



Special Commission of Inquiry into LGBTIQ hate crimes

JUDGMENT

25 October 2023

Introduction

1. This judgment addresses an issue concerning the Inquiry's Terms of Reference that was raised by the Commissioner of Police in submissions dated 10 October 2023 filed in relation to the Investigative Practices Hearing (**IPH**) conducted on 4 to 7 July 2023 and 15 August 2023 (**NSWPF IPH Submissions**).
2. On 13 October 2023 Counsel Assisting filed short written submissions addressing the Terms of Reference issue (**TORS Issue**) separately to the other issues raised in the NSWPF IPH Submissions (**CA TORS Submissions**). On 16 October 2023 the Commissioner of Police confirmed that she did not wish to be heard further in relation to this issue.
3. On 19 October 2023, I issued correspondence to the NSWPF stating that I accepted the submissions of Counsel Assisting in relation to the TORS Issue and considered that, even in cases where Counsel Assisting has submitted that a case is outside the Inquiry's Terms of Reference, and even where I make such a finding, deficiencies in the NSWPF investigation may still, in some circumstances, properly be the subject of the findings I make in the Final Report.
4. These are my reasons for that decision.

The Issue

5. The submission concerning the Inquiry's Terms of Reference is at [271]-[275] of the NSWPF IPH Submissions. It is directed to cases where Counsel Assisting has submitted that cases do not fall within Paragraph A (or Paragraph B) of the Inquiry's Terms of Reference on the basis that they either do not "remain unsolved" and/or they are not a "gay hate crime."

6. The submission is put in these terms:

The investigative steps undertaken in a particular case may properly be the subject of inquiry where they are relevant to determining whether the case falls within Paragraphs A or B. Those steps may also be relevantly considered by the Inquiry where deficient investigative practices impede the Inquiry's ability to determine that question. However, once the Inquiry has inquired sufficiently to form the view that a case does not fall within Paragraphs A or B, it is beyond the scope of the Terms of Reference to conduct a wide-ranging examination of any and all alleged shortcomings into the police investigations of those deaths. Such findings would go beyond the Terms of Reference into a general consideration of police approaches to investigating suspected homicides.

Findings about the specific deficiencies in the investigations, or investigative steps that should have been taken in cases not falling within Paragraph A or B, are also not capable of assisting the Inquiry in its task of determining the manner and cause of death in Paragraph A and B cases. The deficiencies are specific to investigative steps in a particular case.

Accordingly, the Commissioner of Police submits that, in cases falling outside of Paragraphs A and B, findings about the conduct of the particular investigation are not supported by the Inquiry's Terms of Reference. The relevant individual cases are identified below.

7. The cases identified by the NSWPF IPH Submissions as affected are those of Andrew Currie, Russell Payne, Samantha Raye, William Dutfield, Blair Wark and Graham Paynter.
8. As Counsel Assisting identify at [5] of the CA TORs Submissions, the point now taken by the Commissioner of Police was not taken in the submissions filed in the individual documentary tenders in relation to these cases. The reason it was not raised earlier is unexplained, and is unfortunate.

The Inquiry's Terms of Reference

9. I considered the question of the scope of the Terms of Reference in two previous judgments, delivered on 18 July 2023 (**July Judgment**) and 6 December 2022 (**December Judgment**). It is not necessary for me to repeat matters dealt with in those judgments, but I note in particular what I said at [21]-[22] and [67]-[73] of the July Judgment.

Consideration of the issue raised by the Commissioner of Police

10. One basis on which I might make a finding in the Final Report concerning the investigation of a case falling outside Category A or Category B of the Inquiry's Terms of Reference is that set out at [274] of the NSWPF IPH Submissions and referred to at [8] of the CA TORS Submissions: that is, where deficient investigative practices or inadequate records impeded my ability to determine the question of whether a case falls within Category A or B.

11. However, Counsel Assisting go on to make this submission:

However, we submit (contrary to the position taken by the NSWPF) that even in circumstances where the Inquiry has received sufficient information to form the basis for a finding that a case does not fall within Category A or B, it may still be appropriate for findings to be made in relation to the investigation by the NSWPF. That is, in cases where the investigation or other conduct of the NSWPF has affected the ability of the Inquiry to determine the question of whether a case falls within Paragraph A and B, that is a matter which can properly be dealt with in the Commissioner's Final Report.

12. I accept this submission. As Counsel Assisting go on to submit at [9], each of the individual cases identified by the NSWPF is one where deficiencies or oversights in the NSWPF investigation, or the loss or destruction of material, has affected the amount and quality of the information available to the Inquiry, and consequently the confidence with which I may draw factual conclusions and make findings.

13. In reaching this conclusion, I have had regard to the submissions made by Counsel Assisting in respect of each individual case at [10]-[21] of the CA TORS Submissions. I accept those submissions, and consider that in each case the matters identified by Counsel Assisting is indeed a matter that has affected the amount and quality of the information before the Inquiry, and consequently my ability to determine whether a case falls within Category A or Category B.

14. I agree with the submission at [9] of the CA TORS Submissions that the fact that the Inquiry has sufficient information for Counsel Assisting, having carefully considered that information, including information arising from investigative steps taken by the Inquiry, to have made a submission that a particular case does not fall within Category A or B, does not remove those

original deficiencies or the loss or destruction of material from the matters than I can (and should) address in my Final Report.

Conclusion

15. I accept that in each of the cases identified by the NSWPF, the loss of material, or characteristics of the initial investigation by the NSWPF, has affected the information available to the Inquiry. That has, in turn, affected my ability to make factual findings in relation to matters central to the Inquiry's Terms of Reference: (a) whether a death was "unsolved"; (b) whether a death may have been affected by LGBTIQ bias; and (c) the manner and cause of that death.
16. I observe also that, at present, I have not ultimately made findings about the individual cases dealt with in the submissions of both Counsel Assisting and the NSWPF. However, even if I do conclude that those cases fall outside Category A and/or Category B of the Inquiry's Terms of Reference, I consider it appropriate to address matters that affected the amount and quality of information available to me in coming to that conclusion.

The Commissioner

The Honourable Justice John Sackar