsistency between either s 208E or s148B and the self-defence provisions applicable to Schedule 1 offences in s 43BD of the Code. The three defences (in ss 208E, 148B and 43BD) are all available and all operate according to their own terms and an accused can take advantage of any or all of them. We agree with Southwood J and Mildren AJ that there is nothing in the terms of s 208E to suggest that it is the only defence open to a police officer charged with an offence against Part VI of the Code and that there is nothing in the PAA (in s 148B or elsewhere) to indicate that s 148B is not available to an offence under Part VI of the *Criminal Code*.

Answer to Question 4:

[233] The answer to Question 4 is yes.

Summary

Question 1:

Does s 148B of the *Police Administration Act 1978* (NT) apply to acts or omissions done or made, or purported to have been done or made only if the police officer is acting in the capacity of a public official under an authorising law?

Answer:

No. Section 148B applies according to its terms, that is to say, to a person performing a function or exercising a power under the PAA (or purporting to do so).

Question 2:

Having regard to s 148A of the *Police Administration Act 1978* (NT), and based upon the assumed facts, is a police officer who acts or purportedly acts in the exercise of a power of performance of a function under the Act, acting in the capacity of a public official under an authorising law?

Answer:

It is not necessary to answer Question 2 in light of the answer to Question 1. However, if it was necessary to answer that question we would answer it "No".

Question 3:

Based upon the assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, would it be open to the jury to find that the accused was acting in the exercise or purported exercise of a power or performance or purported performance of a function under the *Police Administration Act* 1978, such that s 148B of the Act arises for the jury's consideration?

Answer:

(a) The protection from criminal and civil liability conferred by s 148B of the PAA extends to acts done (or omitted) in the performance or purported performance of functions in s 5 of that Act.

(b) On the assumed facts it would be open to the jury to find that at the time he did the acts which are the subject of the charge (ie firing the second and third shots) the accused was performing or purporting to perform the function of preventing the commission of an offence by the deceased (ie the stabbing of Constable Eberl) and/ or the function of protecting life (that of Constable Eberl) and/ or that he was exercising or purporting to exercise a power under the PAA (the power to arrest the deceased under PAA s 124).

(c) The question whether the accused was in fact acting in the exercise or purported exercise of a power, or the performance or purported performance of a function under the PAA is a question of fact for the jury to determine after they have heard all of the evidence.

(d) The separate question of whether, at the time he performed the relevant acts, the accused was acting in good faith is likewise a question of fact for the jury to determine after they have heard all of the evidence.

(e) Once all of the evidence is in, it will be a matter for the trial judge to direct the jury on the matters they need to be satisfied of to determine whether, as a matter of fact, it is reasonably possible that:

    (i) the accused was performing or purporting to perform a function and/ or exercising or purporting to exercise a power under the PAA; and

    (ii) the accused was doing so in good faith.

Question 4:

The accused, Zachary Rolfe, is charged with murder, contrary to s 156 of the *Criminal Code Act 1983* (NT). In the alternative the accused is charged with reckless or negligent conduct causing death, contrary to s 160 of the *Criminal Code*. In the further alternative, the accused is charged with engaging in a violent act which caused the death of the deceased, contrary to s 161A(1) of the *Criminal Code*. In these circumstances, is a defence under s 148B of the *Police Administration Act 1978* (NT) potentially open in the light of s 208E of the *Criminal Code*?

Answer:

"Yes".
