

RE AN APPLICATION FOR VARIATION OF BAIL BY JOHN MAJOR CLUMPOINT

Applicant's Submissions

This Application

1. The applicant seeks, pursuant to section 10(1) of the *Bail Act* ("the Act"), the removal of several conditions imposed by the Chief Magistrate under section 11(2) of the Act when granting the applicant bail on 6 December 2004 in respect of certain criminal charges.
2. The direct effect of these conditions is to separate the applicant from his wife and young children and to effectively deprive him and his family of his sources of income and employment. It is submitted that these conditions are more "onerous" than what is necessary to ensure that any risks outlined in section 11(2) are sufficiently met, having regard "to the nature of the offence, the personal circumstances of the defendant and the public interest": section 11(2A) of the Act.
3. This application is not a reconsideration of the grant of bail or consideration of the section 16 requirements in that respect. The issue for determination is as noted above and a determination of the extent to which conditions are necessary to meet the relevant bail risks. So, whilst the applicant was in a "show cause" position before the Magistrate to obtain bail,¹ the applicant does not bear that onus in this application. This is not an appeal of the magistrates' exercises of discretion, nor is it a fresh grant of bail either: *Price, An Application for variation of bail* [2004] QSC 84.

History of bail proceedings

4. The applicant was originally refused bail by another magistrate shortly after he was charged. Then, on 6 December 2004, applications for bail by all who were charged with these offences (approximately 30 people), including the applicant, were heard by the Chief Magistrate in the Townsville Magistrates Court. After hearing several separate applications, the bail application in respect of the applicant was heard in bulk with the other remaining co-accused.

¹ Due to the allegation of the use of "offensive weapons" or "explosive substances": s.16(3)(c) of the Act.

5. The police opposed the grant of bail to the applicant. The basis for opposition to bail as revealed in the affidavit filed by police before the Magistrates Court was that if released, there was an unacceptable risk that the applicant would either re-offend or endanger others: section 16(1)(a)(ii)(A) and (B) of the *Bail Act*. The facts said to enliven these risks were:

"The defendant is charged with the indictable offence of riot under section 63 of the Criminal Code. The defendant has extensive previous criminal history which includes offences of violence and damage to property. The defendant is charged with the commission of offences committed amongst the riotous action by locals of Palm Island. Police are advised that on-going difficulties are to be experienced from residents of the Palm Island community, which may include further riotous actions. It is believed that if released back into the community, the defendant may participate in such further behaviour if it again occurs."

6. Bail was granted on the applicant's own undertaking, conditioned that:²
- 6.1. he reside at 49 Powell Street Wulguru (in Townsville) except with the prior written consent of police;
 - 6.2. he be subjected to a curfew such that he should not be absent from that residence between the hours of 7pm and 7am each day;
 - 6.3. he "present himself at the front entrance of his residence when required to do so by a police officer checking compliance with a bail condition";
 - 6.4. he report daily between the hours of 8am and 6pm to the Townsville Police Station;
 - 6.5. he "not visit Palm Island during the duration of his bail"
 - 6.6. he "not during his bail leave the boundaries of the city of Townsville and Thuringowa" without the prior consent of police;
 - 6.7. he not have contact with prosecution witnesses or with any other person charged;
 - 6.8. he attend when required before the Townsville Thuringowa Community Justice Group;
 - 6.9. he "not directly or indirectly organise or participate in any public rally, meeting or protest or other event in relation to the death of Cameron Doomadgee at Palm Island, the Palm Island riots on 26 November 2004 or the circumstances which have resulted in him being charged with these matters."
7. These conditions were varied in minor respects by another magistrate in the Townsville Magistrates Court on 21 December 2004, such that the reporting requirement was reduced to every Monday, Wednesday and Friday. It was accepted that the practical workability of the stringent conditions may not have been fully tested when they were imposed. The police however successfully opposed the lifting of other bail conditions before another magistrate in Townsville.

² See Exhibit "B" to the affidavit of the Applicant.

8. The charges against the applicant are listed for committal mention before the Townsville Magistrates Court on 10 March 2005. One would expect, given the number of co-defendants who are charged co-jointly, the forensic complexity of the evidence and public issues that have been raised that the committal will be lengthy and that the trial, if one is held, will not probably be listed by the trial courts until 2006.

Section 11(1) issues

'Onerous' nature of the present special conditions

9. The term onerous whilst used in section 11 is not defined in the Act. The Macquarie Concise Dictionary, 3rd Ed definition is: "*adj.* burdensome, oppressive, or troublesome."
10. The effect of the present conditions upon the applicant and his family is detailed in the affidavit material before the Court from the applicant and his wife. Those materials show that:
- 10.1. The conditions requiring the applicant to reside in Townsville and not with his family at Palm Island (No.s 1, 4, 5, 6 and 8):
- 10.1.1. Require the applicant to live in unsustainable conditions.
 - 10.1.2. Prevent him improving those conditions because of his effective re-trenching from gainful employment.
 - 10.1.3. Jeopardise his work position which he has held
 - 10.1.4. Cause financial unsustainability for his young family.
 - 10.1.5. Separate him from his spouse of 18 years.
 - 10.1.6. Separate him from his children, which deprive them of his parenting and disrupt their development.
 - 10.1.7. Separate him from his elderly mother and extended family.
 - 10.1.8. Exclude him from his community at a particularly difficult time and deprive his community of his contributions.
 - 10.1.9. Impose an unacceptable burden upon the functioning of his family and cause extreme physical, psychological and emotional stress for him, his wife and children.
- 10.2. These conditions also compound the Applicant's grief and personal distress following the death of his cousin in tragic circumstances and have interfered with and continue to interfere with his capacity to properly grieve that loss. For example he was precluded from attending the funeral of his cousin as well as his cousin's mother. In a small community these deprivations will only foster greater resentment toward police, who sought these conditions, in a relationship that is already strained. It hinders his participation in the collective community healing process that should attend the Coronial Inquest.
- 10.3. The curfew condition, together with the condition that he "present himself at the front entrance of his residence when required to do so by a police officer checking compliance with a bail condition" (No.s 2 and 3) are both demeaning

for an adult responsible male and apt to misuse by police.³ The monitoring of these conditions provides an unnecessary point of conflict between the applicant and police. The condition probably “sets the (applicant) up for failure.”⁴ The curfew also interferes with his employment prospects.

- 10.4. The reporting condition (No. 4) creates additional pressure in terms of costs (of transport) and interference with employment.
11. Most importantly, the fact that the conditions cause in effect the separation of the applicant from his family and precludes his capacity to meet his current employment responsibilities renders them just too onerous given all of the relevant circumstances of the case.

“nature of the offences”

12. The applicant is charged that on 26 November 2004:
- 12.1. he took part in a riot: section 63 *Criminal Code* (maximum penalty 3 years imprisonment); and
- 12.2. whilst riotously assembled he unlawfully destroyed Palm Island police station: section 65 *Criminal Code* (maximum penalty life imprisonment).
13. The specific conduct alleged against him in the police QP9 is that he:
- 13.1. attended a rally meeting, having brought a portable microphone for use by various speakers at the meeting, which speakers then urged the crowd to attack police and damage police property;
- 13.2. was part of a group of people who advanced on the police station after the rally, passing the microphone to others to speak, which speakers then urged an attack against police and their property;
- 13.3. incited the crowd to attack and destroy police property;
- 13.4. was part of a group who damaged a police vehicle using rocks, sticks and a spanner; and
- 13.5. threw rocks at a police residence before it was burnt by others.
14. A brief of evidence has not yet been published so the strength of the crown case cannot really be assessed. However, it would seem in respect of the more serious charge that the applicant is not alleged to have actually burnt the building down, rather it is alleged that he has some liability under section 7 (b), (c), (d) or 8 of the *Criminal Code* in respect of that offence.

³ Para 24 of the Affidavit of Cindy Clumpoint; Para 2 of the Affidavit of Paula Morreau (No.1)

⁴ Royal Commission into Aboriginal Deaths in Custody – Report of the Inquiry into the death of Lloyd James Boney by Commissioner JH Wootten “Underlying Issues – Unreasonable bail conditions.” See excerpts below.

15. The applicant was arrested and transported from Palm Island to Townsville Police station, where he took part in an interview with police. The QP9 records that he denied the specific allegations made against him.

“circumstances surrounding the offences”

16. The offences are serious. However they clearly arose out of a special convergence of unfortunate and tragic events.
17. The context in which the conduct occurred is set out in affidavit of the Chair of the Palm Island Community Council, Erykah Kyle. This provides insight into what led to the alleged offences. These further observations can be made:
 - 17.1. Involvement in the offences was not planned, organised or pre-conceived.
 - 17.2. The conduct can be directly traced to grief, distress and a profound sense of injustice at the hands of the police. Whether this perception is misplaced might be disputed but the fact that it is genuinely held could not be.
 - 17.3. These circumstances do not suggest any general propensity on the part of the applicant to violence or resort to crime generally.

“personal circumstances of the applicant”

18. The applicant is 40 years old. He is indigenous. He is married. He lives with his wife and 4 children, aged 3, 10, 13 and 21. He has lived on Palm Island for most of his life. His extended family also reside on Palm Island.
19. He is a qualified carpenter. He and his family live in a house built by him on the island. He works two jobs, including casual but permanent work with the Bwgcolman Community School (as groundsman, security, skill share program tutor etc) (“the Community School”) and at the Palm Island Aboriginal Council Canteen (as a sales/shop hand). His wife also works full-time, as the registrar of the Bwgcolman Community School.
20. The applicant is regarded as a responsible and productive member of his community.
21. The applicant’s criminal history has had no entries since 2002 (for conduct in 2001). The offences which involve “violence” ceased in 1997 and the only damage to property offence was in a different context altogether. The reference to allegations for which he has not been convicted nor in respect of which he was not given any opportunity respond are unfair even allowing for the capacity of this court to receive a wide ambit of evidence.

22. The applicant's history must be viewed in the context of the history of the Palm Island settlement. See more on this issue below. The fact that he has managed to build a productive and useful life on Palm Island, particularly over the last few years, is probably the most relevant aspect of his history for current purposes.
23. Most entries on the applicant's criminal history are addressed in his affidavit in these proceedings. The following points can specifically be made, however:
- 23.1. The last entry for any offence involving violence was a breach of a domestic violence order in 1997. He was sentenced to a fine and community service. The complainant was the applicant's wife. She attests, in her affidavit filed in these proceedings, that following counselling there is no longer any violence in their relationship and has not been for several years.
- 23.2. The details of his wilful damage charge (in 2000) are contained in the applicant's affidavit. The conduct occurred more than 4½ years ago. He was ordered to pay compensation and perform community service and probation.
- 23.3. Whilst the applicant has previously been sentenced to 3 short periods in jail (the aggregate total of which is 9 months), the terms were imposed for driving offences or breaches of sentencing regimes imposed for driving offences.
- 23.4. The applicant has two breaches of bail, relating to failures to appear before the Palm Island Magistrates Court in April 2000 and November 2001. His evidence is as to confusion/miscommunication in dates and the penalties imposed (convicted but not further punished) would seem to reflect those circumstances.
- 23.5. The applicant's last appearance before the criminal courts was on 10 April 2002, for conduct in December 2001.

The "public interest"

24. Section 11 of the Act requires there to be regard to the "public interest." In *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 the majority⁵ observed:

"(...), the expression "*in the public interest*", when used in a statute, classically imports a discretionary value judgement by reference to the undefined factual matters, confined only "*in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view*". *Water Conservation and Irrigation Commission (N.S. W.) v Browning*, per Dixon J."

25. The objects of the *Bail Act* are to regulate the release of persons under an appropriate framework to ensure that persons charged with offences appear in court when required and to address the risks associated with persons facing serious criminal charges being released into the community.

⁵ Mason CJ, Brennan, Dawson & Gaudron JJ

26. The comments of Thomas JA in *Williamson v. DPP* [2001] 1 Qd R 99 at 103 are instructive:
- “No grant of bail is risk free. The grant of bail however is an important process in civilized societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects.”
27. In assessing “the public interest” in this context it is not possible to view the currently alleged offences fairly without a contextual regard to the history of relations between the police and the Palm Island indigenous community. A useful précis of this history can be found in *Attachment A* which comprises an excerpt from the Queensland Regional Report annexed to the Royal Commission into Aboriginal Deaths in Custody.⁶
28. The interaction of indigenous people, particularly those that live on settlements and missions, with the criminal justice system has historically attracted a special approach from the judiciary particularly in relation to sentencing options. The awareness of the underlying issues has been increasing. There have also been identified important premises for properly assessing the criminality associated with particular offences committed by indigenous people. For example, damage to property, whilst objectively serious, is recognised as manifesting an expression of disempowered frustration following perceptions of injustice within Aboriginal communities.⁷
29. The Royal Commission into Aboriginal Deaths in Custody, published in 1992, (“the RCADIC”) identified the issue of unrealistic bail conditions as an “underlying issue” contributing to Aboriginal deaths in custody. In two specific examples, the deaths of Lloyd James Boney and Shane Kenneth Atkinson, some comments there made are instructive in determining the present application.

“Lloyd James Boney ‘UNREALISTIC BAIL CONDITIONS’

Bail conditions should not be set which obviously will not or cannot be complied with. Unrealistic conditions simply set the defendant up for failure, and produce the result that bail is at the discretion of the police, who can arrest the defendant for breach of conditions whenever they choose not to turn a blind eye to the breach. An example of such an unrealistic condition in the present case was the condition repeatedly imposed on Lloyd's bail during 1987 that he not partake of intoxicating liquor. In the circumstances of Lloyd's life in remote communities in western New South Wales, the limited opportunities for social life revolve around social drinking, very frequently in public under the gaze of police. If it was seriously thought that it was necessary that Lloyd should not drink at all he should not have been released on bail, but obviously this would have been unreasonable. It is interesting to note that whenever there is a record of the conditions sought by police they did not seek the imposition of such a condition. It was apparently automatically added by magistrates or justices to the more appropriate conditions sought by police.

Another very onerous condition which seems to be much too readily imposed is one requiring the defendant to stay out of his own town.“

⁶ It is also exhibit PM-2 to the affidavit of Paula Morreau.

⁷ Chapter 11.10.16 of the RCADIC: “The destruction of property, and various forms of self-mutilation are also widespread and rule-governed expressions of grief and distress in Aboriginal societies.”

“The life and death of Shane Kenneth Atkinson “SHANE KENNETH ATKINSON - ARREST AND BAIL ON 15 SEPTEMBER”

Shane appeared from custody at Griffith Local Court on the morning of 10 September 1986, and pleaded guilty to the charges of stealing a horse and failing to appear, for which he was fined. He returned to live with his friend Robert Monaghan, Robert's wife Lois (who was Mary Lou's sister) and their family at Three Ways until 15 September 1986. On that day Shane took Lois and a friend for a drive in Robert's car. When Robert returned to find his car missing, he reported it to the police. Three police apprehended Shane driving the motor vehicle in Griffith, and he was eventually charged with five offences, including illegal use of the motor vehicle and driving with the higher range of prescribed concentration of alcohol. Constable Cook conducted the breath analysis test at 9.20 pm.

Sergeant Harrington granted Shane bail, one condition being that he report to the officer in charge of Griffith Police Station daily between the hours of 5.00 and 6.00 pm in a sober condition. It was a failure to report that led to Shane's arrest on the day that he died. Sergeant Harrington noted in the reasons for the determination that Shane had intended to take the motor vehicle interstate. He fixed the specific conditions to enable reporting after normal hours of work, although Shane was unemployed. The requirement for sobriety was a condition he imposed for offences committed whilst intoxicated. He could see no problems with these conditions.

The conditions were unrealistic and reflected a failure to take into account the personal position of Shane and the general character of Aboriginal lifestyle. A person such as Shane with brothers and sisters living on both sides of the Murray River would be expected to move frequently between New South Wales and Victoria if only to maintain contact with his family. An intention to go interstate would not indicate that he did not intend to appear. Moreover to require that he be sober at 5 pm each day, given his known habits, meant in effect that his bail was revocable at the whim of police.

Shane appeared at the Griffith Local Court on 22 September and the charges were adjourned until 13 October 1986. A solicitor from the Aboriginal Legal Service advised Shane that he could not act for him because 'the complainant' was Aboriginal. As a result Shane appeared unrepresented and it is unlikely that he sought any review of the bail conditions, which were continued by the court.”

30. These case histories and other observations in a RCADIC place the harshness of the conditions imposed in the grant of bail to the applicant within a proper context. Incidentally, the *Coroners Act 2003* requires the State Coroner to have regard to the recommendations made by the RCADIC.⁸
31. The fact that several of the other defendants have not been able to comply with the stringent reporting and curfew conditions reveal how onerous that in fact these conditions are and the vigilance in police in monitoring these particular defendants.⁹
32. In weighing the considerations in section 11 of the Act, it must be clear that, bail conditions represent no more than an assurance and certainly not "a general reform of (an applicant's) character". They should not be used to meter summary punishment. In *R v S W Bugmy* [2004] NSWCCA 258, Kirby J (with whom Bryson JA and James J agreed) was considering a variation of bond conditions, post-sentence. Similar considerations apply here. In that case, the defendant was sentenced *inter alia* to a bond on certain conditions, which included:

⁸ Section 14 of the *Coroners Act 2003*.

⁹ Para 16, Affidavit of Senior Sergeant Cook 13 January 2005

“(4) He is to remain away from Wilcannia during the term of this sentence unless he has, upon prior application to me, been permitted to do so.”

33. Wilcannia is where the defendant’s family lived:

“39. ... Mr Bugmy who was born in Broken Hill and raised in Wilcannia where the majority of his family still reside, is the third eldest in a family of six children. He left home at the age of 17 years however he has always remained in contact with his family and had their support. ... it appears that alcohol abuse has been prevalent in his family over the years. ... Mr Bugmy said he travelled throughout Australia after he left home although he returns to Wilcannia to visit his family or to attend events such as funerals which are important with the aboriginal culture.”

34. After a review of authorities, his Honour stated:

“61 What, then, are the principles to emerge from these authorities? First, the discretion as to conditions that may be attached to a bond is broad but not unlimited. The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation.

Secondly, the conditions must each be certain, defining with reasonable precision conduct which is proscribed.

Thirdly, the conditions should not in their operation be unduly harsh or unreasonable or needlessly onerous.

70 ... Should such a condition be characterised as unduly harsh or unreasonable or needlessly onerous? If the condition were to provide that an offender should not see his family, it would plainly be unacceptable. Such a condition would not in any obvious way relate to the offence or the purposes of punishment. It would be both harsh and unreasonable. Here Mr Bugmy's family and extended family lived in an area of Wilcannia known as The Mallee. They were said to be poor. Wilcannia is an isolated town in the north west of New South Wales. It is a long way from other major centres. Was the practical effect of exclusion from Wilcannia a severance of the physical link between Mr Bugmy and his family?

71 His Honour, in the exception provided, plainly recognised that, at least in the context of funerals, such a condition would be too harsh. He sought to ameliorate the operation of that condition by permitting Mr Bugmy to make application to him. However, in my view, the exception, even if properly framed, and appropriately administered by the Probation and Parole Service, would still be harsh and unreasonable. The term of the bond was almost two years. That is a long time to exclude or effectively exclude a person from normal physical contact with his family. Even in prison family members are permitted to visit. Whilst it was open to his Honour, in the interests of Mr Bugmy's rehabilitation, and appropriately protecting the community, to provide for his exclusion from Wilcannia for a short period (say six months), two years was too long. A short period may have given Mr Bugmy the respite from alcohol abuse that may have enabled him to have successfully tackled his problem. A two year exclusion from Wilcannia, in my view, was akin to "a general reform of his character" (cf Cox J in *Williams v Marsh* (supra) at 316). The condition was, in my opinion, unduly harsh and unreasonable.”

35. The interests of the Applicant’s children do not seem to have been given any proper regard in imposing and maintaining this condition or in the affidavit material filed in this court.¹⁰ It is almost too trite to submit that an extended separation of the applicant from his children is not in their interests. It is clearly too onerous to cause such a separation before any conviction is obtained or sentence passed.

¹⁰ The UN Convention on the Rights of the Child was ratified by the Commonwealth in 1990 and entered into force in Australia on 16 January 1991. Articles 3 and 9 are apposite. See also *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (19994-1995) 183 CLR 273

36. It is not in the public interest to impose conditions which cause the destruction of a family unit by separation prior to conviction for any extended period.

The Police opposition to bail

37. It is noteworthy that the complainants in the present matter are themselves police officers. It may also be noted that the submissions made to this Court in effect mirror those made by the police prosecutor. It is important, in an application of this nature, that the Court receive assistance by way of submissions which reflect an appropriately detached assessment of the issues.
38. The risks identified by the prosecution in opposing bail before the magistrates were that:
- 38.1. the applicant would commit an offence; and/or endanger the safety or welfare of members of the public;
 - 38.2. he "may participate" in "on-going difficulties ... which may include further riotous actions".
 - 38.3. his criminal history "which includes offences of violence and damage to property"; and police being "advised that on-going difficulties are to be experienced from residents of the Palm Island community, which may include further riotous actions."
 - 38.4. "It is the belief of the arresting officer that the defendant and other defendants may re-group and cause further serious public unrest if released and returned to Palm Island. The funeral of the male person who died in police custody will shortly be taking place on Palm Island and it is anticipated that the defendant and other persons may use the funeral as an excuse to further damage property and attack police."
39. These matters have unfortunately been augmented in the affidavit material filed opposing this application. However it is well documented that police are not always able to see matters from the perspective of the indigenous community particularly when it comes to issues attending isolated communities.¹¹

¹¹ The complexities on this issue are difficult to summarise. They appear in Chapter 13.4 of the RCADIC. One apt observation is at 13.4.8 "It is also important to bear in mind that the police culture is a subculture within the wider culture of non-Aboriginal Australia, in which both Aboriginal people and police are enveloped. Police and Aboriginal people do not interact separately from the rest of the community, but as part of it. Police are agents of the dominant non-Aboriginal community and are almost entirely drawn from it. What they do is in a large degree responsive to attitudes in the wider community, although in times of change police attitudes, embedded in a police culture that is highly resistant to change, may lag behind changes in the rest of the community. On the other hand, with successful and enlightened leadership, police attitudes may be in advance of those of the rest of the community. Certainly the Commission has seen examples at the local level and at the highest level where police have been quicker than the general non-Aboriginal community to respond to new situations and new ideas. Often this is because of the enlightened leadership of some police officer, but it is often reinforced by the realisation of the rank and file police that a good relationship with the local Aboriginal community can make their work more pleasant and less onerous. Aboriginal people themselves become agents of change in police attitudes as they win the respect of police by their efforts and achievements, and by their constructive efforts within their communities. "

40. The respondent's affidavit material filed in this court exemplifies this epistemological limitation that attends the perspectives of those who view the state of living conditions in communities such as Palm Island and the context in which they have reached this point as being the result of inherent limitations in Aboriginal people as distinct from the possibility that it manifests their failure to withstand and cope with the impact of European settlement and the imposition of colonial rule. The inability to see the other side of the coin is obvious. There are a number of opinions expressed and judgements made by these police officer which purport to suggest that the police force as a whole regard themselves as being slighted by the alleged offences.¹² The stressful impact of the riot on a dog is even highlighted.¹³ Paragraph 31 is another example.
41. It is telling that there is no mention, leave alone proper recognition of the considerable trauma which is undoubtedly felt by a community when a member of it, who was arrested for a minor street offence had died shortly after being taken into police custody after sustaining 4 broken ribs and a ruptured spleen. Ms Kyle's affidavit reveals that the community became outraged by the preliminary "official" comment that an "accident" could not be excluded. In the context of there being many people in the Palm Island community who are related to or know of someone personally who has died in custody in the recent past, the acute frustrations as to the shortcomings in many of the coronial inquests into these deaths as reported in the Royal Commission,¹⁴ some greater understanding is necessary within the non-indigenous community, including the police, about the pain and grief that attends such a matter and the lead up to the alleged "riot".
42. This continuing inability of the police service to embrace the indigenous perspective that attends a death in police custody, impairs the capacity of the deponents relied upon by the respondent to these proceedings to dispassionately place relevant evidence before the court on the functional issues. The fact that the pointed recommendations in the RCDIC have not seemingly affected the dominant "police culture" bears circumspect reflection.

¹² The regard given to Inspector Adcock at the funeral: para Affidavit of Louisa Pink; the absence of any further threats or action against the replacement police on the island challenge these suggestions and fears.

¹³ Affidavit of Detective Miles, page 3: "The Senior Sargent's dog was at his residence at the time of the riot. The dog has been subsequently put down due to injuries and distress sustained." It is not alleged that the applicant, or for that matter, any other person injured the dog.

¹⁴ RCADIC: 4.5.5 In many instances the inquest merely reflected the inadequacies of perfunctory police investigations and did little more than formalise the conclusions of police investigators. Reliance was placed on misleading or inaccurate evidence provided by the police without critical examination, relevant witnesses were not called or, if called, were not asked pertinent questions, the hearings of many inquests were delayed, and further delay attended the delivery of findings.

43. Moreover, although these submissions have been prepared in the absence of seeing what the DPP's position will be before this Court in respect of this material, it is apparent that the assertions in paragraphs 31 and 32 of the Affidavit of Detective Senior Sergeant David John Miles bespeak a view that conditions have been imposed as apt "punishment" for the alleged involvement of the applicant in the subject offences. Such a view is of course not permissible.
44. The affidavits of Louisa Pink and Erykah Kyle show that Palm Island is presently undergoing considerable change partly due to legislative changes and partly as a result of the State Government's response to the events surrounding the recent death and destruction of the police station. The State Government, it seems, has undertaken to apply intensive energy to seek to bridge the disparity in the living conditions on the island and that of the mainland non-Aboriginal community. The gap remains significant. It has been acknowledged for example that the shortages in housing on the island are such that up to 20 people are forced to reside in a single dwelling designed to accommodate a nuclear family. Ministers are scheduled to return to Palm Island with the Premier to seek to determine needs and negotiate priorities in February 2005 to seek to address these inequities.
45. Ms Pink's observations as to the civility and respect for the rule of law she experienced and observed on the island is reflected by Magistrate Glasgow observations following his 'post-riot' visit.¹⁵ Even though his Honour has not seemingly noted the significance of that.
46. Ms Kyle's affidavit also reveals that the trigger for the "riot" was the publication of the suggestion that the death in police custody followed injuries which may have been sustained as a result of "an accident" in police custody. The wisdom of such a premature announcement being made by the State Coroner bears examination.
47. On the one hand, it was probably thought by the Coroner - whose personal integrity in making the decision to give a summary release of initial indications following the first autopsy report just days after the death is not in question in these submissions - that there was preliminary indicia that the person might not have been bashed by police might have provided relief to the community. On the other hand, and this is what probably did occur, the community were hoping for an independent transparent inquest into the death which did not start with any assumptions that foul play did not occur. The indication just a few days after the death that the Coroner thought that it might

¹⁵ "I have been there (Palm Island) on the 14th and 15th (December 2004). I've sat in my Courts there. I've been welcomed on the island. Every defendant who should have appeared, appeared before me and no warrants were issued. We proceeded in the normal way. I was not at all under threat. Neither was my staff. We entered that island as guests and were treated with respect as is my my - as my means I always treat the defendants before me similarly."

have been an “accident” rightly prompted a suspicion that nothing had changed in the protection of indigenous communities from summary disregard in the coronial process following a death in police custody.

48. The RCADIC noted this issue and made recommendations to seek to address it:

RCADIC 4.5.8 “A major characteristic of the coronial inquests reviewed was their narrow focus. In this respect they, once again, reflected the approach of police investigators. A finding that there were no suspicious circumstances was usually taken to exhaust the purpose of the inquest. The examination of wider issues was rarely seen as relevant. The lack of inquiry into systems issues such as custodial practices and procedures, hospital and emergency procedures, resulted in a lack of findings or recommendations designed to rectify failures in these systems.”

Recommendation 35:

That police standing orders or instructions provide specific directions as to the conduct of investigations into the circumstances of a death in custody. As a matter of guidance and without limiting the scope of such directions as may be determined, it is the view of the Commission that such directions should require, inter alia, that:

- a. Investigations should be approached on the basis that the death may be a homicide. Suicide should never be presumed;
- b. All investigations should extend beyond an inquiry into whether death occurred as a result of criminal behaviour and should include inquiry into the lawfulness of the custody and the general care, treatment¹ and supervision of the deceased prior to death;
- c. The investigations into deaths in police watchhouses should include full inquiry into the circumstances leading to incarceration, including the circumstances of arrest or apprehension and the deceased's activities beforehand;
- d. In the course of inquiry into the general care, treatment or supervision of the deceased prior to death particular attention should be given to whether custodial officers observed all relevant policies and instructions relating to the care, treatment and supervision of the deceased”

49. The reverse of what was intended was in fact caused. Instead of placation, suggestion that death might have been an accident ignited anger and distress.

50. However, the recent announcement that a coronial inquest into the death (who is the Applicant's cousin) is due to be opened on the island on 8 February is being embraced by the community as the first step towards an independent investigation into the matter. The State Coroner has appointed two counsel (including one senior counsel) to assist him in this inquest and there will be a particular focus on the issues underpinning the state of relations between police and the community.¹⁶ The community will be represented at the Inquest. The likelihood of a full independent judicial inquiry into this matter gives the community some hope of obtaining a just outcome for the family and the community.

¹⁶ See correspondence attached to the affidavit of Paula Morreau (No.1)

51. It is telling that the police material makes no reference at all to this development. If the significance of this development was acknowledged and understood the fears expressed by the police would, to some considerable extent, be allayed.
52. In this context the fears felt by the police of more calamity, particularly given the ferocity of the anger expressed at some of them during the night, whilst understandable are most unlikely to manifest. It is submitted that in assessing whether, if there was more calamity on the island in police relations, the applicant would associate with or contribute to such conduct regard should also be had to the following:
- 52.1. The applicant has already suffered considerable punishment in the form of:
- 52.1.1. 11 days in custody;
 - 52.1.2. demeaning monitoring of curfew conditions;
 - 52.1.3. separation from his family and home over 1 ½ months;
 - 52.1.4. deprivation of his income in that period; and
 - 52.1.5. the risk of losing his employment position.
- 52.2. The applicant is regarded in his community as a responsible family and community man. He has mature responsibilities which he has been meeting. He is now well apprised of the consequences of breaching his bail by involvement in any further criminal conduct. He knows that the consequences of his bail being revoked are dire for his young family.
- 52.3. The police who were on the island prior to the death in custody have all left the community.
- 52.4. The funeral process was peaceful and dignified despite the presence of thousands from within the community.

Submissions

53. The offences faced by the applicant are serious. His alleged role did not include actual involvement in the burning of the building. It is submitted that the grant of bail such that the applicant is released on his own undertaking with:
- 53.1. a reworking of the residence condition (1) to require the applicant to reside on Palm Island with his family in his family home; and
 - 53.2. the retention but amendment of condition (7) to oblige the applicant to not have any communication with prosecution witnesses or any co-accused (of whom his legal representatives are advised in writing) about the evidence surrounding the offences charged;
- is clearly sufficient to meet any perceived risks under the *Bail Act* as a result of his being released into the community.
54. The continuation of the conditions as presently framed which prohibit the applicant from residing with his family at Palm Island are, for the reasons set above, unnecessary and too onerous to address the relevant bail risks.

55. A draft order is attached.

Andrew Boe
B O E L A W Y E R S
14 January 2005

Annexure A

Excerpt from evidence compiled at the Royal Commission into Aboriginal Deaths in Custody 1991 (Regional Report of Inquiry into Queensland)

The first government institution was established at Barambah in 1904 (named changed to Cherbourg in 1931) and Aborigines who had gathered at Durundur reserve near Caboolture were amongst the first transferred. From 1908 there was a steady increase in numbers as Aborigines were transferred from southern Queensland in line with Meston's proposal. The permanent population stood at 663 in 1933. A second settlement was established in 1911 near Taroom but in 1927 this was relocated 120 miles north and became Woorabinda. By 1938 there were 692 people living on this reserve west of Rockhampton. In 1914 Aboriginal people in the Cardwell/Tully districts were systematically rounded up and taken to the newly established Hull River mission. Inmates were shifted to Palm Island in 1918 after a cyclone demolished the premises. Even without the disaster at Hull River, it seems that Palm Island would have been established as it was discussed as a suitable site for a penitentiary in 1916. Since the early 1920s Palm Island has been the largest of the government settlements. It quickly gained a reputation amongst Aborigines as a penal settlement because people were sent there from all parts of the state for 'punishment'; in excess of half the Aboriginal removals between 1919 and 1937 were to Palm Island.

The dormitory system of the early missions where children were isolated from the influence of their parents, was adopted on settlements. Fred Clay recalled that when his family was removed to Palm Island in the 1930s they were separated; his mother and two sisters were sent to the women's dormitory and the three sons to the boys' dormitory:

We saw each other only when permission was granted. There was a white person there they called a matron, you know. We had to get permission from her to visit the dormitory and see our mother. Pretty stiff when you've got to get permission to see your own mother.

Administrators found the location of Palm Island particularly attractive as Aboriginal people could be isolated, most effectively, from the white population. Nevertheless there were numerous accounts of Palm Islanders attempting to swim the 20 miles to the mainland using logs and pieces of wood. In 1925 two men escaped by swimming from island to island and made

their way back to the Mitchell River on Cape York Peninsula. In 1932 nineteen people absconded but eleven were subsequently recaptured, 'punished with short terms of imprisonment', and returned to the settlement while some were transferred to other settlements. As a result of this incident, the increase in 'moral' offences and the general unrest owing to reduced employment opportunities away from the island, it was decided to reorganise and strengthen the Palm Island native police squad.

Aboriginal Police had been operating on reserves for many years prior to their formal recognition in the 1939 Act. For some Aboriginal officers it was work which yielded considerable job satisfaction. Isaac Gundy who went to Palm Island in 1933 became a policeman on the settlement. He recalled that the Aboriginal sergeant recruited suitable candidates:

You could work your way up from a constable to a senior sergeant. I was tough in those days - I didn't favour my brother, cousin, mother, sister - they would have to do the right thing. [I] treated everyone the same and I punished only those that did wrong. I took them to the court first - I didn't do the punishing myself of course. The superintendent did that.

A lot of our old fellows couldn't read or write but they never had trouble keeping law and order in this place ... They knew right from wrong. They were brought up on the old tribal laws and you couldn't break any tribal laws without being punished...the police used to drill like soldiers ... They would go on parade in the morning - down among the workers. I'd put on the parade there and break them off ... had to be spanking clean, starched uniforms, clean shaven, boots polished. You could see the uniform shine on us that's how good we were...

Willie Thaiday who was sent to Palm Island around the same time as Isaac Gundy had a different perspective of the Aboriginal Police which he saw as little more than a tool of the Superintendent:

The policemen on Palm Island should not be called policeman ... They are only trackers from far away inland and they know nothing about law, not a scrap. They never been to school and all they do is what the superintendent tell them. 'Can you do this?'

'yes boss.' 'Can you do that?' 'Yes boss.' They never say no. Then they come to try to stand over us by the power of the superintendent.

We got to do everything what suit the superintendent, not us and every super that go there got the law in his own mouth. What he say is law and the state government allow them to make the rules.

We know it is wrong but still you can't say nothing because the moment you say something they throw you in gaol. If they say you go to gaol you can't say what for and you don't know when you come out. I saw some boys, two or three of them, who spent 18 months without court.

The overwhelming majority of incidents on the settlement were dealt with by the Aboriginal Police and Courts where there was no right to a defence lawyer and no provisions for appeals against rulings made arbitrarily by the superintendent. On Palm Island even children were gaoled for insignificant misdemeanours. Marnie Kennedy recalled her experiences as a child in the late 1920s:

I was singing this song 'Who Said I Was a Bum'. I didn't know that the matron was coming through the dormitory. Next thing I found myself in jail for the night because I was singing that song and using the word 'bum' ... Next time I went to jail we were hunting for stuff on the reef when we saw this big fish in the lagoon. A big one. Of course we started chasing it. We had no sandshoes on but we were running over the coral chasing this fish. The police were blowing the whistle for us to come in and we never heard it. We were too busy chasing the fish. Finally we caught it and the police caught us

and marched us off the jail. We kicked that fish all the way back to the jail. We spent the night there.

Willie Thaiday believed that the Palm Island superintendent treated women harshly as well. He saw one person shoved in gaol for refusing to scrub the hospital floor. He explained that the woman was unable to do the work because she could not leave her children alone at home. Another girl was put in gaol because she ran away from the dormitory for one night.

There seemed to be little logic in the way that punishment was dispensed. One inmate reported that 'a married man cleared out with a single gift for a couple of days. They were sentenced to 14 days gaol. After this the man was appointed to the police force and the girl was sent to Fantome Island'. In 1937 Tommy Ryan was charged with disobeying the orders of the Superintendent and sentenced to seven days imprisonment; Ted Bosun, sergeant of Police was charged with trying to commit suicide, and allowed to carry on as Police Sergeant; Constable Ross was found ill-treating his wife and when he reported the matter to the Superintendent was told to go home and that it was all right.

A multitude of other practices compounded the sense of powerlessness experienced by those Aboriginal people unfortunate enough to be incarcerated on Queensland settlements. A lock hospital was erected on Fantome Island in 1926 to deal with the numerous cases of venereal disease but by the early 1930s all people being transferred to Palm Island had to pass through Fantome Island first. Usually a person who was free of venereal disease would only stay for two weeks but for others it could be months depending on when the medical superintendent decided to grant a free bill of health to enable the person to be transferred to Palm Island. New arrivals had to go straight to the superintendent's office and have their luggage inspected. The Chief Protector maintained that this was necessary 'in order to prevent the entrance of intoxicating liquor'. All inward and outward mail was also censored in much the same way as occurred for soldiers in a war zone. From the 1930s, Aborigines living on settlements had to obtain the permission of the superintendent before they could marry another Aboriginal. Under the provisions of the 1901 Act it had only been necessary to obtain 'permission, in writing of a Protector authorised by the Minister to give such permission' if an Aboriginal woman wanted to marry a non-Aboriginal. Even though most had committed no crime, they had to have the permission of the superintendent before they could leave the settlement. In addition all residents could be ordered to work for 32 hours a week without pay. For those sections of the Aboriginal community subjected to increasing controls and regulations it must have been extremely difficult to maintain a sense of self-worth.

Morale on Palm Island was particularly low in 1937. Director-General of Health, Sir Raphael Cilento reported that 'during the eighteen years that I have known this settlement, I have never seen it in worse condition, or with less evidence of active progress'. The previous year it had been decided to elect a local council which decided to take up the issue of wages with the government. Prior to this they had been paid in tobacco and rations including flour, rice, sugar and porridge. Apparently it was agreed that residents would be paid four shillings a fortnight on the understanding that they did not gamble. Within days however they were caught and the wages stopped. When Cilento visited the Island the following year he reported that there was considerable resentment that the plans for an Aboriginal council had been reversed 'by studied neglect of this activity on the part of the Acting Superintendent'.

(end of excerpt)