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**NSW Police Force**

17 August 2023

Mr Enzo Camporeale
 Director, Legal
 Special Commission of Inquiry into LGBTIQ hate crimes
 121 Macquarie St
 SYDNEY NSW 2000

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

Dear Mr Camporeale

Special Commission of Inquiry into LGBTIQ hate crimes

We respond to two of your letters of 10 August 2023 below.

1. Public Hearing 2 letter

We first address your 13-page letter of 10 August 2023, concerning Public Hearing 2.

Practice Guideline 1 and calling of witnesses

We note your general comments about the purposes of a Commission of Inquiry and the calling of witnesses. We also note your many references to Practice Guideline 1 regarding the calling of witnesses, and your references to requests for information and statements from members of the NSW Police (**NSWPF**).

At the outset, we note the Commissioner of Police has been fully supportive of the important work the Inquiry has been tasked to undertake. However, and as is entirely appropriate, at no time has the Inquiry sought the views of the NSWPF about the direction and focus of the Inquiry.

We acknowledge that the Commissioner is entitled to focus the Inquiry without consultation with interested parties. However, the question of what evidence is required in order to sufficiently investigate the issues that the Inquiry considers should be investigated is not one that interested parties are able to answer in advance. Subject to the constraints of the Terms of Reference, it is for the Inquiry to determine which investigations are necessary.

The general areas of investigation the Inquiry wished to explore had, during the course of evidence, become apparent. However, it was not until receipt of the submissions of Counsel Assisting regarding Public Hearing 2 (**CA Submissions**) that the nature and extent of the adverse findings proposed by counsel assisting were revealed. As expressed in the Commissioner of Police's Public Hearing 2 Submissions (**PH 2 Submissions**), the CA Submissions include significant criticisms of a range of persons who have not been afforded the opportunity to appear before the Inquiry, make submissions and/or adduce evidence. We have submitted that in the absence of evidence from those witnesses, a number of the factual conclusions urged by Counsel Assisting should not be made.

Whilst Practice Guideline 1 provides an avenue for interested parties to seek witnesses to be called, there is no obligation on parties to do so. The obligations on participants in inquiries are referred to in the *Special Commissions of Inquiry Act 1983* (NSW) (**SCOI Act**), and they do not include an obligation to point out to an inquiry which direction the inquiry should take in terms of calling witnesses.

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The fact that the NSW Commissioner of Police has not requested specific witnesses to be called at this Inquiry does not relieve the Inquiry from the obligation to provide procedural fairness to persons against whom adverse comments may be made. Nor does it relieve the Inquiry from the need to call all relevant witnesses, particularly when those witnesses' evidence is likely to relate to adverse findings.

Adverse findings affecting professional or vocational reputation of the kind propounded by Counsel Assisting are to be assessed by reference to the *Briginshaw* principle. The absence of requests for witnesses to be called does not relieve the Inquiry from these fundamental obligations of fairness, which we discuss further below.

Representation of persons named

Practice Guideline 1 provides guidance relating to the rights of persons to appear at the Inquiry and to be represented. On each occasion when we have sought to represent an individual (generally a witness), we have had to assure the Commissioner of the Inquiry that we do not perceive a potential conflict of interest between the witness and those persons whom we already represent, particularly the Commissioner of Police.

We do not represent all employees of the NSWPF at this Inquiry. We represent the Commissioner of Police and certain named employees. In two cases we have had to withdraw from acting for a witness (Messrs Steer and Willing) because of a potential conflict of interest. We are acutely aware of the need to avoid any such conflict.

We have not provided a copy of the submissions of Counsel Assisting to persons other than those whom we represent – with one exception, Detective Superintendent Craig Middleton, whose views have been sought in order to prepare the PH2 Submissions. We note that many of the officers listed in your letter are no longer employees of the NSWPF.

We will seek to formally represent Det Supt Middleton before the Inquiry, so that his views can formally be put to the Inquiry. We also acknowledge that we may be in a position to represent Detective Inspector Paul Grace and Detective Senior Constable Cameron Bignell. We will contact them forthwith, seek their views, and let you know whether they wish us to represent them.

However, in relation to the other persons named or described by you in your letter (many of whom are no longer employees of the NSWPF), at this time, and noting the matters raised in Counsel Assisting's submissions, we perceive a potential conflict of interest and we are of the view that we cannot represent them. We are unable to assure the Inquiry, as is required by [14] of Practice Guideline 1, that no conflict of interest is anticipated.

Requirement to afford procedural fairness

The obligation to alert a person entitled to be heard falls upon the decision-maker¹, not upon the other persons granted leave to appear at an Inquiry. As we do not represent the other persons mentioned in your letter, it would not be appropriate for us to provide them with a copy of the submissions of Counsel Assisting. Upon appropriate request, we will provide you with last known contact details where we have them (confidentially in relation to home contact details for former employees).

We also note that your letter proceeds on the assumption that in the absence of a request by the NSWPF for a witness to be called there is no longer an obligation on the Inquiry to give such persons an opportunity to be heard before the making of adverse findings about them.

¹ See *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J.

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We respectfully submit that this does not correctly capture the right to procedural fairness to be afforded to a person who is not represented. Such a right does not depend on the actions (or omissions) of a party to the Inquiry who is represented. The right to procedural fairness and natural justice of a non-party cannot be waived or abrogated by the actions of a person who is a party to the proceedings.

The requirement to afford a party procedural fairness arises both from the terms of the SCOI Act and common law principles.

In particular, s. 12 of the SCOI Act relevantly provides:

“(2) Where at a Special Commission it is shown to the satisfaction of the Commissioner that any person is substantially and directly interested in any subject-matter of the inquiry, or that the person’s conduct in relation to any such matter has been challenged to the person’s detriment, the Commissioner may authorise the person to appear before the Special Commission, and may allow the person to be represented by counsel or solicitor.

Section 12 of the SCOI Act is framed in discretionary terms, however, the common law makes clear that the obligation to afford procedural fairness is not a matter for the Inquiry’s discretion. It is well settled that procedural fairness is implied as a condition of the exercise of a statutory power through the application of a common law principle of statutory interpretation, namely that: “a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual.”² The presumption operates unless clearly displaced by the particular statutory scheme.³

There is nothing in the SCOI Act to displace this presumption. Accordingly, the Inquiry is bound to afford procedural fairness to persons affected by it in line with the implied procedural fairness requirements.

The content of those requirements has been addressed by the High Court in a variety of decisions. In *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 the Court noted:

“82...compliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a “practical injustice”.

83. Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person.”

In short, before any adverse finding of the type submitted by Counsel Assisting could be made, the persons who are subject to such adverse finding must, at least:

² *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [75].

³ *Ibid.* See also: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [14]-[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

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- a) be appropriately notified by the Inquiry;
- b) be afforded the opportunity to seek to be legally represented;
- c) be provided copies of the material on which Counsel Assisting have formed the views expressed in the CA Submissions; and
- d) be afforded an opportunity to seek to adduce such evidence or make such submissions as they consider appropriate.

In relation to paragraphs 69-75 of your letter, the allegations in CA Submissions (in particular at [635] – [641] and [817]) imply serious misconduct of a kind that would require proof by reference to the *Briginshaw* principle. This, in turn, would require all relevant witnesses to be called to give evidence. We submit that in the absence of the calling of all relevant and significant witnesses (whom we have identified previously) it is not open to the Inquiry to reach the conclusions suggested by Counsel Assisting.

We respectfully submit that it would be unjust for the Inquiry to reach factual conclusions of the type propounded by Counsel Assisting when relevant and significant witnesses have not been called. We have identified in our PH2 Submissions those parts of the submissions of Counsel Assisting where we suggest witnesses who were available have not been called for reasons that are not apparent.

If in Counsel Assisting's view, it is not reasonable or practical for those persons to be afforded procedural fairness, then (and consistent with the PH2 Submissions), it would be inappropriate for adverse findings about those persons to be made by the Inquiry. However, how Counsel Assisting or the Inquiry elects to proceed in the face of such issues, is entirely a matter for the Inquiry.

2. Officers-in-Charge of Documentary Tender Cases letter

We turn now to address your 3-page letter of 10 August 2023 regarding the officers-in-charge (**OICs**) of the investigations concerning the documentary tender cases.

As is apparent from the NSWPF submissions in the documentary tender cases, we do not act for *any* of the OICs referred to therein. In many cases, the Commissioner of Police has made concessions as to apparent deficiencies in the relevant investigations. At this stage, we are not able to give the assurance requested at [14] of Practice Guideline 1 in relation to any of the matters listed at [5] of your letter.

Contrary to the implication in your letter, the obligation of an inquiry to afford procedural fairness is not limited to allegations of criminal conduct or professional or other misconduct. Rather, the obligation to afford procedural fairness arises where, among other things, a person's status or reputation is likely to be affected.⁴

The SCOI Act itself contemplates, at section 12(2), that a person may seek leave to appear where their "*conduct...has been challenged to the person's detriment*". Plainly, the criticism levelled at the various OICs in the tender bundle cases constitutes a challenge to the conduct of the relevant officers to their detriment.

We agree with your observations that there may be limited benefit in calling officers formerly in charge of investigations that occurred 25, 30, 40 or 50 years ago. However, this does not entitle the Inquiry to make adverse findings about the conduct of those investigations based only on the

⁴ *Kioa v West* (1985) 159 CLR 550 at 582, 616-619, 632; *Annetts v McCann* (1990) 170 CLR 596 at 608..

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absence of documentary evidence as to whether or not various steps were taken. As has been repeatedly observed in our written submissions and those of Counsel Assisting, there are numerous police files where the documentation is either missing or lacking in some substantial way. As submitted in our submissions on the tender bundle cases, the mere absence of documentation of certain investigative steps is not sufficient evidence that such steps were not taken.

While it is likely that many of the OICs would not have been able to meaningfully assist the inquiry because of the length of time since the investigations, some of them may well have been able to provide useful evidence, whether of their actual conduct, or of their usual procedures or approach to aspects of investigation practice. As set out in various submissions made in the tender bundle cases, appropriate caution should be exercised in seeking to draw inferences from the absence of documentation of particular steps in circumstances where the material is potentially incomplete and the relevant OICs have not been asked to provide evidence.

Further and in any event, the practical reality that many of the relevant witnesses may have little or no recollection of the events in question does not relieve the Inquiry of the obligation to afford procedural fairness to them. A person who cannot recall an event is nevertheless entitled to respond to criticisms of them, including by seeking to be represented and making submissions if they so desire.

A process of the type contemplated at [14] of your letter is not, in our submission, permissible or appropriate. In the absence of clear words to the contrary in the SCOI Act, the obligation to afford procedural fairness is not abrogated by the practical constraints confronting the Inquiry.

Conclusion

In conclusion, we suggest that this Inquiry is unable at this time to make many of the adverse findings that have been suggested by Counsel Assisting for the reasons identified in the NSWPF's written submissions and above.

With respect to Public Hearing 2, with the exception of Det Supt Middleton, and possibly DI Grace and DSC Bignell, we are not, at this time, in a position to make submissions on the adverse findings proposed on behalf of any other person.

Submissions suggesting adverse findings about other named or otherwise identifiable persons who are not represented should not have been made by Counsel Assisting without providing procedural fairness to those affected. How Counsel Assisting or the Inquiry elects to proceed in the face of such issues is entirely a matter for the Inquiry.

We otherwise maintain the submissions we have made in relation to each of the documentary tender bundle cases.

Again, we do not act for any of the OICs, and do not consider that we are able to assist in the preparation of the statements contemplated at [13] of your letter in circumstances where there is a real potential for a conflict of interests in the relevant cases.

We note that the majority of the relevant officers are no longer employees of the NSWPF. Should you require the contact details of any of those officers, we will endeavour to assist with their last known addresses and contact details upon appropriate request.

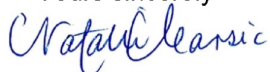
We also suggest that it would be appropriate to remove the allegations against such persons from public access unless or until they have been afforded the opportunity to be heard.

We await your urgent response to the matters raised herein.

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We otherwise wish to reiterate that the work the Inquiry has been tasked to undertake has the full support and cooperation of the Commissioner of Police.

Yours sincerely



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