



New South Wales

## Special Commission of Inquiry into LGBTIQ hate crimes

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### **SUBMISSIONS OF COUNSEL ASSISTING**

#### Investigative Practices Hearing

13 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 address an issue that has arisen in relation to the Inquiry's Terms of Reference.
2. On 4 to 7 July 2023 and on 15 August 2023, the Inquiry conducted the Investigative Practices Hearing (**IPH**). On 15 September 2023, Counsel Assisting filed written submissions in relation to the IPH (**CA IPH Submissions**). On 10 October 2023, the NSWPF filed written submissions in response (**NSWPF IPH Submissions**).
3. At [271]-[275] of the NSWPF IPH Submissions, the NSWPF makes submissions concerning cases in which Counsel Assisting has submitted that those cases do not fall within Paragraph A (or Paragraph B) of the Inquiry's Terms of Reference on the basis that they either do not "remain unsolved" and/or they are not a "gay hate crime."
4. At [274]-[275], the NSWPF submits:

The investigative steps undertaken in a particular case may properly be the subject of inquiry where they are relevant to determining whether the case falls within Paragraphs A or B. Those steps may also be relevantly considered by the Inquiry where deficient investigative practices impede the Inquiry's ability to determine that question. However, once the Inquiry has inquired sufficiently to form the view that a case does not fall within Paragraphs A or B, it is beyond the scope of the Terms of Reference to conduct a wide-ranging examination of any and all alleged shortcomings into the police investigations of those deaths. Such findings would go beyond the Terms of Reference into a general consideration of police approaches to investigating suspected homicides.

Findings about the specific deficiencies in the investigations, or investigative steps that should have been taken in cases not falling within Paragraph A or B, are also not capable of assisting the Inquiry in its task of determining the manner and cause of death in Paragraph A and B cases. The deficiencies are specific to investigative steps in a particular case.

Accordingly, the Commissioner of Police submits that, in cases falling outside of Paragraphs A and B, findings about the conduct of the particular investigation are not supported by the Inquiry's Terms of Reference. The relevant individual cases are identified below.

5. The cases affected by this submission, according to the NSWPF IPH Submissions, are those of Andrew Currie, Russell Payne, Samantha Raye, William Dutfield, Blair Wark and Graham Paynter. The point now taken by the NSWPF in respect of each of these cases was not taken at the hearings for documentary tender, where Counsel Assisting made submissions in relation to the NSWPF investigations, and the NSWPF responded to those submissions. The NSWPF have not identified why this point was not raised earlier than 10 October 2023, either in the course of those documentary tenders or otherwise.

**PART B: THE INQUIRY'S TERMS OF REFERENCE**

6. The scope of the Inquiry's Terms of Reference is considered in the 18 July 2023 judgment of the Commissioner (**July Judgment**), which dealt with the question of whether the conduct by the NSWPF of SF Macnamir and the death of Scott Johnson fell within the Inquiry's Terms of Reference. That judgment in turn referred to the Commissioner's judgment of 6 December 2022 (**December Judgment**), and we draw particular attention to the summary of the key aspects of the December Judgment at [21]-[22] of the July Judgment, and the consideration at [67]-[73] of the nature of a Commission of Inquiry.
7. In our submission, findings about the NSWPF's investigation of a matter that falls outside Paragraph A or B of the Inquiry's Terms of Reference may still properly be made in the Commissioner's Final Report.
8. One basis on which that may occur is the one acknowledged by the NSWPF at [274]: where deficient investigative practices or inadequate records impeded the ability of the Inquiry to determine the question of whether a case falls within Paragraph A or B. However, we submit (contrary to the position taken by the NSWPF) that even in circumstances where the Inquiry has received *sufficient* information to form the basis for a finding that a case does not fall within Category A or B, it may still be appropriate for findings to be made in relation to the investigation by the NSWPF. That is, in cases where the investigation or

other conduct of the NSWPF has *affected* the ability of the Inquiry to determine the question of whether a case falls within Paragraph A and B, that is a matter which can properly be dealt with in the Commissioner's Final Report.

9. Each of the cases identified by the NSWPF is one where deficiencies or oversights in the NSWPF investigation, or the loss or destruction of material, has affected the amount and quality of the information available to the Inquiry, and consequently the confidence with which a conclusion can be drawn. The fact that the Inquiry has before it sufficient information that Counsel Assisting has made a submission that a case does not fall within Paragraph A or B does not remove those deficiencies from the sphere of matters that can properly be addressed in the Commissioner's Final Report.

#### **PART C: THE INDIVIDUAL CASES**

##### C.1 Andrew Currie (died between 12 and 13 December 1988)

10. Mr Currie's death is dealt with at [761]-[768] of the CA IPH Submissions and at [378]-[383] of the NSWPF IPH Submissions.
11. The matters of concern to the Inquiry, identified by Counsel Assisting in the written submissions concerning Mr Currie's death, are summarized as [762] of the CA IPH Submissions. Each of those matters affected the amount and quality of the information available to the Inquiry concerning Mr Currie's death. Each was relevant to the consideration by the Inquiry of both whether Mr Currie's death fell within the Terms of Reference, and the manner and cause of Mr Currie's death. For that reason, we submit that findings may be made in respect of the investigation into Mr Currie's death.

##### C.2 Russell Payne (died on 31 January 1989)

12. Mr Payne's death is dealt with at [681]-[686] of the CA IPH Submissions and at [342]-[346] of the NSWPF IPH Submissions. The matters of concern to the Inquiry are summarised at [682] of the CA IPH Submissions.
13. As with the case of Mr Currie, the reference to the photographs in the statement of the OIC without further information affected the question of whether Mr Payne's death should be regarded as unsolved, and whether it was potentially motivated by LGBTIQ bias. The decision to record that the photographs were "bizarre" without explaining why leaves the Commissioner in the position where he does not know whether their contents may have

informed an assessment of whether the death was accidental or not, or whether the death involved an element of LGBTIQ bias. The fact that the Commissioner is able to reach a particular conclusion, or that Counsel Assisting has made a submission that a particular conclusion is available on the (incomplete) evidence before the Inquiry does not preclude the Commissioner from making findings or observations concerning investigative steps that affected his ability to reach this conclusion.

C.3 William Dutfield (died on 19 November 1991)

14. Mr Dutfield's death is dealt with at [814]-[822] of the CA IPH Submissions and at [404]-[410] of the NSWPF IPH Submissions. The matters of concern to the Inquiry are summarised at [816]-[818] of the CA IPH Submissions.
15. The early dismissal of Mr Ashworth as a suspect, and the failure to take a DNA sample from Mr Ashworth, were both matters that affect the Commissioner's ability to assess whether Mr Dutfield's matter in fact remains "unsolved". The fact that Counsel Assisting submitted that there was a sufficiency of evidence for the Commissioner to find that Mr Dutfield's death was "solved" does not take those matters outside the scope of the Inquiry's Terms of Reference.
16. Submissions in Mr Dutfield's case are also made by Counsel Assisting in relation to a UHT screening form dated 2 May 2005 and an "additional case screening form" dated 1 March 2007. Those submissions focus upon what should have occurred in Mr Dutfield's matter in 2005, after the screening by the UHT was completed (CA IPH Submissions at [823]-[827]). The delay in taking the steps identified by the reviewer in 2005, or the failure to take those steps at all, has similarly affected the amount and quality of the information available to the Inquiry in relation to Mr Dutfield's death, and may properly be the subject of a finding in the Commissioner's Final Report.

C.4 Samantha Raye (died on or around 19-20 March 1989)

17. Ms Raye's death is dealt with at [779]-[789] of the CA IPH Submissions and at [391]-[397] of the NSWPF IPH Submissions. The matters of concern to the Inquiry are summarised at [786] of the CA IPH Submissions. Once again, this is a case where missing information (for example, lost exhibits) and the failure to take specified steps has affected the ability of the Inquiry to make its assessment as to whether Ms Raye's death is "unsolved", and as to whether it was or may have been affected by LGBTIQ bias.

C.5 Simon “Blair” Wark (died on 9-10 January 1990)

18. Mr Wark’s death is dealt with at [798]-[813] of the CA IPH Submissions and at [401]-[403] of the NSWPF IPH Submissions. The matters of concern to the Inquiry are summarised at [808] of the CA IPH Submissions.
19. The fact that Counsel Assisting has made a submission that Mr Wark’s death falls outside Paragraph A of the Inquiry’s Terms of Reference does not mean that the loss or destruction of exhibits and material and the failure to take specified steps should not be the subject of findings in the Commissioner’s Final Report. Each of those matters affected the Inquiry’s ability to make a judgment about whether Mr Wark’s case was “unsolved” (a matter that required consideration of manner and cause of death), and the presence or absence or grounds to suspect LGBTIQ bias. Consequently, we submit that findings about the investigation are within the Inquiry’s Terms of Reference.

C.6 Graham Paynter (died 12-13 October 1989)

20. The investigation into Mr Paynter’s death was not the subject of submissions in the CA IPH Submissions (other than the references at [583] and [587]), or in the NSWPF IPH Submissions other than at [280].
21. In submissions filed on 6 February 2023, Counsel Assisting made a number of submissions concerning the investigation by the NSWPF into Mr Paynter’s death (see, in particular, [26]). Mr Paynter’s case was one where the original investigative file could not be located. That is a matter that affected the quality and amount of information available to the Inquiry, and is thus an appropriate matter to be dealt with in the Commissioner’s Final Report, notwithstanding the submissions of Counsel Assisting that Mr Paynter died as a consequence of an accidental fall ([83]-[84]).

**PART D: CONCLUSION**

22. In each of the six cases set out above, the loss of material, or characteristics of the initial investigation by the NSWPF, has affected the information available to the Inquiry. That has, in turn, affected the ability of the Inquiry to determine: (a) whether a death was “unsolved”; (b) whether a death may have been affected by LGBTIQ bias; and (c) the manner and cause of that death.

23. In those circumstances, we submit that even in cases where Counsel Assisting has submitted that a case is outside the Inquiry's Terms of Reference, and even where such a finding is ultimately made (which would not be until the publication of the Commissioner's Final Report), deficiencies in the NSWPF investigation may still properly be the subject of findings in the Commissioner's Final Report.

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