

The Special Commission of Inquiry  
into LGBTIQ Hate Crimes

## TENDER BUNDLE HEARING OF 9 JUNE 2023

### Concerning the death of Wendy Waine

*Submissions on behalf of the Commissioner of Police*

#### Introductory

1. These submissions are prepared on behalf of the Commissioner of Police in response to the submissions made by Counsel Assisting on 9 June 2023 in relation to the death of Wendy Waine. The Commissioner adopts the same approach as Counsel Assisting to refer to Ms Waine, who was born Wayne Kerry Brennan, by her preferred name (CA, [17]).
2. These submissions are provided in advance of the Commissioner's submissions in respect of the Parrabell hearings. While they necessarily touch upon some of the general matters to which those hearings relate, they do not represent a comprehensive statement of the Commissioner's position on the general Parrabell issues. In due course, these submissions should be read with those made on behalf of the Commissioner of Police in connection with the Parrabell hearings and the other "tender bundle" cases.

#### Wendy Waine

##### *Circumstances of death*

3. On the morning of Tuesday, 30 April 1985, Ms Waine was found dead in the bedroom of her apartment in Darlingtonhurst.<sup>1</sup> She had at least two gunshot wounds to her neck and thorax which were inflicted from behind.<sup>2</sup>
4. Ms Waine was a transgender woman who was an entertainer in Kings Cross. As noted at CA, [88], Ms Waine was also a sex worker who would use her residential unit for sex work.
5. Ms Waine's body was found lying on her stomach with her legs outstretched and slightly

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<sup>1</sup> Statement of Senior Constable Stephen Mark Coles dated 30 April 1985 at page 2 (SCOI.00014.00013); Statement of Constable Raymond Constable dated 4 May 1986 at page 1 (SCOI.00014.00017).

<sup>2</sup> Autopsy Report of Dr Thomas Howard Godfrey Oettle dated 15 October 1985 (SCOI.00014.00022).

apart.<sup>3</sup> Her left arm was stretched up with a slight bend at the elbow. Her right arm was bent with the hand under her neck. There were two areas of blood on the carpet with a trail of blood leading to the head of Ms Waine.<sup>4</sup> There was a large calibre bullet wound between Ms Waine's shoulder blades and also in the back of the left hand.<sup>5</sup>

6. The bedspread had been partially turned down. When turned back, blood was observed on top of the spread and pillow. There was a hole through the spread in the vicinity of this blood.<sup>6</sup>
7. A search of the unit did not locate any spent or fired cartridge cases. The search included the removal of carpet for possible damage to the floorboards by the projectiles (ie bullets).<sup>7</sup>
8. Dr Thomas Howard Godfrey Oettle conducted a post-mortem examination on Ms Waine on the day she was found. Dr Oettle's report dated 15 October 1985 indicated that Ms Waine died as a result of two gunshot wounds.<sup>8</sup> Dr Oettle also opined that Ms Waine had been struck on the back of her head just prior to her death.<sup>9</sup>
9. Investigating police officers formed the view that Ms Waine was lying naked, face down on the bed when she was shot in the back or the neck. Ms Waine was then pushed off the left side of the bed onto the floor. She was then shot a second time. The offender then partially removed the bedspread to retrieve the first bullet and dragged Ms Waine rearwards on the carpet to recover the second bullet.<sup>10</sup>
10. An inquest into Ms Waine's death was conducted on 18 September 1986. On that date, State Coroner Gregory Glass found that Ms Waine "died of the effects of bullet wounds of the neck and thorax inflicted there and then by a person unknown."<sup>11</sup>
11. The Commissioner notes that the Inquiry has briefed an expert who opines that there were three, rather than two, gunshot wounds.<sup>12</sup>

### ***Persons of interest***

12. Investigating police identified numerous lines of enquiry relating to various persons of interest. These included the following:

<sup>3</sup> Statement of Constable Raymond Constable dated 4 May 1986 at page 1 (SCOI.00014.00017).

<sup>4</sup> Statement of Constable Raymond Constable dated 4 May 1986 at page 1 (SCOI.00014.00017).

<sup>5</sup> Statement of Senior Constable Stephen Mark Coles dated 30 April 1985 at page 2 (SCOI.00014.00013).

<sup>6</sup> Statement of Constable Raymond Constable dated 4 May 1986 at page 1 (SCOI.00014.00017).

<sup>7</sup> Statement of Constable Raymond Constable dated 4 May 1986 at page 2 (SCOI.00014.00017).

<sup>8</sup> Autopsy Report of Dr Thomas Howard Godfrey Oettle dated 15 October 1985 (SCOI.00014.00022).

<sup>9</sup> Autopsy Report of Dr Thomas Howard Godfrey Oettle dated 15 October 1985 (SCOI.00014.00022).

<sup>10</sup> Statement of Constable Raymond Constable dated 4 May 1986 at page 3 (SCOI.00014.00017).

<sup>11</sup> Findings of State Coroner State Coroner Glass dated 18 September 1986 (SCOI.00014.00001).

<sup>12</sup> Expert report of Dr Linda lies (Forensic Pathologist) dated 28 October 2022 at page 8 (SCOI.82960).

- a A police officer named 'David Brown'.
  - b A MSS security guard.
  - c A theory that Ms Waine had been killed in relation to a dispute over a quantity of heroin that she had supposedly flushed down the toilet, based on statements allegedly made by a woman named **NP176** (MF) to a man named Danny Shakespeare.
  - d Claims made by an anonymous male caller that the "Coven of Mercy for Fate" was responsible for Ms Waine's killing.
  - e A fingerprint found on a phone in Ms Waine's apartment, identified as belonging to a man named **NP178** (MG).
13. The Commissioner agrees that the available evidence does not reach the required threshold for a positive finding, on the balance of probabilities, as to the involvement of any of the persons of interest in Ms Waine's death (CA, [20]).

#### ***Adequacy of police investigations***

14. The officer in charge, Detective Sergeant Stephen Desmond McCann (**DS McCann**), provided a statement which details the investigation undertaken by investigating police officers.<sup>13</sup> More than 30 witnesses were interviewed or questioned as part of that investigation, with formal statements taken from at least 29 lay witnesses.
15. Counsel Assisting make some criticisms of the original police investigation in the matter. These are addressed in turn below. As a global comment, the Commissioner notes the following applies to many of the criticisms made of the original investigation:
- a It appears that the police officers involved in the initial investigation have not been approached by the Inquiry regarding the bases for investigative steps taken / not taken.
  - b It is possible that due to the passage of 38 years since Ms Waine's death, the records now available do not provide a complete picture of the material.

#### Availability of entire investigations file

16. Counsel Assisting state (CA, [38]) that, if the records produced to the Inquiry by the NSWPF are the totality of police records relating to the case, then there is ground for serious concern as to why various lines of enquiry were either not pursued at all, or not pursued to finality.

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<sup>13</sup> Statement of DS McCann dated 22 July 1986 at [8] (SCOI.00014.00008).

17. Counsel Assisting acknowledge that in other cases which have been the subject of documentary tenders so far, police records, or some parts thereof, cannot now be located by the NSWPF. In that vein, the Commissioner notes that 38 years has passed since Ms Waine's death and, as a result, it would not be surprising (albeit unfortunate and regrettable) if certain records are no longer able to be located by an agency such as NSWPF.
18. Counsel Assisting submit that if it is not the case that material is missing, the absence of certain material, which it is to be expected would surely exist and should therefore have been produced, is both striking and troubling.
19. It appears that there are documents which are missing. For example, the record of interview between investigating police and Danny Shakespeare records Mr Shakespeare as stating that he was questioned by Detectives over the murder of Ms Waine in a manner which suggested this occurred prior to the day of the record of interview.<sup>14</sup> As Counsel Assisting identify, there is nothing in any of the material provided to the Inquiry by the NSWPF which indicates that Mr Shakespeare had been interviewed by police at any previous time in connection with the death of Ms Waine (CA, [208]). This suggests that the records may not provide a complete picture of the investigative steps taken by police.
20. Whilst it is regrettable that a complete record of the initial investigation does not appear to now be available, it is noted that it is not a surprising development given the passage of 38 years since Ms Waine's death. It is further noted that electronic document management systems now utilised by police renders it highly unlikely that a similar issues would arise in respect of an investigation conducted today.

#### Failure to obtain statements

21. Counsel Assisting point out at CA, [41.a] that, based on the material presently available, police did not obtain statements from a number of witnesses.
22. Counsel Assisting identify that this includes a witness who may have been able to assist in determining the time of Ms Waine's death ([I232] (BA)), and a witness who claimed to recognise, from photographs, a police officer with whom Ms Waine was thought to have been having a relationship ([I233] (MR)). Counsel Assisting also identify other witnesses interviewed regarding Ms Waine's possible relationship with a police officer but from whom formal statements do not appear to have been obtained (CA, [158] to [174]).

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<sup>14</sup> Record of Interview with Danny Robert Shakespeare dated 5 January 1986 at page 2 (SCOI.10034.00009).

23. The circumstances underpinning the absence of statements from certain witnesses are not known. For example, it is not clear on the available material whether the witnesses were unwilling to provide formal witness statements or whether the witnesses provided statements but those statements are unavailable because they have been lost, disposed of or have been unable to be found for some other reason (some 38 years since the murder occurred).
24. The majority of the witnesses in respect of whom Counsel Assisting identify an absence of a witness statement were involved in the sex work industry operating in and around Kings Cross. It is not clear on the material presently available why such statements are not available. It is entirely plausible that there may have been a reluctance on the part of some or all of those witnesses to 'go on the record' and assist police by providing formal witness statements (as opposed to providing information in response to questioning).
25. Notably, the record in respect of the interview of Shirley MacArthur, who was interviewed by police, expressly concludes with the comment:<sup>15</sup>

*'STATEMENT NOT OBTAINED...'*

26. A note to this effect is not included for any of the other witnesses whom Counsel Assisting identify as persons from whom the investigating police ought to have taken a statement.
27. The officer in charge, DS McCann, is not separately represented in these proceedings. He does not appear to have given evidence and does not appear to have been notified or approached by the Inquiry in respect of the criticisms levelled against his investigation.
28. Additionally, but particularly in circumstances where DS McCann has not been approached in relation to the criticisms raised, the Inquiry should exercise caution not to unfairly evaluate the steps taken by the officer in charge by reference to modern social norms and investigative standards.
29. To the extent that statements of substantive witnesses were not obtained, it is acknowledged that it would have been prudent for investigating police to obtain formal witness statements from various additional witnesses who were interviewed by police. However, if that were the case, it needs to be considered in the context that extensive contemporaneous running sheet and P 109 report notes were prepared (albeit, as noted above, it is possible that these notes do not represent the complete investigative steps undertaken). Regardless, these notes provide a picture of the investigations that police conducted. These notes also reflect the

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<sup>15</sup> P109 Reports of Occurrence at page 45 (SCOI.82924\_0045).

evidence of a significant number of witnesses who were questioned by police in connection with Ms Waine's death.

30. In respect of BA specifically, Counsel Assisting note that he is someone from whom police should have obtained a statement. Notably, the record in the investigation sheet states that 'arrangements made to get statement at 3.00pm on 1.5.85' after recording BA's version of events.<sup>16</sup> It is not clear whether the statement was ultimately obtained or, if it was not, why it was not obtained. Again, it is possible that BA was unwilling to further assist. Police cannot now, and could not then, compel witnesses to provide statements.
31. In any event, it is not clear what Counsel Assisting suggest ought to have been further clarified with BA. The notes from the initial police investigation indicate that BA spoke to police and stated the following:<sup>17</sup>

*Visited the deceased's flat between 3.45pm and 4pm on Monday afternoon the 29<sup>th</sup> instant. Stated that front door was slightly open. Knocked but received no answer and did not enter flat.*

32. This version was consistent with the evidence of I230 who attended Ms Waine's unit later that day and discovered Ms Waine's body.<sup>18</sup> Whilst the Commissioner agrees that it would have been prudent to obtain a formal statement from BA, it is noted that the lack of a statement does not appear to have any substantive impact on the investigation.
33. In respect of MR, Counsel Assisting assert that a statement should have been obtained which detailed the photograph shown to MR. It is noted that DS McCann's statement recorded the following:<sup>19</sup>

*Eventually, [MR] 48 year old prostitute was interviewed and she identified a 1st Class Constable from photographs, as being the officer whom BRENNAN had been seeing. She added that she saw him working the Local Police truck in Darlington Road, Kings Cross shortly after meeting him. That Constable was questioned and it established that he has never been attached to Darlington Road Police nor has he been in any Police truck in the area. Therefore it is felt that this line of enquiry has been exhausted .*

34. Presumably, investigating police knew the identify of the person in the photograph, including

<sup>16</sup> P109 Report of Occurrence at page 30 (SCOI.82924).

<sup>17</sup> P109 Report of Occurrence at page 7 (SCOI.82924).

<sup>18</sup> P109 Report of Occurrence at page 37 (SCOI.82924).

<sup>19</sup> Statement of DS McCann dated 22 July 1986 at [10] (SCOI.00014.00008).

details of his employment history with the NSWPF. Further, whilst it is not expressly recorded in the material now available, it is likely that investigating police would have been able to (and very likely did) examine the assertion by the Constable which resulted in him being discounted as a person of interest, for example, by reviewing his employment records (including his roster).

35. That said, the Commissioner acknowledges that it would have been prudent for a formal statement to have been obtained to reflect this.

#### Exhibits

36. During the course of the investigation, police collected the following exhibits:
- a An anal swab from Ms Waine taken by Dr Oettle at autopsy;
  - b Hair taken from the left hand of Ms Waine; and
  - c Six cigarette butts taken from an ashtray in the lounge room at Ms Waine's unit.<sup>20</sup>
37. Semen was not detected on the anal swab.<sup>21</sup> Saliva was detected on one of the cigarette butts and showed the presence of A blood group substance,<sup>22</sup> which was consistent with Ms Waine's blood.<sup>23</sup> Testing attempts on the remaining cigarette butts were inconclusive.<sup>24</sup>
38. The hair located in Ms Waine's hand was the subject of 'scientific examination' by forensic biologist Dr Rudolf Weigner. It is unclear what examinations were conducted on the hair at the time. Dr Weigner's report dated 22 May 1985 states that the hair was retained to 'be examined at a later date if considered necessary'.<sup>25</sup>
39. Counsel Assisting state at CA, [28] that the hairs located in Ms Waine's hand are of particular forensic significance, as they may well have originated from a person involved in her homicide. The Commissioner of Police agrees, but acknowledges that this is unfortunately now speculative. The Commissioner of Police agrees that it is highly regrettable that the hair samples are not now able to be located. It is not clear, based on the material presently available, which agency was responsible for the retention of the hair sample at the point that it became lost.

<sup>20</sup> Statement of Constable Raymond Constable dated 4 May 1986 (SCOI.00014.00017); Forensic Biology Report of Rudolf Weigner dated 22 May 1985 (SCOI.00014.00020).

<sup>21</sup> (SCOI.00014.00020).

<sup>22</sup> Forensic Biology Report of Rudolf Weigner dated 22 May 1985, (SCOI.00014.00020).

<sup>23</sup> Forensic Biology Report of Rudolf Weigner dated 22 May 1985 (SCOI.00014.00020).

<sup>24</sup> Forensic Biology Report of Rudolf Weigner dated 22 May 1985, (SCOI.00014.00020).

<sup>25</sup> Forensic Biology Report of Rudolf Weigner dated 22 May 1985, (SCOI.00014.00020).

40. Counsel Assisting also identify at CA, [30] that the cigarette butts seized from the unit, while not necessarily left by any person involved in Ms Waine's death, could nonetheless have developed important investigative leads.
41. The cigarette butts were tested by Dr Weigner. It is not clear whether these samples were disposed of by Dr Weigner or consumed during the testing process or whether they have since been misplaced due to other reasons. Further, the reasons for the exhibits now no longer being able to be located have not been explored with investigating police.
42. It is not clear whether Counsel Assisting is suggesting that police should be criticised for the fact that the hair sample and cigarette exhibits have been misplaced, disposed of (or consumed). Such criticism would be misplaced for the reasons noted above.
43. Regardless, the loss of the hair samples must be viewed in context. It appears that the available 'scientific examination' was conducted by Dr Weigner shortly after Ms Waine's death. The advancements in forensic testing capabilities and identification by DNA in the 38 years since Ms Waine's death could simply not be known in the mid-1980s. Indeed, the earliest DNA testing in a criminal context did not occur until 1986 in the UK (i.e. after Ms Waine's death). DNA testing was not available as an investigative tool to NSW police for a number of years thereafter.
44. Even had such exhibits been retained, whether they would be suitable for testing, the results of such testing and the inferences able to be drawn from those results about the circumstances of Ms Waine's death are matters of speculation.

Lines of inquiry not fully explored

45. Counsel Assisting assert at CA, [40] that a review of the police investigative file indicates that while numerous theories as to who was involved in Ms Waine's death were pursued, to greater or lesser extents, by investigating police, some lines of inquiry were not fully investigated, while in other respects there is insufficient material presently available from which to assess whether all appropriate steps were taken.
46. These are addressed in turn below.

*Last known sighting of Ms Waine*

47. The Commissioner agrees that, on the evidence now available, it appears likely that the last known sighting of Ms Waine was about 3.15am on Monday, 29 April 1985.
48. Counsel Assisting submit that it appears that the investigating police may have placed much



weight on the evidence of Michael Francis McCarthy and Anthony Leslie Reid to the effect that they sighted Ms Waine at about 7.45pm the following evening.<sup>26</sup>

49. Counsel Assisting point to the comment in DS McCann's statement that he considered that "little value" could be given to the line of investigation regarding the man with whom Ms Waine had been seen leaving Premier Lane at about 3:15am that morning, or any other possible clients she may have picked up while soliciting in the early hours of that morning<sup>27</sup> (CA, [143]). That comment, which was made over a year after the investigation commenced, should be seen in the context of the police investigation which had by then been conducted.
50. Whilst DS McCann stated that this line of inquiry appeared to be of little value, this has to be considered in the context of the various competing lines of inquiry which were considered during the investigation. It is further noted that investigating police canvassed with witnesses Ms Waine's movements in the days leading up to her death, which included obtaining statements regarding the person with whom Ms Waine was seen at 3.15am on the Monday morning.
51. It is further observed that prior to obtaining the versions of events from Mr Reid and Mr McCarthy (which appears to have occurred on 7 May 1985, being the dates of their statements), investigating police's 'immediate attention was directed to this line of enquiry'.<sup>28</sup> This includes obtaining at least 26 other statements of lay witnesses between 30 April 1985 and 7 May 1985.
52. Further, DS McCann appears to have not placed as high a weight on Mr McCarthy and Mr Reid's evidence as Counsel Assisting suggest. DS McCann stated at paragraph [9] of his statement:

*It now appears, if accepting McCARTHY's sighting of a female outside the front of the murdered victim's flat, as that of the deceased, combined with the knowledge that [I242], a friend of the deceased found BRENNAN' s front door open and the interior light on at 9pm that same night, therefore it is possible BRENNAN met her demise during this period of time. This is further supported by [I1230], who, on attending the flat found the front door open and the interior light on.*

53. DS McCann's statement goes on to state that inquiries were conducted at 'Pete's Beat' but

<sup>26</sup> Statement of Michael Francis McCarthy dated 7 May 1985 (SCOI.00014.00009); statement of Anthony Leslie Reid dated 7 May 1985 (SCOI.00014.00010).

<sup>27</sup> Statement of DS McCann dated 22 July 1986 at [8] (SCOI.00014.00008).

<sup>28</sup> Statement of DS McCann dated 22 July 1986 at [8] (SCOI.00014.00008).

“nothing came to fruition”. He further stated that inquiries were also directed at Ms Waine’s “associates and they too were of little assistance in identifying the killer.”<sup>29</sup>

54. Therefore, it appears that Counsel Assisting overstate the impact that the possible sighting of Ms Waine in the evening of Monday, 29 April 1985 had on the then ongoing and evolving investigation into Ms Waine’s death.
55. Of course, if this line of inquiry was discounted out of hand by the investigating police as at the time of obtaining Mr McCarthy and Mr Reid’s evidence, that appears to have been regrettable. However, it is noted that DS McCann does not appear to have been approached by the Inquiry in respect of the basis for his conclusion. Further, as noted above, it is possible that due to the passage of 38 years since Ms Waine’s death, the records now available to the Inquiry do not provide a complete picture of the material available to investigating police at the time. It would, in the circumstances, be unfair for DS McCann to be criticised in the way suggested by Counsel Assisting.

*Possible involvement of police officer in Ms Waine’s death*

56. A number of witnesses described an awareness that Ms Waine had been in a relationship with a then serving member of the NSWPF. The officer in charge, DS McCann, said in his statement that, “in light of the fact that the killer had some awareness [of] ballistic evidentiary value, emphasis was placed on trying to identify this person.”<sup>30</sup>
57. Counsel Assisting assert at CA, [41.b] that police did not thoroughly investigate the accounts of witnesses who referred to Ms Waine being in a relationship with a police officer, prior to declaring that line of enquiry to be “exhausted”. Counsel Assisting submit that the inquiries made by investigating police to ascertain the identity of the police officer were incomplete (CA, [151] to [187]).
58. The impact of MR’s evidence is addressed at paragraphs [33] and [34] above in the context of Counsel Assisting’s criticism that statements from certain witnesses appear to have not been obtained.
59. Counsel Assisting identify at CA, [181.c.] that there were other details provided about the supposed police officer that could have provided a means of identifying that person’s identity – for example, where he was residing, the apparent injuries he sustained, and the car he was said to have driven. Regrettably, the material presently available does not indicate

<sup>29</sup> Statement of DS McCann dated 22 July 1986 at [10] (SCOI.00014.00008).

<sup>30</sup> Statement of DS McCann dated 22 July 1986 at [10] (SCOI.00014.00008).

- whether or not information such as this was used to ascertain the identity of the purported police officer.
60. As noted above, the police officer identified by one of the witnesses as being the person in a relationship with Ms Waine was questioned. It is likely that records available to the investigating police officers were consistent with the answers provided by the police officer; while certainly not impossible, it is inherently unlikely that police would have deliberately failed to consider the possible involvement of a police officer in a *murder* investigation. In the absence of evidence from the OIC, such a finding could not sensibly or fairly be reached.
61. Notably, Counsel Assisting acknowledge that the investigations conducted by investigating police indicated the following:
- a There were conflicting versions as to the physical characteristics of the purported police officer.
  - b There were conflicting versions as to the position and geographical station of the purported police officer.
  - c One witness stated that Ms Waine “carried on a bit” when bragging about who she was involved with.<sup>31</sup> This suggests that Ms Waine was prone to embellish some details about her relationships.
62. Further, it is unlikely that Ms Waine was, at various times, in a relationship with two different police officers named David Brown. Therefore, the contrary versions of events provided by MR and CS, coupled with the above factors, meant that the veracity of the evidence regarding Ms Waine’s possible relationship with a serving police officer was unclear.
63. Counsel Assisting acknowledge at CA, [182] that there is no evidence available to the Inquiry to link the specific police officer identified as DRB with whom Ms Waine was in a relationship to her murder. Notably, Counsel Assisting have discounted Constable DRB as having been in a relationship with Ms Waine (CA, [186]). The evidence upon which this is based is confidential and has not been disclosed to NSWPF. However, it is noted that the ultimate conclusion is consistent with investigating police’s conclusion.
64. Therefore, it appears that Counsel Assisting have ultimately formed the same conclusion as investigating police in respect of this aspect of the case (at least in respect of DRB).

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<sup>31</sup> P109 Report of Occurrence, Interview with AP, 6 May 1985 (SCOI.82924, p. 74).

*Possible involvement of MSS security guard*

65. Counsel Assisting assert at CA, [41.c] that police did not check the alibi evidence relied upon by MSS Security officer **NP179** (NP), nor obtain records in relation to whether he had signed in his MSS Security-issued pistol as claimed.
66. Charlie Saville provided the following version in his statement dated 2 May 1985 (ie about 3 days after the incident described):<sup>32</sup>

*On last Sunday or Monday, that would be the 28th and 29th of April, 1985, I remember seeing a man dressed in "blue uniform type" outfit walk in the main doors as I was walking out. I remember looking at his shoulder badge and I think it was light blue with red and I'm pretty sure it was MSS Security. I am differently [sic] sure that it was a security guard. I didn't look back to see which unit he went to. That would have been between 10 and 12 during the day. I would describe this man as being: 30 to 35 old, 5' 8 or 9" tall, well build by that solid and fit. dark brown hair that was long at the sides and he was wearing a uniform type hat same as the Police and the colour matched his uniform. His skin was fair. I would recognize him again.*

67. Police obtained a statement from NP which relevantly included an alibi to the effect that he was asleep at home between about 6pm on Sunday, 28 April and 7.30am on Monday, 29 April and was at work on Monday.<sup>33</sup> In addition, he states that he did not have access to his work firearm between about 1.30am on Saturday, 27 April and 5.30pm on Tuesday, 30 April 1985.<sup>34</sup>
68. Counsel Assisting assert that investigating police did not check with Mr Saville whether the security officer he saw enter Ms Waine's building was NP (CA, [192]). It is not clear based on the material presently available whether such inquiries were made. The Commissioner agrees that, if these inquiries were not conducted, then that would represent a shortcoming in the initial investigation. Again, this potential shortcoming has not been explored with the OIC.

**NP178** } *explanation for his fingerprint*

69. Counsel Assisting assert at CA, [41.e] that police did not investigate the explanation provided

<sup>32</sup> Statement of Charlie Saville dated 2 May 1985 at [8] (SCOI.10040.00073).

<sup>33</sup> Statement of NP dated 2 May 1985 at [9] and [10] (SCOI.10035.00014).

<sup>34</sup> Statement of NP dated 2 May 1985 at [11] (SCOI.10035.00014).

by MG for his fingerprint being found on a phone in Ms Waine's apartment.

70. In July 1989, the fingerprint was identified as belonging to MG.<sup>35</sup> On 10 January 1991, MG was interviewed by Detective Senior Constable Di Francesco. In the interview, MG admitted to knowing Ms Waine through another "Kiwi" transgender sex worker. MG also admitted to engaging Ms Waine's services as a sex worker in 1984, but said that he never did so at Ms Waine's unit.<sup>36</sup> It appears that this admission was made before MG was aware that his fingerprints were located in Ms Waine's unit. Counsel Assisting acknowledge that Ms Waine appeared to have only moved into the unit in November 1984 and, prior to that, the unit was frequently being used for sex work (CA, [246]).
71. MG was unable to provide an explanation as to the presence of his fingerprints in Ms Waine's unit. However, he did state that he had been to the unit when his friend, Carmen Rupe, resided there.<sup>37</sup> Counsel Assisting appear to suggest at CA, [246] that MG's denial of having been to the Ms Waine's unit was a flat denial. However, the Commissioner of Police submits that a proper reading of the transcript of the interview suggests that MG answered the question in the context of it being Ms Waine's unit, not that he had never been to the actual unit previously.<sup>38</sup>
72. Counsel Assisting state that the police do not appear to have made any investigation into MG's explanation for the presence of his fingerprint on the telephone, including making enquiries with the sex worker identified by MG, Ms Rupe, as explaining the presence of his fingerprints at the unit prior to Ms Waine moving there.
73. Once again, it is not clear from the material presently available whether attempts were made to speak to other witnesses regarding MG's version of events. Consistent with the submissions advanced above, if no such attempts were made, then the Commissioner agrees that this may represent a further shortcoming in the investigation of Ms Waine's death. Once again, this potential shortcoming has not been explored with the OIC.

#### *Coven of Mercy for Fate*

74. Counsel Assisting assert at CA, [41.f] that police did not obtain phone records or otherwise investigate the identity of the anonymous caller/s who claimed responsibility for Ms Waine's murder on behalf of the "Coven of Mercy for Fate". As noted at CA, [241], the material

<sup>35</sup> Latent Fingerprint Unit, Serious Crime Identification Report dated 27 October 1989 (SCOI.10228.00002).

<sup>36</sup> Record of Interview with MG dated 10 January 1991 at pages 1 to 2 (SCOI.10040.00045).

<sup>37</sup> Record of Interview with MG dated 10 January 1991 at page 3 (SCOI.10040.00045).

<sup>38</sup> Record of Interview with MG dated 10 January 1991 at page 3 (SCOI.10040.00045).

produced to the Inquiry contains no indication that any steps were taken to request call records or otherwise to identify the caller or callers who made the phone calls received by Mr Baskin and Mr Goulden. If those steps were indeed not taken, then the Commissioner agrees that this is a regrettable shortcoming or oversight of the initial investigation.

75. It is noted that the Inquiry's own investigations have not uncovered any information about any group or organisation called the "Coven of Mercy for Fate." (see CA, [242]). It is likely that if such a group or organisation was known to operate at the time, then this would have been identified by the investigating police.
76. The Commissioner agrees that there is no evidence to substantiate any link between Ms Waine's death and an unidentified "coven" (CA, [243]). It is entirely possible that the caller was opportunistically taking advantage of Ms Waine's murder to sow fear amongst LGBTIQ community (CA, [243]).

*MF's alleged confession*

77. Counsel Assisting assert at CA, [41.g] that police did not investigate an alleged confession by MF to involvement in the murder of Ms Waine.
78. It appears that the asserted confession of MF arose via a record of interview with Danny Shakespeare.<sup>39</sup> The confession was to the effect that, according to Danny Shakespeare, MF had told him that MF was present at Ms Waine's unit at the time of Ms Waine's death. MF apparently admitted that whilst MF was staying at Ms Waine's unit, MF had heroin that she and another sex worker named "Sammy" were bagging to sell when, upon Ms Waine discovering this, Ms Waine flushed the heroin down the toilet. As a consequence, Ms Waine, who refused to reimburse MF for the value of the heroin, was murdered in her unit.
79. Counsel Assisting set out in detail at CA, [224] to [227] the questionable nature of Danny Shakespeare's credibility. The Commissioner of Police agrees with this analysis. Further, as Counsel Assisting identify at CA, [206] to [227], there are significant discrepancies in Danny Shakespeare's version of events to police and to NP181 (SR). Counsel Assisting describe these discrepancies as "numerous and significant" (CA, [229]).
80. It is not clear based on the material presently available whether inquiries were ultimately made with MF regarding the confession that Mr Shakespeare asserts she made to him. As Counsel Assisting note, investigating police appear to have treated her as a suspect at least

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<sup>39</sup> Record of Interview with Danny Robert Shakespeare dated 5 January 1986 (SCOI.10034.00009).

as at 26 January 1986 (being when a note records police spoke to MF but the relevant police officer was not aware of the interest in MF in connection with Ms Waine's death). The Commissioner agrees that, if these inquiries were not conducted, then that would represent a shortcoming in the initial investigation. But again, the fact or otherwise of such inquiries (or a decision not to undertake them) has not been explored with the OIC.

81. A running sheet in relation to the interaction with MF on 25 January 1986 contains the following under the heading "Narrative":

*"[MF] was spoken to at Kings Cross on 26.1.86. At the time the interviewing officer did not realise that she/he was a suspect in the matter and only recorded the details as a matter of course."*

82. Counsel Assisting assert at CA, [42] that some information of apparent potential relevance to the investigation, including the alleged confession made by MF, seems not to have been provided to the Coroner in connection with the inquest into Ms Waine's death.
83. The Commissioner of Police agrees that, based on the information presently available (noting that the available information may not present a complete picture), that this information should have been conveyed to the Coroner. However, the Commissioner notes that the significant issues with Mr Shakespeare's credibility indicate that, on balance, the information is unlikely to have been accepted by the Coroner as establishing that MF was positively involved in the death of Ms Waine. Once again, these issues have not been explored with the OIC.

Search regarding damage to floorboards

84. Counsel Assisting make the following comment at CA, [101]:

*The search **was said to have involved** the removal of the carpet for possible damage to the floorboards by the projectiles; no damage to either the carpet or floorboards was noted in statements by the searching officers. No bullets were found lodged in Ms Waine's body, with each entry wound having a corresponding exit wound.*

**(emphasis added)**

85. Later, Counsel Assisting referred to the following evidence obtained from Ms Waine's sister, Betty Ernst, in May 2023 at CA, [105]:

*The Inquiry made contact with, and obtained a statement from, Ms Betty Ernst,*

*sister of Ms Waine. Ms Ernst recalled that a few weeks after Ms Waine's death, police returned the apartment keys to her. She went to the apartment with her eldest son. On entering the bedroom where Ms Waine was killed, she did not observe blood on the floor or on the bed. The carpets did not appear to have been lifted, and she did not observe any bullet hole in the carpet.*

86. Counsel Assisting do not make any express assertion that the search by investigating police did not involve removing the carpet to search for possible damage to the floorboards. However, it appears by the manner in which Counsel Assisting describe the evidence of investigating police on this aspect that there may be a question around this. If that is Counsel Assisting's position, then this is flatly rejected by NSWPF.

### **Strike Force Parrabell review**

87. Following its consideration of this matter, SF Parrabell concluded that there was "insufficient information" to determine whether Ms Waine's death had been motivated by anti-LGBTIQ bias. Counsel Assisting reach the same conclusion (CA, [253]), as did the academic review team.
88. Counsel Assisting observe that of the 10 indicators used in the Bias Crime Indicators Form (BCIF), five were answered as 'Suspected Bias Crime', four were answered as 'Insufficient Information' and one as 'No Evidence of Bias Crime'.<sup>40</sup>
89. Two criticisms are raised by Counsel Assisting in respect of the SF Parrabell.
90. First, Counsel Assisting identify that the answer of "Suspected Bias Crime" to the indicator "Motives of Offenders" seems somewhat confused (CA, [56]). The response to the prompt, "The victim was perceived to be breaking from traditional conventions or working non-traditional employment", is that Ms Waine was "breaking from traditional conventions and was working in non-traditional employment". However, the indicator concerns the motive of the offender or offenders. Counsel Assisting state that the mere repetition of part of the wording of the prompt, without reference to the perception of any offenders in relation thereto, is of no relevance. Any such perception, on the part of any such offender/s, was unknown.
91. The Commissioner acknowledges that criticism and agrees that this indicator would more appropriately have been marked "insufficient information". Ultimately, it had no bearing on

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<sup>40</sup> BCIF undated (SCOI.74969).



the conclusion reached.

92. Second, Counsel Assisting note that the indicator "Victim/Witness Perception" was answered "No evidence of bias crime". Counsel Assisting notes the entry recording statements by friends or acquaintances to the effect that they did not know who would want to hurt Ms Waine and were not aware of any threats against her, or enemies she may have had. Such statements suggest a lack of motive. On one view, it is arguable that the absence of other motive is (faintly) consistent with the suggestion that bias or hate for her killing (CA, [57]).
93. While, having regard to the contents of the relevant statements, an evaluation of "No evidence of bias crime" was readily understandable, the Commissioner of Police accepts that this indicator could appropriately have been marked "insufficient information".

***Anti LGBTIQ bias***

94. In order to be able to reach any firm conclusion as to whether Ms Waine's death was motivated by gay hate, it is necessary to determine the identity of Ms Waine's attacker/s. This is not a matter in which a gay hate bias can be inferred by the surrounding circumstances. The Commissioner agrees with Counsel Assisting's analysis to the effect that Ms Waine's murder has some features of a professional "hit", including the use of a large calibre gun at close range and the removal of ballistics evidence from the scene (CA, [19]).
95. Counsel Assisting state that Ms Waine's prominence in the LGBTIQ community, and widespread contemporaneous hostility to members of that community including transgender persons, give rise to the realistic possibility that her murder involved LGBTIQ hate (CA, [18]). These observations are speculative but cannot be ruled out on the available material.
96. The Commissioner agrees with Counsel Assisting's assessment that the multitude of theories in relation to the motivation for killing Ms Waine makes it impossible to determine whether LGBTIQ bias was a factor in her death.

***Manner and cause of death***

97. The Commissioner agrees that the circumstances of Ms Waine's death leave no doubt that she was the victim of a homicide (CA, [18]). The Commissioner also agrees with Counsel Assisting's conclusion at CA, [148] that, on the available evidence, the appropriate conclusion is that Ms Waine's death occurred on Monday, 29 April 1985 at a time between

approximately 3:15am (when she was last seen alive by PS) and 9:00pm (when Ms Charleston visited the Darlinghurst unit).

98. The Commissioner of Police supports the submissions made by Counsel Assisting as to the manner and cause of the death, that is that the original finding at the coronial inquest remains appropriate, namely that Ms Waine died on 29 April 1985 of the effects of bullet wounds of the neck and thorax inflicted there and then by a person unknown (CA, [254]).

### **Overall conclusion**

99. The conclusions of Counsel Assisting align with those of SF Parrabell insofar as anti-LGBTIQ bias is concerned; no determination can be made as to the presence or absence of an anti-LGBTIQ motive in connection with Ms Waine's death.
100. Further submissions will be made as to the general issues pertaining to the activities of SF Parrabell in due course.



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23 June 2023

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