

Criminalistics Branch

Forensic & Analytical Science Service
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Health
 Pathology

In the matter of:	Special Commission of Inquiry into LGBTIQ hate crimes - Robert Malcolm
Date:	13th June 2023

Name:	Michele Franco
Occupation:	Group Manager, Evidence Recovery Unit at NSW Health Pathology Forensic & Analytical Science Service
Address:	C/- 480 Weeroona Road, Lidcombe NSW 2141
FASS Ref:	FS920063

- 1 This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief, and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false, or do not believe to be true.
- 2 I am currently employed as the Group Manager, Evidence Recovery Unit at the NSW Health Pathology Forensic & Analytical Science Service (FASS). I have held this position since February 2018.
- 3 I have been employed as a Forensic Biologist by the NSW Department of Health, since 1985.
- 4 My scientific qualifications are a Bachelor of Science from the University of New South Wales and Master of Science Management from the University of Technology Sydney and I have specialised knowledge based on my training, study and experience.
- 5 This statement is given in response to questions raised in a letter from the Special Commission of Inquiry into LGBTIQ hate crimes dated 31st May 2023 to Clint Cochrane, Laboratory Manager, Forensic Biology/DNA, Forensic & Analytical Science Service. The questions are restated below, followed by my responses.

- | |
|---|
| <p>A. A blood reference (post-transfusion) from Mr Malcolm (FASS ref: FS 920063 – 1a)</p> <p>B. Sample from the swab* of blood from the verandah of 6 Holden Street, Redfern. (FASS ref: 920063 – 5)</p> <p>C. Sample from the staining on the back of the right leg of a pair of grey trousers. (FASS ref: 920063 – 7)</p> <p>D. Sample from a bloodstained singlet (FASS ref: 920063 -8)</p> <p>*Swab received in the laboratory labelled as "swab from 6 Holden St, Redfern"</p> |
|---|

Q1. The results of the DNA testing carried out on the crime scene samples listed at A - D above. Where particular tests and/or analysis cannot be undertaken, or are considered to be of no utility, please refer to this in the statement.



- 6 The samples listed in the table at A-D above were retrieved from cold storage at the Forensic Biology/DNA Laboratory for further testing.
- 7 The same DNA profile was recovered from the swab of blood from 6 Holden St, Redfern (item B), blood staining from leg of the trousers (item C) and blood staining from the singlet (item D). This profile has the same profile as Robert Malcolm (item A). It is greater than 100 billion times more likely to obtain this profile if it originates from Robert Malcolm, rather than if it originates from an unknown, unrelated individual in the Australian population.

Q2. The impact of the blood transfusions given to Mr Malcolm as part of his care and treatment at Royal Prince Alfred Hospital on the results of the DNA testing.

- 8 Tests that were conducted in the laboratory in 1992 were occasionally impacted by the occurrence of blood transfusions prior to the blood samples being taken. This was a result of blood products/proteins being transfused from one individual to another.
- 9 The victim's DNA profile did not appear to be affected by an apparent blood transfusion.

Q3. If a DNA profile other than Mr Malcolm's is identified, whether the following persons can be excluded as contributors:

- a. Anthony Hookey (DOB: [REDACTED] 1971);
- b. Kirk Anthony Phillips (DOB: [REDACTED] 1960); or
- c. Richard Green (DOB: [REDACTED] 1963).

- 10 Only DNA matching the profile of Robert Malcolm was recovered.

Forensic analysis in original investigation

Q4. The conclusions that can be drawn from the blood grouping analysis outlined in the report of Mr Weigner dated 3 June 1992.

- 11 Please see the attached report signed by Rudi Weigner dated 3rd June 1992 with the results of the blood grouping analysis (Attachment 1).
- 12 The conclusions that can be drawn are as follows:
- 13 Testing of the blood from the deceased, which was taken post-transfusion, resulted in a mixture of blood types (from more than one person) which was evident in one of the grouping systems (Gc). Therefore, the blood typing of the deceased was determined to be an inconclusive result.
- 14 The human blood recovered from the piece of timber, the swab, the stains from the trousers and the singlet (items 4, 5, 7 and 8) gave consistent results for the blood typing tests using PGM and Hp. The combination of the blood types PGM 2+1+ and Hp 2-1, was expected to occur in approximately 1 in 10 people in the general population.
- 15 The human blood recovered from the broken pieces of timber (item 3) was only able to be typed in one blood typing system (PGM) and could have originated from the same contributor as from items 4, 5, 7 and 8. The blood type from item 3 (PGM 2+1+) was expected to occur in approximately 1 in 4 people in the general population.

Q5. The results of any testing conducted in relation to the Sexual Assault Investigation Kit (SAIK) #5956. In the event that no testing was conducted, the reasons for this decision.



- 16 Spermatozoa were not detected on the rectal, perianal or perineum smears submitted in the SAIK. Due to this finding, the corresponding swabs made from the smears (in the SAIK) were not tested or stored but were returned to police. At the time of the SAIK examination, it was necessary to have semen (containing sperm) or blood present on items to consider DNA testing. In 1992, it was routine practice, to return swabs from SAIKs to police, that were not suitable for testing using the available technology.

Q6. Destroyed Exhibits

Item	Status
Broken brick with blood staining	Destroyed on 1 May 1996
Multiple pieces of blood- stained timber	Destroyed on 1 May 1996
“Toohey’s Draught” beer bottle	Destroyed after examination
“Victorian Bitter” beer bottle	Destroyed after examination
Swab* of blood from veranda	Sample in cold storage at FASS
‘Telegraph Mirror’ newspaper	Destroyed after examination
Pair of black male shoes	Destroyed on 1 May 1996
Red jumper	Destroyed on 1 May 1996
2 x buttons	Destroyed on 1 May 1996
Sexual Assault Investigation Kit (SAIK #5956).	Destroyed on 1 May 1996
Pair of grey trousers	Sample in cold storage at FASS
Belt	Destroyed on 1 May 1996
Pair of underwear	Destroyed on 1 May 1996
Bloodstained singlet (torn)	Sample in cold storage at FASS

*Swab received in the laboratory labelled as “swab from 6 Holden St, Redfern”

The nature of the forensic analysis that could now be conducted in relation to the exhibits contained in the above table noted to be destroyed, had they been retained, that was either not available at the time of the initial forensic analysis in 1992 or that was available but was not carried out at the time.



- 17 DNA testing was only in its infancy in 1992 and the enormous advances in DNA technology was not envisioned in that year. See the following table -

Forensic Testing undertaken in 1992	Limitations of the technology in 1992	Testing that could be undertaken in 2023*
Testing using RFLP	<p>Large sample of good quality blood or semen (with sperm) required.</p> <p>Needed a comparison sample to compare DNA result as DNA searching databases not implemented until 2001.</p> <p>Mixtures of DNA not suitable for interpretation</p>	<p>A relatively small sample of saliva, blood, semen with or without sperm, skin cells, touch DNA*</p> <p>DNA testing using the PowerPlex 21® DNA typing kit. This kit tests for 20 markers of the DNA plus the sex determining marker.</p> <p>The profile obtained can be entered onto a searching DNA database to identify a suspect if an unknown profile recovered.</p> <p>STRmix™ DNA expert forensic interpretation software to resolve mixed DNA profiles.</p>

* If the sample is highly degraded (e.g., due to the age of the stain or by the exposure to environmental factors) then DNA testing may be unsuccessful or partly successful (i.e. obtaining a partial profile).

Addressing each of the items individually:

18 **Brick (item 3)**

Testing of the brick in 1992 recovered a PGM type 2+1+, which is the same as the other items in the case. It was noted by Mr Rudi Weigner, in the case records, that the blood staining on the brick was difficult to recover and that there was limited sample, insufficient for all the grouping tests available at the time. Therefore, there was insufficient DNA present for DNA testing conducted in 1992, as testing required large samples of good quality DNA, which would not be assisted by any contaminants/inhibitors that may be present in the brick.

19 **Testing available in 2023**

Testing using our current DNA testing methodology is much more sensitive, which allows only very small amounts of material to be tested. Detection of skin cells from a person that held the brick may be an option although the passage of time since the skin cells deposition may have meant that the skin cells may have become too degraded for testing.

- 20 The surface material coating the brick (i.e. dirt and other material) can complicate the retrieval of skin cells from the brick. Furthermore any skin on the surface of the brick may have been removed during transport or storage of the brick in intervening years.

- 21 The recovery of DNA from blood could also be challenging due to the porous nature of the brick and the inability to adequately capture all the material soaked into the brick.

22 **Multiple pieces of blood-stained timber**

Testing of the timber in 1992 could have been conducted using blood grouping tests but the results were not very discriminating between people in the population.



- 23 Testing available in 2023
If timber available, target areas where the perpetrator may have held the timber for possible skin cells, if used as a weapon. Testing for blood to determine if blood originates from victim and/or perpetrator. The passage of time since the skin cells deposition may have meant that the skin cells may have become too degraded for testing and there is also a possibility that the wood may have an inhibitory effect on the DNA testing.
- 24 **Beer bottles x 2 ('Tooheys Draught' and 'Victorian bitter')**
Testing available in 2023
DNA testing of saliva from mouth area of the bottle
- 25 **'Telegraph Mirror' newspaper**
Testing available in 2023
Could test for the presence of DNA, especially if it is blood stained, but may be most likely to have the victim's DNA on the newspaper. This item may be more suited to fingerprint testing. Trace DNA could be recovered but as the item is not worn, the amount of contact between the paper and a perpetrator may not be very lengthy and therefore the amount of DNA present may be insufficient for testing, especially after a long time period since deposition.
- 26 **Pair of black male shoes** – found under old carpet
Testing available in 2023
Could test for the presence of DNA to identify the wearer and also test for any blood stains which might match the victim, to connect the shoes to the crime.
- 27 **Red jumper** - noted by police as 'property of Hookey'
Blood was not detected on the jumper when it was tested in 1992.
Testing available in 2023
As the jumper was stated to have been washed before police were able to obtain it from the suspect, and there was no indication of any blood present when tested in the laboratory, then there are no superior tests that could be conducted today.
- 28 **2 buttons** -
Testing available in 2023
Could swab buttons for trace DNA if buttons were touched during struggle. As the surface area of the buttons is quite small and many years have passed since deposition, the chance of retrieving enough DNA for analysis is unlikely.
- 29 **The SAIK**
DNA testing was not conducted on the swabs from the SAIK in 1992 as the corresponding smears did not contain sperm.
- 30 However, it was noted in the SAIK notes prepared by the Medical Officer at the hospital, that there was a delay in taking the SAIK samples and that the patient, Robert Malcolm, was washed and had a rectal probe inserted for temperature monitoring before the swabs were taken.
- 31 Testing available in 2023
Even if sperm are not detected on the smears submitted in the SAIK, DNA testing using PCR technology (PowerPlex 21) could be conducted on the corresponding swab. If there was DNA present from an individual apart from the deceased (e.g. from skin cells), it would be more likely to recover this from an external surface such as from the perineum, rather than from an internal rectal swab. This reasoning is due to the person's own DNA being present in large amounts within their own body which could overwhelm any foreign DNA present. Also in this case, being a male victim, means that there is difficulty in recovering foreign DNA due to the presence of the victim's own DNA.



32 Another consideration is the presence of any faecal material containing bacteria on any of the swabs which would enhance the degradation of any DNA present, making the recovery of any foreign DNA challenging.

33 **Underwear – from Robert Malcolm**

Testing available in 2023

Could test for biological material such as blood, semen, saliva or hair that a perpetrator may have left on the underwear or on the victim's body (which may have transferred or been absorbed onto the underwear).

Other comments

Q7. Any other comments you wish to make regarding forensic analysis in this matter of relevance to the Inquiry.

34 It is my understanding that the crime occurred in a derelict house that did not have windows, was undergoing demolition in parts and was littered with various building materials and dirt. The exposure of some of the items to the elements may have compromised the recovery of DNA, especially if any of the items were wet.

Signature: _____

A handwritten signature in black ink, appearing to be "M. Malcolm", written over a horizontal line.

Date: 13.6.23

DEPARTMENT OF HEALTH
FORENSIC BIOLOGY LABORATORY
DIVISION OF ANALYTICAL LABORATORIES
42-50 PARRAMATTA ROAD
GLEBE

30th May 1992

Re: Alleged Murder of Robert MALCOLM

I, Rudolf WEIGNER,

hereby certify as follows:

(1) My scientific qualifications are Bachelor of Applied Science (Biomedical Science) from N.S.W. Institute of Technology.

(2) The following items in connection with this matter were received on the twenty eighth day of January 1992 from Const. 1/C VAN LEEUWEN from the Crime Scene Unit:

1. S.A.I.K.
2. Broken brick
3. Broken pieces of timber
4. Piece of timber
5. Swab

Received on the fifth day of February 1992 from Const. VAN LEEUWEN of the Crime Scene Unit the following:

6. Red jumper

Received on the sixth day of April 1992 from Const. VAN LEEUWEN of the Crime Scene Unit the following:

7. Trousers
8. Portion of white singlet

(3) These items have been examined with the following results:

Human blood was detected on items 2, 3, 4, 5, 7 and 8.



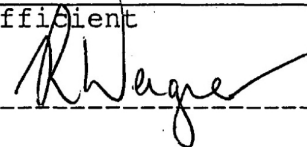
REF: FS 92/63

The following grouping results were obtained.

	Blood Group System		
	Hp	PGM	Gc
2.	**	*	**
3.	**	2+1+	**
4.	2-1	2+1+	*
5.	2-1	2+1+	*
7.	2-1	2+1+	*
8.	2-1	2+1+	1S

* Unsuccessful ** Insufficient

Biologist's Signature



Date 3.6.92

This laboratory confirms results where there is sufficient sample to do so.