

Submissions of Counsel Assisting as to Terms of Reference

Introduction

1. The written submissions of the Commissioner of the NSWPF (hereafter the **CoP**) assert, at [79]-[90], that the “matter of Scott Johnson falls outside the Inquiry’s Terms of Reference.” The CoP submits (at [80]) that “Mr Johnson’s death and SF Macnamir fell, and continues to fall, outside the scope of the Inquiry’s Terms of Reference such that it is not properly the subject of inquiry. As a consequence, it is submitted that any findings made by the Inquiry in respect of these issues would be ultra vires”, and (at [88]) that “any report or recommendations purported to be made by the Inquiry” in relation to those matters would be ultra vires.
2. The CoP submissions further assert (at [204]) that “(s)imilarly it is submitted that a detailed investigation by the Inquiry into the Lateline Issue was also outside the scope of the Terms of Reference, and ultimately fruitless”.
3. The written submissions of Mr Willing (at [99]-[112]) advance similar contentions. Thus at [107] it is asserted that “any investigation by the Commission into the death of Mr Johnson ... falls outside the Terms of Reference”.
4. These submissions respond to this aspect of the parties’ written submissions.

The judgment of 6 December 2022

5. In the judgment of 6 December 2022 (hereafter referred to as **the 6 December 2022 judgment**), the Commissioner made observations and rulings with respect to a number of matters concerning the Inquiry’s Terms of Reference (**ToRs**) that are relevant to bear in mind in considering the present issue. These included the following:
 - a) Subject to the supervision of the courts, the interpretation of the ToRs is a matter for the Inquiry: *Easton v Griffiths* (1995) 69 ALJR 669 per Toohey J (at 672): at [13];
 - b) The ToRs direct the Inquiry to consider the “manner and cause” of relevant deaths. While this has some resonance with the task given to a coroner, it differs from that task because of the specific context of the task given to the Special Commission, namely, whether a death was associated with a ‘gay hate’ or ‘hate crime’ factor. Analysis of whether such a causal connection was present is central to the Special Commission’s task: (at [33]);
 - c) It follows from this that the Commissioner is required to examine the means and the methodologies by which the NSW Police Force (**NSWPF**) arrived at its conclusions with respect to the existence (or non-existence) of gay hate bias in (the relevant specific cases): at [34];
 - d) Paragraph C of the ToRs directs the Commissioner to have regard to previous inquiries and reports, including (but not confined to) those particularly noted in

paragraph C (i), (ii) and (iii). Relevant case law (referred to at [44]-[46] of the 6 December 2022 judgment) highlights the broad discretion of an individual directed to “have regard to” particular matters relevant to the task at hand. Genuine consideration must be given to such material, not merely token or nominal consideration; and

- e) There is no indication in the ToRs that the Commissioner is not to review the material or conduct inquiries in connection with the reports referred to at paragraph C. Further, the list at paragraph C is not exhaustive and the Commissioner is permitted to have regard to other matters in addition to the matters listed: at [47].
6. The 6 December 2022 judgment dealt with whether topics relating to Strike Force (**SF**) and Operation Parrabell, and the creation and some of the activities of the Bias Crime Unit, were sufficiently connected with the Special Commission’s ToRs such that documents concerning those topics could be tendered as part of the evidence before it.
7. As set out at [52]-[53] of the judgment, the Commissioner ruled, inter alia:
- a) that the Special Commission was entitled, indeed obliged, pursuant to the ToRs taken in their entirety, to investigate particular matters which relevantly concern SF Parrabell, including the conclusions drawn and the manner in which those conclusions were drawn;
 - b) that those conclusions are directly relevant, or relate to, paragraphs A and B of the ToRs, as SF Parrabell was seeking by its own route to connect various homicides to a particular motive, this being the same kind of task given to the Commissioner by paragraphs A and B of the ToRs;
 - c) that the Commissioner is entitled under paragraph F of the ToRs to reach a particular state of satisfaction achieved by a consideration of SF Parrabell and its methodologies; and
 - d) that, given the authorisation to make recommendations (in relation to Category A and B matters), the Commissioner is entitled to examine how NSWPF has dealt with bias crime over time and, in particular, the establishment of the Bias Crime Unit and the way in which this unit has characterised hate crimes.

The contentions of the CoP and Mr Willing

8. The relevant contentions of the CoP are made at [80]-[89] and [204] of her submissions. Those of Mr Willing appear at [99]-[112] of his submissions. In both cases, the argument rests on an assertion that the manner and cause of Scott Johnson’s death should at all relevant times have been regarded as “solved” rather than “unsolved”.
9. The argument advanced appears to assume that an examination of aspects of SF Macnamir could only be relevant to an inquiry into the manner and cause of

Scott Johnson’s death in isolation, and could not be relevant to the Special Commission’s ToRs on any other basis. For the reasons advanced below, that contention should be rejected.

10. The submissions of Mr Willing also include contentions that the ToRs do not permit “an investigation into SF Parrabell per se” (at [113]) and do not authorise “a broadbrush consideration of police approaches to potential homicide” (at [114]). The contention at [113] appears to overlook the 6 December 2022 judgment. What precisely the contention at [114] is intended to cover is not clear.

The broader relevance of an examination of SF Macnamir to the Special Commission’s ToRs

11. Among the matters to which the Commissioner has been directed to have regard, by paragraph C of the ToRs, are “the interim and final report and findings of the inquiries conducted by the Standing Committee on Social Issues (**the Parliamentary Committee**) into Gay and Transgender hate crimes between 1970 and 2010”. Those interim and final reports, published in February 2019 and May 2021 respectively, are Exhibit 1, Tabs 3 and 4.

12. The Terms of Reference of the Parliamentary Committee required it to inquire into and report on, among other things (emphasis added):

... the response to Gay and Transgender hate crimes between 1970 and 2010 and current developments in policy and practice in relation to such crimes, and in particular:

- (a) the violent crimes committed in New South Wales between 1970 and 2010 where the victim of that crime was a member of the LGBTIQ community and where the relevant crime was the subject of a report to the NSW Police Force, including:

- (i) **whether there existed impediments** within the criminal justice system that impacted the protection of LGBTIQ people in New South Wales and the delivery of justice to victims of LGBTIQ hate crimes and their families, **with reference to case studies of particular matters including** but not limited to Alan Rosendale, **Scott Johnson**, John Russell and Ross Warren,
- (ii) to the extent that past impediments are identified, how effectively these have been addressed by current policy and practice ...

13. In the interim report, paragraphs 2.4 to 2.31 summarise the case study of the Scott Johnson matter that was undertaken by the Committee, while paragraphs 3.19 to 3.28 summarise matters related to the various police investigations into Scott Johnson’s death between 1988 and 2018.

14. The following references within the interim report are noted:

- a) After referring to the coronial inquest held in 2012, at 2.16 the interim report states “(t)he following year, an episode of Australian Story focusing on Scott’s death aired. Soon after, the police together with the Johnson family held a joint press conference announcing the establishment of Strike Force Macnamir to investigate Scott’s case”;
- b) At 2.19: “According to Mr Steve Page, former NSW Police Force Detective Sergeant, those who had assisted and supported the Johnson family were ‘collectively smeared’ throughout the Macnamir operation. The Johnson family, and in particular Scott’s brother, Steve, became the subject of intense police scrutiny, amid claims that Steve had used his wealth and influence to keep Scott’s case open”;
- c) At 2.20: “The Task (sic) Force ultimately concluded that there was no reason to suspect that Scott’s death involved violence and that the officers of the original investigation had reached the correct conclusion of suicide”;
- d) At 2.25: “Steve had hoped that the Coroner’s findings would spur the police into launching an immediate effort to investigate Scott’s death. However, while Steve, his family and supporters had waited decades for a determination about Scott’s death, the outcome of the coronial inquest was not welcomed by everyone. According to Steve, the police were ‘outraged’ by the Coroner’s findings, ‘as if it was a defeat instead of an independent, fact-based inquiry that had concluded that a homicide had been committed’”;
- e) At 2.28: “According to Steve, a number of questions continue to haunt his family, including why Manly police concluded that Scott’s death was a suicide, thus closing the case so quickly thereafter, and why the NSW Police Force had persisted for so long that this was the only plausible explanation for Scott’s death, thereby rejecting repeated calls to investigate”;
- f) At paragraphs 3.19 to 3.28, observations are made concerning the “highly inadequate” nature of the initial police response to the death and the subsequent challenges faced by the family;
- g) At 3.24 it is said that “(a)ccording to Mr Steve Johnson, the NSW Police Force have, during this 30 year period, treated the Johnson family as ‘adversaries’; have ‘resisted working together with the ... family to find the truth’; and ‘refused to objectively consider evidence amassed by the family’”; and
- h) At 3.25: “Mr Steve Johnson told the committee that ‘police resistance to appropriately investigating crimes against gay victims is not just a relic of the past; it is current’. This view was based on his lengthy experiences in dealing with the NSW Police Force regarding the death of his brother. While Mr Johnson acknowledged the goodwill demonstrated by Assistant Commissioner Anthony

Crandell, Police Education and Training, NSW Police Force, he noted that the NSW Police Force as a whole had not yet proven it had changed”.

15. Thus in fulfilling its responsibilities under paragraphs A and B of its ToRs, (which include making recommendations in relation to the deaths it is required to investigate), the material to which the Special Commission has been directed to ‘have regard’ (bearing in mind the import of that term - see [5(d)] above) therefore includes evidence:
 - that SF Macnamir “collectively smeared” the family of a victim of what then ought properly to have been regarded as a possible gay hate homicide.
 - that the view of SF Macnamir was that there was “no reason to suspect” that the death of Scott Johnson “involved violence”, and that the original investigation’s rapidly reached conclusion of suicide was correct (when it is now known to have been a homicide);
 - that the outcome of the 2017 inquest (namely that the death was a homicide) was viewed by at least some police as a “defeat”; and
 - that based on the experience of the brother of Scott Johnson, as of 2019, police resistance to appropriately investigating crimes against gay victims was not just a relic of the past, but was current.
16. The findings of the Parliamentary Committee in the interim report (February 2019) included Finding 1, which was in the following terms:

Finding 1

That a prevailing acceptance of and indifference towards violence and hostility directed at gay men principally during the period prior to the mid-1990s impacted on the protection of and delivery of justice to victims of hate crime, including but not limited to Mr Alan Rosendale, Mr Scott Johnson, Mr John Russell and Mr Ross Warren.
17. In the final report, paragraphs 1.34 to 1.40 summarised developments in the case of Scott Johnson since the interim report, including the arrest of a man in May 2020.
18. The findings of the Parliamentary Committee in the final report (May 2021) included Finding 2, which was in the following terms:

Finding 2

That historically the NSW Police Force failed in its responsibility to properly investigate cases of historical gay and transgender hate crime and this has undermined the confidence of lesbian, gay, bisexual, transgender, intersex and queer (LGTBIQ) communities in the NSW Police Force and the criminal justice system more broadly.
19. Regardless of whether or not the death of Scott Johnson is to be regarded as “unsolved” for the purposes of paragraph A of the ToRs (as to which see [32]-[45] below), it is submitted that an examination of the investigative processes (including SF Macnamir) that

were the subject of the observations, analyses and findings contained in the interim and final reports is plainly a matter falling within the ToRs.

20. On the face of the matters referred to above at [15], it is clear that the concerns expressed about SF Macnamir in the interim report are matters that might well be of relevance to the investigation of other potential gay hate homicides being considered under paragraphs A and B of the ToRs, and are matters that might lead to recommendations relevant to the investigation of such deaths more generally.
21. It should also be remembered that paragraph C of the ToRs is not exhaustive of the matters to which the Special Commission may have regard in fulfilling its responsibilities (see [5(d)&(e)] above).
22. In any event, given that the Special Commission **must** have regard to the matters outlined at [14] and [15] above, it was incumbent on the Special Commission to embark upon an examination of relevant aspects of SF Macnamir.
23. The Special Commission's intention to do so was made clear at the opening of Public Hearing 2 on 5 December 2022 when it was stated as follows:

(at T539) The Inquiry has also identified Strike Force Neiwand and Strike Force Macnamir as other relevant investigations conducted by NSW Police into possible homicides against LGBTIQ people during the relevant period, to which it is necessary to have regard as well.

Further, in light of the Inquiry's Terms of Reference, it is important for the Inquiry to have regard generally to the ways in which NSW Police have approached the matter of suspected hate or bias crimes, including the identification, investigation and recording of such crimes.

...

(at T540) It is expected that this public hearing will include evidence relating to, firstly, Strike Force Parrabell and its final report, including the methodologies used by the Parrabell police officers on the one hand and the academic team on the other; secondly, Strike Force Neiwand and Strike Force Macnamir, including the reasons for their establishment; and thirdly, changes in the approach of the NSW Police to the identification, investigation and recording of suspected hate or bias crimes, including the relevant history of the Bias Crime Unit as variously named and configured over the years.

Similar statements had been posted on the Inquiry's website in the preceding week.

24. Looking more broadly than SF Macnamir and the investigation of Scott Johnson's death, evidence arising from an investigation into any particular death that might suggest or disclose matters such as poor investigative practices, unwarranted assumptions being made by investigators, personal biases, rigid thinking, lack of understanding of the extent of historical discrimination and bigotry towards LGBTIQ groups, or a lack of empathy or understanding on the part of investigators towards families of LGBTIQ victims, is evidence

- the relevance of which extends well beyond an evaluation of the manner and cause of that particular death.
25. To isolate the relevance of such evidence in such a way (which is the basis on which the objecting parties appear to advance their objections) is artificial. That is particularly so when the Inquiry has been tasked with considering the manner and cause of a large number of deaths of LGBTIQ people, or people perceived to be LGBTIQ, over a lengthy time period (in the specific context noted at [5(b)] above), and with making recommendations that may arise from such consideration.
 26. If, for example, the evidence concerning the conduct of SF Macnamir were to be regarded as having disclosed that one or more deficient practices such as those referred to above at [24] had occurred in relation to that substantial and high profile investigation, the inference would readily be open that such concerns may also affect, or have affected, other investigations conducted by the NSWPF in relation to other potential gay hate homicides, some of which remain unsolved.
 27. In that regard, it is noted that:
 - (a) evidence elicited during Public Hearing 2 has demonstrated that there were overlaps in timing, personnel, approach and outcome between SF Macnamir and SF Neiwand (which was considering three other deaths falling within paragraph A of the ToRs); and
 - (b) the senior Unsolved Homicide Team officer responsible for SF Macnamir (DCI Young) was at the same time co-author (with the other senior Unsolved Homicide Team officer, DCI Lehmann) of an Issues Paper (endorsed by Mr Willing as Homicide Commander), which described the suggestion of 30 unsolved 'gay hate' related murders as a "gross exaggeration", and explicitly (in September 2013, within seven months of the instigation of SF Macnamir) identified the death of Scott Johnson as neither a "probable" nor even a "possible" gay hate death (see CA submissions at [86]-[89]).
 28. It is submitted that the conduct of SF Macnamir is clearly of potential relevance to the Special Commission's obligation to inquire into and report on the manner and cause of death of matters falling within paragraphs A and B, in the context of [5(b)] above, and potentially to make recommendations arising from its consideration of those matters.
 29. Although not clear, the tenor of the submission made on behalf of Mr Willing at [114]-[115] appears to suggest that any recommendations by the Commissioner would have to be circumscribed so as to relate solely to what should occur in relation to particular investigations of particular individual deaths.
 30. If this is what is being suggested, it is flatly rejected. The insights gained, in the course of the investigations and inquiries undertaken by the Special Commission in relation to individual deaths, contribute to a cumulative body of knowledge that can, and it is

submitted, should, inform recommendations that extend beyond action that might be taken in relation to an individual death. Not to draw on the extensive work undertaken by the Special Commission in this way would be to waste a valuable opportunity to help advance the public interest.

31. For the foregoing reasons it is submitted that relevant aspects of the investigation into Scott Johnson's death, including in particular the conduct of SF Macnamir, as examined during Public Hearing 2, fall within the Special Commission's ToRs. Further, as it is intimately connected with those matters, evidence concerning the Lateline interview and its surrounding circumstances is also within the ToRs.

The specific case of Scott Johnson

32. The arguments put by the CoP and Mr Willing, to the effect that the death of Scott Johnson is outside the ToRs because the case is "solved", should be rejected.
33. The terms "solved" and "unsolved" are not defined or fixed in the context of Australian law.
34. The interpretation of the ToRs is a matter for the Inquiry (see [5(a)] above). As a public inquiry borne of a particular history that is well documented by the interim and final reports of the Parliamentary Committee, the underlying purpose of the Special Commission is one that acknowledges that historically, discrimination and systemic biases have adversely affected the operation of the criminal justice system in relation to the identification and investigation of "gay hate crimes".
35. Moreover, as outlined above, there is a specific context to the task given to the Special Commission, namely, whether a death was associated with a 'gay hate' or 'hate crime' factor. Analysis of whether such a causal connection was present is central to the Special Commission's task (see [5(b)] above).
36. It is with these features in mind that the question of whether or not a particular crime ought to be regarded as "unsolved", for the purposes of paragraphs A and B of the ToRs, should be considered. Such a "purposive" approach, it is submitted, is an appropriate way for the Special Commission to approach the interpretation of its ToRs.
37. Scott White has been convicted of manslaughter of Scott Johnson following his plea of guilty to that charge on certain agreed facts, and has been sentenced accordingly. However, the specific task given to the Special Commission is to consider "manner and cause" from the particular perspective of whether the deaths the subject of paragraphs A and B of the ToRs were associated with a 'gay hate' or 'hate crime' factor. It is open to the Commissioner to take the view that it is appropriate to consider the death of Scott Johnson to be "unsolved" in that regard.
38. The sentencing judgment (*R v White* [2023] NSWSC 611) of Beech-Jones CJ at CL is informative in this respect. At [3] his Honour observed (emphasis added):

*Dr Johnson's death was the commencement of a decades-long nightmare of grief and unanswered questions for his family. One of those questions, being who was primarily responsible for his death was definitely answered when, **on 23 February 2023, the offender pleaded guilty to the manslaughter of Dr Johnson. However, it will be apparent from the balance of these reasons that the answers to numerous other questions about how Dr Johnson died, why he died and what happened in the long decades between his death and today are not yet known. Some of those answers may never be provided.***

39. Defence counsel in the sentence proceedings (Mr Game SC) submitted (referred to at [30]), that the sentencing judge “could not be satisfied beyond reasonable doubt that the offender went with Dr Johnson to North Head with a malign purpose, or that any planning was involved in the commission of the offence or that the killing of Dr Johnson was a ‘gay hate crime’.”

40. On that point, at [31] Beech-Jones CJ at CL ruled that (emphasis added):

*... While a scenario whereby the offender enticed Dr Johnson to North Head with a plan to attack him **is not inconsistent with the objective facts, it is also not demonstrated beyond reasonable doubt either. The same reasoning applies with respect to any suggestion that the punching of Dr Johnson was a “gay hate crime”, that is, motivated by hatred of gay men.** While the offender said, “we often used to go poofster bashing”, that was immediately qualified by a statement that his brother did so and it was never said to refer to his encounter with Dr Johnson. Accordingly, I accept Mr Game’s submission.*

41. At [38] Beech-Jones CJ at CL observed:

The end result is that not much is known about the killing of Dr Johnson beyond a punch near a cliff, a vulnerable victim, a fall over the cliff, a death, an absence of taking even the simplest step to render help after the fall and decades of pain and grief that followed.

42. Viewed in light of his Honour’s sentencing judgment, the proposition put by the CoP at [88] that “there can be absolutely no doubt that the manner and cause of Mr Johnson’s death has been determined”, should be rejected. It fails to recognise that the sentencing judge stressed how little was known about relevant surrounding circumstances. Nor does it acknowledge the sentencing judge’s indication that the possibility that the crime may have been a gay hate crime was “not inconsistent with the objective facts”. Rather, on the basis of the limited facts before his Honour, it could not be demonstrated beyond reasonable doubt as an aggravating factor upon sentence.

43. In the opening address to the Special Commission on 2 November 2022, Senior Counsel Assisting said the following in relation to the terms “solved and unsolved” (at T135):

It is for the Special Commission to make its own determination in any given case as to whether that case is “unsolved” or not. Whether a given case will be regarded as “solved” or “unsolved” will depend on the circumstances of that case. For example, the circumstances in which the Special Commission will regard as case as

“solved” would be likely to include cases where one or more persons have been charged and convicted in connection with the death and all appeals have been finalised, or such a person has been acquitted despite having been identified as the perpetrator, on grounds such as self-defence.

44. As outlined in the opening, while in most cases where a perpetrator of homicide has been convicted, the Special Commission may be likely to reach the view that the relevant matter has been “solved”, any given case depends on all the circumstances of that case. Given the distinct features of the death of Scott Johnson (including its occurring at a known beat and the known activities of “gay bashers” at the relevant time), and the very limited facts that were available to the sentencing judge, particularly as they concerned a central issue to the Special Commission, this is a matter that for the purposes of paragraph A of the ToRs should be regarded as unsolved, notwithstanding the fact of the conviction of Scott White.
45. To interpret the matter thus is not in any way to take issue with the appropriateness of Mr White’s conviction, or the conduct of the relevant sentencing proceedings, or the appropriateness of Mr White having been sentenced on the basis that, on the evidence before the sentencing judge, the crime was not proven beyond reasonable doubt to have been a gay hate crime. Rather, it reflects the reality that in reporting on or making findings as to manner and cause, the Commissioner is not required to be satisfied beyond reasonable doubt, nor restricted to the agreed facts that were before the sentencing judge.

ToRs paragraph F

46. Paragraph F of the ToRs does not impose any restriction on the matters with respect to which the Special Commission is to inquire, report and make recommendations pursuant to paragraphs A and B. Rather, it permits the Commissioner to determine that he will not inquire into a particular matter if he is “satisfied” of certain features. Being permissive rather than restrictive in nature, there is nothing in paragraph F that circumscribes the matters that the Commissioner might consider to be “unsolved” for the purposes of paragraphs A and B.
47. Nor does paragraph F otherwise circumscribe the matters into which the Commissioner might inquire. To the contrary, paragraph F widens the matters into which the Commissioner might inquire, to include whether matters have been or will be sufficiently and appropriately dealt with. The Commissioner must be able to inquire into those matters (such as, for example, SF Macnamir) in order to reach the state of satisfaction contemplated by paragraph F.
48. The submissions of the objecting parties overlook the fact that the language of paragraph F recognises that there may be circumstances where the Commissioner takes the view that a matter falls within paragraphs A or B of the ToRs notwithstanding that there has been a conviction in criminal proceedings.

49. The death of Scott Johnson has now been dealt with by a criminal proceeding. There is of course no issue that it has been appropriately so dealt with by that criminal proceeding. Whether or not it has been “sufficiently” dealt with, however, from the perspective of the particular task given to the Special Commission, is a separate question. Whether the death of Scott Johnson was “appropriately” dealt with by SF Macnamir is a further separate question.
50. Even if paragraph F were restrictive in its operation (which it is not), looked at from the perspective of the unifying feature of the Special Commission’s task (that it involves consideration of potential gay hate crimes), it is submitted that it would be open to the Commissioner to conclude that the question of whether or not the death may have been a gay hate crime has not been sufficiently dealt with.

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