

DEATH OF SCOTT RUSSELL JOHNSON:**SUBMISSIONS OF THE COMMISSIONER OF POLICE (NSW)
IN RESPONSE TO UNDATED SUBMISSIONS OF COUNSEL ASSISTING
SERVED 18 MARCH 2015****INTRODUCTION**

1. These submissions on behalf of the Commissioner of Police (NSW) (**Commissioner**) are filed in response to the undated submissions of Counsel Assisting served on 18 March 2015. They address the same issues as those in the submissions of Counsel Assisting: (1) whether Deputy State Coroner Forbes is *functus officio*; (2) whether confidentiality or non-publication orders should be made under ss.65 and 74 of the *Coroners Act 2009* (NSW) (**the Act**); and (3) whether a fresh inquest should be held pursuant to s.83 of the Act.

(1) WHETHER DEPUTY STATE CORONER FORBES IS *FUNCTUS OFFICIO*

2. The Commissioner does not take any position in relation to the question of whether Deputy State Coroner Forbes is *functus officio*, although he accepts that whether it is appropriate to determine to hold a “fresh inquest” pursuant to s.83 of the Act depends on the inquest that was conducted by Deputy State Coroner Forbes having been concluded.
3. The Commissioner submits that the power of the State Coroner to make confidentiality and non-publication orders pursuant to ss.65 and 74 of the Act does not depend on whether or not Deputy State Coroner Forbes is *functus officio*. What is required, according to the statutory language of both provisions, is that there be “coronial proceedings”. As the Commissioner understands the submissions of Counsel Assisting, the Johnson family (including Mr Stephen Johnson) seeks that a further fresh inquest be held (see Submissions of Counsel Assisting at [7]). That, it is submitted, is sufficient to give rise to

“coronial proceedings” within the meaning of the Act, the “coronial proceedings” being “proceedings conducted by a coroner ... for the purposes of [the] Act concerning the investigation of a death ... includ[ing] proceedings to determine whether or not to hold ... an inquest”: s.46. See, further, the Submissions of the Commissioner filed 21 November 2014 at [12]–[15].

(2) ORDERS UNDER SECTIONS 65 AND 74 OF THE ACT

4. On 21 November 2014, the Commissioner filed submissions in support of his application for confidentiality and non-publication orders in respect of the OIC Statement of DCI Pamela Young signed 13 July 2014 (**OIC Statement**) and the Supplementary OIC Statement of DCI Pamela Young signed 10 October 2014 (**Supplementary OIC Statement**).
5. The Commissioner accepts that the orders he has proposed, which Counsel Assisting agree should be made (see Submissions of Counsel Assisting at [9]), would not prevent a copy of the anonymised versions of the OIC Statement and Supplementary OIC Statement being provided to any interested party who is granted leave to appear in the coronial proceedings.
6. The anonymised versions of those statements should, however, also be subject to a non-publication order under s.74(1) of the Act to prevent them from being “published” within the meaning of s.73 until the conclusion of any fresh inquest or until further order.

(3) WHETHER A FRESH INQUEST SHOULD BE HELD

7. The Commissioner submits that it may, at this stage, be premature for the State Coroner to determine whether or not to hold a fresh inquest. Rather, it may be more appropriate for the hearing listed for 13 April 2015 to be confined to the issues of jurisdiction and non-publication.
8. Before determining the substantive question of whether a fresh inquest should be held, it would seem desirable that the Johnson family, who seek the fresh inquest, and Counsel Assisting provide more detailed written submissions addressing the “discovery of new

evidence or facts” which “makes it necessary or desirable in the interests of justice to hold a fresh inquest” within the meaning of s.83 of the Act (cf Submissions of Counsel Assisting at [43] fn 3). The Commissioner submits that the State Coroner ought not rush to decide to hold a third inquest without the benefit of written submissions identifying how and to what extent the “new material” in the OIC Statement and Supplementary OIC Statement is “new evidence or facts” and how such “new evidence or facts” is such as to make it “necessary or desirable in the interests of justice” to hold a fresh inquest. Such a significant decision, with potentially considerable resource implications, ought to be assisted by careful forensic analysis of the “new material” and a careful weighing of the interests of justice in light of that forensic analysis.

9. Alternatively, if the State Coroner is disposed to decide at the hearing on 13 April 2015 the question of whether a fresh inquest should be held, the Commissioner makes the following submissions.
10. The Commissioner accepts that it is not necessary for an applicant for a fresh inquest to demonstrate error or likely error in a finding, and that there are other considerations affecting whether it is “necessary or desirable in the interests of justice” to hold a fresh inquest. Some of those considerations are identified in the Submissions of Counsel Assisting at [42].
11. Likewise, the Commissioner accepts that the State Coroner may weigh in the exercise of his discretion a “consideration of the public importance of the case which may include whether matters of public health and safety ought to be reviewed, and/or made known to the wider public” and “the wishes of the family or community members and whether an inquest might allay suspicions, rumour, or doubts or concerns held about the circumstances of a death”: see Abernethy et al, *Waller’s Coronial Law and Practice in New South Wales* (4th ed, 2010) at [25.4]. The Commissioner accepts further that there have been suspicions, rumours, doubts or concerns in some parts of the community about gay-hate related crimes in the Northern Beaches area of Sydney in the 1980s and about the attitudes of police in relation to such crimes. It would be open to the State Coroner to form the opinion that a fresh inquest could allay those suspicions, rumours, doubts or

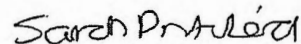
concerns, or could serve an interest in making known to the wider public information relevant to matters of public health and safety.

12. However, in addition to those matters, a further consideration that properly bears upon the State Coroner's discretionary judgment is the "desirability" of allocating limited public resources to a third inquest. There are, of course, very many inquests and not insignificant constraints on police and other public resources. This factor must be weighed when considering whether the "new evidence or facts" makes it "necessary or desirable in the interests of justice" to order a third inquest into Mr Johnson's death.
13. That is particularly so in a case such as the present where Counsel for the Commissioner are instructed by DCI Young that the Commissioner is of the view that, to the extent that the OIC Statement and Supplementary OIC Statement may disclose "new evidence or facts" within the meaning of s.83(4)(b) of the Act, the new evidence or facts, having regard to their reliability and weight, are not such as would result in any findings being made at the conclusion of a fresh inquest that would produce a different result from the open finding made by Deputy State Coroner Forbes on 26 July 2012.
14. Counsel for the Commissioner are instructed that the preparation of a full brief of evidence for the State Coroner in any fresh inquest would require the anonymisation of material, the redaction of material subject to public interest immunity claims, and copying of over 27,000 pages of information and 13,000 pages of passive data (including crime reports). DCI Young estimates that the process would take two investigators working full-time a period of 4 months to complete. The two investigators would be unable to work on current unsolved homicide cases for that duration.
15. Counsel for the Commissioner are further instructed that a full-time team is presently unavailable, and the preparation of a brief of evidence would need to be undertaken by a part-time team.

CONCLUSION

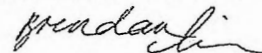
16. For the foregoing reasons, the State Coroner, before deciding whether or not to order a fresh inquest, should hear further submissions on the question of whether it is necessary or desirable in the interests of justice to hold a fresh inquest.
17. The Commissioner respectfully requests the State Coroner at this time to make the following confidentiality and non-publication orders:
- (1) Pursuant to s.65(4) of the *Coroners Act 2009* (NSW) (Act), direct by notation on the coroner's file on this matter that the Statement of Detective Chief Inspector Pamela Young signed 13 July 2014 and the Supplementary Statement of Detective Chief Inspector Pamela Young signed 10 October 2014 not be supplied to any person, until further order.
 - (2) Pursuant to s.74(1) of the Act, the Statement of Detective Chief Inspector Pamela Young signed 13 July 2014 and the Supplementary Statement of Detective Chief Inspector Pamela Young signed 10 October 2014 not be published, until further order.
 - (3) Pursuant to s.74(1) of the Act, the anonymised version, dated 21 November 2014, of the Statement of Detective Chief Inspector Pamela Young signed 13 July 2014, and the anonymised version, dated 21 November 2014, of the Supplementary Statement of Detective Chief Inspector Pamela Young signed 10 October 2014, not be published, until further order.

Dated: 1 April 2015



Sarah Pritchard SC

Eleven Wentworth Chambers



Brendan Lim

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