

Palm Island - 'Something is wrong'

There has been a lot of controversy about Palm Island following the recent death in police custody. Government institutions and judicial systems have had to deal with this isolated Aboriginal community, and it has been difficult. Mistakes have been made. There have been some significant casualties. A Minister for Aboriginal & Torres Strait Islander policy has resigned following Crime & Misconduct Commission ("CMC") findings of dishonesty concerning airfares for a visit to the island. The Premier referred his own conduct - pre-empting public allegations of blackmail against him - at his meeting with the local council, to the CMC as well. That investigation is still proceeding. Last week, 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 lawyers during the inquest. The inquest will start again later this month, but it has stalled as disagreements have arisen amongst the parties about its course and ambit. The Police Commissioner has also become embroiled. He has been censured over his public endorsement of one of the police officers said to be involved in the arrest of the man who later died. The Deputy State Coroner is yet to decide what to do with this prima facie contempt of the inquest. Things will get more complicated when the committal proceedings (the start of the criminal process) get under way in April. Then there will be an 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. Finally, the bail conditions which banish many of the charged men from the island have been examined by the Court of Appeal. In removing this "banishment condition" in respect of one of the men, the Court of Appeal observed: "apart from actual imprisonment, it is difficult to imagine a more onerous bail condition."

Meanwhile, nothing positive has been done for Palm Island other than the opening of a new \$5.5M centre currently being operated by the Police & Citizens Youth Association.

The inquest, bail applications and criminal proceedings have become the focal points for examination of the differences of perspective of the police interests and that of the local Aboriginal community on Palm Island. But we should not allow this to obscure the government's responsibilities to this community.

This paints a grim picture of the challenges that lie ahead in this engagement, for those involved in Palm Island, on all sides including politicians and those representing the various interests about the island and its future. But these events and the associated difficulties shouldn't be regarded as unrelated coincidences. Instead, they show how much care needs to be taken from this point by those involved with Palm Island in these different ways. We should start by taking a clean lens beginning with a proper regard for the history of this State Government 'settlement'. While it's convenient and comfortable to view the living conditions on Palm Island as due to the community's limitations, it ignores the 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 said to be 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 "management" of Palm Island has been flawed. It was a place to which Aboriginal people were sent as a form of punishment. It was built as an open prison and run with authoritarian rule. This has left scars on generation after generation. No-one could seriously dispute that. The 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 Aboriginal people. An apology is pointless; what we need now is a genuine undertaking to right those wrongs.

There is no utility in sinking into debate about the history of Palm Island. The third world conditions on the island, just a short flight from the prosperity in Townsville and the opulence on Orpheus and Dunk islands is enough reason to want to take some fresh ideas into the situation. Something is very wrong on Palm Island and it is our collective responsibility to do something about it.

What's difficult is to assess what needs to be done to start the repair of the social and living conditions in this community. Palm Island is a litmus test for our political and judicial systems and how effectively they can work in this framework. 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. It has taken my firm several months of constant involvement with them to start to be able to do so. The present tragedy is that the government's lack of communication skills and inability to develop trust is only matched by their hubris and certainty. We have an Opposition which seems even less concerned and committed to helping indigenous communities; that only makes this government apply less energy and commitment. Many of the bureaucrats involved waste their energy in finger-pointing at issues or at personalities to try to explain the debacle. There is no use in criticising those who have failed so far. The mistakes are obvious and easy to identify.

Since December 2004 my firm has provided legal assistance and representation to the council in its dealings with government and at the inquest into the death in custody. We have also successfully challenged the banishment condition that was imposed on one of the men charged with involvement in the riot. Government agencies have refused to fund or support the provision of my firm's assistance to the council. We decided that we would not charge any fees for this assistance. The Premier, using the 'coward's castle' that parliamentary privilege provides, has called me and others in my firm "leeches" to the community, a "pack of thugs" and "hangers on" who would best assist the community if we

"left the island".¹ Those insults are untrue, so it is not hard for me to ignore them. The Law Society and Bar Association as well as some others have given the firm professional support for its position. But the attack on the community and the council in the same breath is reprehensible. Surely 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, despite discomfort to the Beattie government, we will continue to assist the council and the community whilst 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 politics generate. Palm Island has had to endure far greater insults from this and other governments than this recent verbal assault, but the public are entitled to expect and should demand more from a sophisticated government.

As to the bigger picture, the solution lies, I think, in approaching Palm Island 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 big responsibility. As indigenous issues are not on the sympathy radar in Australia at the moment, the challenge for government is to lead discussion of its responsibilities, even if it is unpopular. There is a sense within the general community that "we" have given "enough" already to indigenous people. We need our politicians to show leadership to correct that misunderstanding and meet this responsibility.

There are a few other matters which are fundamental in working towards solutions with the Palm Island community.

Firstly, everyone involved needs to understand that the communication lines between this community and the rest of Australia are distorted by mistrust and miscommunication. The historical explains the mistrust. Miscommunication between non-Aboriginal people and those that use Aboriginal English is very well documented.² 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; respect is important and disrespect is acutely noticed.

Those seeking to judge life in this community should try to picture what it must be like to live and grow up in an environment of stark poverty. Ironically, 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 all innocence is ripped 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

¹ Hansard 23 February 2005, p 160-162

² *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."

destruction is evident. The housing conditions are simply appalling in some areas, and third world in most. It is superficial and unintelligent to see this state of affairs as the fault of 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 in a 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 of the traditional owners had been 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 uniquely tragic 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 proper time and process. This sometimes takes time.

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) and the more recent Cape York Justice Study (2001) 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. In my view a specific independent process of inquiry is needed.

Second, 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. What might be quaint to our eye - such as a smoking ceremony to remove the spirits of man who died in custody - is in fact a visceral part of a community of people whose various language and ritual practices were prohibited when they were brought

to the island. We have got to get over offering respect to spirituality or rituals only where they fall within Judeo-Christian tradition or perhaps 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. Their customs and practices survived statutory prohibitions in 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 surrounding the death is something that has not received proper respect from the non-Aboriginal community. Until that respect is shown very little will be achieved.

Thirdly, 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, 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 attitude to the white community; and cynical about promises made but not kept, and the disregard shown towards their tragedies.

We can't leave these issues to the government to resolve alone. We as individuals should walk a little of our own 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 which acknowledge 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 and profit in 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. But the race divide has to be bridged. 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 the Beattie government wants to improve the lives of indigenous people who live on Palm Island then the bullying and 'know it all' approach that has been adopted to date should be abandoned. It just won't work. If, as the Premier 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, Beattie should appoint a skilled mediator to work through this dysfunction. The political slogans of 'partnership' will only work if it is a trusting and equal engagement. The Palm Island community needs compassion and understanding, not dictatorial aggression and public slinging unfairly using the government's power advantage. The 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.³ If you treat situations with vastly different realities in the same way, you will cause injustice 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. For the Beattie government and the newly appointed indigenous affairs Minister and Parliamentary Secretary it's time to start 'walking the (government's) talk'. Enough of the crocodile tears 'for the children'; what is needed is a little respect and integrity and some basic decency in this engagement. Given the political stubbornness of Mr Beattie and his run of faux pas this seems unlikely. The irony may well be that it will take a conservative federal government to lead the way.

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B O E L A W Y E R S

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Boe is a Brisbane based lawyer whose firm has been assisting and advising the Palm Island Aboriginal Council in its engagement with the Queensland Government since December 2004. The firm also appeared for one Palm Islander, John Clumpoint in his successful bid to remove bail conditions that banished him from returning to his family and work on Palm Island - [Clumpoint v DPP \(2005\) QCA 43](#) - and are also appearing for the council at the inquest into the death of the man who died in police custody. The work has been conducted together with the assistance of several barristers, including Bret Walker SC, Elizabeth Fullerton SC and Sarah Pritchard all from the NSW Bar and all on a pro bono (free) basis.

³ *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 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."