

**IN THE CORONER'S COURT OF
THE NORTHERN TERRITORY
AT ALICE SPRINGS**

No. A0051/2019

**IN THE MATTER OF: THE INQUEST INTO THE DEATH OF KUMANJAYI
WALKER**

**SUBMISSIONS ON BEHALF OF THE PARUMPURRU COMMITTEE OF
YUENDUMU COMMUNITY**

1. On behalf of the Parumpurru Committee, we have had the benefit of reading the draft submissions made on behalf of NAAJA, the WLR families and Brown family and respectfully adopt those submissions.
2. By his application and submissions of 6 October 2023, Mr Rolfe, among other things, invites the Coroner to consider recusing herself on the grounds of apprehended bias. For the reasons provided by NAAJA, the WLR families and Brown family, Mr Rolfe's application should be refused.
3. As part of his application, Mr Rolfe submits the Yuendumu visit of 14 and 15 November 2022 gave rise to a "background of concerns" that informs the recusal application.¹ These submissions are focussed on why, in our submission, nothing which occurred during the visit to Yuendumu should be of any concern to any party, including Mr Rolfe. In turn, that analysis informs a consideration of the merits of Mr Rolfe's recusal application, which is grounded on the purported "background of concerns". We make these submissions on behalf of a party deeply affected by the outcome of Mr Rolfe's application. The coronial inquest commenced over 12 months ago, and ongoing delays and disruption have a significant impact on the community which our client represents.

¹ Application and Submissions of Mr Rolfe dated 6 October 2023, at [6]

4. The events of the Yuendumu visit of 14 and 15 November 2022 do not provide any relevant context for Mr Rolfe's recusal application. This is for the following reasons.
5. **First**, all parties were informed of what was proposed for the Yuendumu visit at that time.
 - a. On 5 September 2022, senior Warlpiri elder Robin Japanangka Granites spoke in Court and invited the Coroner to come to Yuendumu to sit with Warlpiri leaders. He stated:²

What we need, and what we want, is for the Coroner to come out and sit with Warlpiri elders. And talk to us. We invite you to Tanami Desert, in Warlpiri country, to be part of our culture and law. We hope you accept our invitation, and listen to what we have to say. Thank you.
 - b. Following that invitation, the Coroner responded "*I very much appreciate your invitation. And we will definitely work towards finding a way where we can accept that invitation at a time that is right for the community*".³
 - c. On 4 November 2022, Mr McMahon addressed the Coroner in respect of the proposed visit. Among other things, he stated:
 - i. The Parumpurru Committee is inviting the Coroner and all parties to the inquest to Yuendumu, for purposes including to allow the community to speak directly to the Coroner in a way which is not normally possible in a court proceeding.⁴

² T9 dated 5 September 2022

³ T10 dated 5 September 2022

⁴ T3253 dated 4 November 2022

- ii. The planned visit was to be a listening experience, with the community asking the Coroner to listen to what they have to say about Warlpiri culture and lore.⁵ It was not anticipated that what was to be spoken about would be the subject of recording or evidence.⁶
 - iii. There was no defined list of issues that would be addressed, and it was not possible to provide a strict schedule of events and topics that might be expected.⁷ It was anticipated some things might go slightly unexpectedly, but it was hoped it would include some of the issues that had been raised through the course of the inquest, including things like the nature of grieving and sorry business, and Warlpiri concepts of justice.⁸
- d. Also on 4 November 2022, Mr McMahon stepped through the proposed schedule for the visit. That included outlining how the Coroner would be welcomed by the Yuendumu Cultural authority, then walked over to House 511 by some of the elders and welcomed again. The visit to House 511 would be followed by a community meeting, or “*what is locally known as a truth telling meeting*”, which would involve a microphone being passed around and community members saying what is on their mind.⁹
- e. On 12 November 2022, Ms Hollway (solicitor for the Parumpurru Committee) emailed all parties to advise, as a matter of procedural fairness, that it was proposed some parts of the events of the visit to Yuendumu would be recorded.

⁵ T3253 dated 4 November 2022

⁶ T3256 dated 4 November 2022

⁷ T3256 dated 4 November 2022

⁸ T3256 dated 4 November 2022

⁹ T3255 dated 4 November 2022

The reason for that change was that it was thought that the occasion of Elders speaking directly to the Coroner about cultural matters presented a rare opportunity to capture those insights. Ms Hollway stated “*we do not of course anticipate such recordings going to matters which might be regarded as disputed facts. Rather, they may go to areas of cultural knowledge of value to the inquest*”. It was envisaged that how the recordings may later be used, if at all, could be discussed in the usual way at Court.

- f. On 13 November 2022, the schedule for the Yuendumu visit was circulated to the parties by the solicitor assisting the Coroner.
6. No objection was taken (by Mr Rolfe or any other party) to the visit occurring, or what was planned for the visit.
 7. **Second**, the visit to Yuendumu was a normal part of a coronial process, and entirely appropriate. In the *Coronial Inquest regarding the death of residents at St Basil’s Homes for the Aged in Victoria*, the Coroner sat at the bar table beside Senior Counsel Assisting to hear about the experience of family members, which was not to be recorded as evidence in the inquest.¹⁰ The Coroner commenced by referring to the importance of the families having “*a voice in the process*”, and that it was important to note what was to be said was not evidence in the proceeding. The Coroner stated it was a “*very informal process*”, and introduced Senior Counsel Assisting and himself by their first names. He stated “*we often in coronial inquests allow families to do this*”.¹¹
 8. The process adopted by the Coroner in that case was subject of scrutiny by the Supreme Court of Victoria. The context of that case was that (not unlike Mr Rolfe) the former

¹⁰ *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422, [29]

¹¹ *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422, [30]

chairperson of St Basil's sought to be excused from giving evidence on the grounds of the privilege against self-incrimination. The Coroner refused that application, and the former chairperson sought judicial review including, inter alia, a ground of apprehended bias. The bias ground related the Coroner having received 'family impact statements' from family members of the deceased residents of St Basil's Homes for the Aged in Victoria one day after the former chairperson made his application to be excused from giving evidence.

9. The Supreme Court rejected the contention that the conduct gave rise to an apprehended bias. The Court stated:¹²

...it was evident (and the fact is) that in a coronial inquest a session directed to the airing of family impact statements is not remotely unusual. In any event, his Honour invited submissions in respect of the proposed course, and none were made.

10. There is nothing unusual or concerning about the Coroner adopting a similar process in the present inquest.
11. Indeed, this coronial inquest concerns the death of an Aboriginal person in custody. As the final report of the *Royal Commission into Aboriginal Deaths in Custody* states:¹³

...[To] understand the last hours of life of each individual and to truly understand the circumstances of their deaths Commissioners had to know the whole life of the individuals and, equally important, had to understand the experience of the whole Aboriginal community through their two hundred years of contact with non-Aboriginal society.

¹² *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422, [247]

¹³ *Royal Commission into Aboriginal Deaths in Custody*, Vol 1, [1991] AURoyalC (15 April 1991), 1.2.15

12. That context, which is critical to the coronial function in making recommendations to prevent re-occurrence of such deaths, cannot be fully gleaned simply through oral testimony in the witness box. It requires the Coroner to have an appreciation of what life is like for Aboriginal people living in Yuendumu and to understand the setting within which the death occurred. Indeed, it is common during the course of a coronial inquest for a Coroner to conduct a view of important locations relevant to the death. The schedule for the Yuendumu visit included views of all sites connected to Kumanjayi Walker's passing.
13. **Third**, in respect of the events that actually transpired in Yuendumu on 14 and 15 November 2022, the only conduct attributed to the Coroner in Mr Rolfe's "concerns" is having her face painted by Leanne Oldfield, and otherwise not distancing herself from the discussion at community meetings. Mr Rolfe's complaints are otherwise directed at what was expressed by members of the community, and Counsel Assisting's conduct (including holding the hand of a grieving family member, and asking the community about what justice looked like to them¹⁴). The complaint by Mr Rolfe that Counsel Assisting is holding the hand of a community member refers to a photograph at Annexure D of Mr Rolfe's application and submissions. It shows an elderly, frail Warlpiri woman, seated on a walker, holding the hand of Counsel Assisting as Counsel Assisting leans respectfully, apparently trying to hear what is being said. It is appropriate and respectful that visiting judicial officers, as with any visitor to a remote community, accept traditional greetings. It cannot seriously be put that these simple gestures, of holding a hand or receiving a traditional welcome, give rise to "background concerns" relevant to the recusal application.

¹⁴ Application and Submissions of Mr Rolfe dated 6 October 2023, [32]-[33]

14. Again, regard may be had to what the Victorian Supreme Court found in respect of the St Basil's case. The plaintiff there contended the conduct of the hearing on 16 December 2021 was "unusual judicial conduct", in that:¹⁵
- a. there was no urgency to conduct that type of hearing at that time bearing in mind the significance of the ruling on which his Honour had reserved the previous day;
 - b. on the day concerned, a 'personal familiarity' and 'alliance' was created with those that were allowed to be there who, through their counsel, had opposed the plaintiffs application the very day before;
 - c. by contrast, the representatives for the other interested parties weren't being offered parity of position at the Bar table or even the opportunity to be present; and
 - d. in the course of the session, his Honour made no comment or criticism of those who made statements when they digressed into criticism in relation to St Basil's and the plaintiffs.
15. Notably, unlike the St Basil's case, all parties in the present inquest were afforded the same opportunity to be present and participate in the Yuendumu visit. Indeed, on 4 November 2022, Mr McMahon (on behalf of the Parumpurru committee) stated:
- I don't anticipate generally anything being – that's spoken about outside in the other events I've described really as being the subject of recording or evidence or any such matters. It's of a different nature. It is unique. That's why of course it's appropriate and proper that everyone here is invited and is able to attend*

¹⁵ *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422, [235]

and it's a genuine invitation extended to all the lawyers here and I encourage them to come if they wish to accompany your Honour on any part of the entire two days.

16. This invitation was accepted and lawyers for all parties who have sat through the inquest did attend.
17. Further, in respect of criticism that the Coroner failed to control statements made by certain family members in the St Basil's case, the Court noted:¹⁶
 - a. *his Honour did not have prior notice of precisely what would be said;*
 - b. *it was not said to his Honour that he should personally have prior notice of precisely what would be said;*
 - c. *his Honour could not reasonably be said to have actively encouraged any expressions of distress concerning St Basil's, the governments or the one such statement directed to the plaintiffs;*
 - d. *his Honour had previously intimated — quite correctly — that in an emotional setting in which the usual elements of question and answer are not present, there are very real practical limits upon the extent to which it might be possible for him to intervene without exacerbating the problem about which a party in the position of the plaintiffs might be concerned; and*
 - e. *such risk was, in practical terms, definitively met by his Honour's assurances that the family impact statements would not be received as evidence in the inquest and would not bear upon his Honour's determination of the application*

¹⁶ *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422, [256]

— *which were earlier expressly accepted and, on the day in question, not questioned.*

18. The parallels to the circumstances of this inquest, and in particular the visit to Yuendumu, are obvious and apt.
19. **Fourth**, there has been substantial and unexplained delay in Mr Rolfe's application with respect to the visit to Yuendumu. Notably:
 - a. insofar as his complaint concerns the conduct of the visit, Mr Rolfe did not make any application with respect to his concerns at any time between 16 November 2022 and 6 October 2023, two weeks before this inquest is due to reconvene; and
 - b. insofar as his complaint concerns the redactions of the recordings of the Yuendumu visit, Mr Rolfe did not take any steps between 17 February 2023 (when he was informed the Coroner was open to a written request to obtain a transcript of the recordings so the length and reason for each edit can be identified with precision), and 19 August 2023 when he first requested details of the redactions.
20. Mr Rolfe has proffered no explanation for these delays. The importance of bringing an application in a timely manner cannot have been lost on Mr Rolfe, given the Coroner's observations in Ruling No 2 as to the inconvenience and disruption occasioned by late applications.¹⁷
21. **Fifth**, on 16 November 2022 Mr Rolfe objected to giving evidence on the grounds of penalty privilege. On 8 November 2022, the Coroner published reasons dismissing Mr

¹⁷ *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 017, [6]-[9]

Rolfe's objection. Mr Rolfe instituted proceedings in the Supreme Court (and, subsequently, the Court of Appeal) challenging that determination. The Supreme Court proceedings were heard on 23 and 24 November 2022. At that time, the visit to Yuendumu had occurred, and Mr Rolfe was aware of comments made during the visit regarding spearing of Mr Rolfe and payback, as well a comment and question from a community member concerning the fact of His Honour Justice John Burns presiding as trial judge over the murder trial of Constable Rolfe.¹⁸ Indeed, Mr Officer (on behalf of Mr Rolfe) had expressed his concern about these matters in open court on 18 November 2022 in the context of Mr Rolfe's application to be excused from giving evidence.¹⁹ Notwithstanding, no attempt was made by Mr Rolfe on 23 and 24 November 2022 to argue the Coroner's decision to compel him to give evidence was affected by apprehended bias.

22. **Sixth**, Mr Rolfe submits that what was said by members of the Yuendumu community during the visit "extended beyond the representations that had been made about the content of the Yuendumu visit".²⁰ That submission should be rejected. Mr McMahon expressly stated the obvious point that it was impossible in the context to give a strict schedule of what might be discussed.²¹ Further, the subject matter of what was raised was to a large extent topics which have been addressed during the course of the inquest. In particular:

- a. On 5 September 2022, Robin Japanangka Granites told the inquest that Mr Rolfe returning to the police force following his acquittal was not fair.²²

¹⁸ Email from Luke Officer dated 19 November 2022

¹⁹ T3388 dated 18 November 2022

²⁰ Application and Submissions of Mr Rolfe dated 6 October 2023, at [33]

²¹ T3256 dated 4 November 2022

²² T9 dated 5 September 2022

- b. On 5 September 2022, Ned Hargraves (another senior Warlpiri elder) told the inquest that, in Warlpiri culture, where a man did something bad, that man had to pay punishment in the form of a spear to the legs.²³
- c. The cultural practice of payback through spearing has been a topic repeatedly visited through the course of the inquest.²⁴ This is of particular significance since the Court was informed that a topic likely to be discussed was Warlpiri concepts of justice,²⁵ and no party took any objection to that.
- d. Racist text messages, and many other matters not put before the jury in the criminal trial, have been subject of examination during the course of the inquest (reflecting the different nature of a coronial inquest to a criminal trial).
- e. On 17 November 2022 (following the visit to Yuendumu) Counsel Assisting asked Bradley Wallace a question in the following terms *“the challenge, if I might say, is – what we heard about in the community also is that payback would involve spearing. And in this case, where the community are aggrieved understandably by Kumanjayi’s death and that Constable Rolfe caused the death, this court can’t condone grievous bodily harm to be committed against a constable who was involved in that situation. I’m wondering if there is a way of – that you can talk to about how to accommodate customary lore outside of that practice?”*.
- f. On 27 February 2023, Counsel Assisting expressly addressed how the issue of payback or spearing had been dealt with during the course of the inquest, and concluded *“So there is no suggestion, in this court, that spearing of anybody will*

²³ T6 dated 5 September 2022

²⁴ See, for example, T3589 dated 21 November 2022 (Dole) and T3771 dated 28 November 2022 (Wilson)

²⁵ T3256 dated 4 November 2022

*be condoned. And it is distressing if mis-information is provided to the public, about what this court understands, or has heard evidence of, or what this court would condone. And I can only urge, on behalf of the court, respectful engagement by the media is sought from Counsel Assisting”.*²⁶

23. Mr Rolfe does not articulate how it is said that community views expressed by one person or another about these matters, creates a “background of concern” to his apprehended bias submission.

Conclusion

24. A judicial officer will be expected to be capable of separating the relevant from the irrelevant in coming to a decision.²⁷ As the Coroner has made clear, the inquest will proceed on the evidence that is received during the course of the inquest, and on the information that is provided during the course of the proceedings.²⁸
25. Far from being a cause for concern, the conduct of the Coroner in visiting Yuendumu is exemplary of how a remote Aboriginal community should be engaged following the death of an Aboriginal person in custody. The death of Kumanjayi Walker occurred in a complex cultural setting, leaving a community in grief, anger and bewilderment. The actions of the Coroner in respectfully visiting Yuendumu to listen to Warlpiri people talk to their culture is of great utility. The actions of the Coroner and Counsel Assisting were nuanced, culturally informed and courteous. The submission that the matters raised a “background of concerns” must be rejected.

²⁶ T4043 dated 27 February 2023

²⁷ *BMT19 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2022] FCA 328, [62]; *British American Tobacco Australia Services v Laurie* (2011) 242 CLR 283, [140]

²⁸ T3389 dated 18 November 2022

DATED: 13 October 2023

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