New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

JUDGMENT

8 February 2023

Introduction

1. An application is made to the Special Commission of Inquiry into LGBTIQ Hate Crimes (**the Inquiry**) by the Commissioner of NSW Police (**NSW Police**) for pseudonym and non-publication orders in the following matters: David Lloyd-Williams, Graham Paynter, John Hughes, Andrew Currie, Brian Walker, William Dutfield and Russell Payne.

2. The process adopted was to invite NSW Police and the solicitors assisting the Inquiry to engage in detailed discussions by way of exchange of submissions in writing. As a result of those discussions, Counsel Assisting and NSW Police have agreed on the scope of pseudonym and non-publication orders in the matters of David Lloyd-Williams, Andrew Currie, Brian Walker, William Dutfield and Russell Payne. I am satisfied that the proposed orders in relation to those matters are appropriate.

3. Aside from the proposed redactions and pseudonyms that are the subject of the agreed orders referred to in paragraph 2, several other redactions are proposed by NSW Police in two separate matters: Graham Paynter, and John Hughes. Counsel Assisting opposes the making of non-publication orders in respect of those redactions. Each of the proposed redactions is considered in turn below.

4. The written submissions of Counsel Assisting and NSW Police in relation to the disputed redactions are set out in a document entitled, 'Special Commission of Inquiry Response to Redactions Tables provided by NSWPF on 1 February 2023'.

General principles in relation to non-publication orders

Open justice

5. The principle of open justice is widely recognised as "one of the most fundamental aspects of the system of justice in Australia": *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; [2004] NSWCA 324 at [18] per Spigelman CJ. As noted by McHugh JA in *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-477:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.

6. The principle of open justice may operate differently in the context of a Special Commission when compared to its operation in a superior or inferior court. This is because Special Commissions regularly possess powers ancillary to their investigative function that permit private hearings and the admission of confidential evidence in appropriate circumstances.

7. Nevertheless, the principle of open justice retains its fundamental importance where an Inquiry is established for the purpose of investigating a matter of significant public importance. By the Letters Patent dated 13 April 2022, which establish this Inquiry, I am empowered as Commissioner to inquire into, report on and make recommendations to the Governor of New South Wales in relation to unsolved deaths that occurred between 1970 and 2010 and were potentially motivated by gay hate bias. For obvious reasons, this issue is of great public significance to the families of victims, the LGBTIQ community, and the NSW public more broadly. It is hoped that by seeking out and scrutinising all available material in connection to these crimes, the Inquiry will shine a light on the circumstances surrounding suspected hate crimes, the impact these crimes have had on victims and their families, and the actions of Australian society and institutions carried out in response.

8. It is also relevant that the Inquiry - and the staff engaged by it - bear the weight of public expectation. It is incumbent upon the Inquiry to, first, rigorously scrutinise the evidence and matters before it and, secondly, be seen by the community to be doing this. Publication of evidence is an important way that the Inquiry can demonstrate to the community that it is doing its job.

9. Publication also performs three other functions. First, publication demonstrates that the Inquiry is committed to acting in accordance with the principle of open justice to the extent it possibly can. Secondly, publication reflects the fact that the entire purpose of an Inquiry, such as this one, is to provide the government (and the people to whom it is accountable in the constitutionally prescribed system of representative and responsible government) with information in relation to a particular issue. Thirdly, publication assists the media and the public to better understand the evidence and issues under consideration by the Inquiry.

The power to make non-publication orders and apply pseudonyms

10. However, it is accepted that in exceptional and compelling circumstances, courts possess jurisdiction to modify and adapt the content of general rules of open justice and to make non-publication orders: *HT v The Queen* (2019) 269 CLR 403; [2019] HCA 40 at [44] and [46] per Kiefel CJ, Bell and Keane JJ.

11. The Commissioner is empowered to make orders relating to the non-publication of evidence by s 8 of the *Special Commissions of Inquiry Act 1983* (NSW) (**SCOI Act**). That provision states that, "A Commissioner may give directions preventing or restricting the publication of evidence given before the Commissioner or of matters contained in documents lodged with the Commissioner." The power to make orders relating to the non-publication of evidence also exists by virtue of the Commissioner's implied powers to control the processes of the Inquiry to secure the proper administration of justice: see, by way of analogy, *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [21] per French CJ.

12. These powers are reflected in paragraph 34 of the Inquiry Practice Guideline 1, which specifies that in an appropriate case, the Commissioner may:

    a. direct non-publication of the name, or the use of a pseudonym, to protect the name of any witness or any person about whom evidence is given;

    b. give directions otherwise preventing or restricting the publication of evidence given before the Commissioner or of matters contained in documents tendered to the Commission; and

    c. direct during a public hearing that part of such a hearing take place in private, and may give directions as to the persons who may be present during such part of the hearing to be held in private.

General principles regarding exercise of power

13. The following principles serve as a useful guide in relation to the making of non-publication orders pursuant to section 8 of the SCOI Act.

14. *First*, an order of this nature ought to be regarded as exceptional: *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50D-E and 54G.

15. *Secondly*, a non-publication order must be clear in its terms and do no more than is necessary to achieve the due administration of justice: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-477 per McHugh JA.

16. *Thirdly,* the word "necessary" is a "strong word": *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30] (***Hogan***). It is not sufficient that an order appears to the Court to be "convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some 'balancing exercise' the order appears to have one or more of those characteristics": *Hogan* at [31]. That said, the word "necessary" is not to be given a narrow construction: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 (***Ibrahim***) at [8].

17. *Fourthly,* the task of achieving the proper administration of justice will "have a colour which will depend upon the circumstances": *Ibrahim* per Basten JA at [46]. His Honour continued (also at [46]):

> The prejudice may be a possibility or a certainty; its effect, if it eventuates, may be minor or it may cause a trial to miscarry. Similarly, prevention will involve matters of degree: the proposed order may diminish a risk of prejudice or it may obviate the risk entirely. All of these variables may affect what is considered "necessary" in particular circumstances.

18. *Fifthly*, if a document is already in the public domain, this fact cannot be ignored as there may be no confidentiality left in the document to protect: *Robinson v South Australia (No 2)* [1931] AC 704 at 718 (cited by Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 45). The evidence must demonstrate that the non-publication orders, if made, would be effective: *Ibrahim* at [78]. However, in certain circumstances, limited disclosure will not preclude the availability of a non-publication order if the prior disclosure has not lessened the secrecy maintained for the information in question: *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241 at 248. An order will not necessarily be futile because material is available otherwise in cached form, from which it may be removed once the source page has been taken down, or if the material is available on websites overseas: *Ibrahim* at [76].

19. *Sixthly,* and noting that the list below is not intended to be comprehensive or exclusive, a non-publication order may be necessary on the basis that publication of the relevant information would, for example:

    a. reveal the identity of a police informer. There may be an exception to this rule if disclosure of the identity of the informer is necessary to establish the innocence of an accused person: *Attorney-General for NSW v Stuart* (1994) 34 NSWLR 667 at 674-675;

    b. reveal the identity of witnesses and other persons who have assisted police: *R v Popovic; R v Koloamatangi (No 1)* [2017] NSWSC 1017;

    c. 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. I acknowledge that there is authority that, at least in the context of public interest immunity (which is not claimed in this case), NSW Police would not be required to produce evidence as to: (i) the precise stage an investigation has reached; (ii) what charges have been laid (or are being considered); or (iii) how precisely the production of the documents would inhibit the investigation if such production would lead to disclosure of some of the very information for which immunity is claimed: *Attorney-General for NSW v Stuart* (1994) 34 NSWLR 667; and/or

d. contravene a statutory provision set out in an applicable statute including, for example, the *Telecommunications (Interception and Access) Act 1979* (Cth), the *Listening Devices Act 1984* (NSW) (now repealed), or the *Surveillance Devices Act 2007* (NSW) (which has replaced the *Listening Devices Act 1984*).

Consideration

20. The submissions of the parties and my consideration in relation to each of the relevant matters is set out below.

Graham Paynter

21. First, in relation to Documents SCOI.10935.00006, SCOI.10935.00008, SCOI.10935.00011, SCOI.10935.00014, SCOI.10935.00017, SCOI.10935.00021, SCOI.10935.00022, SCOI.74992, SCOI.82112, SCOI.82164, SCOI.82207, NSW Police press redactions to the words which relate to the positioning of the victim and his clothing on the basis that information of this nature could be used at an undetermined date in the future to test the veracity of individuals who claim to have information about the crime in question. NSW Police say that specific information of this nature could not be used in this manner by NSW Police at a later date if it were published by the Inquiry. This is because the information would be known by the public at large.

22. Counsel Assisting disagrees with this submission and says that there is no basis for a non-publication order. According to Counsel Assisting, it is not evident how the positioning of Mr Paynter's clothes could prejudice any future investigations in the event that such investigations were progressed by NSW Police. In addition, Counsel Assisting argues that as several other murders of LGBTIQ people have involved the deceased being discovered in a state of undress, the positioning of Mr Paynter's clothes is, therefore, highly relevant to the inclusion of the death in Strike Force Parrabell.

23. In relation to this matter, I do not consider that NSW Police have properly substantiated the claim for a non-publication order. The original investigating police and the Coroners Court each treated Mr Paynter's death as being caused by an accidental fall. Strike Force Parrabell noted there were no suspicious circumstances or any indication of foul play in relation to Mr Paynter's death. There is no evidence that third parties were involved. NSW Police has not provided evidence (or even submitted) that a future investigation into the circumstances of Mr Paynter's death is anticipated or even likely. As discussed above at [19], a non-publication order cannot be said to be "necessary" if no investigation is active or being actively considered by NSW Police.

John Hughes

24. In relation to specified classes of documents,[1] NSW Police argue that: (i) Mark Locke should be referred to by a pseudonym; (ii) references to Mr Locke's identity should be redacted; and (iii) references to Mr Locke as a suspect should be redacted on the basis that the evidence given by Mr Locke in the trial of Mr Jones could be used to identify a confidential witness in another criminal trial. The name of that individual is presently subject to a non-publication order.

25. For the same reason, NSW Police argue that in relation to:

    a. Document SCOI.10056.00062, the evidence of Ian Jones' motive as provided by Mr Locke should be redacted; and

    b. Documents SCOI.10081.00024 and SCOI.10081.00025, which are statements of Mr Locke, each should be entirely subject to a non-publication order.

26. Counsel Assisting does not agree that disclosure of this information would have the effect proposed by NSW Police. According to Counsel Assisting, Mr Locke is a key witness in the John Hughes matter

[1] Each class of documents is specified by Document No. in the Orders made by the Inquiry on 7 February 2023.

and gave evidence at the criminal trial of Mr Jones prior to his death in 2021. There is no evidence that Mr Locke should be regarded as a confidential source as opposed to a witness who provided statements to the investigation and gave evidence at Mr Jones' trial.

27. In relation to a second class of documents,[2] NSW Police argue that Kerrie Stanton should be referred to by a pseudonym and that her statements, in their entirety, should be made subject to a non-publication order. The basis of this submission is that the evidence of Ms Stanton could be used to identify a confidential witness in another criminal trial. The name of that individual is presently subject to a non-publication order.

28. Counsel Assisting does not agree that disclosure of Ms Stanton's name would have the effect proposed by NSW Police. Counsel Assisting says that Ms Stanton is a key witness in the John Hughes matter and gave evidence at the criminal trial of Mr Jones. According to Counsel Assisting, it is also relevant that Kerrie Stanton's name has been published in documents available on the Inquiry website (e.g. SCOI.10081.00039).

29. In relation to these matters, I do not consider that the proposed redactions should be made. It is highly relevant that the connections between the confidential witness and: (i) Mr Locke; and (ii) Ms Stanton have previously been disclosed in a public criminal trial. In addition, no evidence has been put before me that demonstrates with any precision how or why the disclosure of Mr Locke's or Ms Stanton's name would cause prejudice to ongoing proceedings.

The Commissioner

The Honourable Justice John Sackar

[2] The entire class of documents is specified by Document No. in the Orders made by the Inquiry on 7 February 2023.