

*Martin Hinton**

A FINAL BAIL REVIEW¹

The door to the courtroom opens to the cry, ‘All stand.’

‘Once more into the fray,’ I think to myself, then enter.

I make my way to the centre of the Bench, turn to the bar table, bow and sit.

‘Call the matter on,’ I command.

‘In the matter of Michael Smith and the Queen,’ a voice declares. Appearances follow.

This is a review of the decision of a magistrate refusing Michael Smith bail. Michael Smith is not the applicant’s real name. I have not used his real name for the obvious reason.

As counsel for Michael Smith makes ready to speak, I look across at the flat screen on the wall. There sits Michael Smith in an audiovisual link suite somewhere in one of the State’s institutions. Thin, wiry, with long black hair, just off his collar. He is obviously Aboriginal.

Counsel for Mr Smith commences her submissions.

Mr Smith is 17 years old. He has been charged with serious criminal trespass and theft. I look up, my interest piqued. I had not had the opportunity to read the papers. I was rostered in the short notice list and it had been a hectic week. In fact, I felt very much like a ‘short order cook’ during the dinner rush with numerous pots and pans all on the heat at the same time. It was not that I minded being extra busy — I did not — it was just that I was so busy that I was not as prepared as I would have preferred. Still, counsel prepare on the basis that judges have not had the opportunity to familiarise themselves with the papers, and, fortunately, on this I can rely.

My mind returns to the matter at hand. ‘Why is Michael Smith in custody?’ I ask myself. No doubt the charges were serious but, the presumption of bail aside,² in my experience it was most unusual for a youth to be denied bail for breaking into premises and stealing something. I assumed Michael had not broken into residential premises. Had he done so, the statement of the offence would have included that fact

* Director of Public Prosecutions (SA); Adjunct Professor of Law, University of Adelaide; former Justice of the Supreme Court of South Australia (2016–19).

¹ Martin Hinton, ‘A Bail Review’ (2019) 40(1) *Adelaide Law Review* 187; Martin Hinton, ‘Another Bail Review’ (2019) 40(3) *Adelaide Law Review* 627.

² *Bail Act 1985* (SA) s 10(1).

and if someone was home, it would have been an aggravated offence. So, I thought, he must have broken into something like a shed, shop or factory — perhaps even a school.

Break-ins are common offences amongst youths, particularly break-ins involving non-residential premises. Rarely does such offending result in the refusal of bail, or even detention upon plea, or conviction. A break-in or two as a youth, accompanied by the theft of small, readily consumable items, does not indicate a first step in a life committed to crime. Even if the youth has convictions for drug use, drunkenness, theft, graffiti, perhaps joy-riding and other street crimes, it is likely that the criminogenic factors in operation and the youth's attitude are amenable to change. As a community we know this all too well. We have established specialist courts for dealing with the young and specialist services because we know that the young remain open to assistance and guidance.³ Knowing this, how the system treats the young is critical to forging positive relationships allowing for attitudinal and behavioural change to occur. No doubt there are some youths who test the patience and skills of the mostly saintly, but they are the exception. We cannot imagine a system where we compromise on the care, protection and education of our youth and ignore our responsibility for putting opportunity in their way. Accepting this, detention must be reserved for the exceptional case.

My mind dwells on these things a moment longer. With all we know about over-representation,⁴ the link between the imprisonment of Aboriginal youths and the imprisonment of Aboriginal adults,⁵ intergenerational trauma⁶ and the failure of the

³ See generally *Youth Court Act 1993* (SA); 'Youth Court of South Australia', *Courts Administration Authority of South Australia* (Web Page, 2012) <<http://www.courts.sa.gov.au/OurCourts/YouthCourt/Pages/default.aspx>>.

⁴ The Royal Commission into Aboriginal Deaths in Custody reported that as at 30 June 1989, the proportion of the adult Aboriginal population in prison was 15 times greater than the proportion of the adult non-Aboriginal population in prison: *Royal Commission into Aboriginal Deaths in Custody* (National Reports, April 1991) vol 1, ch 9, 9.3.1 ('*Royal Commission*'). As at 30 June 2019, Aboriginal and Torres Strait Islander prisoners accounted for 28% of the total Australian prisoner population: Australian Bureau of Statistics, *Prisoners in Australia, 2019, Aboriginal and Torres Strait Islander Prisoner Characteristics* (Catalogue No 4517.0, 30 June 2019).

⁵ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 73, 486.

⁶ Ibid 79–81. See generally Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62(6) *International Social Work* 1522; Beverley Raphael, Patricia Swan and Nada Martinek, 'Intergenerational Aspects of Trauma for Australian Aboriginal People' in Yael Danieli (ed), *Intergenerational Handbook of Multigenerational Legacies of Trauma* (Springer, 1998) 327.

Closing the Gap strategy⁷ to bring about widespread and lasting change in the lives of Aboriginal people, there had better be a good reason for Michael Smith being in custody. I can feel my agitation rising.

It is tempting as a judge, when one's sensibilities are challenged, to launch into an aggressive cross-examination of counsel. No matter how impatient one is to get to the heart of the matter, it is seldom helpful to let one's impatience and agitation show. I check myself, turning instead to the papers for the detail.

Michael is in Year 12. He lives in Amata, a remote Aboriginal community in the north-west of South Australia on the Anangu Pitjantjatjara Yankunytjatjara Lands ('APY Lands').⁸ English is not his first language. I stop reading and look up at the young man on the flat screen. I hold up one hand.

'Hold on, hold on,' I say.

Counsel stops talking.

'Do we need an interpreter for Mr Smith?'

Counsel looks at me blankly, then discloses that she has not spoken with Michael. Instructions had been provided by another solicitor from the office who was nowhere to be seen. I turn my gaze back to the screen. Michael had not flinched. He was looking straight ahead, not obviously engaged.

'Are you Michael Smith?' I ask. He nods, once, but as if unsure.

'Michael, do you speak English?'

'Yep.'

'Have you been able to understand what your lawyer has been saying?'

'She my lawyer?'

'Yes. Did another lawyer come and see you?'

'Yep.'

⁷ See 'What We Know', *Closing the Gap* (Web Page) <<http://www.closingthegap.gov.au/>>. See also Australian Government, *Closing the Gap: Report 2020* (Report, 2020) 11, 13; Fiona Stanley, Daniel McAullay and Sandra Eades, 'Closing the Gap Measures Need to Be Changed. Here's How', *The Conversation* (online, 19 June 2020) <<https://theconversation.com/closing-the-gap-measures-need-to-be-changed-to-improve-outcomes-heres-how-140728>>.

⁸ Anangu Pitjantjatjara Yankunytjatjara, 'The Amata Community', *APY Communities* (Web Page, 2020) <<https://www.anangu.com.au/en/sa-communities/amata>>.

‘Well that lawyer told this one what to say for you, ok?’

He nods.

‘Do you know why we are here?’

He nods.

‘Can you tell me why we are here?’

I am unsure whether I should ask this question. It could prompt a statement Michael might later regret. However, seeing as counsel did not flinch, I quickly throw off my concern. In any event, he does not seem the type to ‘run off at the mouth’.

‘‘Cos I got locked up. I want out.’

‘Can I just ask you, at school does the teacher speak in English or in language?’

‘English.’

I leave it there. I figure if Year 12 lessons are conducted in English, Michael should have sufficient command of the language to understand generally what is going on. I also plan on explaining to him in plain English whatever I decide and why. That is a habit of mine, irrespective of who is in the dock. I have always thought that it does the administration of justice no credit that judges rarely speak directly to the people most affected by what has happened or is happening. I know that counsel will speak to their client and explain what has occurred, but the dignity invested by a judge taking a moment to speak to the people most affected can only positively contribute to the administration of justice and the perception of the court’s humanity and connection to the community.

Why lock up a 17-year-old from a remote community?

I turn back to counsel. ‘Can you tell me what the police say Mr Smith has done?’

‘Mr Smith and two of his mates, who are both also youths, broke into the community store. They stole three mobile telephones, sunglasses and chocolate.’

‘And?’ I ask, thinking there had to be more.

‘They were arrested within an hour of doing so and Mr Smith has been in custody ever since.’

‘Was the property recovered?’

‘The chocolate, your Honour, was long gone, but the phones and sunglasses were recovered and, luckily, remained in a resaleable condition.’

‘When did this occur?’

‘About 10 weeks ago.’

‘Was any damage caused to the store?’

‘Some minor damage to a lock on a window.’

‘Did he apply for police bail?’

The questions are flowing thick and fast but, hopefully, not aggressively or such as to betray my impatience or agitation.

‘He did, your Honour, but that was refused and he was transported first to Coober Pedy, then on to Port Augusta and then down to Adelaide.’

‘Are his co-accused in custody?’

‘No, both were granted bail when this matter was last before the Youth Court.’

‘When was that?’

‘Two weeks ago.’

‘Did Mr Smith apply for bail on that occasion?’

‘Yes, your Honour, but his application was refused on the basis that he did not have a suitable place of residence to which he could be bailed.’

‘Let me get this straight. He has been in custody for 10 weeks for breaking into a store, causing negligible damage, and stealing items recovered and resaleable, with the exception of a handful of chocolate bars. Is that the position?’

‘That’s about it, your Honour.’

Try as I might to deliver this summation without any hint of prejudgment, agitation or annoyance, I doubt I succeeded.

My mind begins to whirl. On what I know, the repeated denial of bail makes no obvious sense.

‘Does he have any previous convictions?’

‘Yes.’

‘Ah-ha,’ I think to myself.

An antecedent report is handed up. I run my eye down the document. Michael first came into contact with the law as a 14-year-old when he stole a bicycle in Port Augusta. When he was 15, he had been convicted twice of property damage and

once for fighting, and when 16, was convicted of possessing cannabis and carrying an offensive weapon. I look up.

‘What was the weapon?’

‘A waddy.’⁹

‘Where did that occur?’

Counsel is unsure of the exact location, but it was somewhere on the APY Lands.

The APY Lands is a vast area of over 100,000 square kilometres in the far north-west of South Australia. It is occupied by around 3,000 people of Aboriginal descent spread over a number of communities like Amata.¹⁰ Collectively the Aboriginal occupants are known as the Anangu,¹¹ although there are a number of language groups including the Ngaanyatjarra, the Pitjantjatjara and the Yankunytjatjara.¹² Many of the people who live on the APY Lands continue to speak their own language and live according to traditional law and custom.¹³

I reflect on this a moment longer. A waddy. There could be many reasons why a young Aboriginal man who lives on the APY Lands would have a waddy in his possession, none of which would necessarily be criminal.

I turn back to counsel. My mind has travelled off on a tangent.

‘Is Mr Smith initiated?’ I ask.

Counsel cannot answer.

Again, I turn to the flat screen.

‘Michael, have you been through the law?’

‘Yes, boss.’

⁹ A waddy is formally defined as a ‘heavy wooden ... club’: *Macquarie Dictionary* (online at 8 September 2020) ‘waddy’ (def 1).

¹⁰ See Regional Anangu Services Aboriginal Corporation, ‘APY Lands Communities’, *Working with the Community (Community-ngka Tjunga Wakaringanyi)* (Web Page) <<https://www.rasac.com.au/working-with-apy-communities/apy-lands-communities>>.

¹¹ Parks Australia, ‘Anangu Culture’, *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/>>.

¹² Ibid; ‘About Us’, *Anangu Pitjantjatjara Yankunytjatjara* (Web Page, 2020) <<https://www.anangu.com.au/en/about-us>>.

¹³ Parks Australia (n 11).

Boss. Aboriginal men from the APY Lands commonly call whitefellas in positions of authority boss. I am caught in two minds in the instant. On the one hand, being called boss smacked of a history of repression by those who thought themselves superior. I do not care to perpetuate this. On the other hand, respect for the law and the Court as an institution is important generally. I let it pass hoping that I have not contributed to the ethnocentric tendencies of our institutions.¹⁴

It is February. I recall being told in another case that February to March can be an important time for Men's and Women's Business.¹⁵ In the same case I had learned that Men's Business, and when and where it was to occur, was not something that could be reduced to some kind of program that may find its way into a whitefella's annual planner. It was a matter for the old men to decide who, what, where, when and for how long.

'You missing Men's Business?' I ask.

He nods. Nothing more is volunteered.

My understanding of the *tjukurpa* is very imperfect. I have not been privileged to be admitted to the knowledge, practice and understanding of its breadth and depth. However, I have come to know that for those initiated, the *tjukurpa* is bigger than the law. My poor understanding is that it is indispensable to identity, status, role and relations, defining the individual, claiming them and giving them purpose and meaning.¹⁶ Central to this is the relationship to, and responsibility for, the land.¹⁷

'Where's your country?'

'Amata.'

'It's more than that,' I think to myself.

'Where are you meant to be now?'

'Home, maybe.'

¹⁴ *Royal Commission* (n 4) vol 2, ch 12. See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor & Francis, 2015).

¹⁵ See Parks Australia, 'Men's and Women's Business', *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/mens-and-womens-business/>>; 'Men's and Women's Business', *Deadly Story* (Web Page) <https://www.deadlystory.com/page/culture/Life_Lore/Ceremony/Men_s_and_Women_s_Business>.

¹⁶ Parks Australia, 'Tjukurpa', *Uluru-Kata Tjuta National Park* (Web Page) <<https://parksaustralia.gov.au/uluru/discover/culture/tjukurpa/>>.

¹⁷ *Ibid.*

I had also come to appreciate that for a traditional Aboriginal man, Men's Business and the *tjukurpa* is not like a course of study at university that culminates in a graduation ceremony and the conferral of a qualification. It is a journey, lifelong, spiritual and more. Again, my knowledge and understanding are limited.

'What about school?'

He shrugs.

Fair enough. It was a dumb question betraying my whiteness. Try as I do to learn and understand, too often I unthinkingly fail to appreciate difference and diversity. For an initiated man — and whilst Michael was a youth in Court, he was a man elsewhere — school and Year 12 were not necessarily high on the list of priorities. My question betrayed the values and priorities of my culture; values and priorities that, I had to remind myself, were not always subscribed to by others.

My thinking quickly travels to a film I have recently seen — *In My Blood It Runs*.¹⁸ The main character is a primary school boy who can speak three languages but struggles with his schoolwork. He is a self-described 'bush kid' that you quickly warm to. Whilst the dominant culture tends to see his poor performance in school as a shortcoming, the film shows the cultural richness in his life that gives him purpose and meaning.¹⁹ The question that the film raises is why can the dominant culture not embrace and accommodate the cultural richness of Aboriginal Australia? I understand that the issues that arise where cultures meet and share the same space are complex, but the film demonstrates powerfully that different ways can provide a no less loving and fulfilling life than that which the dominant culture suggests we should all aspire to. The film has affected my thinking.

'Is there a suitable residence now available for Mr Smith?'

'There is, your Honour.'

An address in Ernabella, another community on the APY Lands,²⁰ is supplied.

'Perhaps I should hear from the Crown.'

¹⁸ *In My Blood It Runs* (Closer Productions, 2019).

¹⁹ *Ibid.* See also *Royal Commission* (n 4) vol 2, ch 10, 10.2.3; Michael J Halloran, 'Cultural Maintenance and Trauma in Indigenous Australia' (Conference Paper, Australian and New Zealand Law and History Society Conference, 2–3 July 2004) 10. On the misunderstanding of Aboriginal culture see generally Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 15.

²⁰ Anangu Pitjantjatjara Yankunytjatjara, 'The Pukatja Community', *APY Communities* (Web Page, 2020) <<https://www.anangu.com.au/en/sa-communities/pukatja-ernabella>>.

It is not a question. I have heard enough. It is time for the Crown to justify Michael Smith's ongoing detention on remand.

Perhaps I should hear from the Crown. As counsel I had heard that statement from the Bench more than I cared to remember. Often it signals doom. At the very least, a difficult grilling may be expected.

The prosecutor stands, collects himself, and states, 'Mr Smith was denied bail for his own protection.'

If this was an advocacy course, such a statement would attract high praise from any instructor. In one fell swoop it neutralises the force of the applicant's submissions and sets the argument on a fresh course. It takes me aback, causing me to sit silently and let the prosecutor proceed.

He explains that the break-in occurred under cover of darkness in the early hours of a Thursday morning, and, once discovered at opening time, resulted in the community store being closed whilst the police were summoned. There being only one store in Amata, the people in the community could not buy anything. Worse still, it was payday so people wanted to stock up and could not. Agitation quickly turned to anger. The offenders were identified and a mob went looking for them to give them a hiding. When the police arrived, Michael and his co-accused broke cover and surrendered. As mentioned, they were taken into custody for their own protection and Michael had been in custody ever since.

My mind drifts. What if police had not been able to attend? Would the community have taken over? Should we trust the community to administer justice in matters like this that affect only the Anangu? Would that mean sanctioning corporal punishment? Why is dragging a 17-year-old youth hundreds of kilometres away to a detention centre for months any more just and merciful? These are large questions to which I do not know the answer. Do I add to the burden of colonisation by putting such questions out of my mind? Surely one way of relieving intergenerational trauma is to hand back power to communities like Amata? Why not have an Anangu court dispensing a form of justice that bridges cultures, is acceptable to both, and is linked to the national integrated judicial system? Large questions that will involve a lot of talking. Questions for legislators and policymakers, not judges. Questions that in a courtroom have no immediate relevance.

My mind snaps back to the case at hand.

I do not know much about Amata. I have never been there. But I do know that on a day-to-day basis the community store in a remote community is a focal point for the residents. Clearly the closure of the store because of the break-in caused significant inconvenience, angering some. How widespread and deeply felt that anger was, I do not know. What I do know is that things were bad enough for the police to remove Michael and his co-accused from the community. I also know that the police station in Amata is small with only four resident officers, hardly enough if things in the community get very heated, especially as help is a couple of hours' drive away.

'How long was the store closed?'

‘Three or four hours, your Honour; just long enough for a check to be made of what was missing, and for one of the officers who had crime scene training to check for fingerprints and take photographs.’

As it transpired, by the time the officers finished at the store, Michael and his co-accused were well on their way to Coober Pedy in a police troop carrier. Now Michael was in Adelaide, 15 hours or more by car from home. A 15-hour drive in Europe would take you through several different countries. The position is no different here. Whilst a 15-hour drive saw Michael still in South Australia, depending on the route the police took, he could have passed through the country of the Antikirinya,²¹ the Arabana,²² the Kokatha,²³ the Banggarla,²⁴ the Nukunu,²⁵ and, the Kaurna.²⁶ Perhaps for Michael, it was like driving from Warsaw to Calais. What is certain is that he was a long, long way from his family and his country. In Adelaide he might have a few visitors, a few relatives who had come to the city. But his day-to-day life in detention would be so very different to life on the APY Lands. This could not be a positive experience.

I am suddenly reminded of the Aboriginal and Torres Strait Islander Youth Justice Principle (‘Principle’).²⁷ A recent report detailing the pilot inspection of the Adelaide Youth Training Centre (*Kurlana Tapa*)²⁸ suggested the elements of the Principle had not yet adequately permeated systems and services in this State.²⁹

²¹ ‘Antikirinya’, *Mobile Language Team* (Web Page) <<http://mobilelanguageteam.com.au/languages/antikirinya/>>.

²² ‘Arabana (Arabunna)’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/arabana-arabunna/>>.

²³ ‘Kokatha’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/kokatha/>>.

²⁴ ‘Barngarla’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/barngarla/>>.

²⁵ ‘Nukunu’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/nukunu/>>.

²⁶ ‘Kaurna’, *Mobile Language Team* (Web Page) <<https://mobilelanguageteam.com.au/languages/kaurna/>>.

²⁷ The Aboriginal and Torres Strait Islander Youth Justice Principle details culturally sensitive supports that Aboriginal and Torres Strait Islander youth are entitled to whilst in custody: *Youth Justice Administration Regulations 2016* (SA) reg 5. For example, it requires that ‘assessment, case planning and decision-making in respect of an Aboriginal or Torres Strait Islander youth includes consultation with relevant Aboriginal and Torres Strait Islander people or organisations to assist the youth’: at reg 5(c).

²⁸ The Adelaide Youth Training Centre is a South Australian detention facility for young people between the ages of 10–18: see ‘Adelaide Youth Training Centre: Kurlana Tapa’, *Government of South Australia* (Web Page, 3 June 2019) <<https://www.sa.gov.au/topics/rights-and-law/young-people-and-the-law/adelaide-youth-training-centre>>. *Kurlana Tapa* ‘means New Path in the language of the Kaurna people of the Adelaide Plains’: Alan Fairley, Belinda Lorek and Jessica Flynn, *Great Responsibility: Report on the 2019 Pilot Inspection of the Adelaide Youth Training Centre (Kurlana Tapa Youth Justice Centre)* (Report, Training Centre Visitor, Government of South Australia, June 2020) 6.

²⁹ Fairley, Lorek and Flynn (n 28) 23, 38–9, 87.

‘What is the Crown’s attitude to Mr Smith being bailed to the address in Ernabella?’

‘We oppose that course.’

‘Why?’

‘Two reasons. First, it is proposed that he live with an uncle who has an extensive criminal history, and, second, there is no effective means of supervising him in Ernabella.’

The uncle’s antecedent report is handed up. The prosecutor takes me through a list of prior convictions running to some four pages for a man who, I am told, is in his forties. His offending also started as a youth. In fact, his early offending is not unlike Michael Smith’s — convictions for low level public order offending, theft, minor assaults and property damage abound. Initially he was fined, but fines soon made way to short periods of imprisonment. The offending continued as he aged, but remained largely of the same order. Small periods of imprisonment became longer as the system lost patience. At two points, significant periods of imprisonment had been imposed for significant assaults. Obviously, the antecedent report did not tell the full story of this man. I wondered if he was a traditional man. I wondered to what extent drink was involved in his offending. Perhaps he was a senior *wati* caught in the clash of cultures.³⁰ What impact had colonisation had on his life? Was he a victim of racism and institutional bias?

‘What happened to Mr Smith’s co-accused?’

‘Both were bailed to live with relatives in Port Augusta.’

Further discussion follows about the inability of the authorities to locate a suitable residence for Michael. The topic then switches to the substantive proceedings and when it is likely they will be finalised. It seems to me that a guilty plea is on the cards and a sentence no more punitive than the 10 weeks Michael had already spent in custody likely. In fact, it is highly likely that the sentence will be community-based with care and correction as the goal, and was always likely to be. Standing back and considering all the circumstances, to deny Michael bail is not in the interests of justice. It definitely is not in his best interests.

‘Why can’t he just go back to Amata?’

‘He’s at risk.’

‘How do you know that? Have you received an update from the officers in Amata or someone in the community?’

³⁰ A *wati* is an ‘initiated man’: Wilf H Douglas, *An Introductory Dictionary of the Western Desert Language* (ECU Publications, 2011) 105.

‘No, your Honour.’

‘The alleged offending occurred almost three months ago. Within hours of the store re-opening wouldn’t the initial anger have dissipated? And within days whatever inconvenience was caused would have been forgotten, wouldn’t it? Is he truly at risk?’

I sneak a glance at the flat screen. Michael is shaking his head.

‘Those are my instructions,’ states the prosecutor, signalling that he has nothing more.

‘Just before you sit down ...’

‘Yes your Honour.’

‘Have the authorities exhausted all possibilities with Michael’s family? And in referring to his family, I don’t mean in the European sense.’

The answer is negative. Chances are the authorities were not even aware of the extended family to which Michael belonged.

I turn to Michael’s counsel.

‘Have you got any information on the risk to Michael should he return to Amata?’

‘No.’

‘Can you tell me anything about his family in Amata?’

I learn that Michael’s father is in prison and his mother is somewhere in the Northern Territory.

‘But what about aunts and uncles?’ Counsel does not have the answers.

I think quickly.

‘If I leave the Bench and order that the Court be vacated, except for you, and further order that the link to the detention centre remain open so that you can speak to your client, do you think you might be able to take instructions on the risk to him as he understands it if he returns home, to whom the Court might speak to confirm any opinion your client may have, and whether he has any aunts or uncles in Amata that he might stay with for the duration of his time on bail?’

Counsel wisely runs with the invitation. Before adjourning I tell the prosecutor that I would also benefit from anything the officers at Amata might be able to tell me, should he be able to contact them, before telling Michael that I intend to leave the Bench so that he can speak to his lawyer.

I adjourn for 45 minutes.

We reconvene promptly three-quarters of an hour later. I am hopeful.

Defence counsel tells me that Michael is happy to be bailed back to Amata and does not think anyone will carry through on the threat to give him a hiding.

‘Is there anyone in Amata that he can live with?’ I ask.

‘His Aunt Jenny.’

‘Have you spoken to Aunt Jenny yourself?’

‘Yes, in the last twenty minutes.’

‘What did she tell you?’

I am told that Aunt Jenny is happy to have Michael live with her.

‘Did Aunt Jenny say anything about the mood of the community and whether, if Mr Smith went back, he would be at risk?’

No, is the answer, but counsel did not ask her about this.

The prosecutor advises that there has been a rotational change in the officers stationed at Amata. None of those currently posted to the community were there when Michael and his co-accused are said to have broken into the community store. They are in no position to help. All they can say is that things are quiet in Amata, and that life seems to be going on as usual. The prosecutor adds that part of the APY Lands have been closed to outsiders because Men’s Business is taking place and many of the men in Amata have gone.

I pause to think; I have no doubt that Aunt Jenny is happy to have Michael stay with her. The Aboriginal notion of family and responsibility for family members is deeply ingrained and is always at the forefront of an Aboriginal person’s thinking. Something grave would have to happen for her to reject him. Had I spoken to Aunt Jenny, I would have asked about the mood of the community and how people might react if Michael Smith returned.

Again, my mind began to whirl. Michael, like most Aboriginal offenders who live on the APY Lands, is disadvantaged in the criminal justice system because of the remoteness of his country. Remoteness and the relative sparsity of population mean less resources are available to the person charged, and less options for a court considering bail, than are available in the city or larger rural towns. And then there is the question of the access that people who live on the APY Lands have to lawyers and the ability lawyers have to take instructions, gather evidence and to find witnesses. Whilst there are specialist Aboriginal legal organisations, funding is often limited and

the services on offer, correspondingly limited.³¹ To this must be added the paucity of programs and the relative non-availability of supervision for those who might be eligible for bail, community-based sentences and parole. In these respects, the system opens itself up to allegations of unequal treatment and worse. My mind returns to the idea of Anangu courts and the involvement of the Anangu in bail and community-based programs.

My mind runs on. Recent research undertaken by the Australian National University demonstrates that amongst the non-Indigenous population of Australia, there is an implicit negative bias against Indigenous Australians which is likely to result in the racist treatment of Indigenous Australians.³² This bias is unconscious. It may be described as a collective negativity that impacts upon all outcomes for Indigenous Australians at all levels. If this is right, the odds of Michael receiving equal treatment are against him. The same study finds an absence of bias by Indigenous Australians against Indigenous Australians.³³ It seems to me yet another argument for Anangu courts.

‘Do you have Aunt Jenny’s telephone number?’ I ask.

Hesitatingly, defence counsel says yes. I had noticed there was a cordless telephone on the bench occupied by my associate.

‘Do either of you object if I call Aunt Jenny?’ Neither counsel stirs.

I dial the number. A woman answers. I tell her who I am and why I am calling. She sounds unimpressed and inconvenienced. I ask her whether she knows Michael Smith and if she is happy for Michael to live with her in Amata if he is released on bail. She tells me that he is her nephew and that she is happy to have him. I ask her if he is likely to get a hiding if he returns. She says not. I tell her that I have been told that some people wanted to give him a hiding. She tells me that things are good now. I impress upon her that I would not want to see Michael get hurt if he goes back.

‘Nah, nah, he’ll be alright with me,’ she says. She sounds strong and confident.

I ask whether she is prepared to help me make sure that Michael stays out of trouble and attends Court. She assures me he will listen to her.

Before terminating the call, I ask counsel if they have any questions for Aunt Jenny. None. I thank her, tell her it is likely that Michael will be back in Amata soon and that that

³¹ Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015–2020* (Final Report, February 2019) 85.

³² Siddharth Shirodkar, ‘Bias against Indigenous Australians: Implicit Association Test Results for Australia’ (2020) 22(3–4) *Journal of Australian Indigenous Issues* 3, 5.

³³ *Ibid* 14.

she can expect a call letting her know if and when he is coming. I return the phone to my Associate and turn back to the bar table. I invite any further submissions. None are made.

I announce that I intend to grant Michael bail on the condition that he live with his Aunt Jenny in Amata. The prosecutor does not speak against my decision, but requests a condition that Michael not associate with or contact his co-accused. He also mentions that the Department of Correctional Services would like the bail agreement to include a condition that Michael must attend school. I am tempted to do so, but check myself. I do not want bail revoked because Michael failed to turn up for school, and I do not want him to miss Men's Business because of a condition in a bail agreement that he must go to school. I do not include the condition.

The bail conditions are settled, but still I am troubled. If the men are away, will the lure for Michael to join them not be strong? Very strong? If he does, he will breach his bail agreement by failing to reside with his aunt and may be returned to custody. Does the Court have to wait for Men's Business to finish? Should it? How do I accommodate the traditional ways and yet discharge my duty?

'When is Michael next due in Court?'

Defence counsel responds, telling me that the Magistrates Court circuit to the APY Lands is due in Amata on the coming Friday. It is now Tuesday afternoon. It occurs to me that if Michael is on a bus tomorrow morning, he will arrive in Amata in time to appear in Court.

'What do you envisage will happen on Friday?'

'We will apply for the matter to be adjourned for three months and bail to be varied to allow Michael to attend Men's Business.'

'Do the magistrates commonly make such orders?'

'They do.'

'And is bail answered?'

More often than not, is the answer.

Counsel further informs me that some of the Elders attend Court and that they have been known to reinforce what the magistrate says about coming back. Sometimes people are a week or two late, I am told, but generally they answer. I am also told that the Anangu know that to fail to answer bail will make things difficult for others. I am not sure what to think of this. Has the dominant culture forced the less dominant culture into submission yet again, or is this indicative of a meeting of minds? Is it a step toward embracing diversity and most importantly the culture of the First Australians? It is, but it is hardly worth celebrating. Michael Smith has served 10 weeks in

detention because of where he lives. Surely we can do better. As it has in the past,³⁴ the *Uluru Statement from the Heart* invades my thinking:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.³⁵

³⁴ Hinton, 'A Bail Review' (n 1) 197–8; Hinton, 'Another Bail Review' (n 1) 639.

³⁵ Referendum Council, *Uluru Statement from the Heart* (26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-from-the-heart>> (emphasis in original).