



New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

JUDGMENT

2 December 2023

Introduction

1. The Commissioner of the NSWPF (**NSWPF**) has made an application for non-publication orders in respect of certain information contained in supplementary documents tendered as part of Exhibit 67.
2. The relevant documents within Exhibit 67 comprise correspondence between the Special Commission of Inquiry into LGBTIQ Hate Crimes (**Inquiry**) and the NSWPF. In particular, the NSWPF seeks non-publication orders that would have the effect that redactions are applied to parts of the following letters (**the Letters**):
 - a. Letter from the NSWPF to the Inquiry dated 18 October 2023 (SCOI.86459);
 - b. Letter from the Inquiry to the NSWPF dated 25 October 2023 (SCOI.86457); and
 - c. Letter from the NSWPF to the Inquiry dated 1 November 2023 (SCOI.86458).
3. The information over which redactions are sought concerns an assertion by the NSWPF in relation to the difficulties experienced by the Unsolved Homicide Team (**UHT**) in identifying and locating witnesses in certain circumstances, as described below.
4. I reject the application, for the reasons that follow.

Relevant background

5. On 18 October 2023, the NSWPF wrote to the Inquiry advising, *inter alia*, that the UHT had encountered a number of difficulties in identifying and locating witnesses. Those difficulties were attributed to the differences between the date of birth and current names of witnesses. The NSWPF further advised that those difficulties “arise especially when witnesses are transgender”.
6. On 25 October 2023, I caused a letter to be issued to the NSWPF indicating that the Inquiry was troubled by the NSWPF’s instructions that the difficulties in identifying and locating witnesses “arise especially when witnesses are transgender”. That correspondence noted that the possible need to

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search for people under different names and genders has been obvious for many years, indeed decades. Further, that correspondence noted that if the NSWPF does not have adequate systems in place to take this into account, that is a matter of significant concern that warranted comment by me in my final Report. In addition, in the event that the reference to transgender witnesses was gratuitous, the Inquiry noted that this would tend to reinforce the importance of the second recommendation sought by Counsel Assisting in their written submissions dated 15 September 2023 relating to the Investigative Practices Hearing, which concerns further mandatory education for NSWPF officers concerning the LGBTIQ community.

7. On 1 November 2023, the NSWPF responded to the Inquiry's letter of 18 October 2023, noting that the difficulties the UHT have encountered "may be at least partly attributable to the differences between the date of birth and current names of witnesses" (emphasis in original). By way of example, the NSWPF noted that if a witness legally changes their name, this is recorded on the appropriate database and, generally, the identification of the witness is relatively easily established. In circumstances where the name change has not been legally effected, the NSWPF notes that this process is "more complicated". The NSWPF further indicated that those difficulties are "not exclusive to" transgender witnesses.

Application

8. By email dated 1 December 2023, the NSWPF sought a non-publication order over extracts from the Letters which refer to the difficulty of the NSWPF identifying witnesses who have changed their name. At that time, the NSWPF indicated that it was content for me to determine this matter on the papers.
9. The NSWPF submits that disclosure of certain information (**the information**) contained in the Letters may prejudice future investigations because "... disclosure of such information to the public will alert current and future witnesses of NSWPF investigations to the internal difficulties of witness identification and may prompt individuals to change their name to avoid identification which, in turn, may frustrate the investigations by hindering the success and utility of the NSWPF's witness identification strategies."
10. Beyond the above submissions, the NSWPF did not seek to put any material before me for the purpose of determining its application for a non-publication order.

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Consideration

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

12. 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 inquiries.” 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 [...].”

13. I accept that, for example, the disclosure of confidential NSWPF methodology, such as specific techniques used in covert policing operations, may well justify a non-publication order. The information in the present case, however, is not of the nature. It is a matter of common knowledge, and common sense, that by changing one’s name (whether formally or otherwise) a person may make it more difficult for their location to be ascertained. It can come as no surprise to members of the public that this is the case.

14. Indeed, that fact is acknowledged by the NSWPF in documents published by this Inquiry to which no objection was taken. For example, in a police statement from 2008 forming part of Exhibit 42 (at Tab 4, SCOI.10850.00014), the Officer in Charge acknowledged that an alias may be used to avoid detection. In particular, the Officer in Charge recorded in his statement that:

“...it can not be discounted that BAUMANN, using an alias, has simply changed his name to avoid detection...”

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15. That document is published on the Inquiry's website. No objection was taken to the publication of that information at the time it was tendered, and no application was made for non-publication orders over it. That was, presumably, because the use of aliases to avoid detection is a matter of notoriety.
16. The Inquiry has also received evidence and submissions concerning the difficulties faced by members of the trans and gender diverse communities arising from discrepancies between a person's identity and the legal records concerning that person.¹ While the submissions of the NSWPF assert that persons may seek to change their name to gain some form of advantage by confusing official records, this Inquiry has received evidence of how, in fact, it is often the case that people are disadvantaged by the administrative processes concerning identity.
17. Correspondingly, both aspects of the information the subject of the application – the fact that the use of an alias or a change of name may make a person more difficult to find, and the fact that those within the trans and gender diverse community may experience discrepancies between legal records and their lived experience – are already dealt with in evidence before this Inquiry. They are also, once again, matters of general knowledge and common sense.
18. I am not persuaded that I should make the orders sought by the NSWPF. I do not see how the articulation of a matter of basic logic could have any impact on present or future police operations.

Conclusion

19. It follows that I do not consider that the non-publication order sought by the NSWPF over the Letters should be made.

The Commissioner

The Honourable Justice John Sackar

¹ Exhibit 2, Tab 10, Statement of Dr Eloise Brook, 15 December 2022, [81]-[83] (SCOI.77309); Exhibit 70, Professor Noah Riseman, *Speaking Out Against Anti-Trans Violence: A Call for Justice* (Report, 23 June 2023), 29 (SCOI.86684).