

## SPECIAL COMMISSION OF INQUIRY INTO LGBTIQ HATE CRIMES

### IN THE MATTER OF SCOTT STUART MILLER

### SUBMISSIONS ON BEHALF OF THE MILLER FAMILY

#### Introduction

1. These submissions are filed on behalf of the family of Scott Stuart Miller, namely, his parents, Christine Miller and Stuart Miller, and his brothers, Shane Miller and Mark Miller (collectively, the **Miller family**).
2. The Miller family would like to take the opportunity to formally and sincerely thank the Inquiry, and Counsel and Solicitors Assisting the Inquiry, for their collective efforts in carrying out this new investigation into the circumstances of Scott's death.
3. The core submission the Miller family wishes to convey is that they, respectfully, do not agree with Counsel Assisting's recommendation in their submissions dated 15 June 2023 (**CAS**) that the relevant register be amended under section 45(1)(b) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) to the effect that the cause of Scott's death be recorded as "*multiple injuries sustained in an accidental fall from a height*": CAS [171]-[172]. Such a correction would be premature and unsafe at this stage.
4. The Inquiry's own investigations have revealed that the initial investigation in 1997 was flawed, there is still evidence to be examined, there are conflicting opinions of experts, and there are now important further investigative steps that should be taken before any conclusion can safely be reached as to the cause of Scott's death.

#### Submissions

##### Shortcomings of initial investigations

5. The Inquiry has uncovered shortcomings with the initial investigations by police into Scott's death: see CAS [23]-[51]. It may be that the flaws in the investigative steps in and around 1997 were caused by the quick conclusion reached by PCSC Lane that Scott's death was accidental: see CAS [23]. The Inquiry should consider whether a more strongly worded finding is necessary regarding the shortcomings and flaws of the police's initial investigations: *cf.*, CAS [26].<sup>1</sup>

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<sup>1</sup> Counsel Assisting characterise those shortcomings and flaws by stating that "*some aspects of the investigation into Mr Miller's death were not pursued as thoroughly or completely as they could have been*": CAS [26].

6. The failure to take contemporaneous statements from all security guards and also interview all relevant crew members (see CAS [27] and [28], respectively) raises questions as to the possibility that Scott's body was placed in the Patricks compound (as opposed to falling from the cliff above) (see CAS [31]). In relation to the security guards, what appears to have occurred is that police interviewed some of the guards in the weeks after Scott's death (in March 1997), while others were not interviewed until October 1997: see, e.g., CAS [97]-[98] and the footnotes therein. Issues with memory and recollection of events may create reliability issues with the evidence obtained from witnesses some 7 months after the incident.
7. It is also concerning that further "*forensic review*" of the crime scene was not undertaken despite DS Barwick's recommendation: CAS [33]-[34].
8. These shortcomings and flaws show how a critical factual issue – that is, whether Scott's body could have been placed in the Patricks compound – was not properly investigated by police. These shortcomings are sufficient reason for the Inquiry to not make any finding as to cause of death until further investigative steps are undertaken (see below).

#### Importance of examining all material evidence

9. One of the Miller's family foremost concerns is that not all material evidence has been properly examined and analysed. It is apparent that the debris from Scott's right hand was misplaced such that it was "*never entered as [an] exhibit or specimen*" in the relevant archive room: see CAS [19], [67].<sup>2</sup> On the information available in the tender bundle, it is difficult to ascertain the precise error regarding the storage and retention of the debris evidence,<sup>3</sup> but there is a question as to how any error was made regarding such critical evidence.
10. The Miller family seek that appropriate steps be taken by police at all locations where any evidence might be held to ensure that there is no other important evidence which has been similarly misplaced and therefore potentially overlooked. The doubts as to the adequacy of the police's records and evidence storage in relation to the investigation into Scott's death are heightened given how the police answered the respective summonses of 18 May 2022 and 13 April 2023: see CAS [54]-[56]. While it is not clear, it appears that the police may have uncovered further material responsive to the 22 May 2022 summons (such as the debris) while performing searches pursuant to the 13 April 2023

<sup>2</sup> See UHT Review Case Screening Form dated 21 April 2004, NPL.0100.0015.0001 at .0010.

<sup>3</sup> The Statement of Inspector Andrew Brady dated 7 June 2023 (NPL.9000.0017.0072) referred to in footnotes 35 and 35 of CAS was not part of the tender bundle.

summons: see CAS [65]-[67]. It is critical that police be certain that they have produced to the Inquiry all available evidence concerning Scott's death.

11. The Miller family are further concerned that given the lateness of the police production under the respective summonses, there may be materials that have not yet been properly considered by the Inquiry. In that regard, the production of 9 June 2023 and a further document on 15 June 2023 is notable: see CAS [56]. The Miller family are not being critical of the Inquiry and are only concerned to ensure that the Inquiry itself would have had sufficient time to review the production; noting, here, that Counsel Assisting's submissions are dated 15 June 2023 and the public hearing only took place on 16 June 2023. The Inquiry should not make any finding as to the cause of death until it is reasonably satisfied that all material evidence in storage has been located, produced, and then properly examined.

#### Further testing of certain evidence

12. There are two items of evidence that require further testing. The ***first*** item is Scott's clothing. As submitted above, the Inquiry's investigations have uncovered shortcomings with the initial investigations in around 1997. One indicator, and potential consequence, of the inadequacy of those investigations is that no proper examination of the pockets in Scott's jeans took place. Indeed, it was not until 11 April 1997 that Scott's key card and the cash in his pockets were discovered,<sup>4</sup> and it is not clear whether such materials have been examined.<sup>5</sup>
13. A more detailed examination of Scott's clothing should be undertaken. The Inquiry's own investigation shows the importance of those further steps. For example, the Inquiry's expert, Jae Gerhard, engaged to examine blood patterning evidence only (see CAS [17]) notes the presence of "*[a] number of small, discrete stains, which had a slightly varied appearances and were red/orange/brown in colour were observed on the outside front and rear surfaces of the jeans.*"<sup>6</sup> Ms Gerhard also noted "*[s]ome generalized dirt and sticky residue was observed on the inside hems of the jeans.*"<sup>7</sup> These marks tested negative to a presumptive test for blood and so were not examined further. The initial forensic reports from 1997 and 1998 by Virginia Freeman indicated that investigations were limited to analysis of some swabs and a DNA analysis of four locations of blood on

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<sup>4</sup> Statement of Michael Lane dated 1 May 1997, SCOI.02737\_00051 at \_0011 (paragraph 45).

<sup>5</sup> See, e.g., Statement of Michael Lane dated 1 May 1997, SCOI.02737\_00051 at \_0012 (paragraph 48).

<sup>6</sup> Expert report of Jae Gerhard dated 29 May 2023, SCOI.82890\_0001 at \_0010 (paragraph 10.6).

<sup>7</sup> Expert report of Jae Gerhard dated 29 May 2023, SCOI.82890\_0001 at \_0010 (paragraph 10.7).



Scott's shirt.<sup>8</sup> This raises the prospect that Scott's clothing has not yet had any or proper forensic analysis, with the marks on his jeans such as those mentioned above not having been examined. There is also the evidence in DS Barwick's case screening form dated 21 April 2004 wherein he noted "*no examination has been made of the victims clothing*": see CAS [32]. As noted above, the Unsolved Homicide Team did not undertake any such forensic review despite DS Barwick's recommendation for this to occur.

14. The technology existed in 1997 for blood pattern analysis yet this was not carried out until by the Inquiry's expert, Ms Gerhard, in 2023. However, in any event, the reliability of blood pattern analysis used as a stand-alone forensic tool may be questioned. A more thorough forensic analysis of all items of Scott's clothing should be undertaken before any finding as to cause of death is made.

#### Debris from Scott's right hand

15. The second item requiring further testing is, as referred to above, the debris from Scott's right hand, which was extracted by Dr Duflou during the post-mortem investigation. It remains the case that the debris has never been forensically analysed or tested. It would be inappropriate for the Inquiry to make any recommendation to correct the register until all material evidence, including the debris, is properly analysed. Expert examination of the debris is yet to be undertaken (see CAS [70]), and the Miller family respectfully seek to be kept informed of the results of that examination and make further submissions once those results are available.

#### Conflicting expert opinions as to the cause of Scott's death

16. The manner of Scott's injuries and how he received them has not been consistently explained by forensic experts. Dr Duflou, although initially describing three possible scenarios for Scott's death, gave evidence during the inquest in 1997 that Scott's injuries were atypical of a fall from height: see CAS [106].
17. Experienced detectives DSC Van Leeuwen (CAS [109]) and DSS Cameron (CAS [114]) both thought Scott's death was suspicious and that his injuries were not caused by a fall. Only PCSC Lane, in charge of his first homicide investigation, thought that a fall had taken place. The detectives and Dr Duflou both had the advantages of access to the crime scene and access to the physical evidence.
18. Dr Iles, the forensic expert retained by the Inquiry, contradicted Dr Duflou and stated that "*[a]ll of Mr Miller's injuries can be accounted for by a fall from a cliff face*": CAS [132].

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<sup>8</sup> Statement of Virginia Freedman dated 1 April 1997, SCOI.02737.00070\_0001; Second statement of Virginia Friedman dated 19 May 1998, SCOI.10048.00006\_0001.

Dr Iles' investigation had access only to crime scene and autopsy *photographs* and not physical evidence.

19. The Miller family respectfully submit that a third opinion could be sought by the Inquiry given that there are now conflicting expert opinions. Although the further expert would only have access to the same limited materials as Dr Iles, it would give the family more confidence that the investigation has reached the most accurate conclusion reasonably obtainable in the circumstances. Such a step would be appropriate given that the rejection or undermining of Dr Duflou's conclusions presently seems unsafe as even Dr Iles commented on how Dr Duflou's autopsy report was "*comprehensive*" and photo-documentation was of "*a relatively high standard*": see CAS [131]. In light of those comments, to now depart from Dr Duflou's conclusions because of the more recent expert reports may be premature. An additional expert opinion is warranted; particularly to consider the reports of Dr Duflou and Dr Iles, and to consider their conflicting views as to cause of death.

#### Security at Patricks compound

20. The assumption made by the police that Scott must have fallen down the cliff as his body was found in the Patricks compound was questionable. The Miller family acknowledge the evidence that the compound was surrounded by a tall fence and only accessed by a security gate manned by two security guards: see, e.g., CAS [97].
21. However, Counsel Assisting also submitted that a security guard conducted mobile patrols on the hour which involves one guard leaving the compound: see CAS [97]. Additionally, there is a long list of persons allowed to travel through these gates such as "*Shipping agents, Maritime Staff, Customs/quarantine staff, staff of vessels*": see CAS [99]. Witness statements also record that the security personal worked 16-hour shifts.<sup>9</sup>
22. In the inquest, James Gould, a plant mechanic from the site, gave the following evidence regarding the security surrounding the Patricks compound:<sup>10</sup>
  - Q. But I imagine if you really wanted to get in there you could probably manage it or wanted to get someone in there you could probably manage it?
  - A. Maybe, yeah maybe, it's possible.
  - Q. Would a vehicle be able to travel in there without being checked?
  - A. Possible, I couldn't say yes or not but possibly.

<sup>9</sup> Statement of Warren White dated 6 October 1997, SCOI.02737.00038\_0001 at \_0002 (paragraph 8); Statement of Stephen John Williams dated 6 October 1997, SCOI.02737.00040\_0001 at \_0002 (paragraph 8).

<sup>10</sup> Transcript of Coronial Inquest dated 7 October 1997, SCOI.02737.00041\_0001 at \_0022 (p22.6-14).

23. Such evidence shows that consideration should be given to whether it may have been the case that Scott's body was placed in the Patricks compound rather than Scott having fallen from the cliff.

### **Conclusion**

24. Given the foregoing and based on the current information available to the Inquiry, the Miller family respectfully submit that it is premature for the Inquiry to make any finding, at this stage, as to the cause of Scott's death. There are further investigative steps that need to be undertaken before any definitive findings may be made and to do so without these first being undertaken would be unsafe.
25. The Miller family have lived with the uncertainty of the circumstances of Scott's death for more than 26 years. The Miller family would like to ensure that any findings made by the Inquiry are reached following a thorough and comprehensive investigation. The Miller family has been denied this for too long.

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