



Special Commission of Inquiry into LGBTIQ hate crimes

SUPPLEMENTARY SUBMISSIONS OF COUNSEL ASSISTING

25 September 2023

IN THE MATTER OF JOHN RUSSELL

Introduction

1. These submissions are filed on behalf of Counsel Assisting the Special Commission of Inquiry into LGBTIQ hate crimes (**Inquiry**). They supplement the written submissions prepared by Counsel Assisting dated 27 June 2023 (the **primary submissions**), and the oral submissions of Counsel Assisting at the public hearing held into the death of John Russell on 28 June 2023.

Additional expert opinion obtained

2. On 18 August 2023, the Inquiry wrote to the Forensic and Analytical Science Service (**FASS**), seeking an expert opinion from an appropriately qualified employee addressing questions relating to previous forensic testing of clothing and other exhibits referable to the death of John Russell as well as to explain the results of more recent forensic testing requested by the Inquiry in respect of those exhibits.¹
3. Michele Franco, Group Manager, Evidence Recovery Unit at New South Wales Health Pathology, FASS prepared an expert opinion in response to that request, dated 23 August 2023.²
4. In summary, despite comprehensive forensic testing using modern technologies and standards, a DNA profile sufficient for comparison has not been recovered in the latest round of testing by FASS. Those results and the results of previous testing are summarised below from the report of Ms Franco.

¹ Exhibit 46, Tab 83, Letter of instruction requesting report on forensic testing undertaken by FASS, 18 August 2023 (SCOI.84089).

² Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023 (SCOI.84089).

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5. Ultimately, the results of the further forensic testing do not alter the primary submissions of Counsel Assisting as to the manner and cause of Mr Russell's death.

Results of testing conducted in 2001/02

6. During the Taradale investigation, in about 2002, Mr Russell's shoes, jeans and sloppy joe were forensically examined for the presence of blood. Some of these areas were cut out and underwent DNA testing.³
7. DNA testing was unsuccessful on the areas tested for the shoes and the jeans, as the amount of DNA recovered was very low and did not generate a DNA profile. There were indications of DNA present but not enough for interpretation or comparison purposes.⁴
8. It was noted that dye was seen in the DNA extract from the sloppy joe, and the quantity of DNA present could not be determined due to the interference of the dye. DNA profiles were not generated from the samples cut out of the sloppy joe.⁵
9. The unsuccessful results were recorded in the court report signed by Vivien Beilby, dated 11 January 2003.⁶
10. It is observed that the lab did not have a reference sample for Mr Russell from which to make comparisons at the time of this testing in 2002.⁷
11. In May 2002, a biologist discussed with police the possibility of obtaining a Guthrie card from the deceased or alternatively father/sibling reference samples. In July 2002 police indicated they were unable to obtain a Guthrie card. A biologist responded that if any DNA results were obtained, a sample could then be requested from Mr John Russell's father for comparison. As no DNA results were obtained from the evidence, a reference sample from the father was not requested at this time.⁸

³ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [14]-[28] (SCOI.84089).

⁴ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [29] (SCOI.84089).

⁵ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [30] (SCOI.84089).

⁶ Exhibit 46, Tab 31, Expert statement of Vivien Beilby, 11 January 2003 (NPL.0115.0003.0371).

⁷ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [32] (SCOI.84089).

⁸ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [33]-[35] (SCOI.84089).

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Results of testing conducted in 2016

12. In 2016, SF Neiwand submitted to FASS samples from the jeans and sloppy joe for DNA testing. The samples included 14 tape-lifts (in tubes) and a section of material cut from the front of the sloppy-joe.⁹
13. Additional testing was also conducted on the DNA extracts from areas of clothing previously sampled from the clothing items in 2002.¹⁰
14. Testing of the tape-lift samples produced weak and complex DNA mixtures, originating from more than one person.¹¹
15. There were no distinct patterns to the DNA mixtures recovered from the tape-lifts submitted in 2016.¹²
16. The testing conducted on the 2002 samples that had been stored in the FASS freezer was either unsuccessful because no DNA was detected or the DNA recovered was too weak. A very weak partial profile with indications that it was a mixture of more than one contributor was found on samples from the jeans and sloppy-joe.¹³
17. In November 2016 Police emailed to ask FASS if there was anything further that could be done with the mix of weak/complex results. Further profiling/ interpretation was considered to be not warranted, due to the complexity and low levels of the mixed DNA profiles and the limitations of the software available to interpret the results for databasing purposes.¹⁴
18. FASS did not request from police that a sample be obtained from a family member of Mr Russell so that comparison testing could occur. This is because from the results obtained, there was not a substantial DNA profile available for comparison purposes.¹⁵

Results of testing conducted in 2022 and 2023

19. In 2022 the Inquiry facilitated the retrieval of a reference sample from Mr Russell's brother and this was provided to FASS. The sample was used to infer a DNA profile for Mr Russell.

⁹ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [59]-[61] (SCOI.84089).

¹⁰ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [62] (SCOI.84089).

¹¹ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [64] (SCOI.84089).

¹² Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [64] (SCOI.84089).

¹³ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [66], Table 3 (SCOI.84089).

¹⁴ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [68] (SCOI.84089).

¹⁵ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [69] (SCOI.84089).

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20. In the course of 2022 and 2023, testing was undertaken by FASS over some of the 2002 samples and 2016 tape-lifts that are still stored by FASS. In addition, fresh cut outs from the clothing were also subjected to testing.
21. The results of the testing are encompassed in Tables 5, 6A, 6B, 7 and 8 of Ms Franco's statement.¹⁶
22. An area of the jeans, from the front left ankle, recovered a weak partial DNA profile with indications it was a mixture of more than one contributor.¹⁷
23. An area of the sloppy joe, on the right cuff, recovered a very weak partial profile, with indications of more than one contributor.¹⁸
24. Due to the low levels and complexity of the mixtures, Ms Franco was unable to comment on the similarities or differences of the mixed profiles.¹⁹
25. It was observed that the jeans had been washed as the stains looked washed-out and diluted.²⁰
26. A section of material from the inside waistband of the sloppy-joe has been retained in the freezer. A section of fabric from the left cuff of the sloppy joe and a stored area of the jeans remains in cold storage.²¹

Persistence

27. Ms Franco was asked to comment on how long before Mr Russell's death it is likely that any DNA recovered came in contact with the relevant item of clothing.
28. Ms Franco explains that the DNA recovered in the testing was either "trace DNA" (originating from loose skin cells and cellular debris) or DNA from a stronger biological source of DNA, such as blood.²²
29. Ms Franco states that determining the time of deposition of trace DNA is not possible for a number of reasons:
 - a. First, the chain of custody of the items was not maintained as the exhibits were returned to Mr Peter Russell's family before they were forensically examined. DNA from skin cells (trace

¹⁶ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, Tables 5, 6A, 6B, 7 and 8 (SCOI.84089).

¹⁷ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [87] (SCOI.84089).

¹⁸ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [88] (SCOI.84089).

¹⁹ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [93] (SCOI.84089).

²⁰ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [78] (SCOI.84089).

²¹ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [76] (SCOI.84089).

²² Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [94] (SCOI.84089).

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DNA) could potentially be deposited onto any of the items from anyone who inspected the clothing, before they were returned to police and eventually examined in the lab.²³

- b. Secondly, it is possible that trace DNA, composing loose cells and cellular debris, which may have been present on the clothing, may have been removed upon washing.²⁴
- c. Thirdly, trace DNA can be contaminated from an external source, such as with an examiner or handler's own DNA. Testing for trace DNA was only implemented in NSW around the year 2000. In 1989, there was no awareness regarding exhibit handling practices to minimise DNA contamination and they were therefore not part of standard police procedures at this time.²⁵

30. With respect to the blood stains, Ms Franco observes that if a blood stain is washed in cold water soon after its deposition on a fabric all traces of blood are likely to be removed. If blood has had time to set, it is difficult to remove the staining.²⁶

31. Ms Franco states that it is impossible to determine when the blood stains were deposited on the clothing of Mr Russell. They appeared to be washed out and old looking but all that can be stated is that they were present on the garment some time before they were examined in 2001/2002. She is currently not aware of a method that can be used to age the DNA recovered on the clothing.²⁷

32. Ms Franco's observations about the impact of any cleaning of the clothes is consistent with Counsel Assisting's primary submissions that the cleaning of the clothing in 1989 is likely to have had at least some adverse impact on the forensic testing subsequently undertaken in 2002, 2016 and 2023. As has been demonstrated in other cases investigated by this Inquiry, subjecting historical exhibits to modern forensic testing can produce valuable outcomes not previously possible. However, as a result of (*inter alia*) the cleaning of the clothing, that has unfortunately not been possible in the case of Mr Russell.

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²³ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [97] (SCOI.84089).

²⁴ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [98] (SCOI.84089).

²⁵ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [99]-[100] (SCOI.84089).

²⁶ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [102] (SCOI.84089).

²⁷ Exhibit 46, Tab 84, Statement of Michele Franco, 23 August 2023, [103]-[104] (SCOI.84089).