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NSW Police Force

2 December 2022

Hon. Justice John Sackar
Commissioner,
Special Commission of Inquiry into LGBTIQ hate crimes

c/o Mr Enzo Camporeale
Director, Legal
121 Macquarie St
SYDNEY NSW 2000

By email ONLY: enzo.camporeale@specialcommission.nsw.gov.au

Dear Commissioner,

Special Commission of Inquiry into LGBTIQ hate crimes – New South Wales Police Force

We refer to the cancellation of the Directions Hearing that had been listed for 10am on 30 November 2022. Although we are aware that Counsel Assisting your Inquiry has agreed to some redactions and delayed the consideration of other objections by us to publication of certain information contained in documents summonsed by you from the New South Wales Police Force, we continue to have a wish to present submissions to you in relation to some of our concerns regarding the publication of documents by your Inquiry.

This is an outline of the submissions which we would wish to make before the Inquiry:

1. We wish to draw your attention to section 9(2) and (3) of the *Special Commissions of Inquiry Act 1983* which provide that you shall only receive evidence “that appears to relate to a matter specified in the relevant commission” (i.e. your terms of reference) and that you shall only receive as evidence or permit to be given in evidence matter that in your opinion “would be likely to be admissible in evidence in civil proceedings”. We submit that this requires a consideration of admissibility issues under the New South Wales *Evidence Act 1995*, including the provisions of sections 55 to 58 of that Act that relate to relevance and s. 130 relating to the preservation of confidentiality.
2. We respectfully submit that relevance in an Inquiry such as yours is determined by the Terms of Reference. The facts in issue in your Inquiry are determined by paragraphs A and B of your Terms of Reference as “the manner and cause of death” of various persons in the categories specified. We submit that in assessing the relevance of evidence to be received by your Inquiry, you must be satisfied that such evidence would be admissible in civil proceedings concerning those facts in issue.
3. Paragraph C of your Terms of Reference clearly indicates the wish of those who drafted them that you should not go over the same material or conduct the same inquiries that have already been done by the previous Inquiries listed in that paragraph.
4. Paragraph F of your Terms of Reference provides that you are not to enquire into matters that have already been sufficiently and appropriately dealt with by another

OFFICE OF THE GENERAL COUNSEL

LOCKED BAG 5102 PARRAMATTA NSW 2150

T 02 9506 5199 F 9506 5111 W www.police.nsw.gov.au

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- inquiry or investigation. We respectfully submit that this paragraph indicates a clear intention by those who drafted the Terms of Reference that you are not tasked with an assessment of the methodology or background of the previous inquiries listed in paragraph C. We submit that the exercise by Strike Force Parrabell was clearly not an investigation or a reinvestigation of the manner and cause of the 88 deaths, but rather an exercise of categorising whether or not they were “motivated by bias including gay-hate”. Rather, paragraph F indicates a desire that you are to continue any investigation or enquiry into the “manner and cause of death” of those cases referred to in paragraphs A and B. Strike Force Parrabell was not such an investigation or inquiry.
5. Section 5(1) of the Special Commissions of Inquiry Act provides that a Commission may be subject to conditions and limitations. In relation to your Inquiry, those conditions and limitations are contained in paragraphs D to F of your Terms of Reference. Section 5(2) of the Act specifies that it is the duty of the Commissioner to ensure that such conditions and limitations are complied with and observed “to the fullest possible extent”. Paragraph E of your Terms of Reference contains such a condition or limitation that in conducting the enquiry you are “to operate in a way that avoids prejudice to criminal investigations, any current or future criminal prosecutions, and any other contemporaneous enquiries”. We submit that the term “criminal investigations” refers not only to current investigations but indeed to potential future investigations. We submit that in any weighing exercise as to whether material should be put into the public arena, you have a duty to prevent potential prejudice to future investigations “to the fullest extent possible”.
 6. We have expressed our concerns to your senior solicitor that various pieces of information that are included in documents provided by the New South Wales Police Force to your Commission should not be disclosed or published in public so as not to prejudice future investigations. We direct your attention to the latest statement by Chief Inspector Nigel Warren. Whilst the police have reluctantly agreed to the general dissemination of information concerning Strikeforce Parrabell upon being pressed by your staff, we continue to remain concerned at the possible prejudice of future investigations by the publication of information regarding specific investigations of suspected hate crimes. We are particularly concerned that any references to information from informers and the disclosure of police methodology. Such matters are routinely the subject of suppression orders in criminal trials throughout this State.
 7. We also wish to bring to your attention section 65 of the *Coroners Act 2009*. That section has the effect that even though documentary evidence may be tendered during a Coronial Inquest, that does not mean that it is available to the media or the general public. Section 65 provides that in order for a person to be granted access to the Coroner’s file, they must satisfy the Coroner that there are reasons why access should be granted. Under s. 34(4) of the *Coroners Act 1980*, access was only granted to a person who “shows cause sufficient in the opinion of the appropriate official why they should be supplied with a copy of the coroner’s file”. It is our understanding that in many cases, particularly where there is an actual or potential ongoing police investigation, access to the Coroner’s file is not given to the media. We respectfully submit that just because a document has been tendered in a Coronial Inquest, that does not mean that it has been made available to the public. Moreover, the fact that information was at one stage tendered in an Inquest that may have been open to the

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- public, does not mean that *further* publication of the same information could not prejudice ongoing investigations. This is particularly so when the relevant inquest was conducted many years ago.
8. We also respectfully submit that the suggestion of a particular fact about an investigation into a suspected murder in a published book is quite different to a disclosure of that same fact in a police document, or a report of a Commission of Inquiry, in terms of the potential to harm a future investigation. While in some cases, we have acceded to publication of particular information in part because of its publication, we submit that these matters should continue to be borne firmly in mind as the Inquiry progresses.
 9. Your Counsel Assisting previously intended to tender documents in a way that would have resulted in the publication of the direct work phone numbers and email addresses of members of the New South Wales Police Force. We understand that he has now resiled from this position for the moment, but understand that the issue has not yet been finally settled and may be revisited in future. We refer you to the affidavit by Mr Patrick Hodgetts, Solicitor and submit that it is the invariable practice in the courts that such material is deleted from any documents that are made public, or even documents that are provided to an accused person. To publish such material may contravene paragraph F of your Honour's terms of reference by rendering those police officers amenable to harassment and inappropriate contact from members of the public; such contact might well interfere with criminal investigations or future prosecutions.
 10. Further and in any event, we find it hard to see how this information could possibly assist in the determination of the manner and cause of death of the persons in the categories contained in your Terms of Reference. We respectfully submit that the publication of work phone numbers and email addresses of serving police officers would have the effect of prejudicing the effective exercise of those police officers in their agency's functions.
 11. The Unsolved Homicide Team and the Office of the General Counsel of the NSW Police Force have devoted considerable resources to assisting the Commission's Inquiries as expeditiously as possible. The material provided by the NSWPF to date includes:
 - a. over 220 boxes of archived materials; and
 - b. approximately 77,000 electronic files.
 12. This has necessarily had a substantial impact on police resources; 11 operational police officers, including 7 members of the unsolved homicide team have been called upon to assist in the provision of materials to the Commission. That has necessarily impacted upon their capacity to engage in other investigative tasks. Indeed, we are instructed that approximately 12 UHT investigations and reviews have had to be placed on hold while the relevant officers assist in the context of this Inquiry.
 13. Additionally, significant legal resources have been allocated to facilitate the expeditious responses of the NSW Police Force:

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- a. Senior and Junior counsel have been engaged;
 - b. two solicitors from the Office of General Counsel have been working essentially full time on the responses to the Inquiry, while another member of the Office of General Counsel has been working part time in facilitating the NSWPF's response; and
 - c. a private law firm has been engaged to assist in responding to summonses and other tasks.
14. The Inquiry's first summons to the Commissioner was issued on 18 May 2022. Since that date, the Inquiry has issued a further 37 summonses to the Commissioner compelling the production of documents. Of the 38 summonses, 30 of these have been issued since 22 August 2022, most requiring the production of a vast number of documents and with timeframes that are compressed and often overlapping. Separately, the Inquiry has also required statements from several officers and employees of the NSW Police Force and made various requests for information.
15. There have also recently been several instances where key documents have been served on the Commissioner on weekends, or between midnight and 2am, with a direction that a response be provided to the Inquiry within 24 to 48 hours. For example, the Commissioner was served with an initial tender bundle comprising of approximately 200 documents at 1.00am on 29 November 2022 with a request that the Commissioner advise of her position in relation to the same by 30 November 2022. Further, our office was served with a supplementary tender bundle at 1.15am this morning, with we understand is also to be tendered at the commencement of the hearing next week.
16. These expectations, together with the volume of material requested, has often meant that we are unable to provide substantive responses, to the Inquiry's satisfaction, in the provided timeframes. It has also materially impacted upon the capacity of the Commissioner to adequately consider issues such as the need for protective mechanisms in respect of particular information. The compressed timetables also impact upon the Commissioner's capacity to respond to the Inquiry more generally, for example, by ensuring that witnesses are apprised of the issues and documents that may be addressed with them. This is likely to impact upon the quality of the assistance the relevant witnesses are able to offer the Inquiry.
17. The NSW Police Force is determined to respond as quickly and thoroughly as possible to the Inquiry's subpoenas and requests for objections, however we ask for consideration by you and your staff concerning the severe resourcing implications that arise, and the stress placed on my solicitors, and those who instruct us.

Yours sincerely



Natalie Marsic
General Counsel
Office of the General Counsel
NSW Police Force