Special Commission of Inquiry into LGBTIQ hate crimes

JUDGMENT

18 July 2023

Introduction

1. The Special Commission of Inquiry (**the Inquiry**) has convened hearings in relation to the activities of three strike forces of the NSW Police Force (**NSWPF**): Strike Force (**SF**) Parrabell, SF Macnamir and SF Neiwand. Those hearings occurred in December 2022, February-March 2023 and May 2023, and are collectively referred to as **Public Hearing 2**.
2. On 7 June 2023, Counsel Assisting the Inquiry served comprehensive written submissions in relation to Public Hearing 2 on the NSWPF and on Michael Willing (together, **the interested parties**). On 21 June 2023, the Inquiry heard oral submissions on behalf of Mr Willing. On 28 June 2023, the Inquiry received written submissions from the interested parties.
3. Those submissions assert that I am not permitted to inquire into certain matters because they fall outside the Inquiry's Terms of Reference (**ToR**).
4. Those matters are said to be the conduct by the NSWPF of SF Macnamir and the death of Scott Johnson (to which SF Macnamir was directed). Objection to the former is said by the Commissioner of the NSWPF to extend to evidence concerning the involvement of the senior officer in charge of SF Macnamir in the ABC TV program "Lateline" in April 2015.
5. I subsequently invited and received written submissions on this issue from Counsel Assisting the Inquiry, and written submissions in reply from the interested parties. Before Public Hearing 2 proceeds any further, it is necessary for me to determine the objection that has been raised to this aspect of the Inquiry.

6. I note that this objection has been raised at a very late stage, after the Inquiry has spent significant time and public resources considering these matters, and after the Inquiry has concluded the evidence in relation to Public Hearing 2. If the interested parties considered that these matters were outside the ToR, it would have assisted the Inquiry and benefitted the public interest if they had raised it at an earlier time.

7. However, the Inquiry has a continuous obligation to operate within the ToR, which establish and limit its jurisdiction. The fact that this objection was not raised earlier is therefore legally irrelevant to the interpretation of the ToR, and I do not take it into account.

Letters Patent and Terms of Reference of the Inquiry

8. 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.*

9. 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).*

10. 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.

Background – Public Hearing 2

11. Before I set out the submissions of the parties, I provide some general background.

12. On 5 December 2022, public hearings in relation to Public Hearing 2 commenced.

13. In his opening address on that day, Senior Counsel Assisting indicated that the hearing would be considering various aspects of SF Parrabell and the ways in which the NSWPF has approached issues relating to "bias crime", or "hate crime", over the years from 1970 to the present. Senior Counsel Assisting also said that SF Macnamir was a matter that would be considered during Public Hearing 2:

    The Inquiry has also identified Strike Force Neiwand and Strike Force Macnamir as other relevant investigations conducted by NSW Police into possible homicides against LGBTIQ people during the relevant period, to which it is necessary to have regard as well.

    Further, in light of the Inquiry's Terms of Reference, it is important for the Inquiry to have regard generally to the ways in which NSW Police have approached the matter of suspected hate or bias crimes, including the identification, investigation and recording of such crimes.[1]

    …

    It is expected that this public hearing will include evidence relating to, firstly, Strike Force Parrabell and its final report, including the methodologies used by the Parrabell police officers

[1] Transcript of the Inquiry, 5 December 2022, T539 (TRA.00010.00001).

on the one hand and the academic team on the other; secondly, Strike Force Neiwand and Strike Force Macnamir, including the reasons for their establishment; and thirdly, changes in the approach of the NSW Police to the identification, investigation and recording of suspected hate or bias crimes, including the relevant history of the Bias Crime Unit as variously named and configured over the years.[2]

14. Similar statements had been published on the Inquiry's public website during the week prior to the commencement of the hearing. It should also be noted that on 25 August 2022 I had issued a summons to the NSWPF that sought a range of documents relating to SF Macnamir including all reports made by it. Documents relating to SF Macnamir were produced and tendered without any objection, including on the basis that their subject matter fell outside the ToR.

15. Prior to the commencement of Public Hearing 2, the Commissioner of the NSWPF had foreshadowed an objection to the tender of documents relating to the following four topics:

    a) the creation of the Bias Crime Unit within the NSWPF and the characterisation of hate crimes within that unit;

    b) the creation of Operation Parrabell and its methodology;

    c) the creation of SF Parrabell and its methodology; and

    d) the contract between the NSWPF and certain academics from Flinders University to provide an independent review of SF Parrabell's report.

16. On 6 December 2022, I delivered a judgment that considered whether the four topics were sufficiently connected with the Inquiry's TOR such that documents concerning those topics could be tendered as part of the evidence before the Inquiry. I ruled that they were sufficiently connected and could be tendered.

17. After the delivery of that judgment, the Inquiry proceeded to hear oral evidence in Public Hearing 2 on 18 sitting days spanning from 6 December 2022 to 15 May 2023. Those hearings involved 12 witnesses and over two thousand pages of transcript. In addition, over 400 documents have been tendered in evidence.

18. Some of the documentary evidence tendered and oral witness testimony (including some of Mr Willing's evidence) concerns SF Macnamir, now said by the interested parties in their written submissions to be outside the ToR. At no point during the oral evidence of Public Hearing 2 did

[2] Ibid, T540.

the NSWPF or Mr Willing object to the tender of material or to the examination of witnesses on the basis that these matters were outside the ToR.

19. The submissions of the interested parties (each dated 28 June 2023) suggest that certain procedural steps that have occurred in relation to the death of Scott Johnson since the commencement of the Inquiry are relevant to the issue I must now determine. I note those steps as follows:

    a) On 10 January 2022, prior to the date the ToR were published (13 April 2022), Scott White pleaded guilty to the murder of Scott Johnson. His plea had surprised his legal representatives and on 13 January 2022 he unsuccessfully sought to withdraw that plea;

    b) On 3 May 2022, Mr White was sentenced by Wilson J in the Supreme Court for the offence of murder;

    c) Mr White then sought leave to appeal from his conviction on the basis that the incorrect legal test had been applied in relation to his application to withdraw his plea. On 18 November 2022, the Court of Criminal Appeal allowed the appeal, set aside the conviction and sentence and remitted the matter to the Chief Judge at Common Law, where it was listed for an application to withdraw the plea of guilty to murder;

    d) On 23 February 2023, Mr White was permitted to withdraw his plea to murder and enter a plea to manslaughter in satisfaction; and

    e) On 8 June 2023, he was sentenced by Beech-Jones CJ at CL for the offence of manslaughter.

20. It is noted that Scott Johnson's death was one of the 88 matters considered by SF Parrabell.

My judgment of 6 December 2022

21. My judgment of 6 December 2022 dealt with several matters that also have some bearing on the present issue. In summary form, key aspects of that judgment include as follows:

    a) Subject to the supervision of the courts, the interpretation of the ToR is a matter for the Inquiry: *Easton v Griffiths* (1995) 69 ALJR 669 per Toohey J (at 672) (at [13]);

    b) The words "appears" and "relate to" in sub-section 9(2) of the *Special Commissions of Inquiry Act 1983* (NSW) (***SCOI Act***) differ from a test of "relevance" (at [26]-[28]);

    c) The ToR direct the Inquiry to consider the "manner and cause" of relevant deaths. While this has some resonance with the task given to a coroner, it differs from that task because

of the specific context of the task given to the Inquiry, namely, whether a death was associated with a 'gay hate' or 'hate crime' factor. Analysis of whether such a causal connection was present is central to the Inquiry's task (at [33]);

d) It follows from this that I am required to examine the means and the methodologies by which the NSWPF arrived at its conclusions with respect to the existence (or non-existence) of gay hate/bias in (the relevant specific cases) (at [34]);

e) The Inquiry has an investigatory function which necessarily requires it to amass information from a variety of sources and to attempt to establish connections between certain facts and the subject of the Inquiry. Regard must be had to the investigatory character of an Inquiry when assessing its legitimate scope of enquiry (at [37]-[39]);

f) Paragraph C of the ToR directs me to have regard to previous inquiries and reports, including (but not confined to) those particularly noted in Paragraph C (i), (ii) and (iii). Relevant case law (referred to at [44]-[46] of the 6 December 2022 judgment) highlights the broad discretion of an individual directed to "have regard to" particular matters relevant to the task at hand. Genuine consideration must be given to such material, not merely token or nominal consideration; and

g) There is no indication in the ToR that I am not to review the material or conduct inquiries in connection with the reports referred to at Paragraph C. Further, the list at Paragraph C is not exhaustive and I am permitted to have regard to other matters in addition to the matters listed (at [47]).

22. In relation to the question as to whether the four topics were sufficiently connected with the ToR, I made rulings including as follows at [52]-[53] of the judgment:

a) the Inquiry is entitled, indeed obliged, pursuant to the ToR taken in their entirety, to investigate particular matters which relevantly concern SF Parrabell, including the conclusions drawn and the manner in which those conclusions were drawn;

b) those conclusions are directly relevant, or relate, to Paragraphs A and B of the ToR, as SF Parrabell was seeking by its own route to connect various homicides to a particular motive, this being the same kind of task given to me by Paragraphs A and B of the ToR;

c) I am entitled under Paragraph F of the ToR to reach a particular state of satisfaction achieved by a consideration of SF Parrabell and its methodologies; and

d) given the authorisation to make recommendations (in relation to Category A and B matters), 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.

Submissions of the interested parties as set out in their general Public Hearing 2 written submissions

23. The "objection" made by the Commissioner of the NSWPF is set out at [80]-[89] of her written submission. At [80] it is asserted that:

    Mr [Scott] Johnson's death and SF Macnamir fell, and continue to fall, outside the Inquiry's terms of reference …. it is submitted that any findings made by the Inquiry in respect of these issues would be ultra vires.

24. The rationale for this position (at [85]) is said to be that:

    at no point following the issue of the Inquiry's Terms of Reference was the Johnson matter "unsolved" within the ordinary meaning of that word such that it fell to be considered by cl. A [of the ToR].

25. The Commissioner of the NSWPF then sets out the procedural chronology of the criminal proceedings that were on foot in relation to the Scott Johnson matter from the commencement of the Inquiry until the sentencing of Mr White on 8 June 2023.

26. At [86] of her submission, reference is made to Paragraph F of the ToR and it is said that I, as the Commissioner:

    … should have been sufficiently satisfied at the establishment of the Inquiry that Mr Johnson's death would be dealt with sufficiently and appropriately by the criminal proceeding on foot in the Supreme Court. At the very least, there is no basis upon which the Commissioner should not have been so satisfied upon Mr White's entry of a plea to the charge of manslaughter on 23 February 2023. It is noteworthy that this occurred approximately two months before a further hearing of the Inquiry dedicated solely to aspects of SF Macnamir and the Lateline Issue in May 2023.

27. It is further submitted by the Commissioner of the NSWPF at [88] that "any report or recommendations purported to be made by the Inquiry in relation to the death of Mr Johnson or SF Macnamir would be ultra vires" as a consequence of the conviction and sentence of

Mr White for manslaughter "such that there can be absolutely no doubt that the manner and cause of Mr Johnson's death has been determined."

28. The objection made by Mr Willing is set out at [99]-[112] of his submission. His submission also makes reference to the procedural chronology of the criminal proceedings against Mr White. The submission places significance on the fact that the sentencing judge Beech-Jones CJ at CL did not find that Scott Johnson's death was motivated by gay hate and that "it was accepted between the parties that Mr White was gay".

29. Mr Willing states that since 13 April 2022 (being the date of the ToR) the death of Scott Johnson has "not been unsolved" and that the possibility that his death was motivated by gay hate "had been excluded entirely." For these reasons, it is said, any "investigation" or "enquiry" by the Inquiry is outside its terms of reference.

30. Mr Willing also asserts that up until 8 June 2023 (when Mr White was sentenced), any consideration of Scott Johnson's death by the Inquiry risked prejudice to the relevant criminal proceedings; that the ToR, while permitting the Inquiry to have regard to SF Parrabell, do not "direct or permit in investigation into SF Parrabell per se"; and that the ToR "do not authorise, let alone direct, a broadbrush consideration of police approaches to potential homicides".

Submissions of Counsel Assisting

31. Counsel Assisting submit that the arguments advanced by the interested parties appear to assume that the examination by the Inquiry of SF Macnamir could only be relevant to an inquiry into the manner and cause of Scott Johnson's death in isolation, and could not be relevant to the Inquiry's ToR on any other basis. Counsel Assisting rejects such a proposition.

32. Secondly, Counsel Assisting note that among the matters to which I have been directed to have regard, by Paragraph C of the ToR, are "the interim and final report and findings of the inquiries conducted by the Standing Committee on Social Issues (**the Parliamentary Committee**) into Gay and Transgender hate crimes between 1970 and 2010". Those reports, published in February 2019 and May 2021 respectively, are in evidence before the Inquiry.

33. The ToR of the Parliamentary Committee required it to report on, among other things, whether, in relation to crimes occurring between 1970 and 2010, there existed impediments within the criminal justice system that impacted the protection of LGBTIQ people in NSW and the delivery of justice to victims of LGBTIQ hate crimes and their families, with reference to case studies of particular matters including that of Scott Johnson.

34. Counsel Assisting then note portions of the interim Parliamentary Committee report which outline evidence of potential deficiencies in the manner in which the death of Scott Johnson was examined by the NSWPF, in particular by SF Macnamir. This, it is said, includes evidence that:

    a) SF Macnamir "collectively smeared" the family of a victim (Scott Johnson) of what then ought properly to have been regarded as a possible gay hate homicide;

    b) SF Macnamir considered that there was "no reason to suspect" that the death of Scott Johnson "involved violence" and that the conclusion of suicide by the original investigation was correct (when it is now known to have been a homicide);

    c) the outcome of the 2017 inquest into Scott Johnson's death (namely that the death was a homicide) was viewed by at least some police as a "defeat"; and

    d) based on the experience of the brother of Scott Johnson, as of 2019, police resistance to appropriately investigating crimes against gay victims was not just a relic of the past, but was current.

35. Counsel Assisting also draw attention to two of the findings of the Parliamentary Committee reports that are highly critical of historical police attitudes towards investigating violence directed at gay men, which it is said impacted on the delivery of justice to victims of hate crime, including in the matter of Scott Johnson. It was also found that such attitudes generally undermined the confidence of the LGBTIQ community in NSW towards police and the criminal justice system.

36. Counsel Assisting submit that an examination of the investigative processes (including SF Macnamir) that were the subject of the observations, analyses and findings contained in the interim and final Parliamentary Committee reports is plainly a matter falling within the ToR of the Inquiry. In particular, it is said that:

    a) such an examination might well be of relevance to the investigation of other potential LGBTIQ hate homicides being considered under paragraphs A and B of the ToR, and might lead to recommendations relevant to the investigation of such deaths more generally;

    b) Paragraph C of the ToR is not exhaustive of the matters to which the Inquiry may have regard in fulfilling its responsibilities. Rather, it directed that the Inquiry ***must*** have regard to relevant parts of the Parliamentary Committee reports and for this reason it was

incumbent on the Inquiry to embark upon an examination of relevant aspects of SF Macnamir;

c) the Inquiry's intention to consider SF Macnamir in the course of Public Hearing 2 was made apparent prior to and at the opening of the hearing;

d) it would be artificial to isolate the potential relevance of evidence that arises out of the investigation of a particular death to the manner and cause of that death alone, if that evidence were to disclose matters such as poor investigative practices, unwarranted assumptions being made by investigators, personal biases, rigid thinking, lack of understanding of the extent of historical discrimination and bigotry towards LGBTIQ groups, or a lack of empathy or understanding on the part of investigators towards families of LGBTIQ victims;

e) if, for example, the evidence concerning the conduct of SF Macnamir were to be regarded as having disclosed that one or more such deficient practices had occurred, an inference may be available that such deficiencies had also affected other investigations of potential gay hate homicides. That this is so is apparent from evidence demonstrating an overlap in personnel, approach and outcome between SF Macnamir and SF Neiwand, and the co-authorship by the senior officer responsible for SF Macnamir of an "Issues Paper" which described the suggestion of there being 30 unsolved 'gay hate' related murders as a "gross exaggeration"; and

f) to isolate the relevance of the evidence in the way suggested by the interested parties would be particularly unwarranted given the specific context of the task given to the Inquiry being one where a large number of deaths with potentially common characteristics relating to victims and perpetrators are being examined.

37. Thirdly, in response to observations made in Mr Willing's submissions, Counsel Assisting submit that in making recommendations, I am not limited to recommendations that solely concern what should occur in relation to the particular investigation of a particular death. It is said that the cumulative body of knowledge gained in the course of my inquiries may inform recommendations that I may make and that these may extend beyond action that might be taken in relation to an individual death. Counsel Assisting suggest that not to draw on the extensive work undertaken by the Inquiry in this way would be to waste a valuable opportunity to help advance the public interest.

38. Fourthly, Counsel Assisting submit that I should reject the submission by both interested parties that Scott Johnson's death must be regarded as "solved" for the purposes of Paragraph A of the ToR. They advance the following reasons:[3]

    a) the terms "solved" and "unsolved" are not defined or fixed in the context of Australian law;

    b) the interpretation of the ToR is a matter for the Inquiry (see 6 December 2022 judgment at [13]). As a public inquiry borne of a particular history that is well documented by the interim and final reports of the Parliamentary Committee, the underlying purpose of the Inquiry is one that acknowledges that, historically, discrimination and systemic biases have adversely affected the operation of the criminal justice system in relation to the identification and investigation of "gay hate crimes";

    c) there is a specific context to the task given to the Inquiry, namely, whether a death was associated with a 'gay hate' or 'hate crime' factor. Analysis of whether such a causal connection was present is central to the Inquiry's task (see 6 December 2022 judgment at [33]); and

    d) it is with these features in mind that the question of whether or not a particular crime ought to be regarded as "unsolved", for the purposes of Paragraphs A and B of the ToR, should be considered. Such a "purposive" approach, it is submitted, is an appropriate way for the Inquiry to consider the interpretation of its ToR.

39. Counsel Assisting draw attention to various passages from the sentencing judgment in relation to Mr White, who pleaded guilty to the manslaughter of Scott Johnson, noting that the sentencing judge stressed how little was known about relevant surrounding circumstances. Counsel Assisting observe that it was on the basis of the limited facts before his Honour, that it could not be demonstrated beyond reasonable doubt that gay hate was an aggravating factor upon sentence.

40. Counsel Assisting observe that, consistent with the opening address to the Inquiry by Senior Counsel Assisting, while in most cases where a perpetrator of homicide has been convicted, the Inquiry may be likely to reach the view that the relevant matter has been "solved", any given case depends on all the circumstances of that case. Given the distinct features of the death of

[3] I add that, if I am satisfied that the matters under examination in Public Hearing 2 are within ToR for the broader reasons advanced by Counsel Assisting, strictly speaking it may not be necessary for me to determine this issue for present purposes.

Scott Johnson (including its occurring at a known beat and the known activities of "gay bashers" at the relevant time), and the very limited facts that were available to the sentencing judge, particularly as they concerned a central issue to the Inquiry, this is a matter that for the purposes of Paragraph A of the ToR should be regarded as unsolved, notwithstanding the fact of the conviction of Mr White.

41. Counsel Assisting submit that to do so is not in any way to take issue with the appropriateness of Mr White's conviction, or the conduct of the relevant sentencing proceedings, or the appropriateness of Mr White having been sentenced on the basis that, on the evidence before the sentencing judge, the crime was not proven beyond reasonable doubt to have been a gay hate crime. Rather, it reflects the reality that in reporting on or making findings as to manner and cause of death, I am not required to be satisfied beyond reasonable doubt, nor restricted to the agreed facts that were before the sentencing judge.

42. Fifthly, Counsel Assisting submit that Paragraph F of the ToR is permissive rather than restrictive in nature and does not circumscribe the matters that I might consider to be "unsolved" for the purposes of Paragraphs A and B. Nor does it circumscribe the matters into which I might inquire. Rather it widens them to include whether or not matters have been sufficiently and appropriately dealt with, and I must be able to look into those matters (for example, SF Macnamir) in order to reach the state of satisfaction contemplated by Paragraph F. Counsel Assisting further submit that:

    a) the submissions of the interested parties overlook the fact that the language of Paragraph F recognises that there may be circumstances where I take the view that a matter falls within Paragraphs A or B of the ToR notwithstanding that there has been a conviction in criminal proceedings;

    b) the death of Scott Johnson has now been dealt with by a criminal proceeding. There is no issue that it has been appropriately dealt with by that criminal proceeding. Whether or not it has been "sufficiently" dealt with, however, from the perspective of the particular task given to the Inquiry, is a separate question. Whether the death of Scott Johnson was "appropriately" dealt with by SF Macnamir is a further separate question; and

    c) even if Paragraph F were restrictive in its operation (which it is not), looked at from the perspective of the unifying feature of the Inquiry's task (that it involves consideration of potential gay hate crimes), it would be open to me to conclude that the question of

whether or not the death may have been a gay hate crime has not been sufficiently dealt with.

Submissions in reply on behalf of the Commissioner of the NSWPF

43. In a written submission in reply to Counsel Assisting, the Commissioner of the NSWPF asserts that Counsel Assisting's submissions "seek to imbue the phrase 'have regard to' with a force that goes far beyond that afforded to it in [my 6 December 2022 judgment] or any sensible construction of those words". In particular, the reply submissions draw attention to [52] of the 6 December 2022 judgment, which indicated the basis upon which I determined that certain inquiries relating to SF Parrabell were within the ToR. The reply submissions suggest that this delimits the manner in which I may "have regard to" the reports of the Parliamentary Committee.

44. The Commissioner of the NSWPF also submits that the requirement that I undertake a "genuine consideration" of the Parliamentary Committee's reports does not permit or call for an investigation of the subject matter addressed in the reports.

45. The reply further states that Counsel Assisting "assert that a comprehensive exploration of the work of the Parliamentary Committee is permitted or required" after "urging the Commissioner to make findings that traverse far beyond the Terms of Reference".

46. The reply suggests that the logic of Counsel Assisting's submissions would "require" me to investigate any non-fatal assaults that were the subject of consideration by the Parliamentary Committee reports. The reply further contends that "the Inquiry is not charged with conducting a broad-ranging investigation into every matter that might be relevant to the NSWPF's approach to the investigation of anti-LGBTIQ hate crimes."

47. The reply submissions also state that "the conduct of particular investigations relating to particular homicides is only properly the subject of the Inquiry where the relevant investigation relates to a matter that otherwise falls within Paragraph A or B of the Terms of Reference" and that "the authorisation to make recommendations … does not otherwise enlarge the scope of the Inquiry permitted to be undertaken in accordance with Paragraphs A and B".

48. In relation to the "Lateline interview", it is said by the Commissioner of the NSWPF that the fact that it concerned Scott Johnson's death and was given by the Investigation Supervisor of SF Macnamir does not bring it within the ToR, apparently for the same reasons that it is said that SF Macnamir does not fall within the ToR.

49. In relation to whether the death of Scott Johnson should be considered "solved" or "unsolved" for the purposes of Paragraph A of the ToR, in her reply submissions the Commissioner of the NSWPF states that the word "unsolved" should be "given its ordinary meaning", that the case should be considered "solved" by virtue of the criminal sentence proceedings that have been completed in the Supreme Court and that it has been apparent at all times since 10 January 2022 that the person responsible was Mr White.

50. The reply submissions also observe that to date, Counsel Assisting have not made submissions in any documentary hearing regarding a matter that has been the subject of a criminal trial resulting in conviction, and further point to two deaths where Counsel Assisting have submitted that deaths are not unsolved, notwithstanding that both were homicides and the question of potential LGBTIQ bias had not previously been the subject of judicial inquiry.

51. The reply submissions further suggest that if Counsel Assisting's submissions were accepted, all 88 deaths considered by SF Parrabell would need to be regarded as unsolved, and the Inquiry would be required to examine all homicides (including those the subject of conviction) where the question of possible LGBTIQ bias had not been determined.

Submissions in reply on behalf of Mr Willing

52. In brief written submissions in reply to Counsel Assisting, other than to state that he interprets the term "'have regard to' differently to the judgment of 6 December 2022", Mr Willing does not otherwise appear to address the broader basis upon which Counsel Assisting assert that an examination of SF Macnamir falls within the ToR.

53. To the extent that the reply submissions go beyond directing attention to the issue of whether or not Scott Johnson's death is to be considered "solved", they assert that "the fact that Mr Johnson was not the victim of a gay hate crime is also important."

54. The reply submissions reassert that Scott Johnson's death was not a gay hate crime based on the relevant finding at sentence, evidence indicating that Mr White was gay, and the fact that the Director of Public Prosecutions (**DPP**) did not suggest (during the 2023 sentence proceedings) that it was a gay hate crime.

55. It is asserted that the evidence "does not allow a finding that Mr Johnson was the victim of a gay hate crime, notwithstanding which standard of proof is applied".

56. Other matters asserted in the reply submissions include as follows:

a) that the causal connection of gay hate is irrelevant to the question of whether or not a crime has been solved;

b) that both the manner and cause of Scott Johnson's death have been established beyond a reasonable doubt, namely that he was punched and fell down the edge of a cliff, with the injuries sustained causing death;

c) that the absence of there being evidence in relation to every issue is not the test for determining whether or not a crime has been solved;

d) that there has not been any evidence adduced which addresses any remaining unknown issues concerning the death of Scott Johnson; and

e) that Paragraph F of the ToR does not provide "free rein" to the Inquiry to make findings which are otherwise outside the specific ToR.

57. The reply submissions also contend that the submissions of Counsel Assisting did not address a concern raised by Mr Willing in the substantive submission that the Special Commission's inquiries (as are now objected to) potentially may have caused prejudice to extant criminal proceedings prior to the sentencing of Mr White on 8 June 2023.

Consideration

58. Before considering the competing submissions, it is helpful to have regard to the following matters:

a) the description by the interested parties of the subject matter that is said to be *ultra vires* – principally, SF Macnamir and the death of Scott Johnson;

b) the actions of the Inquiry said by the interested parties to be affected by their objections;

c) the two different bases upon which Counsel Assisting suggest the inquiries are within the ToR; and

d) the relevance of the distinct nature of a Commission of Inquiry in undertaking investigatory tasks given to it by the Executive Government.

The interested parties' description of the subject matter said to be ultra vires - SF Macnamir and the death of Scott Johnson

59. The submissions of the interested parties refer to the matters into which it is said that the Inquiry has impermissibly trespassed as both SF Macnamir and the death of Scott Johnson. The Commissioner of the NSWPF extends her objection to the "Lateline interview".

60. Although SF Macnamir was an investigation into Scott Johnson's death, and the two matters are for that reason connected to one another, the matter that has been the subject of the Inquiry's consideration during Public Hearing 2 has been the manner in which SF Macnamir was conducted. The examination of SF Macnamir has understandably touched upon the competing theories in relation to Scott Johnson's death and the manner in which those competing theories were investigated, but it has not been an inquiry into the manner and cause of Scott Johnson's death per se.

61. Public Hearing 2 has not involved, for example, the calling of civilian witnesses in connection to factual matters relating to events occurring at the time of Scott Johnson's death in December 1988, as an inquiry concerned with the cause and manner of his death might do. That is because one of my purposes in undertaking Public Hearing 2 has been to examine the manner in which the NSWPF were approaching the examination of potential gay hate homicides at around the time SF Parrabell was being conducted, in order to bring an appropriate understanding of police practices and methodology to my task under Paragraphs A and B of the ToR.

The actions of the Inquiry said by the interested parties to be affected by their objections

62. I note that the "objections" made by the interested parties differ in their description of the effect on the Inquiry's activities that they appear to seek.

63. The Commissioner of the NSWPF asserts that "any <u>findings</u> made by the Inquiry in respect of" Scott Johnson's death and SF Macnamir would fall outside the Inquiry's ToR and would be *ultra vires*. The Commissioner of the NSWPF further asserts that "any <u>report</u> or <u>recommendations</u> purported to be made by the Inquiry in relation to the death of Mr Johnson or SF Macnamir would be ultra vires". Mr Willing states more broadly that any "<u>investigation</u>" or "<u>enquiry</u>" by the Inquiry is outside its ToR (emphasis added).

64. I take Mr Willing's objection to be asserting that the tender of evidence and oral testimony adduced on the topics was itself impermissible (although no objection was taken at the time of the relevant tender). That appears to be based on s 9(2) of the *SCOI Act,* which requires that in

public hearings I "only receive evidence that appears to relate to a matter specified in the relevant commission". I take the effect of what both interested parties say to be that I am not permitted to make any 'findings' in relation to the topics (as explicitly claimed by the Commissioner of the NSWPF). In that respect the "objection" is prospective, as I have not made any such findings. I take the objection to such findings to mean that the parties in effect assert that I am not permitted to express any views about those topics in my report to the Executive Government, bearing in mind that I am required by the ToR to report to it on Paragraphs A and B, having had regard to the findings of previous inquiries and reports including those explicitly referred to at Paragraph C. In the case of the Commissioner of the NSWPF, explicit objection is made to "any" reporting by me that "relates to" the impugned topics, as well as any recommendations that "relate to" them.

The separate bases of 'relevance' of SF Macnamir to the ToR asserted by Counsel Assisting

65. Broadly speaking, Counsel Assisting's submissions advance two separate bases upon which the Inquiry's examination of the relevant issues during Public Hearing 2 fall within the ToR: that which I will refer to as the <u>*primary basis*</u>, involving an examination of SF Macnamir, given the Inquiry's obligation to have regard to the matters identified in Paragraph C of its ToR and what SF Macnamir may reveal about the approach more generally of the NSWPF to investigating matters falling within Paragraphs A and B of its ToR; and a <u>*secondary basis*</u>, stemming from a view that, in context, Scott Johnson's death should be considered "unsolved" for the purposes of Paragraph A of the ToR.

66. If I form the view that an examination of SF Macnamir is within the ToR on the <u>*primary*</u> basis, it will not be necessary for me to separately consider the question of whether Scott Johnson's death should be considered "unsolved" or not for the purposes of Paragraph A of the ToR.

The distinct nature of a Commission of Inquiry in undertaking investigatory tasks given to it by the Executive

67. It is helpful at this point that I make reference to some of the relevant case law concerning the distinct nature of an Inquiry of this type. In particular I am mindful of case law going to the manner in which I am permitted to pursue various lines of inquiry in informing myself on matters that may assist me in my task of addressing my ToR, and how the term "relevance" is to be considered in these circumstances.

68. I referred to the following passage from Ellicott J's decision in *Ross v Costigan* (1982) 41 ALR 319 (hereafter *Ross v Costigan*) in my judgment of 6 December 2022. It is equally apposite here:[4]

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.

69. On its terms, Starke J described a Victorian Commission of Inquiry into claims of bribery involving members of Parliament as "what might be described as a fishing inquiry": *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73 at 92. Justice Abadee adopted similar terminology in *ICAC v Cornwall* (1993) 28 NSWLR 207 at 241-242, when discussing the concept of relevance in the context of an investigation by that statutory commission:

It is important to understand that in his investigation, the Commissioner may have to follow leads … If the ICAC bona fide seeks to establish a relevant connection between certain acts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference. …

[4] It is acknowledged that as distinct from the circumstances in *Ross v Costigan*, some evidentiary rules do apply to the present proceedings.

Relevance is to be judged in relation to the function of the Commissioner, who in the instant case is acting in a purely inquisitorial capacity. In some respects the inquiry is a fishing inquiry, and of a very general kind, operating within a framework of very wide terms of reference. The evidence which the Commissioner will consider for the purpose of his discrete investigation must therefore be very much a matter of discretion.

To demonstrate that a question is irrelevant or outside a relevant area of investigation will not be an easy task …

70. While allowing for the reference made to ICAC's "very wide terms of reference", it is observed that, subject to the supervision of the Courts, the interpretation of the ToR is a matter for the particular Inquiry: *Easton v Griffiths* (1995) 69 ALJR 669 per Toohey J (at 672).

71. I am also mindful of the broad manner in which references to "relevance" should be regarded in the context of this Inquiry, and of whether use of the term "relevance" is appropriate at all, in view of both the case law and the language of sub-section 9(2) of the *SCOI Act*. As noted above, that sub-section provides that "The Commissioner shall only receive evidence that appears to relate to a matter specified in the relevant commission" (emphasis added).[5]

72. I also bear in mind that "the fact that there is no evidence before an inquiry linking persons to any relevant subject matter (eg possible illegal conduct) is not a reason against a commission of inquiry pursuing a matter and requiring evidence from any persons considered necessary for the performance of its tasks": *Ross v Costigan* at 335.[6]

73. Against that background I now proceed to consider the separate bases on which Counsel Assisting submit that SF Macnamir falls within the ToR.

The primary basis on which an examination of SF Macnamir is said to fall within ToR

74. Counsel Assisting's submission as to the primary basis on which an examination of SF Macnamir is said to fall within the ToR is supported by findings and observations of the Parliamentary Committee in its two reports which I am required to "have regard to" under Paragraph C of the ToR.

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[5] The significance of the words "appears" and "relate to" in being permissive of a particularly broad interpretation of relevance is the subject of further observation at [26]-[28] of my 6 December 2022 judgment.

[6] As cited in Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (Lawbook Co, 2nd ed, 2019), at [8.155].

75. In this respect I refer to the analysis of the term "have regard to" set out at [43]-[46] of my judgment of 6 December 2022. I am required to give "genuine consideration and not merely token or nominal consideration" to matters to which I am directed to have regard: *Secretary, Department of Defence v Fox* (1997) 24 AAR 171 at 176; *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [212]. More generally, as I observe at [46], the authorities therein quoted highlight the broad discretion of an individual directed to "have regard to" particular matters relevant to the task at hand.

76. The Parliamentary Committee's interim report paragraphs 2.4 to 2.31 summarise the case study of the Scott Johnson matter that was undertaken by the Committee, while paragraphs 3.19 to 3.28 summarise matters related to the various police investigations into Scott Johnson's death between 1988 and 2018. The following references within the interim report are noted:

    a) After referring to the coronial inquest held in 2012, at 2.16 the interim report states "(t)he following year, an episode of Australian Story focusing on Scott's death aired. Soon after, the police together with the Johnson family held a joint press conference announcing the establishment of Strike Force Macnamir to investigate Scott's case";

    b) At 2.19: "According to Mr Steve Page, former NSW Police Force Detective Sergeant, those who had assisted and supported the Johnson family were 'collectively smeared' throughout the Macnamir operation. The Johnson family, and in particular Scott's brother, Steve, became the subject of intense police scrutiny, amid claims that Steve had used his wealth and influence to keep Scott's case open";

    c) At 2.20: "The Task (sic) Force ultimately concluded that there was no reason to suspect that Scott's death involved violence and that the officers of the original investigation had reached the correct conclusion of suicide";

    d) At 2.25: "Steve had hoped that the Coroner's findings would spur the police into launching an immediate effort to investigate Scott's death. However, while Steve, his family and supporters had waited decades for a determination about Scott's death, the outcome of the coronial inquest was not welcomed by everyone. According to Steve, the police were 'outraged' by the Coroner's findings, 'as if it was a defeat instead of an independent, fact-based inquiry that had concluded that a homicide had been committed'";

    e) At 2.28: "According to Steve, a number of questions continue to haunt his family, including why Manly police concluded that Scott's death was a suicide, thus closing the case so quickly

thereafter, and why the NSW Police Force had persisted for so long that this was the only plausible explanation for Scott's death, thereby rejecting repeated calls to investigate";

f) At paragraphs 3.19 to 3.28, observations are made concerning the "highly inadequate" nature of the initial police response to the death and the subsequent challenges faced by the family;

g) At 3.24 it is said that "(a)ccording to Mr Steve Johnson, the NSW Police Force have, during this 30 year period, treated the Johnson family as 'adversaries'; have 'resisted working together with the … family to find the truth'; and 'refused to objectively consider evidence amassed by the family'"; and

h) At 3.25: "Mr Steve Johnson told the committee that 'police resistance to appropriately investigating crimes against gay victims is not just a relic of the past; it is current'. This view was based on his lengthy experiences in dealing with the NSW Police Force regarding the death of his brother. While Mr Johnson acknowledged the goodwill demonstrated by Assistant Commissioner Anthony Crandell, Police Education and Training, NSW Police Force, he noted that the NSW Police Force as a whole had not yet proven it had changed".

77. I also note that the findings of the Parliamentary Committee interim report (February 2019) included Finding 1, which was in the following terms:

Finding 1

That a prevailing acceptance of and indifference towards violence and hostility directed at gay men principally during the period prior to the mid-1990s impacted on the protection of and delivery of justice to victims of hate crime, including but not limited to Mr Alan Rosendale, Mr Scott Johnson, Mr John Russell and Mr Ross Warren.

78. Paragraphs 1.34 to 1.40 of the Parliamentary Committee's final report (May 2021) summarised developments in the case of Scott Johnson since the interim report, including the arrest of a man (Mr White) in May 2020. The Committee's findings in the final report included Finding 2, which was in the following terms:

Finding 2

That historically the NSW Police Force failed in its responsibility to properly investigate cases of historical gay and transgender hate crime and this has undermined the confidence of lesbian,

gay, bisexual, transgender, intersex and queer (LGTBIQ) communities in the NSW Police Force and the criminal justice system more broadly.

79. I accept Counsel Assisting's submission that pursuant to Paragraph C of the ToR I have in effect been directed to have regard to evidence of potential deficiencies in the manner in which Scott Johnson's death was examined by the NSWPF, given that this is a matter highlighted in the Parliamentary Committee's reports.

80. I do not accept, as suggested by the Commissioner of the NSWPF, that Counsel Assisting are asserting that a "comprehensive exploration of the work of the Parliamentary Committee is permitted or required". This paints the submission made by Counsel Assisting in an exaggerated manner. I do not understand Counsel Assisting to be seeking to undertake such a task. Nor could Counsel Assisting do so, having regard to parliamentary privilege.

81. The reply submissions by the Commissioner of the NSWPF are heavily predicated on an assumption that my judgment of 6 December 2022 somehow circumscribes the manner in which it can be said that the reports I am required to have regard to by Paragraph C are of relevance to informing my inquiries under Paragraphs A and B of the ToR. The 6 December 2022 judgment dealt quite distinctly with the question of how I considered that an examination of matters relating to the SF Parrabell report would help inform my duties in relation to Paragraphs A and B of the ToR.

82. It was the processes and methodologies of SF Parrabell that were of particular interest and utility to my consideration of Paragraph A and B matters. It is wrong to infer from this (as the NSWPF reply submissions do at [15]-[16]) that it can only be the "processes and methodologies" or "means and methodologies" of other entities that have produced reports referred to in Paragraph C of the ToR (namely the Parliamentary Committee and ACON) that it is permissible for me to examine in connection with my consideration of Paragraph A and B matters.

83. The reports of those entities may clearly be of relevance to the Inquiry in a different manner, and they are. As a review process concerning the identification of potential "gay hate homicides" (SF Parrabell) that was conducted by the same agency (the NSWPF) that is responsible for the investigation of the deaths the subject of Paragraphs A and B, the relevance in particular of the methodologies deployed by that review process is obvious. By contrast the Parliamentary Committee reports have the objectivity of standing outside the NSWPF and were conducted by well known methodologies involving the receipt and consideration of documentary and oral

evidence, and submissions. It is the report and findings of the Parliamentary Committee, and the evidence and other work on which they are based, that I am directed to "have regard to". The work of the Committee has a particular relevance, given that it gave rise to the recommendation for the current Inquiry.

84. I am entitled to inquire into matters if I think they will assist me in connection with my task of determining the manner and cause of death in Paragraphs A and B matters. The task set for me of determining the cause and manner of a large number of potential gay hate crime deaths over a considerable span of time is a substantial one. I am greatly assisted in that task by having a baseline of information and understanding generally concerning the culture, practices and approaches over time by the NSWPF to the investigation of potential gay hate homicides.

85. As one of the most prominent such investigations conducted by the NSWPF in recent times, and one that is the subject of extensive consideration by the Parliamentary Committee concerning such practices, I have considered it appropriate to inform myself, through evidence acquired during Public Hearing 2, of relevant features of SF Macnamir. While I must have regard to the content of the Parliamentary Committee reports generally, the extent to which I think particular matters referred to in the report are worthy of more detailed exploration in order to assist me with my task pursuant to Paragraphs A and B is a matter for my discretion. The practices and approaches of police in connection with SF Macnamir have stood out as a matter where further exploration was likely to be, and has been, fruitful.

86. The purpose in exploring SF Macnamir (in association with other NSWPF investigative entities – see below) first and foremost, has been to help give the Inquiry an appropriate understanding of attitudes, practices, and approaches within the NSWPF towards the investigation of potential gay hate crimes in order to help interpret the evidence I have received in relation to Paragraphs A and B matters as I proceed to consider the manner of cause and death in those matters.

87. The Commissioner of the NSWPF suggests that the logic of Counsel Assisting's submissions would "require" me to investigate any non-fatal assaults that were the subject of consideration by the Parliamentary Committed report. She further observes that "the Inquiry is not charged with conducting a broad-ranging investigation into every matter that might be relevant to the NSWPF's approach to the investigation of anti-LGBTIQ hate crimes."

88. Self-evidently the suggestion that I would be required to investigate all matters, including non-fatal assaults, referred to in the Parliamentary Committee reports is wrong – I am not "required"

to do so and the submission made by Counsel Assisting does not, either expressly or by implication, suggest this to be the case. The NSWPF submission ignores the discretion I have to consider (having appropriate regard to the reports, and for the purposes of helping me with my task in relation to Paragraphs A and B) which particular matters identified in those reports it may be fruitful for me to conduct further inquiries about through the exercise of my powers including the conduct of public hearings. If I considered that it would be fruitful to conduct further inquiries about those non-fatal assaults, it would be open to me to do so.

89. It should therefore not be surprising that in the course of Public Hearing 2 I have focussed *inter alia* on SF Neiwand and SF Macnamir. In the case of SF Neiwand, the deaths it was investigating are also the subject of case study in the Parliamentary Committee reports. The two Strike Forces appear to have been the most substantial NSWPF investigative teams charged with considering potential gay hate homicides in the years immediately preceding the work of that Committee. They were conducted over a similar time period as each other and SF Parrabell, and, at least on the submissions of Counsel Assisting, their personnel overlapped (although the extent of the overlap is disputed by the Commissioner of NSWPF). There is evidence that the senior officer responsible for SF Macnamir was also involved in the production of an Issues Paper for the NSWPF that more generally considered and expressed views concerning 30 potential gay hate homicides encompassing the period of those that I have been tasked to consider.

90. In these circumstances, I have taken the view that inquiring into the methodologies and practices of those Strike Forces will potentially assist me by helping to inform my understanding of the evidence (including relevant police practices) relating to the individual deaths the subject of Paragraphs A and B.

91. As will be apparent, in my discretion I have not embarked on such a detailed examination of other matters reported on by the Parliamentary Committee precisely because they appear to me to be of lesser potential relevance and utility in assisting me in my task related to Paragraphs A and B of the ToR.

92. No suggestion has been made by Counsel Assisting that the “recommendation power enables an unfettered consideration of SF Macnamir” as the NSWPF submission might be taken to imply. It is also not correct to suggest, as the NSWPF reply submission does, that Counsel Assisting have suggested that the Inquiry is “free to expand the scope of its investigations by reference to what might ‘help advance the public interest’”.

93. The effect of the NSWPF reply submissions on these matters is to set up straw men (which do not accurately reflect the position taken by Counsel Assisting) to be knocked down, rather than to address Counsel Assisting's submissions in their actual terms.

94. Any suggestion that I am embarking on the inquiry into SF Macnamir solely for the purpose of assisting me in connection with making recommendations is incorrect and rests on an overly simplistic construction of the nature of the work of the Inquiry. Rather, having embarked on the inquiry into SF Macnamir and derived assistance from it for the purposes to which I have referred, if the evidence derived also helps to inform recommendations relating to Paragraphs A and B of the ToR, I do not consider there to be any barrier to me from drawing on it for that purpose.

95. In relation to the "Lateline interview", it is said by the Commissioner of the NSWPF that the fact that it concerned Scott Johnson's death and was given by the Investigation Supervisor of SF Macnamir does not bring it within the ToR, apparently for the same reasons that it is said by her that SF Macnamir does not fall within the ToR.

96. The fact that the interview was given by the senior officer responsible for SF Macnamir, and that it concerned Scott Johnson's death, demonstrate its intimate connections with SF Macnamir. Its content also reflects the animosity of the officer towards Scott Johnson's family member as reflected in the excerpts from the Parliamentary Committee interim report set out earlier in the judgment. I consider the evidence relating to the interview to be relevant to the ToR for the same reasons that SF Macnamir is relevant.

The secondary basis on which an examination of SF Macnamir is said to fall within ToR

97. It is a matter of public record that Mr White pleaded guilty to the manslaughter of Scott Johnson on 23 February 2023 and was sentenced in the Supreme Court by Beech-Jones CJ at CL on 8 June 2023.

98. Although not necessary to my determination of this matter, I reject the assertion of Mr Willing that up until 8 June 2023 (when Mr White was sentenced), any consideration of Scott Johnson's death by the Inquiry risked prejudice to the relevant criminal proceedings. To the extent that any public consideration of matters touching upon Scott Johnson's death has occurred, this has been to consider police approaches to the investigation of suspected gay hate homicides as reflected by (the now historical) SF Macnamir. That has occurred in a timeframe that post-dates Mr White's plea of guilty to manslaughter, from which point the matter was for the exclusive

consideration of a Justice of the Supreme Court in relation to sentence, there being no prospect of a pending trial by jury. In those circumstances I do not consider there to have been any appreciable risk to any current investigation or criminal prosecution (cf ToR Paragraph E). As a matter of fact there has been no prejudice.

99. As I am of the view that my inquiries in relation to SF Macnamir in the course of Public Hearing 2 fall within the ToR on the primary basis referred to above, it is not necessary for me to express a view as to whether or not those inquiries fall within the ToR on the secondary basis that Scott Johnson's death should be regarded as an "unsolved" death, potentially motivated by gay hate bias.

100. I have set out the views of Counsel Assisting and the interested parties on this issue. Without expressing a concluded view on whether or not Scott Johnson's death should be regarded as "unsolved" for the purposes of the ToR, I note the following matters.

101. The view expressed by the Commissioner of the NSWPF was that "there can be absolutely no doubt that the manner and cause of Mr Johnson's death has been determined." In a similar vein, Mr Willing asserts that the possibility that Scott Johnson's death may have been motivated by gay hate "had been excluded entirely."

102. Counsel Assisting highlighted the uncertainty expressed by Beech-Jones CJ at CL concerning the facts of the offence when sentencing Mr White (*R v White* [2023] NSWSC 611).

103. At [3] his Honour observed:

> *Dr Johnson's death was the commencement of a decades-long nightmare of grief and unanswered questions for his family. One of those questions, being who was primarily responsible for his death was definitely answered when, on 23 February 2023, the offender pleaded guilty to the manslaughter of Dr Johnson. However, it will be apparent from the balance of these reasons that the answers to numerous other questions about how Dr Johnson died, why he died and what happened in the long decades between his death and today are not yet known. Some of those answers may never be provided*. (emphasis added)

104. Defence counsel in the sentence proceedings (Mr Game SC) submitted (referred to at [30]), that the sentencing judge "could not be satisfied beyond reasonable doubt that the offender went with Scott Johnson to North Head with a malign purpose, or that any planning was involved in the commission of the offence or that the killing of Scott Johnson was a 'gay hate crime'."

105. On that point, at [31] Beech-Jones CJ at CL ruled that:

> *…. While a scenario whereby the offender enticed Dr Johnson to North Head with a plan to attack him* <u>*is not inconsistent with the objective facts, it is also not demonstrated beyond reasonable doubt either. The same reasoning applies with respect to any suggestion that the punching of Dr Johnson was a "gay hate crime", that is, motivated by hatred of gay men.*</u> *While the offender said, "we often used to go poofter bashing", that was immediately qualified by a statement that his brother did so and it was never said to refer to his encounter with Dr Johnson. Accordingly, I accept Mr Game's submission.* (emphasis added)

106. At [38] Beech-Jones CJ at CL observed:

> *The end result is that not much is known about the killing of Dr Johnson beyond a punch near a cliff, a vulnerable victim, a fall over the cliff, a death, an absence of taking even the simplest step to render help after the fall and decades of pain and grief that followed.*

107. Mr Willing appears to assert that I must take the view that Scott Johnson's death was not a gay hate crime based on the relevant finding at sentence, evidence indicating that Mr White was gay, and the fact that the DPP did not suggest (at least during the 2023 sentence proceedings) that it was a gay hate crime.

108. In *Gilham v R* (2007) 73 NSWLR 308 McClellan CJ at CL observed as follows:

> *[205] Although sentencing proceedings require the sentencing judge to determine the relevant facts beyond reasonable doubt, it is for a limited purpose. The available evidence will either have been tendered at the trial, in which case the jury will have returned a verdict, or will be tendered at the sentencing hearing following the acceptance by the prosecution of a plea. In either case the decision making function of the judge is confined. If there has been a trial the judge must make findings consistent with the jury's verdict. If a plea has been entered, but the relevant facts are in dispute, the findings must nevertheless accord with the plea. If the facts are agreed the judge's determination will be confined by that agreement.*
>
> *[206] Although the limits of the principle of incontrovertibility have not been settled, informed by the values to which I have referred, I see no reason why facts "found" in the sentencing process should be elevated so that they cannot be controverted in other proceedings. Those facts are not "found" for the purpose of a finding of guilt or innocence but rather for the purpose of establishing the culpability of an offender where a jury has found him to be guilty of the offence charged or he has acknowledged his guilt of that offence by entering a plea.*

> *[207] The view that the incontrovertibility principle does not operate in relation to findings of fact in the sentencing process is most readily accepted where, as in the present case, the facts are found without a contested hearing. In that circumstance the court has not been asked to determine between competing versions of events or make its own finding. The role of the judge has been confined to acceptance of the evidence agreed by both parties.* (emphasis added)

109. The views expressed by his Honour are consistent with the fact that the Office of the Director of Public Prosecution's Guidelines provide for matters to be determined by way of "charge resolution", depending on certain factors including where:

> *… the evidence available to support the prosecution case is weak in a material way, even though it cannot be said that there is no reasonable prospect of conviction, and the public interest will be satisfied with an acknowledgment of guilt to certain lesser criminal conduct.*[7]

110. If I have not taken the view in the case of other deaths where there has been a conviction in criminal proceedings that the case does or might nevertheless fall within Paragraphs A or B of the ToR, that does not mean that I am not permitted to do so in instances where on the particular facts of a case, it is open to me to conclude that it may fall within those terms. Notwithstanding the fact of Mr White's conviction after pleading guilty to manslaughter and his sentence based on an agreed set of facts, it is apparent from the passages of the sentencing judgment set out above that much does remain unknown in relation to circumstances surrounding Scott Johnson's death.

111. That it is open to me to take the view that a matter falls within Paragraphs A or B of the ToR notwithstanding that the matter has proceeded to conviction in criminal proceedings is in fact specifically contemplated by the way in which Paragraph F of the ToR is framed.

112. Further, even if ultimately I were to agree with the view of the interested parties that Scott Johnson's death should not be regarded as "unsolved" for the purposes of the ToR, in my view I would be permitted to make inquiries to assist me to reach an appropriate conclusion on that issue.

[7] NSW ODPP Prosecution Guideline 4.3, issued under s 13(1) of the *Director of Public Prosecutions Act 1986* (NSW).

113. Given the conclusion I have reached that the relevant inquiries are permitted on the primary basis referred to above, I do not consider there to be utility in further commenting upon the submissions of the parties on this issue.

Conclusion

114. For the reasons set out above, I am of the view that I am permitted to inquire into SF Macnamir, including the involvement of the senior officers of the NSWPF responsible for SF Macnamir in the "Lateline interview".

115. I will give due consideration to the parties' submissions in relation to Public Hearing 2, and the submissions in reply on the present issue in considering the extent and manner in which I report and make recommendations on anything arising from, or relating to, SF Macnamir.

The Commissioner

The Honourable Justice John Sackar