

The Special Commission of Inquiry
into LGBTIQ Hate Crimes

PUBLIC HEARING 2

SF MacNamir and the Terms of Reference

Reply submissions on behalf of the Commissioner of Police

Introductory

1. These submissions are provided by way of reply to the submissions of Counsel Assisting provided on 7 July 2023 regarding the question of whether the death of Scott Johnson, the work of SF Macnamir, and Detective Chief Inspector Young's appearance on the Lateline program fall outside the Inquiry's terms of reference.
2. These submissions supplement the submissions advanced on behalf of the Commissioner of Police at [79] to [90] and [204] of the Public Hearing 2 submissions.

The relevance of SF Macnamir to the Terms of Reference (CA, [11] – [31])

3. Scott Johnson's death was one of the 88 matters considered by SF Parrabell. That fact, however, is not sufficient to authorise the Inquiry to conduct a comprehensive examination of SF Macnamir. The confines of the Terms of Reference are unambiguous; in order to fall within the proper ambit of the Inquiry, an issue must:
 - a) first, relate to an "unsolved" death as defined in paragraphs A and B of the terms of reference; and
 - b) second, concern the "manner and cause" of that death.
4. The issues relating to the death of Scott Johnson, the work of SF Macnamir generally, and DCI Young's appearance on the Lateline program, do not meet these requirements.

Considerations of the Parliamentary Committee

5. Counsel Assisting notes that the Commissioner has been directed to have regard to the interim and final report and findings of the Inquiries conducted by the Standing Committee on Social Issues (**Parliamentary Committee**) into Gay and Transgender Hate Crimes between 1970 and 2010 (CA, [11]).

6. Reference is then made to the Terms of Reference of the Parliamentary Committee (CA, [12]) and to a number of references in the Parliamentary Committee's report to Scott Johnson's death and the investigations conducted in relation to it (CA, [13] – [14]).
7. Counsel Assisting then submits that, in fulfilling its responsibilities under the paragraphs A and B of the Terms of Reference, the Inquiry has been directed to "have regard" to particular evidence set out in the reports of the Parliamentary Committee (CA, [15]) and to particular findings set out in its final report (CA, [16] and [18]).
8. Accordingly, Counsel Assisting submits that "an examination of the investigative processes (including SF Macnamir) that were the subject of the observations, analyses and findings contained in the interim and final reports is plainly a matter falling within the ToRs" (emphasis added).
9. In this respect, Counsel Assisting's submissions seek to imbue the phrase "have regard to" with a force that goes far beyond that afforded to it in the ToR Judgment or any sensible construction of those words.
10. In the ToR Judgment, the Commissioner concluded that the phrase "have regard to" imported a requirement to engage in "genuine consideration, and not merely token or nominal consideration".¹ That did not, however, entirely uncouple the consideration of the SF Parrabell process from paragraphs A and B of the Terms of Reference.
11. To the contrary, the Commissioner's decision that the Terms of Reference permit a detailed consideration of the methods of SF Parrabell was premised on the fact that paragraph A of the Terms of Reference define the scope of the Inquiry by reference to precisely the task being undertaken by SF Parrabell. In that respect, the ToR Judgment concluded that (emphasis added):

"...the Commission is entitled, indeed obliged, pursuant to the Terms of Reference taken in their entirety to investigate particular matters which relevantly concern Strike Force Parrabell, including the conclusions drawn and the manner in which those conclusions were drawn. In my opinion, that clearly involves in the first instance having to understand the reasoning process adopted by the persons concerned in order to evaluate the relevance or irrelevance of their conclusions. Those conclusions are directly relevant, or relate to, Paragraphs A and B in the

¹ ToR Judgment, [43].

Terms of Reference. In other words, Strike Force Parrabell was seeking by its own route to connect various homicides to a particular motive. That is precisely the task that I am required to carry out pursuant to Paragraphs A and B of the Terms of Reference. In doing so, I am also required to give consideration to other matters, Strike Force Parrabell being one. It follows that I am entitled under Paragraph F of the Terms of Reference to reach a particular state of satisfaction achieved by a consideration of Strike Force Parrabell and its methodologies.”²

12. The ToR Judgment does not extend to include a consideration of the extent to which paragraph C of the Terms of Reference required or permitted an examination of the methodologies or processes of the Parliamentary Committee.
13. The requirement to undertake a “genuine consideration” of the Parliamentary Committee’s reports does not import an obligation (or an authorisation) to comprehensively analyse the Parliamentary Committee’s processes or methodology. Nor does it permit or call for an investigation of the subject-matter addressed in the Parliamentary Committee’s report.
14. Again, the Commissioner’s conclusion that a detailed consideration of the processes and methodology of SF Parrabell fell within the Terms of Reference was heavily predicated on the fact that SF Parrabell had reached conclusions as to the “existence (or non-existence) of gay-hate bias in these specific cases” (i.e. those falling within paragraph A of the Terms of Reference).³
15. Consistent with this, the Inquiry has not, in fact, engaged in any such consideration of the processes or methodologies of the Parliamentary Committee. Only now, after urging the Commissioner to make findings that traverse far beyond the Terms of Reference, do Counsel Assisting assert that a comprehensive exploration of the of the work of the Parliamentary Committee is permitted or required.
16. Counsel Assisting’s submissions, however, are not confined to a suggestion that (consistent with the scope of the examination of SF Parrabell contemplated by the ToR Judgment⁴) the “means and methodologies” of the Parliamentary Committee can be the subject of Inquiry. Rather, Counsel Assisting asserts that all “investigative processes” that

² ToR Judgment, [52].

³ See ToR Judgment, [34].

⁴ Ibid.

were the “subject of the observations, analyses and findings” by the Parliamentary Committee now fall for consideration (CA. [19]).

17. In this respect, the construction advanced by Counsel Assisting would effectively import the entire terms of reference of the Parliamentary Committee into those governing the Inquiry. It scarcely needs to be said that the framers of the Terms of Reference did not intend such an outcome.
18. By Counsel Assisting’s logic, the Inquiry would be required to investigate the assault of Alan Rosendale (which is expressly mentioned in the terms of reference of the Parliamentary Committee) and other non-fatal assaults the subject of consideration in the Parliamentary Committee report.
19. Counsel Assisting has not previously urged the Inquiry to adopt such a broad construction of the Terms of Reference. And for good reason; it is not properly open. Paragraphs A and B of the Terms of Reference remain the touchstone of the investigations the Inquiry is to undertake. Those paragraphs play a foundational role in delimiting the boundaries of the findings it may make.
20. Consistent with this, Counsel Assisting’s submissions at [26] – [31] put the cart before the horse. The Inquiry is not charged with conducting a broad-ranging investigation into every matter that might be relevant to the NSWPF’s approach to the investigation of anti-LGBTIQ hate crimes.
21. Even if the assertions made by Counsel Assisting at [26] – [27] could be sustained (and, for the reasons set out in the Commissioner of Police’s Public Hearing 2 submissions, they cannot), the conduct of particular investigations relating to particular homicides is only properly the subject of the Inquiry where the relevant investigation relates to a matter that otherwise falls within Paragraph A or B of the Terms of Reference.
22. The same is true of Counsel Assisting’s submissions in relation to the authorisation to make recommendations. It may be accepted that the recommendations power is not limited such that any recommendation must “relate solely to what should occur in relation to particular investigations of particular individual deaths” (CA, [30]). But that is not to say that the recommendation power enables an unfettered consideration of SF Macnamir (or all other investigations of the homicide of members of the LGBTIQ communities). Much

like the general authorisation to inquire, the authorisation to make recommendations remains tethered to paragraphs A and B of the Terms of Reference.

23. The Inquiry can make recommendations in relation to matters (including matters of that go beyond the investigation of the particular cases) flowing from the Inquiry's consideration of the manner and cause of the particular deaths. The authorisation to make recommendations, however, does not otherwise enlarge the scope of the Inquiry permitted to be undertaken in accordance with Paragraphs A and B. So much is clear from the fact that the Terms of Reference indicate that the Inquiry is empowered to make recommendations "on" the matters set out in Paragraphs A and B. Accordingly, the fact that an investigation of a death (or other event) might "contribute to a cumulative body of knowledge that can...inform recommendations" does not authorise an Inquiry into it (cf, CA, [30]).
24. An Inquiry is not free to expand the scope of its investigations and findings by reference to what might "help advance the public interest" in a general sense (cf CA, [30]). Undoubtedly, any number of investigative steps might serve the public interest. That is not, however, the appropriate test of whether or not a Special Commission of Inquiry is permitted to investigate and report upon a particular matter.

Lateline interview

25. At CA [31], the "Lateline interview" (which was not the subject of consideration in either the interim or final reports of the Parliamentary Committee) is said to be "intimately connected" with "matters" falling within the Terms of Reference (presumably the conduct of SF Macnamir). By extension it is said to be within the terms of reference.
26. It is unclear what is meant by the "intimate connection" referred to in CA [31]. Counsel Assisting has not attempted to identify in concrete terms how the Lateline Interview falls within the "manner and cause" of Mr Johnson's death or how it otherwise sits within the Terms of Reference.
27. In any event, as outlined above, a matter does not properly fall within the Terms of Reference unless it relates to the "manner and cause" of an "unsolved" death of the type considered at paragraphs A or B of the Terms of Reference. For the reasons explored above, the fact that the Lateline interview concerned Mr Johnson's death, and was given

by the Investigation Supervisor of SF Macnamir does not bring it within the Terms of Reference.

The case of Scott Johnson – CA [32] – [45]

28. The Inquiry is directed to inquire into and report on “unsolved” cases listed in Paragraphs A and B. In the absence of judicial consideration of the word “unsolved”, the term should be given its ordinary meaning (cf CA, [33]).
29. No substantial inquiry is required in order to identify that Scott Johnson’s case has been solved; it is not, for example, a matter in which a person of interest was identified and charged but found not guilty or otherwise not the subject of a successful prosecution (for example, because the charge was dropped, or the person of interest died).
30. Rather, it is a case in which the identity of the perpetrator has been determined and the circumstances of the offence have been the subject of sentencing proceedings in the Supreme Court.
31. On no sensible construction of the term “unsolved” can the death of Mr Johnson be regarded as such.
32. At all times since 10 January 2022, it has been apparent that the person responsible for his death was, in fact, Scott White.⁵ As detailed in the Public Hearing 2 submissions, Mr White was ultimately convicted and sentenced for the manslaughter of Mr Johnson.
33. Tellingly, the approach Counsel Assisting now contends for is at odds with the approach that has been taken in connection with the Tender Bundle hearings conducted to this point:
 - a) First, Counsel Assisting has not made submissions in relation to *any* of the cases among the 88 that have been the subject of a criminal trial that resulted in a conviction.
 - b) Second, Counsel Assisting has urged a finding that a death was not “unsolved” in a number of cases, notwithstanding the fact that anti-LGBTIQ bias fell for potential consideration. In particular, Counsel Assisting has submitted that the deaths of both Brian Walker and William Dufield were not unsolved, despite the fact that both

⁵ See *R v White* [2023] NSWSC 611 at [8] per Beech-Jones CJ at CL for a summary of the course of proceedings.

cases were homicides and the question of potential LGBTIQ bias had not previously been the subject of judicial inquiry.

34. Evidently, the purpose of a criminal proceeding is not to determine whether or not, on the balance of probabilities, a homicide was motivated by LGBTIQ bias (see CA, [45]). That does not, however, mean the word “unsolved” should be construed in the strained manner contended for by Counsel Assisting.
35. Rather it militates directly against such a construction; Counsel Assisting’s approach would render the term “unsolved” entirely otiose. If Counsel Assisting’s submissions were accepted, all 88 cases listed in paragraph A would have to be regarded as unsolved.
36. What is more, Counsel Assisting’s approach would vastly expand the scope of the Inquiry’s task under paragraph B. In short, the Inquiry would be required to examine any and all homicides (including those the subject of a conviction) where the question of possible LGBTIQ bias had not been positively determined.
37. There may be any number of historical homicides that were motivated by LGBTIQ bias and were the subject of convictions. The Inquiry is simply not charged with investigating those cases.

Paragraph F of the Terms of Reference

38. Paragraph F of the Terms of Reference does not “circumscribe” the matters into which the Commissioner might Inquire (CA, [47]). Nor, however, does it expand them beyond the otherwise permissible scope of the Inquiry.

39. In particular, paragraph F of the Terms of reference is subservient to paragraphs A and B. It does not itself define the scope of the Inquiry; if a death is not “unsolved” for the purposes of paragraphs A or B, it is not within the scope of the Inquiry. No aspect of paragraph F changes that.



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