

24 April 2022

Independent Forensic Services PO Box 2466 NORTH PARRAMATTA NSW 1750

By email:

Dear Ms Gerhard and Ms Roebuck

Special Commission of Inquiry into LGBTIQ hate crimes: Expert report on death of Scott Miller

As you are aware, I assist the Honourable Justice John Sackar in the Special Commission of Inquiry into LGBTIQ hate crimes ("the Inquiry"). Kathleen Heath, of counsel, and Kate Lockery, solicitor, are assisting the Commissioner his consideration of the death of Scott Stuart Miller.

Mr Miller was found deceased near Wharf 5, Hickson Road in Darling Harbour, Sydney on Monday, 3 March 1997.

The Inquiry

By way of background, on 13 April 2022 the Governor of NSW, by Letters Patent, issued a commission to his Honour to inquire into and report on historical LGBTIQ hate crimes. Specifically, the Letters Patent require the Commissioner to inquire into and report to the Governor and Premier on the following matters by 30 June 2023:

- A. 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; and
- B. The manner and cause of death in all unsolved suspected hate crime deaths in New South Wales that occurred between 1970 and 2010 where:
 - 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.

Mr Miller's death is one of the unsolved deaths which the Commissioner is inquiring into pursuant to item A of the Letters Patent.

Request for expert opinion

By this letter, you are briefed to prepare a written report in relation to Mr Miller's death to assist the Inquiry. I note that it is anticipated that Mr Miller's case will proceed to a public hearing in early June 2023.

Arrangements are currently being made for you to physically examine of Mr Miller's clothing. Once the examination date is confirmed, please advise Ms Lockery of when you anticipate being in a position to provide your report.

Background

To assist you in the preparation of your report, you are provided with the following background information in relation to Mr Miller. This information is provided by way of summary only, and should not be treated as a comprehensive record or a substitute for your own review of the materials.

- Mr Miller (born 27 July 1975) was found deceased near Wharf 5, Hickson Road in Darling Harbour, Sydney on Monday, 3 March 1997. On the evening of Saturday, 1 March 1997, Mr Miller attended the Mardi Gras Parade on Oxford Street, Sydney, with three friends Shawn Kelly, Nathan White and Jason Elvy. It is noted that Mr Miller identified as heterosexual and had a long-term girlfriend.¹
- 2. After the parade, the friends travelled to The Rocks. Mr Miller and Mr White went to the Observer Hotel. At about 12:30am on Sunday, 2 March 1997, they were asked to leave due to their intoxication. Mr Miller and Mr White went to join Mr Kelly and Mr Elvy at the Orient Hotel. Mr White went inside, but Mr Miller remained outside speaking to two women.²
- 3. At some time between 1.30am and 2.00am on the morning of Sunday, 2 March 1997, Mr Kelly left the Orient Hotel to meet his brother. He saw Mr Miller walking across the road near the Orient Hotel. According to Mr Kelly, apart from being intoxicated, Mr Miller seemed himself. Mr Kelly told Mr Miller to meet the others in the Orient Hotel; however, when Mr Kelly returned to the Orient Hotel, Mr Miller wasn't there, and no one had seen him.³
- 4. At around 2.10am, Mr Miller was possibly seen by local resident Jade Carter walking down Watson Road from Observatory Hill. If accurate, this is the last known sighting of Mr Miller alive (and 600m from where his body was ultimately found). Ms Carter described Mr Miller as being in no rush and gave the following description of his appearance:

"He had a white t-shirt which was tucked into his jeans, faded blue jeans that were a good fit, dark belt and dark shoes. He appeared to be well dressed and looked like a north university student. He didn't appear to have any injuries, his clothes were neat and tidy and he didn't look out of the ordinary."

5. Mr Miller's body was found on the morning of Monday, 3 March 1997, by employees of Patrick the Australian Stevedore ("Patricks") in an area of Wharf 5 referred to as the "graveyard". 5 Mr Miller's body

¹ Statement of Plain Clothes Senior Constable Michael Lane dated 1 May 1997 (Tab 21).

Statement of Nathan White dated 4 March 1997. Statement not provided and available on request. See also statement of Plain Clothes Senior Constable Michael Lane dated 1 May 1997 (Tab 21).

³ Statement of Shawn Kelly dated 4 March 1997. Statement not provided and available on request.

⁴ Statement of Jade Carter dated 6 March 1997. Statement not provided and available on request.

⁵ Statement of Vince Micallef dated 6 March 1997 (Tab 17); see also Statements of Peter Cowan and Jim Gould, 6 March 1997. Statements not provided and available on request.

was at the bottom of a relatively small cliff, approximately 7 metres in height.⁶ Photographs of the location of Mr Miller's body are at **Tabs 9 – 13** of your briefing material.

- 6. The "graveyard" was an infrequently used part of the wharf which stored old, heavy machinery. It was fenced off with wire fencing with a gate that was accessible from within the wharf. However, public access to the wharf itself was blocked by a fence and required entry past a security checkpoint which was staffed at all times. Staff thought it was unlikely that somebody could get past the checkpoint without them knowing.⁷
- 7. Mr Miller's body was found about 1.1m from the base of the cliff, nearly parallel to the cliff face and adjacent to a gutter at the base of the cliff.⁸ He was face down, with his body laid out straight. His right arm was tucked up underneath his chest and his left arm was extended down the left side of his body, with his palm facing up. Mr Miller was fully clothed, with his clothes intact and his wallet in his back pocket. Blood was pooling under Mr Miller and extending out to the right side. There was also blood staining on the back of his t-shirt. Testing confirmed that this was Mr Miller's blood.⁹
- 8. Police examined Munns Reserve, the park directly above where Mr Miller was located in the machinery yard. The western side of the reserve was fenced with galvanised chain wire fencing, which was 1.9m off the ground and topped with barbed wire, which made the overall height of the fence 2.3m. A portion of the barbed wire on the top of the fence had come away from the support poles, near where a tree was leaning against the fence. There were no recent scuff marks on the chain wire fencing or on the galvanised tubular steel top rails or any holes in the chain wire fence. The leaf litter on the reserve side of the fence showed no obvious signs of being recently disturbed.¹⁰
- 9. On the outside of the chain wire fence was a sandstone ledge, which was 1m wide and covered in ivy. The ledge was below the level of the ground in Munns Reserve. There was a lack of disturbance of the vegetation or ivy on this ledge. 11 There was also no evidence of vegetation having slipped towards the edge of the cliff, indentation marks, or broken stems, although a small amount of ivy was found at Mr Miller's feet. 12

Post-mortem investigations

10. Dr Johan Duflou, forensic pathologist, attended the scene and conducted the autopsy. A copy of his final autopsy report is at **Tab 2** of your briefing material. In summary, Dr Duflou found multiple injuries, including massive skull fracturing and contusions of the brain, laceration of the liver, avulsion of the right kidney, intra-abdominal haemorrhage, bilateral wrist fractures, pulmonary contusion and previous injury to sternum and left tibia. Based on body temperature and information that Mr Miller was last seen alive at 2.00am on 2 March 1997, Dr Duflou estimated the likely time of death to be between 2.00am and 8.00am on 2 March 1997.¹³

⁶ Statement of Detective Senior Constable Lyle William Van Leeuwen dated 14 June 1997 (Tab 22).

Statements of Lance Neilson dated 28 October 1997, John Straube dated 14 March 1997, Warren White dated 6 October 1997, Stephen Williams dated 6 October 1997, Colin Plant dated 13 March 1997, and Archibald Price dated 14 March 1997. Statements not provided and available on request.

⁸ Transcript of coronial hearing dated 7 October 1997 (Tab 7).

⁹ DAL Certificate dated 19 May 1998 (Tab 6).

¹⁰ Statement of Detective Senior Constable Van Leeuwen (Tab 22).

¹¹ Statement of Detective Senior Constable Van Leeuwen (Tab 22).

¹² Transcript of coronial inquest on 7 October 1997, p. 6 (Tab 7).

¹³ Final Autopsy Report dated 5 June 1997 (Tab 2).

11. Anal and oral swabs and smears were negative for the presence of semen.¹⁴ A toxicology report found that Mr Miller had a blood alcohol level of 0.220g/100mL, reflecting a night of heavy drinking (although the report does not make it clear whether the blood alcohol level had been adjusted to account for the length of time between obtaining the sample and Mr Miller's death).¹⁵

Manner and cause of death

12. Various conflicting opinions have been provided as to whether Mr Miller's death was a homicide or an accidental fall.

Initial investigation and inquest (1997)

- 13. In his autopsy report (Tab 2), Dr Duflou stated that the manner by which the injuries were sustained remains unclear, but posited three possible scenarios:
 - a. Scenario 1: that the injuries were inflicted by one or more persons in a homicidal fashion. In this scenario, the head injury may represent impact with a heavy object swung against the forehead, and injury to the liver and kidney may similarly have been inflicted by one or more persons either kicking Mr Miller or hitting him with an object. The wrist injuries may be an indication of defensive injury;
 - b. Scenario 2: that the injuries were sustained during a fall from a height. Dr Duflou states that the wrist injuries, and possibly the head and abdominal injuries, could have been sustained during a fall from a height, but that "both the head and abdominal injuries... are somewhat atypical for a fall from a height"; or
 - c. Scenario 3: a combination of Scenarios 1 and 2. This combination is said to "explain all the injuries satisfactorily, and the sequence would most likely have been an assault followed by a fall from a height." He hypothesises that Mr Miller could have been moved to the place he was found.
- 14. During his evidence at the coronial hearing, Dr Duflou was asked which of the three scenarios was more likely. He gave the following evidence:

"My understanding is that there is no evidence at all of the Deceased having been on top of the cliff face... If that's the case the Deceased could not have fallen from the cliff face or from the top of the cliff face and its sounds unlikely to me that he in fact started climbing the cliff face as an alternative. In that case the Deceased would more likely than not have been killed in a homicidal fashion... I suppose the only major reason why a fall from the cliff face was a possibility was the fact that he was found at the bottom of a cliff face. If he had been found anywhere else I would have been prepared to say that homicide was by far the most likely manner of death." 16

¹⁴ DAL Certificate dated 1 April 1997 (Tab 5).

¹⁵ Toxicology Report dated 27 March 1997 (Tab 3).

¹⁶ Transcript of coronial inquest on 7 October 1997, p. 5 (Tab 7).

- 15. Dr Duflou further gave evidence that some of the injuries that Mr Miller received, particularly to the front of his neck and his wrists, could only be consistent with a fall if Mr Miller had moved at least a small amount following the fall.¹⁷
- 16. Detective Senior Constable Van Leeuwen, crime scene examiner, opined that the death of Mr Miller was "suspicious". He provided the following opinions and/or observations from his examination of the crime scene:
 - a. "The presence of blood stains on the back of the deceased's white T shirt can not be explained and is of a suspicious nature."
 - b. "The lack of separate individual blood spots throughout the machinery yard indicate that the deceased did not stagger around the machinery yard."
 - c. "The deceased was located lying face down on the ground at the base of the cliff. If he had fallen or jumped from Munns Reserve I would have expected his position to have been more contorted than it was."
 - d. "The deceased had a lack of external injuries usually seen in a person who has died as a result of a fall. If he had fallen or jumped from Munns Reserve, he could have fallen a distance of between 7 and 11.1 metres."
 - e. "There was a lack of trace evidence on the fencing at the western end of Munns Reserve indicating that the deceased had climbed the fence. It is not uncommon for clothing fibres or shoe imprints to be found on chain or barbed wire fencing or framework."
 - f. "There was no disturbance to the vegetation or ivy on the outside of the fence at the western end of Munns Reserve."
 - g. "There were no holes in the chain wire fence at the western end of Munns Reserve." 18
- 17. Detective Senior Constable Van Leeuwen considered that it was possible for a person to fall from the fence without touching the ivy, but for that to happen the body would have ended up further from the cliff than 1.1m.¹⁹
- 18. Detective Senior Sergeant Carlton Cameron, crime scene examiner, opined that he didn't believe that Mr Miller "came through or over the fence" in Munns Reserve, and that Mr Miller's injuries were not sustained by a fall.²⁰
- 19. Plain Clothes Senior Constable Michael Lane, the original officer in charge of the investigation, formed the opinion that Mr Miller accidentally fell from the cliff. His theory was that Mr Miller was attempting to go from The Rocks to the casino in Darling Harbour, where he liked to go after having been on a night out. On his way he may have become lost or disoriented and walked up Observatory Hill, where he was seen by the witness Jade Carter. He then walked the relatively short distance to Munns Reserve, from where you can see Darling Harbour and the casino. Once at the cliff, Mr Miller may have attempted to

¹⁷ Transcript of coronial inquest on 7 October 1997, p. 6 (Tab 7).

¹⁸ Statement of Detective Senior Constable Van Leeuwen, p. 9-10 (Tab 22).

¹⁹ Statement of Detective Senior Constable Van Leeuwen, p. 9-10 (Tab 22).

²⁰ Transcript of coronial inquest on 7 October 1997, pp. 10-11 (Tab 7).

²¹ Statement of Plain Clothes Senior Constable Michael Lane dated 1 May 1997 (Tab 21).

take a short cut down. He scaled the fence, which was made easier due to the barbed wire being down at one point of the fence. Once over the fence, Mr Miller may have either slipped and fell, or he may have realised there was no way down and fallen asleep and rolled off the cliff.²²

- 20. As part of Plain Clothes Senior Constable Lane's investigation, he noted that Mr Miller was found in an almost identical position to a deceased male who had fallen from scaffolding on the Opera House.²³
- 21. On 7 October 1997, Coroner Abernethy returned a finding that Mr Miller died "of multiple injuries inflicted by a person or persons unknown." The coroner found that a number of factors militated against Plain Clothes Senior Constable Lane's opinion that Mr Miller fell from the cliff. He considered that Dr Duflou gave "cogent reasons" for his view that it is more likely that Mr Miller was either assaulted near where he was found, or taken there and dumped.

Reinvestigation - 1997-1998

- 22. Plain Clothes Senior Constable Lane's theory was given some support during the reinvestigation of Mr Miller's death by Detective Sergeant Desmond. He noted the following factors which tended to support the theory that Mr Miller fell from the cliff above where his body was located:
 - a. The evidence of security staff that no vehicle or pedestrian could have entered the wharf without being challenged;
 - b. The lack of blood particles around the machinery yard.
 - c. Mr Miller's clothing being intact. 24

Review by the Unsolved Homicide Team 2004

- 23. A review of Mr Miller's death by the NSW Police Force Unsolved Homicide Team was conducted in 2004. For the purposes of your report, please assume the facts set out below in relation to that review.
- 24. The review concluded that Mr Miller "must have come over the cliff" to his final resting spot and supported a theory that Mr Miller died as a result of accident or misadventure. The review notes the following:
 - a. Mr Miller's injuries which bled could only have occurred where he was found. No blood was located at the top of the cliff or the surrounding area. The blood was pooled and no splatter marks were located which would indicate the use of a weapon to inflict them.
 - b. The reinvestigation determined that no pedestrian or vehicular access could have been gained to the Terminal, meaning that Mr Miller could not have been assaulted somewhere else and carried in.
 - c. Crime scene photographs show green ivy and a tree branch next to Mr Miller.
 - d. The position of the body is not unusual.

²² Statement of Plain Clothes Senior Constable Michael Lane dated 1 May 1997 (Tab 21).

²³ NSW Police running sheet dated 13 March 1997 (Tab 23).

²⁴ Report of Detective Sergeant Desmond, "New information on Darling Harbour death" dated 3 January 1998 (Tab 25).

- e. The height of the fence makes it extremely unlikely that Mr Miller, who weighed 87 kg, was lifted over the fence by other persons.
- f. The distance from the top of the fence to the ledge is almost 4m. In the poor light and in a state of intoxication, Mr Miller may not have realised that the ledge was lower than the ground level of the park. The injuries to Mr Miller's stomach and organs may have been caused from landing on the ledge, or the edge of it, on his stomach.
- g. The injuries to Mr Miller's neck appear to be scratches/ grazes flowing in a vertical direction and would support the theory that the deceased slid over the ledge on his stomach before falling to the ground.

Expert report of Dr Linda Iles

- 25. Dr Linda lles was briefed by the Inquiry in to provide an expert report in relation to Mr Miller's death from the perspective of a forensic pathologist. Dr lles was briefed with certain investigative and coronial material, including the crime scene material and autopsy findings (as outlined in her report). The expert report of Dr lles provided on 14 December 2022 is at **Tab 26** of your briefing material.
- 26. Dr lles opined that all of Mr Miller's physical injuries can be accounted for by a fall from a cliff face, with a primary impact point to the front of his face, decelerative injuries within his abdomen, and bracing type injuries to his distal forearms. She considered that these injuries are not typical of an assault. While Dr lles could not exclude Mr Miller being assaulted prior to a fall from a height, she considered that he did not have injuries to indicate that an assault occurred.
- 27. Further, Dr lles considered that the severity of Mr Miller's craniofacial injuries precludes him moving any distance following his fall, and that the circumstantial evidence supports the conclusion that he died at the location that his body was found.
- 28. While Dr Iles reached the conclusion that Mr Miller died after falling from the cliff above where he was found, she was unable to say, based on the medical evidence, how Mr Miller's fall occurred that is, she could not discriminate between Mr Miller falling from the cliff edge or being pushed over the cliff.
- 29. Dr lles indicated that, in her view, the pattern of blood staining on the left shoulder and left upper arm region of Mr Miller's shirt may be accounted for by blood being absorbed into the shirt from the pooling below Mr Miller's body. Dr lles also indicated that the blooding staining on the top right back of Mr Miller's shirt and to the right side of his face and ear could possibly be accounted for by agonal expiration of air and blood. However, Dr lles qualified that blood pattern analysis is not her area of expertise, and recommended an opinion be sought from a forensic biologist/ blood pattern analysis expert.

Materials with which you are briefed

For the purpose of preparing your report, you are briefed with the materials in the **enclosed** index. The material contained in the index. This material has primarily been extracted from file provided by the Coroners Court of NSW and the investigative file provided by the NSW Police Force.

²⁵ Expert Report of Dr Linda lles dated 14 December 2022, p. 11 (Tab 26).

Please note that the briefing materials contain sensitive images. The relevant tabs of your briefing material have been marked in red. If there is any additional material that you consider would be of use to you in forming your opinion, please contact Ms Lockery and this material will be provided to you (if available).

The Inquiry has confirmed that the following items of Mr Miller's clothing are in the custody of the NSW Police Force at the Metropolitan Exhibit and Property Centre:

- Brown belt, blue jeans and two white t-shirts (EFIMS Barcode X0001676064 | FS970244/205481;
- Multicoloured socks (EFIMS Barcode X0000643237); and
- Brown shoes (EFIMS Barcode X0000643238).

As discussed above, arrangements are being made for you to have access to these exhibits for the purpose of preparing your expert report.

Matters to be addressed in your report

I would be grateful if you could address the following matters in your report, having regard to the material with which you are briefed and to the extent that they are matters which fall within your training and expertise:

- 1. Please outline the physical examinations you conducted in relation to Mr Miller's clothing.
- 2. Please provide your opinion as to the cause/s (or possible cause/s) of the following observed in the photographs of Mr Miller contained at Tabs 9 to 14 of your briefing material:
 - a. The blood tracks down the right side of Mr Miller's face; and
 - b. The position and pattern of the blood on Mr Miller's t-shirt.

In providing your opinion, please indicate whether you agree with the views expressed by Dr Iles expressed on these points by Dr Iles at page 11 of her report.

- 3. In your opinion, was the location where Mr Miller's body was found a place where he landed after a fall, or was his body moved to that location? Please explain your reasons.
- 4. In the course of your examination, did you identify any marks or damage to Mr Miller's clothing or shoes that could suggest he climbed over a fence while them? For example, did you observe any rips or barbed wire punctures in his clothing or shoes.
- 5. To the extent not already outlined above, please provide your opinion as to any conclusions that can be drawn as to the manner and cause of Mr Miller's death through bloodstain pattern analysis, specifically the likelihood of misadventure (namely, an accidental fall from the cliff) or foul play (namely, an assault, or a push over the edge of the cliff) or both.
 - In answering the above, please comment where appropriate upon opinion of Dr Duflou, the findings of Coroner Abernethy, any views expressed by investigating police officers, and the opinion of Dr Iles.
- 6. Please provide any other comment, within the area of your expertise, regarding the likely manner and cause of Mr Miller's death and any additional areas of medical investigation or expert opinion

you consider would assist the Commissioner on the issues of Mr Miller's injuries and the manner and cause of his death.

The above questions are not intended to be exhaustive. Accordingly, if there is any matter arising from the circumstances of Mr Miller's death within your area of expertise on which you wish to express an opinion and which will be of assistance to the Commissioner, please do so.

I also request that you please attach detailed curricula vitae to your report.

Expert Code of Conduct

I **enclose** a copy of the Expert Code of Conduct and ask that you read it carefully. In the report you should acknowledge that you have read the Code and agree to the bound by it. I suggest the following form of words be included in the body of your report:

"I, **Jae Gerhard**, acknowledge for the purpose of Rule 31.23 of the Uniform Civil Procedure Rules 2005 that I have read the Expert Witness Code of Conduct in Schedule 7 to the said rules and agree to be bound by it."

"I, **Helen Roebuck**, acknowledge for the purpose of Rule 31.23 of the Uniform Civil Procedure Rules 2005 that I have read the Expert Witness Code of Conduct in Schedule 7 to the said rules and agree to be bound by it."

Please do not hesitate to contact Kate Lockery on process or contact Kate Lockery or contact Kate Locker

Thank you for your consideration and assistance.

Yours faithfully,

KAreche

Kate Lockery Principal Solicitor

Solicitor Assisting the Inquiry

DEATH OF SCOTT STUART MILLER INDEX TO EXPERT BRIEF TO JAE GERHARD

(as at 24 April 2023)

Tab	Document	Date	Reference No		
VOLUME 1					
Coronial Documents					
1.	P79A Report of Death to Coroner	3 March 1997	SCOI.02737.00009		
2.	Final Autopsy Report of Dr Duflou	5 June 1997	SCOI.02737.00048		
3.	Toxicology Report	23 March 1997	SCOI.02737.00019		
4.	Neuropathology Report	1 April 1997	SCOI.02737.00049		
5.	DAL Certificate	1 April 1997	SCOI.02737.00070		
6.	Additional DAL Certificate	19 May 1998	SCOI.10048.00006		
7.	Transcript of Coronial Inquest	7 October 1997	SCOI.02737.00041		
8.	Coronial Findings	7 October 1997	SCOI.02737.00004		
Photographs					
9.	Crime Scene Photographs [Sensitive material]	Undated	SCOI.10047.00004		
10.	Crime Scene Photographs [Sensitive material]	Undated	SCOI.10047.00008		
11.	Crime Scene Photographs [Sensitive material]	Undated	SCOI.82893		
12.	Crime Scene Photographs [Sensitive material]	Undated	SCOI.10047.00065		
13.	Crime Scene Photographs [Sensitive material]	Undated	SCOI.82894		
14.	Autopsy Photographs [Sensitive material]	Undated	SCOI.82892		
NSW Police Force statements and material, and witness statements					
15.	Police Situation Report (Senior Constable J Howe)	3 March 1997	SCOI.02737.00072		
16.	Police Running Sheet re timeline	4 March 1997	SCOI.02737.00074		
17.	Statement of Vincent Walter Micallef	6 March 1997	SCOI.10048.00026		
18.	Statement of Paul James Riley	10 March 1997	SCOI.02737.00063		
19.	Statement of Senior Constable Brendan Anthony Crowe	6 March 1997	SCOI.02737.00052		

Tab	Document	Date	Reference No	
20.	Statement of Constable Sarah Anne Coates	7 March 1997	SCOI.02737.00053	
21.	Statement of Plain Clothes Senior Constable Michael Lane	1 May 1997	SCOI.02737.00051	
22.	Statement of Detective Senior Constable Lyle William Van Leeuwen [Sensitive material]	14 June 1997	SCOI.02737.00068	
23.	Police Running Sheet re similar deceased	13 March 1997	SCOI.02737.00106	
24.	Summary of Evidence relating to the death of Scott Stuart Miller by Raff Del Vecchio	11 September 1997	SCOI.02737.00008	
25.	Report of Detective Sergeant Desmond, "New information on Darling Harbour death"	3 January 1998	SCOI.10047.00024	
Expert Report obtained by the Inquiry				
26.	Expert Report of Dr Linda lles	14 December 2022	SCOI.82891	