New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

Judgment

Tuesday, 6 December 2022

Introduction

1. This application concerns an objection by the Commissioner of NSW Police Force (**NSWPF**) in relation to several documents proposed to be tendered as part of the evidence before the Inquiry. The documents the subject of the objection have not been identified by reference to particular documents, but they do include Annexures 7-14 of the statement dated 31 October 2022 of Assistant Commissioner Anthony Crandell (**Crandell Statement**), among others.

2. Rather, the Commissioner of NSWPF identifies the documents more generally as being those documents connected with four particular topics, namely:

   - the creation of the Bias Crime Unit within NSWPF and the characterisation of hate crimes within that unit;
   - the creation of Operation Parrabell and its methodology;
   - the creation of Strike Force Parrabell and its methodology; and
   - the contract between the NSWPF and certain academics from Flinders University to provide an independent review of Strike Force Parrabell's report.

3. The objection by the Commissioner of NSWPF is made on the basis of relevance. Essentially, this application requires me to determine whether the topics referred to above are sufficiently connected to the Terms of Reference so that documents concerning these topics may be tendered as part of the evidence before the Inquiry.

Letters Patent and Terms of Reference of the Inquiry

4. Before I set out the submissions of the parties, I provide some general background and set out the Terms of Reference of the Inquiry.

5. On 13 April 2022, I was authorised as Commissioner by Letters Patent to inquire into and report and make recommendations to the Governor of New South Wales on:

   A. The manner and cause of death in all cases that remain unsolved from the 88 deaths or suspected deaths of men potentially motivated by gay hate bias that were considered by Strike Force Parrabell.

   B. The manner and cause of death in all unsolved suspected hate crime deaths in New South Wales that occurred between 1970 and 2010 where:

      i. the victim was a member of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community; and

      ii. the death was the subject of a previous investigation by the NSW Police Force.

6. I was directed to establish a Special Commission of Inquiry for this purpose. I was also directed, in conducting the Inquiry, to have regard to:

   C. The findings of previous inquiries and reports, including:

      i. the interim and final report and findings of the inquiries conducted by the Standing Committee on Social Issues into Gay and Transgender hate crimes between 1970 and 2010;

      ii. the report and findings of Strike Force Parrabell; and

      iii. the AIDS Council of New South Wales report, *In Pursuit of Truth and Justice* (2018).

7. I was further directed, in conducting the Inquiry:

D. to establish such arrangements as the Commissioner considers appropriate for evidence and information, including the testimony of witnesses in current and previous inquiries, to be shared with the inquiry in a manner that avoids unnecessary duplication and minimises trauma to witnesses;

E. to operate in a way that avoids prejudice to criminal investigations, any current or future criminal prosecutions, and any other contemporaneous inquires; and

F. that the Commissioner is not required to inquire, or to continue to inquire, into a particular matter to the extent that the Commissioner is satisfied that the matter has been or will be sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

8. Specific paragraphs of the Terms of Reference, namely Paragraphs A, B, C, D, E and F as set out above, are discussed in the judgment below.

Correspondence between the parties pre-hearing

9. Since at least 18 November 2022, representatives for NSWPF and the solicitors assisting this Inquiry have exchanged multiple items of correspondence regarding a proposed application to be made by NSWPF with respect to certain documents proposed to be included in the December tender bundle on the basis of confidentiality.

10. The issue of relevance (as distinct from confidentiality) in relation to these documents was not articulated until 1 December 2022, when it was raised in a letter addressed to Mr Enzo Camporeale, Solicitor Assisting the Inquiry, from Ms Katherine Garaty, Director of the Crime Disruption and Special Inquiries Law, NSWPF. That letter stated:

> The Commissioner of Police wishes to be heard on the issue of the relevance of many of the documents in the 5 December Tender Bundle, and intends to make oral submissions in this regard at the commencement of the hearing on Monday. An outline of those submissions will be the subject of a separate letter.

11. On the following day, an outline of submissions was provided in a letter dated 2 December 2022 addressed to me (care of Mr Camporeale) from Ms Natalie Marsic, General Counsel of

the NSWPF (**2 December Letter**). Those submissions were supplemented yesterday in oral submissions by Mr Tedeschi KC.

12. Later on 2 December 2022, Mr Camporeale sent a letter to Ms Marsic indicating that the solicitors assisting the Inquiry understood that the Commissioner of NSWPF did not intend to press an objection on the basis of confidentiality with respect to Annexures 7-13 of the statement dated 31 October 2022 of Assistant Commissioner Anthony Crandell. In letters dated 18 and 25 November 2025, Ms Garaty had previously indicated that the Commissioner of NSWPF's position was that those documents should be redacted in their entirety because they were commercial documents related to the academic review associated with Strike Force Parrabell. On 4 December 2022, Ms Garaty sent an email to Mr Camporeale indicating that the NSWPF did, in fact, press its objection with respect to Annexures 7-13, but that objection was now made on the basis of relevance (rather than confidentiality).

General Principles and Statutory Provisions

13. The Terms of Reference of the Inquiry have already been set out above at [5]-[7]. Subject to the supervision of the courts, the interpretation of the terms of reference is a matter for the Inquiry: *Easton v Griffiths* (1995) 69 ALJR 669 per Toohey J (at 672).

14. The Commissioner of NSWPF's application is made on the basis of section 9 of the *Special Commission of Inquiry Act 1983* (NSW) (the **Act**). Section 9 of the Act, which is entitled 'Limitations as to evidence', provides as follows:

> **9 Limitations as to evidence**
>
> (1) As far as practicable, a Commissioner shall, in the course of a hearing in public, only receive evidence in accordance with this section.
>
> (2) The Commissioner shall only receive evidence that appears to relate to a matter specified in the relevant commission.
>
> (3) The Commissioner shall only receive as evidence, and (as far as practicable) only permit to be given in evidence, matter that, in the opinion of the Commissioner, would be likely to be admissible in evidence in civil proceedings.

> (4) Despite subsection (3), the Commissioner is required, when preparing a report in connection with the subject-matter of the commission, to disregard (in the context of dealing under section 10 with offences that may or may not have been committed) evidence that, in the opinion of the Commissioner, would not be likely to be admissible in evidence in relevant criminal proceedings.
>
> (5) For the purposes of this section, in determining whether evidence is admissible, regard is not to be had to parliamentary privilege to the extent that that privilege is waived by or under this Act or otherwise.

Submissions of Parties

15. The submissions of the Commissioner of NSWPF were as follows. First, Mr Tedeschi KC submitted that the main focus of the Commission this week, and possibly next week, appeared to be on four distinct topics, including:

- the creation of the Bias Crime Unit within NSWPF and the characterisation of hate crimes within that unit;
- the creation of Operation Parrabell and its methodology;
- the creation of Strike Force Parrabell and its methodology; and
- the contract between the NSWPF and certain academics from Flinders University to provide an independent review of Strike Force Parrabell's report.

16. It was then submitted that the focus on these topics was outside the Terms of Reference that govern the Inquiry. In particular, it was argued that it is apparent from the Terms of Reference and from the circumstances in which the Inquiry was established that:

    a. First, the Executive did not wish the Inquiry to be a review of the establishment or methodologies adopted by any prior investigation, including Strike Force Parrabell. This is especially the case given that Strike Force Parrabell was not an inquiry into the "manner and cause" of death of members of the LGBTIQ community and rather should be characterised as a "categorisation exercise". In this respect, it ought to be distinguished from Operation Parrabell, which commenced as an exercise in reinvestigation;

b. Secondly, the Executive did not wish me to review the Flinders University analysis of Strike Force Parrabell, or the establishment of the Bias Crime Unit; and

c. Thirdly, that the task of the Inquiry is to identify cases that warrant further investigation and in which I, as Commissioner, may be able to use my coercive powers to further those investigations to the point where the NSWPF can conduct further inquiries or prosecutions can be commenced.

17. This interpretation of the Terms of Reference was said to be supported by the fact that:

a. Paragraphs A and B (presumably in the reference to "manner and cause") are identical to the terms in the *Coroners Act 2009* (NSW) (**Coroners Act**) that govern the conduct of an inquest. This provides "an irrefutable indication" of the way in which the Executive seeks that I conduct this Inquiry;

b. Paragraph C, which directs me to "have regard to" the report and findings of Strike Force Parrabell, should be interpreted as meaning that I should note the contents of the reports specified under that paragraph but not investigate their adequacy;

c. Paragraph D specifies that I am to conduct the Inquiry in a manner that "avoids unnecessary duplication";

d. Paragraph F specifies that I am not required to inquire into a particular matter to the extent that I am satisfied that the matter has been or will be sufficiently and appropriately dealt with by another inquiry or investigation; and

e. Extrinsic materials, including the final report of the New South Wales Legislative Standing Committee on Social Issues into Gay and Transgender Hate Crimes between 1970 and 2010 in that led to the creation of this present Inquiry, support this interpretation. Mr Tedeschi KC highlighted that the final report of the Gay and Transgender Hate Crimes Inquiry recommended that the NSW Government establish a judicial inquiry or other form of expert review to inquire into unsolved cases of suspected gay and transgender hate crimes deaths. He also noted that this recommendation was supported by the government, as indicated in a letter dated 4 November 2021 from the Hon. David Elliot MLA published to the Standing Committee.

18. Several of these points were foreshadowed in the 2 December Letter, in which the Commissioner of NSWPF submitted that:

    a. First, the "facts in issue" in the Inquiry are determined by Paragraphs A and B of the Terms of Reference and should be interpreted as being synonymous with the "manner and cause of death" of various persons in the categories specified;

    b. Secondly, section 9(3) of the Act requires a consideration of admissibility issues under the *Evidence Act 1995* (NSW) (**Evidence Act**), including sections 55 to 58 (which concern relevance) and section 130 (which is entitled 'Exclusion of evidence of matters of state'). Section 130 of the Evidence Act is generally directed to circumstances in which the Court may direct that certain information that relates to matters of state is not adduced as evidence on the basis that the public interest in admitting that evidence outweighed by the public interest in preserving secrecy or confidentiality (s. 9(1));

    c. Thirdly, Paragraph C, which directs me to have regard to the findings of previous inquiries and reports, including the report and findings of Strike Force Parrabell, "clearly indicates the wish of those who drafted them that you should not go over the same material or conduct the same inquiries that have already been done by the previous Inquiries listed in that paragraph"; and

    d. Fourthly, that Paragraph F indicates "a clear intention by those who drafted the Terms of Reference that you are not tasked with an assessment of the methodology or background of the previous inquiries listed in Paragraph C." It was submitted that "the exercise by Strike Force Parrabell was clearly not an investigation or a reinvestigation of the manner and cause of the 88 deaths, but rather an exercise of categorising whether or not they were 'motivated by bias including gay-hate'.

19. Senior Counsel Assisting made the following submissions in reply. First, the task of a Special Commission is not simply a "mirror" of the task of a Coroner, despite the use of the language of "manner and cause" in Paragraphs A and B. These paragraphs refer to the "manner and cause" of deaths in a particular context, that is, a context in which gay hate is fundamental

to each of the two categories of victims referred to in Paragraphs A and B. The concept of "manner and cause" as it is used in Paragraphs A and B is necessarily shaped by the Terms of Reference in a way that does not find a place in the Coroners Act.

20. Secondly, Senior Counsel Assisting noted that Strike Force Parrabell had specifically considered whether there was a bias factor involved in the 88 deaths and used two methodologies to do so. One methodology was used by the NSWPF and a different one was used in the academic review. Given the nature of the inquiries required by Paragraphs A and B, the connection between those inquiries and the Strike Force Parrabell and the subsequent academic review is obvious. It was submitted that understanding Parrabell's methodology would assist the Commission in understanding the very issue at the heart of this Commission, that is, whether a particular death was affected by a gay hate bias factor. If I am entitled only to read the Strike Force Parrabell report, without more, that would be of almost no use whatsoever in assisting me to consider the manner and cause of any of the 88 deaths.

21. Thirdly, Senior Counsel Assisting stated that Paragraphs C and F, when read together, are to the effect that I am positively directed to have regard to the report and findings of Strike Force Parrabell.

22. Fourthly, Senior Counsel Assisting submitted that Paragraph F has a significance somewhat different to that put by the Commissioner of NSWPF. Noting that Paragraph F provides that I am not required to inquire into a particular matter to the extent that I am satisfied that the matter has been or will be sufficiently and appropriately dealt with, Senior Counsel Assisting submitted that it may be the case, subject to evidence, that the inquiry as to whether the Parrabell deaths were motivated by gay hate bias may not have been sufficiently and appropriately dealt with by the inquiry constituted by Strike Force Parrabell and its academic review.

23. Fifthly, Senior Counsel Assisting emphasised that the criterion in section 9(2) of the Act is "appears to relate". In section 9(3), the criterion is that I am only to receive evidence that in my opinion would be "likely" to be admissible in civil proceedings. Senior Counsel Assisting argued that to some extent, this brings into play rules governing the admissibility of evidence

in civil proceedings. However, this is limited by the fact that civil proceedings necessarily presuppose adversarial (rather than inquisitorial) proceedings. In light of this distinction, section 9(3) does not prevent the Commission from receiving the evidence now under discussion.

24. Sixthly, the extraneous materials referred to by Mr Tedeschi KC (which included recommendations from a particular parliamentary committee) provide little assistance to me in construing the Terms of Reference. A different body, namely the Governor in Council, framed and decided upon the Terms of Reference a significant period after the publication of the report.

Consideration

Application of Section 9

25. I turn first to the relevant provision of the Act. Section 9(1) states that "[a]s far as practicable, a Commissioner shall, in the course of a hearing in public, only receive evidence in accordance with this section". This subparagraph operates generally to impose certain restrictions on the evidence that the Commissioner may "receive". In this context, "receive" must connote an act by the Commissioner to accept or, by analogy with a court, admit evidence. However, section 9(1) modifies the application of section 9 in the case of public hearings such that it only applies "[a]s far as practicable". It follows that section 9(1) recognises that given the distinct nature of the public inquiry process, there are some circumstances in which it will not be practical to adhere to the requirements of section 9, and (in particular) the rules of evidence as they apply in a civil proceeding.

26. Section 9(2) provides that, "The Commissioner shall only receive evidence that appears to relate to a matter specified in the relevant commission". Significantly, evidence that "appears to relate" is distinct from evidence that is "relevant" as that term is understand in section 55(1) of the Evidence Act. The evidence must only "relate to" a matter. Even in a civil matter, the conventional definition of relevance - that the evidence could rationally affect (directly or indirectly) the assessment of the existence of a fact in issue – is not a term of great precision and it necessarily requires an evaluation that there is a connection between the

evidence proposed to be led and an issue in the proceedings: see, for example, *BBH v The Queen* (2012) 245 CLR 499.

27. Connecting phrases such as "relate to", "in relation to" and in "respect of" are commonly used in legislation and subsequently interpreted by the Courts. An expression such as "relates to" is of broad import. This was illustrated by the High Court's consideration of the phrase, "in relation to" in *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374. In that case, McHugh J said (at 376) as follows:

> The prepositional phrase "in relation to" is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters.

28. For the purposes of section 9(2), the phrase must be construed as having even broader application due to the insertion of the word "appears". It is only necessary that the evidence "appears to relate to" a relevant matter in the Inquiry.

29. Section 9(3) provides that the Commissioner shall only receive as evidence matter that, "in the opinion of the Commissioner, would be likely to be admissible in evidence in civil proceedings. First, the Commissioner's opinion must simply be one that "can be formed by a reasonable [person] who correctly understands the meaning of the law" (*R v Connell; Ex parte Hetton Bellbird Colliers Ltd* (1944) 69 CLR 407 at 430). This is consistent with well-settled principles of administrative law. Secondly, the Commissioner is required to arrive at the view that the evidence is *likely* to be admissible, but there is no requirement for that evidence to be *actually* admissible in civil proceedings.

30. The meaning of the word "likely" was discussed by Deane J in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 Deane J stated (at 346) that:

> The word 'likely' can, in some contexts, mean 'probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a 50 per cent chance … It can also, in an appropriate context, refer to a real or not remote chance or possibility, regardless of whether it is less or more than 50 per cent. When used with the latter meaning in a phrase which is descriptive of conduct, the word is equivalent to 'prone', 'with a propensity' or 'liable'.

31. It follows the test under section 9(3) provides ample discretion to the Commissioner to receive evidence so long as the opinion is held that the evidence in question is *likely to* be admissible.

Manner and Cause

32. The Terms of Reference specifically require me to inquire into "manner and cause" of the deaths referred to in Paragraphs A and B. To "solve" the "unsolved" cases is not the task given to the Special Commission by the Terms of Reference. Rather, as stated, that task is to "inquire into", to "report on", and to "make recommendations on", the "manner and cause" of the deaths in question. It is the "manner and cause" of those deaths to which the present Inquiry is directed.

33. Such a subject has some resonance with the nature of the task typically embarked upon by a coroner: section 81, Coroners Act. In considering "manner and cause", the Special Commission (like a coroner) must form a view as to how a death occurred (manner) and as to the "real" or "actual" cause (as distinct from the terminal cause, e.g., trauma to the skull) of that death. However, for this inquiry, the subject is refined in particular ways that are not provided for or contemplated in the Coroners Act, namely by reference to the concepts referred to as "gay hate" and "hate crime". The Special Commission is directed by the Terms of Reference to inquire into "manner and cause" in the specific context of whether a death was causally associated with a "gay hate" or "hate crime" factor. Analysis of whether such a causal connection was present is thus central to the Special Commission's task.

34. I do not consider that the application of the Coroners Act in this context is necessarily relevant in the way contended by the Commissioner of NSWPF. This is because one of the principal "causes" I am investigating is the existence of "gay hate bias". It follows that I am necessarily required to examine the previous investigations of NSWPF and consider the extent to which gay hate bias was recognised to be a relevant causal factor in the death of particular individuals. It further follows that I am required to examine the means and the methodologies by which NSWPF arrived at its conclusions with respect to the existence (or non-existence) of gay hate bias in these specific cases. This requires me to examine, in particular, the report

and findings of Strike Force Parrabell and the academic review of that process that followed. It cannot be that in my role as investigator, I am required to accept the findings of a report such as Strike Force Parrabell without ascertaining the extent to which I am satisfied by those findings. This is even more the case in circumstances where a number of parties, including ACON, formerly the AIDS Council of NSW, have expressed concerns in relation to Strike Force Parrabell. If I were required to accept the findings uncritically of the reports listed in Paragraph C (as appears to be the position submitted by the Commissioner of NSWPF), the public value of a Commission such as this would be vastly diminished.

Relevance in the context of a Special Commission

35. As stated in the 2 December Letter, the Commissioner of NSWPF submits that "the facts in issue in your Inquiry are determined by Paragraphs A and B of your Terms of Reference as 'the manner and cause of death' of various persons in the categories specified." That submission was supplemented in oral submissions by Mr Tedeschi KC, who said that it is apparent from the Terms of Reference and from the circumstances in which the Inquiry was established that the Governor did not wish the Inquiry to be a review of the establishment and methodologies adopted by any prior investigation, including Strike Force Parrabell. This was said to be especially the case given that Strike Force Parrabell was not an inquiry into the manner and cause of death. As put by Mr Tedeschi KC, Strike Force Parrabell (as opposed to Operation Parrabell) was not an investigation into any crimes. Strike Force Parrabell was, according to Mr Tedeschi KC, a categorisation exercise and in this respect it ought to be distinguished from Operation Parrabell, which commenced as an exercise in reinvestigation. According to Mr Tedeschi, I am not expected to review the adequacy of the findings in the three reports referred to in Paragraph C.

36. The phrase "facts in issue", as that phrase was used in the 2 December Letter, requires consideration. In the context of inquisitorial proceedings, it is questionable whether the phrase "facts in issue" provides this most useful focus. This is because the Commission is not determining a dispute between two parties, as is the case in civil litigation (although, of course, specific facts that arise in inquiries may be contested by various parties).

37. Rather, the Inquiry has an investigatory function which necessarily requires it to amass information from a variety of sources and attempt to establish connections between certain facts and the subject of the Inquiry. In *Ross v Costigan* (1982) 41 ALR 319, Ellicot J considered the matter of whether "a matter is relevant to the inquiry" in the context of a Royal Commission. His Honour stated as follows (at 334-335).

> In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken…This does not mean, of course, that a Commission can go off on a frolic of its own.
>
> However, I think a court if it has power to do so, should be very slow to restrain a Commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the Commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the Commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the inquiry.

38. Despite the fact that some evidentiary rules do apply in these particular proceedings, his Honour's remarks remain apt. Regard must be had to the investigatory character of a Special Commission. Ellicott J's decision was affirmed by the Full Court, which stated that, "what questions the Commissioner should ask, or allow to be asked, is a matter for his own good sense and judgment" and "what he bona fide believes will assist him in his inquiry": (1982) 41 ALR 337 at 350-351. In *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (No 3) (1980) 47 FLR 163, a Full Court of the Federal Court (Brennan, Keely and Fisher JJ) considered several issues with respect to the scope and operation of section 155 of the *Trade Practices Act 1974* (Cth). At 173-174, the Court stated:

> The power conferred by s 155(1) is in aid of that function and is a power which authorizes inquiries both wide in scope and indefinite in subject matter. It is an investigative power which is under consideration here and it is not possible to define a priori the limits of an investigation which might properly be made. The power should not be narrowly confined....The investigative power may properly be exercised by inquiring into the existence of facts which do not themselves constitute a contravention or deny the possibility of a contravention. The power may properly be exercised to ascertain facts which may merely indicate a further line of inquiry, or which may tend to prove circumstances from which an inference can be drawn as to the existence of other facts which have a more immediate and proximate relationship to the matter under investigation.

39. It follows that regard must be had to the investigatory character of a Special Commission when assessing its legitimate scope of enquiry. A Special Commission - such as this Inquiry - is effectively established by an executive government for the purpose of obtaining information and making recommendations with respect to an analysis of that information. The remarks of Branson J in *Ferguson v Cole* [2002] FCA 141; 121 FCR 402 (at [74]) are pertinent in this regard:

> Where the Executive Government has a need for information it has the option of seeking to obtain that information by one or more of various means. The establishment of a Royal Commission is one way in which the Executive Government may obtain information. […] The time provided to the Commissioner to provide the report required of him is a matter for the Executive Government. The nature and extent of the Commissioner's inquiries and the detail of the measures recommended by him will be influenced by the time frame within which he is required to work and the resources provided to him. These are not matters with which the law is directly concerned.

"Have regard to"

40. In the 2 December Letter, the Commissioner of NSWPF submitted that Paragraph C of the Terms of Reference, which directs me to "have regard to" the report and findings of Strike Force Parrabell, "clearly indicates the wish of those who drafted them that you should not go over the same material or conduct the same inquiries that have already done by the previous Inquiries listed in that paragraph".

41. Mr Tedeschi KC further stated in oral submissions that Paragraph C limits my consideration of Strike Force Parrabell to: (i) the final report; and (ii) the case summaries (Annexure 14 to the Crandell Statement), which is permissible only to the extent to which the report and case

summaries informs this Special Commission's inquiry into the manner and cause of the deaths as captured by Paragraphs A and B of the Terms of Reference. In other words, I am entitled to have regard to the final report and the case summaries to inform my view in relation to whether or not each of these deaths is a hate crime, but no more.

42. The Commissioner of NSWPF also submits that interpreting what it is I must, and must not, have regard to, I should consider what might, in the context of statutory interpretation, be called "extrinsic material" or otherwise. These documents referred to by Mr Tedeschi KC were the final report of the New South Wales Legislative Standing Committee on Social Issues into Gay and Transgender Hate Crimes between 1970 and 2010 (paragraph 2.92 at page 21, paragraphs 2.106 to 2.108 at page 34, Recommendation 1) and a letter from the Hon. David Elliott MLA, who was the Minister for Police and Emergency Services at the relevant time, which was provided to the Standing Committee and included the NSW Government response to the recommendations of the Standing Committee.

43. In examining the significance of the phrase "have regard to", I note the following. First, the phrase "have regard to" is commonly used in administrative law, in statutes and in contract law. As I have noted above, the interpretation of the Terms of Reference is a matter for the Inquiry. It is not, amongst other things, an exercise of statutory interpretation under the *Interpretation Act 1987* (NSW) or otherwise.

44. Secondly, the content of the requirement to "have regard to" a particular matter "has been consistently interpreted to mean that the decision-maker must take into account the matter to which regard is to be had and give weight to it as an element of making the decision."[1] In order to "have regard to" a matter, consideration of that matter must be genuine consideration, and not merely token or nominal consideration: *Secretary, Department of Defence v Fox* (1997) 24 24 AAR 171 at 176; *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134.

45. Thirdly, the context in which the phrase appears will be relevant to how the phrase is interpreted. In the case of *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478,

[1] Pearce and Geddes, Statutory Interpretation in Australia, 9th ed. at [21.17].

the New South Wales Court of Appeal (Spigelman CJ (Beazley and Fitzgerald JJA agreeing) discussed the meaning of the phrase "may have regard" in the context of a lease. Spigelman CJ said (at [18]) that:

> The formulation "have regard to" or "may have regard to" often appears in statutes or contracts. The words themselves do not indicate one way or another whether the facts and matters which follow are intended to be exhaustive or merely indicative. That issue can only be decided by considering the total context in which the formulation appears including both the whole of the document and the "objective framework of facts within which the contract came into existence". (*Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 at 352).

46. A similar issue was considered by the High Court in the case of *Rathborne v Abel* (1964) 38 ALJR 293 (***Rathborne***) in relation to a statute that stipulated certain matters that a decision-maker "shall have regard to" in making its determination. In *Rathborne*, Barwick CJ stated (at 295) that generally speaking a direction to a tribunal "to have regard to" certain facts or circumstances is: "a direction…. to consider each of these matters and determine for itself whether any, or any particular weight should be given to them when arriving at its conclusion". It is significant that each of these authorities highlights the broad discretion of an individual directed to "have regard to" particular matters relevant to the task at hand.

47. It follows that I do not accept the Commissioner of NSWPF's interpretation of Paragraph C, which specifically directs me to "have regard to" certain matters, with the report and findings of Strike Force Parrabell being one of them. I also note that there is no indication of any intention that I not review the material or conduct inquiries in connection to these reports. The list in Paragraph C is not exclusive (i.e. I am permitted to have regard to other matters in addition to the matters listed in Paragraph C).

48. Indeed, the Commissioner of NSWPF's reading of this paragraph would otherwise appear to be entirely contradicted by the contents of Paragraph F of the Terms of Reference. The Commissioner of NSWPF submits that pursuant to Paragraph F, I am "not to enquire into matters that have already been sufficiently and appropriately dealt with by another inquiry or investigation". In the Commissioner of NSWPF's submission, this means that I am not "tasked with an assessment of the methodology or background of the previous inquiries

listed in Paragraph C" because, insofar as I understand her submission, Strike Force Parrabell was not an investigation or inquiry such that it doesn't fall into the matters that can be examined under Paragraph F.

49. Paragraph F of the Terms of Reference states that in conducting the Inquiry, the Commission is directed:

> That the Commissioner is not required to inquire, or continue to inquire, into a particular matter to the extent that the Commissioner is satisfied that the matter has been or will be sufficiently appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

50. I do not accept the Commissioner of the NSWPF's submission that because the NSWPF do not consider Strike Force Parrabell an "investigation", as that word is used by the NSWPF, I am prohibited from considering the methodology it used or reasons why it was established. Indeed, Paragraph F does not prohibit this Special Commission from inquiring into any matter; it serves to identify matters that I am not required to inquire into if certain preconditions are met. In particular, I am not required to inquire where I am "satisfied that the matter has been or will be sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding." It follows that Paragraph F has no application in circumstances where I am <u>not</u> satisfied that the matter has been, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding. In fact, the terms of Paragraph F arguably point to the converse of what was put by Mr Tedechi KC. That is, if I do consider that an earlier inquiry may not have "sufficiently and appropriately dealt with" a matter, then I am positively required to inquire into that matter.

51. The Commissioner of NSWPF also submits that in interpreting what it is I must, and must not, have regard to, I should consider what might, in the context of statutory interpretation, be called "extrinsic material" or otherwise. These documents referred to by Mr Tedeschi KC were the final report of the final report of the New South Wales Legislative Standing Committee on Social Issues into Gay and Transgender Hate Crimes between 1970 and 2010 in (paragraph 2.92 at page 21, paragraphs 2.106 to 2.108 at page 34, Recommendation 1) and

a letter from The Hon. David Elliott, who was the Minister for Police and Emergency Services at the relevant time, which was provided to the Standing Committee and included the NSW Government response to the recommendations of the Standing Committee. I reject the suggestion that the Terms of Reference should be interpreted by reference to the materials identified by the NSWPF. As noted by Senior Counsel assisting the Commission, these materials provide little assistance to me in construing the Terms of Reference. A different body, namely the Governor in Council, framed and decided upon the Terms of Reference a significant period after the publication of the reports.

Conclusion

52. For the reasons set out above, I refuse the application made by the Commissioner of NSWPF. It follows from what I have said above that the Commission is entitled, indeed obliged, pursuant to the Terms of Reference taken in their entirety to investigate particular matters which relevantly concern Strike Force Parrabell, including the conclusions drawn and the manner in which those conclusions were drawn. In my opinion, that clearly involves in the first instance having to understand the reasoning process adopted by the persons concerned in order to evaluate the relevance or irrelevance of their conclusions. Those conclusions are directly relevant, or relate to, Paragraphs A and B in the Terms of Reference. In other words, Strike Force Parrabell was seeking by its own route to connect various homicides to a particular motive. That is precisely the task that I am required to carry out pursuant to Paragraphs A and B of the Terms of Reference. In doing so, I am also required to give consideration to other matters, Strike Force Parrabell being one. It follows that I am entitled under Paragraph F of the Terms of Reference to reach a particular state of satisfaction achieved by a consideration of Strike Force Parrabell and its methodologies. In addition, part of the methodology employed by NSWPF was to retain an academic team who purported to monitor the NSWPF's activities in relation to the very same cases. Therefore, the methodologies employed by those persons and their respective credentials are, in my view, matters in respect of which I am entitled to investigate.

53. As dictated by the Terms of Reference, I am also entitled to make recommendations. At the very least, I am entitled to examine how NSWPF has dealt with bias crime over time and, in

particular, the establishment of the Bias Crime Unit and the way in which this unit has characterised hate crimes. In my mind, this is also a relevant issue.

54. It follows that documents and questions relating directly or indirectly to the areas identified above in [2] fall within the Terms of Reference of the Inquiry.

The Commissioner

The Honourable Justice John Sackar