



## Special Commission of Inquiry into LGBTIQ hate crimes

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### JUDGMENT

20 February 2023

#### Introduction

1. This judgment concerns two distinct issues. The first issue relates to non-publication and pseudonym orders proposed by Counsel Assisting for the purpose of restricting the disclosure of several categories of information deemed non-suitable for publication. These categories include:
  - a. Redactions required under the *Children (Criminal Proceedings) Act 1987*;
  - b. Certain kinds of personal information, including dates of birth, residential addresses, telephone and facsimile numbers, CNI numbers, except where that information relates to an individual whose death falls within the Inquiry's Terms of Reference;
  - c. Email addresses, telephone numbers and employee numbers of officers of the NSW Police and legal representatives;
  - d. Information relating to prosecutions which are currently before the courts; and
  - e. Information relating to sexual assault and child sexual abuse.
2. I have reviewed these orders and am satisfied that they are appropriate.
3. The second issue concerns an application made to the Special Commission of Inquiry into LGBTIQ hate crimes (**the Inquiry**) by the Commissioner of NSW Police Force (**NSW Police**) for pseudonym and non-publication orders in respect of several annexures to the statement of Detective Sergeant Steven Morgan, dated 31 October 2022 (**Morgan Statement**).

#### First stage

4. The application was made in two stages. On 11 January 2023, NSW Police indicated that non-publication orders were sought over the entirety of annexures 4-9, 11-13, 18 and 22-25 to the Morgan

Statement (**Sensitive Morgan Annexures**).<sup>1</sup> Written submissions dated 11 January 2023 (**WS**) were provided to the Inquiry in support of the application. NSW Police indicated that they considered the Sensitive Morgan Annexures “should not be published on the Inquiry’s website, made visible on screen in the course of a live stream of the Inquiry’s hearings, or otherwise made publicly available.” It was not submitted by NSW Police that the Sensitive Morgan Annexures should not be tendered, considered, or otherwise referred to in the course of the Inquiry’s hearing (**WS**, [5]).

5. The application was supported by two affidavits of Detective Inspector Nigel Warren, dated 29 November 2022 and 9 December 2022 respectively. In his evidence, Detective Inspector Warren identified several reasons why he considered that the Sensitive Morgan Annexures could potentially prejudice: (i) future investigations into the deaths of John Russell, Ross Warren and Gilles Mattaini; and/or (ii) future criminal investigations more generally.

### Second stage

6. On 6 February 2023, legal representatives assisting the Inquiry met with the legal representatives for NSW Police to discuss the application. On 8 February 2023, a letter was sent to NSW Police requesting that NSW Police provide additional information as to what specific redactions NSW Police would seek in the event that the application in relation to the entirety of the Sensitive Morgan Annexures was dismissed. A response was received from NSW Police on 9 February 2023. From that date, the process adopted was for NSW Police and the solicitors assisting the Inquiry to engage in detailed discussions by way of exchange of submissions in writing.
7. As a result of those discussions, Counsel Assisting and NSW Police have agreed on the scope of pseudonym and non-publication orders in relation to all but one of the Sensitive Morgan Annexures. I am satisfied that the proposed orders as agreed are appropriate.

### Annexure 23 to the Morgan Statement

8. One matter not agreed to concerns the redactions proposed by NSW Police in relation to Annexure 23. This document is an expert certificate prepared by Professor Johan Duflou in relation to the death of John Russell. NSW Police propose that the following text be redacted:
  - a. *“of the left temple, grazes on both hands, and a broken left elbow and right wrist”;*

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<sup>1</sup> Senior Counsel for the Inquiry does not propose to tender annexures 3, 15-17, 19, 21 and 26 to the Morgan Statement.

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- b. *“although there was some damage to the vegetation on the seaward side of the path above the deceased's location”;*
- c. *“A laceration was present on the left side of the occipital region measuring 7.5 x 1.5 cm”;*
- d. *“when the position of the body was located face down? Is it possible the injury is the result of a corresponding injury to the left side of the forehead?”; and*
- e. *“(left occipital region)...”.*

### Submissions of NSW Police

9. In addition to the written submissions provided on 11 January 2023, further submissions by NSW Police in relation to the proposed redactions are set out in a document entitled, *‘Table of Proposed Redactions to Statement of Detective Sergeant Steven Morgan’* dated 13 February 2023.
10. NSW Police submitted that the text referred to at paragraph 8(a)-(b) above is, first, not in the public domain; and, secondly, precisely the type of information (as referred to at paragraph 11 of Detective Inspector Warren’s affidavit of 9 December 2022) that is likely to be of value to investigators to test the veracity of witness and suspect accounts if not publicly disclosed.
11. Thirdly, NSW Police note that a significant length of time that has passed since the incident, rendering this specific information even more valuable. This is said to be because as time goes on, it becomes more and more unlikely that further specific information will emerge that can potentially be used by investigators to test the veracity of witnesses and suspect accounts. Additionally, the fact that general information in relation to the nature of Mr Russell’s injuries is already publicly available means that this highly specific information is all the more valuable. Revealing this information would, say NSW Police, potentially prejudice any further re-investigation that results from this Inquiry or otherwise.
12. Finally, NSW Police draw the Inquiry’s attention to the Inquiry’s Terms of Reference, and note that pursuant to Section E, the Inquiry is required to operate in a manner that avoids prejudice to criminal investigations, criminal prosecutions and any other contemporaneous inquiries.

### Consideration

13. I have set out the general principles in relation to non-publication orders at paragraphs 5-19 of the Judgment of this Inquiry handed down on 8 February 2023 (**8 February Judgment**). These principles are not repeated here, save for paragraph 19(c), which is relevant to the matter before me.

14. Paragraph 19(c) states that a non-publication order may be necessary on the basis that publication of the relevant information would:

cause harm to ongoing and future investigations. Relevantly, Section E of the Terms of Reference requires me “to operate in a way that avoids prejudice to criminal investigations, any current or future criminal prosecutions, and any other contemporaneous inquires.” For example, the courts have made non-publication orders in relation to specific techniques utilised in covert police operations: see, for instance, *R v Fesus (No 2)* (unreported, 15 August 2017, cited in *R v Fesus (No 8)* [2017] NSWSC 1423 at [9]). In my view, in considering whether publication should not occur on the basis that it might cause harm to an investigation, evidence must be presented to the Inquiry that demonstrates an investigation is either active or actively being considered. A future investigation will justify the making of non-publication orders only if it is a realistic prospect. If no such evidence is available, it is difficult to see how the test of “necessity” could be satisfied [...].

15. NSW Police submit that to construe a non-publication order as only being “necessary” in circumstances where “there is an active investigation planned or on foot” is to apply an “unduly narrow construction” of that term, contrary to authority, *R v Kwok* (2005) 64 NSWLR 335; [2005] NSWCCA 245 at [13]; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 per Bathurst CJ at [8]; *John Fairfax Group Pty Ltd (Receivers & Managers Appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131.
16. In my observations at paragraph 19(c) of the 8 February Judgment, I did not say that a relevant investigation needs to be “planned or on foot”. Rather, I said that it needs to be either “active or actively being considered”, that is, the prospect of a new investigation needs to be a realistic one. “Actively being considered” presents a considerably lower bar than the word “planned”. As I stated in the 8 February Judgment, a future investigation will justify the making of non-publication orders only if it is a realistic prospect. If no evidence is available that a future investigation is a realistic prospect, the test of “necessity” cannot be satisfied. In this case, there is no evidence that NSW Police are actively considering the reinvestigation of Mr Russell’s death.
17. In addition, I am not satisfied that the text referred to at paragraph 8(a)-(b) has genuine utility for the purpose of testing the veracity of witness and suspect accounts in any future investigation. First, Mr Russell’s death occurred more than 30 years ago and any assault on Mr Russell almost certainly occurred at night. Secondly, Professor Duflou’s report does not distinguish between injuries that were potentially caused by a fall and those that were caused by an assault. If a person of interest were to come to the attention of NSW Police in the course of a hypothetical future investigation, it seems

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unlikely that they would be able to recall - or, given the fact Mr Russell fell or was pushed from a cliff, even have particular knowledge of - the specific injuries Mr Russell suffered.

### **Conclusion**

18. It follows that I do not consider that the redactions proposed by NSW Police to Annexure 23 should be made.

The Commissioner

The Honourable Justice John Sackar