

## Inquest Touching the Death of Scott Johnson

Amended Submissions on behalf of the family of Scott Johnson in Response to  
submissions of Counsel Assisting

### Summary

1. On behalf of the Scott Johnson family, in response to the submissions of Counsel Assisting, respectfully submit that Your Honour can properly find on the whole of the evidence and should therefore find that:
  - a. Scott did not take his own life;
  - b. Scott's death was not the result of an accident; and
  - c. Scott's death was the result of a homicide, that is, that his death resulted from the unlawful actions of one or more persons who acted intending to threaten or cause him physical harm or to be put in fear, such as an assault.
  
2. All of the evidence indicates that there was no reason for Scott to have taken his own life. To the contrary, Scott had every reason to live. And he would have clearly appreciated this. He had demonstrated capacity to cope with life. Counsel Assisting have not been able to identify any evidence which indicates that even on the probabilities Scott was likely to have intended to take his own life. The family submits not only the position that the evidence does not support a finding of suicide, but that on the whole of the evidence, including the expert evidence, an affirmative finding can be made that suicide was not only unlikely but did not occur.
  
3. Likewise, the evidence establishes that Scott's death was unlikely to be the result of an accident. Accident can and should be ruled out as not being a reasonable possibility.
  
4. Once these two theories have been dispensed with, the only appropriate finding on the whole of the evidence was that Scott's death was the result of some unlawful activity, likely to be homophobic in motive.

### Not a Suicide

5. It has long been held that "Suicide is not to be presumed. It must be affirmatively proved to justify the finding not be made in the absence of compelling evidence."<sup>1</sup>
  
6. On 16 March 1989, three months after Scott's body had been found, and without the benefit of any real investigation by police, Coroner Hand made a

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<sup>1</sup> *Re Davis (deceased)* [1967] 1 All ER 688 Sellers, Diplock and Russell, LJ per Sellers LJ at 690D. See too *R v Coroner for the City of London, Ex Parte Barber* [1975] 1 WLR 1310

finding that Scott had jumped to his death with the intention of taking his own life.<sup>2</sup>

7. For reasons given by Counsel Assisting at paragraphs 12-15 which are embraced by the family, and others which it is unnecessary to detail at length, that finding cannot be supported.
8. It is significant that Coroner Hand accepted that there was no evidence as to why Scott might have wanted to take his own life. That was the situation in 1989 and it remains the situation now.
9. At that time the evidence was that police did not know that the area above where the body was found was a gay beat. There was no evidence to explain the significance of the fact that Scott's clothing had been folded. There had been no canvassing of the area on the days following the location of the body. Police did not revisit the scene where the clothes were found. Police when interviewing Stephen Johnson on 6 March 2013 did not seek his opinion as to Scott's mental health history and mental state or whether Stephen believed that Scott's death might have been as a result of suicide. Indeed, it is apparent that without any real investigation of the scene<sup>3</sup>, police by Monday, 11 December 1988 had determined that there were "no suspicious circumstances"<sup>4</sup> surrounding the death of Scott.

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<sup>2</sup> Ex. 4.1/28.43 and Ex. 4.1/29. Although that finding has been removed it is still relevant to note the fact that, with respect to Coroner Hand, he applied the wrong test in coming to that conclusion. In his remarks regarding finding of suicide Coroner Hand said that the matter had been fully and properly investigated and then he used the expression "in the absence of anything to the contrary" in concluding that this was a suicide. These two statements with respect are sufficient by themselves to vitiate the finding of suicide. For reasons dealt with later in these submissions, and contrary to the Coroner's statement, there had been very little in the way of investigation, e.g. the police had not canvassed the area and had not even discovered that the area above where Scott's body was found was a gay beat. (Mr Noone discovered this for himself when he visited the area). That this area was a gay beat was significant because it explained the folded clothes and why Scott was in the vicinity and why he was naked. Also, the statement "in the absence of anything to the contrary" amounted to the application of the wrong test. Additionally, the absence of anything else type of reasoning could take the matter nowhere in the absence of a full and thorough investigation.

<sup>3</sup> The officer in charge had not even visited the scene. No photos of the scene (other than long range shots) were taken of the folded clothes. Nor was the unfolding of the clothes recorded as it took place. The police approach seems to have been that because they did not have at hand any reports of assaults upon gay persons in the area where Scott's clothes were found it did not occur to them that the area was a gay beat. All of this was despite evidence that prior to Scott's death police were aware that Reef Beach was a known gay beat where homosexual men had been attacked, beaten and robbed.

<sup>4</sup> "NFA" (no further action) was written on the Police Occurrence pad with a notation that it was written on Dec 11, 1988 at 11:15 a.m. – almost exactly 24 hours after police first arrived on the scene. The local newspaper, the Manly Daily, under the heading "Body on Rocks"

10. On day 8 of the hearing the Court indicated an appreciation that "the family and observers would be puzzled and disappointed by the paucity of the investigation".<sup>5</sup> The police did not take and therefore lost the opportunity to conduct a full and proper investigation close in point of time to Scott's death. Be that as it may it is appropriate to keep steadily in mind that there is a significant difference between a finding that death was more likely than not to have been the result of homicide and a finding that a known person *committed or contributed* to the homicide.
11. The failure by the police to conduct a full and proper investigation into the circumstances of the death in a timely fashion has severely handicapped efforts to identify the perpetrator or perpetrators. However, the difficulty in identifying definitively a perpetrator should not inhibit the Coroner's Court from finding that Scott's death was not the result of a suicide and that it was most likely the result of a homicide. Whether that homicide was deliberate or the result of an assault that led Scott to flee to protect himself and as a result he went over the cliff or whether the homicide occurred otherwise, is not to the point. The evidence strongly indicates that the death was not a suicide. It is extremely unlikely that the death was the result of an accident. Once the Court moves past those options and dismisses them as being unlikely the only remaining likely manner of death is homicide.
12. It is apparent that on the whole of the evidence there are a number of possible perpetrators. Uncertainty about the identity of a perpetrator or the statutory impediment to this Court nominating a perpetrator is no impediment to a finding in the circumstances of this case, infected by the gross delay in the conduct of any meaningful investigation, that the death of Scott Johnson was a homicide.
13. Counsel Assisting have not pressed the Court for a finding that Scott's death was the result of suicide. There is good reason for this. The evidence does not support such a finding, nor in our respectful submission does the evidence provide a rational basis for concluding that there remains any rational possibility that the death resulted from suicide. Rather, the evidence as a whole strongly supports a finding that suicide was not the cause of the death of Scott Johnson.
14. On the issue of whether Scott committed suicide amongst other matters we know that:
  - a. There was a rational explanation for Scott's presence, naked in the area above where his body was found: the area was a well-known in the gay community as a gay beat. In other words, where gay men would go to meet others of a gay persuasion, or just to be alone and not to disturb or be disturbed by others who were not of that persuasion. There has been a

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reported that police had said that there were no suspicious circumstances associated with the death of Scott Johnson. This was reported on 14 December 1988

<sup>5</sup> Lines 1 and 2

- great deal of evidence called to this effect. Gay men would sunbake naked in the relevant area,<sup>6</sup>
- b. A great deal of evidence was called from persons about the beat, its history, how it operated, its dimensions and points of access. These included Messrs. Reed, Klemmer, Antares, Sharp and Professor Tomsen<sup>7</sup>. Each gave evidence in a frank manner. The evidence of each should be accepted. The family adopts the submissions of Counsel Assisting at paragraphs 114 to 123 of their submissions. It is to be noted that the evidence of Ulo Klemmer<sup>8</sup> describing the way in which persons used the beat was very similar to the description given by [REDACTED]
  - c. The area in the vicinity of Scott's clothes was private, and conducive to sunbaking. It provided access to a sweeping view of the northern beaches and far out to sea. It was isolated and as indicated by Ulo Klemmer this was an advantage to those who wanted the privacy and a disadvantage in the sense that it provided some cover for those whose interest was to assault gay beat users<sup>9</sup>.
  - d. Stephen Patterson who was with Messrs Butson and Paul Patterson when Scott's body was located, who had since gained a lot of experience working for the Government contractor retrieving bodies of persons who had committed suicide at cliffs, indicated that the body was not facing as would be expected if the victim had jumped. Dr. Cala accepted the position of Scott's body was consistent with being pushed or rolled. (In DCI Young's report Dr. Cala is reported to have indicated that (from the photographs) the body seemed to have encountered "multiple strike points."<sup>10</sup>
  - e. In his statement of 18 August 2011 Constable Troy Hardie, said that "in instances where I either viewed or recovered the remains of people who had jumped or fallen from North Head and surrounding cliff faces, I never, except in the case of Scott JOHNSON, located the remains naked. I can state that the location where the remains of Scott JOHNSON were located was not favoured by people wishing to commit suicide."<sup>11</sup>

<sup>6</sup> In her report Dr Robertson said she believed that there was "*general agreement*" [between her and Professor Large] that "*Scott went to Bluefish Point of his own accord and took off his own clothes for the intention of casual sex*".

<sup>7</sup> See also the statement and oral evidence of Mr Reed 30/9/2011 and the information from Wotherspoon referred to at paragraph 1254 of Det Chief Inspector Young's statement

<sup>8</sup> Day 5 13 June 17 at T7 to 25

<sup>9</sup> *ibid* at T20.50 -T21.14

<sup>10</sup> The submissions of Counsel Assisting at paragraph 154 are mistaken when they refer to Paul Patterson has having given evidence. The witness was Paul Patterson's son, Stephen

<sup>11</sup> Statement, 18 August 2011, paragraph 9. Provided for the second inquest. OIC Young at Paragraph 104. Counsel Assisting are in error at paragraph 108 of their submissions. Const.

- f. Although Scott had been in a steady relationship with Michael Noone for some time, Scott had also demonstrated that he was not averse to having intimate relations with others during the course of that relationship<sup>12</sup>. Mr Noone was away in Melbourne and this clearly presented an opportunity for Scott to pursue private endeavours;
- g. There was direct and compelling evidence from [REDACTED] [REDACTED] [REDACTED] [REDACTED] others, would go through the Blue Fish Point beat area looking for gay men to assault. These admissions were made, first to Johnson family representatives, then to police in digitally recorded interviews. It is the case that when called to give evidence he sought to withdraw his filmed and recorded statements where he had identified the area in question as being the area where he and others went to assault gay men. He explained his changed evidence on the basis that he had been confused. He said that the area of which he could be seen identifying on the tapes and of which he could be heard speaking was not Blue Fish point but Reef Beach. His attempt to withdraw his recorded statements should be rejected for reasons dealt with separately below;
- h. Evidence has been given that the area in question would be raided by men looking to assault and harass gay men<sup>13</sup>;
- i. Michael Noone gave evidence that shortly after Scott's death he went up to the area in question and met with some persons there and confirmed for himself that the area was being used as a gay beat. Unfortunately, he did not report this to police or to anyone else.
- j. Scott had last been seen by his flat mate, Mr Noone's sister, on Thursday. She was a psychiatric nurse and had not noticed anything untoward about him. Nor had she formed any view that he was at risk of self-harm. She said this much to police and she has given unchallenged evidence about this;
- k. Professor Street had provided Scott with information to the effect that his work, including his recent work, was already more than sufficient to justify the award of a PHD in mathematics. Professor Street's evidence was "I said to him that that alone would be sufficient for a PhD"<sup>14</sup>;

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Hardie did not go to the top of the cliff. Const. Ludlow accompanied by Const. Taplin went to that area.

<sup>12</sup> Mr Allen provided a statement and gave evidence of having met Scott at the Midnight Shift, a bar/nightclub in Oxford Street Sydney frequented by members of the gay and lesbian community. His evidence was that they had an intimate affair which included visits to Mr Allen's apartment. Mr Noone gave evidence of Scott having told him of his liaison with a gay man at Macquarie University. See the statement of OIC Young at paragraph 565.

<sup>13</sup> Evidence was given by Gordon Sharp and AH to this effect see transcript Day 6 line page 33 lines 7-11 and continuing; To similar effect was the evidence of AH Day 6 page 33

<sup>14</sup> Transcript Tuesday 13 December page 41, line 15

- i. Scott made an appointment to meet with Professor Street the following week. Scott also told Professor Street that he intended to spend Christmas with the Noone family at Lane Cove<sup>15</sup>. These are strong indicators that Scott was not planning to take his own life;
- m. Mr Noone did not believe that Scott's death was the result of suicide. He said as much to police.<sup>16</sup>
- n. Scott Johnson had attended two parties in the two weeks prior to his death. Some of those who spoke to him were called to give evidence not one gave evidence of any observation which was consistent with Scott was at risk of suicide;
- o. Scott's wallet has never been found, despite evidence that he almost always carried it, and that perpetrators of assaults at gay would routinely bash, then rob, their victims. (Discussion below)
- p. Scott had good coping and protective mechanisms. He spoke feely with Mr Grealy about his personal situation. Mr Grealy was a psychiatric nurse and did not notice anything that led him to believe that Scott was a suicide risk<sup>17</sup>. Mr Grealy's evidence is important because it demonstrates that rather than being introverted or withdrawn Scott spoke openly to Mr Grealy of his thoughts. Contrary to any view of Dr Robertson this evidence indicates that Scott had good protective or protective mechanisms. One comes to the same conclusion when one reads the many letters Scott handwrote to his family members including his brother Stephen and his sister. A fair reading of those letters demonstrates that Scott spoke about various issues in his life, He betrays a capacity for objective analysis and at no stage does Scott appear to the withdrawn and unable to express his feelings.
- q. Scott wrote long and insightful letters to his sister and brother dealing with his sexuality, his thoughts on how it would be received by others;
- r. Associate Professor Dr Matthew Large, Conjoint Professor of Psychiatry at the University of New South Wales, provided a report and gave evidence as did Dr Rozalinda Robertson, a psychologist who had been retained by Counsel Assisting. Both agreed that Scott was not suicidal when it is likely he went to Blue Fish Point. The evidence is dealt with in more detail below.

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<sup>15</sup> Transcript Tuesday 13 December page 16 line 46

<sup>16</sup> Noone also told police about a conversation that Scott had once had with him concerning an event when on one view Scott had contemplated suicide when he thought he had contracted the AIDS virus. This is dealt with later in these submissions.

<sup>17</sup> To the extent that Mr Grealy expressed sensitivity to the content of his conversation with Scott it is worth noting that neither Professor Large or Dr Robertson relied upon any opinion or concern expressed by Mr Grealy

### Michael Noone and the Alleged "Attempted Suicide" in San Francisco

15. Counsel Assisting have submitted that, "it must be acknowledged that Mr Noone's account of the circumstances in which he came to have the telephone conversation with Scott has been inconsistent at times"<sup>18</sup>. Despite identifying some of the inconsistencies Counsel Assisting stop short of submitting that his evidence on this point was unreliable and at best exaggerated, yet this is with respect a frank assessment of his evidence about the incident in San Francisco.
16. It was Mr Noone's revelation of this conversation with Scott that so excited the interest of and distracted Det. Chief Inspector Young.
17. Mr Noone's evidence about the statement by Scott, that he had attempted suicide, is so attenuated by doubt that it needs to be completely set aside. The history of the web woven by Mr Noone is set out in paragraphs 62-64 of Counsel Assisting's written submissions.
18. The principle variations in Mr Noone's accounts of the facts surrounding the events include the following:
- a. He told the police in his first statement that he knew of no psychological or behavioural difficulties Scott had experienced. He said that "about 5 years previously" Scott mentioned a "suicide attempt";
  - b. On 12 February 1989 Mr Noone provided a further statement of sorts in which he said that Scott had telephoned him **about two days before 5 September 1985** (the date Scott flew from the US to live with him in Cambridge UK). Mr Noone said that Scott had telephoned him **from San Francisco** to tell me that **he had unsuccessfully attempted suicide by trying to jump from an area at or close to the Golden Gate Bridge...** he was convinced that he had contracted the AIDS virus and was distressed for the consequences for himself and our relationship." (emphasis added)
  - c. When Mr Noone gave evidence on 16 March 1989 he said that the conversation took place very soon after the "attempt". Upon learning that Scott had not been in San Francisco in days before 5 September, and that he had attended his brother Stephen's wedding in Los Angeles, and that Scott had left Los Angeles (400 miles from San Francisco) by bus a few days before 5 September, and that he travelled directly to New York and not by way of San Francisco, Mr Noone changed his evidence and said that it would cause him to "**put back the days**".<sup>19</sup>
  - d. On 23 March 2013, in a recorded interview, Mr Noone changed his version of events again and said that he had initially found out about the incident in a letter he received at Hampstead and that this prompted him to phone Scott. The letter was not produced in the interview. It was not produced

<sup>18</sup> CA submissions para. 62

<sup>19</sup> T 32 16 March 1989 in xx by counsel for the family

during his evidence and it has not been produced since. This is despite the fact that Mr Noone has shown a remarkable ability to produce other documents, such as a page from Scott's address book that included Mr. Allen's phone number, a copy of the letter he purportedly had sent to Mr. Bancroft and more than 20 letters Scott had written to Michael from Cambridge, MA, USA in 1986.

- e. His evidence during the last hearing was again different in several respects from prior versions. The incident no longer concerned an "attempted suicide" in "an area at or close to" the Golden Gate Bridge. Rather in chief he said (as recorded by Counsel Assisting at paragraph 64) "he decided to do away with himself but when he got there his muscles froze".

- 19. From the above it can be seen that Mr Noone's version of events changed significantly over time in ways that are not explicable by passage of time. Indeed, his memory appears to have improved over time. Yet there is nothing to explain the improvement.
- 20. Further it is inconceivable that if Mr Noone believed that Scott's incident at or close to the Golden Gate Bridge represented a true "attempt at suicide" that they would never speak of it. On the last version of events given by Mr Noone he learnt of the "attempt" not long before Scott arrived in Hampstead yet they never spoke about it again. This might be understandable if what Scott had spoken of was not in fact a suicide "attempt" but rather ideation and thoughts concerning what he might do if he believed he had been infected with the AIDS virus in 1985.
- 21. Mr Noone produced a copy of a letter which he said was a copy of a letter that he sent to Dr Roger Bancroft. The letter refers to a "previous suicide attempt". Yet Dr Bancroft's recollection of his conversation with Mr Noone was that it concerned Scott having "thought about throwing himself off the Golden Gate Bridge." Dr Bancroft has no recollection of ever receiving the letter.<sup>20</sup>
- 22. Dr Bancroft's evidence taken at its highest is inconsistent with a conversation about an actual attempt but consistent with suicidal ideation related to a fear that Scott had contracted AIDS. We know of course that Scott had not contracted AIDS and that he had at least two sexual partners during his time with Mr Noone. One of these, Mr Allen, gave evidence of his affair with Scott.<sup>21</sup> The other was a person with whom Scott has a sexual liaison at Macquarie University. Neither of these events, both of which postdate Scott's time in the US, led Scott to attempt suicide.
- 23. The highest that Mr Noone's evidence rises on the issue is that on one occasion whilst Scott was in the US in about 1985 he had a sexual encounter with another gay man and was concerned that he may have contracted the AIDS virus and that if he had contracted the AIDS virus he may have

<sup>20</sup> Transcript Tuesday 13 June 2017 page 136 and following

<sup>21</sup> Michael Allen Transcript Thursday 15 December 2017 page 50 and following



contemplated suicide. But even that version of events is so unreliable that it cannot be accepted.

### **The evidence of Associate Professor, Dr Large and Dr Robertson**

24. Each of the above provided a report and gave evidence. There was a measure of agreement between them. However, there were matters upon which they had different approaches and conclusions. It is submitted that given his extensive experience as a practising psychiatrist to the extent that there were any significant differences of opinion between Professor Large and Dr Robertson, Professor Large's opinion should be accepted in preference to that of Dr Robertson.

25. In addition to the matters dealt with above it is relevant to note that Professor Large serves as the Chief Psychiatrist at the Prince of Wales Hospital and is the Medical Superintendent of Mental Health and Senior Psychiatrist attached to the Emergency Department of the Prince of Wales Hospital. He undertakes research into psychiatric disorders and has published more than 200 peer-reviewed articles including 50 dealing with suicide. A full description of his professional experience can be found at page 5 of his report.

26. The areas of agreement and disagreement between Professor Large and Dr Robertson are set out helpfully at page 29 of Professor Large's report. After discussing Scott's personality, the fact that he had no mental illness, was not depressed, did not engage in drug or alcohol abuse and was not under any particular stress in either his personal or professional life, Professor Large concluded:

"As a consequence of my knowledge and research into jumping and knowledge and research into suicide ideation I have no confidence that Scott died by suicide. I put less weight on the naked state, but think that naked suicide in a public place by a non-mentally ill, non-drug affected person, can only be considered to be an extraordinarily rare event, even for suicide."

27. Significantly, Professor Large also observed that while the Prince of Wales Hospital where he worked since 2008 (the past 9 years) has a catchment area with many high areas from which a person might jump (we interpolate this would include The Gap at Watson's Bay, Sydney's most notorious suicide spot), in his entire career he has never seen a jump survivor who did not have a mental illness or suffered from substance abuse. Professor Large also made the point that jumping itself is a rare form of suicide in Australia with a rate of death of *much less than* 1 in 100,000. In fact, jumping suicide in Australia is much less than the rate of homicide.

28. Professor Large's conclusion is telling and serves a useful focal point:

"Scott's life has now come under the most extreme scrutiny, the type of scrutiny that if applied to almost any adult would find a number of relevant existential issues. Even under these conditions, with the hindsight bias and

the outcome bias of such a tragedy, no plausible account of why he might have suicided has emerged.”

29. Dr Robertson has conceded that “we do know he made an appointment that afternoon and therefore taking into account the proximate features of the events leading up to his demise, in my opinion Scott Johnson did not have any intention of taking his own life on the Thursday morning prior to his visit to Bluefish Point.”

30. However, Dr Robertson goes on to speak of a triggering event. Why she did so is difficult to understand. Was this the result of outcome bias? However, with respect Dr Robertson fails to appreciate that there is absolutely no evidence of any event that would or could have triggered suicide. She does not identify one. In effect, her evidence rises no further than, “if there was a triggering event” Scott may have committed suicide. However, there is no evidence of a triggering event resulting in suicide and no reason to suppose that one had occurred leading to Scott’s decision to suddenly end his life.

31. Dr Robertson writes:

“There is general agreement that Scott went to Bluefish (sic) Point of his own accord and took off his own clothes for the intention of having sex.”

This is a statement of opinion. Dr Robertson however continues:

“Assuming this is the case, then it is my opinion that whatever occurred whilst he was at this location was the triggering event that ultimately led to his demise. We know from the research that an impulsive suicide can be triggered should a traumatic event occur and the means be available. As such, should he have been sufficiently distressed due to whatever happened at the location, it remains a possibility that Scott may have taken his own life. However, as the triggering event remains unknown the possibility that it resulted in Scott’s demise due to accident or homicide also remains an equally plausible possibility.”

32. What Dr Robertson appears to be suggesting that even though there is no evidence that Scott had any intention to take his own life when he went to the gay beat intending to have sex with another gay person, that is even though he was not suicidal and had planned ahead, it is possible that something may have happened at the location, the nature of which we do not know, and which she cannot identify, that made him take his own life, even though there is not a shred of evidence as to what this was or that such an event took place. The conclusion is that even though we have no idea what such an event may have been if it occurred suicide is a possibility.

33. There is nothing cogent in the logic of this, especially when considered alongside Professor Large’s evidence based upon his extensive experience and learning that should prevent this Coroner’s Court, seized as it is of all of the evidence and avoiding speculation, from concluding that Scott’s death

was not a suicide. It is only by speculating about an unproved triggering event that there is any support for even a possibility of suicide, and to reach this stage one has to set aside the evidence of Professor Large.

34. Dr Robertson herself concedes that there is no evidence of any such triggering event that might have compelled Scott, a talented and accomplished young and healthy man, having just learnt that he had completed the major requisites for his PhD, who was in a long term and stable relationship, with no history of depression or mental illness or drug abuse, no evidence from the toxicology report that he was under the influence of any drugs or alcohol<sup>22</sup>, with a close relationship with his brother, a bright future, supported and liked by those who knew him at this time of his life, to commit suicide.
35. With respect to Dr Robertson it does appear that her reasoning concerning the happening of a triggering event that caused Scott to suicide reflects perhaps a subliminal approach that begins with suicide and then works backwards to justify or explain it.
36. It is telling that after reviewing all of the evidence provided to both experts the best Dr Robertson can suggest as events prompting suicide were<sup>23</sup>:
- i. Recent loss such as divorce or bereavement
  - ii. Increased stressors such as employment, marriage, school, relationship, financial
  - iii. Recent exposure to another's suicide
  - iv. Feelings of being trapped, like there is no way out and sense of purposelessness
37. There is no evidence that any of these "acute precursors" as they are described existed in Scott's life on the 8<sup>th</sup> or 9<sup>th</sup> of December 1988.
38. At the conclusion of her oral testimony Dr Robertson agreed that there was nothing in the evidence to indicate that suicide was likely. She went on to say that she had not assessed the probability of an accident or of homicide.
39. It is submitted that when the Court comes to weigh all of the evidence it can safely conclude that suicide was an unlikely manner of death in this case.

#### **Accident Should be Ruled Out as Not a Reasonable Possibility**

40. Counsel Assisting has summarised the evidence concerning Scott's health life and clean living. He was a young fit and experienced bushwalker and hiker.

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<sup>22</sup> Refer to Dr Duflou's autopsy report and testimony. Of the .005 grams per 100 mls detected upon analysis of Scott's blood Dr Duflou said "I would be more than content of this [0.005 gram per 100 mls] to have been the result of post—mortem fermentation (16 Dec, 2016 Transcript Page 11, line 17)

<sup>23</sup> See para. D on page 6 of the report

He had climbed the Matterhorn, no mean feat, so one can add mountain climber to his skills. He was intelligent and observant and the risk of falling or tripping nearing the edge of the precipice would have been obvious to Scott.

41. The evidence is that he was most likely at the beat and naked for a reason. He was not there to hike or bush walk. It would not have been part of his purpose to stand on or near the edge. He was a person fully in control of his physical powers. The edge was an obvious risk. It is likely that the weather was fine and warm<sup>24</sup> given his state of undress and the purpose of his being there.
42. In the absence of drugs or alcohol it is extremely unlikely that Scott's death was the result of some accidental trip, stumble or fall.
43. It is wrong to say that Scott's clothes were located "near the edge" as Counsel Assisting submit in paragraph 139 of their submissions. The folded clothes are not near the edge in the sense that they were within such proximity that Scott was at risk of accidentally fall over the edge when dressing or undressing. In fact, they were proximate to a cleared space. The evidence of Constable Ludlow, i.e. his statement tendered at the first inquest, was that he "located a bundle of clothing which was neatly folded some ten metres back from the top of the cliff...".<sup>25</sup> This evidence has never been challenged and appears to be consistent with the aerial photographs.
44. We accept and support the submission at paragraph 139<sup>26</sup> that there is insufficient evidence to support a positive finding on the balance of probabilities that Scott's death was the result of an accidental fall. We submit that when regard is had to the evidence and when one sets aside speculation, the prospect of death being result of an accidental fall is so low that it can and should be excluded on the basis that it is not a reasonable possibility.

## Homicide

45. If the submissions above are accepted then the result is that in the absence of suicide or accident, homicide presents as the most likely cause of death. This submission is made not in a vacuum. The exclusion of suicide and accident as likely causes of death must, in this case, and, on the whole of the evidence inevitably lead to a conclusion that death was the result of homicide.
46. Given what has been exposed through the diligence of the family of Scott Johnson and the uncovering of a deal of evidence dealing which had never before been put before a Coroner it is submitted that homicide presents as the only real and probable explanation of Scott's death. That evidence includes evidence in the following categories:

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<sup>24</sup> The temperature on 9 December 1988 was 26.1 degrees. See OIC Young's statement para. 194

<sup>25</sup> Statement dated 29 December 1988

<sup>26</sup> Pages 34-35

- a. the true nature of the gay beat at Blue Fish Point including the history of assaults upon gay men there;
- b. the negative attitude of some Army personnel stationed at North Head to gay men as evidenced by the frank, albeit alarming, testimony of Patrick McIntyre<sup>27</sup>;
- c. [REDACTED]
- d. a proven antipathy by some members of the community towards gay men, not just in the wider Sydney area and Eastern Suburbs as evidenced by the Taradale Inquests and investigation, but also on the northern beaches reflecting itself in violence being directed to gay men,
- e. police at the time recognized that there was prevalent violence targeting gay men at gay beats, even in Manly;<sup>28</sup> yet police at the time said they did not accept that Blue Fish Point was a beat; now that police have accepted that Blue Fish Point was a beat, it would seem they should now agree and it is appropriate for this Court to find, that it was a likely target for violence even if previous attacks had not been reported, and
- f. the fact that Scott's wallet, which he almost always carried with him, was not found among his belongings, and in fact has never been found despite a "thorough search" by Mr Noone and others.<sup>29</sup> It is apparent that robbery was at least in part the motive for a number of assaults upon gay men in the relevant period. The offences admitted by NP98 include theft of jewellery and wallets.<sup>30</sup>

47. Counsel Assisting have digested a great deal of the evidence relating to the above 4 points in their submissions between paragraphs 164 and 246. In general, the family supports that summary with exceptions, which are set out below.

48. Counsel Assisting submit at paragraph 247 that "The circumstances suggest that the possibility that Scott's death was the result of a homicide or foul play remains a reasonable hypothesis. It is submitted that there is sufficient evidence to support a finding that some form of foul play was involved in Scott's death *but it would be equally open for the Court to find (bearing in mind the legal principle set out above) that such evidence was insufficient to support a positive finding in this regard.*"<sup>31</sup>

49. We submit that the first sentence of the submission at this point is correct as far as it goes. However, the suggestion is much more than a reasonable hypothesis. It is the only inference available on the whole of the evidence. Any competing inference be it suicide or accident simply cannot be accepted given

<sup>27</sup> Day 12, 22.06.17 at 174 and following

<sup>28</sup> This is supported by the evidence of Det. Sgt Cruickshank, as she then was, at the first inquest in 1989

<sup>29</sup> OIC Young's statement at paragraphs 503 and 627

<sup>30</sup> See OIC Young's statement at paragraph 2170; Also to similar effect is the material from Sue Thompson referred to at paragraph 2437

<sup>31</sup> Para 247, page 60

that the standard of proof is the civil standard as explained by Dixon J in *Briginshaw*.

50. If one infers that when Counsel submit "some form of foul play was involved in Scott's death" they mean that some form of foul play was causative of Scott's death, which appears to be the only available inference, we accept and support this submission as well. However, we reject the balance of the paragraph following the word "but".
51. There is no warrant for this qualification. Indeed, having found that there is a sufficient evidence to support a finding or conclusion that some form of foul play was involved in Scott's death, it would be inimical for the Court to go on to conclude that it would be equally open for the court to find that such evidence was insufficient to support a positive finding in this regard. Once the concession is accepted the qualification has no work to do and should be rejected.
52. In referring to the authorities Counsel Assisting have not identified the circumstance that in every one of the case referred to the court was dealing with a possible finding the scope of which identified a particular person as a perpetrator of some grave wrong, usually amounting to a crime. This Court is not permitted to nominate any known person as being responsible for an indicatable offence. Moreover, we do not seek (nor could we) such a finding. Our primary submission is that a finding that someone died as a result of a homicide does not without more require the application of the *Briginshaw* refinement of the balance of probabilities. Counsel Assisting have not cited a single decision of any court whether it be the Coroner's court or otherwise which would lead to the rejection of this submission.
53. In *Hurley v Clements*<sup>32</sup> a decision of the Full Bench of the Court of Appeal in Queensland, a decision with which this Court will be familiar, the Court said:

[25] A further general observation which may be made here is that all parties accepted that findings were to be made on the balance of probabilities in conformity with the sliding standard of satisfaction explained in *Briginshaw v Briginshaw*.<sup>[10]</sup> That position was adopted, no doubt, because the guidelines issued under s 14 of the Act<sup>[11]</sup> contain the following statement:<sup>[12]</sup>

"The particulars that a Coroner must if possible find under s 45 need only be made to the civil standard but on the sliding *Briginshaw* scale (*Anderson v Blashki* [1993] VicRp 60; [1993] 2 VR 89 at 96 and *Secretary to the Department of Health and Community Services v Gurvich* [1995]

2 VR 69 at 73). **That may well result in different standards being necessary for the various matters a Coroner is required to find. For example, the exact time and place of death may have little significance and could be made on the balance of probabilities. However, the gravity of a finding that the death was caused by the actions of a *nominated person* would mean that a**

<sup>32</sup> [2009] QCA 167, a strong Court, McMurdo CJ, Keane and Fraser JJA

standard approaching the criminal standard should be applied because even though no criminal charge or sanction necessarily flows from such a finding, the seriousness of it and the potential harm to the reputation of that person requires a greater degree of satisfaction before it can be safely made."

[26] Two things must be kept in mind here. First, as Lord Lane CJ said in *R v South London Coroner; ex parte Thompson*,<sup>[13]</sup> in a passage referred to with evident approval by Toohey J in *Annetts v McCann*:<sup>[14]</sup>

"... an inquest is a fact finding exercise and not a method of apportioning guilt ... In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

[27] Secondly, the application of the sliding scale of satisfaction test explained in *Briginshaw v Briginshaw* does not require a tribunal of fact to treat hypotheses that are reasonably available on the evidence as precluding it from reaching the conclusion that a particular fact is more probable than not. That this is so is apparent from the following passage from the reasons of Dixon J, (the Court went on to quote the well known passage from the judgment of Dixon J) (Emphasis added)

54. What can be seen from the highlighted passage is that the purpose of the application of the *Briginshaw* test is the protection of the reputation of a "nominated person". The inference from the whole of the quoted passage is that in the absence of a nominated person and where the finding concerns a manner of death and not the identity of a nominated person or an identifiable group of people<sup>33</sup> the *Briginshaw* test does not apply.

55. In the alternative we submit that even with the application of the *Briginshaw* refinement this Court can and should find that on the probabilities, having regard to the significance of the finding and the gravity of the matter and applying *Briginshaw*, it is more probable than not that Scott Johnson died as a result of a homicide.

56. We return now to deal with each of the sub-paragraphs of paragraph 46 above.

a. *The true nature of the gay beat at Blue Fish Point including the history of assaults upon gay men there*

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<sup>33</sup> As in *The Secretary of the Department of Health and Community Services and others v Gurvich* [1995] 2 VR 69 where the alleged perpetrators was a group of identifiable nurses

57. The evidence of Gordon Sharp establishes that people he referred to as bashers would come to the beat on occasion and the word would go out that bashers were present. His evidence is summarised at paragraphs 160 and 161 of the submissions of Counsel Assisting and need not be repeated here. Suffice to say that material provided by Professor Tomsen, Sue Thompson and even Sgt Cruickshank that gay beats were a honey pot for those wanting to assault and rob gay men in Sydney during the 1980s and beyond.

*(b) the negative attitude of some Army personnel stationed at North Head to gay men as evidenced by the frank, albeit alarming, testimony of Patrick McIntyre<sup>34</sup>;*

58. Patrick McIntyre gave evidence via video link. The evidence was alarming but given in a frank and straightforward manner. There is no reason to doubt its veracity. The evidence is summarised at paragraphs 239-242 of the submissions of Counsel Assisting. It speaks of a tangible and toxic homophobic culture at the Army base proximate to the Blue Fish Point gay beat during the period that Scott Johnson attended that beat. Mr McIntyre heard of Army personnel speak of going poofter bashing although he was not told where they intended to carry out the assaults. The culture was such that the conversations did not concern him because he did not agree with homosexuality. He never reported the conversations.

59. Material provided by Mr AH, a bar attendant at Manly and another witness who worked in a bar in London, and which has recently been tendered under the cover of a supplemental statement of Det Sgt Penny Brown is entirely consistent with and corroborative of a culture of gay hate and anti-gay violence at North Head amongst some Army personnel.

60. The culture of which Mr McIntyre spoke so freely is reminiscent of the findings of the Coroner Millege who dealt with and exposed in the Taradale Inquests. This evidence and the evidence of [REDACTED] NP98 and his associates and NP4 and his associates proved that homophobic gay hate culture was not confined to the eastern Suburbs of Sydney in the late 1980s.

*(c) the evidence of [REDACTED]  
[REDACTED] assaults at the gay beat at Blue Fish Point*

61. [REDACTED] He had suggested the meeting place at Shelly Beach just below the gay beat, [REDACTED] how they would access the gay beat, the movement through the "hole in the wall" and how he would approach gay men at that gay beat so they could be assaulted by [REDACTED] and others.

<sup>34</sup> Day 12, 22.06.17 at 174 and following



62. He indicated [REDACTED] access to the beat via a bush track uphill through the hole in the wall. He gave detailed descriptions of [REDACTED] the movement of others [REDACTED]. He described [REDACTED] the areas used by gay men. [REDACTED] His detailed version of events [REDACTED] was cogent and he never expressed any reservations about it [REDACTED]. His evidence was also similar to Ulo Klemmer's evidence as to how the beat worked. [REDACTED] could not have known what Ulo Klemmer had told police when he provided the detailed descriptions [REDACTED].
63. [REDACTED] he said in effect that he mistook the area of the gay beat at Blue Fish Point for the area at Reef Beach and he said that he had not been to the area at Blue Fish Point. However later he said that he had been there. His evidence about mistaking the gay beat at Blue Fish Point for the area at Reef Beach cannot be accepted. His explanations were transparent lies. There is no similarity between the two areas. To reach Reef Beach one parks a long distance away and walks downhill to the beach through the gay beat. To reach the gay beat at Blue Fish Point one either walks a relatively flat and short distance from the road or up from the direction of the car park through bushland that is steep and arduous to traverse. One then passes through the "hole in the wall", a distinctive feature, not replicated at Reef Beach in any fashion whatsoever.
64. In short there is no way known [REDACTED] could have been mistaken about the locations. However, this does not mean that the version [REDACTED] false or unreliable. [REDACTED]. It is also possible that [REDACTED] as detailed in Counsel Assisting's submissions at paragraph 226 and having aroused the suspicion in the mind of [REDACTED] to that effect he determined to change his evidence. [REDACTED] denied every suggested reason as to why he had changed his evidence and there were many logical reasons why he would have done so, in order to protect himself from [REDACTED]<sup>35</sup>. Every one of them is a better explanation than the one [REDACTED] clung to, i.e. that he had made a genuine mistake about the terrain and the confused Reef Beach with Shelly Beach. His demeanour when attempting to explain the withdrawal of his admissions recorded by police gave the lie to his evidence that he had been mistaken about the location.
65. Counsel Assisting deal with this at paragraph 161 and do not distinguish between the credibility of the two versions. However, there is no reason to believe that when he spoke to Mr Glick<sup>36</sup>, who [REDACTED] had sought out and to whom [REDACTED] volunteered his account and who he understood at the time was

<sup>35</sup> Day 11 21/6/17 at T56, T66 and T69

<sup>36</sup> Summarised in the statement of OIC Young paragraph 1870

a journalist and was speaking to him in confidence (confidentiality [REDACTED] had sought) and then when he later spoke to police and walked them through the [REDACTED] he was either mistaken or fabricating evidence. It is to be remembered that when [REDACTED] was asked about various matters recorded by Mr Glick as having been told him by [REDACTED] [REDACTED] confirmed the accuracy of those matters.

66. If [REDACTED] first [REDACTED] version is accepted and or the version he gave to Mr Glick [REDACTED] is accepted as being correct, as it is submitted it should be, then [REDACTED] gang members, [REDACTED], contrary to their denials, are likely to have been perpetrators of assaults upon gay men at the Blue Fish Point beat.

67. [REDACTED]

68. Whilst NP98 and NP10 denied involvement in gay bashings at North Head [REDACTED]

[REDACTED]<sup>37</sup>

69. Counsel Assisting summarise the evidence concerning NP98, NP10 and a person by the name of Nick Janus at paragraphs 227-233. We accept those submissions save that we submit that there is no evidence to corroborate or support in any way the claim that NP98 provided any information about the criminal conduct of others other than a statement of facts tendered at his sentence hearing. It is not known whether the information extended beyond the signed records of interview [REDACTED] provided police upon his arrest.

70. There is good reason to suspect that the relationship between NP98 and one or more of the Manly police was tainted by corruption. NP98's explanation of his dealings with police lacked credulity. The retired police officers he named had been convicted of corruption-related offences. NP98's demeanour reflected a person who had long ago abandoned truth whenever he was asked questions concerning his interaction with police responsible for his arrest and who he claimed had beaten him to secure false confessions to crimes he did not commit and to which crimes he pleaded guilty. NP98 admitted that he invited those same officers to his wedding, without a plausible explanation of why he did so.<sup>38</sup> It is not possible to accept any denial NP98 made to the effect that he was not involved in gay bashing after his arrest. It may be that this was the case after his sentence however by then Scott had already been killed. The same can be said of the evidence given by NP10 and NP104.

71. It is, however, accepted that there is no direct evidence that implicates [REDACTED] in the death of Scott it is plain [REDACTED]

<sup>37</sup> Day 12 21/6/17 at T 47

<sup>38</sup> Day 9, page 101 line 34

[REDACTED] The possibility remains that if [REDACTED] and or members of [REDACTED] group believed that they were protected by police or that they had a corrupt relationship with police in Manly and wanted to continue to commit gay hate crimes but felt that they could no longer venture into areas outside of Manly they are likely to have been inclined to continue to seek out gay men in Manly and at the Blue Fish Point beat in particular.

72. Another group of admitted gay bashers about which there is evidence that their members assaulted at least one person at a gay beat in Manly or North Head and who were involved in other gay hate crimes in the Eastern Suburbs as well as the northern beaches was centred around [REDACTED] and his [REDACTED] associates [REDACTED]. On one view of the evidence for which we contend [REDACTED] were involved in bashing gay men at Manly, including a person described by them as "an American faggot" who "got away" from them. If that evidence is accepted as it is submitted it ought to be, the person described as the "American faggot" is likely to have been Scott Johnson.

73. Counsel Assisting digest the evidence concerning NP3 at paragraphs 164 - 216. [REDACTED]

74. [REDACTED]

75. [REDACTED]

76. [REDACTED]

[REDACTED]

[REDACTED]

77. [REDACTED]

[REDACTED] In circumstances where Counsel Assisting has not been prepared to attack the credibility of Mr Noone over his various statements, now exposed as being unreliable and inconsistent with other evidence (e.g. Dr Bancroft), about Scott's prior "attempted suicide" it seems odd that a different standard is applied by Counsel Assisting to [REDACTED]'s evidence and his use of the terms North Head and Manly.

78. [REDACTED]

79. If [REDACTED]'s evidence is accepted, then it is likely that Scott was the person bashed by [REDACTED]. It is also likely that this was the event that precipitated in his death on 8 or 9 December.

#### **Conclusion as to Homicide**

80. It is submitted that both suicide and accident ought to be excluded as likely explanations for the death of Scott Johnson. The objective evidence supports a finding to an appropriate level of satisfaction that Scott Johnson's death was the result of a homicide.

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<sup>40</sup> para 178 of Counsel Assisting's submissions

[REDACTED]

### **A Bare Open Finding Should be Avoided**

81. A bare open finding without more would not do any justice to the investigation that that the family of Scott have instituted, funded, driven and supported or the consequent investigation that has be conducted by police and by this Coroner's Court.

82. In *Jervis on the Office and Duties of Coroners, 10<sup>th</sup> Ed.0p196*) the editors state:

"It should be noted that an open verdict is only to be used as a last resort if there is insufficient evidence to enable the coroner or the jury to reach one of the other verdicts. Furthermore, the fact that there may be uncertainties to the other parts of the inquisition, for example as to the precise cause, time or place of death, does not authorise recoding an open verdict if there is sufficient evidence to record how the deceased came his death".

83. The rule upon which this statement of principle is founded is that regard should be had to the evidence and the court should determine the findings based on the evidence before it. In this matter, there is an abundance of evidence that Scott Johnson had no intention to self-harm when he went to Blue Fish Point. Both experts agreed with this. There is absolutely no evidence of any "triggering event". There isn't even any evidence what a triggering event in the circumstances of this case would look like. There is no evidence of mental illness, drug use or alcohol involvement in the death. There is evidence to explain the nudity and the folded clothes and cogent evidence to explain why Scott Johnson was at the area concerned at North Head. There is no evidence that would support a finding of suicide. Indeed, suicide can be ruled out on the evidence. There is no evidence to support a finding of accident. There is no room for an open verdict in this case because overall of the evidence this is a case of homicide, i.e. unlawful and dangerous conduct leading to death. A doubt about whether the death was deliberate or as to the identity of the perpetrator does not diminish the force of the evidence which supports a finding of death by homicide.

84. It is submitted that in the event, contrary to these submissions, that the Court does not believe it appropriate to make a finding that the death of Scott Johnson resulted from a homicide and is minded to return an "open finding" for reasons given above that open finding ought to be accompanied by findings that:

- a. make it plain that Scott's death was unlikely to have been caused by suicide or accident;
- b. recognise in the very least, that homicide is a reasonable hypothesis to explain the death of Scott

### **Recommendations**

85. Whether the finding be one or homicide, a related finding or an open finding we submit that the Court make recommendations concerning the further

investigation of the death of Scott Johnson pursuant to s. 82 of the *Coroners Act 2009 NSW*. The recommendations we press for are as follows:

- a. The investigation of the circumstances of the death of Scott Johnson should continue;
- b. That the investigation be continued by investigators who can bring “fresh eyes” to the investigation in the sense in which that expression is used in the submissions relied upon by Senior Counsel for the family of Scott Johnson in the hearing on 3 April 2016 that is:
  - i. The investigation be conducted on the basis that its justification is the same working new cases, i.e. to bring perpetrators to justice and to protect society from dangerous individuals. The bottom line must be not just whether a case is cleared but whether the perpetrator is arrested, tried and convicted;
  - ii. The investigating team should be independent so that it can critically evaluate a case. This is not said to criticise or disparage previous investigators, as that has not been the purpose of this hearing, but in recognition that fresh eyes and a new perspective are beneficial overlays to earlier investigative work;
  - iii. The investigative team should be focused on cold cases and thus able to develop its own expertise relevant to unresolved cold cases;<sup>42</sup>
- c. That those conducting the further investigations work closely with the family of Scott Johnson and keep the family informed of the progress of the investigation;
- d. That those conducting the investigation and those assigned to the Parrabell investigation work closely together and exchange information

86. In support of these recommendations attention is drawn to the very large number of avenues of inquiry that have resulted to date from the investigations conducted on behalf of the Johnson family. An enormous amount of valuable information and leads for further investigation generated by those investigations were passed to Macnamir and to the police assisting Counsel Assisting and to the State Crown Solicitor for the attention of Counsel Assisting and those police. This has led to the calling of witnesses identified by the family’s investigations and those undertaken by police. There remain a number of further avenues of inquiry to be pressed in the search for the identification and prosecution of perpetrators of crime leading to Scott’s death.

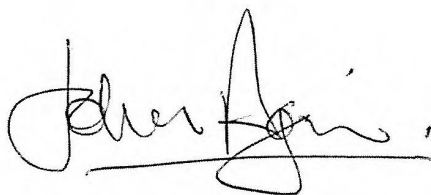
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<sup>42</sup> The written submissions in April 2016 identified a number of sources including publications issued by agencies including the US Bureau of Justice Assistance. One source was work published by the RAND Corporation in 2012.: R.C Davis et al. *Cold Case Investigations: An analysis of current practices and Factors Associated with Successful Outcomes*. It was noted by the authors of this publication, which followed a widespread study that “the presence of new witnesses coming forward is one of the most cited reasons to re-activate a cold case”. This hearing has identified a very large number of “new witnesses coming forward”. New witnesses have continued to come forward even after the formal hearings closed and it is likely that the publicity given to these proceedings when findings are announced will attract the attention of others who have not yet come forward.

Clearly that investigation should continue and advantage should be taken of the public interest that the hearing has generated and will continue to generate.

**Reservation of Position re Further Submissions concerning Recommendations and Objections to Certain Material in Evidence**

87. We are led to believe that objections to certain material which has been tendered have been made and submissions in support of those objects are to be made. We respectfully reserve an opportunity to respond to those submissions is otherwise appropriate. We also seek an opportunity to submit additional or alternative recommendations once we have had an opportunity to review the written submissions of Counsel for the Police Commissioner.

A handwritten signature in black ink, appearing to read 'John Agius', with a horizontal line underneath.

John Agius SC  
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18 October 2017

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