



Special Commission of Inquiry into LGBTIQ hate crimes

SUPPLEMENTARY SUBMISSIONS OF COUNSEL ASSISTING

18 October 2023

IN THE MATTER OF SCOTT STUART MILLER

Introduction

1. These supplementary submissions are filed on behalf of Counsel Assisting the Special Commission of Inquiry into LGBTIQ hate crimes (**Inquiry**). They supplement the written submissions of Counsel Assisting dated 15 June 2023 (**primary submissions**), and the oral submissions made by Counsel Assisting at the public hearing held into death of Scott Stuart Miller held on 16 June 2023.

Further investigative steps taken by the Inquiry

2. After the hearing of Mr Miller's case on 16 June 2023, the Inquiry undertook the following additional investigative steps:
 - a. Summoning material from the Forensic and Analytical Science Service (**FASS**) in relation to forensic testing in Mr Miller's matter;
 - b. Consequent upon (a), making enquiries as to further consideration of Mr Miller's case by the Unsolved Homicide Team (**UHT**) between 2010 and 2012;
 - c. Arranging for the examination of a piece of debris recovered from Mr Miller's right hand at the time of the post-mortem examination (**debris**) by independent forensic scientist Professor Claude Roux;
 - d. Arranging for DNA testing of the surface of the debris;
 - e. Arranging for testing of a small fibre located on the surface of the debris;
 - f. Obtaining a supplementary report from Ms Jae Gerhard in relation to possible avenues for further forensic testing of Mr Miller's clothing;

Special Commission of Inquiry into LGBTIQ hate crimes

- g. Arranging for further DNA testing be carried out of Mr Miller's clothing;
 - h. Obtaining, from a third forensic pathologist, a peer review of the opinions of Dr Johan Duflou and Dr Linda Iles; and
 - i. Obtaining an expert opinion as to the species of ivy found next to Mr Miller's body.
3. The results of these further enquiries are set out below.

Discovery that forensic testing was carried out in 2010–2012

4. In the first month of the operation of the Inquiry, on 18 May 2022, the Inquiry issued a summons (summons NSWPF1) to the NSWPF for material "held or created by the Unsolved Homicide Squad" in relation to Mr Miller's death.¹
5. Among the material produced by the NSWPF was an undated and unsigned "Case Screening Form".
6. On 24 May 2023, the Inquiry wrote to the NSWPF asking, *inter alia*:
- a. "whether any other case screening form, triage document or review document has been prepared in association with Mr Miller's death"; and
 - b. "whether Mr Miller's case has been considered by the Unsolved Homicide Review Committee for a final determination as to whether the matter will be reinvestigated."²
7. By a letter dated 1 June 2023,³ the NSWPF:
- a. provided the Inquiry with a copy of that Case Screening Form, as signed by Detective Sergeant (DS) Barwick on 21 April 2004;
 - b. informed the Inquiry that that signed and dated copy had been located "in a homicide office storage room with hardcopy files" that was generally used for the temporary storage of files and only searched "out of an abundance of caution";
 - c. informed the Inquiry that the Case Screening Form prepared by DS Barwick in 2004 was the only case screening form, triage document or review document ever prepared in relation to Mr Miller's death, and that Mr Miller's matter had never been considered by the Unsolved Homicide Review Committee.⁴

¹ Statement of Kathryn Lockery, 14 June 2023, [7] (SCOI.83681).

² Letter from the Inquiry to NSWPF, 24 May 2023 (SCOI.83527).

³ Letter from NSWPF to Inquiry enclosing signed UHT case screening form dated 21 April 2004, 1 June 2023 (SCOI.83403).

⁴ Letter from NSWPF to Inquiry enclosing signed UHT case screening form dated 21 April 2004, 1 June 2023 (SCOI.83403).

Special Commission of Inquiry into LGBTIQ hate crimes

8. On the basis of the matters set out in the preceding paragraphs, the primary submissions proceeded on the assumption that the Inquiry had been provided with all documents relevant to any review of Mr Miller's case by the UHT, and that no "forensic review" had been undertaken (as had been recommended by DS Barwick in 2004): see primary submissions at [32]-[34]. The "forensic review" so recommended by DS Barwick was for a "re-examination of the crime scene and Mr Miller's injuries", including an examination of Mr Miller's clothing.
9. On 27 June 2023, the Inquiry issued a summons to FASS (summons FASS4) for all documents or other records held by FASS relating to the death of Mr Miller.⁵ This summons was issued with a view to pursuing further DNA testing: see below at [60] and following.
10. In response to that summons, FASS produced material which indicated that on 10 March 2010, Detective Sergeant (**DS**) Robert Allison of the UHT had requested that FASS conduct testing on Mr Miller's clothing.⁶ (The results of that testing by FASS are set out in a report dated 9 November 2012,⁷ and are discussed below at [25].)
11. No such testing by FASS, in or after 2010, had been referred to in any document received from the NSWPF.
12. On 17 July 2023, the Inquiry issued a further summons to the NSWPF (summons NSWPF152)⁸ for material held by the UHT in relation to that testing, including, *inter alia*, any "document or summary recording the outcome of the above testing and any further investigations undertaken or recommended".
13. On 24 July 2023, the NSWPF advised that no records were identified which recorded the outcome of the testing undertaken by FASS in Mr Miller's matter between 2010 and 2012.⁹

⁵ Summons to Produce to FASS (summons FASS4), 27 June 2023 (SCOI.84762).

⁶ Forensic Examination Request Form P377, 10 March 2010 (SCOI.85742).

⁷ FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741).

⁸ Summons to produce to NSWPF (summons NSWPF152), 17 July 2023 (SCOI.85732); Statement of Penelope Smith, 5 October 2023, [8] (SCOI.86023).

⁹ Letter from NSWPF to Inquiry re NSWPF152, 24 July 2023 (SCOI.85735).

Special Commission of Inquiry into LGBTIQ hate crimes

14. Summons NSWPF152 also requested any correspondence, file note or other record of communications between the UHT and FASS. The NSWPF produced only two documents in response, being two “Investigators Notes” prepared by DS Allison. The first was dated 9 March 2010 and outlined the context in which he had requested forensic testing in 2010;¹⁰ the second was dated 10 March 2010 and recorded that the clothing had been conveyed to the Department of Analytical Laboratories (DAL), the predecessor to FASS.¹¹
15. In the 9 March 2010 note, DS Allison recorded that on 4 February 2010, Mrs Christine Miller (Mr Miller’s mother) had contacted him and had enquired about the status of the investigation into her son’s death. According to DS Allison’s 9 March note, the investigation had been “formally reviewed” by the “Review Team” of the UHT, and that “review” had recommended “a forensic examination of the deceased’s clothing be undertaken in order to identify evidence of ‘trace DNA’ or signs of a struggle,” but that recommendation remained outstanding.
16. DS Allison accordingly put in train arrangements for the examination of the deceased’s clothing,¹² and on 10 March 2010 four items of Mr Miller’s clothing were conveyed to DAL.¹³
17. The “formal review” referred to by DS Allison on 9 March 2010 cannot be a reference to the 2004 Case Screening Form signed by DS Barwick. This is because:
 - a. DS Barwick had recommended an examination of Mr Miller’s shoes and other clothing on the basis that it “may provide evidence of barbed wire punctures.” He made no reference to trace DNA, or to testing to identify evidence of a struggle. Rather, his thesis in 2004 was that Mr Miller may have climbed over the fence, which was topped with barbed wire; and
 - b. The first paragraph of the 2004 Case Screening Form noted that it would be forwarded to the “Unsolved Homicide Review Team” following its completion. Other evidence before the Inquiry indicates that a recommendation by an individual reviewer is distinct from, and a precursor to, consideration of that recommendation by the “Review Team”.¹⁴
18. Accordingly, some other document, containing the different recommendation referred to by DS Allison, must exist, or at least have existed in March 2010. The most likely inference is that the Unsolved Homicide Review Team, at some point after April 2004, reviewed Mr Miller’s case and made the recommendation referred to by DS Allison.

¹⁰ Investigator’s Note by Chief Inspector Robert Allison re forensic review of clothing, 9 March 2010 (NPL.0201.0001.0001).

¹¹ Investigator’s Note by Chief Inspector Robert Allison re transfer of clothing exhibits, 10 March 2010 (NPL.0201.0001.0002).

¹² Investigator’s Note by Chief Inspector Robert Allison re forensic review of clothing, 9 March 2010, (NPL.0201.0001.0001).

¹³ Investigator’s Note by Chief Inspector Robert Allison re transfer of clothing exhibits, 10 March 2010 (NPL.0201.0001.0002).

¹⁴ See for example Exhibit 6, Tabs 162B-E, Tabs 399 and 399A.

Special Commission of Inquiry into LGBTIQ hate crimes

19. However, the NSWPF has maintained, in correspondence in July 2023, that “the NSWPF has not conducted any further review or triage in the matter of Mr Miller since April 2004.”¹⁵
20. Having regard to the new material recently provided by FASS and the NSWPF, the submission made at [34] of the primary submissions may not be correct. A review of Mr Miller’s case, of some kind, seems likely to have occurred in or before 2010, and some forensic testing of the clothing did occur between 2010 and 2012.
21. However, two further submissions are now made.
22. **First**, it is remarkable and troubling that the NSWPF is unable to locate any records of its own, of the results of the DNA testing reported by FASS as recently as 9 November 2012,¹⁶ nor of the recommendation of the Review Team to which DS Allison referred in his Investigator’s Note of 9 March 2010. In this respect, reference is made to the submissions of Counsel Assisting dated 15 September 2023, in relation to the Investigative Practices Hearing, in relation to the NSWPF’s record keeping practices.
23. **Secondly**, although some testing of Mr Miller’s clothing did eventually occur, it would appear that this step was only taken after Mrs Miller’s call prompted DS Allison to take steps to implement the recommendation which had evidently been made by the UHT Review Team. It should not be incumbent on the family of a deceased person to continue to call or enquire about their loved one’s case in order for investigative steps to be taken.
24. In the absence of any evidence as to when the Review Team actually made that recommendation, it is unknown how long that recommendation sat dormant and unactioned. What is known is that approximately six years passed between DS Barwick’s initial recommendation (of April 2004) and the UHT arranging (in March 2010) for Mr Miller’s clothing to be tested at all. Arranging for testing to occur is not a resource intensive step, and the unexplained inactivity suggests a failure of the UHT’s internal systems for monitoring and progressing the cases for which it has responsibility.

Results of the forensic testing in 2010-2012

25. In the request form to DAL submitted by DS Allison in 2010, DS Allison stated that the objective of the further forensic testing was to identify any trace DNA on the items, as well as “signs of a struggle which may be evident from damage or stretch marks to any of the items”.¹⁷

¹⁵ Letter from NSWPF to Inquiry re NSWPF152, 24 July 2023 (SCOI.85735).

¹⁶ FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741).

¹⁷ Forensic Examination Request Form P377, 10 March 2010 (SCOI.85742).

Special Commission of Inquiry into LGBTIQ hate crimes

26. The results of the further testing by FASS were set out in a report dated 9 November 2012.¹⁸ In summary:
- a. Blood was not detected on Mr Miller’s blue Jag brand jeans.¹⁹ The notes prepared by FASS indicate that “several areas of r/b staining” were targeted for testing.²⁰
 - b. Four areas of the jeans pockets were tape-lifted, but DNA testing of those tape-lifts was unsuccessful.²¹
 - c. Four stored extracts taken from the stains on Mr Miller’s t-shirt were re-tested and returned results consistent with the blood originating from Mr Miller.²²
27. The results of the forensic testing reported by FASS in 2012 do not advance the inquiry into the manner and cause of Mr Miller’s death.

Examination of the debris

28. A piece of debris was recovered from Mr Miller’s right hand at the time of the post-mortem examination (EFIMS reference X0000542512).²³ As noted in the primary submissions at [65]-[69], the debris was examined by Inspector Andrew Brady of the FETS Command of the NSWPF on 2 June 2023. He noted that the debris had the appearance of rust, reacted to magnets and had metallurgical properties, but stated that further analysis would be required to definitely conclude the nature of the debris.²⁴
29. At the time of the primary submissions, the Inquiry proposed to brief an appropriate expert to ascertain the nature of the material: see primary submissions at [70].
30. In written submissions on 30 June 2023, the NSWPF acknowledged that it was regrettable that no forensic testing or metallurgical examination had been completed on the debris.²⁵

¹⁸ FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741).

¹⁹ FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741).

²⁰ General Worksheet, 8 March 2011 (SCOI.85743); Photographs of the jeans, 10 February 2011 (SCOI.85972).

²¹ General Worksheet, 8 March 2011 (SCOI.85743); FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741); see also Supplementary expert report of Jae Gerhard, 21 August 2023, [10.2] (SCOI.85167).

²² FASS Report to NSWPF re further testing, 9 November 2012 (SCOI.85741); see also Supplementary expert report of Jae Gerhard, 21 August 2023, [10.3] (SCOI.85167).

²³ Statement of Inspector Andrew Brady, 7 June 2022, [27] (NPL.9000.0017.0072); UHT Review Team Case Screening Form, 21 April 2004 (NPL.0100.0015.0001).

²⁴ Statement of Inspector Andrew Brady re debris, 7 June 2023, [34] (NPL.9000.0017.0072).

²⁵ Written submissions for NSWPF, 30 June 2023, [57] (SCOI.84264).

Special Commission of Inquiry into LGBTIQ hate crimes

31. On 30 June 2023, following enquiries made by the Inquiry, the NSWPF indicated that there were no suitably qualified officers at the FETS Command to undertake the required further analysis of the debris.²⁶
32. On 1 August 2023, the Inquiry requested that Professor Claude Roux, forensic scientist and Director of the UTS Centre for Forensic Science, conduct a forensic examination of the debris.²⁷
33. Professor Roux conducted an optical examination of the sample, with and without magnification. The optical examination revealed three visible layers, two described as “grey/brown, rusty”, and one described as “white/light”.²⁸
34. The debris was then chemically examined by two techniques:²⁹
 - a. “Fourier Transform Infrared Spectroscopy” (**FTIR**); and
 - b. “Laser Ablation-Inductively Coupled Plasma Mass Spectrometry” (**LA-ICP-MS**).
35. The results of the examination were that the debris is comprised of 52% iron and 47% zinc, with the remaining 1% comprising small amounts of lead and chromium.³⁰
36. Professor Roux expressed the opinion that the metal composition and multilayered morphology of the debris support the proposition that the sample comes from a “coated metallic object, possible galvanized steel”.³¹
37. Professor Roux was not able to determine the likely provenance of the debris without access to comparison materials. However, his review of the brief, including photographs of the crime scene, indicated that the metallic fence, machinery and shipping containers in the vicinity of the crime scene should be considered as the possible provenance for the debris.³²
38. Professor Roux also noted that, given Mr Miller was found in the machinery yard, and given the small size of the sample, the fact that the debris was found in Mr Miller’s hand does not mean Mr Miller came into direct contact with the metallic object from which the debris came. It could be explained by contact between Mr Miller’s hand and another surface on which the debris was present (such as the ground).³³

²⁶ Letter from Inquiry to NSWPF re testing of debris, 30 June 2023 (SCOI.85739); Letter from NSWPF to Inquiry re testing of debris, 3 July 2023 (SCOI.85740).

²⁷ Letter of instruction to Professor Claude Roux, 1 August 2023 (SCOI.85316).

²⁸ Expert Report of Professor Claude Roux, 25 August 2023, 2 (SCOI.85317).

²⁹ Expert Report of Professor Claude Roux, 25 August 2023, 2 (SCOI.85317).

³⁰ Expert Report of Professor Claude Roux, 25 August 2023, 3 (SCOI.85317).

³¹ Expert Report of Professor Claude Roux, 25 August 2023, 3 (SCOI.85317).

³² Expert Report of Professor Claude Roux, 25 August 2023, 3 (SCOI.85317).

³³ Expert Report of Professor Claude Roux, 25 August 2023, 3 (SCOI.85317).

Special Commission of Inquiry into LGBTIQ hate crimes

39. Professor Roux’s opinion is consistent with the submission made in the primary submissions that Mr Miller is likely to have climbed the fence at Munn Reserve and fallen to his death. In this scenario, the debris in Mr Miller’s hand could be the result of direct contact with the fence at Munn Reserve. However, given the existence of alternative sources for the debris, and the availability of other explanations as to how metallic debris may have come to be on Mr Miller’s hand, Professor Roux’s opinion does not significantly advance the inquiry into the manner and cause of Mr Miller’s death.

DNA testing of the surface of the debris

40. Prior to the transportation of the debris from the custody of NSWPF to the UTS Centre for Forensic Science, Sergeant Hayley Bennett of FETS collected a swab from each side of the debris, which were labelled “side A” (EFIMS reference XF000536277) and “side B” (EFIMS reference XF000536278).³⁴
41. Virginia Friedman of FASS reported the following results from the testing of those swabs:³⁵
- a. A partial profile the same as Mr Miller’s was recovered from the side A swab; and
 - b. The profile recovered from side B was “not suitable for comparison due to the low level”, which was explained to mean that DNA profiling was carried out, but “a very limited amount of DNA profile information was recovered, and as such, the result is not suitable for meaningful comparison”.³⁶
42. The results of the DNA testing do not advance the inquiry into the manner and cause of Mr Miller’s death.

Fibre attached to the debris

43. On 31 July 2023, in the process of collecting the above swabs, Sergeant Bennett located a “very small fibre attached to the piece of debris which dislodged when turning the debris over”.³⁷ The fibre (EFIMS reference XF000536279) was approximately 1mm in length.³⁸

³⁴ Statement of Sergeant Hayley Bennett, 20 September 2023, [12] (NPL.9000.0036.0001); See also Letter from NSWPF to Inquiry re testing of debris, 3 July 2023 (SCOI.85740); Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 1 (SCOI.85779).

³⁵ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [R1], [R2] (SCOI.85779).

³⁶ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 3 [5.3] (SCOI.85779).

³⁷ Statement of Sergeant Hayley Bennett, 20 September 2023, [13] (NPL.9000.0036.0001).

³⁸ Statement of Sergeant Hayley Bennett, 20 September 2023, [13] (NPL.9000.0036.0001).

Special Commission of Inquiry into LGBTIQ hate crimes

44. Inspector Brady provided a supplementary statement dated 28 September 2023 in which he stated that the fibre appeared to be attached to the debris at the time of his examination on 2 June 2023.³⁹ In his view it was likely that the fibre became detached from the debris following his examination and the swabbing of the debris by Sergeant Bennett.⁴⁰
45. On 6 September 2023, the Inquiry requested that FASS conduct a forensic analysis of the possible fibre to determine its nature and origin.⁴¹
46. The fibre was then tested by FASS and Ms Friedman determined that the possible fibre was, in fact, two fibres. These fibres were not identified to be human or animal hair, and not suitable for nuclear DNA testing.⁴² Accordingly, no information can be gleaned from the fibre located on the debris found in Mr Miller's hand.
47. At the time of examining the fibre, Ms Friedman located a hair that appeared to be of animal origin on the outside of the container in which it had been placed.⁴³ Since the fibre was located in 2023 and subsequently placed into the container, materials on the outside of that container are not relevant to Mr Miller's death.

Supplementary report from Jae Gerhard

48. In written submissions dated 30 June 2023, the Miller family submitted that a more detailed examination of Mr Miller's clothing should be undertaken.⁴⁴ In light of that submission, on 26 July 2023 the Inquiry requested a supplementary opinion from Jae Gerhard, in her capacity as both a forensic scientist and a blood pattern analyst, in relation to further avenues for forensic testing.⁴⁵

³⁹ Supplementary Statement of Inspector Andrew Brady, 28 September 2023, [14] (NPL.9000.0037.0001) annexing high-resolution photograph of the debris, annexed and annotated, 15 September 2023 (NPL.0100.0026.0001).

⁴⁰ Supplementary Statement of Inspector Andrew Brady, 28 September 2023, [16] (NPL.9000.0037.0001).

⁴¹ Letter of instruction to FASS re fibre, 6 September 2023 (SCOI.85734).

⁴² Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [8a] and [8b] (SCOI.85779); Statement of Penelope Smith, 5 October 2023, [16] (SCOI.86023).

⁴³ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [8c] (SCOI.85779).

⁴⁴ Written Submissions for the Miller Family, 30 June 2023, [12]-[14] (SCOI.84265).

⁴⁵ Letter of instruction to Jae Gerhard, 26 July 2023 (SCOI.85166).

Special Commission of Inquiry into LGBTIQ hate crimes

Staining on the jeans

49. Ms Gerhard considered the forensic opportunities for testing Mr Miller's jeans. She noted that no blood was detected on the jeans, but there was some "generalised staining" with a "dirty appearance" on the front and back of the jeans, and a "sticky type material" on the inside cuffs/seams of the jeans which also tested negative for blood.⁴⁶ Ms Gerhard stated that it may be possible to do chemical analysis on the jeans to further identify the dirt type material and sticky residue, and recommended seeking the opinion of a forensic chemist as to what types of analysis could be performed and the likely probative value.⁴⁷

Re-testing of DNA samples taken from inside pockets of jeans

50. Ms Gerhard noted that trace DNA testing had been conducted on the inside pockets of the jeans in 2012: see above at [26]. She explained that current DNA testing technology is more sensitive than the technology used in 2012, and that it would be possible to re-test these DNA samples with current technology. She expressed the opinion that re-testing of existing samples should be prioritised, rather than re-sampling the pockets, since cellular material would already have been removed from the inside of the pockets by the previous sampling.⁴⁸

Further trace DNA testing of Mr Miller's shirt or jeans

51. Ms Gerhard explained that "trace DNA" is DNA that cannot be attributed to a biological fluid, and also encompasses DNA that is deposited by handling or touching items, or that is shed into the environment.⁴⁹

52. Ms Gerhard considered that sampling and testing further areas of Mr Miller's shirt or jeans would be of "limited probative value".⁵⁰

53. Ms Gerhard explained that trace DNA testing on Mr Miller's clothing would require speculative testing of areas of the clothing that may have been touched by another individual.⁵¹ Even if a DNA profile was obtained, it would not be possible to evaluate whether this DNA was deposited through some form of contact with Mr Miller, or via indirect DNA transfer through his social interactions.⁵²

⁴⁶ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.1]-[11.1.3] (SCOI.85167).

⁴⁷ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.4] (SCOI.85167).

⁴⁸ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.5.2] (SCOI.85167).

⁴⁹ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.5.1] (SCOI.85167).

⁵⁰ Supplementary expert report of Jae Gerhard, 21 August 2023, [12.3] (SCOI.85167).

⁵¹ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.5.3], [12.3] (SCOI.85167).

⁵² Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.5.5.] [12.3] (SCOI.85167).

Special Commission of Inquiry into LGBTIQ hate crimes

54. In relation to indirect transfer, Ms Gerhard noted that the sensitivity of modern DNA testing means that it cannot be assumed that trace DNA profiles are the result of recent direct contact.⁵³ DNA can be transferred through activities like talking, sneezing, coughing, breathing or shedding skin cells in an environment, and can be transferred indirectly via another person or object. It is not possible to reliably determine the nature of the deposition.⁵⁴
55. In Mr Miller’s case, it is known that he was wearing his clothing from at least midday on Saturday 1 March 1997, when he drove to the home of Mr Kelly: see primary submissions at [77]. He then wore the same clothing while socialising with friends, attending the Mardi Gras parade and attending the Observer Hotel in the Rocks: primary submissions at [78]-[81]. It is not known when he last washed his jeans or t-shirt. Accordingly, the presence of other DNA profiles may be expected, and is of no probative value to the inquiry into the manner and cause of his death.
56. Ms Gerhard finally noted that Mr Miller’s clothing has been re-examined on multiple occasions, and there is a possibility that DNA (whether it be trace DNA or bloodstaining) could have been re-distributed on other areas of the clothing.⁵⁵ This factor again reduces the probative value of any result that may be achieved by testing for trace DNA.

Further testing of the blood staining of Mr Miller’s shirt

57. Ms Gerhard confirmed that the overall bloodstain patterns on Mr Miller’s shirt had the appearance of originating from the wearer of the shirt (i.e. Mr Miller). However, she observed that there were a number of small discrete stains that could “potentially” originate from someone else. Ms Gerhard identified four such discrete stains by marking photographs of the t-shirt.⁵⁶

Consideration of testing of the stains on Mr Miller’s jeans

58. As noted above at [49], Ms Gerhard recommended that the opinion of a forensic chemist be obtained as to what testing could be performed on Mr Miller’s jeans. In that regard, the Inquiry had a preliminary phone call with Professor Roux, in his capacity as a forensic scientist, regarding the testing possibilities for the staining on the jeans. The advice received from Professor Roux was that such testing would be complex and, in his opinion, unlikely to yield evidence that would assist in determining manner and cause of death.⁵⁷

⁵³ Supplementary expert report of Jae Gerhard, 21 August 2023, [9.2.1] (SCOI.85167).

⁵⁴ Supplementary expert report of Jae Gerhard, 21 August 2023, [9.2.2] (SCOI.85167).

⁵⁵ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.1.5.4] (SCOI.85167).

⁵⁶ Supplementary expert report of Jae Gerhard, 21 August 2023, [11.2], [12.2] (SCOI.85167); Appendix B to Supplementary expert report of Jae Gerhard, 21 August 2023 (SCOI.85165).

⁵⁷ Statement of Penelope Smith, 5 October 2023, [14] (SCOI.86023).

Special Commission of Inquiry into LGBTIQ hate crimes

59. After careful consideration, the Inquiry decided there was no utility in pursuing this testing. In the absence of any information as to how long Mr Miller had been wearing the jeans since they were last washed, or what substances he may have come into contact with during that period, the probative value of identifying the staining would be negligible.

Further DNA testing of shirt and jean pocket samples

60. Following the receipt of Ms Gerhard's supplementary expert report, the Inquiry requested that FASS undertake further DNA testing of:⁵⁸
- a. the discrete blood stains on Mr Miller's shirt identified by Ms Gerhard; and,
 - b. the swabs from the pockets of Mr Miller's jeans.
61. Ms Friedman of FASS produced an expert certificate dated 22 September 2023 outlining the results of the testing, as summarised below.⁵⁹

Testing of blood stains on Mr Miller's shirt

62. Four further stains from Mr Miller's t-shirt were tested, with the following results:⁶⁰
- a. A stain on the lower centre of the t-shirt's front (marked "5v") returned a partial, mixed DNA profile. Mr Miller was not excluded as a major contributor from this stain and the minor contributors were "too weak";
 - b. A stain on the mid centre of the t-shirt's front (marked "5vi") returned a partial profile which was the same as Mr Miller's;
 - c. A stain on the mid left of the t-shirt's back (marked "5vii") returned a partial profile which was the same as Mr Miller's; and
 - d. A stain on the back of the t-shirt's left sleeve (marked "5viii") returned a partial, mixed DNA profile. Mr Miller was not excluded as a major contributor from this stain and the minor contributors were "too weak".
63. The results of the further testing on stains "5vi" and "5vii" indicate the likelihood of the blood having come from Mr Miller.

⁵⁸ Letter of instruction to FASS re shirt and jeans, 21 August 2023 (SCOI.85733).

⁵⁹ Expert Certificate of Virginia Friedman, FASS, 22 September 2023 (SCOI.85779).

⁶⁰ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [5v], [5vi], [5vii], [5viii] (SCOI.85779).

Special Commission of Inquiry into LGBTIQ hate crimes

64. In relation to stains “5v” and “5viii”, the description of Mr Miller as “not excluded” as the major contributor means that there are no differences between Mr Miller’s DNA profile and the sample obtained from the stain.⁶¹ Accordingly, those results are also consistent with the blood originating from Mr Miller.
65. The biological source of the profile of the minor or additional contributors to stains “5v” and “5viii” is unknown. Having regard to Ms Gerhard’s comments as to trace DNA, as discussed above at [54]-[56], it is submitted that no conclusions can be drawn from the presence of a mixed DNA profile.

Testing of samples from the pockets of Mr Miller’s jeans

66. The Inquiry also requested that FASS re-test the samples from the pockets of Mr Miller’s jeans.⁶² As noted above at [30], these swabs were tested without success in around 2012, after which FASS retained the DNA extracts collected from the swabs.⁶³
67. The results of re-testing the DNA extracts from the pockets of the jeans were as follows:⁶⁴
- a. The DNA extracts from the front right pocket, front left pocket and back right pocket (marked “6bi”, “6bii” and “6biii”, respectively) returned mixed DNA profiles, which were “not suitable for comparison due to the low level”; and
 - b. A DNA profile was not recovered from the DNA extract from the back left pocket (marked “6biv”).
68. It is submitted that that low level mixed DNA profiles taken from three of Mr Miller’s pockets do not advance the inquiry with respect to the manner and cause of Mr Miller’s death, having regard to the comments of Ms Gerhard set out above at [54]-[56] in relation to the transfer and persistence of DNA, and the many scenarios which may have occurred to result in trace DNA being located in the pockets.

Expert opinion from forensic pathologist

69. The Miller family raised concerns as to the inconsistency between the opinions of Dr Duflou and Dr Iles, and submitted that a third opinion could be sought by the Inquiry prior to departing from Dr Duflou’s conclusions, to give the family “more confidence” in the conclusion reached by the Inquiry’s investigations.⁶⁵

⁶¹ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, Appendix, [7.1] (SCOI.85779).

⁶² Letter of instruction to FASS re shirt and jeans, 21 August 2023 (SCOI.85733).

⁶³ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [6bi], [6bii], [6biii], [6biv] (SCOI.85779).

⁶⁴ Expert Certificate of Virginia Friedman, FASS, 22 September 2023, 2 [6bi], [6bii], [6biii], [6biv] (SCOI.85779).

⁶⁵ Written Submissions for the Miller Family, 30 June 2023, [16]-[19] (SCOI.84265).

Special Commission of Inquiry into LGBTIQ hate crimes

70. With respect to that submission, the Inquiry briefed Dr Victoria Kueppers, an independent expert forensic pathologist from Western Australia, to conduct a peer review of the opinions of Dr Iles and Dr Duflou. In particular, Dr Kueppers was asked to comment on whether she agreed or disagreed with the opinions expressed by Dr Iles and Dr Duflou, and to provide reasons for her agreement or disagreement. To the extent that the opinions of Dr Iles and Dr Duflou differed, she was asked to identify which opinion she preferred and her reasons as to why.⁶⁶
71. The main issue identified by Dr Kueppers was “whether Mr Miller sustained his fatal injuries as a result of a fall from height versus homicidal action.”⁶⁷

As to Dr Duflou

72. Dr Kueppers considered that the autopsy report prepared by Dr Duflou was “reflective of a comprehensive approach” to Mr Miller’s death and that the photographs were sufficient to assist in the formation of an opinion. She agreed with Dr Duflou that Mr Miller died from multiple injuries.⁶⁸
73. Dr Kueppers observed that, in his autopsy report, Dr Duflou considered a number of scenarios as to how the injuries occurred (including a fall from height, homicidal assault or combination of both) and did not favour any scenario over the other.⁶⁹ By contrast, at the later inquest, Dr Duflou favoured the scenario that the injuries were due to assault, and opined that the injuries were overall not typical with a fall from height.⁷⁰
74. Dr Kueppers stated that she “mostly disagreed” with the verbal opinion of Dr Duflou expressed at inquest.⁷¹
75. In her opinion, Mr Miller’s overall injuries, in conjunction with the circumstances surrounding the death, including the positioning of the body, are “entirely in keeping” with a fall from height. Dr Kueppers explained:⁷²
- a. The blunt force injuries to Mr Miller’s face and neck appear to have a vertical directionality, in areas appearing like “brush abrasions which are not infrequently seen with broad blunt impact with a degree of directional friction, i.e. impacting a rough surface such as asphalt”;

⁶⁶ Expert Report of Dr Linda Iles, 14 December 2022 (SCOI.82891); Final Autopsy Report of Dr Johan Duflou, 5 June 1997 (SCOI.02737.00048); Transcript of Coronial Inquest, 7 October 1997, 4-6 (SCOI.02737.00041).

⁶⁷ Expert Report of Dr Victoria Kueppers, 18 September 2023, 3 (SCOI.85712).

⁶⁸ Expert Report of Dr Victoria Kueppers, 18 September 2023, 4 (SCOI.85712).

⁶⁹ Expert Report of Dr Victoria Kueppers, 18 September 2023, 4 (SCOI.85712).

⁷⁰ Expert Report of Dr Victoria Kueppers, 18 September 2023, 4 (SCOI.85712).

⁷¹ Expert Report of Dr Victoria Kueppers, 18 September 2023, 4 (SCOI.85712).

⁷² Expert Report of Dr Victoria Kueppers, 18 September 2023, 5 (SCOI.85712).

Special Commission of Inquiry into LGBTIQ hate crimes

- b. The underlying skull and brain injuries are consistent with a frontal impact to the face, there being no obvious features of a localised assault and/or multiple impacts;
 - c. The internal injuries to Mr Miller’s chest and abdomen are consistent with deceleration-type injuries, which may occur in a fall from height where the face is the primary impact site. In some cases of abdominal trauma, significant abdominal wall injuries or rib fractures may not be observed due to the pliable nature of the abdomen and ribcage, especially in a young person;
 - d. Mr Miller’s wrist injuries could have occurred due to the fall, and there is nothing specific to the wrist or hand injuries which would indicate defensive-type injuries.
76. Dr Kueppers concluded that “the overall findings are in keeping with the death having occurred as a result of a fall from height. I cannot deduce how the fall may have occurred, i.e. as a result of an accident or a push”.⁷³
77. Dr Kueppers disagreed with Dr Duflou’s conclusion that it is unlikely that Mr Miller climbed the fence given his blood alcohol level. In her view, while a blood alcohol content of 0.22% would render many individuals very intoxicated, the level of impairment depends on the individual and their tolerance to alcohol.⁷⁴

As to Dr Iles

78. Dr Kueppers expressed overall agreement with Dr Iles’ interpretation of the findings and injuries.⁷⁵ She agreed with Dr Iles that, “whilst other high energy blunt impact scenarios are possible (such as a pedestrian being hit by a moving vehicle), there are no truncal or lower limb injuries which suggest this”. She further agreed that “no injuries suspicious of an assault or defensive action are clearly identifiable”, although “an assault prior to the fall cannot be excluded”.⁷⁶
79. Based on all the information available to her, it appeared to Dr Kueppers that “there is a lack of evidence of homicidal assault”, and that the injuries are “in keeping with a fall from height”.⁷⁷

⁷³ Expert Report of Dr Victoria Kueppers, 18 September 2023, 5 (SCOI.85712).

⁷⁴ Expert Report of Dr Victoria Kueppers, 18 September 2023, 5 (SCOI.85712).

⁷⁵ Expert Report of Dr Victoria Kueppers, 18 September 2023, 4 (SCOI.85712).

⁷⁶ Expert Report of Dr Victoria Kueppers, 18 September 2023, 6 (SCOI.85712).

⁷⁷ Expert Report of Dr Victoria Kueppers, 18 September 2023, 6 (SCOI.85712).

Special Commission of Inquiry into LGBTIQ hate crimes

Other reports

80. Dr Kueppers was provided with, and commented on, the expert report of Ms Gerhard dated 29 May 2023 in relation to blood pattern analysis, the statement of Inspector Andrew Brady dated 7 June 2023 and the expert report of Professor Roux in relation to the debris.⁷⁸ These reports were not available to either Dr Duflou or Dr Iles.
81. Dr Kueppers considered that Ms Gerhard's report supported the scenario of a fall from height having resulted in Mr Miller's fatal injuries.
82. She considered that while the findings of Inspector Brady and Professor Roux are not conclusive in relation to how Mr Miller's injuries occurred, "they could be consistent with Mr Miller falling off the cliff after having climbed the fence, the piece of metal representing direct transfer from the fence".⁷⁹
83. Overall, Dr Kuepper's report provides additional support for the submission of Counsel Assisting that Mr Miller's death is likely to have been the result of a fall from a height.

Further analysis of the ivy

84. As noted in the primary submissions at [86], Mr Miller's body was discovered about 1.1 metres from the base of the cliff, with a portion of ivy located adjacent to his left leg.⁸⁰ The primary submissions note at [94]-[96] that Munn Reserve, at the top of the cliff, was fenced with galvanised chain wire fencing and that beyond the fence was a sandstone ledge, covered with vines and vegetation.⁸¹
85. The Inquiry engaged Peter Jobson, Information Botanist at the Australian Institute of Botanical Science, Royal Botanic Gardens and Domain Trust, to provide an expert opinion regarding the vegetation observed in the area where Mr Miller's body was found.⁸²
86. Mr Jobson provided an expert report advising that the ivy growing in Munn Reserve and the ivy located next to Mr Miller were the same species, namely English ivy (*Hedera helix*), in contrast to the other types of ivy which grow in south-east Australia at the current time and also as at 1997.⁸³

⁷⁸ Expert Report of Jae Gerhard, 29 May 2023 (SCOI.83328); Statement of Inspector Andrew Brady, 7 June 2023 (NPL.9000.0017.0072); Expert Report of Professor Claude Roux, 1 August 2023 (SCOI.85316).

⁷⁹ Expert Report of Dr Victoria Kueppers, 18 September 2023, 7 (SCOI.85712).

⁸⁰ See Statement of Detective Senior Constable Lyle Van Leeuwen, 14 June 1997 (SCOI.83347); Crime Scene Photographs, 3 March 1997, photographs 3, 4, 5, and 6 (SCOI.83350); Statement of Plain Clothes Senior Constable Michael Lane, 1 May 1997, [11] (SCOI.02737.00051).

⁸¹ See Statement of Detective Senior Constable Lyle Van Leeuwen, 14 June 1997, [6] (SCOI.83347); Statement of Detective Senior Sergeant Carlton Graeme Cameron, 3 October 1997, [4] (SCOI.02737.00069); Crime Scene Photographs, 3 March 1997, photographs 13 to 18 (SCOI.83350).

⁸² Letter of instruction to Australian Institute of Botanical Science, 21 September 2023 (SCOI.85971).

⁸³ Expert Report of Peter Jobson, Australian Institute of Botanical Science, 5 October 2023 (SCOI.86104).

Special Commission of Inquiry into LGBTIQ hate crimes

87. It is submitted that, the fact that the ivy found adjacent to Mr Miller was the same species as that growing in Munn Reserve is consistent with, and provides some support for, the hypothesis that Mr Miller disturbed the ivy at the top of the cliff during a fall.
88. Detective Senior Constable (DSC) Van Leeuwen, in his oral evidence at the inquest, said that he “didn’t place any weight on that ivy” in considering whether Mr Miller had fallen or been assaulted, on the basis that “it had been raining, it had been very windy and you will get naturally ivy just you know leaves and that moving around the area and there were only two leaves”. DSC Van Leeuwen said that he would have expected a “significantly large number of leaves” had Mr Miller fallen through the ivy.⁸⁴
89. The Inquiry has no expert evidence in relation to how many ivy leaves would be expected to have been disturbed if Mr Miller had fallen from the cliff. However, it is observed that Mr Miller’s injuries were in a single plane with no obvious features of multiple impacts, which may suggest that he did not land heavily on the ledge covered with ivy during his fall. That would explain why more ivy was not found at the bottom of the cliff.

Further submissions as to Mr Miller’s manner and cause of death

90. Having regard to the additional investigative steps taken by the Inquiry, Counsel Assisting maintains the position adopted at [171] of the primary submissions: that the evidence supports a finding that Mr Miller died as a result of multiple injuries sustained in an accidental fall from a height.
91. The opinions of Dr Iles and Dr Kueppers are the most persuasive evidence supporting the hypothesis that Mr Miller fell to his death, and should be preferred to the opinion of Dr Duflou expressed verbally at the inquest that Mr Miller’s injuries are more consistent with an assault. The opinions of Dr Iles and Dr Kueppers are supported by the expert bloodstain pattern analysis conducted by Ms Gerhard. While the circumstantial evidence may leave open a possibility of Mr Miller’s body being “placed” in the Patricks compound,⁸⁵ that possibility is outweighed by the expert evidence indicating the probability that Mr Miller’s died as a result of injuries sustained from a fall and that his body did not move following his death.

⁸⁴ Transcript of Coronial Inquest, 7 October 1997, 9 (SCOI.02737.00041).

⁸⁵ See Written Submissions for the Miller Family, 30 June 2023, [20]-[23] (SCOI.84265).

Special Commission of Inquiry into LGBTIQ hate crimes

92. In the written submissions on behalf of the Miller family, it was submitted that a finding that Mr Miller died as a result of a fall would be “premature and unsafe”,⁸⁶ and that further investigative steps should be taken, including the testing of Mr Miller’s clothing, the identification of the debris in Mr Miller’s hand, and the obtaining of a third opinion from a forensic pathologist.⁸⁷ Each of those investigative steps was given full consideration and, with the exception of chemical testing to ascertain the nature of the stains on Mr Miller’s jeans, pursued. Additional investigative steps were identified and undertaken by the Inquiry, including the briefing of an expert botanist, the DNA testing of the debris, and the testing of a fibre that was attached to the debris.
93. Having regard to all of the evidence, it is submitted that a finding that Mr Miller’s death was the result of a fall should not be regarded as premature, and that the available evidence supports the making of such a finding on the balance of probabilities.
94. The Inquiry acknowledges that the Miller family have lived with the uncertainty of the circumstances of Mr Miller’s death for more than 26 years,⁸⁸ and is grateful for their participation in this process.

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⁸⁶ Written Submissions for the Miller Family, 30 June 2023, [3], [24] (SCOI.84265).

⁸⁷ See Written Submissions for the Miller Family, 30 June 2023, [12]-[19] (SCOI.84265).

⁸⁸ See Written Submissions for the Miller Family, 30 June 2023, [25] (SCOI.84265).