

ANU PUBLIC LECTURE SERIES 2005

Law Lecture Theatre, Faculty of Law,
Fellows Road, Australian National University
The National Centre for Indigenous Studies and The Centre of International & Public Law

Palm Island – ‘Something is very wrong’¹

Andrew Boeⁱ

In November 2004, an Aboriginal man was found dead in a police cell on Palm Island.² He was unconscious when he had been placed into the cell – which was comprised of a besser block box with no means of communication with the outside world other than through a intercom device³ – a few hours earlier by a police officer who had arrested him for a “public nuisance offence”⁴: for saying, “you shouldn’t be locking him up, you’re a blackfella yourself, you shouldn’t be locking up black people” to an Aboriginal police liaison officer who was helping in the arrest of another man for swearing in public. The police officer admitted to having been involved in a “scuffle” with his prisoner before he was left comatose in the cell, he had, he said, continued to resist arrest.

The man’s slow and painful death is recorded on the watch house video. It is an appalling document to look at closely. The post mortem evidence now suggests that the cause of the death was the application of severe localised blunt force to the abdomen resulting in the cleaving of the liver such that it was almost sliced in half. A punch thrown at a standing person is said not to be sufficient to cause such an injury; the person would have to have been against a fixed wall or the ground and a knee or elbow dropped into the region. A coroner is still to assess whether there is

¹ This paper was presented at the Australian National University on 28 September 2005. It seeks to update an earlier paper entitled “Something is wrong” published in February 2005. The assistance of Paula Morreau LLB (Hons), Louisa Pink LLM (QUT) and Renée Cobb LLB (Hons) in the preparation of these papers is acknowledged.

² Some members of this man’s family have asked that he be referred to as ‘Mulrunji’. This probably sought to be in line with traditional practices in the Gulf. Anthropologist David Trigger observes: “The best spelling for the term in Gulf languages, used instead of a person's name for a period following the death, is probably 'moordinyi'. Inserting the 'r' means Australians are likely to pronounce it as sounding like 'sure' ('moordinyi') which is correct, rather than like 'zoo' (which is not correct). The reason the 'u' is used in technical work ('murdinyi') rather than 'oo' is that this is the linguistics usage. Trouble is standard English speakers interpret 'u' as in the word 'must'.”

³ The evidence at the Coronial Inquiry has revealed that this intercom device was either not functioning properly or had not been turned on. The recorded cries for help from the man as he writhed in pain before his death were apparently not heard by the police in the station. Perhaps more concerning is that two senior police officers from the station said that they did not know how to operate this monitoring device and had not used it in respect of other detainees.

⁴ *Summary Offences Act 2005 (Qld) 6 Public Nuisance*

(1) A person must not commit a public nuisance offence. Maximum penalty—10 penalty units or 6 months imprisonment.

(2) A person commits a public nuisance offence if—(a) the person behaves in—(i) a disorderly way; or (ii) an offensive way; or (iii) a threatening way; or (iv) a violent way; and (b) the person’s behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

(3) Without limiting subsection (2)—(a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language; and (b) a person behaves in a threatening way if the person uses threatening language.

(4) It is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence.

sufficient evidence to raise a suspicion that an offence has been committed;⁵ and otherwise make findings as to the cause of this death.⁶

The coronial hearings to date have already revealed two concerning aspects to the investigation. Firstly, local police, for several hours, did not tell the family that the man had died; they say, out of fear and panic.⁷ They, and senior operational police, ignored the recommendations of the Royal Commission in this respect.⁸ In fact, family members who came to the watch house making inquiries about the man were misled and told to come back later. The man lay on the cement floor in the cell for several more hours and rigor mortis set in. Secondly, the initial stages of the investigation into the death were handled by the local police,⁹ including a detective who lived on the island and was a close friend of the police officer who arrested the man who died. He was involved in taking statements from critical witnesses in the first 5 days of the investigation. The person in charge of the investigation, although from Townsville, also knew the police officer under investigation on a personal level.

The incident received considerable media interest when, a few days later, the State Coroner authorised the release of an interim report which was interpreted by the local community as suggesting that the death may have been the result of an “accidental fall”. Many members of the local Aboriginal community, which comprises almost 95% of the island’s residents, were enraged by this indication. The reverse of what the State Coroner hoped to achieve by this interim release occurred.¹⁰ The local police station was torched, as were the police residences. The police and other white service providers were evacuated and the Premier declared a State of Emergency.

⁵ *Coroners Act 2003* (Qld) **48 Reporting offences or misconduct**

- (1) A reference in this section to information does not include information obtained under section 39(2)
 (2) If, from information obtained while investigating a death, a coroner reasonably suspects a person has committed an offence, the coroner must give the information to—
 (a) for an indictable offence—the director of public prosecutions

⁶ **45 Coroner’s findings**

- (2) A coroner who is investigating a death or suspected death must, if possible, find—
 (a) who the deceased person is; and (b) how the person died; and (c) when the person died; and (d) where the person died, and in particular whether the person died in Queensland; and (e) what caused the person to die.

⁷ The sergeant pointed to this panic to explain why he did not perform CPR even though he had felt a faint pulse on the man. He also stated that he had not completed his CPR training, even though he had been a police officer for many years and was the officer-in-charge of an isolated indigenous community.

⁸ c.f. RCIADIC recommendation: 19 “That immediate notification of death of an Aboriginal person be given to the family of the deceased and, if others were nominated by the deceased as persons to be contacted in the event of emergency, to such persons so nominated. Notification should be the responsibility of the custodial institution in which the death occurred; notification, wherever possible, should be made in person, preferably by an Aboriginal person known to those being so notified. At all times notification should be given in a sensitive manner respecting the culture and interests of the persons being notified and the entitlement of such persons to full and frank reporting of such circumstances of the death as are known.”

⁹ c.f. RCIADIC recommendation: 32 & 33 “That the selection of the officer in charge of the police investigation into a death in custody be made by an officer of the Chief Commissioner, Deputy Commissioner or Assistant Commissioner rank. That all officers involved in the investigation of the death in police custody be selected from an Internal Affairs Unit or from a police command area other than that in which the death occurred and in every respect should be as independent as possible from police officers concerned with matters under investigation. Police officers who were on duty during the time of last detention of a person who died in custody should take no part in the investigation into that death, save as witnesses or, where necessary, for the purpose of preserving the scene of death.”

¹⁰ Some of the local residents had seen punches thrown when he was removed from the rear of the police paddy wagon.

Over the next few days a ‘battalion’ of police arrived in helicopters and police planes, many of them hooded so that they could not be identified, to secure safety on the island and arrest the rioters.

Reports vary, but many accounts have been given of women and children being burst in upon by armed and hooded police at night and in the early hours of the morning, while men ran to ‘safe houses’ to try to hand themselves over in front of the media out of fear that they might otherwise be shot at. Children later required trauma counselling and two babies were prematurely born. Complaints were made about this police response. A CMC inquiry was finalised in August 2005 and has made some recommendations – such as that hooded armed police should wear something that permits their identification later – but essentially the Police regard themselves as not having conducted themselves inappropriately.

Forty-three local men and one woman were arrested, as were some children, for their alleged involvement in the riots and burning down of the police facilities. Initially, most of them were refused bail. Police vehemently opposed their going back to live on Palm Island with their families in their homes, but the grounds for opposing bail included that the accused did not have accommodation in Townsville. A few weeks later the Chief Magistrate granted bail on stringent conditions including daily reporting, curfews and prohibitions from returning to their homes and families or participating in public rallies about the death in Townsville.¹¹

The Premier took a very robust approach to the situation; almost immediately, he leapt wholeheartedly to the defence of the police and their actions. He arrived in his government jet with a hastily drawn ‘five point plan’ and dictated to the local Aboriginal Council what he would do. The Police Minister, on several occasions, referred to the Palm Island community and its council as “dysfunctional.”

That was the information that we had, when an associate in my firm, Louisa Pink and I travelled with an indigenous academic from QUT, Victor Hart, to Palm Island on 3 December 2004. We had no specific agendum, but of course my focus was to assess whether any legal assistance was sought or needed and whether we could feasibly provide it. Victor Hart knew the Chair of the Aboriginal Council, Erykah Kyle, which permitted us to find out about the underlying issues. There was a little irony, given the reason the man who died was arrested, that the High Court had refused special leave that morning to an indigenous woman appealing her conviction and gaoling for 3 weeks for telling a police officer to “fuck off cunt.”¹²

The Palm Island we saw over those few days as we spoke to Ms Kyle and other senior community members, visited the local ‘canteen’, walked through the streets at night and sat on the local jetty speaking to children and women, was a place of contradictions. It was clear to us that at many levels something was very wrong. Amidst sublime beauty lay instances of unimaginable violence.¹³

¹¹ Several of those that were granted bail, breached their reporting conditions and one was gaoled for these breaches.

¹² *Couchy v Del Vecchio* [2004] HCA Trans 520 (3 December 2004). Ms Couchy was an itinerant alcoholic. She had used these words at 4 a.m. in the morning in an industrial estate when the only other people surrounding her were 6 other uniformed police who were shaping to take her to a holding facility because she was drunk, a place to which she did not want to go. She had a string of similar convictions.

¹³ On a recent visit, a woman was being evacuated off the island after the spurned spouse of her new boyfriend had bitten part of her face off.

We returned a week later to attend the man's funeral. We placed ourselves in a position to document any interaction between local residents and the police if further conflict followed the funeral. Incidentally there was no violence at all. It was a well attended and very sad occasion and the local community closed the canteen the night before out of respect for the family. Ms Pink and I were the only non-Aboriginal attendees at the funeral other than a lone police officer who was invited to attend.¹⁴ Inspector Trevor Adcock had been an officer-in-charge on Palm Island almost a decade ago and continues to attract the respect of most in the community. Not one of the non-indigenous teachers, nurses, doctors or other service providers thought it appropriate to attend this funeral which attracted about 3000 Aboriginal people from the island as well as from the mainland. The divide spoke volumes about how far true reconciliation is out of the grasp of this community and why in many respects the situation is about race and colour, fear and loathing.

These visits and our subsequent involvement in the Coroner's inquest compel me to think that the death was merely a trigger for attention. It only provides a reason to peer at the problems and issues faced by this small island community, and which they have faced for many years under systemic disregard and failures. Palm Island is apparently the largest single Aboriginal community in Australia.¹⁵ Whilst a death in police custody should be noteworthy, the 'bigger picture' surrounding this community is as tragic and requires much more substantial regard.

The circumstances surrounding this death and the events that have followed, have meant that Government institutions and judicial systems have had to publicly engage with this isolated Aboriginal community. Mistakes have been made. There have been some significant problems. A Minister for Aboriginal & Torres Strait Islander policy resigned following Crime & Misconduct Commission ("CMC") findings of dishonesty concerning claims about how the airfares of visitors to the island were paid. The Premier referred his own conduct at his meeting with the island's local indigenous council, to the CMC as well, pre-empting public allegations of blackmail against him. Although an independent Queens Counsel indicated that the Premier had a *prima facie* case to face in respect of these allegations, the CMC cleared him from further investigation. Also, the State Coroner stood down from the coronial inquiry following issues being raised about his past involvement in investigations into police while he was a CMC officer and his social contact with myself and other lawyers during the inquest.

The inquest has since been taken over by the Deputy State Coroner and has been at times stalled by legal arguments raised by the Commissioner of Police.¹⁶ The Police Commissioner (and others) has been censured over public endorsement of one of the police officers said to be involved in the arrest of the man who later died.¹⁷

¹⁴ Since first publishing this paper it has been pointed out to the author by a Peter Le Grand that he is non-indigenous and attended the funeral. Mr Le Grand was there as the representative of the State Minister for Child Safety and local member for Townsville, Mr Mike Reynolds. Although I did not see him, I accept that assertion. It does not greatly change my comment in the following paragraphs.

¹⁵ I have not sought to verify this claim.

¹⁶ *Commissioner of Police v Clements & Oths* [2005] QCA 203.

¹⁷ These matters have been referred to the Attorney-General, however no further action has taken place.

The committal hearings for the alleged rioters have been held and some of the men face trial. That process may present the opportunity to examine whether the alleged “riot” was an understandable expression of distress and frustration over the death in police custody or merely a violent attack on police buildings by a lawless mob. The bail conditions which banished many of the charged men from the island were examined by the Court of Appeal. In removing this “banishment condition” in respect of one of the men – he had a young family on the island and employed by the local school – the Court of Appeal observed: “apart from actual imprisonment, it is difficult to imagine a more onerous bail condition.”¹⁸

In this climate, the Premier pushed ahead with the opening of a new \$5.5M centre currently being operated by the Police & Citizens Youth Association despite objections to the facility being operated under the auspices of a police organization. It is the most significant piece of infrastructure on the island.

The inquest, bail applications and criminal proceedings became focal points for examination of the differences of perspective between police interests and that of the local Aboriginal community on Palm Island. After being cleared by the CMC,¹⁹ the Premier, in a politically astute move, announced a joint select parliamentary committee to examine issues affecting Palm Island.

The above paints a grim picture of the challenges that lie ahead in this engagement, for all those involved in Palm Island, including politicians and those representing the various interests about the island and its future. But these events and associated difficulties shouldn’t be regarded as unrelated coincidences. Instead, they show how much more care needs to be taken from this point by those involved with Palm Island in these different ways.

What is clear is that in looking at solutions, there must be a proper regard for the history of this State Government ‘settlement’. That much is reflected in the Queensland Parliament Palm Island Select Committee’s report, tabled in August 2005.²⁰ While it may be convenient and more comfortable to view the living conditions on Palm Island as resulting from the community’s limitations or dysfunctions, such a view ignores reality. Some of the bare statistics provide a sense of the institutional and systematic disregard endured by this community. A Department of Public Works Director-General’s briefing note records that in an 8 month period in 2003, there were 16 youth suicides and 8 domestic murders on the island. The community of 3500 indigenous people is squeezed into about 220 houses, averaging 17 people to a house. The rates of violence - in particular alcohol fuelled conduct - are disproportionately high. The unemployment rate on the island is said to be around 95%.

If one then looks at the history of the island, one can see that this settlement was set up, ‘managed’ and left to flounder whilst the adjoining islands and surrounding areas, including Townsville, have prospered. From the beginning, the “concept” of Palm Island has been flawed. It was set up as a place to which Aboriginal people were sent as a form of punishment for being difficult to manage on the mainland. It was built as an open prison and run with authoritarian rule. Families were torn apart when people were sent there. This has left scars on generation

¹⁸ *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at para 31.

¹⁹ Palm Island Bribery Allegation: Report of a CMC investigation into an offer made by the Premier of Queensland to the Palm Island Aboriginal Council: March 2005: www.cmc.qld.gov.au/library/CMCWEBSITE/FullBeattiereport.pdf

²⁰ <http://www.parliament.qld.gov.au/view/committees/documents/PISC/reports/report.pdf>. See the Chair’s foreword, pp1-2.

after generation. Notwithstanding recommendations from Royal Commissions, and subsequent independent studies and polished sloganism on State Government websites, policing policies have not lessened this conflict. No-one could seriously dispute that. The institutional treatment of Aboriginal people on the island should attract international censure. The history of Palm Island is a raw example of the failings of government policy in respect of indigenous people. In order to set up this settlement, the original native title holders were displaced from the island. Decades later, a Deed of Grant in trust was granted, effectively removing, by executive declaration, any native title rights that could have been asserted.

The whole framework under which people are living on this island is a mess. The epicentre of the town was a police fortress. It is a blight on this country's professed position as a decent, democratic and fair society. An underclass, defined by race, colour and social circumstances, can be documented in any visit to the island. The much vaunted demand for a political apology is pointless; what we need now is a genuine undertaking to right those wrongs.

I accept that what has been set out above has some emotion about it. But, the third world conditions on the island, just a short flight from the prosperity in Townsville and the opulence on Orpheus and Dunk Islands are enough reason to want to take some fresh ideas into the situation. Australia is a first world country where many live in affluence and most do not live in poverty. Something is very wrong on Palm Island and it is our collective responsibility to do something about it.

It is not difficult to assess what needs to be done to start the repair of the social and living conditions in this community. From my brief engagement with the Premier and some of his advisers, I think there is a preparedness in his government to do something; but his advisers and ministers have not thought enough about what the priorities are and how to go about achieving them. Not many people within government understand how to communicate with this community. The present tragedy is that the government's lack of communication skills and inability to develop trust is only matched by its hubris and certainty. That the Opposition seems even less concerned and committed to helping indigenous communities only permits the government to apply less energy and commitment.

Government agencies, under direct instructions from the highest levels in government, it would seem, initially refused to support my firm's assistance to the council. The Premier, using the 'coward's castle' that parliamentary privilege provides, called my firm "leeches" upon the community, a "pack of thugs" and "hangers on" who would best assist the community if we "left the island".²¹ This sort of political bullying and nonsense has been easy to counteract. The Law Society and Bar Association as well as some others including the Chief Justice have given the firm professional support for the role that we have sought to play. But the attack on the community and the council in the same breath has been quite reprehensible. Aboriginal people are entitled to assert their legal rights in relation to government action. They are entitled to disagree with government policy and they are not "dysfunctional" merely because they do. So, we have continued to seek to assist the council and the community while we are welcomed by them to do so and while we can see that our assistance is worthwhile and sustainable. This is an example of the wasted energy that populist politics generate. Palm Island has had to endure far greater insults from this and other governments than this recent verbal assault. But the public is entitled to expect and should demand more from a sophisticated government.

²¹ Hansard 23 February 2005, p 160-162.

However what would be ideal is if the legal advice and governance support needed by the community was more broadly based and provided as part of an acceptance by Government ministers that in order for the local council to function in its engagement with government, it needs sound legal advice and support, so that government programmes are understood and crafted with community input.

It is probably convenient now to bring to this discussion a focus on the bigger picture, and to look at long term solutions.

Firstly, it seems obvious that Palm Island deserves to be approached with a generous hand, mindful of the current circumstances and limitations, remembering the recent past and being honest about what is needed to bring about the necessary changes. Non-Aboriginal Australia has a significant responsibility and Palm Island is a beacon of injustice. Indigenous issues are not on the sympathy radar in Australia at the moment, so the challenge for State and Federal governments is to lead this discussion of its responsibilities, even if it is initially unpopular amongst the under-informed general population. There is a need to disturb the mistaken sense within the general community that “we” have already given “enough” to indigenous people. Our elected representatives must show leadership to correct this misunderstanding and meet this responsibility.

Secondly, it needs to be understood that the communication lines between this community and the rest of Australia are distorted by mistrust and miscommunication. The fact that mistrust and miscommunication exists between non-Aboriginal people and those that use Aboriginal English is very well documented.²² Whilst some of the same words are used, there is clearly a different language spoken on the island and there are different cultural practices: time has a different meaning; non-verbal communication is subtle and substantially resorted to; respect is important and disrespect is acutely noticed.

Those seeking to judge life in this community should try to picture what it is like to live and grow up in an environment of stark poverty with no hope of economic advancement. Children grow up in a backyard of extraordinary natural beauty: postcard perfect beaches, abundant fishing, a jetty which is both a stage for the acrobatic skill of children at high tide and a place of respite from domestic calamities at night. However, at adolescence, innocence is ripped away. They have to shift between two worlds – the distractions and vices of the first world, predominantly white and prosperous community is only a 15 minute flight away. The effects of a ruined culture manifest themselves in a sense of hopelessness; and some are debilitated by adolescent alcohol abuse. Youth disillusionment and self destruction is evident. The housing conditions are simply appalling in some areas, and third world in most. It is superficial and wrong to seek to attribute this state of affairs to the people on the island. The Premier blustered in Parliament that “these people should get off their backsides and work.” It was an irresponsible statement designed to revive the Hanson myth that Aboriginal people are inherently lazy. However its unfairness is obvious when you look a little closer at the lack of opportunities on Palm Island. The framework in which people live on the island would be foreign to most of us. Children who grow up in a

²² *R v Kina*, Court of Appeal (Qld) CA 221 of 1993: “In this matter there were insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (1) her Aboriginality (2) the ‘battered woman syndrome’ and (3) shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.”

community where hardly any of their parents or relatives have had the chance of a job are not likely to find mainstream educational curricula relevant. There is little to which these children can aspire.

Moreover, the rest of us have the opportunity to get ahead by owning property. Mortgages support many small businesses, including my own law practice. However, private ownership of land on the island is not lawful. The statutory framework that was placed on the island in 1986 by the Bjelke-Petersen government effectively extinguished ‘native title rights’ as the Mabo decision subsequently defined them. In any event, all but one family of the traditional owners were moved off the island decades earlier, when the settlement was first set up. The present community is comprised of the descendants of displaced persons from communities throughout the State: people whose parents and grandparents were brought to the island for punishment. The land upon which they all live is held by the local council under a deed of grant in trust which requires the use of land to be limited “for the benefit of the Aboriginal inhabitants”. There is no economic base that can be used to spawn local business or private industry.

This history has created a unique and difficult situation. The Palm Island community is connected by familial tentacles to almost every other indigenous community in the State, and its circumstances are a symbol of oppression for many indigenous people. This community has had to integrate politically across family lines, and to a large extent they have done so. The elected council is comprised of representatives from the larger family groups on the island and has operated cohesively despite the current problems. The council has been able to make important decisions unanimously given adequate time and appropriate process.

Only once this framework is understood is it remotely possible to start devising the ‘changes’ needed to help this community to function and deal with government on an equal level. While the Royal Commission into Aboriginal Deaths in Custody (1993)²³ and the more recent Cape York Justice Study (2001)²⁴ are instructive about indigenous issues generally, government involvement with Palm Island will not work if they try to apply a template approach of what they think has worked with other black communities. A specific independent process of inquiry is needed.

Thirdly, any engagement with Palm Island should respect the cultural mores and practices of the community. It can be challenging to empathise with and respect the cultural traditions of indigenous peoples; e.g. a smoking ceremony held to release the spirits of the man who died in custody. These customary practices are a visceral part of a community of people whose various language and ritual practices were prohibited when they were brought to the island. It is unacceptable that some within our community only seem to respect customary practices, spirituality or rituals when they fall within Judeo-Christian tradition or sporting folklore. A community deprived of material wealth may well turn to its faith. The Aboriginal spirituality which has developed – and which has accommodated Christian missions – is important to this community. There is little evidence that customary practices have otherwise survived the statutory prohibitions of the last century as well as the cynicism of many non-Aboriginal people who have had some dealings with the community. The community’s respect for the man who died, concern about how he died, and how the community deals with the underlying issues

²³ <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/>

²⁴ <http://www.communities.qld.gov.au/community/publications/capeyork.html>

surrounding the death is something that has not received proper respect from the non-Aboriginal community.

Fourthly, we should accept that we, as a society, are quite capable of being racist – if not in our hearts and minds, then certainly in our systemic and institutional actions. It is mostly a passive and almost lazy racism veiled as indifference and inaction. Aboriginal communities such as Palm Island are entitled to our collective generosity. Their plight may not be as a result of a tsunami or hurricane, but a significant toll has been inflicted by waves of generational disregard by successive governments from both sides of the white political fence that we have elected and tolerated. A community with these appalling statistics and attributes is likely to be guarded in its attitudes toward the white community; cynical about promises made but not kept, and wary of the ‘crocodile tears’ that accompany the political disregard shown towards their circumstances.

Finally, we cannot leave these issues to politicians and governments to resolve. They have shown that they have not been able to do so.

Each of us should walk a little of our talk. Palm Island needs committed and skilled professionals across all service areas. Housing needs to be developed to meet immediate need as well as fostering the regeneration of the community’s social structures. Medical intervention is required to meet the community’s particular health needs. Social services and education professionals have to devise curricula which address the local needs and embrace the local conditions. It is a traumatised community straining under poverty and many need counselling. Ethical private investment is also needed. A privately operated bakery training and employing local people would both invest in and profit from the community. A fishing co-operative would feed and support the community. There are some symbols of hope on the island horizon. Individual teachers, nurses, doctors and police officers acting with decency have had and continue to have a profound effect. Architects without Frontiers²⁵ has made a preliminary visit and proposed some minor projects to improve the local public space. But the race divide has to be bridged. As I have said, the absence of white faces at the funeral of the man who died in police custody was a haunting indicator of this divide.

I have kept my observations general. But the challenge is clear. If we want to improve the lives of indigenous people who live on Palm Island then the certain and ‘know it all’ approach that has been adopted to date should be abandoned. It just won’t work. If, as the Government has repeatedly stated, the Palm Island community and its council are “dysfunctional”, then it is not too difficult to see how it became so and who caused it. Rather than public abuse and bullying, the Government must provide chiselled solutions to work through this dysfunction. The political slogans of ‘partnership’ and ‘reconciliation’ will only work if it is a trusting and equal engagement. The Palm Island community needs compassion and understanding, not dictatorial aggression and public slanging unfairly using the government’s power advantage. State and Federal governments should not see the injection of public funds as acts of undeserved generosity, but as the due discharge of an obligation that it has built up over decades of disregard.

Equality before the law does not mean that all people are given “the same” treatment.²⁶ If you treat situations with vastly different realities in the same way, you will inevitably cause injustice

²⁵ <http://www.architectswithoutfrontiers.com.au/>

²⁶ *Mabo (No. 1)* 1988 166 CLR 189; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Gerhardy v Brown* (1985) 159 CLR 70 at 129, per Brennan J, citing a passage from the judgment of Judge Tanaka in the *South West Africa Cases (Second Phase)* [1966] ICJR 3 at 305-306, including: “We can say accordingly that the principle of equality before the

to some. It is not enough to treat the Palm Island community the same as other communities. There are unique issues. The community needs extraordinary and specific measures to fix the deficiencies in public infrastructure and housing.

Enough of the crocodile tears ‘for the children’ on the political stage; what is needed is a little respect and integrity and some basic decency in this engagement.

Otherwise, this death, the 147th black death in custody since the handing down of the Royal Commission in 1990, will just be a further aspect of our shameful history.²⁷

Andrew Boe
25 September 2005

¹ Andrew Boe is a Brisbane based lawyer whose firm, Boe Lawyers (www.boelawyers.com.au) has been assisting and advising the Palm Island Aboriginal Council in its engagement with the Queensland Government since December 2004 and has appeared for the Council in the ongoing coronial inquest. The work has been conducted with the assistance and support of several barristers, including Bret Walker SC, Elizabeth Fullerton SC and Dr Sarah Pritchard all from the NSW Bar and all on a pro bono (free) basis. Mr Walker and Dr Pritchard have self funded all costs of travel and accommodation to meet these briefs.

law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely to treat equally what are equal and unequally what are unequal ... Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law. Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness.” Brennan J also referred to the observation of Ray CJ in *Kerala v Thomas* [1976] 1 SCR 906 (Supreme Court of India) that “Equality of opportunity for unequals can only mean aggravation of inequality.” See also *Henry v Boehm* (1973) 128 CLR 482 at 502 per Stephen J: “I regard it as incorrect to say of a disadvantage that because it is the consequence of a requirement of universal application that disadvantage is equally applicable to all; if the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes.”, passage cited with approval in *Street v Queensland Bar Association* (1989) 168 CLR 461. Also refer to *Abdulaziz Cabales and Balkandali* (1985) 2 EHRR 8 at 68: “The difference of treatment must therefore be regarded as having had an objective and reasonable justification and in particular, its result have not been shown to transgress the principle of proportionality.”

²⁷ “In the decade from 1990-1999, 115 Indigenous people died in custody. With the rate of Indigenous deaths in custody peaking in 1995 (approx 6 per 1,000 Indigenous prisoners) A significant feature of these deaths was that there were significantly fewer deaths in police custody (as opposed to in prisons) which tends to indicate that the implementation of recommendations of the Royal Commission relating to conditions and design of police custody had some impact. Despite these improvements, Indigenous deaths in custody throughout the 90s still represented 18% of all deaths in custody. This figure rose in 2000-2002 to 20% of all deaths in custody with 2002 seeing 14 Indigenous persons dying in custody, 8 occurring in prison facilities and 6 occurring while in police custody. 2002 was also the first year since National Deaths in Custody Program (the national monitoring body) recorded no deaths due to hanging. In 2003, 17 Indigenous persons died in custody (25% of all deaths in custody). The rate of Indigenous deaths in prison custody in 2003 was 2.1 per 1,000 Indigenous prisoners, while the rate of non-Indigenous deaths in prison custody was 1,6 per 1,000 non-Indigenous prisoners.”