

**Inquest into the death of Scott Russell Johnson
(DOB 27-11-1961)**

Written submissions of the Commissioner of Police

Introduction

1. The Commissioner of Police (NSW) (**the Commissioner**) makes these brief submissions in response to the closing submissions of Counsel Assisting dated 27 September 2017 (**CAS**), and the addendum to CAS dated 29 September 2017 (**the Addendum**).
2. The Commissioner largely agrees with the submissions of Counsel Assisting, but raises a few additional matters including in relation to the statutory task of the State Coroner under s 81 of the *Coroners Act 2009* (NSW) (**the Act**).
3. In these submissions, the Commissioner adopts Counsel Assisting's approach of referring to Scott by his first name.¹ The Commissioner similarly adopts the language employed by Counsel Assisting in delineating three broad case theories as being applicable as to the manner of Scott's death: accident; suicide, and homicide or foul play.²
4. The Commissioner agrees that the primary unresolved issue which remains for the State Coroner to determine is the manner of Scott Johnson's death.³
5. The Commissioner submits, as will be outlined below, that on the evidence before the Court, a positive finding could not be made in relation to any of the three case theories to the requisite standard, but that equally, none of the three case theories can be ruled out.
6. Accordingly, the Commissioner submits that the manner of Scott's death remains open.
7. The Commissioner also submits that no further recommendation should be made pursuant to s 82(1) of the Act (by reference to s 82(2)(b)) in circumstances where substantial and far-reaching investigations have already been conducted by officers of Strikeforce Macnamir. Any further investigations into Scott's death should be for the NSW Police to determine in accordance with ordinary policies and protocols.
8. Finally, the Commissioner will seek a non-publication order pursuant to s 74(1)(b) of the Act over lawfully intercepted material in evidence.

¹ CAS at [1].

² CAS at [39].

³ CAS at [37].

Accident

9. The Commissioner agrees with Counsel Assisting that while there is insufficient evidence before the Court to support a positive finding that Scott's death was the result of an accidental fall, accident can nevertheless not be excluded as a possibility.⁴

Suicide

10. On the question of suicide, Counsel Assisting note that both experts who gave evidence, Professor Matthew Large and Dr Rozalinda Robertson, considered that suicide could not be eliminated as a realistic possibility.⁵
11. The Commissioner submits that the State Coroner should find that suicide cannot be eliminated as a possibility, which appears to be the position taken by Counsel Assisting.⁶ However, the Commissioner makes several additional submissions in relation to the consideration by Counsel Assisting of the forensic evidence relevant to this case theory.⁷

Commissioner's review of forensic evidence raised by Counsel Assisting

12. The Commissioner does not suggest that any of the matters raised below constitutes positive evidence of suicide, but seeks to draw the Court's attention to additional matters which support suicide remaining a possibility.⁸
13. *First*, on the evidence of Mr Brian Butson (one of the three persons who found Scott's body and who led police to the location of Scott's clothes) who insisted that lying diagonally on top of the pile of Scott's clothes was a steel or metallic "heavy metal pen",⁹ it is open to the Court to infer that that pen may have been used to write a suicide note.
14. The evidence was that there was a significant amount of storm activity and rain on the evening of 9 December 1988. As such, it could be reasonably inferred that any note which had been written had blown away or was otherwise destroyed by wind and/or rain.
15. The Commissioner submits that in these circumstances the absence of a suicide note found with Scott's clothes is not such as to discount or diminish the possibility of suicide.

⁴ CAS at [139]-[140].

⁵ CAS at [149].

⁶ CAS at [155].

⁷ CAS at [151]-[154].

⁸ Cf CAS at [155].

⁹ Transcript Day 2, 14/12/16, at p 26, line 41 to p 27, line 19; p 34, lines 26-31.

16. **Secondly**, there is some evidence that Scott was thinking about suicide, at least in general terms. He raised the topic with Walter Grealy at his birthday party in the pool on the weekend prior to his death.¹⁰ The two experts seemed to agree that they would give this “a bit of weight”, or at least not no weight.¹¹
17. **Thirdly**, the Commissioner submits that the fact that Scott was naked was not a factor either in support or against the possibility that Scott jumped to his death.¹²
18. While neither Dr Duflou nor Dr Large could recall any case in which they had been involved concerning a naked jumper,¹³ Dr Duflou’s evidence was that in discussions with colleagues in Christchurch, he learned of one case in 2016 where “exactly” a person going from the top to the bottom of a cliff naked “had happened”.¹⁴
19. There is additionally evidence before the Court in the form of COPS records which detail incidents also there was a police response to a person who had jumped or who had threatened to jump to their death while naked.¹⁵ Similarly, the journal article entitled “Naked Suicide”¹⁶ (albeit deemed “not very helpful” by Dr Large) contains reference to the phenomenon of individuals jumping to their deaths while naked.¹⁷
20. **Fourthly**, the Commissioner submits that the evidence of Stephen Patterson¹⁸ should be given no weight. Mr Patterson is not an expert pathologist, nor an expert in any sense to qualify him to give reliable or relevant evidence as to injuries sustained to bodies he recovered while working at a funeral company in comparison to Scott’s injuries. Not only was Mr Patterson 13 years old at the time he found Scott’s body nearly 28 years ago, there is no evidence before the Court as to the length of time he worked at the funeral company, as to his age when recovering bodies, or any other specific information capable of contextualising or supporting the evidence of his “knowledge”.¹⁹

¹⁰ Cf CAS at [151]; see also Counsel Assisting’s question to the experts describing the evidence of Walter Grealy as “thoughts of suicide”: Transcript Day 7, 15/06/17, at p 63, line 37.

¹¹ Transcript Day 7, 15/06/17, at p 63, line 36 to p 64, line 29.

¹² Cf CAS at [152].

¹³ Ex 12, Vol 5, Tab 178A, Report of Dr Large of 9 June 2017, p 6.

¹⁴ Transcript Day 4, 16/12/16, at p 3 lines 27-37.

¹⁵ Ex 12, Vol 1, Tab 8: pp 2-40.

¹⁶ Dr Robert Simon, “Naked Suicide: Analysis and Commentary”, (2008) 36(2) *Journal of the American Academy of Psychiatry and the Law* 240.

¹⁷ Ex 12, Vol 6, Tab 226A, p 240.

¹⁸ As opposed to Paul, who is inadvertently named in CAS at [154] and fn 136.

¹⁹ See Transcript Day 2, 14/12/16 at p 60, line 6.

21. To the extent that Mr Patterson recalls two jobs in particular where he picked up bodies at the bottom of a cliff, the Commissioner submits that any number of other factors such as the nature of the drop at those cliff faces, the height from the bottom or the general trajectory of the fall could be relevant in distinguishing the injuries he has identified as suffered by those bodies and those suffered by Scott (if that is in fact what Mr Patterson's evidence purports to do).
22. The Court has the benefit of Dr Duflou's evidence in relation to Scott's injuries, and Dr Cala's evidence as to matters relevant to the position of Scott's body at the base of the cliff. Both are experts in their fields. Stephen Patterson's evidence in relation to Scott's injuries is unqualified and unreliable, irrelevant, and should be disregarded.
23. The Commissioner reiterates that these four matters are raised not to persuade the State Coroner that there is positive evidence of suicide, rather, as relevant to the submission like the other two case theories in relation to manner, that suicide cannot be ruled out as a possibility.

Homicide or foul play

24. The Commissioner agrees with Counsel Assisting that the seriousness of a finding that Scott's death was as a result of homicide is not diminished by the fact that the finding may not identify any individual as being involved.²⁰ The Commissioner also agrees with the submission that on the evidence before the Court, there is insufficient evidence to identify any particular persons of interest as possibly being responsible for Scott's death.²¹
25. The Commissioner submits, however, that there is not sufficient evidence to support a positive finding that some form of foul play was involved in Scott's death, and submits that on the evidence, such a finding would not be open.²²
26. Counsel Assisting appear to base their submission to the contrary on the following five matters:²³
 - The area above where Scott was found was an active gay beat;
 - There is some evidence of occasions when groups of young men had attended the beat to commit violence towards homosexuals;

²⁰ CAS at [47].

²¹ CAS at [243].

²² Cf CAS at [247].

²³ CAS at [244]-[246].

- A group of young men including NP98 had committed gay bashings in the later 1980s at Reef Beach, which was relatively nearby and also had a degree of remoteness of access;
- At least two identifiable groups of young males were actively involved in gay bashings in the Northern Beaches area in the late 1980s and were also prepared to travel to other areas of Sydney to commit such offences; and
- Army personnel stationed at barracks within a close proximity of the Blue Fish Point beat had occasionally expressed their dislike of homosexuals and had spoken about plans to go "poofter bashing" on weekends or had boasted of such activities.

No reliable evidence as to violence towards homosexuals in the late 1980s or early 1990s at the North Head beat

27. The Commissioner submits that none of these matters, alone or in combination, is capable of supporting a positive finding that foul play was involved in Scott's death. This is particularly so because, in the Commissioner's submission, there is no credible evidence before the Court that groups of young men attended the beat at North Head to commit violence towards homosexuals in the late 1980s or early 1990s, that is, proximate to the time when Scott's body was found.
28. The evidence of Ulo Klemmer who attended the beat at North Head as an outreach worker in 1992 was that he did not hear any talk of it being a dangerous place.²⁴
29. Michael Antares, though a beat user from the early 1980s until 1992,²⁵ gave evidence of only one instance when he recalled hearing that someone had been bashed, that being in the early 1980s.²⁶
30. Professor Tompsen's evidence went only as high as that the remoteness of the beat *could* have attracted anti-gay violence, and that the location would not necessarily deter or have deterred perpetrators of anti-gay violence. Professor Tompsen provided no evidence of any actual occasions when groups of young men attended the beat to commit violence towards homosexuals.

²⁴ CAS at [115], [119].

²⁵ Transcript Day 5, 13/06/17 at p 42, line 49 to p 43, line 4.

²⁶ Transcript Day 5, 13/06/17 at p 50, lines 31-33; CAS at [120].

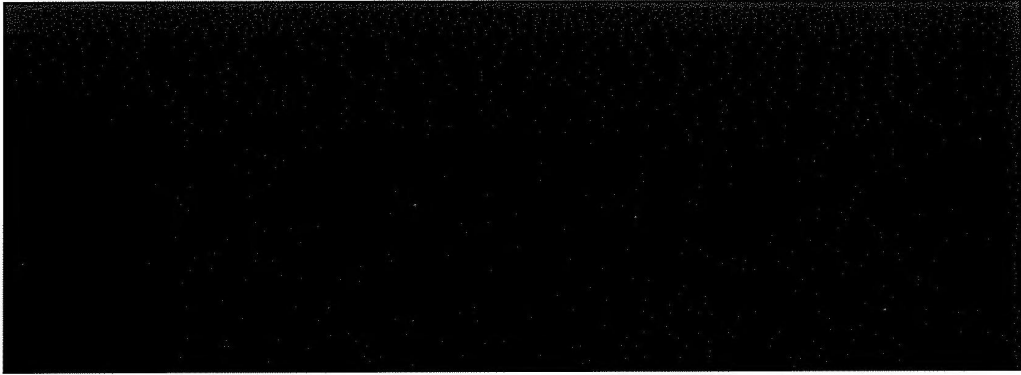
31. Counsel Assisting also relies on the evidence of Gordon Sharp, the witness who heard the cry “bashers!”²⁷ However, Mr Sharp was living in Manly and was a beat user between 1967 and 1976, which is more than a decade before Scott’s death.²⁸ The most recent time he attended the beat was “’79 to ‘80, maybe.”²⁹
32. Additionally, the evidence of [REDACTED] which may have provided some basis to suggest there was anti-gay violence at the beat, changed in multiple respects on multiple issues as between his previous statements to police, and his evidence before the Court. In particular, [REDACTED]’s statements to investigators that [REDACTED] committed violence against homosexuals in the area of the North Head beat in the late 1980s should be entirely disregarded in circumstances in which [REDACTED] he completely resiled from that account on multiple occasions.³⁰ Counsel Assisting note that the Court may well have concerns about the credibility of [REDACTED]’s evidence.³¹ In the Commissioner’s submission, the Court should go further and wholly disregard [REDACTED]’s evidence.

33. [REDACTED]

²⁷ CAS at [121]; [161].

²⁸ Transcript Day 6, 14/06/17 at p 12, lines 25-26; p 19 line 4.

²⁹ Transcript Day 6, 14/06/17 at p 19, lines 47-49.

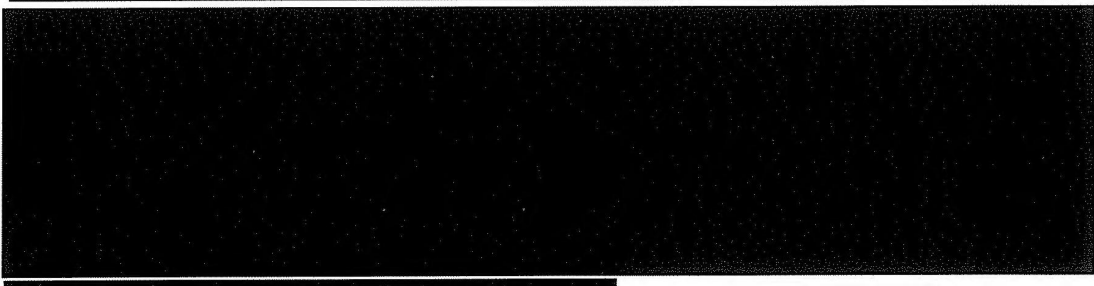
34. 

35. Counsel Assisting note that there is an absence of any specific reports of anti-gay violence in the area, yet suggest that notwithstanding that, there was a real prospect that persons intending to inflict harm upon beat users may have attended the area for that purpose from time to time.⁴¹ As noted above, Counsel Assisting go even further to suggest that there is some evidence of occasions when groups of young men had attended the beat to commit violence towards homosexuals.

36. The Commissioner respectfully submits that based on the analysis of the evidence above, there is no evidence of any actual occasions when groups of young men attended the beat at North Head to commit violence towards homosexuals in any period proximate to the time of Scott's death. Mr Antares and Mr Sharp provided the only credible evidence of any bashing having occurred, and that was in the early 80s.

Insufficient positive evidence to support finding of foul play

37. Similarly, in relation to the evidence regarding army personnel, as Counsel Assisting note, there is no direct evidence of gay bashings having been perpetrated by army personnel at the beat above where Scott's body was found.⁴²



⁴¹ CAS at [123].

⁴² CAS at [242]. Evidence given by Gordon Sharp was that he saw the army come through once, and they were "not at all" violent, however, the Commissioner notes that this evidence related again only to the period between 1967 and 1976: Transcript Day 6, 14/06/17 at p 25, lines 12-13.

38. Though there is evidence before the Court of violence in the form of gay bashings at Reef Beach, and at other areas within the Northern Beaches, the Commissioner submits that there is insufficient evidence of any such violence at the area above where Scott's body was found and in the period surrounding Scott's death to permit a positive finding of even some form of foul play as to the manner of Scott's death.
39. Even if the Court were to find some evidence of occasions when groups of young men attended the beat at North Head to commit violence towards homosexuals, contrary to the Commissioner's submissions made above, this would still not suffice to satisfy the threshold required for a positive finding of foul play to be made.
40. The Commissioner accepts that the evidence is such that the manner of Scott's death being foul play is a possibility, but submits that the evidence does not allow a positive finding of foul play to be made in circumstances where the Court must be satisfied on the balance of probabilities (to the Briginshaw standard) that this was the case.

Finding as to manner of Scott's death

41. To summarise the Commissioner's submissions in relation to each of the three case theories, the Commissioner first submits that accident cannot be excluded as a possibility.
42. The Commissioner secondly submits that suicide also remains a possibility, and that a careful examination of the forensic evidence neither supports nor diminishes the likelihood of suicide.
43. Thirdly, in relation to foul play, the Commissioner submits that the evidence relied upon by Counsel Assisting, even including the matters which the Commissioner submits are not borne out by the evidence, could not form the basis for a finding of foul play proven to the requisite standard. Rather, at its highest, it is evidence from which it can be inferred that foul play cannot be ruled out as a possibility; that is, it remains a possibility.
44. The Commissioner agrees that the necessary standard before a finding of suicide or foul play can be made is as put by Counsel Assisting, namely that the State Coroner must feel an actual persuasion; the corollary is that it is insufficient for one of the three theories to be the basis of any manner finding simply because it is more likely than the other to have occurred, if still overall below the standard.
45. Accordingly, and on the basis of the above, the Commissioner submits that the State Coroner should make an open finding as to the manner of Scott's death.

Extent of police investigations and ongoing investigations

46. As noted by Counsel Assisting,⁴³ following the conclusion of the second inquest into Scott's death, her Honour Deputy State Coroner Forbes recommended to the Commissioner that Scott's death be "referred to Cold Cases for further investigating in accordance with police procedure and protocol."⁴⁴
47. As a result, Strikeforce Macnamir was established on 12 February 2013.⁴⁵ As noted by Counsel Assisting, officers involved have carried out a substantial amount of investigations,⁴⁶ over nearly 5 years.
48. This has included, as was noted in the Commissioner's opening address on 13 December 2016, in 2012, 2013 and 2014, searches of police intelligence and crime data for matters relating to Scott's death, and manual review of over 13,000 records which were returned.⁴⁷ The NP98 and [REDACTED] lines enquiry included covert operations, over 40,000 telephone activations and the obtaining of financial profiles. Multiple witnesses have been led on walk-throughs of the North Head beat area, and many interviews and re-interviews of witnesses have been conducted.
49. Counsel Assisting note that "the work of Strike Force Macnamir has continued throughout the course of the preparation and hearing of this third inquest and is ongoing".⁴⁸ They also note that "a continuing line of inquiry concerns the possible involvement of army personnel".⁴⁹
50. In this regard, the Commissioner notes that, as observed by Higgins CJ, Crispin and Bennett JJ, an inquest is not a "wide-ranging inquiry akin to a Royal Commission, with a view to exploring any suggestion of a causal link, however tenuous, between some act, omission or circumstance and the cause or non-mitigation of the [death]".⁵⁰ Though these observations were made in the context of s 18(1) of the *Coroners Act 1997* (ACT) concerning the "cause and origin of a fire", the Commissioner submits it has equal

⁴³ CAS at [23].

⁴⁴ Ex 4, Vol 1, Tab 31: Transcript 27 June 2012 p 24, lines 4-7.

⁴⁵ Ex 12, Vol 1, Tab 1 at [55].

⁴⁶ CAS at [25].

⁴⁷ Transcript Day 1, 13/12/16, at p 26 line 1-3; Ex 12, Vol 1, Tab 1 at [1445]; [1448].

⁴⁸ CAS at [31].

⁴⁹ CAS at [239].

⁵⁰ *R v Doogan; Ex p Lucas-Smith* (2005) 158 ACTR 1 at [28]; see also *Harmsworth v State Coroner* [1989] VR 989.

application to s 81 of the Act and the State Coroner's statutory task of determining manner and cause of death.

51. In the Commissioner's submission, the matters contained in the last served statement of Detective Sergeant Penelope Margaret Brown of 14 September 2017 demonstrate that all fruitful lines of inquiry have been exhausted, pending any new information that emerges. This inquest, the provision of the \$100,000 reward, advertisements placed in various army publications, and a dedicated Court telephone number will have no doubt assisted, and will continue to assist, in eliciting any such information from members of the public.
52. Under s 51(2) of the Act, a "coroner may give a police officer directions concerning investigations to be carried out for the purposes of coronial proceedings or proposed coronial proceedings." Thus, at the conclusion of these coronial proceedings (as defined in s 46(1)), s 51(2) no longer has any application.
53. The Commissioner submits that once the officer in charge is no longer under the direction of the State Coroner, given the substantial and far-reaching investigations conducted to date, no further recommendation in relation to investigations should be made under s 82 of the Act. Any further investigation into Scott's death should be a matter for the NSW Police to determine in accordance with its ordinary policies and protocols.



⁵¹ See Addendum at [16]-[22].

⁵² Ex 12, Vol 2, Tab 1.

⁵³ See *R (Commonwealth) v Mark William Standen* [2011] NSWSC 1040 at [13]-[14] (per James J) ("*It is well established that, although not expressly authorised by section 74 [of the TLA Act], the publication by the media of a fair and accurate report of evidence given in accordance with section 74 is necessarily impliedly authorised by section 74 of the Act and will not constitute a contravention of section 63.*")

Conclusion

56. On the evidence before the Court, the manner of Scott's death could be any one of three likely possibilities. The Commissioner should make an open finding as to the manner of Scott's death.

Sarah Pritchard SC
Forbes Chambers

Surya Palaniappan
Sixth Floor Selborne Chambers

18 October 2017