



New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

FURTHER SUPPLEMENTARY SUBMISSIONS OF COUNSEL ASSISTING

20 October 2023

IN THE MATTER OF KENNETH BRENNAN

Introduction

1. These submissions are filed on behalf of Counsel Assisting the Special Commission of Inquiry into LGBTIQ hate crimes (**Inquiry**). These submissions supplement the written submissions filed on behalf of Counsel Assisting the Inquiry on 23 June and 28 July 2023.
2. This matter was the subject of a hearing by way of documentary tender on 23 June 2023.

Further material from NSW Police Force (NSWPF)

3. On 28 August 2023, the Inquiry issued a letter to the NSWPF, enclosing summons NSWPF173 seeking a digital copy of property collected by the NSWPF from **NP215** on or around 23-24 August 2023.¹
4. On 29 August 2023, the NSWPF issued a letter to the Inquiry advising the Inquiry that 171 documents were produced in response to summons NSWPF173.² These documents have been reviewed by the Inquiry but it is not proposed that any of these documents should be publicly tendered.

Further material from Forensic and Analytical Science Service (FASS)

5. On 24 August 2023, the Inquiry issued a letter of instruction to FASS requesting further further forensic testing be conducted on Condoms 2 and 3, or swabs of those condoms, with a view to locating a DNA profile or profiles on those exhibits, and if successful, identifying the DNA profile or profiles on those exhibits. These were the condoms located in the toilet bowl water, as opposed to Condom 1, which was located on the rim of the toilet and matched with the Unknown Male 'B' profile. The Inquiry

¹ Exhibit 37, Tab 197, Letter from Solicitor Assisting, the Inquiry to Office of the General Counsel, NSW Police Force, 28 August 2023 (SCOI.86249); Exhibit 37, Tab 197A, Summons to Produce to NSW Police Force (NSWPF173), 28 August 2023 (SCOI.86245).

² Exhibit 37, Tab 198, Letter from Office of the General Counsel, NSW Police Force, to the Solicitor Assisting the Inquiry, 29 August 2023 (SCOI.86246).

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requested an expert certificate setting out the analysis undertaken and the results obtained from the further DNA testing on Condoms 2 and 3.³

6. On 8 September 2023, Dr Bruce provided the Inquiry with an expert certificate that set out the following results:⁴

- a. a weak partial DNA profile originating from an unknown male (**Unknown Male 'C' profile**) was recovered from the outside surface of Condom 2. This profile could not have originated from **NP215**, **NP214**, **NP204**, **NP200**, **NP190**, **NP189**, **NP188** or the Unknown Male 'B' profile;
- b. another DNA profile was recovered from the outside surface of Condom 3 was found to be too weak for comparison; and
- c. a weak partial mixed DNA profile was recovered from the inside surface of Condom 3. Mr Brennan cannot be excluded as one of the contributors to this profile. The other contributor originated from an unknown male (**Unknown Male 'D' profile**). The Unknown Male 'D' profile could not have originated from **NP215**, **NP214**, **NP204**, **NP200**, **NP190**, **NP189**, **NP188** or Unknown Males 'B' or 'C'

7. On 17 September 2023, Dr Bruce attended a teleconference with the Commissioner, Counsel Assisting and the Inquiry legal team to discuss his expert certificate. Following this teleconference, the Inquiry issued an email of instruction to Dr Bruce, requesting Dr Bruce respond to further questions.⁵ These questions (and subsequent answers provided by Dr Bruce in a statement dated 27 September 2023)⁶ included the following:⁷

6. In what years were condoms [2] and [3] tested by FASS? In particular, were condoms [2] and [3] tested in 2016/2017?

The condoms, numbered [2] and [3] by Police, were originally examined at FASS on the 29th August 1995 and samples taken from each of the condoms were DNA tested (DQAlpha) on the 6th September 1995. The same condoms were resubmitted to FASS on the 15th of March 2016 and examined and sampled on the 15th April 2016. DNA testing

³ Exhibit 37, Tab 199A, Letter of Instruction, 24 August 2023 (SCOI.86248).

⁴ Exhibit 37, Tab 199, Expert certificate of Dr David Bruce, 8 September 2023 (SCOI.86247).

⁵ Exhibit 37, Tab 200A, Email of Instruction, 19 September 2023 (SCOI.86250).

⁶ Exhibit 37, Tab 200, Statement of Dr David Bruce, 27 September 2023 (SCOI.86252).

⁷ Please note that in the expert certificate of Dr David Bruce dated 8 September 2023, the email of instruction dated 19 September 2023, and the subsequent statement of Dr David Bruce dated 19 September 2023, the condoms the subject of these submissions were referred to as "Condom 1" and "Condom 2". These are the condoms that were located in the toilet bowl water. However, consistent with the primary submissions of Counsel Assisting (dated 23 June 2023), we have referred to these condoms as "Condom 2" and "Condom 3". This is because in the primary submissions, the term "Condom 1" was used to refer to the condom located on the rim of the toilet bowl, which was found to contain a spermatozoon. The Unknown Male 'B' profile was located on this exhibit.

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using a different DNA typing kit (PowerPlex 21) was carried out on these samples in 2016. In addition, further DNA testing using PowerPlex 21 was carried out in 2016 on the DNA extracts from the condoms which were tested using DQAlpha in 1995. The DNA extracts had been stored in the freezer archives since 1995.

2. If condoms [2] and [3] were tested in 2016/2017:

a. please indicate the results of the 2016/2017 tests; and

DNA was not detected on the samples taken from the resubmitted condoms [2] and [3] in 2016 (DNA profiling was not carried out due to the low levels of DNA that may be present and the low chance of obtaining a profile suitable for interpretation). The further testing using the PowerPlex 21 typing kit in 2016, using the stored DNA extracts from the 1995 DQAlpha testing of the condoms, produced DNA profiles which were too weak for interpretation

b. indicate in what way (if any), the 2016/2017 tests produced different results from the results referred to in your expert certificate dated 8 September 2023 (“2023 results”), and the reasons for those differences.

DNA testing in 2023 was carried out on the stored DNA extracts from the original testing of the condoms in 1995 (previously tested using the DQAlpha testing kit) and a stored sample from the inside of condom no. [3] (taken in 1995). These DNA extracts were tested initially in 2016 using PowerPlex 21 with the standard 29 cycle amplification protocol and the DNA profiles recovered from this testing were too weak for interpretation. The DNA testing carried out in August 2023 used an enhanced 30 cycle amplification protocol with PowerPlex 21 in an attempt to enhance the DNA profile result. The latter results are reported in the Statement dated 8th September 2023

3. If condoms [2] and [3] were not tested in 2016/2017, please indicate whether the 2023 results would have been able to be obtained in 2016/2017 had testing in 2016/2017 been carried out.

It is unlikely that any improvement in the result from the resubmitted condoms sampled in 2016 would have been obtained in 2023. However, the results that were obtained in 2023 from the stored 1995 DNA extracts could have possibly been obtained in 2016 if the 30 cycle amplification protocol for PowerPlex 21 had been used at that time.

...

6. If possible, please identify the medium (i.e. blood, semen, saliva etc) of each of the DNA profiles referred to at: (a) item 36i [condom 2]; and (b) item 37ii [condom 3] of paragraph 4 of your expert certificate dated 8 September 2023.

The 1995 examination of the condoms indicated that a single sperm head was detected on the outside of item 36 (condom no. [2]) and a possible sperm head was detected on the outside of item 37 (condom no. [3]). This result would suggest that semen may have been present on these items; however, it would be difficult to state categorically that semen is the actual source of the DNA recovered from the condoms rather than that it is a possible source. Testing for blood or saliva was not carried out on the condoms; therefore, the possible presence of these biological fluids on the items was not determined. Brown

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staining was noted on the surface of the condoms when they were initially examined in 1995.

8. These results are significant and indicate that in addition to Unknown Male B, there may have been one or two more persons present during the violent assault on Mr Brennan and/or the sexual activity that occurred in the Elizabeth Bay apartment just before it.
9. It follows that Counsel Assisting submits that the proposed recommendations in this matter be updated as follows:
 - a. FASS takes steps to:
 - i. enhance the “Unknown Male B”, “Unknown Male C”, and “Unknown Male D” profiles, should technological developments occur in the future that indicate a prospect of such enhancement; and
 - ii. run the “Unknown Male B”, “Unknown Male C”, and “Unknown Male D” profiles against state and national DNA databases on a regular basis, so that the NSWPF will be notified in the event that there is an individual or familial match with the profiles; and
 - b. The NSWPF take steps, including by DNA analysis, to eliminate suspects who may have been prematurely excluded from the investigation.

Clairification of a matter relating to exhibits

10. In its earlier submissions dated 23 June 2023, Counsel Assisting referred to a chrome metal ring (see [17(g)] and [28(j)]). This item was variously described in NSWPF records as a chrome metal ring or a “butt ring”, and the submissions of Counsel Assisting reflected those records. However, the NSWPF records and Counsel Assisting’s written submissions did not take into account NP215 evidence in his statement of 29 June 1995 at [3], which explained that the chrome metal ring was a cock ring. NP215 NP215 evidence is more reliable and should be accepted.

James Emmett SC

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