



Special Commission of Inquiry into LGBTIQ hate crimes

JUDGMENT

17 February 2023

Introduction

1. An application is made to the Special Commission of Inquiry into LGBTIQ hate crimes (**the Inquiry**) by Associate Professor Derek Dalton to provide evidence by way of audio-visual link (**AVL**) during the February hearings.
2. Dr Dalton has been called by the Inquiry to provide evidence in relation to the academic review of the work of Strike Force Parrabell, which itself comprised a review of 88 deaths between 1976 and 2000, each said to have potentially involved motivations of LGBTIQ hate bias. The academic review was carried out by Dr Dalton with his then-colleague, Professor Willem de Lint, during 2016 and 2017. Both academics were employed by Flinders University at the time. Two joint statements (one dated 28 October 2022; the other undated but sent to the Inquiry on 30 January 2023) have been prepared by Dr Dalton and Professor de Lint for the Inquiry.
3. Material relevant to Dr Dalton's application to appear by AVL is annexed to an affidavit of one of the solicitors of the Inquiry, Mr Vincenzo Camporeale, dated 15 February 2023 (**Solicitor's Affidavit**). This affidavit was provided to Dr Dalton and to me. Oral submissions were also made by Dr Dalton in a hearing of the application on 15 February 2023. On that date, I ordered that the application be dismissed and indicated that I would hand down written reasons for my decision by 17 February 2023. These are those reasons.

Background

4. The factual matters relevant to the application are set out in the Solicitor's Affidavit and the attached annexures. They are as follows:
 - a. On 15 November 2022, the Inquiry issued a letter to Dr Dalton enclosing a summons to attend the Inquiry to give evidence. The letter informed Dr Dalton that he would be informed in due course of the precise date on which he would be required to attend. In December, Dr Dalton

contacted one of the solicitors assisting the Inquiry by telephone and enquired whether it would be possible for him to give evidence by AVL on the basis that he had an unspecified medical condition. The solicitor told Dr Dalton that in order to make an application to the Inquiry to provide evidence by AVL, he would need to do so in writing and to provide medical evidence in support of his application.

- b. On 22 November 2022, the Inquiry issued a letter to Dr Dalton noting that his evidence was scheduled to be provided to the Inquiry on a date to be fixed in early 2023.
- c. On 22 December 2022, a further letter was issued by the Inquiry to Dr Dalton regarding the evidence he would give at the hearing in 2023. This letter indicated that Dr Dalton was scheduled to provide evidence in February 2023 and enclosed a copy of three expert reports obtained by the Inquiry.
- d. On 10 January 2023, Dr Dalton wrote to one of the solicitors assisting the Inquiry via email. Dr Dalton indicated that he wished to appear via AVL and attached a letter from his doctor, Dr Tim Moss, dated 21 December 2022 as supporting evidence. In his letter, Dr Moss stated as follows: *“I wish to confirm to the Commission that A/Prof Dalton is currently suffering from a combination of complex medical issues which makes it inadvisable for him to travel in person to NSW to attend the inquiry between January and April of 2023. If testimony can be given via video link this would be the preferred option.”*
- e. On 20 January 2023, a letter was issued by the Inquiry to Dr Dalton regarding his application to appear via AVL before the Inquiry. The letter indicated that the material so far put forward by Dr Dalton was inadequate to assess whether Dr Dalton ought to be granted leave to appear by AVL. In particular, it was noted that: (i) Dr Moss had stated that it was *“inadvisable”* for Dr Dalton to travel but provided minimal detail as to why this was the case; and (ii) Dr Moss is a General Practitioner, and medical evidence in support of an application to appear by AVL ought to be provided from an individual with specialised medical qualifications relevant to Dr Dalton’s specific health conditions.
- f. On 25 January 2023, Dr Dalton wrote to Mr Camporeale, via email, and provided a letter from clinical psychologist, Dr Renae Hayward, dated 24 January 2023 as further supporting evidence for his application. Dr Hayward wrote as follows:

“Mr Dalton consulted with me on 17th January 2023 [...] and has a further consultation booked for 30th January 2023. I again consulted with Mr Dalton today who has noted experiencing stress and anxiety in relation to the Inquiry and in particular, the travel associated with attending the Inquiry. He reports disrupted sleep, persistent worry and rumination, feeling tense and agitated, and feeling emotional with teary episodes. He also noted experiencing Diverticulitis, which may worsen with stress and travel. Given reported precipitating stressors including acclimatising to a new job, a recent relationship breakdown, financial pressures associated with travel to the Inquiry and uncertainty around access to legal support, it is foreseeable that the added pressure of travel, isolation when in Sydney and distance from support networks will cause significant stress and exacerbate Mr Dalton's current symptoms.

The added stress may be somewhat alleviated by attendance at the Inquiry via video link. Mr Dalton will be able to access his support network and continue to consult with AFP welfare support during this time.”

- g. On 2 February 2023, a letter was issued by the Inquiry to Dr Dalton regarding his application to appear via AVL. The letter indicated that Senior Counsel Assisting: (i) was of the view that the material provided up until that date was insufficient for Dr Dalton’s application to be granted; and (ii) intended to submit to the Commissioner that the application should be refused if no supplementary material was provided. The letter requested that Dr Dalton provide any further material in support of his application by 10 February 2023, and indicated that the application would be considered by the Commissioner at a hearing commencing at 10:00am on 15 February 2023.
- h. No additional evidence in relation to the application was provided by Dr Dalton prior to the hearing on 15 February 2023.

Submissions of Dr Dalton

- 5. Dr Dalton stated in his oral submissions during the hearing that he has faced numerous difficulties in recent weeks. In particular, Dr Dalton submitted that:
 - a. he has recently lost his employment with Flinders University and is now working for the Australian Federal Police (**AFP**). The transition to this new job has been stressful and Dr Dalton has not been sleeping well;
 - b. he is currently suffering from “*major depression and anxiety*” and taking antidepressant medication. I do not propose to question Dr Dalton’s evidence in this regard but note that neither of these facts was recorded on the letters prepared by Dr Moss and Dr Hayward in

- support of Dr Dalton's application, meaning that it is difficult for me to give this factor significant weight;
- c. building works are presently ongoing on his neighbour's property so that the fence to his backyard has been temporarily removed. This means that Dr Dalton's greyhound cannot be left unattended in the backyard at the present time;
 - d. his twin brother is facing some employment-related challenges and presently needs his support; and
 - e. he was diagnosed with COVID-19 several months ago in circumstances where he suffers from compromised lung capacity, and it was difficult to recover. During this period, he used most of his sick leave associated with his employment with the AFP and is concerned that by travelling to Sydney he would be at increased risk of contracting COVID-19 once again.
6. Dr Dalton was perfectly candid to the Inquiry in stating that he had attended an ear, nose, and throat specialist on Monday, 13 February 2023 but that no ear infection had been diagnosed. He also said, frankly, that he was aware that he would not lose any salary (or other benefits) associated with his AFP employment, and that it was likely the issue with his backyard fence would be resolved by the time he is presently scheduled to give evidence.

Principles relevant to the Application

7. Section 14 of the *Special Commissions of Inquiry Act 1983* (NSW) (**SCOI Act**) provides that: "*A Commissioner may, by writing, summon any person to attend the Special Commission at a time and place named in the summons, and then and there to give evidence and to produce any books, documents or writings in the person's custody or control which the person is required by the summons to produce.*" Although witnesses are ordinarily required to appear in person for the purpose of providing oral evidence to the Inquiry, it is open to the Inquiry to modify its procedure to accommodate the particular circumstances of witnesses on a case-by-case basis.
8. During the COVID-19 pandemic, the Supreme Court of New South Wales implemented arrangements in accordance with the special provisions in ss. 22C(3) and (4) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) to facilitate the appearance of practitioners and accused persons via AVL. Since 1 October 2022, the Court's COVID-19 protocols have ceased to operate.

9. One reason for the requirement for witnesses to appear in person is that the ability to assess a witness in person is generally considered a significant advantage, not only for a Judge or Commissioner, but also to an advocate who either intends to call a witness or intends to cross-examine a witness.
10. The benefits of having a witness appear in person, rather than by AVL, are well-documented in the authorities. For example, I note the remarks of:

- a. Giles CJ CommD (as his Honour then was) in *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court (NSW), 11 March 1997, unrep) at 4:

“The ordinary procedure is [that a witness gives oral evidence before a judge in a courtroom] and there are sound reasons for following it unless cause to the contrary be shown. The conduct of proceedings in open court, available to public scrutiny, is of great importance. Cross-examination may be more difficult when video evidence is taken because documents have to be transmitted or produced in an unfamiliar manner, because of delay in voice transmission, or for other reasons, and the effectiveness of cross-examination as a weapon in the fight for truth should not be unduly hindered. And in many cases the Court is assisted in fact by observance of what is misleadingly called the demeanour of the witnesses, upon which the taking of video evidence may impact.”

- b. Palmer J in *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1; [2001] NSWSC 651 at [27]:

“...where the matter in contest involves major issues of credit or where documentary material of some volume and complexity is likely to be deployed in Court, it is still desirable, in my opinion, to have the witness in Court for examination, unless good reasons are shown to the contrary.”

- c. Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502 at [7]:

“... [The difficulties associated with taking evidence by video-link] include technical problems such as difficulties with hearing, in presenting documents to the witness, in maintaining transmission over an extended period of time and those arising from time differences. More importantly, even if those difficulties can be overcome or minimised, there are the problems in maintaining a line of cross-examination and the difficulty of assessing a witness where evidence is given by video link. As a matter of justice to both parties these problems are critical. It is perhaps more workable where one is dealing with an expert witness who is generally well-prepared, has written a detailed report and has an expertise and familiarity with the subject that may not be the case with a lay witness.”

- d. Lee J in *Palmer v McGowan (No 2)* (2022) 398 ALR 524; [2022] FCA 32 at [43]:

“Not only does receiving the evidence of the witnesses in person maintain fluidity between the witness, counsel and the judge, but there is much to be said about a witness coming into the usually unfamiliar confines of a courtroom, swearing an oath or taking an affirmation in a witness box to tell the truth, and proceeding to give evidence on oath or affirmation in the physical presence of counsel and the judge. There is a solemnity about the giving of evidence, and the formalities reinforce it.”

11. However, in certain circumstances, factors may weigh in favour of a witness being permitted to give evidence via AVL. This may occur if a witness is based overseas or vulnerable in some respect. For example, there have been occasions where ill health has necessitated that evidence be taken from a witness’s bedside or by other means. In each case, the exercise of the discretion is a balancing exercise as to what will best serve the administration of justice: *Australian Competition and Consumer Commission v StoresOnline International Inc* [2009] FCA 717 per Edmonds J at [14]. One of the notable exceptions where an application to appear by AVL is rarely granted is where the credit of the witness may be in issue.

Consideration

12. I am, in many respects, entirely sympathetic to the concerns raised by Dr Dalton during the hearing. However, the medical evidence and the submissions made by Dr Dalton must be balanced against the administration of justice and my obligations in relation to the Inquiry. In this case, despite providing letters from two medical practitioners, I do not consider that Dr Dalton has provided a substantive medical reason as to why he cannot travel to NSW. I say this for the following reasons.
13. *First*, the letter from Dr Moss refers to Dr Dalton suffering from “*a combination of complex medical issues*” which would make it “*inadvisable*” for Dr Dalton to travel. However, the letter does not state what these complex medical issues actually are. Although made in a context where a plaintiff was absent from Court without reasonable excuse (rather than in an application to appear via AVL), the remarks of Barrett J in *Magjarraj v Asteron Life Limited* [2009] NSWSC 1433 at [22] are apt in these circumstances:

“All too frequently judges see cryptic written statements from medical practitioners referring to some undisclosed and undiagnosed ‘medical condition’, culminating in the assertion that a person is unfit to attend court or unfit for a court hearing. To the extent that such statements are put forward as evidence about the state of the person’s health and the extent to which impaired health may

incapacitate a person from participating in court proceedings, the statements fail the most fundamental test for the reception of expert evidence. Bald unexplained and unfathomable statements of that kind must be simply rejected out of hand as evidence of anything.”

14. *Secondly*, the letter from clinical psychologist, Dr Hayward, indicates that Dr Dalton has been experiencing stress and anxiety associated with the Inquiry and travel to the Inquiry in particular. She writes that, “*it is foreseeable that the added pressure of travel, isolation when in Sydney and distance from support networks will cause significant stress and exacerbate Mr Dalton's current symptoms.*” However, Dr Hayward does not say that Dr Dalton has been formally diagnosed with a specific mental health condition, such as depression or an anxiety disorder. In addition, Dr Hayward’s letter indicates that the date of Dr Dalton’s first appointment with her was 17 January 2023. This suggests that he was not attending regular appointments, at least with Dr Hayward, for psychological treatment before this date. Dr Hayward does note that Dr Dalton has indicated that he is suffering from diverticulitis, which I understand is a condition of the digestive tract. However, Dr Hayward provides no detail as to why that condition is susceptible to worsen due to travel (and I would query whether, as a clinical psychologist, Dr Hayward is in a position to provide evidence regarding Dr Dalton’s diverticulitis in any case).
15. *Thirdly*, neither Dr Moss nor Dr Hayward has indicated that they have prescribed any medication which could not be continued if Dr Dalton travelled to NSW. I understand that there is no reason why Dr Dalton would not be able to communicate with Dr Moss or Dr Hayward by telephone or videoconference during his time in Sydney if he felt it was necessary for health reasons to do so. In addition, Dr Dalton openly stated that it was unlikely he would be able to secure an appointment with Dr Moss during the week he is scheduled to give evidence, even if Dr Dalton were to stay in Adelaide.
16. Several matters unrelated to the medical evidence are also relevant. *First*, I note that the travel and accommodation expenses associated with Dr Dalton’s travel to NSW are to be covered by the Inquiry. Dr Dalton will not lose any salary (or other employment-related benefits) due to his attendance.
17. *Secondly*, it is significant that Dr Dalton played an important role in the academic review of the Strike Force Parrabell findings. This role continued over many months and his evidence is relevant to, in particular, paragraph 3 (ii) of the Terms of Reference, which requires me to “*have regard to*” the report and findings of Strike Force Parrabell.

18. *Thirdly*, it is likely to be necessary for Senior Counsel Assisting to present numerous documents to Dr Dalton in the course of questioning. If Dr Dalton were to give evidence by AVL, the Inquiry would need to arrange for members of staff to be present in Adelaide to assist Dr Dalton in accessing the documents that Senior Counsel Assisting intends to put to him. It is also likely that other representatives, including counsel for the Commissioner of the NSW Police Force, may seek to put supplementary questions to Dr Dalton and/or require him to consider specific documents.
19. For the above reasons, I consider that Dr Dalton's application to provide evidence to the Inquiry via AVL should be dismissed. As noted above, I appreciate the concerns raised by Dr Dalton. All measures will be taken to assist him when he gives evidence in Sydney. However, almost everyone who appears as a witness in a court room environment will experience some stress associated with that event. The Inquiry must balance this factor against the important work the Inquiry is obliged to pursue pursuant to the Terms of Reference. To date, no adequate reason has been provided as to why Dr Dalton cannot attend in person.

The Commissioner

The Honourable Justice John Sackar