

## **SPECIAL COMMISSION OF INQUIRY INTO LGBTIQ HATE CRIMES**

### **Submissions on behalf of Mr Michael Willing APM**

- 1 The suggestion that Mr Willing would deliberately mislead this Commission is illogical, not open on the evidence before this Commission and, if made, would be procedurally unfair to Mr Willing for the reasons explained below.

#### **Summary**

- 2 The Johnson family faithfully refused to believe that Mr Johnson had taken his own life, made an enormous contribution (including in time and money) to understand what had happened to Mr Johnson and ultimately, in certain respects, were proven to be correct. The suicide theory was proven to be wrong.
- 3 But the Johnson family's important and ongoing fight for justice does not mean that all the family's theories were correct. It also does not mean that all the conclusions drawn by the police were incorrect. As it transpires, they were both right and both wrong. Mr Johnson's death was not suicide, nor did it involve gay hate.
- 4 While it cannot be doubted that Pamela Young conducted a detailed investigation, it was clear that over time she lost all objectivity. It is clear that she came to believe that the Johnson family had received preferential treatment. And, rightly or wrongly, she formed the view that the Johnson family had received that treatment by reason of the family's wealth and connections, which other grieving families did not have.
- 5 This loss of objectivity caused Ms Young to devise and execute a strategy to publicly air her grievances. Ms Young knew that she needed an ally, and she chose her offsider, Ms Brown, to assist her. Ms Young and Ms Brown then deliberately concealed their plan from everyone at NSW Police, including Mr Willing.
- 6 The evidence demonstrates that Ms Young did not disclose prior to 13 April what she had been planning with the ABC. And she had been making those plans for months. Her strategy involved a high-profile program with a hand-picked journalist she trusted. She knew that what she had told Emma Alberici prior to 13 April was explosive. Indeed, she was accusing the Police Minister himself of inappropriate conduct and was accusing the Johnson family of buying access and influence to jump the queue.
- 7 Ms Young kept her strategy secret to avoid NSW Police taking steps to stop the interview going to air. She knew that her planned interview required approval from NSW Police, and she knew that NSW Police would never have approved what she wanted to say had she disclosed her intentions. She also knew that a studio interview would have mandated the presence of a media liaison officer (**MLO**), including for all the meetings in advance of the interview.

- 8 Revealing her true intentions would have undermined everything Ms Young sought to achieve. From her perspective, if she was unable to air her grievances publicly the Johnson family would have “won”.
- 9 The above matters are incontrovertible.
- 10 Having regard to those matters, it would be completely illogical for Ms Young to have taken active steps to conceal her intention to do a sit-down studio interview, in breach of police approvals and protocol, for months, and yet disclose the critical event to Mr Willing prior to giving that interview or prior to the interview going to air.
- 11 She needed to ensure that no one other than Ms Brown was aware of the studio interview until the program went to air. She knew that any senior officer who knew about the studio interview in advance would have been obliged to inform the NSW Police media unit and that NSW Police would have taken steps to stop the interview being broadcast.
- 12 Ultimately, Ms Young succeeded. The interview went to air. Georgina Wells was left ‘speechless’. Mr Willing was shocked and angry. And Georgina Wells’ reaction as revealed in her interview with Ashurst<sup>1</sup> is an important contemporaneous record of what actually occurred. In fact, Ms Wells told Ashurst that she had expected an interview involving quick grabs or snippets, statements consistent with the media release and did not expect an in studio interview. Quite properly, it has not been suggested that Ms Wells lied in her Ashurst interview.
- 13 Yet Counsel Assisting’s Submissions (**CAS**) asks the Commission to disbelieve Mr Willing’s direct evidence and to infer that Ms Young was prepared to, and did in fact, reveal her plan to him before the interview went to air, jeopardising a calculated strategy which she had planned and executed for months. This inference cannot be drawn in light of the evidence adduced before this Commission.
- 14 There are further reasons such an inference simply cannot be drawn:
- (a) First, an inference to this effect involves an assertion that a respected senior officer in would have deliberately and wilfully ignored a media strategy which had been approved by a Deputy Commissioner and the Head of Public Affairs, and that such a senior officer would have risked the wrath of the hierarchy, indeed committed career suicide, for no obvious benefit. Given what Ms Young said during the studio interview, it was inevitable that there would have been an investigation either by NSW Police or by the State Coroner.
  - (b) Secondly, during oral submissions on behalf of Mr Willing (T4379) the Commissioner made the point that failure to complain is often a very potent methodology by which one judges plausibility. In this case, a particularly potent matter is Ms Young’s failure to complain. That is, despite Ms Young being deeply aggrieved at Mr Willing’s preparedness to attribute the word ‘inopportune’ to her controversial statements on

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<sup>1</sup> NPL.0147.0001.0001

Lateline, and despite having conveyed her displeasure to Mr Willing, at no stage did Ms Young suggest (or even hint at) Mr Willing having approved her appearance on Lateline or the statements she made on Lateline. And whatever else may be said about her, Ms Young was not a shrinking violet. The only logical conclusion to be drawn from Ms Young's silence is that she did not inform Mr Willing of her plan, and Mr Willing did not sanction it. Similarly, the Commission cannot infer that Mr Willing's restraint in not immediately throwing Ms Young 'under the bus' tells against his evidence in circumstances where Ms Wells adopted the same restrained approach.

- (c) Thirdly, and importantly, the Commission should not engage in an inferential fact-finding process, contrary to Mr Willing's direct evidence and contrary to the overwhelming weight of objective contemporaneous evidence, where Ms Young, Ms Brown and Ms Wells have not been called to give evidence. Ms Wells and Ms Young in particular could have given further direct evidence of these matters and, in Ms Young's case, would likely have confirmed that she did not inform Mr Willing about these matters. To make a contrary finding in these circumstances would cause genuine practical injustice to Mr Willing.
- (d) Finally, it should be recalled that the 5pm conversation occurred 8 years ago, while Mr Willing was driving. Mr Willing should not be criticised for having an imperfect recollection of that call. Mr Willing has steadfastly maintained that Ms Young did not inform him she intended to do an in studio interview (or had done an in studio interview) and all the contemporaneous evidence is consistent with that evidence.

15 There is one final matter affecting the conclusions being sought by CAS. The adverse conclusions that CAS seeks to draw against Mr Willing do not fall within the Terms of Reference. We address this issue in further detail below.

#### **Structure of these submissions**

- 16 These Submissions will address in further detail the following matters:
- (a) Preliminary matters concerning Mr Willing and his evidence.
  - (b) The issue of solvability.
  - (c) The Lateline Interview.
  - (d) Other issues concerning Mr Willing.
  - (e) The Terms of Reference.

#### **Preliminary matters**

17 The starting point for this Commission should be an assumption that a person in Mr Willing's position and with Mr Willing's character and background would not set out to mislead. Mr Willing has been given the responsibility of extremely senior and critical roles within NSW Police, by

Government and now in the private sector. He has dedicated his life to public service. His Curriculum Vitae is in evidence and speaks for itself. In summary:

- (a) Mr Willing reached Deputy Commissioner level in the NSW Police. He led Homicide and Counter-Terrorism in a storied career. He had responsibility for the Lindt Café investigation.
- (b) The NSW Government gave Mr Willing a senior leadership role in relation to the bushfire crisis. Again, this was a critical and broad ranging appointment that required integrity, intelligence, dedication and an ability to manage and lead people.
- (c) Even Mr Willing's current role in the private sector involves benefitting public service law enforcement and national security.

There are very few people in the community with Mr Willing's unique skill-set and experience and Mr Willing has never before had reason to have his integrity questioned.

- 18 Mr Willing was asked to assist this Commission. He gladly did so. He was happy to attend voluntarily and provide whatever assistance he could to the Commission. Mr Willing accepts that the passage of time may mean mistakes are made. And naturally, Mr Willing's evidence would change as he was given access to more material and time to reflect on what had occurred, such as the revelations concerning Ms Young's lengthy and deceptive dealings with the ABC in the early months of 2015. However, there is no reason to doubt Mr Willing's integrity and there is simply no logical reason for Mr Willing not to have given frank and truthful evidence to this Commission. That is what he did.
- 19 There is also an absence of any direct evidence, or any compelling indirect evidence, to call into question Mr Willing's credibility. To deal with the absence of evidence, it seems that CAS have chosen to hint at unspecified police conspiracies involving unnamed senior officers to support the logic of the serious accusations being made. But CAS also omits evidence and analysis inconsistent with these unsubstantiated conspiracy theories. And CAS denigrates unnamed senior officers, some of whom are able to be identified, without those officers being called to give evidence.
- 20 The suggestion that there has been some sort of "conspiracy" is as necessary for Counsel Assisting to assert as it is wrong. Counsel Assisting has presumably done so because there is otherwise simply no compelling evidence or any logical reason to disbelieve Mr Willing or call into question his credit. And having regard to the Terms of Reference, there is no need to do so.

#### **The issue of solvability**

- 21 Before responding to the detail of CAS, we note some preliminary substantive matters. Those matters appear to have been overlooked or ignored in both the questioning of Mr Willing and in CAS.

- 22 To charge a person with murder, police need credible evidence. Theories are not good enough. The Director of Public Prosecutions needs to be satisfied that there are reasonable prospects of conviction.
- 23 In late 2012, the solvability of the Johnson case was described as zero, and rightly so. This is criticised at CAS [311], but that criticism is misplaced because there was no evidence which might later be able to be tested with better technologies, there were no known witness who may have been able to assist, there were no remaining leads and there were no gaps to fill: CAS [317]. CAS fails to point to a single further initiative that could have been taken.
- 24 Zero solvability does not mean that the case can never be solved. The most hopeless case may be solved by an admission or unexpected tip-off. If CAS [315] is suggesting that the evidence was, in fact, available because someone knew something but had not come forward, then the premise is flawed.
- 25 There is also no suggestion that any forensic evidence led to the arrest and charging of Mr White. As Mr Willing said, as noted in CAS [314], the evidence which led to the conviction was not available to police 'in any way' in 2012. And no such suggestion against that was made to him in cross-examination by Counsel Assisting. If it had been, there would have been no basis to suggest it. CAS [318] is another criticism of Mr Willing which is groundless.
- 26 There is also no suggestion, nor could there be, that the death was solved by anything given to police by the Johnson family as a product of their private investigations.
- 27 The contribution of the Johnson family was nevertheless significant. They faithfully refused to believe that Mr Johnson had taken his own life. They knew him better than anyone. They were proven to be correct. The suicide theory was proven to be wrong.
- 28 The fact that Ms Young ultimately lost objectivity says nothing about the quality of her earlier police work. She had concluded that there was no evidence of foul play and she was correct.
- 29 Assaults and homicides in the area do no more than leave open the theoretical possibility that that also happened to Mr Johnson. While theoretical possibilities open avenues of investigation, they do not prove cases. At the time of the Third Inquest, there was no basis to positively find that Mr Johnson died from foul play.
- 30 We also know from their written submissions what the respective parties told the State Coroner at the conclusion of the Third Inquest. Counsel Assisting made various submissions but ultimately said that it was open to find some form of foul play and 'equally open' to find such evidence insufficient: at [247]. The NSW Police did not actively submit that this was a suicide, only that it could not be ruled out and the police position therefore was not to seek a finding of suicide: at [23]. The NSW Police said that there was insufficient evidence for a positive finding of foul play, that foul play was a possibility and that there should be an open finding: at [25], [41-45]. The Johnson family submitted that this was a homicide such as an assault and likely

- to have been motivated by gay hate: at [2], [4] and directly criticised Mr Noone alleging significant shifts in his version of events: at [19].
- 31 The Coronial findings that left open foul play did so on the basis of similar gay hate assaults in the area or other parts of Sydney. That reasoning was theoretically open, but ultimately proven to be incorrect. In fact, neither Wilson J nor Beech-Jones CJ at CL, found that the death was motivated by gay hate and on Sentence, the DPP did not urge such a finding.
- 32 As noted in CAS [123]-[124], the findings at the Third Inquest also relied on a homosexual attack. The findings made the same erroneous inference of gay beat attacks as the Second Inquest. Gangs of men assaulting gay men at beats proved to be irrelevant. Ms Young had already decided that for herself. There was no evidence which would permit that as a positive finding, albeit it was open theoretically. The State Coroner was wrong to positively find that the death was caused by a gay hate attack.
- 33 The investigation of the Third Inquest, conducted by the State Coroner, also did not uncover the offender who would later plead guilty. No criticism could possibly be made of that. The evidence was unknown at that time. No investigation could have uncovered it.
- 34 CAS do not note the incorrect conclusions drawn by the Second and Third Inquest. And yet CAS assumes that any conclusion made by Coroner Milledge must be unchallengeable and effectively asserts that police were bound to accept them.
- 35 If it is the position of CAS that police were bound to accept, and only act on the basis that Mr Johnson was the victim of a gay hate attack, such an approach would have excluded the offender.
- 36 The theory with the most credence at that time was in fact suicide. Ultimately, that was also proven to be incorrect.
- 37 The evidence which ultimately led to the offender, Mr White, being charged only emerged after the Third Inquest. It led to the use of police informants and a recording of a conversation made of the offender in custody. Such is apparent from the Remarks on Sentence. That was the evidence which led to the guilty plea of manslaughter.
- 38 It cannot possibly be controversial that if the police had that information earlier Mr White would have been investigated, charged and convicted. It would be wrong to suggest that Ms Young would have ignored that evidence. No doubt if she had the evidence then, Ms Young would not have believed that Mr Johnson took his own life.
- 39 CAS [75] notes findings by Young and Lehmann made in April 2014. At that time, those findings were correct. There has been no suggestion by Counsel Assisting that they were wrong.
- 40 At the time of the Third Inquest, there was no credible evidence of foul play. There was no credible evidence of misadventure. There was evidence to support suicide as found by Deputy State Coroner Hand and noted at CAS [297]. The family were urging a gay hate murder. Ms

Young found no evidence to support that. She was convinced that Mr Johnson took his own life.

- 41 What no-one contemplated, because there was no evidence to support it, was that Mr Johnson met someone who was also gay and that the two of them went to the location together. The only person who ever thought this was Mr Willing who told Ashurst that he held that view at one point: CAS [378]. No-one contemplated that a punch, not motivated by gay hate or intending to kill, tragically caused Mr Johnson to fall to his death – and only because he was near a cliff edge.

### **The Lateline Interview**

- 42 As a dedicated homicide detective, Ms Young was extremely concerned about the many families who were grieving over unsolved murders. She allowed those concerns to dictate her behaviour and took on a personal crusade to fight for them. From her perspective, she did not like the fact that the Scott Johnson death was being allocated further resources when there was no evidence of foul play. She objected to the Johnson family having access to the Police Minister. She disliked the fact that the family could afford to assemble an expensive team - \$1m according to Mr Feneley<sup>2</sup> - to pursue the family's case theory. She did not like the fact that other cases were deprioritised.

- 43 Ms Young also knew that:

- (a) the senior police hierarchy would not support her forthright positions;
- (b) she was only authorised to speak off the record for backgrounding purposes (meaning that she could take some liberties because no public reference would be made to her comments in the media, but would permit the reporting to be more balanced in the face of the media campaign against NSW Police, to which the police could not respond directly);
- (c) she was not permitted to say what she wanted to say (but ultimately did say);
- (d) the police hierarchy would actively stop an on the record interview which adversely questioned the conduct of the Police Minister;
- (e) she had to organise the interview discreetly;
- (f) she could trust Ms Penny Brown, and no-one else.

- 44 Ms Alberici also understood these matters. Ms Young needed to keep the studio interview a secret until it was aired.

- 45 This is why she devised a covert and sophisticated plan. She raised backgrounding media conceptually but did not reveal that she had already well and truly commenced the process. She limited who was in the loop to Ms Brown. She replaced the journalist specifically picked by Mr Willing (Lorna Knowles). Neither he nor NSW Police had chosen Ms Alberici. It could

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<sup>2</sup> NPL.0138.0001.0106

- hardly be said that Mr Willing (and the NSW Police more broadly) were part of a conspiracy when the very journalist he had handpicked was replaced by Ms Young. Ms Young sought out a journalist who would give her what she wanted. It is not surprising that CAS do not criticise Ms Young or Ms Brown for their extraordinary concealment, deception and misconduct as doing so would simply highlight the absurdity of a suggestion that anyone else in NSW Police management had approved, welcomed or had advance notice of the interview on 13 April.
- 46 Even on the afternoon of 13 April, Ms Young kept her plans to herself. She had no other option. Ms Wells emailed Ms Young and Mr Willing at 2.15pm to update them on media after the announcement of the Third Inquest.<sup>3</sup> The media unit had to be informed of appearances and backgrounding. That email included media articles which had been posted online which noted that Mr Steve Johnson had spoken to the media outside the Glebe Coroner's Court. Mr Willing received that email and assumed that Mr Johnson was interviewed at Court because he had historically been interviewed at Court. This was correct.
- 47 Ms Young should have informed Mr Willing and Ms Wells, particularly Ms Wells, that she had agreed to a studio interview that evening. She did not because she did not want to tell anyone until it went to air. To suggest that she told Mr Willing before the broadcast that she would or had been recorded in studio is inconsistent with all the evidence. In particular, it is inconsistent with the incontrovertible evidence of Ms Young having adopted a calculated media strategy for weeks prior to the Lateline interview, which she did not disclose to Mr Willing and which she, in fact, actively withheld from Mr Willing and the police media unit.
- 48 It was positively put to Mr Willing, as a challenge to his evidence, that by 6.30pm on 13 April he did not know whether Ms Alberici had spoken to Mr Johnson outside Court.<sup>4</sup> This was incorrect. He had been informed in the email sent by Ms Wells at 2.15 pm.
- 49 So, when Mr Willing said that he understood that Mr Johnson and Ms Young would be on Lateline in the same format, he was correct. He was informed on the afternoon of 13 April that Mr Johnson had spoken to the media at Glebe. And he knew that he had authorised Ms Young to give a bland doorstep at Glebe. Coupled with the reference to Ms Brown's hair and lipstick in the email from Ms Young, Mr Willing was justified in assuming that the Lateline appearances would be limited to the interviews at the Glebe Coroners Court.
- 50 Mr Willing's belief is also consistent with Ms Wells' understanding of what Ms Young had told Mr Willing. Ms Wells explained her position to Ashurst<sup>5</sup>. She said that she followed police processes which included recording the information such that the relevant persons would be informed and able to access that information. CAS must be suggesting that Mr Willing knew about the Lateline interview in advance, did not want to do anything about it, yet told Ms Wells who would formalise that very information. Which the media unit and senior police could

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<sup>3</sup> NPL.0138.0001.0106

<sup>4</sup> T 3785.21

<sup>5</sup> NPL.0147.0001.0005



- access. The suggestion is illogical. This is an important factual matter which CAS do not analyse or rationalise. CAS is simply silent about this evidence.
- 51 It would also be inconsistent with the way Ms Young and Ms Brown conducted themselves with Ms Alberici. The approved media strategy *contemplated* going on the record if a Third Inquest was announced and the Young Statement released. However, there would need to be further consideration given to that change in approach at the most senior levels. The email from Ms Wells of 14 April made that clear<sup>6</sup>. And that was obvious given that the strategy had been approved by a Deputy Commissioner and Head of Public Affairs. It would have been career suicide for a less senior officer such as Mr Willing to have authorised, or remained silent about, a proposed in studio interview during which the Police Minister himself would be pilloried.
- 52 None of the people mentioned at CAS [395] have been called to give evidence. In the case of Ms Wells, this is despite the fact that she spoke to Ms Young about the possibility of going on the record: CAS [408].
- 53 CAS [420] says that there was no reason to believe that whatever happened on 10 April did not finish on that day. This is incorrect:
- (a) Firstly, there was no evidence that the backgrounding had finished on 10 April. Mr Willing had not heard the outcome of it<sup>7</sup>. Ms Young had also spent time with The Australian earlier that day. Mr Willing's dot point notes for the Ashurst interview<sup>8</sup> record that 'later that afternoon' being after 1.54 pm, Ms Young was on her way to the ABC. They may have run out of time<sup>9</sup>;
  - (b) Secondly, Ms Young informed Mr Willing on 12 April that the ABC had been in contact to clarify a few things CAS [421]. The backgrounding clearly had not finished on 10 April;
  - (c) Thirdly, the Inquest was announced on 13 April. Why would that not be a particularly notable event that warranted further backgrounding? It would make eminent sense for the backgrounding to continue to the day of the major announcement, which was the whole point of the police media strategy.
- 54 The focus of Mr Willing's examination, and CAS, is the 5pm phone call. It is suggested that Mr Willing's evidence was not "true" (CAS [437]). It is also suggested, incorrectly, that what Ms Young said in a conversation with Mr Willing at around 5pm on 13 April 2015 was "*the subject of a considerable amount of evidence*" (CAS [431]). The submission that there was a "considerable amount of evidence" about the 5pm call is surprising and wrong. In fact, there is an absence of evidence about this issue, and certainly an absence of any compelling evidence to support the findings for which Counsel Assisting contends. The most critical witnesses in

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<sup>6</sup> T 3749.27-37, T 3750-51, T 3769.32

<sup>7</sup> T 3762.28

<sup>8</sup> NPL.0001.0012

<sup>9</sup> See also T 3761.25

- relation to this issue were not called to give evidence. Ms Young could easily have told the Commission whether she had called Mr Willing before or after her attendance at the ABC on 13 April. She could also have told the Commission what she said to Mr Willing on that call. Ms Young physically attended the Commission on one of the days that Mr Willing gave evidence, so we know she was in the jurisdiction. Counsel Assisting could have asked Ms Young these questions. Mr Willing could also have asked Ms Young pertinent questions on issues about which Counsel Assisting now seeks to impute his character.
- 55 We also have no evidence from the ABC about when the interview on 13 April was actually recorded. No doubt ABC's recordings would have time stamps. Material was sought by the Commission from the ABC as we have seen internal ABC emails. Again, this leaves open the possibility that Ms Young's explosive interview was recorded after the 5pm phone call.
- 56 It does not matter why witnesses were not called or why obvious evidence is not before the Commission. The Commission may have good reason for this. But the fact remains that this evidence was not before the Commission and if the findings contended for by Counsel Assisting are made, and Mr Willing's evidence is to be disbelieved, the failure to call Ms Young (and others) in light of the important evidence summarised above would cause serious, practical injustice to Mr Willing.
- 57 Mr Willing was an extremely busy officer and had just attended a funeral for a highly respected former Commander and was asked about a conversation that occurred 8 years ago while he was driving. It is therefore understandable that he does not have a perfect recollection of the telephone conversation with Ms Young. He has, however, steadfastly maintained that he was not made aware of a studio interview. His dot point notes and what he told Ashurst make that clear.
- 58 By the time of the 5pm phone call, Mr Willing had no reason to believe that Ms Young was doing anything other than complying with the agreed backgrounding strategy. No problem had emanated from the backgrounding interviews on 10 April with either The Australian or the ABC, despite the absence of a MLO. In fact, Ms Wells had informed Mr Willing and Ms Young that the backgrounding with The Australian had gone well.<sup>10</sup>
- 59 Mr Willing was not aware that Ms Young had gone further than she should have at the Glebe doorstep. As far as he knew, this experienced Detective was acting within the bounds of her authority and in accordance with relevant approvals. While NSW Police was aware of some of Ms Young's grievances, they had no reason to believe an experienced police officer such as Ms Young would act on her personal grievances by disregarding the media strategy approved by a Deputy Commissioner.
- 60 The pervasive theme of CAS is that Mr Willing knew what Ms Young was doing and either encouraged it or did nothing about it. Counsel Assisting does not, for example, suggest that Mr Willing placed too much trust in Ms Young, should have insisted on an MLO accompanying

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<sup>10</sup> NPL.0138.0001.0106

Ms Young to interviews, should have asked more questions of Ms Young or been more sceptical about what she was telling him. While that would also be wrong (as Mr Willing was entitled to trust Ms Young as a capable, experienced police officer), it would certainly not have the same prejudicial impact for Mr Willing as the finding urged by CAS. In fact, Mr Willing did tell Ashurst that he had made a mistake in not insisting on an MLO accompanying Ms Young to the interviews, an appropriate and creditable concession.

61 There are further compelling reasons why it would be an error to conclude Mr Willing knew what Ms Young was doing and either encouraged it or did nothing about it:

(a) First, Ms Young has never claimed that she was given permission or even tacit approval by Mr Willing. She has never claimed that Mr Willing knew about her interview being on the record. Even when Ms Young felt that Mr Willing was not protecting her, she did not assert any knowledge or complicity on his part. Ms Young's character has been vividly revealed in the evidence before the Commission. She is not a shrinking violet and would not have refrained from making her feelings known if Mr Willing had said or done anything to have provided her with permission or tacit approval to do the in studio interview. This inference is particularly compelling when one considers Ms Young's reaction to Mr Willing's use of the word 'inopportune' in the media release. It is inconceivable that if Mr Willing knew about the studio interview in advance, or had permitted the interview, Ms Young would not have made that perfectly clear. Indeed, it is to be recalled that Ms Young was a senior officer who emailed herself text messages in order to secure relevant information.

(b) Secondly, at its absolute highest, Ms Young could only have received authority from the release of her statement on 13 April. However, by this stage, she had already promised Ms Alberici an explosive and exclusive interview. She had provided her statement without authority in February, well in advance of the backgrounding strategy. She had allowed Ms Alberici to record the interview on 10 April with knowledge that it might be used to promote another ABC program. None of these matters fell within Ms Young's authority. The interview for 13 April had been pre-arranged in advance with full details, much of which had been rehearsed on 10 April. Ms Young deliberately kept this behaviour from senior police for the obvious reason that they would have put an immediate to stop it had they known. As late as the afternoon of 13 April, Ms Young did not inform Mr Willing or Ms Wells about the Lateline interview which she had agreed to give. She did not respond to the Ms Wells' email of 2.15 pm. It cannot be correct that Ms Young, having enacted a secret and deliberately deceptive plan calculated to publicly air her grievances, then informed Mr Willing and risked him thwarting that plan.

62 Ms Young had been authorised to give a doorstep at Glebe. We do not know if she deliberately avoided that doorstep in order to give Ms Alberici and the ABC sole access at Glebe. If she had been called to give evidence, she would have been asked that question.

- 63 But whatever her motivation, Ms Young informed Mr Willing and Ms Wells that she was too late for the media pack. This caused the bland media statement to be released<sup>11</sup>. That statement would have been sent to Ms Young by email. Again, if Ms Young had given evidence, she would have been asked if she read that media statement before calling Mr Willing at 5pm. If, as one would expect, Ms Young did read the media statement she would have known that she had to correct the record and inform the NSW Police that she had in fact given a doorstep interview to Ms Alberici. Because if that was ascertained, for example, by police media seeing a clip on the 7pm news or a promotion for it, police media would have realised in advance of the Lateline broadcast that Ms Young had in fact spoken to a media outlet at Glebe. Ms Young had to relay to Mr Willing or Ms Wells that she had spoken to the ABC at Glebe. And that is what she did. And that is the message that Mr Willing relayed to Ms Wells. And that is what Ms Wells told Ashurst in her interview. This is entirely consistent with Ms Young's text messages to Mr Willing and Ms Wells (which she forwarded to herself) and which triggered no concerns from Mr Willing or Ms Wells and was clearly intended by Ms Young to refer to the Glebe doorstep<sup>12</sup>.
- 64 Counsel Assisting's theory seems to be that Ms Young never told the police about her doorstep at Glebe, even though it was on the news. That is, she never corrected the record even though her earlier communication about having missed the media would be patently misleading, and obviously so.
- 65 CAS [426] asserts that, in fact, Ms Young lied to Mr Willing, about the Glebe doorstep and suggests that this was significant: CAS [427]. The logic is tortured. It seems to be suggested, on the one hand, that Ms Young was prepared to lie to Mr Willing about the Glebe doorstep but was inexplicably prepared to 'come clean' and tell him the truth later that same day about a recorded Lateline interview.
- 66 What has also not been analysed in CAS is the answer recorded at CAS [441] and CAS [443]. It is possible that the ABC interview was later. Again, if Ms Young had been called to give evidence, that could easily have been resolved. It could also have been resolved by Ms Alberici, if she had been called.
- 67 CAS [436] asserts that Mr Willing's evidence given on 20 February 2023, without having been given, and without having considered, all the relevant information, was not just mistaken but untrue. For all the reasons outlined in this submission, CAS is wrong and cannot be sustained.
- 68 CAS [444] is telling. What Ms Wells thought would be on Lateline was not 'unclear' as CAS is compelled to assert. Ms Wells' lack of precision does not matter when we know for a fact that her belief does not support what is alleged in CAS. Ms Wells' understanding is important and is entirely consistent with the doorstep and with Ms Young speaking in line with her authority. What Ms Wells told Ashurst is entirely inconsistent with the serious and unfounded allegations

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<sup>11</sup> NPL.0138.0002.7545

<sup>12</sup> NPL.0138.0001.0042

made in CAS about the 5pm phone call. It is abundantly clear that Ms Wells' understanding, as gleaned from her call with Mr Willing, was as follows:

- (a) Ms Wells believed there would be 'snippets' or 'quick grabs' in line with the media statement;
- (b) Ms Wells did not believe that Ms Young had participated in a studio interview and she did not expect a studio interview; and
- (c) Ms Young's studio interview itself left her speechless.

What Ms Wells told Ashurst is also entirely different to either conclusion CAS draws at [447].

69 Ms Wells' Ashurst interview compounds the practical difficulty and potential injustice for Mr Willing of the Commission not having called Ms Young (or Ms Brown) to give evidence.

70 There is further contemporaneous evidence validating Mr Willing's position:

- (a) The messages between Ms Fiori and Mr Doyle at the ABC suggest that the plan was for Ms Young to arrive at the ABC at around 5pm for the interview.
- (b) Emails were exchanged between ABC staff up to 4.16 pm regarding parking for Ms Young which strongly suggests she had not arrived at the ABC studio by that time.
- (c) Ms Young would have had to park, enter the building, meet the relevant staff member(s), go to make-up and presumably have a final discussion with Ms Alberici.
- (d) The interview would then itself would have to be recorded. After that, and after whatever other formalities would need to occur, Ms Young would have been able to return to her car and leave.

71 This sequence of events makes it much more likely that the call described as the 5pm call between Mr Willing and Ms Young occurred before Ms Young arrived at the ABC studios. Ms Young could not have completed a 5pm studio interview in time to make the call at anywhere near 5pm. On the evidence before the Commission, it cannot be said that Ms Young recorded the in studio interview before the 5pm phone call to Mr Willing and it therefore the reference in the materials to a recorded interview having taken place by the time of the 5pm phone call can only be a reference to the recorded 'door stop' interview with the ABC at Glebe.

72 It is said at CAS [451] that Mr Willing's dot point notes prepared in advance of his interview with Ashurst are a believable account. The relevant dot point note includes:

'... she had recorded an interview with the ABC and that her interview, along with interviews with Steve Johnson and Dan Glick, would feature on that night's Lateline program.'

73 This suggests that the format of the interviews with Ms Young and Mr Johnson were the same. The interview featuring Mr Johnson was from Glebe. While Lateline may be a feature program with its own style, it did include clips and grabs. Moreover, by this time Ms Wells had emailed Mr Willing (and Ms Young) and Mr Willing therefore knew that Mr Johnson had spoken to media outside Glebe Court. Mr Johnson did not participate in a studio interview. Mr Willing assumed,

at that time, that the Lateline interview was the original back-grounding discussion. That is, it was certainly not a studio recorded interview. The 7pm bulletin also said that the big story was the fact of a Third Inquest. Not that the officer in charge had made extraordinary allegations against the Minister and the Johnson family. Anyone watching the 7pm promotion of Lateline would have expected the Lateline program to be as anodyne as has been reported at 7pm. The only logical inference is that the ABC and Ms Young deliberately agreed to refrain from revealing the 'explosive' aspects of the Lateline interview and for the same reason, Mr Willing was not told about the in studio interview or what Ms Young had said in that interview. It is also clear from Mr Willing's notes that Ms Young did not suggest that Mr Willing's expressed views had changed. Or that he knew about the studio interview in advance. These dot points support Mr Willing's evidence. He also told Ashurst (page 6) that he:

'assumed it would be a door stop or just the material from the background made into a story'. 'At most a stand-up type interview'.

It was never put to Mr Willing that he lied in the Ashurst interview.

- 74 The best evidence of what Mr Willing recalls about the events leading up to the Lateline interview is the transcript of the Ashurst interview and his preparatory notes. That interview was conducted less than two weeks after the Lateline interview and Mr Willing confirmed that there was no discussion about Ms Young doing an 'on the record' interview.
- 75 Mr Willing's dot point summary is also consistent with the 6.18 pm email from Ms Wells noted at CAS [453]. Both Ms Young and Mr Johnson had been interviewed on camera and were to appear on Lateline. Both were interviewed at Glebe. Ms Young had been given permission to speak at Glebe. By 6.18 pm, Ms Young had no authority to participate in a studio interview. She had no authority to do anything more than what the bland media statement said. And no-one in the police media unit had any idea that she would be giving a studio interview. The information for the 6.18 pm email came from Mr Willing. He had the same belief. In Mr Willing's dot point notes for the Ashurst interview (second last point on page 5), he in fact refers to a direct conversation he had with Ms Young in the afternoon of 15 April, and records that Ms Young had asked him a question as follows:

She again asserted that she had permission to go on the Lateline program and I said only the Director of Public Affairs could authorize that. She asked, "so what you are saying is that after the backgrounding of the jourmos and the release of the statement on the public records she had to come back and seek authorization before doing the Lateline interview". I said, "Yes." DCI Young then outlined that she had been receiving calls all day about the interview and was fatigued so she didn't want to discuss it any more. We then ended the call.

It is particularly notable that having been given the opportunity to talk to Mr Willing and express her views privately, Ms Young did not say that Mr Willing had explicitly or tacitly authorised to do what she did. It is also notable that Mr Willing did challenge Ms Young about why she participated in an in studio interview when she was not authorised to do so.

- 76 The submission at CAS [454] that Ms Wells must have understood that the interview was not a doorstep is inconsistent with she told Ashurst. Moreover, it is difficult to understand how this proposition can be put when the Commission has not heard evidence from Ms Wells particularly when the proposition is inconsistent with the evidence before this Commission. Ms Wells' emails and interview with Ashurst makes it clear that she had no reason to believe at 6.18 pm that Ms Young was not following the approved media strategy and complying with her authority. Mr Strath Gordon told Ashurst that he had a long history with Ms Wells and trusted her judgment. He found her to be mature, reliable and generally risk averse. The Commission cannot find that Ms Wells lied to Ashurst.
- 77 Despite all this evidence it has not been explained why a senior and well-respected officer such as Mr Willing would have behaved so recklessly? The Commission simply has no basis for such a finding, particularly where it does not have evidence from Ms Young, the only other person who could have explained what Mr Willing had been told or what had (or had not) authorised her to do.
- 78 In fact, all the available evidence reinforces Mr Willing's recollection. Ms Young sent a text to both Mr Willing and Ms Wells where she referred to the exclusive on Lateline that night<sup>13</sup>. There was no suggestion there was to be a studio interview. There was however a reference to the hair and lipstick of Ms Brown. There was never a suggestion that Ms Brown would be interviewed by Lateline in any format. But clearly, she would be alongside Ms Young in a doorstep or walking footage. And that is what happened. The Young texts to both Ms Wells and Mr Willing referenced Glebe and Glebe only. Even though Ms Young knew that she had a studio interview pre-arranged she had kept that secret. She did not reveal it in the text. Why would Ms Young have revealed it for the first time in a call with Mr Willing at 5pm?
- 79 Mr Willing did not have to have watched the ABC news to form the view referred to at CAS [461]. He had authorised a doorstep and Ms Young had no authority to do anything else. She had kept the rest hidden from everyone but Ms Brown.
- 80 At CAS [462], a hypothesis is advanced by Counsel Assisting without having asked Ms Young. The hypothesis is in any event obviously mistaken. The reference to the ABC was a choice over Fairfax generally. It was not a reference to who Ms Young was glad she had spoken to at Glebe. It related to the backgrounding strategy. That does not mean that the message does not relate to Glebe. The final reference was to Ms Brown which could only have been relevant to Glebe.
- 81 CAS [469] elides messages. The reference to the Deputy Commissioner relates to the media strategy in response to the 'media being pushed by the Johnson family'. That is, backgrounding. Mr Willing uses the term 'interview' interchangeably with 'backgrounding'. Ms Young was not 'interviewed' in the usual sense by The Australian. It was backgrounding only. Mr Willing was not giving evidence when communicating with Ms Young and others and his

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<sup>13</sup> NPL.0138.0001.0042

- communications should not be deconstructed as if he was giving evidence. Mr Willing used his own perhaps imprecise short-hand term for what he assumed was doorstep interview. However, when analysed with all the other material available to the Commission it is clear Mr Willing was not referring to an in-studio interview.
- 82 Mr Willing had no reason to distrust Ms Young at 5pm on 13 April. He had had a busy week in relation to other multiple major investigations. He had just attended a funeral of a valued former Commander of his Unit. He was organising a nationwide conference. What he expected to be an anodyne interview on Lateline would hardly be a priority. Of course, he told Ms Young that he would watch the program when she sent a text to Ms Wells and him. What else was he supposed to do? No doubt he would have watched if he was able to do so.
- 83 And what if he had immediately contacted Ms Young as CAS [477] criticises him for not doing? Why is that any different from doing so the next day when it became obvious that the interview had created a storm. The content of Ms Young's interview was explosive. Would someone have accused Mr Willing of forewarning Ms Young when it was inevitable an internal investigation or an investigation by the coroner would take place?
- 84 It is unclear what inference is Counsel Assisting is asking the Commission to make in CAS [477]. Is Counsel Assisting suggesting that despite being kept in the dark about the discussions with the ABC over several months, Mr Willing was in cahoots with Ms Young for her to say what she did, despite senior levels of police and the media unit having approved a very different strategy? That is, to allow the interview to take place despite a Deputy Commissioner's involvement? This serious allegation was not put to Mr Willing. There is simply no evidence to corroborate it. And Ms Young, who is obviously centrally relevant to the allegation, was not called to give evidence about it and has not said anything about such a conspiracy in writing or even hinted at it. Moreover, Ms Wells knew what Mr Willing knew. And she was 'speechless'.
- 85 It is suggested at CAS [503] that Mr Willing supported what Ms Young said. That was not put to him and is wrong. Nor was it put to him that he did not disagree with it. He gave evidence that he did not believe that the Police Minister had behaved inappropriately or that the Johnson family had improperly influenced the judiciary<sup>14</sup>. A further slur is made against unnamed others in State Crime Command. None of those people have been given the opportunity to defend that allegation.
- 86 No-one in police criticised Mr Willing for not doing anything specifically. They knew what was expected of him. Mr Willing had one obligation, which he fulfilled – and that was to inform the media unit, which in turn informed the Police Executive, of the 5pm phone call.
- 87 The immediate reaction from Mr Finch was an example of what would happen as a consequence of a lack of approval. Who authorised the interview would be ascertained. Who knew about it would be determined. None of this would have happened if a police conspiracy within State Crime Command, or otherwise, existed. Ultimately, Ms Young was the one who

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<sup>14</sup> T 3741.43



- was to be investigated via a Part 8A complaint. That investigation could not proceed until the Coroner had determined his course of action regarding possible contempt proceedings against Ms Young. When he ultimately did, she avoided that investigation by going off sick. It was not 'not proceeded with' or dropped per se.
- 88 There was no suggestion that Mr Willing had behaved improperly at all. He appropriately informed Ms Wells. He clearly did not approve the Lateline interview as he did not have such authority. He clearly did not know in advance that a studio interview with Ms Young was to be aired – let alone an explosive one. He had been kept in the dark.
- 89 CAS refers to, and criticises, the purported attitude of Ms Young and Mr Willing, to the Johnson family suggestion of gay hate homicide at CAS [354ff]. References are made to text messages. The fact that the police were correct to reject gay hate homicide seems to be irrelevant to Counsel Assisting. A huge amount of police and public resources was devoted to that issue, despite their misgivings.
- 90 Mr Willing explained in his evidence what he was doing<sup>15</sup>. His dot point notes are also more extensive than quoted in CAS. Leadership calls for pastoral care when needed. Ms Young was under his command. She was under extreme stress and the fallout from her ill-fated interview the day before had begun. She had been personally attacked by the Johnson family for some time. Her reputation, despite her hard work, was in jeopardy. She was inconsolable and in tears. His repeated attempts to speak to her had failed. He had failed to convince head office to find wording that suited her. Mr Willing had attempted to speak on the phone a number of times. When she finally responded, by way of text, Mr Willing had her engaged. And he tried to calm her down and support her. Mr Willing was the person dealing with the Johnson family, Ms Young and the State Coroner. He had to appease everyone. He had to protect his team when he could, particularly those who were at risk of going off sick. The suggestion at CAS [359] that he wanted to prevent a finding of homicide is completely untenable and was not put to him in cross-examination.
- 91 Is it seriously being suggested that if the ultimate evidence came out before or during the Third Inquest that Mr Willing and Ms Young would have done anything to suppress the truth, just to post a 'win' against the Johnson family? Because unless it is being suggested that they would have perverted the course of justice, the submission by Counsel Assisting is utterly without merit.

#### **Other issues concerning Mr Willing**

- 92 CAS [307] misunderstands how roles in the NSW Police Force work. Mr Willing was not the Homicide Commander until November 2017. It may suit the temporal and staffing narrative which CAS seeks to urge: CAS [342-43, 345, 347, 361-62] but it is based on an incorrect

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<sup>15</sup> T 3823ff

- understanding of police roles. Mr Willing had no effective role at NSW Police Homicide from April 2017.
- 93 In early April 2017, Mr Willing was tasked by Commissioner Fuller to work on the Lindt Café matter. That is what he did from then until he was appointed Assistant Commissioner Terrorism & Special Tactics. The responsibility for the Homicide Squad (including the Unsolved Homicide Team) was taken on by the Acting Homicide Commander. That does not mean that that person acted as Mr Willing's deputy. That person assumed full control and responsibility of Homicide. Mr Willing was not running Homicide and Lindt Café at the same time.
- 94 The thrust of the criticism comes at CAS [361-62]. However:
- (a) Mr Willing's role as head of Homicide effectively ended in April 2017 and no evidence is relied on to suggest otherwise.
  - (b) Even if he was aware at a general level of relevant events, it cannot seriously be suggested that Mr Willing was aware of the minutiae of the investigations when he was engaged full time with the Lindt Café matter.
  - (c) There is no evidence that Mr Willing knew what was happening after April 2017 when he ceased performing the role as Homicide Commander.
  - (d) Members of the Unsolved Homicide Team were not incapable of exercising their own judgment and it is unfair to make any suggestion to the contrary in circumstances where they have not given evidence.
  - (e) SF Parrabell was, appropriately, not conducted by the Unsolved Homicide Team. Former Commissioner Fuller was not called to explain that strike force and his oversight of it.
  - (f) By the time SF Parrabell and Neiwand started, SF Macnamir was in the hands of the State Coroner.
- 95 CAS mentions, but fails to accept or analyse, the steps Mr Willing took in relation to Macnamir.
- (a) In October 2013, he asked the Crime Commission to review SF Macnamir. This step, to retain an independent expert agency to conduct a review, is inconsistent with the submissions being made by Counsel Assisting. This step would have helped appease the Johnson family, hardly suggestive of wanting to defeat them. If the investigation was flawed, this would be exposed. If Mr Willing had done anything wrong, that would also be at risk of being exposed.
  - (b) The Crime Commission report, delivered in February 2014, found that the investigation had been comprehensive and thorough and had not identified any line of inquiry that had not been undertaken. This finding is at odds with the criticism made in CAS that the Johnson case had a zero solvability at that time.

- (c) In March 2014, Mr Willing asked the State Coroner to conduct a formal examination: CAS [382-83]. Again, if anything had been done ineptly, why invite independent scrutiny. If wanting to oppose the Johnson family to defeat them, why do something which might lead to a Third Inquest?
- 96 None of this means that the NSW Police could not take the view that a Third Inquest did not have a basis for a different finding to the Second Inquest: CAS [393]. The view expressed by NSW police was in fact correct. The gay hate attacks were irrelevant and therefore the open finding previously made was correct. And the Third Inquest did not identify the offender.
- 97 One final matter ought to be noted. The 'Unsolved Homicide Team' prepared a report dated 25 September 2013 entitled "*Issue Paper from Detective Chief Inspector John Lehmann re: Assessment of 30 potential 'gay hate' unsolved homicides by the Unsolved Homicide Team*" to determine if any bias motivation existed<sup>16</sup>. Mr Willing endorsed this report (as Acting Director, Serious Crime Directorate) and again endorsed it in his January 2014 'issues' report.
- 98 This Commission has now investigated the majority of the cases referred to in the Lehman report and it seems that Counsel Assisting largely agree with the positions outlined in that report. In fact, of the cases that this Commission has examined, with the exception of the matters where DCI Lehmann and Young could not find records, it seems Counsel Assisting agree with the Lehmann/Young report conclusions in all but one case (that of John Gordon Hughes – where a person had been prosecuted and Counsel Assisting have made submissions concerning his possible motive).

### Terms of Reference

- 99 The Terms of Reference are dated 13 April 2022 and are as follows (our emphasis):
- We hereby authorise you as Commissioner to inquire into and report and make **recommendations** to Our Governor of the said State on:
- 1 The **manner and cause of death** in all cases that **remain unsolved** from the 88 deaths or suspected deaths of men **potentially motivated by gay hate** bias that were considered by Strike Force Parrabell.
  - 2 The **manner and cause of death** in all **unsolved suspected hate crime** deaths in New South Wales that occurred between 1970 and 2010 where:
    - i. the victim was a member of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community; and
    - ii. the death was the subject of a previous investigation by the NSW Police Force.
- AND hereby establish a Special Commission of Inquiry for this purpose.  
AND We direct you, **in conducting the inquiry, to have regard to:**
- 3 The findings of previous inquiries and reports, including:
    - i. the interim and final report and findings of the inquiries conducted by the Standing Committee on Social Issues into Gay and Transgender hate crimes between 1970 and 2010;

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<sup>16</sup> SOCI.74906\_0001

- ii. the report and findings of Strike Force Parrabell; and
- iii. the AIDS Council of New South Wales report, In Pursuit of Truth and Justice (2018).

AND **We direct you**, in conducting the inquiry:

- 4. to establish such arrangements as the Commissioner considers appropriate for evidence and information, including the testimony of witnesses in current and previous inquiries, to be shared with the inquiry in a manner that avoids unnecessary duplication and minimises trauma to witnesses;
- 5. **to operate in a way that avoids prejudice to criminal investigations, any current or future criminal prosecutions, any other contemporaneous inquires;** and
- 6. that the Commissioner is not required to inquire, or to continue to inquire, into a particular matter to the extent that the Commissioner is satisfied that the matter has been or will be sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

100 Mr Scott White was recently sentenced by Beech-Jones CJ at CL: *R v White* [2023] NSWSC 611. His Honour's remarks on Sentence state at [6-7] that:

On or about 12 May 2020, the offender was arrested for the murder of Dr Johnson and refused bail. He has not been released from custody since. On 28 January 2021, the offender was committed to the Supreme Court for trial. Although he was not formally arraigned, sometime thereafter the Court was advised that the offender would plead not guilty. His trial was fixed to commence on 2 May 2022 with various pre-trial arguments listed during the Court vacation on 10 January 2022. Prior to pre-trial argument commencing, the offender was arraigned. He pleaded guilty to murder. Apparently, this came as a surprise to his legal representatives. There was an application to withdraw the plea. This was refused on 13 January 2022 (*R v White* [2022] NSWSC 11).

101 As at the date the Terms of Reference were published, the offender had pleaded guilty to the murder of Mr Johnson. As at the date of the establishment of this Commission, the death of Mr Johnson was not 'unsolved'; a criminal prosecution was proceeding.

102 On 3 May 2022, Wilson J sentenced the offender for murder. Wilson J did *not* find that the death was potentially motivated by gay hate.

103 On 18 November 2022, the Court of Criminal Appeal set aside the guilty plea. The matter was set down for an application to withdraw the murder plea. The accused was seeking a trial at a time when this Commission was taking evidence on the same death.

104 On 23 February 2023, Mr White was allowed to withdraw his plea and enter a plea to manslaughter in full satisfaction.

105 The sentence was pronounced on 8 June 2023. Beech-Jones CJ at CL, like Wilson J, *did not* find that the death was motivated by gay hate. He found that the offender was an 18-year-old man, who admitted he was gay to both police and witnesses who were clearly informants. He was a young man who had been homeless since he was 15 years of age, was dysfunctional, had learning difficulties, was disadvantaged and cognitively impaired. He had been bashed as

- a young person. He had also committed acts of violence as a young person and had attempted to take his own life on a number of occasions.
- 106 Not only did the *DPP* *not* urge a finding of gay-hate motivation, but it was also accepted between the parties that Mr White was gay and that he and Mr Johnson went to that gay beat together after a few drinks. This was not the position adopted by Ms Young on sentence. The matter had nothing to do with her by this stage. This was the position taken by the DPP after a thorough analysis of the evidence.
- 107 What this means is that since 13 April 2022, the death of Mr Johnson has not been unsolved, and any investigation by this Commission into the death of Mr Johnson therefore falls outside the Terms of Reference.
- 108 Moreover, from 13 April 2022, it has not been the case that the death of Mr Johnson was motivated by gay hate. That possibility had been excluded entirely. For this additional reason, any enquiry by this Commission into the death of Mr Johnson falls outside the Terms of Reference.
- 109 From 13 April 2022 until 8 June 2022, there have been criminal proceedings on foot in relation to the death of Mr Johnson. Until 23 February 2023, the matter may have gone to trial. With respect, this Commission should not have been considering the death of Mr Johnson.
- 110 Between 23 February 2023 and 8 June 2023, the sentencing proceedings were on foot. Even on sentence, prejudice was possible. A finding of gay-hate as a motivation would have aggravated sentence. With respect, this Commission should not in these circumstances have been considering the gay hate motivation angle.
- 111 An example of the prejudice that could have been caused to extant criminal proceeding relates to the question of how Mr Johnson died. This has been a focus of this Commission. There has long been a contention from some that this was a homicide and that one or more people, potentially a homophobic and violent gang, had murdered Mr Johnson because he was gay. That a deliberate death was sought and achieved. That is not what happened. What actually happened was an assault, possibly a common assault, with tragic consequences.
- 112 What the Special Commission was tasked to do, as was made clear in paragraphs 1 and 2 of the Terms of Reference, was to inquire into manner and cause of death of unsolved gay hate deaths. The purpose was also publicly discussed by the Premier and Attorney-General at the time - to provide comfort to families of unsolved gay hate deaths. As noted, with respect correctly, at [34] of the Commissioner's Judgment of 6 December 2022, the Commission has the role of 'investigator'. The Commission has been given significant powers, for example to compel witnesses, in a way which the police cannot.
- 113 Finally, the Terms of Reference permit this Commission to have regard to SF Parrabell. This must mean 'have regard' to SF Parrabell in relation to paragraphs 1 and 2 of the Terms of Reference, being the unsolved deaths potentially motivated by gay hate. The Terms of Reference do not direct or permit an investigation *into* SF Parrabell *per se*.

- 114 The Terms of Reference do not authorise, let alone direct, a broadbrush consideration of police approaches to potential homicides. The Governor is seeking a recommendation into unsolved gay hate deaths. And to assist in that, the Commission is authorised to consider previous inquiries and reports which include police investigations.
- 115 One example of the work this Commission has been tasked to perform concerns the breakthrough achieved by this Commission into the death of Mr Crispin Dye. That progress would not have occurred but for this Commission and the investigatory role it has undertaken. And that is precisely what this Commission was tasked with.

*Conclusion*

- 116 The findings sought by Counsel Assisting in relation to Mr Willing are not established on the evidence. Moreover, to make those findings would be procedurally unfair to Mr Willing. In any event, the proposed findings in relation to Mr Willing do not need to be made by this Commission and, if made, would be outside the Terms of Reference.

**M. Thangaraj SC**  
**Forbes Chambers**

**J. Milner**  
**Arnold Bloch Leibler**

**28 June 2023**