New South Wales

Special Commission of Inquiry into LGBTIQ hate crimes

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING

Investigative Practices Hearing

19 October 2023

PART A INTRODUCTION

1. These submissions are filed on behalf of Counsel Assisting the Special Commission of Inquiry into LGBTIQ hate crimes (**Inquiry**). They concern the Investigative Practices Hearing (**IPH**) which occurred from 4 to 7 July 2023 and on 15 August 2023. They should be read in conjunction with the submissions of Counsel Assisting filed on 15 September 2023 (**CA Submissions**), and use the same abbreviations.

2. On 10 October 2023, the Inquiry received submissions from the NSWPF (**NSWPF Submissions**). The NSWPF also sought to tender four additional documents, which have been received into evidence as Exhibit 65.

3. These submissions respond to the NSWPF Submissions. They commence, in Part B, by dealing with some categories of findings considered in both sets of submissions. They move then, in Part C, to consider areas of common ground. Part D deals with areas of continuing disagreement. Part E deals with homicide investigation, Part F with cold cases and unsolved homicides, and Part G with individual cases under review by the Inquiry.

PART B PARTICULAR FINDINGS

4. We commence these submissions by addressing three types of findings which are the subject of a number of submissions through the NSWPF Submissions. They are findings which might be made where individual officers have not been called to give evidence, findings where it is not possible to know precisely what occurred in relation to exhibits and documentary records, and findings made about general practices or patterns observable from the evidence before the Inquiry.

B.1 Findings where an individual has not been called to give evidence

5. The NSWPF raise, on a number of occasions, the fact that an individual has not been called to give evidence. In some cases, this is said to be a denial of procedural fairness. That submission is dealt with at Pt D.1 below. In other instances, the NSWPF Submissions suggest that, separate to an obligation in relation to procedural fairness, a criticism or finding should not be made because, in the absence of evidence from an individual, the Inquiry does not have a complete evidentiary picture.

6. There is an important distinction to be drawn between the question of whether the requirements of natural justice have been discharged in relation to a particular individual, and whether the Inquiry has the evidence before it to permit a particular finding to be made, although of course the two questions may overlap or interact. The latter question is one of sufficiency of evidence. In

our submission, the fact that additional evidence may have been obtainable does not preclude a finding from being made where the evidence before the Inquiry is sufficient to establish a particular fact or finding.

7. For example, the NSWPF accept that a "significant error" was made in respect of the 2005 Screening Form in relation to the death of Ms Waine. However, it is said that the Inquiry does not appear to have contacted the reviewer and afforded them an opportunity to "explain how this error might have arisen" (NSWPF Submissions at [368]). The CA Submissions do not invite any observations or findings to be made in respect of how or why this error came about (CA Submissions at [735]-[737]), but rather record that DCI Laidlaw's evidence was that he would not expect a competent reviewer preparing a screening form to make this mistake. Since the Commissioner has not heard from the reviewer, the Commissioner should not criticise the reviewer personally and should make findings in a way that avoids practical injustice. This is the procedural fairness issue addressed in Pt D.1 below. It is nevertheless open to the Commissioner to be satisfied that there is sufficient evidence to make a finding that there is a significant error in the document.

8. Similarly, at NSWPF Submissions [376], in relation to the failure to conduct an anogenital examination of Mr Rooney, the NSWPF submit that the Inquiry did not explore with the Officer in Charge (**OIC**) why the examination was not conducted. As is identified at [46] below, the relevant OIC was put on notice of the CA Submissions (as were all OICs in cases considered by the Inquiry). However, the evidence of an individual as to the explanation or subjective reasoning for a particular decision (if, indeed, they are able to recall that decision decades after the fact) does not affect whether, objectively, a particular step should or should not have been taken as a matter of proper police practice. Once the Inquiry has received evidence of proper police practice, and provided the Inquiry ensures procedural fairness as a practical matter, the Inquiry need not hear from an individual officer before making a finding that a particular step should have been taken. That does not necessarily involve a criticism of any particular individual.

9. In continuation of this type of submission, at NSWPF Submissions [73] it is submitted that additional information concerning the cases identified as warranting consideration for reinvestigation between 2004 and 2008, and the 9 cases that were re-opened for investigation, could have been obtained from officers who were involved in that initial review. It is observed that the Inquiry has not sought evidence from those persons.

10. That is correct, but does not undermine the submission made that the apparent lack of institutional knowledge about aspects of the initial 2004-2008 UHT review is regrettable (CA

Submissions [311]). The NSWPF make a similar point in respect of the CA submission that there were missed opportunities to improve the management of historical exhibits during the initial UHT review (NSWPF Submissions [169]). In our submission, a finding that there was a missed opportunity is independent of the endeavour of those who were undertaking the initial review, or the constraints they faced: the fact is, a review was undertaken at that time, and nothing occurred in relation to the management of historical exhibits. Again, it is not a criticism of any particular individual.

11. It may also be observed that the NSWPF could have sought information from these persons and did not do so. The NSWPF was in a far better position than the Inquiry to identify those who were likely to hold that information. As set out at CA Submissions [310]-[312], the Inquiry issued a Summons seeking the records forming the basis for evidence given by DS Doherty concerning the cases identified as warranting reconsideration. Nothing was produced. The Inquiry had also requested statements from the NSWPF concerning the commencement and operation of the UHT. The evidence given by DCI Laidlaw and DS Doherty, the persons put forward by the NSWPF as the proper persons to address this issue, did not shed light on this issue.

12. In addition, the NSWPF should not be insulated from criticism on the basis that there may have been additional steps (more readily available to the NSWPF than to the Inquiry) that could have yielded more information. The Inquiry, for example, requested statements from the NSWPF in relation to what happened to exhibits or documentary material in a number of cases. If relevant policies and procedures permitted the destruction of an exhibit, and further authorised the destruction of any record made of that decision, that is a matter which could and should have been explained by the NSWPF. The fact that the Inquiry may not be in a position to make positive findings in some cases exemplifies rather than answers the concerns of the Inquiry in relation to exhibit management and record keeping.

13. In each case before the Inquiry, the Inquiry sought, by summons and by correspondence, all relevant material held by the NSWPF. The NSWPF has produced, in each case, what is said to be the totality of the material that could be located. In our submission, this is a matter that must be taken into account when the NSWPF submits that certain conclusions should not be reached because other records, which have not been produced, might have cast a different light on matters.

B.2 Findings where the evidence does not permit a conclusion about what occurred to be reached

14. As is identified in both the CA Submissions and the NSWPF Submissions, there are many instances where the evidence before the Inquiry does not permit a conclusion to be reached about precisely what occurred. This generally emerges in the context of exhibit management and record keeping. For example, there are instances where it is not apparent whether there has been a failure of exhibit management (because an exhibit has been lost or destroyed without authorisation) or a failure of record keeping (because authorised destruction was not recorded or the record not retained). In some cases, there is a third possibility that arises for consideration, being authorised destruction of both the exhibit *and* the relevant record in circumstances where the relevant authorisations are not in evidence before the Inquiry.

15. As this issue arises in a number of matters, we address those matters together in this Part. As a preliminary matter, we submit that it should be accepted, as is identified at NSWPF Submissions [300], that the possible breach of policies and procedures concerning recordkeeping is a distinct matter from whether it would reasonably be expected that the exhibits would have been retained. Both of these matters are distinct from, but may overlap with, the question of whether there may have been breaches of the State Records Act or the Archives Act, which is dealt with at Pt D.3 below.

16. Similarly, we submit that the NSWPF Submissions at [358] should be accepted: that is, there is a distinction between circumstances where the evidence establishes a failure to take particular steps, and where it cannot be known whether the steps were taken or whether there is a failure of record-keeping. It is important that these scenarios are identified and treated separately. However, both warrant attention in the Commissioner's Final Report.

17. The NSWPF Submissions accept at [359], in the context of Mr Baumann's case, that the lack of documentation regarding investigative steps necessarily affected later investigation of Mr Baumann's case and was attributable to actions of the NSWPF. It is important to contextualise the question of what findings or observations should be made in circumstances of uncertainty by reference to the fact that the NSWPF is the only entity which might be expected to be able to provide certainty.

18. In some instances, the Inquiry has received evidence that *either* of the alternatives (failure to retain the exhibit, or failure to make and/or retain a record) indicates a breach of proper police practice. In such cases, a finding that a breach of proper police practice had occurred is clearly open on the evidence. For example, in Mr Cuthbert's case, although AC Conroy's evidence was

that while it was not possible to conclude whether the exhibits were destroyed with proper authorisation, a record of the destruction should have been made (NSWPF Submissions [348]).

19. In respect of the destruction or loss of exhibits, the NSWPF Submissions draw attention at [300], in the context of Mr Stewart's case, to the 1962 Instruction which required the retention of exhibits until it was established that "all possible Court action has been finalised".[170] In Mr Wark's case, the NSWPF submit that there is no evidence that would allow the Inquiry to determine precisely when the exhibits were disposed of, and that "[i]n all likelihood they were undertaken in reasonably close proximity to the coronial determination that Mr Wark's death was a suicide." Further, the NSWPF submit that there would be "no basis" on which to conclude positively that those records should still be held by the NSWPF (NSWPF Submissions at [402]). In Ms Waine's case, it is observed that it is not clear what agency had possession of the relevant exhibits at the time they were lost (NSWPF Submissions [365]). In Mr Rooney's case, it is submitted that it is not clear whether exhibits were required by procedure to be retained, though it is accepted that it would be preferable if they had been retained (NSWPF Submissions at [365]).

20. In our submission, it is appropriate in such circumstances to recognise the possibility, for example, that the exhibits in Mr Stewart's case were destroyed with appropriate authorisation. However, it is also appropriate to observe that the NSWPF did not furnish this Inquiry with evidence that this is, in fact, what occurred. It may be further observed, for example, that concluding that in all likelihood those steps were taken in reasonably close proximity to the coronial determination that Mr Wark's death was a suicide is the type of speculation the NSWPF has sought to caution the Inquiry against. AC Conroy's evidence was that exhibits might be disposed of upon receipt of written instructions from the Coroner (CA Submissions [807]). No such record is before the Inquiry. It is open to the Commissioner to find that, if such a record existed, it should have been retained and produced to this Inquiry.

21. Turning to documentary records, in relation to Mr Currie's case, the NSWPF submits that there is no basis to expect that any investigation file should have been retained for 24 years when it was understood that the death was accidental (NSWPF Submissions [382]). Similar submissions are made in the cases of Mr Sheil and Ms Raye (NSWPF Submissions [335] and [395]). In submissions concerning the death of Mr Lloyd-Williams (see [327]), it is submitted that there is no evidence as to the authorities in place or notifications given under the Archives Act (a point which is reiterated in Pt C.8.1.2 of the NSWPF Submissions).

22. This point made in relation to the Archives Act is dealt with in Pt D.3.1 below. However, it should be noted that the submission made in the CA Submissions is that the NSWPF *may* have failed to

comply with the Archives Act. That conclusion is available on the evidence before the Inquiry. The Inquiry is faced with a situation where material is missing, where it has requested an explanation from the NSWPF, and where uncertainty remains concerning precisely what occurred and whether that was in compliance with obligations under the Archives Act. It is open to the Commissioner to observe that the evidence indicates there may have been a breach of the Archives Act.

23. In some instances, it appears impossible to know what occurred. In some such cases, the NSWPF have accepted that, whatever occurred, there has been a breach of proper police practice. In those circumstances, we do not understand it to be controversial that a finding to this effect should be made. In other instances, the NSWPF submits it is not possible to know what occurred, and that no positive finding of a breach is open. In our submission, even where there is uncertainty as to whether a breach of policies or procedures has occurred, a finding or observation that there *may* have been a breach of relevant policies, procedures or legislation is of value in the context of the work of the Inquiry.

24. Similarly, there may be circumstances where a positive finding concerning the obligation to retain (as opposed to create) records should not be made. An example may be the possibility of authorised destruction of records following the inquest in Mr Wark's case. However, the fact that the Inquiry is not in a position to make a positive finding is unsatisfactory. The NSWPF have been provided with ample opportunity to put on evidence concerning what policies and procedures were actually in place. It is unsatisfactory that nobody from the NSWPF has been able to explain whether records at particular times should have been retained. That is itself a matter about which the Commissioner can and should comment in his Final Report.

B.3 Findings or observations made at a level of generality

25. We note the submission made at NSWPF Submissions [56] that the matters raised at CA Submissions [255]-[257] should be dealt with by reference to specific cases, as the question of whether the disposal of records or exhibits constituted a breach of procedure cannot be determined at a general level. That submission should be accepted as far as it goes. However, in our submission it is also appropriate for the Commissioner to consider making general observations about patterns or similarities he observes between cases. The topics dealt with at CA Submissions [255]-[257] are examples of the types of issues that may warrant such an observation.

PART C COMMON GROUND

26. This Part deals with areas of common ground between the NSWPF and Counsel Assisting. In doing so, it focusses upon areas where, in our submission, the submissions of the NSWPF should be accepted. There are a range of instances throughout the NSWPF Submissions where the NSWPF expresses agreement with the CA Submissions, and those are not repeated here (see, e.g., NSWPF Submissions [32]-[33]), though we submit they should be recorded in the Commissioner's Final Report.

C.1 The work of homicide investigators and of the UHT

27. The submissions recorded at [8]-[9] of the NSWPF Submissions should be accepted. It is important at the outset of these submission to acknowledge the dedication, diligence and commitment of homicide detectives to undertaking onerous work in the public interest. The nature of an Inquiry of this kind is that it will tend to draw attention to areas of potential deficiency, and this may be more noticeable if propositions were at first resisted which were then clearly demonstrated on the evidence (see CA Submissions at [902]). That is not to detract from the professionalism of the substantial majority of homicide investigators, present and historical.

28. Similarly, the reference at CA Submissions [915] that the UHT has been "beset by inactivity" should not be understood as a criticism of any particular UHT member, or a denigration of the UHT as a whole. The submission at [915] obviously invites criticism of aspects of the operation of the UHT, and the matters addressed in that part of the CA Submissions are matters which Counsel Assisting respectfully submit call for significant adverse comment by the Commissioner. Nevertheless, the submissions of the NSWPF concerning the challenges faced by the UHT (see Pt C.3 below) should be accepted, including the submission at NSWPF Submissions [453] concerning the nature of the work undertaken by those working within the UHT. Even where CA Submissions invite criticism of individuals, that should be in the context of recognising the challenges and difficulties faced by cold case investigations, as is clear when the CA Submissions are read as a whole. The members of the UHT can and should take pride in the work they do for the community. However, in our submission, the hard work of individuals does not mean that it may not be appropriate to criticise important aspects of the current or past operations of the UHT.

29. The CA Submissions proceeded on this basis, but in light of the NSWPF Submissions, it is appropriate to state expressly our agreement that this aspect of the submissions by the NSWPF should be accepted.

C.2 The value of recording past failures and the impact of the work on the Inquiry

30. It is common ground that there is a value in past failures being acknowledged and attributed: see NSWPF Submissions [341]. Similarly, the NSWPF acknowledges that in a number of cases the loss or destruction of exhibits and records has affected the Inquiry's ability to carry out its work, and that this is a serious concern: NSWPF Submissions at [57].

C.3 The initial case review and the challenges face by the UHT

31. The submissions of the NSWPF recorded at [78]-[83], [94]-[97] and [168] concerning the difficulty of the task faced by the UHT upon its formation should be accepted. In relation to the initial case review, we submit that it is not necessary for any finding to go beyond what is accepted by the NSWPF at [91] and [267] of the NSWPF Submissions: that is, that the initial review was not comprehensive, and that it represents a significant missed opportunity.

32. While, for the reasons set out at [48]-[57] below, we submit it was not necessary for the Inquiry to hear from individual officers, we emphasise that our submissions concerning the initial case review were not directed at any individual officers, and should not be understood to be suggesting that those officers were not working diligently on a difficult and, at that time, novel, task.

33. Similarly, we draw attention to the acceptance at NSWPF Submissions [176] concerning the missed opportunity to conduct a thorough audit of records and exhibits, and submit that the observations at NSWPF Submissions [177] should be accepted. Nevertheless, while those matters can and should be recognised by the Commissioner, we respectfully maintain the submissions made at CA Submissions [911]-[923].

C.4 Exhibit management and record keeping-procedures

34. We submit that the submission made at NSWPF Submissions [114]-[115], consistent with CA Submissions [430], should be accepted. It is clear that substantial efforts have been made by the NSWPF to address record keeping and exhibit management procedures, and AC Conroy's evidence demonstrates that the improvements are significant. NSWPF Submissions at [103]-[104] and [113] set out matters that are common ground and should be accepted. NSWPF Submissions at [125] should be accepted as far as they go. However, we maintain the submission that it was foreseeable by the early 1990s that DNA technology was available as a forensic technique and was likely to improve over time. No doubt that awareness became clearer and more widespread over time, and the Commissioner may be more inclined to consider that exhibits in individual cases should have been considered for DNA testing (or retained for possible DNA testing) by the mid-1990s. We also maintain the submission, consistent with the last sentence of NSWPF Submissions [125],

that irrespective of DNA technology, many lost exhibits had other potential forensic value, and a putative future prosecution would risk being undermined by their loss or destruction.

C.5 The nature of unsolved homicides

It is common ground that unsolved homicides cannot be treated as a representative sample of all police work, because their unsolved status serves as a "confounding variable": NSWPF Submissions [58]-[59], as recognised at CA Submissions [906]. Similarly, we submit that NSWPF Submissions [459]-[463] should be accepted.

C.6 The importance of respectful and inclusive communication

35. We draw attention to the acceptance at NSWPF Submissions [444] that references to Ms Rose's former name, the mislabelling of her gender, and references to her as a "cross dresser" were "disrespectful and unacceptable", and to the submission that "such references should not be perpetuated in new records created unless there is a clear forensic purpose underpinning the use of the relevant language." Similarly, at [464] of the NSWPF Submissions it is submitted that the Commissioner of Police is cognisant that that the use of inappropriate language can be extremely harmful in various ways, and that "[i]t is of utmost importance that the NSWPF officers communicate in respectful and inclusive ways".

C.7 Relationship between the Homicide Squad and the EHCU

36. The NSWPF acknowledges, as submitted at CA Submissions [67], that the decision to contact the EHCU is one made by the investigating officer, and is thus reliant on that officer detecting signs of bias crime. The NSWPF draws attention to additional training provided to officers, not set out in the CA Submissions ([18], [42]-[45]). As set out above, notwithstanding this evidence, we submit that Recommendation 2 should be made.

37. Having regard to the submissions made at NSWPF [24]-[27], and accepting the possibility that individual officers are making contact with the EHCU, we submit that rather than a finding in terms of CA Submissions [70], it would be appropriate for a recommendation be made that procedures be put in place to ensure that UHT officers are aware that the EHCU should be contacted in appropriate circumstances.

C.8 Recommendations

C.8.1 Recommendation 1

38. The submission at NSWPF Submissions [471] should be accepted, recognising that the Inquiry has not explored the volume of cases where inquests are dispensed with, either generally or

where the NSWPF holds records in relation to that question. We submit that consideration should be given to a recommendation to give effect to the "practical solution" suggested at [471] of the NSWPF Submissions, and that the relevant procedure be recorded in applicable SOPs or equivalent documents.

C.8.2 Recommendation 2

39. The NSWPF agrees in principle with the recommendation made in the CA Submissions, and has drawn attention to some existing mandatory training provided to NSWPF officers (NSWPF Submissions at [18], [42]-[46], [473]), including training provided as part of the induction to the force.

40. DS Doherty did not give evidence about the mandatory training identified in AC Cooke's statement, but we acknowledge that [155] of the CA Submissions did not take into account the evidence of AC Cooke. Nevertheless, we submit that the evidence before the Inquiry as a whole supports the recommendation, and it is common ground that a recommendation should be made. There is force in the NSWPF Submissions at [476]-[477] that such a recommendation should accommodate consideration of the matters described in those paragraphs.

C.8.3 Recommendation 3

41. We draw attention to the submission made at NSWPF Submissions [481]-[482]. There is force in this position, particularly given the difficulties identified in the CA Submissions and the NSWPF Submissions concerning, for example, the operation of LEPRA. In our submission, the recommendation that the State Records Act be amended to clarify its operation need not specify the nature of that amendment; that is a matter for the legislature, and the position of the NSWPF should be recorded. The NSWPF's concession that tags and labels on exhibits may constitute "records" should also be noted and might be appropriate for the legislature to take into account in considering the terms of any amendment.

C.8.4 Recommendations 4, 5 and 6

42. These recommendations are supported in principle by the NSWPF: NSWPF Submissions at [483]-[484].

PART D AREAS OF DISAGREEMENT

43. This section identifies the area where there remains a significant difference between the submissions of Counsel Assisting and the submissions of the NSWPF.

D.1 Procedural fairness

44. The NSWPF Submissions assert on a number of occasions either that the obligations of procedural fairness required particular persons to be called, or that findings or criticisms should not be made in the absence of an individual being called to respond to them. The question of sufficiency of evidence to make a finding is dealt with at Pt B above.

D.1.1 The service of submissions on officers in charge in each of the cases considered by the Inquiry

45. Separate to the question of the content of any obligation of procedural fairness arising in relation to the submissions made in the CA Submissions, this submission proceeds on an incorrect premise so far as the OIC of each investigation is concerned (NSWPF Submissions at [159], [346], [381], [389], [428]).

46. Over the course of August to October the Inquiry contacted each OIC and provided them with copies of the submissions made by both Counsel Assisting and the NSWPF in respect of the individual documentary tenders and, where relevant, the CA Submissions.[1] Those OICs were advised of the operation of s 12 of the SCOI Act, and were given the opportunity to put on a statement or submission. In some cases, OICs have taken up that opportunity.

47. Consequently, there has been no denial of procedural fairness in relation to any of the findings or observations proposed in relation to OICs, even if the submissions made in the CA Submissions had engaged an obligation to put those persons on notice. The NSWPF was advised of this matter by correspondence dated 11 October 2023.

D.1.2 The operation of the principles of procedural fairness in relation to individual officers

48. In addition to the submissions made in relation to OICs, the NSWPF submits that individual officers would need to be notified before a criticism of them is made in the Commissioner's Final Report (NSWPF Submissions at [159], [368], [381], [428], [455]).

49. Turning to the instances where procedural fairness has been raised, it is appropriate to commence with some of the core principles concerning procedural fairness. It is uncontroversial that the requirements of procedural fairness attach to the Inquiry. However, what is required in order to discharge a requirement of procedural fairness is not fixed: procedural fairness represents "a flexible obligation to adopt fair procedures which are appropriate and adapted to the

[1] See Exhibit 66, Tabs 1-92.

circumstances of the particular case".[2] Procedural fairness "is essentially practical ... [T]he concern of the law is to avoid practical injustice".[3]

50. It has been said that the "fundamental obligation of the inquirer" in a Commission of Inquiry is to "give a person, whose interests might be affected by the decision of the inquirer, a reasonable opportunity to be heard before the decision which may affect those interests is made".[4] Findings adverse to the interests of a person should not be made "without first giving them an opportunity to answer the matters put against them and to put submissions as to the findings or recommendations that might be made".[5]

51. Courts have taken a broad and open-ended approach to determining the kinds of "interest" which attract the protection of procedural fairness.[6] An effect on a person's personal reputation would ordinarily enliven obligations of procedural fairness.[7] However, a person must be affected as an individual in order for procedural fairness to apply. There is a distinction between a decision affecting an individual, and a decision affecting a group or class of which an individual is a member (including the public at large).[8]

52. The first matter that must be noted is the language of "findings" and "decisions". In our submission, adverting to an error that has been made in an investigation, even in critical terms, does not necessarily enliven an obligation to afford procedural fairness in relation to an individual involved in the investigation. The Commissioner can comment on deficiencies or oversights in an investigation without criticising the individuals involved. The Commissioner can also comment on what emerges from the documentary record. In appropriate cases, it would be open to the Commissioner to state expressly that his comments should not be understood as a criticism of an individual officer, mindful that the Inquiry might not have heard from that officer, but is rather a comment or criticism of an investigative practice or of what emerges from the face of a document. This would avoid practical injustice to individual officers—especially bearing in mind that it could never be practical to hear from every officer involved in every investigation—while nevertheless

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[2] *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J)
[3] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37].
[4] *Lawrie v Lawler* [2016] NTCA 3 at [180].
[5] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581; see also *Annetts v McCann* (1990) 170 CLR 596 at 600–601; *NCSC v News Corp Ltd* (1984) 156 CLR 296 at 314–315.
[6] *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319; [2010] HCA 41 at [75].
[7] See *Annetts v McCann* (1990) 170 CLR 596 at 608–609 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578 (Mason CJ, Dawson, Toohey and Gaudron JJ), 592 (Brennan J).
[8] *Kioa v West* (1985) 159 CLR 550 at 620 per Brennan J; *Castle v Director General State Emergency Service* [2008] NSWCA 231 at [6] (Basten JA), dissenting as to outcome but not as to the relevant statement of principle.

performing the Commissioner's function of reporting on the quality of investigations into which he has inquired.

53. Furthermore, even if an individual officer's reputational interest were thought to be affected by a particular proposed criticism, that does not determine the scope of the requirements of procedural fairness. It is well established that the "statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires".[9] For example, in certain contexts the importance of protecting confidential information means that the principles of procedural fairness do not require the substance or "gist" of that information.[10] The content of the obligation of procedural fairness should not frustrate the purpose for which statutory power was conferred.[11]

54. The Commissioner has been tasked with considering unsolved homicides over a 40-year period. It is likely that hundreds of individual police officers have, over that period, come into contact with those matters. In many cases, explaining the progress of the Inquiry's work will involve engaging critically with the investigations that have occurred. This may involve identifying errors or oversights in those original investigations. The scope of the obligation of procedural fairness suggested by the NSWPF would frustrate the purpose for which power has been conferred on the Commissioner by vastly multiplying the cost and time required for the Inquiry to conduct its work.

55. In the present case, the work of the Inquiry has been extensively publicised over a significant period of time. The Inquiry's website contains a large amount of information about each case considered by the Inquiry, including written submissions and the livestream of each public documentary tender. It contains details for how an individual can make contact with the Inquiry. In a number of cases, this has led to individuals approaching the Inquiry with information which they consider to be relevant to the Inquiry's work.

56. In the present circumstances, and accepting that a general invitation to be heard would not ordinarily be sufficient to satisfy the obligations of procedural fairness, we submit that it would be consistent with the requirements of procedural fairness for the Commissioner to accept the criticisms made in CA Submissions about investigative oversights or deficiencies, and about what appears from the face of the documentary record.

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[9] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26]; *Chief Commissioner of Police v Nikolic* (2016) 338 ALR 683 at [76].
[10] *Chief Commissioner of Police v Nikolic* (2016) 338 ALR 683 at [74].
[11] *Kioa v West* (1985) 62 ALR 321 at 349 (Mason J), 371 (Brennan J); *Johns v Australian Securities Commission* (1993) 116 ALR 567 at 581.

57. Of course, this does not preclude a more onerous obligation arising in respect of an officer who might be the subject of a serious finding: for example, a finding that their conduct, as an individual, was negligent, or was actuated by bias. The NSWPF have not identified a finding of that nature, except in relation to the topic of unconscious or conscious bias, which is dealt with at Pt D.2 below.

D.1.3 The operation of the principles of procedural fairness in relation to a class of persons

58. As noted above, there is a distinction between a decision affecting an individual, and a decision affecting a class of persons. This is of particular relevance to the submissions advanced at NSWPF Submissions [37]-[39] about conscious and unconscious bias. Whether a finding should be made in the terms submitted at CA Submissions [130] is a topic that is returned to at [60] below, and the question of procedural fairness in relation to such a finding is similarly dealt with below.

D.2 Conscious and Unconscious Bias

59. The NSWPF accepts that it is possible that conscious or unconscious bias played a part in the investigation conducted in relation to some of the matters before the Inquiry, and it is similarly accepted that this possibility should be publicly acknowledged (NSWPF Submissions [34]). At [35] the NSWPF submits:

> As was observed in the submissions filed on behalf of the Commissioner of Police in Public Hearing 2, the NSWPF is not merely a product of society, but plays an important culture-shaping role in it. That being so, the possible existence of bias within the NSWPF is to be abhorred and denounced, even where that bias may have reflected wider social norms of the time. As noted by Counsel Assisting (CA, [135]) a failure by an officer to discharge their duties impartially and with respect to all members of the community has the capacity to cause great harm.

60. At CA Submissions [130] we submitted that "no finding need be made in relation to individual cases in order for the observation to be made that it is possible, and indeed likely, that officers investigating some of the cases considered by the Inquiry were affected by conscious or unconscious bias." We maintain that submission and respectfully contend that the contentions in the NSWPF Submissions at [35]-[41] should not be accepted.

61. *First*, the submission is directed to both subconscious and unconscious bias. Subconscious bias does not require the person in question to be acting in a deliberately biased manner. It is accepted by the NSWPF that homophobia existed within society and within the NSWPF during the relevant period. The NSWPF also accepts that comments were made in some matters that are "potentially suggestive of homophobia or some form of bias" ([40]). The Inquiry also received, at the November Hearings, a large amount of evidence concerning the negative experiences of the LGBTIQ community concerning the NSWPF, including conduct going far beyond subconscious bias.

The NSWPF did not seek to challenge any of that evidence. In those circumstances, we submit that it is open to the Commissioner to make a finding of the kind identified at CA Submissions [130], which is not targeted at an individual officer or officers, and which is expressed as a likelihood rather than a certainty.

62. *Second*, this Inquiry has come about in the context of an existing concern regarding the views held by many within society at large about the LGBTIQ community, and in the context of an existing discourse concerning the conduct of the NSWPF in relation to cases that may have been hate crimes. The history leading to this Inquiry included concerns about bias in the way cases were investigated or prosecuted.[12] The fact that bias should not be attributed to the actions of an individual officer does not mean the Commissioner should refrain from drawing inferences from the material that is before the Inquiry about both possibilities and probabilities.

63. In our submission, an acknowledgement that it is *possible* that bias played a role in some investigative oversights or deficiencies is insufficient. Some may argue, given the widespread homophobia and the volume of investigative deficiencies that have been observed, that it would be surprising indeed if none of the investigative deficiencies were affected by conscious or unconscious bias. In our submission:

    a. The NSWPF agree that it is possible that some of the oversights or deficiencies were affected by conscious or unconscious bias;

    b. In light of this concession and the evidence referred to at [61] above, it would be open to find that, in every case where a victim was believed or suspected to be a member of the LGBTIQ community, it is possible that conscious or unconscious bias contributed to the identified investigative oversights or deficiencies;

    c. In each such case, the possibility could be described as real, not remote. That is, in every case where the victim was believed or suspected to be a member of the LGBTIQ community there is a real, non-remote possibility that the oversights or deficiencies were affected by conscious or unconscious bias;

    d. Having regard to the number of identified oversights or deficiencies, and the way in which conscious or unconscious bias can be pervasive but unseen, the chance that *none*

[12] See, eg. Exhibit 1, Tab 1, ACON, In Pursuit of Truth & Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century (Report, May 2018), 20 (SCOI.3667); Exhibit 1, Tab 3, Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Gay and Transgender hate crimes between 1970 and 2010*, [1.58], [1.66], [1.74]-[1.75], [1.78], [1.82]-[1.83], [3.104], [3.112] (Interim Report, Report 52, February 2019).

of them was affected by conscious or unconscious bias is between low and extremely low; and

e. This provides a rational basis for the Commissioner to conclude that it is more likely than not that some of the oversights or deficiencies were affected by conscious or unconscious bias.

64. Recognising the principles in *Briginshaw v Briginshaw*, the finding sought at CS Submissions [130] is appropriately balanced, by being confined to the proposition that it is *likely* that *some* of the investigating officers were affected by conscious *or unconscious* bias.

65. To the extent that this finding casts a shadow over many investigations, that is a regrettable consequence of the widespread bias in society and in the NSWPF at the time—something which the NSWPF has recognised on many occasions. It can and should be stressed that such a finding is not a criticism of any individual officer. In that context, there is no practical injustice to individual officers in making such a finding. If the Commissioner is satisfied that the evidence supports a finding of likelihood, the Commissioner should make that finding. Findings of that kind are common in contexts where, for example, a Royal Commission has considered a topic which has required consideration of an institutional context. Observations are frequently made about characteristics of that institutional context including, for example, institutional discrimination and racism.[13]

D.3 State Records Act

66. The NSWPF accepts that documentary records created in the course of investigation of an offence are "state records" (NSWPF IPH Submissions at [206]). However, the NSWPF submits that physical exhibits are not "state records" (NSWPF IPH Submissions at [204]). At [210], the NSWPF acknowledges that where records have been lost or destroyed outside of proper procedures, this may have involved a contravention of the State Records Act.

67. It should be noted at the outset that it may not be necessary for the Commissioner to rule either the position taken in the CA Submissions or in the NSWPF Submissions is correct. For the reasons that are set out in both sets of submissions, there are problems with the competing interpretations. The interpretation proposed in the CA Submissions has consequences which

[13] See, eg, *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 2, ch 13, 13.4.40-13.4.52; *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, ch 2, 21-22, 130; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 16, book 2, 202, 278-280, 584ff; NSW Department of Premier and Cabinet, *Independent inquiry into workplace bullying and harassment at Workcover (NSW)* (Final Report, February 2011), 4-6.

might create practical problems. Conversely, for the reasons set out below, there are textual problems with the submissions made by the NSWPF. In the event that the Commissioner accepts that both constructions are open, and consequently ambiguity exists, it is common ground between Counsel Assisting and the NSWPF that consideration should be given to a recommendation to clarify this matter (see [41] above).

68. The NSWPF submits that on the evidence before the Inquiry, it is not possible to determine whether any particular person has committed an offence under s 21(2)(a) or (e) of the Act. However, "it is accepted that the possibility that such contraventions have occurred is a serious matter and the Commissioner of Police acknowledges that it underscores the gravity of the loss of records in those circumstances" (NSWPF IPH Submissions at [210]). This is common ground between the NSWPF and Counsel Assisting.

69. The construction of the State Records Act set out in the CA Submissions is described, on several occasions, as "novel". That may be the case in the sense that the NSWPF does not appear to have previously considered the question of whether physical exhibits may be covered by the State Records Act. That does not answer the substance of the submission.

70. Before turning to the question of interpretation, two preliminary points should be made.

71. *First*, we submit that the submission made in Pt C.8.2.2 should be rejected. The letter dated 26 May 2023 and quoted at NSWPF Submissions [227] invited the NSWPF to address the State Records Act in the context of exhibits that had not been located or had been destroyed. The Inquiry was seeking to understand what the position of the NSWPF was concerning the application of that Act to exhibits. It may have been a "longstanding understanding" within the NSWPF that exhibits were not state records. That is what the Inquiry was asking to be addressed in a statement, and in our submission a fair reading of the letter dated 26 May 2023 makes that apparent.

72. The submission at [215] and [225] of the NSWPF Submissions should be rejected. The reference at CA Submissions [578]-[579] was not a reference to evidence at large, but a reference to the following statement in the letter to the NSWPF dated 26 May 2023: "[i]t would also be of assistance to the Inquiry if the requested statement addressed any relevant provisions under the *State Records Act 1998* (NSW)". This assistance was not provided. Rather, the Inquiry was left to piece together the position of the NSWPF on the basis of documents provided in response to other requests for information, and now referred to in both the CA Submissions and the NSWPF Submissions.

73. *Second*, the CA Submissions clearly acknowledge the difficulties that flow from the preferred interpretation set out therein, including in relation to the interaction with LEPRA, and we draw attention to the submissions at NSWPF Submissions [253]-[255]. That is why a submission is made that consideration should be given to a recommendation that the State Records Act should be amended to ensure the matter is clarified. However, the fact that a particular outcome is a surprising or inconvenient one does not mean it can be ignored. Parliament clearly indicated in s 22(7) its intention that other legislation should not be interpreted as prevailing over, or otherwise altering the effect or operation of, s 22 save to the extent that the other legislation expressly so provides. Similarly, the existence of policies or documentation issued by the NSWPF or by the State Records Authority cannot control the meaning of the language in the State Records Act.

D.3.1 The position under the Archives Act

74. As is recorded at [211] of the NSWPF Submissions, it is submitted in the CA IPH submissions that material lost or destroyed prior to the State Record Act's commencement *may* have constituted a breach of the Archives Act. Implicit in that submission is acceptance of what is put at NSWPF Submissions [212], which is that there is insufficient material before the Inquiry to reach a concluded view on that matter in relation to documentary records. The NSWPF submits that "the Inquiry should not venture into speculation as to whether the NSWPF historically failed to comply with the Archives Act."

75. In our submission, the concern that there may have been non-compliance with the Archives Act emerges clearly on the evidence before the Inquiry. There are numerous instances where documentary material (setting aside, for the present, the question of exhibits) has been lost. The NSWPF has not furnished any evidence to explain that the destruction of these records was authorised, beyond material suggesting that it *may* have been authorised. Consequently, and in accordance with the submissions made at [20]-[24] above, it is appropriate that the Commissioner's Final Report identify that there *may* have been historical non-compliance with the Archives Act.

76. To the extent that the Inquiry is criticised for failing to take the step identified at NSWPF Submissions [214], this is also material that the NSWPF could have obtained. Further, this material is not necessary in order for a concern about possible historical non-compliance to be expressed. In the same way that it would not be appropriate to assume there had been non-compliance and to make a positive finding of non-compliance, it would equally be inappropriate to assume that

there has been compliance in circumstances where the evidence raises an unanswered question which the NSWPF could have been expected to be in a position to answer.

D.3.2 The position under the State Records Act

77. As is clear from the submissions as CA Submissions [577]-[578], there are two categories of material which must be treated separately. The first is documents created by the NSWPF, such as investigative files. It is common ground between the parties that these are state records, and the material summarised at NSWPF [216]-[225] shows that the NSWPF has considered the obligations under the State Record Act in relation to such documents.

78. The second category of material is exhibit material, which can be further divided into material with a documentary character and non-documentary physical exhibits once created and labelled (see NSWPF Submissions at [233], CA Submissions at [563]). The submission made at CA Submissions [577] includes exhibit material with a documentary character. Similarly, the criticism made at CA Submissions [579] is directed to this exhibit material. It is common ground that there has been an effort on the part of the NSWPF to comply with the State Records Act in respect of documents created by the NSWPF, as is clear from the NSWPF policies and procedures. However, it is also clear that many such documents have been lost.

79. There is no evidence before the Inquiry of any consideration of the status of exhibits under the State Records Act, beyond bald statements that the State Records Act does not apply to exhibits. If it is accepted that the interpretation of the State Records Act set out in the CA Submissions is correct, then it follows that there has been a systemic failure to endeavour to comply with the State Records Act in relation to this material (as opposed to material such as investigative files). In the event that the primary submissions of the NSWPF on this topic are accepted, then this criticism would likewise be rejected.

D.3.2.1 Whether exhibits are state records

80. It is submitted at NSWPF Submissions [239] that exhibits, whether documentary or non-documentary, do not fall within the definition of "state record" because they are not records "made or received" by a person in the NSWPF within the meaning of s 3. Rather, exhibits are, in the submission of the NSWPF, "seized" by the NSWPF as reflected in Pt 17 of LEPRA.

81. It should be noted at the outset that LEPRA was introduced after the State Records Act, and consequently caution should be exercised in juxtaposing the "seizure" of material under LEPRA with the making or receipt of a document under the State Records Act as though this assists in

determining what material is captured by the State Records Act, particularly having regard to s 11(7) of the State Records Act.

82. The NSWPF emphasises the language of "made or received" in resisting the submission that exhibits of any kind may be State Records. The submission at NSWPF Submissions [240] has superficial attraction, but cannot be sustained. It does not grapple with situations where an exhibit clearly *is* "received" by a police officer within the meaning of "received" set out at that paragraph (for example, when material is given to an officer by a witness), as opposed to being seized from a location. There will be many cases where it is difficult to say whether material was "received" in the narrow sense advanced by the NSWPF or "seized", if seizure falls outside the Act. The submissions also does not grapple with the fact that, when an exhibit is labelled, a record is clearly "made" – the only debate then becomes whether the Act treats the label alone as the record, or regards the labelled exhibit as the record (ie, the source of information).

83. Similarly, the submissions concerning purpose at NSWPF Submissions [241] presuppose that exhibits are not state records. The submission does not explain why exhibits are not "records of the public offices of the State", and why they may not be captured by "other purposes" in the long title of the State Records Act. If they are "records", as defined, then they fall within this stated purpose. Moreover, if the definition of "record" captures them according to the ordinary meaning of the words of Parliament, then the purpose – which resides primarily in the text – can be discerned there. It is one thing to say that, for practical reasons, categories of item should be excluded from the operation of the Act. The second half of [241] of the NSWPF Submissions provides policy considerations in favour of the exclusion of exhibits. However, if the purpose of the State Records Act is the maintenance of records of public officers, the logical starting position is that items that are "compiled" for the express purpose of being a source of information are records of public office that should be maintained.

84. Contrary to the submission at NSWPF Submissions [244], the definition of "record" clearly identifies that the nature of an item may change once steps have been taken in relation to it. That is recognised in the language of (emphasis added) "other source of information <u>compiled</u>, recorded or <u>stored</u>." This language recognises that something that is a source of information may become one through the process of compilation, recording or storage. The problem with seeking to define a record by its "intrinsic informational content" is that this assumes there is only one point in time where an item can be assessed for status as a record. An exclusion from the Act should not be based on difficult-to-articulate distinctions between different kinds of object, where those holdings are created for the specific purpose of being a source of information in connection with a public office.

85. The difficulty implicit in this submission is seen at NSWPF Submissions [251]. It is accepted that the tag or label may be a record, which is said to be distinct from the exhibit. However, it is not explained why the labelling of the exhibit would not comprise the compilation of information, such that the composite, labelled exhibit is a state record. To divorce the label from the exhibit deprives the label of the very informational content for which it has been created. The same may be said for public hospital holdings comprising labelled samples (NSWPF Submissions at [252]). There may be sound policy grounds for excluding them from the operation of the State Records Act, but it would not serve the purpose of the Act to conclude that they are not "records" in the first place.

86. Furthermore, it is clear that the loss of exhibits has in most or all cases been accompanied by the loss of the label or tag which would have been attached to the exhibit according to usual police practice. The NSWPF's interpretation, even if correct, would not answer the concern that there may have been widespread failure to comply with the Archives Act and/or the State Records Act in relation to those labels or tags.

87. In the event that it is accepted that it is not necessary to rule on the question of the interpretation of the State Records Act, there is no need to consider the point raised at NSWPF Submissions Pt C.8.3.4 in relation to normal administrative practice. If that point is considered, we submit that the submission made at CA Submissions [576] should be accepted. If the Inquiry has received evidence that particular exhibits or material was destroyed in compliance with normal administrative practices, then that should be noted. However, where there is a dearth of evidence concerning what occurred, we submit that it should not be assumed that the administrative practices exception applied.

PART E HOMICIDE INVESTIGATION

E.1 The formation of the Homicide Squad

88. We draw attention to the acknowledgement at NSWPF Submissions [13] that it is appropriate for consideration to be given to further reviewing the 2022 UHT SOPs to ensure consistency with proper practice.

PART F COLD CASES AND UNSOLVED HOMICIDES

F.1 The history of the UHT and its current operation

89. A number of topics concerning the history of the UHT and its current operation are dealt with in Parts B and C above. Some further matters are the subject of brief submissions in this section.

90. In relation to the submission made at NSWPF [76], no submission is made at CA Submissions [334] that DCI Laidlaw was not candid or forthcoming in his evidence, either in writing or orally.

91. We draw attention to the acknowledgment at NSWPF Submissions [86] that the lack of capacity for matters to be reviewed, while it may well explain DCI Laidlaw's prioritisation of those matters, does not provide a justification for triages not being progressed in a timely manner. Similarly, at NSWPF Submissions [89] is it acknowledged that there has been a demonstrable failure of the triage process, and that the problems with the triage process should have been addressed sooner.

92. While we submit that the submission at NSWPF Submissions [90] should not be accepted in terms—because the evidence does not, in our submission, demonstrate an "ongoing attempt to systematically deal with a very large number of cases a setting of limited resources and substantial demands on the time of UHT officers in connection with active investigations"—we submit that it should be accepted that the change to a two-stage process does reflect the fact that, at least at this point in time, consideration was being given to how to review cases more effectively. The submission at CA Submission [369] is directed to the present triage process, as in place since 2018, and not to the screening processes adopted since the commencement of the UHT.

F.2 Submissions concerning exhibit management

93. In relation to the point made at [156] of the NSWPF Submissions, it is common ground that the "unsolved" status of unsolved homicides should be taken into account, and that any finding should be qualified accordingly (see NSWPF Submissions [447]). However, the material before the Inquiry, including evidence such as the Lehmann Report, does suggest the deficiencies were systemic or widespread. Such a conclusion is consistent with the proposition that there has been appropriate exhibit management and record keeping in many – indeed one hopes the large majority – of cases. The deficiencies may nevertheless be regarded as systemic or widespread given that the evidence indicates they occurred on many occasions in many different area commands, and the problems appear to have persisted across many years.

94. The submission in the first sentence of NSWPF Submissions [160] should be rejected. Even if the submission made in the latter half of [160] is accepted—that is, that the destruction of the relevant record may have accorded with proper procedure—it is still correct to say that the loss or destruction of many documents and exhibits is unexplained. The NSWPF is the only entity that could be expected to explain what occurred. While it may be that destruction of exhibits or records occurred in an orthodox way, that is a matter which the NSWPF have been continually invited to explain and demonstrate. They have not done so.

95. Although the NSWPF Submissions at [163] cavil with the submission made at CA Submissions [493], it appears that in fact the NSWPF accept, as set out at NSWPF Submissions [164], that the number of instances of error suggest deficiencies in the system or training provided to officers.

F.3 Knowledge within the NSWPF concerning the difficulties locating and retrieving exhibits and documentary material

96. It should be observed, in relation to NSWPF Submissions [171]-[172], that the submission at CA Submissions [496] is not personally critical of AC Conroy or DI Warren. Rather, it points out that it is remarkable that AC Conroy had not seen the report, and that DI Warren was not aware of the problems set out in the report. Given the magnitude of the issue, and the effect on the work of the UHT (which comprises a significant part of the Homicide Squad), we submit that it is surprising that they were not aware of these matters.

97. The submission at [193] of the NSWPF Submissions calls for comment. The interpretation of Recommendation One of Strike Force Parrabell's Final Report put forward by the NSWPF is less natural on the plain language and, if it was correct, would be ill-suited to address the problems identified in the first two sentences of the recommendation. There is no reason to read "storage of evidence" and "storage of all investigative material in the same location" as confined to electronic records in e@gle.i. The work of the Inquiry has demonstrated that maintenance of e@gle.i could not sensibly be regarded as an adequate way to address the problems clearly encountered due to the legacy of poor exhibit and record-keeping practices that had been identified nearly two years earlier in the Lehmann Report. The first two sentences of the recommendation reflect the fact that the Strike Force Parrabell operatives encountered the problems described in the Lehmann Report. If the recommendation was not intended to address those problems, or if that is not how it was interpreted by the NSWPF, then that is itself regrettable.

PART G INDIVIDUAL CASES UNDER REVIEW BY THE INQUIRY

98. This Part deals with submissions made in relation to individual cases. In some instances, there is nothing concerning a particular case about which we wish to make further submissions. We repeat and rely upon the submissions made in the CA Submissions. In addition, these submissions, as with the CA Submissions, should be understood as supplementing the submissions of Counsel Assisting made in each matter.

G.1 The cases of Andrew Currie, Paul Rath, Russell Payne, Graham Paynter, Samantha Raye, Peter Sheil and Blair Wark

99. The question of whether findings should be made concerning the NSWPF investigation of cases the subject of a submission that the case does not fall within Category A or B of the Terms of Reference is to be dealt with separately. Submissions were served concerning this issue on 13 October 2023, following correspondence with the NSWPF. As such, that topic is not dealt with in these submissions.

100. In relation to the submission at NSWPF Submissions [283], it is common ground between the parties that in circumstances where *new* information comes to light (e.g., information is passed on to the NSWPF by a previously unknown witness), this information will be communicated to the UHT and a matter may be revisited. The concern raised at CA Submissions at [585]-[588] is that there are cases where that information may never become known, or cases may never be revisited, because there is no appropriate catalyst.

101. The NSWPF agrees in principle with the submissions made in the CA Submissions concerning Recommendation 4 (NSWPF Submissions [483]-[484]) and we submit that the Commissioner's Final Report should also note the matter raised at NSWPF Submission [284], which identifies that the NSWPF is liaising with the Coroners Court to identify matters which may have been identified by a Coroner as potentially suspicious but not referred specifically to the UHT.

G.2 The cases the subject of Strike Force Neiwand

102. The topic of Strike Force Neiwand is, as the NSWPF observe, dealt with extensively elsewhere, and it is likely that further submissions will be made by both Counsel Assisting and the NSWPF concerning SF Neiwand. For the purposes of these submissions, we draw attention to the acceptance at NSWPF Submissions [291] that the classification of the matters of Mr Warren and Mr Russell as "undetermined" would have resulted in a decrease in the priority afforded to those cases.

G.3 General issues arising in relation to screening or triage forms

103. We draw attention to the submission at [293] of the NSWPF Submissions that the failure to implement recommendations or the delay in implementing them is reflective of the "capacity issues" set out in Part C.3 of the NSWPF Submissions, which had the effect that "the number of cases with lines of inquiry far outstripped the investigative capacity". However, the NSPWF nonetheless acknowledged that some recommendations should have been followed (see [423]), and that it is appropriate for it to be recorded if a decision is ultimately made not to follow a recommendation (for example, due to resourcing constraints) ([461]).

104. In relation to screening, triage and review documents, it is appropriate, as submitted at NSWPF Submissions [294], to take into account the fact that these documents are internal working documents. However, the NSWPF have accepted that a number of the forms are clearly incomplete. In addition, that does not excuse errors or objectionable language, although it may excuse, for example, brevity.

G.4 Mark Stewart (died 10 or 11 May 1976)

105. The NSWPF Submissions accept that there ought to have been a record if the exhibits were destroyed, disposed of or returned to Mr Stewart's family ([299]). They also submit that it is not possible to discern whether the failure to retain these records is a breach of an applicable procedure. AC Conroy accepted in her evidence that it was possible that there had been a breach of procedure (see CA IPH Submissions [617]). Submissions concerning a situation where there is uncertainty as to what has occurred are made at [18]-[24] above. It may well be the case that these exhibits were not retained on the basis of the 1962 Instruction (see NSWPF IPH Submissions at [300]). However, the fact that what happened to these exhibits is unknown remains unsatisfactory.

106. The only other matter arising in relation to Mr Stewart is the submission at NSWPF Submissions [303] that "[i]n view of the quick contact made by the police with the Hilton Hotel, it is submitted that it is unlikely the police overlooked contacting the Chevron Hotel". In our submission, if the name of the Chevron Hotel did appear on the notepaper, the evidence before the Inquiry does not support the inference sought by the NSWPF. Rather, the inability to reach a conclusion about this is one of the reasons why the failure to retain the handwritten note is described at CA Submissions [622] as a serious matter.

G.5 Paul Rath (died on 15 or 16 June 1977)

107. The matters set out at NSWPF Submissions [316]-[318] should be accepted. In particular, we submit that it should be accepted that the changes to exhibit management practices since the time of Mr Rath's death mean that it is unlikely that a similar failure of record keeping would occur at present, even in relation to a case regarded as non-suspicious.

108. The submissions made at NSWPF Submissions [323]-[324] should not be accepted. The submissions of Counsel Assisting in Mr Rath's case, summarised as CA IPH Submissions [639], clearly identifies the matters which are said not to have been considered. The evidence of DI Warren is set out at [645], and supports the submission that those steps should have been taken.

109. In our submission, the decision of the Coroner to dispense with an inquest should be treated neutrally. That is not to criticise that decision: the decision of the Coroner was reliant upon the information put before them, as is set out at CA Submissions [588]. Similarly, while it is true a Coroner's decision will not be affected by "hindsight bias",[14] it will necessarily be dependent on the information before the Coroner at that time.

G.6 Russell Payne (died on 31 January 1989)

110. In our submission, even if it was reasonable for the NSWPF to not have taken the photographs into evidence, the failure to describe them with precision, when they formed a component of the OIC's reasoning in respect of the case, is not appropriate. Moreover, the NSWPF Submissions at [345] appear to assume that the photographs depicted the sexual practice known as "sounding" (the insertion of a rod into the urethra). This is necessarily speculative because the photographs were not retained or described. If the photographs were of "sounding", then alongside the evidence in the Counsel Assisting documentary tender submissions at [7](b), (c) and (h), they would have supported an immediate suspicion that this practice may be relevant to the cause of death. This would warrant collecting the photographs as exhibits and giving a neutral description of what they depicted. If they depicted unrelated sexual practices, then one is left in ignorance about why the OIC regarded them as "bizarre" and whether this might have shed any further light on the manner and cause of death.

[14] NSWPF Submissions at [324].

111. Contrary to the NSWPF Submissions at [344](a), it is clear from the OIC's statement at [14] that the "large number of erotic photographs" were a component in the reasoning to the conclusion that "the deceased may have engaged in bizarre sexual practices", which in turn informed the conclusion that Mr Payne had himself inserted the piece of the television antennae into his urethra. The only other evidence referred to (other than the piece of antennae located at the post-mortem) is a stained piece of broom handle.

112. The word "bizarre", when used in relation to sexual practices by an investigating officer in a witness statement, was both pejorative and imprecise. With respect, the NSWPF submission at [345] has an impact that may not have been intended. Describing particular sexual practices as "bizarre" creates the risk of stigma or embarrassment which could make someone less likely to seek help when needed. Even in submissions to this Inquiry, it is appropriate to be circumspect when describing diverse sexual practices. It risks perpetuating such stigma to defend the OIC's language by submitting that there is "no doubt" that the expression was apt "[e]ven by modern standards". We maintain the submission that the use of such language, then and now, is undesirable.

G.7 Wendy Waine (died on 29 April 1985)

113. Contrary to the submission at NSWPF Submissions [361], and consistent with the explanation given in the CA Submissions, the fact a matter is not dealt with in the CA Submissions does not mean that no issue is taken with the adequacy of the investigative steps. The CA Submissions, and the evidence received at the IPH, supplemented rather than replaced the submissions made in each documentary tender.

114. In relation to [366]-[367] of the NSWPF Submissions, we do not press the second sentence of CA Submissions [724]. As is set out in the NSWPF Submissions, the weight of the evidence indicated that the fired bullets never existed and the screening form was wrong. The evidence of AC Conroy, summarised at [732] of the CA Submissions, demonstrates that if the exhibit book had been properly maintained this would have been readily ascertainable.

G.8 William Rooney (died on 20 February 1986)

115. In relation to the submission at [377] of the NSWPF Submissions, the submissions of Counsel Assisting filed in Mr Rooney's case acknowledge that officers spoke with Ms Garbutt's mother on 17 February 1986 ([142]). However, as is recorded in those submissions, there is nothing on the material to suggest that police ever interviewed, or sought to interview Ms Garbutt.

G.9 Andrew Currie (died between 12 and 13 December 1988)

116. In relation to the submissions made at [381]-[383] of the NSWPF Submissions, the submission at [381] should not be accepted. DI Warren agreed that the circumstances of Mr Currie's death warranted it being treated as suspicious, and that investigating police, acting properly, would obtain statements from family (CA Submissions [765]-[766]). DI Warren's evidence does not support a criticism of the NSWPF for the failure to record the reasons for not taking a statement from family members. Nevertheless, the Commissioner is not obliged to proceed on the basis of DI Warren's suggestion that "it may have been more relaxed" at that time, and is entitled to observe—if he forms this view—that such reasons should have been recorded.

117. The submission made at [382] of the NSWPF Submissions is dealt with at [21] above. In relation to the submission made at [383], DI Warren was not able to assist with whether the NSWPF should have considered whether the relevant area was a beat. As is acknowledged in the written submissions filed by Counsel Assisting concerning the documentary tender at [7], there is no specific evidence of the use of the public toilet in which Mr Currie's body was found being used as a beat, although in some areas of Manly there were known to be robberies occurred at public toilets, sometimes with gay men as victims. In relation to whether or not the location was a beat, the Commissioner need go no further than to observe that the experience of this Inquiry has highlighted the importance of asking this question and that the failure to ask this question in other cases has caused important possibilities to be overlooked. Nevertheless, in light of DI Warren's evidence, criticism is warranted in respect of the failure to treat Mr Currie's death as suspicious.

G.10 William Allen (died between 28 and 29 December 1988)

118. In response to the submission made at [386] of the NSWPF Submissions, Mr Berwick's recollection as set out at CA Submissions [771]-[772] is consistent with the evidence from the photograph, which includes messages on the wall dated in 1988. If the NSWPF had examined the toilet block wall, it is to be expected that this would have been recorded. The failure to examine the wall, or the failure to record the examination, indicates a failure to comply with proper police practices, including judged by the standard of the day.

G.11 Simon "Blair" Wark (died on 9-10 January 1990)

119. The submissions at [403] of the NSWPF Submissions should be rejected. DI Warren's evidence, summarised at [812]-[813] of the CA Submissions, supports the conclusion that the death should have been regarded as suspicious, and that various steps should have been taken in relation to the death. The conclusion of Counsel Assisting that Mr Wark's injuries were sustained after he deliberately jumped from a cliff in the vicinity of the Gab at Watson's Bay while affected by a psychotic required careful consideration of the evidence that had been gathered and an assessment of whether there were gaps or insufficiencies in the evidence. Had the investigative oversights accepted by DI Warren not occurred, this conclusion might have been reached more readily.

G.12 Robert Malcolm (died on 29 January 1992)

120. The submission made at NSWPF Submissions [412] should not be accepted. Dr Allsop's evidence that there was not a widespread understanding concerning the evolution of DNA technology should be taken into account, and it may be that many law enforcement officers were not aware or had not turned their minds to the possibility of such improvements. Nevertheless, at least by May 1996, it would have been reasonably clear, had NSWPF officers turned their mind to this question, that DNA technology had advanced and was likely to advance.

121. In addition, we submit that the submission at [413]-[414] should not be accepted. Even putting DNA aside, Mr Malcolm's case was a homicide. It should have been clear that physical exhibits were important and ought to be retained.

G.13 Crispin Dye (died on 25 December 1993)

122. We submit that the submission at [420] of the NSWPF Submissions that the criticism concerning the failure to locate the relevant piece of paper should not extend to the paper review conducted in 2005 and the triage conducted in 2019, having regard to the nature of those processes, should be accepted.

G.14 James Meek (died 7 March 1995)

123. We understand that Mr Meek's matter will be the subject of further submissions having regard to material that came to light after the documentary tender. That being the case, we do not propose to deal with Mr Meek's matter in these submissions.

G.15 Carl Stockton (died on 11 November 1996)

124. The submission at CA Submissions [884] was not a separate criticism of the NSWPF, but rather an observation that the NSWPF had not previously addressed this issue. We acknowledge that the NSWPF have now done so, making appropriate concessions, in the NSWPF Submissions at [434]. We note that the NSWPF were on notice of the issue shortly after 27 March 2023 when the written submissions of Counsel Assisting were served and a statement was requested in correspondence.

G.16 Scott Miller (died on 2 March 1997)

125. In relation to [437] of the NSWPF Submissions, the submissions summarised at [889]-[890] of the CA Submissions identify that there is ambiguity concerning the interviews, including whether interviews were conducted individually. The absence of detail prevents the Inquiry from understanding the nature of the interviews conducted. That absence of detail similarly affects the utility of the records to officers considering the case at a later point. That is regrettable and is an appropriate matter for comment by the Commissioner.

G.17 Submissions concerning the individual matters before the Inquiry

126. In relation to [445], we submit that the characterisation of the submissions at [902] and [908] of the CA Submissions as "sweeping generalisations" is not apt. Those submissions are not generalisations, they are submissions referable to a significant number of individual cases, the detail of which is set out in the CA Submissions and in these submissions.[15] In some of the cases referred to above we have acknowledged the force of the NSWPF submissions in relation to specific cases. However, we maintain the bulk of the submissions put about individual cases. In light of those matters, we respectfully maintain the submission at [902] at [908].

[15] See the matters dealt with a CA Submissions at [616]-[616] (Mr Stewart), [659]-[661] (Mr Bedser), [694]-697] (Mr Cuthbert), [707]-[708] (Mr Sheil), [731]-[732] (Ms Waine), [765]-[767] (Mr Currie), [812]-[813] (Mr Wark), [857]-[858] (Mr Dye), [878]-[879] (Mr Meek).

G.18 Submissions concerning the UHT

127. The submissions made at NSWPF Submissions [450]-[455] are dealt with at [27]-[28] above. We maintain the submission at [456] of the CA Submissions that it is a matter of concern that, on the evidence, the backlog of triage forms has not been brought to the attention of DCI Laidlaw's superiors, and that it raises questions about DCI Laidlaw's supervision. However, recognising that the matter has not been explored with DCI Laidlaw's superiors we submit that the Commissioner should not make (and the CA Submissions at [919] did not seek) a positive finding that there has been a failure of supervision.

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