

Inquest Touching the Death of Scott Russell Johnson

Written Submissions of the Johnson Family in Reply to the Written Submissions of the NSW Commissioner of Police

Summary

1. The submissions of the Commissioner of Police (SOC) betray a misunderstanding of the standard of proof in that they speak in favour of excluding the possibility of suicide and accident rather than whether the evidence establishes to the appropriate standard that Scott's death was the result of homicide.
2. The SOC relies upon and urges the Court to rely upon evidence of Mr Butson that there was a heavy metal pen found on top of Scott's folded clothes which could have been used to write a suicide note and which note could have blown away in the wind created as part of the storm on the night of Friday 9 December 1988. In so doing the SOC ignores the evidence of police who did visit the scene with Mr Butson that there was no heavy metal pen found, in favour of speculation. No metal pen is listed or photographed among the items located by police. The SOC also ignore the evidence that Mr Butson did not refer to the pen when he made his first statement.
3. The SOC ignore the evidence that there was a significant culture of violence amongst Army personnel who were stationed at the North Head Artillery School training facility.
4. The SOC ignore the shared opinion of Dr. Robertson and Associate Professor Dr. Large that on 8 December 1988 when Scott went to the gay beat at Blue Fish Point he was not suicidal.



5. The SOC elevate the evidence of Mr Grealy's reporting of conversation with Scott to evidence that Scott "was thinking about suicide". This misrepresents Mr Grealy's evidence.
6. The SOC make no mention of the protective factors which militate against a finding of suicide: Scott's ability to articulate his feelings as demonstrated by the correspondence with Mr Noone, Scott's sister Terry, his brother Stephen, and his conversation with Mr Grealy.
7. The SOC seek to elevate an unsupported remark by Dr Duflou concerning one case in Christchurch where a person went from the top to the bottom of the cliff in 2016 where Counsel assisting have not led any evidence about that death and this Court has no evidence of the circumstances. For example, the Court does not know whether the event was a suicide nor does the Court have any evidence about the state of mind of the deceased in that matter. In submitting that Scott's nakedness was "not a factor either in support or against the possibility that Scott jumped to his death" the SOC ignore that the evidence that the nakedness supports a finding that Scott had removed his clothes in accordance with the common practice of users of the area as a place for gay men to meet.
8. In dealing with the "extent of police investigations and ongoing investigations" the SOC raise issues that were excluded from the ambit of this Coronial Inquiry. The submissions also raise matters not supported by any evidence and raise matters which not only were the family prevented from exploring during the inquest but which were never identified as an issue in the inquest and indeed which had over objection by the family been excluded by the court from the issues to be explored. In short to accede to the SOC under this heading would clearly amount to a breach of procedural fairness and vitiate any findings or recommendations of the Court.

The Proper Test

9. Consistent with our primary submissions the family submits that in the event that the evidence does not entirely remove a possibility that Scott's death was the result of an accident or of suicide, that does not prevent the Court from deciding on the whole of the evidence that Scott's death was the result of a homicide i.e., an unlawful and dangerous act resulting in death.
10. As Counsel Assisting state in their Submission, "Section 81 of the Act provides that at the conclusion or suspension of an inquest a coroner is required to record in writing the coroner's findings as to whether the person died and, if so, the identity of the deceased, together with the date and place of death; and if concluded, findings as to the manner and cause of death" ¹
11. Further, "The standard of proof to be applied is the civil standard of the balance of probabilities. In the context of this inquest, the Court is required to be satisfied on the balance of probabilities as to the manner of Scott's death before any such findings can be made."² The probabilities, moreover, must be established by evidence. "No court should act upon mere suspicion, surmise, or guesswork in any case," *Briginshaw v. Briginshaw*.³
12. In arguing that the Coroner should issue an open finding - i.e. that he cannot find that Scott Johnson's death was caused by accident, suicide, or homicide - the Commissioner ignores each and every one of the above principles. Instead he argues that the Coroner cannot eliminate any potential cause of death, if it is theoretically possible it could have been the cause, whether or not there is any evidence in the record to support that theoretical possibility. This standard for deciding on the cause and manner of death in an inquest

¹ CA submissions para. 36

² CA submissions 41

³ [1938] 60 CLR 336, CA submissions para. 42

has no basis in law or precedent and has been created out of whole cloth by the Commissioner.

Not an Accident

13. In the SOC it is contended: "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 It is worth noting that not only does the Commissioner fail to refer to any evidence in making his claim that accident cannot be excluded as a possibility but in fact there was **no evidence** to support such a theory.
14. Moreover, the legal question is not whether one or other potential cause of death can be ruled in or out as "possible" or "not possible." As stated above, the standard for determining what was the cause of death (accident, suicide or homicide) is a balancing of **probabilities** between the various alternatives and not whether any one or another alternative can be eliminated as a "possibility." Nowhere in the legal literature is the concept of "possibility" of a potential cause of death part of the calculation. The probabilities that are weighed, moreover, must be based on evidence provided at the inquest and not on "mere suspicion, surmise or guesswork." Indeed the Commissioner does not even suggest how the scenario for accidental death might have happened, let alone refer to evidence to support such a suggestion.
15. The facts are that Scott was an experienced bush walker and mountain climber. His clothes were some 10 metres from the edge. There is no evidence that he ever needed to be in close proximity to the edge. The edge was clearly defined and clearly visible. There is no evidence that Scott suffered from vertigo or was afraid of or on the other hand not cognisant of the risks associated with heights. The evidence is that he was not affected by

⁴ SOC para. 9

drugs or alcohol. These matters militate against accident being anything more than a technical possibility at best. In any event, it is an unlikely manner of death on the evidence.

Not Suicide

16. The Commissioner takes an identical position concerning suicide, although his discussion of this possibility is longer if not more cogent. "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

17. The SOC state: "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. However the Commissioner makes several additional submissions in relation to the consideration by Counsel Assisting of the forensic evidence relevant to this case theory"⁶ After discussing the above referenced additional submissions, the Commissioner concludes as follows: "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 the manner, ***that suicide cannot be ruled out as a possibility***"⁷ (Emphasis added.)

18. The Johnson Family will not repeat here its review of the evidence relating to suicide presented at length in its Submission but refers the Coroner in particular to paragraphs 24 through 39 thereof in which the testimony of Dr. Large and Dr. Robertson are elucidated. Suffice it to say for the purposes of the instant discussion that both of these expert witnesses agreed that Scott Johnson did not have any intention of taking his life when he went to Bluefish

⁵ SOC para. 10

⁶ SOC para.11

⁷ SOC para. 23

Point. Dr. Robertson did leave open the possibility that there might have been a “triggering event” that transpired once he got there that might have altered his state of mind, but she did not describe or even suggest what that “triggering event” could have been, nor did she have any idea of whether such an event took place. There is no evidence, it goes without saying, that such an event, whatever it could have been, actually happened and therefore this theoretical possibility can only be described as prototypical “mere suspicion, surmise or guesswork” and can play no role in the Coroner’s analysis of the manner and means of death.

19. Dr Robertson spoke of a triggering event in oral evidence at page 65 on 15 June 2017:

STERN: So you, just to summarise, you say well there’s a complete dearth of information thereafter and that gives rise to the possibility that something may have occurred which triggered the reaction of--

WITNESS ROBERTSON: Could’ve possibly occurred, can we take away the possibility of suicide, no, **because we have no idea what occurred** and he, is he an individual that we can completely rule it out in, no. So whatever happened that, that afternoon or the next day, we don’t know. [**Emphasis added**].

STERN: That’s, as we said at the outset, that’s as high as you put it.

WITNESS ROBERTSON: Yes.

20. In this passage of transcript one sees that Dr Robertson has introduced the concept of a “triggering event” because “we have no idea what occurred.” Even in that context Dr Robertson agreed that this was the highest she could put it. In other words her view is that because we don’t know what happened we cannot rule out a triggering event which caused him to take his own life.

21. This Court is entitled to and indeed required to look at the whole of the evidence and to determine what happened according to law. The test does not require the Court to completely rule out the possibility of suicide. That could never be the test. Earlier in her evidence there was this exchange between Dr Robertson and Counsel Assisting:

STERN: Is it right that in the course of your work in preparing psychological

autopsies, from time to time you have come across cases where there is an individual who appears to have committed suicide but that there are no warning signs?

WITNESS ROBERTSON: Yeah, that's correct.

STERN: When I say that they appear to have committed suicide, is it right that you can never really know for sure?

WITNESS ROBERTSON: No, you can never know, it's, it's an area that you never get an answer to.

22. If one accepts this evidence of Dr Robertson about the limitations of her process, psychological autopsy, then she would never know whether a person has committed suicide or not. It is not surprising then that Dr Robertson points to the possibility of a triggering event to explain what she considers to be an unknown.
23. The issue of balancing the probabilities of accident, suicide or homicide on the merits, based on the evidence in the record, has been addressed in the primary Submission of the Johnson Family and there is no need to repeat it here. Nevertheless, it is critical to confront directly the mistaken and misleading assertion by the Commissioner that the Coroner can only find that Scott Johnson's death was a homicide, if he can eliminate all theoretical possibilities (whether supported by any evidence or not) that the death **could have been** the result of accident or suicide. Such a standard would require the proof of a negative; this is not the law, and must be rejected.
24. There is no known authority that supports this view of the law. Propounding it is an easy out for the Commissioner.
25. The Court has available evidence of protective factors that guard against suicide. They include:
- Scott's ability to discuss problems in correspondence with his sister and brother;

- Scott's strong relationship with his brother Stephen;⁸
- Scott's discussion of the San Francisco event with Mr Noone and Mr Grealy (albeit that it is likely that Mr Noone has exaggerated the report to him and elevated to an attempt at suicide when the evidence, particularly when one has regard to Dr Bancroft's evidence, supports a finding that the event was one of ideation and not an attempt).
- Scott was in a long term loving relationship;
- Scott had made plans to meet Prof. Street and had learnt that his work had qualified him for the award of a PhD;
- Scott told Prof. Street that he would be spending Christmas with Mr Noone's family in Lane Cove;⁹
- If Scott was introverted, which is not accepted, the introverted coping mechanism was, according to Dr Robertson, a protective mechanism;¹⁰

26. The Court also has the evidence that in 1985, the precipitating factor in the Golden Gate Bridge event was a fear that Scott may have contracted AIDS. In 1988 there is no evidence that Scott had any such fear. Indeed, if one accepts Mr Noone's evidence, Scott did not fear he had contracted AIDS after 1985. This evidence diminishes the significance of the event as a factor to be taken into account on the likelihood that Scott's death was a suicide. This is the evidence of Dr Large at T70 line 23-T71 line 29. The fear of having contracted AIDS was the sole driver of Scott's apparent suicide ideation in San Francisco in 1985. It was irrelevant in 1988. Beyond that Scott had spoken about the event to both Mr Noone and Mr Grealy, the latter being a total stranger. Clearly it was no longer a predictive factor for suicide in December 1988.

⁸ Joint evidence of Prof. Large and Dr Robertson 15/6/17 T 66 lines 9-16

⁹ CA's remarks 13 December 2016, T 16 line 45; Prof. Street on 13 December 2016 T45 line 39

¹⁰ Ibid lines T 66 19-27; Dr Large's evidence on this aspect was as follows: "I don't think anybody is saying that he was an ordinary person and I wouldn't necessarily think that inferences about the, you know, ordinary people who are introverted would necessarily apply to Scott. My reading this, it's his letters, is that he was actually quite an expressive sort of person really, there aren't many men of that age who write long letters to their family and friends, that, that would be a rare, you know, thing to do..." at T66 lines 43 et seq.

Additional matters claimed by the Commissioner to support suicide remaining a possibility

27. At paragraphs 13-16 of the SOC the Commissioner points to material from Mr Butson concerning the presence of a "heavy metal pen" lying on top of Scott's clothes. The Commission contends that, "it is open to the court to infer that that pen may have been used to write a suicide note."

28. With respect to those through whom the Commission makes this submission, it is entirely fallacious and not deserving of consideration by the Court. The presence of "a heavy metal pen" is not supported by the two police who attended the scene above where Scott's body was found, neither of whom saw any such item. The items found were photographed by a third forensic officer and nothing approaching a "heavy metal pen" is to be seen. Conversely, another pen was found secreted in Scott's shoe with his valuables: a black plastic felt pen.¹¹ Why Scott would have 2 pens is unexplained. The source of any notepaper up on the cliffs is also unexplained.¹² Yet the Commissioner asks the Court to speculate that the heavy metal pen might have been used to write a suicide note, which was blown away. Such a submission is unworthy but it does serve to demonstrate how far the Commissioner is prepared to go to avoid further investigation of this death.

29. In the same vein, the SOC seek to elevate a medical journal article by Dr. Simon (SOC para 19) solely because of its title, "Naked Suicide." Any actual reading of the article would indicate that a) it is not a peer-reviewed article, but a call out to other researchers to provide data regarding naked suicide because there was so little data on the subject, b) that the first sentence of Dr. Simon's article is that "Suicide attempts and completions by individuals while naked remain unexplored, both by clinicians and in the professional literature."

¹¹ Statement of Const. Ludlow 29 December 1988 at Paragraph 4 (page 830 of the brief)

¹² There is no evidence of a notebook or other paper in Scott's possession. The valuable items, watch, student card, building society account/teller card, \$10 in a plastic sleeve and a plastic felt pen were all located in a shoe at the bottom of the pile of clothes.

(The cite is in the SOC brief, but I repeat it here: Dr Robert Simon, "Naked Suicide: Analysis and Commentary", (2008) 36(2) *Journal of the American Academy of Psychiatry and the Law* 240. C) is the fact that this 2008 article has only been cited 10 times by other researchers.¹³

30. One can work backwards from a suicide to contemplate that someone like Scott would have left a note if he intended to kill himself, even if only to explain his circumstances to his family or to the strangers who may happen across his body. One would expect such a note to be highly valued by the author and that it would have been placed in the shoe where other valuables were found. From what we know of Scott's life at the time of his death the absence of a note, if anything, tells against a suicide.
31. In this case all of the evidence indicates that Scott had no pressures in his life that might have led him to suicide. To the contrary, he was in a long term loving relationship, he was close to his family, and he had just been told that his work had qualified him for the award of a PhD. Additionally, the people closest to Scott saw no sign of suicide or of any change in his demeanour nor any psychological changes in him.
32. It is surprising that the Commissioner ignores this evidence and invites the Court to engage in pure speculation that the missing pen might have been used to write a suicide note which note was placed under the pen (not under the clothes where it would remain to be found but on top of them where it might be blown away).
33. Even if a heavy metal pen had been located on top of Scott's clothes a missing suicide note could not be contemplated because of all the reasons set out in the primary submissions that demonstrate that this was not a suicide.

¹³ <https://scholar.google.com/scholar?um=1&ie=UTF-8&lr&cites=1223090296031795461>, reflecting the ongoing rarity of this kind of event

34. The cynicism (alternatively inconsistency) of the Commissioner's approach to investigating Scott Johnson's death is displayed in the dramatic change of position he takes in the most recent submission in regard to the relationship between the existence of a gay beat and the likelihood of violence occurring at such a location.

35. For almost two decades, from at 1988 to 2007 the NSWPF forcefully argued that the location where Scott Johnson died was not a gay beat.

36. It has continued to argue this periodically, and in different ways, from 2007 until 2014 contending either Blue Fish Point *might not* have been a beat, or if it was a beat, the precise area where Scott Johnson's clothes were found was not within the borders of the beat. See, for example, in the initial "Statement of the officer in charge (2014)" DCI Young states at page 433 paragraph 2892 the following:

Physical features of the site where Scott's clothes were found are more suggestive of seeking isolation rather than gay activity. ***It is outside the active gay beat area, and a person sitting or sunbaking there is difficult to see from the active beat area.*** (Emphasis added)

37. This argument was not based on any investigation that the NSWPF conducted but rather on the assertion that since there were no reports of violence from this location, it could not have been a beat. In other words the police recognised that there was a direct correlation between a place being a gay beat where men came for casual sexual activity and violent assaults on them by people with antipathy to gays. The fact that there were no episodes of violence reported to the police from Blue Fish Point led inexorably to the conclusion that it could not have been a beat. See for example in the initial Statement of the OIC referenced above this statement appears (at page 436 paragraph 2908):

At the time of Scott's death, North Head was not known to police as being a gay beat. As is in evidence of Detective Cruickshank at the 1989 Inquest, police identify the existence of a gay beat when they receive reports of gay-linked crime. This is evidenced in other areas of Manly and Sydney in that era.

38. At the hearings in this inquest this June extensive evidence was provided that uncontrovertibly demonstrates that the location where Scott Johnson died was a beat. This is no longer a contested issue.

39. Now that it is proven that Scott Johnson died at a beat, the Commissioner has abandoned its previous strongly held position that there is a direct correlation between an area being a beat and the likelihood of violent attacks occurring there. He now argues that even if Blue Fish Point was a beat, there was no direct evidence of violence occurring there and the Coroner cannot find that given the fact that it was a beat it is more likely that Scott's death was a homicide. See the Commissioners submission of 18/10/2017 under heading **Homicide or foul play** pages 4-7 paragraphs 25 – 36.

40. The Commissioner provides no rationale for this radical change in position. What the reader is left with is the unmistakable impression that the Commissioner is committed to the proposition that Scott Johnson's death should not be ruled a homicide (there should be only an open finding) and that the evidence, whatever it is, should always be interpreted in a manner to reach this a priori conclusion.

41. This is exactly the opposite of how a professional investigator should approach any investigation. The NSWPF should have, as will the Coroner, compiled all the evidence it could have and followed it wherever it led. Any unbiased investigator will arrive at his or her conclusion as to the manner and means of death by amassing and evaluating as much evidence as possible and objectively analysing it. The final result should not be posited from the

outset and the investigation should not consist of simply arranging and analysing the evidence in a manner that justifies the predetermined result.

42. Unfortunately, that is not how the police have proceeded, and are continuing to proceed, in investigating Scott Johnson's death. Given the willingness of the police to change their long held arguments such as the connection between a location being a beat and the likelihood of violence occurring there to reach the predetermined result that is exhibited in their most recent submission, the Johnson family fears that the police will continue to proceed in the same flawed manner in conducting any subsequent investigation after the Coroners verdict, even if that verdict is that Scott Johnson's death was a homicide.

Walter Grealy

43. The SOC state that Scott was "thinking about suicide, at least in general terms" when he spoke to Mr Grealy at the birthday party the week before his death. The fact that Scott spoke to others about having in the past thought of suicide is not much of an indicator that he would commit suicide but is instead an indicator of a protective factor, i.e. that he was open about himself, would not bottle up issues which had in the past concerned him. The facts and circumstances concerning the event in San Francisco have been dealt with in detail in the family's primary submissions. Suffice to say Scott's personal situation since he was in San Francisco had changed considerably. There is no evidence to suggest that Scott had any reason to believe in December 1988 that he might have been infected with the AIDS virus. He was in a loving relationship and he had succeeded in qualifying for his PhD.

44. The SOC also state in relation to Mr Grealy's evidence that "the two experts seemed to agree that they would give this [Scott said that he had thought

about jumping from a bridge on two occasions in the past¹⁴] a bit of weight or at least not no weight."¹⁵ The SOC does not refer to the next portion of Dr. Large's report wherein at paragraph 30 wherein Dr. Large said:

"If Scott had, in conversation, mentioned ideas about jumping while otherwise seeming to be quite mentally well, in a pool, at a party, in the weeks before his death, I would put a slight amount of weight on this. **However, this weight would be reduced if, as seemed to be the case that Scott was relating his earlier experiences of suicide ideas on hearing that Mr Grealy worked in Mental Health. I note that Mr Grealy did not think that Scott was depressed or suicidal. This interaction only slightly increases the likelihood of suicide a short time later, even if it took place as it was described by Mr Grealy in his evidence on 14 December 2016.**"

45. Mr Grealy gave evidence to the following effect:

- Scott didn't express any thoughts about jumping off a bridge other than in the past¹⁶;
- There was nothing that Scott said to him at the party that indicated that Scott currently had any thoughts of taking his own life;¹⁷
- He had no idea whether Scott "had actually got up onto a bridge";¹⁸
- Scott seemed very happy;¹⁹
- When asked by Counsel Assisting "Didn't it seem to you that is was highly relevant given that approximately a week later Scott's body was found at the bottom of a cliff?" Mr Grealy said "I think at the time when it as in that social context at the barbeque, I didn't regard it as anything that would raise any risk or any concerns. As I said I thought he was quite happy and so I, you know, I didn't think I would bring it up."²⁰
- Mr Grealy agreed that given that he had Scott's phone number (it will be recalled that Scott gave him his phone number) and that if he had thought there was anything in what Scott had told him, that is any

¹⁴ See Grealy's statement of 7 December 2016 at paragraph

¹⁵ Transcript Day 7 15/6/17; T 63 line 36 to 64 line29

¹⁶ 14/12/16, T 7 line 9 and line 45-46

¹⁷ 14/12/16 T8 lines 3-5

¹⁸ Ibid T 8 lines 44-47

¹⁹ Ibid T 9 line 48

²⁰ Ibid T 10 lines 42-47

indicator in the conversation with Scott that was averse to his wellbeing, it was likely that he would have contacted Scott, yet had not done so.²¹ Mr Grealy said that Scott did not appear to be depressed;²²

46. In the light of the above it is appropriate not to place any or any but the slightest weight on the conversation Scott had with Mr Grealy as increasing the likelihood that this was a suicide. One would also have to take into account the evidence of other matters which militate against a finding of suicide.

Nakedness

47. The Commissioner contends that Scott's nakedness was not a factor either in support or against the possibility that Scott jumped to his death. The fact that Scott was found naked is consistent with one thing: that he had gone to the area in question to sunbake and meet other gay men for the purpose of engaging in sex. He had followed the course taken by others of a like mind who went to that area. This alone explains the nakedness. There is no reason to suppose that the nakedness represents anything other than this. Scott's condition of undress is far more likely to be explained by the purpose for which he was at the beat than by some intention to kill himself whilst naked. It is entirely consistent with his having been set upon by one or more others and for him to have met his death whilst attempting to avoid them.

48. There is one significant issue associated with Scott's state of undress that does inform on the issue of his mindset at the time of his death and that concerns the fact that his clothes were neatly folded and his valuables were secreted in a shoe at the bottom of the pile. The folding of his clothes and the concealment of his valuables strongly indicates that he intended to put his clothes on again. That is the only rational reason he would have folded the

²¹ Ibid T13 lines 42-45

²² Ibid page 7 line 15

clothes and secreted his valuables under the pile. This reasoning strongly supports a finding that Scott did not intend to take his own life.

49. Neither of the doctors regard the fact that Scott was naked as a factor to be taken into account as increasing the likelihood that this death was a suicide.
50. There is no evidence that nakedness can be used as a test to determine or assist in determining whether a death was the result of suicide. In this matter the nakedness is fully explained when account is taken of the accepted fact that the area where his clothes were found was a gay beat and the evidence as to why it was that Scott was there.

Stephen Patterson

51. There is no reason to give the evidence of Stephen Patterson no weight as submitted by the Commissioner. He gave evidence that reflected his experience as a government contractor. The observations he made and of which he gave evidence were central to the task he was performing at the time he made the observations.
52. It is to be recalled that the evidence of Dr Duflou was that Scott had struck a number of contact points with the cliff surface during the fall. He said, in the course of an answer to Counsel Assisting: "I would think that likely the body did scrape along the cliff face in some way on the way down, it sounds reasonable to me."²³ This would as a matter of logic appear to be inconsistent with Scott wanting to die by jumping from the cliff. He had at least 10 metres (the distance given by Const. Ludlow between the edge and the pile of clothes) in which to effect a run and jump and ensure that he missed the rocky protrusions below and suffered death when he hit the rocks below.

²³ Dr Duflou, 16/12/16 T 24 lines 43-44; DCI Young reports that Dr Cala referred to multiple strike points, see statement at para. 85

Alternatively, he may also have chosen a spot along the cliff where he was unlikely to have struck a protrusion before reaching the bottom.

53. As we have submitted the Commissioner has ignored a great deal of evidence, summarised in our primary submissions, that indicates that suicide is an extremely unlikely manner of death in this case. Whilst it may remain technically possible on the whole of the evidence suicide can be ruled out as a manner of death. The consequence of this analysis is that there is no reason to accept the Commissioner's argument that a suicide finding remains open.

Homicide or foul play

54. The SOC deal with this topic between paragraphs 24 and 26. In our primary submissions we argued with reliance upon a decision of the Queensland Court of Appeal²⁴ that in making a finding of homicide or foul play in relation to manner of death the Court is not required to apply the *Briginshaw* test in the way in which it would be required if the Court were to nominate a particular person or particular persons as perpetrators. We will not repeat those submissions here. We continue to rely upon them and we continue to submit in the alternative that even if the *Briginshaw* test is to be applied the evidence supports a finding to a degree of comfortable satisfaction that Scott's death was the result of homicide or foul play.

55. In paragraph 26 of the SOC the Commissioner attempts to summarise the position of Counsel Assisting into 5 points. With respect, this is an unwarranted oversimplification of the basis for a finding of homicide or foul play. It also ignores the very position taken by the Commissioner at the second inquest and that was to support the challenge to the finding of suicide on the basis that the police had discovered so it was said that the area above

²⁴ *Hurley v Clements* [2009] QCA 167, 1 Qd R 215 at 232 [25]-[26]

where Scott's body was found was a gay beat. Something which the police claimed and continue to claim they were not aware of in 1988 and 1989 before the first inquest.

56. This position taken by the police in the second inquest recognised the tangible fact that in the 1980s and into the 1990s gay beats used by men attracted violence.

57. The evidence of Det. Sen. Const. Wilson at the second inquest makes plain that it was a lack of knowledge by then police that the area in question was a gay beat that informed a police decision to regard Scott's death as a suicide. His evidence was that had the police known that the area was a gay beat they would have treated the death as suspicious. His evidence includes the following (after he had testified that following receipt of information provided by Mr Dan Glick he had established that the area was a gay beat at the time of Scott's death²⁵):

Mr Parsons: Q: Now if this information had been known to police at the time of the death would I be correct in saying that they [the police] wouldn't have gone down a suicide avenue of investigation. There would have been a foul play route of investigation?

Det. Wilson: A: Yes. It would have been considered suspicious.

Q: It would have been regarded as suspicious and, therefore, the matter would have to be investigated?

A: Yes²⁶

58. The reason for this, it is submitted, wasn't that the gay community had a reputation for murdering their own at gay beats, but because it was accepted that there were people in the community who preyed upon gays and engaged in gay hate crimes at gay beats. The Taradale Inquests made this plain.

²⁵ Evidence of 2nd Inquest 27/6/12 at pages T9-11

²⁶ Ibid T11 lines 9-17

59. The Commissioner submits that there is no credible evidence that the matters summarised are not capable of supporting a positive finding that foul play was involved in Scott's death. The submissions continue: "this is particularly so because 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, proximate to the time of Scott's death."

60. There are flaws in the Commissioner's approach:

- a. It omits any reference to the other evidence that militates against findings of accident or suicide. Once accident and suicide are dismissed as unlikely explanations for manner of death, then the only possible explanation is homicide or foul play.
- b. The police themselves regarded the single fact that the area was a gay beat sufficient to regard the incident of Scott's death as suspicious;
- c. An absence of evidence that the beat had attracted persons intent on bashing gay men in the late 1980s or early 1990s is not evidence of absence of violence. The culture was not to report incidents of gay hate acts of violence.
- d. As we have indicated in our primary submissions, Ulo Klemmer had said that there was good and bad in the fact that the area was secluded. The good clearly is a reference to privacy. The bad could only have been the risk of assault or worse.
- e. Prof Tomsen's evidence and the evidence of Sue Thompson was to the effect that gay beats attracted violence. This was also the clear message from the Taradale Inquests. It appears that sadly even as of 2017 the Police Commissioner is not cognisant of that message.

- f. Whilst Gordon Sharp's direct evidence of violence at the beat is limited to the period he attended it there is no known reason why this beat would have been immune from the systemic violence perpetrated against gay men in Sydney and the Northern Beaches after the early 1980s. Skinheads were prepared to travel from Narrabeen to the Eastern Suburbs²⁷ to assault and rob gay men at gay beats. NP98 and his gang were prepared to travel to Reef Beach, Balgowlah and North Sydney to do the same. There was no "ring of confidence" around the beat at North Head. Indeed, publicity over the Sadie Thompson stabbing and the assaults at Reef Beach may well have drawn attention to gay beats in the general area of the lower northern beaches.
- g. AH's evidence of violence by Army personnel directed at gay men is not referred to by the Commissioner.
- h. The evidence of strong anti-gay feeling and violence being occasioned to gay men by Army personnel is not taken into account by the Commissioner. That evidence is undisputed and served to corroborate AH.
- i. ██████ had provided his version of events nominating the area above Blue Fish Point to Mr Dan Glick on a number of occasions before he took the police there and gave a convincing tour of the area of the gay beat. His evidence concerning how the beat operated closely matched that of Mr Klemmer in a way that cannot be explained other than that he had his own knowledge of it.
- j. Whilst ██████ withdrew that part of his evidence that related his evidence to Blue Fish Point there were very likely to have been reasons for that withdrawal, ██████
██████ The Commissioner ignores this. ██████

²⁷ Darlinghurst and Moore Park

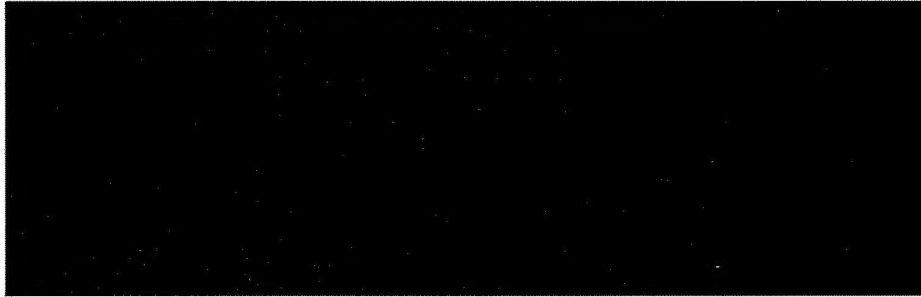
[REDACTED]
appears to be rational and his commentary [REDACTED] appears frank and is freely given. On the other hand, his claim to be mistaken about the area and his claim that he was talking about Reef Beach and not Blue Fish Point was anything but frank or honest. His demeanour gave the lie to that.

- k. [REDACTED]'s testimony is completely discounted because of his reference to North Head. The possibility that he used the terms interchangeably as did others is not considered.

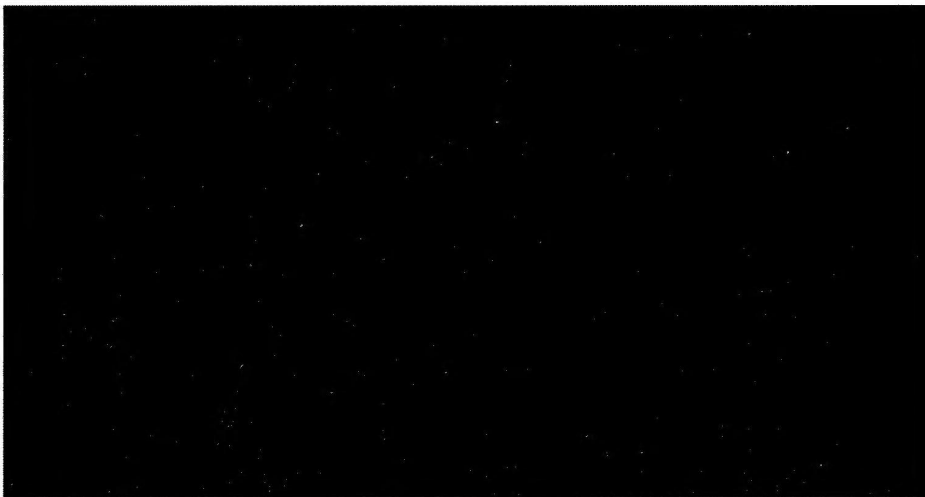
l. [REDACTED]

- m. No investigation of the movements of persons he nominated as being said to have been involved in the event, beyond asking them if they were guilty of the assault, was carried out.

n.



o.



p.



Extent of police investigations and ongoing investigations

61. In paragraph 48 the Commissioner refers to material that is not in evidence before this Court. In particular, there is no evidence of "over 40,000 telephone activations" and no evidence as to what that phrase means in real terms. There is no evidence of any covert operations other than telecommunication

interception. In the absence of evidence the submissions on these claims should be set aside and ignored.



63. Such investigation as there has been did not begin until after the 2nd inquest. Indeed, even after Coroner Forbes had referred Scott's file "for Cold Case Investigation"²⁹ the NSW police still declined to investigate.³⁰ The investigation by Strike Force Macnamir was announced the day after the Australian Story program featuring Scott's death and Stephen Johnson aired on ABC Television in February 2013.

64. The Commissioner's statement in paragraph 47 of the SOC that Strikeforce (sic) Macnamir investigated Scott's death over nearly 5 years is an exaggeration. It commenced in February 2013 and DCI Young's report was delivered to the Coroner in March 2014. This is a period of 13 calendar months from which should be excluded the period from October to late January when the Macnamir team was not actively pursuing the investigation³¹.

²⁹ 27/6/12 T26 line 47

³⁰ See DCI Young's statement at Tab 203 letter to John Lehmann, then in charge of "unsolved Homicides" dated 13 January 2013 referring to a meeting between Rebecca Johnson and Mr Dan Glick with Mr Lehmann which took place on 9 January 2013 at which Mr Lehmann informed Ms Johnson and Mr Glick that the case had received a "zero solvability index" and would not be investigated. See further DCI Young's statement at paragraph 2828 noting a conversation with between herself, Spt. Michael Willing and Stephen and Rebecca Johnson on 23 August 2013.

³¹ See emails to the Johnson family from DCI Young over 4/5 October 2013 Tab 1 page 426 DCI Young's statement: "The investigation is in its closing stages. All of our more significant inquiries are at an end, and in the absence of anything new or recommended by the State Crime Commission, my report will conclude that the cause of Scott being found deceased at the base of North Head is unable to be determined". See too an email from Det. Willing on 4 December 2013 "The Unsolved Homicide

65. The Commissioner refers to the decision of the ACT Supreme Court in *R v Doogan; Ex parte Lucas-Smith* however it will be observed that the comments quoted are said to relate to the conduct of an inquest whereas in fact the case, although it related to the tragic deaths of 4 people, was primarily an Inquiry into the origin and cause of a wild fire which had resulted in those deaths. It was not concerned with a police investigation. The issue in *Ex Parte Lucas-Smith* related to causation of a fire and the Inquiry had been running for 16 months. The context in which the quoted remarks were made by the Full Court needs to be considered. They do not protect or justify an inadequate investigation by police who commenced an investigation in 2013 into what they belatedly admitted was a suspicious death in 2012, 24 years after the death.

66. It is clear that the Commissioner is raising as an issue the extent and adequacy of the police investigation. This was not an issue that the Inquest dealt with. It was never opened as an issue to be dealt with by Counsel Assisting. It was not the subject of submissions by Counsel Assisting nor was it addressed by the family in its submissions. Indeed the scope of the Inquest was crafted to exclude any inquiry into the extent or adequacy of the police investigation.

67. The Commissioner's submissions raise as issues the extent and adequacy of the police investigation. They should not be received. To admit those submissions at this late stage would be a denial of procedural fairness to the family who have maintained since Scott died that the police investigation has always been sub-standard. It is the family's submission that the police failed to properly investigate Scott's death in the days and weeks after his body was found and that without any investigation concluded that this death was a

Team has completed its investigation....". telephone intercepts were carried out between January and March 2014 and 27 March 2014 Supt. Wrote to the Johnson family and indicated that ""Strike Force Macnamir have now completed all significant lines of inquiry."

suicide. Why this happened has not been explored. The police have maintained that they were not aware that the area where Scott's clothes were found was a gay beat, yet Mr Noone discovered that on his one visit to the site. A former Homicide Squad detective hired by the family discovered this was the case from multiple sources in 2007. Mr. Glick, an American, confirmed this was the case after a few days of investigation in May 2007. Information about the area being a gay beat was then passed to police by Mr Glick in 2007³² and yet the police did not conduct any further investigation into the death. At the second inquest police gave evidence that the information that the area was a gay beat was sufficient to regard the death as suspicious and that had this been known at the time Scott's body was located the death would have been investigated as such.

68. Even after the referral of the matter to the Cold Case section of the NSW police force by Coroner Forbes, the police indicated that they would not investigate the matter further. When the investigation was conducted by DCI Young, it is plain that the primary purpose of her investigation was to refute any evidence that suggested other than the death was a suicide. To this end the police went to the extent of contacting the present occupiers of the apartment that Stephen and his wife and child lived in when Scott and Mr Noone visited in 1985 to investigate the size of the apartment. [REDACTED]

³² This was the evidence of Det Wilson at the second inquest

69. There are many other aspects of the investigation to date that the family would have raised had the issue of the extent and sufficiency of the police investigation not been excluded from the purview of the Coroner.
70. There can be no doubt after the decision in *Annetts v McCann* (1990) 170 CLR 596 that this Coroner's Court is bound by the rules of Natural Justice in that regard. In the absence of any notice that the issues identified above and now sought to be raised by the Commissioner, who sat silent and took advantage of the Court's decision not to permit any investigation of the extent or adequacy of the police investigation, were to be the subject of adjudication, examination or findings it would be a breach of the duty of procedural fairness to receive and act upon any submission by the Commissioner which raises those issues.
71. In seeking to support his case that the police investigation has exhausted all fruitful lines of inquiry the Commissioner refers to the recent statement of Det Sgt Brown of 14 September 2017 which has been received into evidence after the Inquest was adjourned and whilst written submissions were being prepared. That statement does not support the submission of the Commissioner at paragraph 51.

Further investigation

72. The Commissioner submits that "all fruitful lines of inquiry have been exhausted," yet at the same time acknowledges that there are further lines of inquiry to be completed whilst at the same time noting that Counsel Assisting "note that a continuing line of inquiry concerns the possible involvement of army personnel."³³

³³ Paragraph 49 of the SOC and CAS paragraph 239

73. There are a number of other lines of inquiry open at this time. They include (but are not limited to) the following:

a. Investigation of the possible involvement of NP3 and his gang including NP3.1, NPs 4,5 and 6 in the death;

b. Investigation as to whether the evidence of [REDACTED] [REDACTED] can be corroborated;

c. [REDACTED]

d. [REDACTED]

e. Investigation of the reasons why [REDACTED] changed his testimony as to the place of the assaults from North Head to Reef Beach. His reason given [REDACTED] that he was confused as between North Head and Reef Beach, which it seems the Police Commissioner accepts when he embraces the change in [REDACTED] evidence, must be rejected particularly when as the police who attended the site [REDACTED] know that it was he and not they that nominated the area at North Head.

f. The possible involvement of NP98, NP10 and their associates in assaults upon gay men at North Head in December 1988;

- g. The true relationship between NP98 and former police Messrs. Peattie and Patison. It is odd that Mr Patison claims to have no knowledge of the matters set out in the statement of facts bearing Peattie's name which was tendered during NP98's sentence proceedings given that he was intimately involved in the arrest and questioning of the gang of which NP98 was a member.
- h. The information provided by a named source concerning his knowledge that the area above Blue Fish Point was a gay beat 1987 and importantly was known by police to have been a gay beat in "around 1987" does not appear to have been thoroughly investigated by police. This information, volunteered to a member of the Johnson Family after contact by a named source through a Facebook page was passed to those assisting the Coroner yet there is no evidence that it has ever been investigated. The named source said that he and his friend Scotty, now deceased, visited the gay beat once together and that there were gay men "everywhere" with "their towels" wandering about naked and "playing with themselves". He said that the area was known as "the church". He said that around 1987 police warned Scotty not to go to the gay beat or he would be arrested. This material, if accepted as it should be, is proof that police knew the area was a gay beat.³⁴ It is highly significant as it discredits the police position that as at 1988 the area was not known to police as a gay beat. This material contradicts the police explanation for not treating Scott's death as suspicious in 1988, or thereafter until at least 2007, when passed to and accepted by police proved unequivocally that the area was a gay beat in 1988.³⁵

³⁴ Paragraph 2760 of DCI Young's statement Page 415 Ex 3 has a summary of what the person told the Johnson Family. Unsurprisingly he refused to speak to police. Counsel Assisting have confirmed that there has been no investigation of the person's information.

³⁵ The material was uncovered by investigations carried out by Mr Dan Glick and Mr John McNamara, a private investigator and former Homicide Squad officer retained by the Johnson Family

- i. Phil Brundrit provided information about NP143.³⁶ NP143 had been interviewed by police before Brundrit's information was known to them. Accordingly, they did not interview NP143 about the material in Brundrit's statement concerning what PN143 had told him. When NP143 was interviewed, he denied making the statement to Mr Brundrit. This was a very thin investigation. It amounted to no more than inviting NP143 to admit to knowing the identity of persons known by him to have been involved in the death of Scott Johnson. The matter requires a thorough investigation designed to discover whether NP143 had associates in 1988 who had a reputation for or who were involved in assaults upon gay men which assaults extended to throwing gay men "off cliffs".
- j. Other inquiries, which involve information provided by a community source about the gay hate crimes of a person known to him and with whom he interacted in commerce.

74. The above-mentioned lines of inquiry are not intended to be exhaustive. They have been identified by the Johnson family and those advising or assisting them. There are likely to be others to be identified by specialist cold case investigators.

75. We submit that the Court should keep steadily in mind the significant difference between a finding that Scott's death resulted from a homicide and a finding or an absence of a finding as to the identity of a perpetrator. The

³⁶ A statement by Det Sgt Brown records: "*Phil stated around 15 to 20 years ago he was purchasing paints from [name and location of shop provided]. It was a warm / hot day directing the time of the year to the summer months. BRUNDRIT cannot recall the day, month, or year. During this purchase of paints, the store clerk (a person BRUNDRIT has nominated as being [Christian name provided]) pointed to the Daily Telegraph, which was on the counter, and said'....my mates are involved in this. They go around bashing gays and then they throw them off cliffs.,.'* (or words similar to this). BRUNDRIT wasn't very impressed by these comments and didn't respond to it, and purchased his paint and left the shop.

absence of the ability to identify a perpetrator does not impede a finding as to manner of death.

76. We have submitted in our principle submissions that whilst the *Briginshaw* test would apply to the level of satisfaction required were the Court to identify a perpetrator or were the Court, in another case, to find that a death was deliberately self-inflicted, it does not apply to a finding of the manner of death alone.

Recommendations

77. In our principle written submissions we have suggested recommendations, which involve the referral of the investigation into Scott's death back to the NSW police. In the light of the Police Commissioner's submissions and his expressed views we withdraw only so much of the submission that the matter be referred back to NSW police. We submit, with respect, that in view of the Police Commissioner's submissions there would be no reasonable expectation that any further investigation of Scott's death would not be tainted by the appearance of a bias. To put the submission another way, there would be a reasonable apprehension of bias, not only on the part of the family but also on the part of the reasonable observer with knowledge of the circumstances and evidence before the Coroner, in relation to any investigation conducted by officers of the NSW police force in circumstances where the Police Commission had submitted that in his opinion there is nothing further to investigate. Any police officer required to further investigate a homicide where her or his Commissioner has publicly expressed that view would be subject to huge pressure should she or he demonstrate that it is possible to undertake further fruitful investigations. There would also be the real risk that support for any further investigation would not be forthcoming from the Commissioner and those officers answerable to him.

78. In place of a reference back to the NSW police we submit that an appropriate recommendation be that the death be referred to the Management Committee


of the NSW Crime Commission with a request that it be referred to the Crime Commission for investigation as a cold case.

79. There are several advantages in referring the death of Scott to be investigated by the NSW Crime Commission rather than the NSW police. These include:

- a. The avoidance of a suspicion of bias by NSW police and the difficulty of expecting NSW police to further investigate a homicide when the Police Commission has submitted that there is nothing fruitful to be gained by such an investigation;
- b. The NSW Crime Commission has the power to compel answers to questions even though the answers may incriminate the person being questioned;
- c. The NSW Crime Commission has its own dedicated electronic and physical surveillance resources;
- d. The NSW Crime Commission is a dedicated investigative body with a wealth of experience in collating admissible evidence to be used in prosecutions. One can reasonably expect that it will approach the investigation dispassionately. It is well equipped to investigate the true relationship between NP98 and former police officers Peattie and Patison;
- e. The NSW Crime Commission would have the resources and the experience to investigate the true nature of the relationship between NP98 and former police Peattie and Patison and whether NP98 was or believed himself to be protected by police at Manly in December 1988.

Telephone Intercepts

80. In the SOC the Commissioner seeks that the content of the transcript of telephone intercepts (but not the fact of the interception of telephone calls) in evidence be marked as a confidential exhibit. The Johnson Family has no objection to this on the basis that the matter of Scott's death is still under and should remain under investigation as a homicide.



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