

6 December 2004

The Honourable Peter Beattie  
Premier  
Office of Premier & Cabinet  
Brisbane Q 4000

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Dear Mr Beattie

### **Re Palm Island - Death in Custody**

Aunty Erykah Kyle, Chair of the current Palm Island Aboriginal Council (“PIAC”)<sup>1</sup> last week requested that my firm attend Palm Island to assist in relation to the range of issues arising from the death of a person in the community whilst in police custody<sup>2</sup> including the formulation of an appropriate response to a document styled “Five Point Plan for Palm Island” (“the FPP”) issued by your government last week.

As a result Ms Louisa Pink and I attended Palm Island on 3 – 5 December 2004 to meet the Chair and other members of PIAC and take their initial instructions on these matters.

Neither Ms Pink nor I have had prior involvement in issues concerning Palm Island. We have had direct consultations with PIAC and the Chair over the last few days. You would be aware that prior to leaving Brisbane, Ms Pink had some dialogue with key personnel in several government departments, in particular Ms Uschi Schrieber from your own department. We appreciate that dialogue. PIAC have indicated that they have found it difficult to construct a meaningful dialogue with the relevant departments which have responsibilities for implementing programs and policies on the Island to this point. The preliminary information from Ms Schrieber has assisted us in providing informed advice to PIAC. We hold instructions to seek to maintain and build on this line of communication.<sup>3</sup>

Ms Pink will contact Ms Schrieber (or whoever else you might suggest) as soon as we have had an opportunity to process the information we have gathered from our attendance on the island. We hold instructions to be, at least in the immediate interim period, the conduit between PIAC and the several government agencies that are identified in the FPP as seeking to implement a number of policy and funding initiatives in the midst of the current difficulties. However before we can usefully commence that process, from the instructions we’ve received and our own observations, it is quite apparent, we believe, that the foremost role that we might play is to facilitate some reparation of the breakdown in communications between the community as a whole, PIAC and government agencies concerning this death, subsequent events and the underlying causative factors.

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<sup>1</sup> Ms Kyle is also Mayor designate.

<sup>2</sup> Mindful of cultural sensitivities we have not used the deceased person’s name in this correspondence.

<sup>3</sup> We are not funded to undertake such a role but will continue in it given the present difficulties being encountered in constructing such dialogue at this important juncture.

Accordingly we shall focus this correspondence on two of the immediate if not urgent matters that we have identified viz., the funeral and the charges pending against numerous members of the community alleged to have been involved in the damage done to some key government buildings on the island immediately following the announcement of the initial findings by the State Coroner as to the cause of the death.

We shall also seek to address PIAC's responses to the FPP.

### Funeral and related issues

We do not hold instructions nor do we purport to represent the deceased's family. We understand that they are separately represented by Chalk & Fitzgerald (Melbourne). There are however several matters that PIAC believes need to be discussed on behalf of the community as a whole:

1. The funeral arrangements.
2. Police presence at the funeral.
3. The facilitation of attendance of family and close community members to the funeral, particularly of those who are presently in custody in gaols throughout Queensland.
4. Government funding of aspects of the funeral.

A glance through the Cape York Justice Study ("CYJS") commissioned by your government from Tony Fitzgerald QC in 2001 reveals that the issues currently afflicting Palm Island are not unique amongst remote Aboriginal and Torres Strait Islander Communities. Many of the observations and recommendations in it are quite apt to the present situation.

Before we descend to the issues surrounding the funeral we think it is useful to refer to the points made in the CYJS concerning the complexities that arise in convening a culturally appropriate burial for a community member in these circumstances. It appears at pages 261 - 262 of the CYJS in the chapter concerning governance issues.

*"Aboriginal politicians have very strict cultural protocols to follow in the conduct of funerals that involve an extensive network of ceremonial and kin obligations. These obligations, strongly rooted in tradition and custom, must be respected and carried out by particular leaders and/or individuals depending upon their position in the kinship system. They generally require both ritual material outlays such as ceremonial goods, grave goods and foods, and financial outlays, particularly if kin need to be brought in from other communities. Expenditures are incurred on individual, family and communal levels, again depending upon the position of the deceased, the positions of those carrying out the obligations, and the nature of the obligation. **Neglecting these obligations risks ... community outrage.** Council assets also become part of the expenditure process; councillors often drive council vehicles to transport those who do not own vehicles to the funeral and relevant ceremonies. In this case a council asset thus becomes a mode of public transport, which is not its intended purpose. Communal expenditures of this type are not included in mainstream budgets. From the point of view of the community residents, the council is there to serve their needs and community needs include burying the dead as much as paving the roads. Owing to cultural dynamics of reciprocity, sharing and obligation, the leadership finds itself in a position where the resource, whether financial or capital, is expected to be shared. Councils are then found to be in breach because community priorities have taken precedence over mainstream accounting and audit standards. But in the view of community members the council members have conducted themselves appropriately, the council itself has fulfilled its obligations, and council affairs have been properly managed.*

The **Queensland Auditor-General** has noted that funeral expenditures is an issue that requires immediate attention, for while the cultural significance of funerals to community members is appreciated by Government,

***...there are no guidelines in place for the use of public funds and community moneys towards meeting the costs of such community events... I believe it would be prudent for guidelines to be issued to assist with the determination of what might constitute appropriate levels of contribution of both community and public moneys towards funeral.***

We would urge acceptance of the following broad premises: -

Firstly, this is a significant funeral within the indigenous community. The death and the events following it continue to affect the entire Palm Island community. The significance of it extends to numerous familial connections throughout the State particularly in North Queensland and in the Aboriginal community nationally. With no disrespect to the deceased or his family, the obvious tragedy is that the primary reasons for this significance are the circumstances in which it occurred, that is, it is the latest Aboriginal death in police custody. This has been compounded by the events that immediately followed.

Secondly it is apparent that many if not most members of the community are grief-stricken and in a profound state of mourning. Significant hurt and disillusionment attaches to the bare and indisputable facts –

1. The deceased was arrested and taken into custody for a trivial “nuisance offence”
2. He was affected by alcohol.
3. He was taken into a police lockup.
4. He died shortly thereafter after sustaining broken ribs and internal injuries.

The community’s pain has been severely compounded by the heavy handed response taken by police in steps to arrest people suspected to have been involved in the damage to the police station, court house and other government buildings. The removal of many people from the island has further compounded this hurt and distress. Ms Pink and I received a poignant summary of this sentiment when we were approached by a very impressive, but tired and emotional young man at the local canteen who we do not have permission to identify. He did not know who we were when the dialogue started – he assumed that we were “white teachers”. We have used our best recollection of his words, merely to be accurate rather than patronizing. In sum this young man said:

“you don’t need to be scared of me or any of us”; “we are human beings”; “I am a proud man”; “our children and our elderly are traumatised by guns being pointed at their heads by police”; “this was a murder”; “white people have nothing to fear from us”; “this was just wrong”; “that fella was my cousin brother”; “if we wanted to have killed the police, our people could have easily done that”; “we didn’t, we are human beings just like you, what would you have done?”

Despite his emotion and the confronting sense of the dialogue, we felt completely unthreatened. However the pain in his heart was palpable and frankly it was heartbreaking to see it in such a visceral setting. Another man added, quite ‘matter of factly’: “they bash you all the time we just accept that, but this was wrong, this was murder”. We have encountered similar sentiment throughout our very brief stay.

Thirdly, it does not involve an acknowledgement of responsibility for the death to take a compassionate approach to the situation from a governmental perspective.

Palm Island is, as you know, an impoverished community in an economic sense. PIAC could not, and we would add, should not have to, self fund this funeral in a way commensurate with its importance to the community. Nor should any further burden be placed upon the family.

Finally, the risk of further conflict between police and the community, including at the funeral and following can be managed, if not avoided, if a degree of respectful regard is shown and led by your government.

We suggest, in this respect, the following:

1. Genuine support should be given by government to ensure that the community can hold a culturally appropriate burial and that due respect be given by government and other agencies to the obvious grief that attends this event and which will be confirmed, if not be heightened, by the funeral.
2. Administrative provision should be made to ensure that all extended family members<sup>4</sup> who are reasonably available - including those who are in custody on remand in relation to the riot offences - be permitted and practically able to attend the funeral. (See section 59(1)(b) of the *Corrective Services Act 2000*). If extra-ordinary arrangements and funding are necessary that should be put in place. You could consider this a minimal investment towards reducing the perceived risks of a repetition of last week's events.
3. We noticed a significant police presence on the island in our brief stay. It is perhaps understandable but we query the logic in that. There is no suggestion of "horizontal violence" in the community. Nor is there any report of even isolated anti-white sentiment or any undisciplined interaction with police. Most people are in a state of grief and a profound sense of mourning. The targets of the anger following the State Coroner's first announcement as to the cause of death as being an "accident"<sup>5</sup> and the current resentment amongst some of the community were the physical structures associated with the arrest, incarceration and death. Although it would be naïve to suggest that all, if anything, has been forgiven by many within the community, Palm Island is not a lawless, mindless community and gratuitous violence or anti-white sentiment has not been a feature of the island's history including the events following the destruction of the police station and court house.
4. Accepting that these are police operational matters, we would suggest that the police presence on the island in the lead up to and during the course of the funeral day and night be designed in a way that is unobtrusive, unchallenging and non confrontational. Individual officers should, if at all possible, be selected on their experience and training in conflict resolution, cultural awareness and sensitivity rather than their capacity for or experience in using force to restrain citizens. If at all possible the most visible should be selected from the indigenous officers in the force. There should be a continuing dialogue with the family of the deceased and continued personal interaction with the elected councillors of PIAC and its Chairperson to 'negotiate' these arrangements.

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<sup>4</sup> Including as many members of the "extended family" as is possible.

<sup>5</sup> If, as is suggested in media reports, there had been a scuffle with a police officer in the police watch house and fall which might explain the injuries, and if it was thought that this "accident" caused the death, it is questionable why this is still not a prima facie case of manslaughter which would warrant a charge or at least a very serious examination of preferring such a charge. The question of accident is usually for a jury to resolve.

It would be a significant symbolic step towards reparation of the current divide and an indication of goodwill and respect if the government announced that it could meet the overall costs of the funeral and facilitate the attendance of family members at the funeral. A humane and generous approach might be taken, rather than one laced in fear and perhaps driven by a desire to “show force” or to “teach a lesson”. It should, in this context, be borne in mind that the government lost two buildings (one of which was scheduled for demolition and replacement) whereas the community has had another death in police custody to deal with, compounded by many of their community being arrested and transported off the island. The latter is not an event that has attended the lives of most non-indigenous Australians, yet is a frequent occurrence in the indigenous community.

### **Charge and Bail Issues**

We are mindful of the need for an independent judiciary.<sup>6</sup>

We do not purport to have a detailed understanding of the magistrate’s refusal of bail for a number of the people who have been charged with the “riot offences”. They are separately represented. We do not hold instructions from any of them. It is nevertheless concerning to learn that respected members of the community who have had no prior interaction with the criminal justice system have been refused bail or have been required as a condition of bail not to return to Palm Island (particularly given the provisions of s11 of the *Bail Act 1980*).

We recognise that the charges laid are most serious, but that must be seen in a proper context. The alleged conduct arises out of the community outrage and upset following the publication of the first Coronial Report. Some of those refused bail are mature decent people who have been charged with their first ever criminal offences. Some are children. The apparent reason for the refusal of bail is their present inability to point to an appropriate residential place of abode away from their homes on Palm Island. The prosecution submissions at these bail hearings, we understand, includes the requirement that these people are not to reside on Palm Island pending the resolution of the charges they face.

Whilst bail is a function of the court system, the availability of bail options is affected by the social and physical infrastructure available to assess the conventional issues that should attend the grant of bail under the *Bail Act* viz, a due assessment of the unacceptability of risks of re-offending and/or failing to appear in court. State government resources would well be expended, to immediately establish bail hostels on the island to accommodate the few, if any people, who fall short the objective criteria because of the absence of adequate residential arrangements. PIAC wishes to assist in converting current structures on the Island as an interim measure.

### **Five Point Plan for Palm Island**

Due the above, we would urge you to delay the imposition of many of the matters set out in your FPP. PIAC recognises the apparent urgency of negotiating these longer term and systemic issues however the community needs to grieve appropriately from recent events before these they can be properly negotiated.

It would be injudicious to see what has recently occurred as an isolated incident fuelled by mismanagement affected by alcohol.

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<sup>6</sup> This firm was involved in the recent cases involving the magistracy in which these principles were highlighted.

A student of history could well see that these events are almost the inevitable consequence of the history of Palm Island caused by the erroneous policies of past governments. PIAC sees this point in time as an opportunity to change the direction of this path. Your government has an equal opportunity to participate in this directional change and we can see some of the seeds are in the FPP and the white paper issued by your government following the CYJS.

Whilst a joint and genuine commitment to seek to deal with these fundamental causative factors is immediately necessary, the detail of that discussion must wait until the grief diminishes at least a little, and the path to genuine trust is re-established or at least on the horizon.

You would know for example that the Alcohol Management Plan is still the subject of dialogue with the Palm Island community and the operation of the *Local Government (Community Government Areas) Act 2004* is imminent. PIAC is very mindful of its responsibility to meet the challenge of getting the Palm Island community to engage in this discussion in a genuine and meaningful way.

To impose these changes in the current climate would be a reversion to past governmental mistakes, contrary to the core principles in the CYJS, your government's own White Paper and perhaps more importantly is not likely to be embraced by the community. Instead of relieving the tensions and deprivations currently experienced by the community and which have underpinned recent events, it will exacerbate them.

This is, in these respects, a pivotal 'fork in the road', for both sides of this complex dynamic. We would urge you to seize the opportunity presented by the current situation.

We have taken instructions from PIAC as to the detail of the FPP and associated matters and will be in a position to assist PIAC in its liaison with your government over the next few weeks.

Indeed, Ms Pink, as I have said, will call Ms Schrieber shortly to discuss and negotiate the framework for this discussion on behalf of PIAC. However, your acknowledgement of the matters raised above and your stated commitment to this process is an essential ingredient for this to occur in a meaningful way.

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