

The Special Commission of Inquiry  
into LGBTIQ Hate Crimes

## TENDER BUNDLE HEARING OF 19 MAY 2023

### Concerning the death of Paul Rath

#### *Supplementary submissions on behalf of the Commissioner of Police*

1. These submissions are prepared on behalf of the Commissioner of Police in response to Counsel Assisting's supplementary submissions dated 27 October 2023 in relation to the death of Paul Rath (**CA**).
2. They supplement submissions filed in relation to the matter on 1 June 2023 (**CP Submissions**) as well as submissions made in the context of the Investigative Practices Hearing.<sup>1</sup>

#### **Report of Ms Jae Gerhard and supplementary report of Dr Linda Iles**

##### Were the observed stains caused by blood?

3. The question of whether the stains apparent on Mr Rath's clothing were caused by blood is addressed by Ms Jae Gerhard's report. Ms Gerhard is a forensic scientist with more than 20 years' experience in the field.<sup>2</sup> Her expertise extends to include bloodstain pattern analysis.
4. As to the quality of the available source material, Ms Gerhard notes:

"The two close up photographs supplied depict the position Mr Rath was located in and only a small portion of his body and clothing is visible. No photographs have been supplied which allow all of his clothing to be viewed. Furthermore, as the photographs are black and white making an interpretation of the clothing very challenging as a number of assumptions regarding any visible staining present need to be made."<sup>3</sup>
5. Ms Gerhard then goes on to observe:

"In my opinion, the limited photographs supplied do not enable me to provide an

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<sup>1</sup> See Submissions of Commissioner of Police, Investigative Practices Hearing, 10 October 2023, both generally and in particular at [281], [309]-[324].

<sup>2</sup> Export Report of Jae Gerhard, 7 July 2023, [1.4] (SCOI.85458\_0003).

<sup>3</sup> *Ibid*, [6.2] (SCOI.85458\_0006).

opinion on whether the dark staining observed in the black and white photographs has been deposited by some type of assault or by the fall and tumble from the cliff top. I base this opinion on two reasons:

- (i) It is not reasonable to consider all of the dark staining observed is blood. There is the very real possibility that given the case circumstances that some of this dark staining observed in the photographs of the clothing could be mud or dirt.
- (ii) Even if the dark staining observed is assumed to be blood, in my opinion the discrete staining observed on the back of the jacket, the sleeves of the jacket and the cuffs of the shirt, could have been deposited as a result of a tumble down the cliff whilst bleeding or by some form of assault. The information supplied is too limited to form an opinion on which is more likely. If additional photographs of the clothing were supplied, it may assist in the evaluation.”<sup>4</sup>

6. As a consequence of these observations, Ms Gerhard concludes that the supplied photographs are “insufficient to provide an opinion on the deposition staining on the clothing of Mr Rath”.<sup>5</sup>
7. The Inquiry also conferred with Dr Mark Reynolds, a forensic scientist, who “advised that he would be unable to conclusively determine – on the basis of the black and white photographs and without any other evidence – whether the staining was due to blood”.<sup>6</sup>
8. Dr Linda Illes was not asked to comment on the likelihood that the relevant staining was, in fact, blood in her recent report. In her original report, Dr Illes observed only that “the staining observed in the photographs is likely blood, dirt, or a combination of the above.”<sup>7</sup>
9. In the circumstances, while there is good reason to think that some of the stains were, in fact, caused by blood, the Inquiry could not, in the face of the clear evidence of Ms Gerhard (and the indicative opinion informally offered by Dr Reynolds) positively conclude that the identified staining was caused by blood.

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<sup>4</sup> Expert Report of Jae Gerhard, 7 July 2023, [9.1] (SCOI.85458\_0007-0008).

<sup>5</sup> Ibid, [10.1] (SCOI.85458\_0008).

<sup>6</sup> Letter from the Inquiry to Dr Linda Illes, p. 2 (SCOI.85460\_0002).

<sup>7</sup> Expert Report of Dr Linda Illes, 26 October 2022, p. 8 (SCOI.82906\_0008).

### Additional uncertainties

10. There are two further significant aspects of uncertainty in relation to the observed staining that do not appear to have been the subject of consideration in the recently obtained expert reports (or in Counsel Assisting's supplementary submissions).
  - a First, the detail provided in the autopsy report of Dr Russell is, as identified by Dr Illes, scant. Consequently, while the only blood specifically referred to in the report was "issuing from both nostrils" and "present in the right ear"<sup>8</sup>, that does not account for the possibility that some of Mr Rath's other injuries might have led to bleeding of some kind. In particular, the autopsy report refers to the presence of "numerous externally obvious injuries."<sup>9</sup> Those injuries included "compound comminuted fractures of the lower ends of the tibia and fibula".<sup>10</sup> It would be surprising if the "numerous externally obvious injuries" suffered by Mr Rath (which include injuries where Mr Rath's bones broke the surface of his skin) did not result in at least some blood loss.
  - b Second, none of the evidence indicates when the relevant staining was deposited on Mr Rath's clothing. The possibility remains that some of the observed staining was unrelated to the incidents leading to Mr Rath's death, having been deposited at some time prior to his fall.

### Dr Illes' views

11. On the basis of an assumption put forward by the Inquiry that "all the areas of staining are blood", Dr Illes offers some opinions as to the potential for the staining to have been caused by bleeding from Mr Rath's nose.
12. As for the "small number of rounded areas of staining on both coat sleeves and on his left trouser leg", Dr Illes observes that it is "highly unlikely that these rounded but separate areas of staining could be accounted for by blood having originated from Mr Rath's nose following Mr Rath's primary impact i.e., during after falling from a height of 50 metres."<sup>11</sup> Further, Dr Illes observes that "I do not think [the blood stains] could have occurred as a result of passive dripping [from Mr Rath's nose] onto the sleeves and left trouser leg"<sup>12</sup>
13. Regarding the "more diffuse staining" on Mr Rath's trouser legs, Dr Illes opines that if that

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<sup>8</sup> Autopsy Report of Dr Peter Russell, p. 1 (SCOI.02734.00010).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Report of Dr Linda Isles, 16 August 2023, p. 2 (SCOI.85459\_0001).

<sup>12</sup> Ibid.

staining is blood, “it cannot be accounted for by the dripping and/or smearing of blood originating from Mr Rath’s nose given its location, extent, Mr Rath’s documented injuries and autopsy findings indicating death being rapid in onset”.<sup>13</sup>

14. In response to the converse assumption, namely that none of the staining is blood, Dr Illes observed:

“If none of the staining present it [sic] blood, and is instead mud/dirt, this can be accounted for by primary impact, and tumbling secondary impacts with a muddy/dirty surface. An area of grassy embankment is depicted in the scene photographs, which could be the source of dirt/mud on Mr Rath’s clothing”.<sup>14</sup>

15. Given Counsel Assisting’s observation about the absence of rain, it is appropriate to note that Dr Illes’ observations in this respect were not limited to the possibility that the staining was caused by “mud” by extended to include the possibility that it was “dirt”.

#### **Overall position following the additional expert evidence**

16. Contrary to the position advanced by Counsel Assisting (CA, [12]), Dr Illes’ opinion cannot be said to lend “real weight to the possibility that the injury to [Mr Rath’s] nose occurred prior to the fall”. There are a number of reasons for this.
17. First, Dr Illes’ opinion is offered on the basis of an assumption, that is not positively supported on the evidence, that all of the observable staining was blood.
18. Second, on the converse assumption that the staining is not blood (which similarly is not the subject of positive evidence), Dr Illes observes that the staining can be accounted for “by primary impact, and tumbling secondary impacts with a muddy/dirty surface”.
19. Third, it is not clear that Dr Illes’ opinions as to the dynamics of blood transfer during a fall are based on her expertise as a forensic pathologist. In that respect, Counsel Assisting’s submission that her views should be preferred to those of Ms Gerhard is not well-founded (CA, [11]). The reality is that any assessment of the extent to which blood might have transferred to Mr Rath’s clothing during the course of a fall is likely to involve a significant degree of speculation.
20. Fourth, the many “externally obvious injuries” suffered by Mr Rath are quite likely to have resulted in at least some bleeding. Accordingly, even if it is accepted that the staining is

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<sup>13</sup> Report of Dr Linda Isles, 16 August 2023, p. 2 (SCOI.85459\_0001).

<sup>14</sup> Report of Dr Linda Isles, 16 August 2023, p. 3 (SCOI.85459\_0001).

unlikely to have resulted from bleeding from Mr Rath's nose during or after his fall, the possibility remains that the stains resulted from bleeding from another of the external injuries suffered by Mr Rath.

21. Fifth, Counsel Assisting's submission does not account for the fact that some of the staining may have been present prior to the events leading to Mr Rath's fall.
22. All told, the additional expert evidence does not meaningfully impact upon the position as it stood at the time of the CP Submissions in June.

### **Statement of Rosemary Rath**

23. Rosemary Rath's statement was provided on 22 October 2023, more than 36 years after Mr Rath's death. She was 13 years old at the time of Mr Rath's death.<sup>15</sup>
24. Even assuming Ms Rath's recollection of the timing of the return of the suit is correct, it appears that it occurred subsequent to the autopsy examination conducted by Dr Russell and after Inquiries made by police in relation to the psychological condition suffered by Mr Rath.<sup>16</sup>
25. The Coroner reached a positive finding that Mr Rath "Died of the effects of multiple injuries sustained then and there when he fell accidentally onto rocks at the foot of a cliff."<sup>17</sup> As observed in the CP Submissions<sup>18</sup>, there is reason to think that the Coroner's conclusion in this respect might have been influenced by the extant presumption against suicide, and the family's attitude towards such a possibility.
26. Having regard to the available forensic testing as at 1977 (in particular the absence of DNA testing), as well as the prevailing circumstances surrounding Mr Rath's death, there is nothing to suggest that the decision to return and/or dispose of Mr Rath's clothing was inappropriate having regard to accepted practice of the time. Counsel Assisting has not identified what, if any, testing could have been conducted that would have meaningfully advanced the investigation of Mr Rath's death as at 1977.
27. Again, there is nothing to suggest that the Coroner considered that further investigative steps were required or was otherwise critical of the treatment of the clothing.

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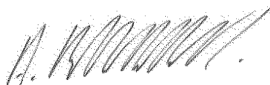
<sup>15</sup> Statement of Rosemary Rath, 22 October 2023, [3] (SCOI.85461.0001).

<sup>16</sup> See Autopsy Report of Dr Peter Russell, 30 June 1977 (SCOI.02734.00010) which was conducted on 18 June 1977, and P79 Report of Death to Coroner, 17 June 1977 (SCOI.82905).


<sup>17</sup> Findings of Coroner Ray William Henry, 16 September 1977 (SCOI.02734.00001).

<sup>18</sup> At [45].

28. There was, and remains, no evidence to positively suggest Mr Rath's death was the result of a homicide. On the other hand, there are a number of matters clearly suggestive of the possibility that Mr Rath died by suicide.<sup>19</sup>
29. Nevertheless, for the reasons expressed in the CP Submissions, it would be appropriate for an open finding to be made in connection with Mr Rath's death.



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<sup>19</sup> See CP Submissions, [43].