

The Special Commission of Inquiry  
into LGBTIQ Hate Crimes

**TENDER BUNDLE HEARING OF 7 JULY 2023**

**Concerning the death of Robert Malcolm**

*Submissions on behalf of the Commissioner of Police*

**Introductory**

1. These submissions are prepared on behalf of the Commissioner of Police in response to the submissions made by Counsel Assisting on 7 July 2023 in relation to the death of Robert Malcolm.
2. The Commissioner separately filed submissions on 28 June 2023 in respect of Public Hearing 2 (**PH2 Submissions**). These submissions necessarily touch upon some of the general matters to which those hearings related, but they do not represent a comprehensive statement of the Commissioner's position on the issues considered during Public Hearing 2. These submissions should therefore be read together with the PH2 Submissions and the submissions filed in the other "tender bundle" cases.

**Robert Malcolm**

***Circumstances of death***

3. In the early hours of Saturday, 11 January 1992, Mr Malcolm was found in an abandoned derelict house in Redfern. When Mr Malcolm was found, he was lying on his back with his shirt on, with his trousers down around his ankles and his underpants around his knees.
4. Mr Malcolm had sustained extensive head injuries during an assault which likely occurred late on Friday, 10 January 1992 or in the early hours of Saturday, 11 January 1992 (CA, [3]). He died on 29 January 1992 at Royal Prince Alfred Hospital.
5. There is no evidence that would positively establish that Mr Malcolm was gay or otherwise a member of the LGBTIQ community.
6. On the afternoon and evening of Friday, 10 January 1992, Mr Malcolm was drinking at the Menzies Hotel with colleagues. He was last seen by friends at around 8.15pm.

7. Dr Johan Duflou conducted a post-mortem examination on Mr Malcolm's body on 31 January 1992. Dr Duflou's report indicated that<sup>1</sup>:
  - a The direct cause of death was "sequelae of a head injury".
  - b Mr Malcolm's external injuries included a subconjunctival haemorrhage in his right eye and a number of scars and contusions.
  - c There was also extensive bruising of the scalp, fractures to the skull and numerous injuries to the eyes, nose, mouth and teeth.
  - d The "rectum and anus were normal".
8. On 29 January 1992, Mr Malcolm's death was reported to the Coroner.<sup>2</sup> Police subsequently charged Anthony Stanley Hookey and Kirk Anthony Phillips with Mr Malcolm's murder. Police also charged Richard John Green with accessory after the fact to murder. As a result, the inquest was terminated.<sup>3</sup>
9. On 3 August 1992, a committal hearing commenced. It was adjourned due to the non-appearance of Sharon Murphy, a key witness linking the defendants to Mr Malcolm's death. Ms Murphy was located by police that evening.<sup>4</sup> On 4 August 1992, Ms Murphy gave evidence, after which the defendants were discharged.<sup>5</sup> It appears Ms Murphy failed to provide the evidence she had been expected to give linking the accused with Mr Malcolm's death.<sup>6</sup>

### ***Adequacy of police investigations***

10. Investigating police conducted extensive canvassing and inquiries commencing from shortly after Mr Malcolm was found. Counsel Assisting observe that investigative steps taken by the original investigators indicate that they were evidently alive to the possibility that Mr Malcolm may have been assaulted in circumstances involving LGBTIQ bias (CA, [19]).
11. Counsel Assisting make some criticisms of the original police investigation in the matter.

<sup>1</sup> Post mortem report of Dr Johan Duflou dated 28 May 1992 (SCOI.10494.00017).

<sup>2</sup> P79A Report of Death to Coroner dated 29 January 1991 (SCOI.101494.00006).

<sup>3</sup> Coroners Court Brief Running Sheet dated 5 February 1992 – 1 June 1992 (SCOI.10494.00005); Letter from the Coroners Court to Robert Malcolm re termination of inquest dated 22 June 1992 (SCOI.10494.00016).

<sup>4</sup> Statement of Mark Kelly dated 5 June 2023 (SCOI.83437); Third Statement of Sharon Murphy dated 3 August 1992 at [5]-[8] (SCOI.10939.00083).

<sup>5</sup> Master Tape History Sheet dated 4 August 1992 (SCOI.11290.00077); Coroners Court Record dated 4 August 1992 (SCOI.11290.00002).

<sup>6</sup> As noted at paragraph [15.a] below, it is possible that she failed to give the particular evidence due to fears arising from her interaction with Mr Green the evening before she gave evidence.

These are addressed in turn below.

Relationship with community

12. Counsel Assisting identify that a feature of the original police investigation was the poor relationship between the officers at Redfern Police Station and the Redfern community (CA, [52]). For instance, an undated report by the Homicide Unit states that “investigating Police have met with a wall of silence and have received little or no assistance from the aboriginal community [sic]”, and that a number of persons interviewed had given fictitious addresses, thereby posing issues for follow up or the taking of statements.<sup>7</sup>
13. It is uncontroversial that police forces around Australia, including the NSWPF, have had a strained relationship with First Nations communities. Police forces, including the NSWPF, played a significant part in the discrimination suffered by First Nations persons over a long period of time. The difficult relationship between the NSWPF and First Nations people in Redfern in the 1990s has been well publicised.
14. The original investigators were clearly alive to those issues and their potential impact on the investigation. The original investigators took steps to address these issues including by involving Aboriginal Liaison Officers. Counsel Assisting have not identified further steps which should have been, but were not, taken by the original investigators in this respect. Counsel Assisting do not suggest that the original investigators behaved in a manner which in any way exacerbated the situation.
15. Further, it should be noted that at least some of the persons of interest suspected to have been involved in Mr Malcolm’s death took steps, or contemplated taking steps, in an attempt to interfere with potential witnesses. For example:
  - a On the day that Ms Murphy was meant to, but did not, attend the committal hearing, she saw Mr Green on Darlinghurst Road in King Cross. She stated that he spat at her and said “you fuckin’ dog. You should have been at court. You give up.”<sup>8</sup> Following that, Ms Murphy did not give evidence about statements said to have been overheard which implicated Mr Green and Mr Phillips in Mr Malcolm’s murder (CA, [179]).
  - b Mr Hookey said that he saw the assault but that he “can’t dob them in but my family will give them a bashing”.<sup>9</sup>

<sup>7</sup> Situation Report – Homicide Unit (undated) (NPL.0174.0001.0001.0005).

<sup>8</sup> Third Statement of Sharon Murphy dated 3 August 1992 at [4] (SCOI.10939.00083).

<sup>9</sup> Statement of Sergeant Stephen John Martlew dated 1 May 1992 at [9] (SCOI.10939.00021).

16. Additionally, the investigative file records that “numerous persons provided Police with anonymous information in regards to the assault”.<sup>10</sup> Other entries in the investigation file indicate that information was obtained from unidentified sources.
17. It is possible that fear of retribution from persons perceived to have been involved in Mr Malcolm’s death played a significant role in the reluctance of members of the Redfern community to provide comprehensive assistance to investigating police. Indeed, Counsel Assisting acknowledge that it is possible that Ms Murphy perceived the above interaction as a threat and then, out of fear of reprisal, did not give evidence about alleged statements which would have implicated Mr Green and Mr Phillips in Mr Malcolm’s murder (CA, [179]).

Lines of inquiry not fully explored and statements not taken

18. Counsel Assisting assert that police did not contact or obtain statements from several identified witnesses.
19. Of the 17 individuals identified by Counsel Assisting in this respect, it appears – from the material available – that only a relatively small number have not been spoken to (or if they were, not such record was made or retained). Some observations should be made in relation to the criticisms of Counsel Assisting in respect of the police approach to the following witnesses:
  - a Sharon Stephens, bar attendant at the Terrace Bar at Menzies Hotel, who saw Mr Malcolm at around 8pm. The running sheets indicate that Ms Stephens, who was spoken to by the original investigators, stated that Mr Malcolm was “really drunk” when he left.<sup>11</sup> Counsel Assisting’s criticism appears to extend only to the fact that no formal statement was obtained from Ms Stephens. It is not clear what obtaining a statement from Ms Stephens would have added to the initial investigation, having regard to her version recorded in the running sheet notes.
  - b ‘Greg’, employee of the Subway Hotel, who was with Mr Hookey in the early hours of 11 January 1992. Counsel Assisting appear to be mistaken in suggesting that no statement was obtained. The original investigators spoke to a bartender who appears to be the person that Mr Hookey thought (but was not sure) was named ‘Greg’. This person was named Bradford Keith Bloodworth, who provided a statement dated 8

<sup>10</sup> Intelligence Report or Continuation Sheet dated 20 January 1992 (SCOI.76958).

<sup>11</sup> Bundle of Selected Running Sheets at page 21 (SCOI.83976).

February 1992 (which is contained at tab 60 of the tender bundle for this matter).<sup>12</sup> Notably, Mr Bloodworth indicated in his statement that he was working at the Subway Hotel at the relevant time and that he had a bandage on his arm (which is the identifying feature provided by Mr Hookey). Unfortunately, Mr Bloodworth was not able to provide conclusive evidence as to whether or not Mr Hookey did attend the Subway Hotel at the time he asserted, although he did recognise Mr Hookey as a regular customer and indicated that there was a "very good chance that he could have been there".<sup>13</sup>

- c David William Whitlock, who was with Mr Hookey at the time he was first questioned by police in the morning of 11 January 1992. The running sheets confirm that Mr Whitlock was spoken to by police outside the CBA at Redfern and then again at the police station.<sup>14</sup> Unfortunately, the material presently available does not indicate what Mr Whitlock said to police. It therefore appears that Counsel Assisting's criticism is confined to a failure to take a statement from Mr Whitlock or otherwise adequately record his version of events. The Commissioner agrees that any answers Mr Whitlock gave (if he indeed did give any answers) should have been appropriately recorded. In respect of the failure to take a statement, it is not clear whether Mr Whitlock was prepared to assist police in providing a statement (or indeed whether his evidence would have been of any substance to the investigation).
- d **NP244** who appears from the running sheets to have been identified on the basis that he was known to frequent the Factory. There appears to be no other information or evidence linking him to Mr Malcolm's murder. It is not clear from the material presently available whether **NP244** was spoken to by police regarding Mr Malcolm's death.
- e **NP243** who told police that he had found Mr Malcolm and that he had also seen him the previous night at 11.30pm. The running sheets indicate that **NP243** approached police on 11 January 1992 and stated that he walked into the building to "meet some friends" when he saw Mr Malcolm bleeding. He then left and went down to 'the Factories' to ring an ambulance. The note appears to record that he initially would not tell police who he was with at the time, only that he was with 'two males'.<sup>15</sup>

<sup>12</sup> Statement of Bradford Keith Bloodworth dated 8 February 1992 (SCOI.83019).

<sup>13</sup> Statement of Bradford Keith Bloodworth dated 8 February 1992 at [5] to [8] (SCOI.83019).

<sup>14</sup> Bundle of Selected Running Sheets at page 4 (SCOI.83976).

<sup>15</sup> Bundle of Selected Running Sheets at page 9 (SCOI.83976).

He appears to have been spoken to again that day and, on that occasion, informed police that the persons with pseudonyms I308 and I310, together with Jason Phillips, had found Mr Malcolm and then informed Mr Green who called an ambulance.<sup>16</sup> It therefore appears that Counsel Assisting's criticism vis-à-vis [NP243] is confined to the fact a statement was not taken from him. It is not clear whether [NP243] was prepared to assist police in providing a statement. However, it may be inferred from his initial reluctance to provide police with the names of the persons who were with him, and the fact that he omitted reference to Mr Green contacting the ambulance, that he was reluctant to provide substantive assistance. Indeed, the running sheets indicate that [NP243] may have provided police with a false address, as attempts to locate him proved unsuccessful, despite the canvassing properties in the vicinity.<sup>17</sup>

- f Wayne Hookey: who is Mr Hookey's uncle. He attended Redfern Police Station on 13 January 1992 to tell police that Matt Perry saw Mr Hookey with a white man on 10 January 1992.<sup>18</sup> It is not clear whether Wayne Hookey was prepared to assist police in providing a statement. Having regard to the issues that the original investigators recorded having in obtaining meaningful assistance, and the general reluctance of members of the Redfern community at the time to proactively assist police in the absence of community and legal meetings, it is entirely possible, if not likely, that Wayne Hookey was unwilling to provide a statement.
- a Peter Carroll, John Carroll and Ruth Williams. It is apparent from the running sheets that police did speak to Peter Carroll and John Carroll. It appears that they each suggested that they did not really know anything about the murder of Mr Malcolm save for what the other told them.<sup>19</sup> Therefore, it is not clear what Counsel Assisting suggest would have been achieved by taking a statement from either of them (if indeed either of them was willing to provide a statement). It is apparent that police took steps to speak to Ruth Williams, but did not locate her.<sup>20</sup> It is not clear from the material available how extensive those searches were.

- 20. In respect of the balance of the persons identified by Counsel Assisting, it is not clear from the material presently available whether any steps were taken to attempt to locate and

<sup>16</sup> Bundle of Selected Running Sheets at page 10 (SCOI.83976).

<sup>17</sup> Bundle of Selected Running Sheets at page 13 (SCOI.83976).

<sup>18</sup> Bundle of Selected Running Sheets at page 19 (SCOI.83976).

<sup>19</sup> Bundle of Selected Running Sheets at pages 22 and 23 (SCOI.83976).

<sup>20</sup> Bundle of Selected Running Sheets at page 23 (SCOI.83976).

interview those persons. It is similarly not clear from the material tendered by Counsel Assisting as to whether steps have been taken by the Inquiry to locate and speak to any of those persons, noting that Dianne McGuinness and **NP243** are the only persons specifically referred to as being the subject of steps by the Inquiry. It is not clear whether these persons would have been prepared to speak to police, or what assistance they would have provided.

21. By way of example, Counsel Assisting criticise the original investigators for not (based on the material available) speaking to Dianne McGuinness (Mr Hookey's ex-girlfriend) and her cousin Tracy McGuinness. The Inquiry's attempts to locate Dianne McGuinness (including through interagency cooperation, extensive checks were also conducted across state and federal databases) were unsuccessful in identifying a person matching the details of Dianne McGuinness.<sup>21</sup> It is not clear from the material presently available whether Dianne McGuinness or Tracy McGuinness were located by the original investigators and, if so, whether either was interviewed. It is not clear on the material tendered by Counsel Assisting whether attempts were made by the Inquiry to speak to Tracy McGuinness.
22. The running sheets record various instances where information was obtained but does not identify the source of the information. The reason or reasons for this are not presently known. It is noted that reasons which may explain this include that the information was given on an anonymous basis. Therefore, it is not able to be confirmed with any certainty whether the original investigators did take the step of speaking to any or all of the persons identified by Counsel Assisting.
23. Further, the running sheets record that at least one person indicated that they were not prepared to speak to police until after the local community had held a meeting with the Aboriginal Legal Service about the incident with a view to a summary being compiled (presumably by the ALS) and provided to police.<sup>22</sup>
24. Any criticism levelled against the original investigators needs to be considered in light of the apparent reluctance of members of the local community to actively assist with the investigation. No doubt the fraught relationship between the NSWPF and the First Nations community in and around Redfern in the 1990s played a role in that reluctance. The evidence, however, does not establish a basis for criticism to be levelled at individual investigators in connection with that reluctance.

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<sup>21</sup> Statement of Kathryn Lockery dated 6 July 2023 at [28] to [29] SCOI.84074).

<sup>22</sup> Bundle of Selected Running Sheets at page 25 (SCOI.83976).

25. It is of course acknowledged that it is regrettable *if* any of these lines of inquiry were discounted out of hand by the investigating police.

#### Exhibits

26. The initial investigation occurred over 30 years ago. The Inquiry has received evidence and submissions (in the context of other deaths into which the Inquiry has inquired) about the prevailing forensic technology, including knowledge of that technology.
27. Indeed, in the context of Mr Malcolm's death, Counsel Assisting have tendered a statement of Michelle Franco, who is a forensic biologist who holds the position of Group Manager, Evidence Recovery Unit at the NSW Health Pathology Forensic & Analytical Science Service (**FASS**). Ms Franco's evidence is that "DNA testing was only in its infancy in 1992 and the enormous advances in DNA technology was not envisioned in that year."<sup>23</sup> This statement appears to relate to persons involved in that field generally, not a specific comment on the knowledge or likely knowledge of original investigators.
28. Counsel Assisting refer to the enormous advances in DNA technology, but make no mention of the fact that those advances were not envisioned in 1992. Great care should be taken not to engage in criticism that reflects what is now known about DNA technology and the advances therein. Consideration of whether criticism is appropriate needs to proceed by reference to what little NSWPF investigators at the time of Mr Malcolm's death were likely to have known about DNA testing.
29. On 11 January 1992 from around 5:15am, Constable Lyle Van Leeuwen attended the house. He took 21 crime scene photographs, and collected a number of exhibits, including<sup>24</sup>:
- a "Victorian Bitter" 375ml beer bottle, uncapped.
  - b Pair of black male shoes.
  - c Two bloodstained buttons.
  - d Swab of blood from the veranda.
  - e Broken brick with bloodstaining.
  - f Multiple pieces of blood-stained timber, from the courtyard.

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<sup>23</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [17] (SCOI.83957).

<sup>24</sup> Statement of Constable Lyle William Van Leeuwen dated 19 April 1992 at [4]-[6], [8]-[9] (SCOI.10939.00063).



30. The police collected further exhibits from Mr Malcolm while at hospital, including<sup>25</sup>:
- a Pair of grey trousers;
  - b Belt;
  - c Pair of underwear;
  - d Torn, blood-stained singlet.
  - e Sexual Assault Investigation Kit (**SAIK**).

*Failure to arrange DNA testing*

31. Counsel Assisting state that no steps were taken to arrange DNA testing to see if any blood from Mr Hookey, Mr Phillips or Mr Green was identified as matching blood located on certain exhibits from the crime scene (CA, [101]). In making this criticism, Counsel Assisting acknowledge that there were “some limited forms of DNA testing available at that time”. Counsel Assisting do not identify what form of DNA testing they envisage should have been undertaken during the initial investigation.
32. This criticism is plainly unwarranted, having regard to the available evidence. In particular, there is no evidence to establish that DNA testing could, in fact, have been available to investigators as a matter of practical reality.
33. Additionally, Ms Franco stated that the following in respect of each of the relevant exhibits, with the balance of the exhibits apparently having no avenues for DNA testing in 1992<sup>26</sup>:
- a Bloodstained brick: There was insufficient DNA present for DNA testing conducted in 1992.<sup>27</sup> DNA testing was only in its infancy in 1992 and the enormous advances in DNA technology was not envisioned in that year.<sup>28</sup>
  - b Multiple pieces of blood-stained timber: Testing using blood grouping tests were possible, even if the tests would not have been very discriminating between people in the population. Counsel Assisting have not identified what practical effect this would have had on the investigation.

<sup>25</sup> Statement of Detective Senior Constable Paul Andrew Thomas dated 7 May 1992 at [6] (SCOI.10939.00025); Statement of Detective Constable Richard Yannakis dated 6 May 1992 at [6] (SCOI.10290.00012); Sexual Assault Referral Unit Protocol, dated 11 January 1992 at page 3 (SCOI.83022).

<sup>26</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [24] to [33] (SCOI.83957).

<sup>27</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [18] (SCOI.83957).

<sup>28</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [17] (SCOI.83957).

- c Red jumper: Blood was not detected on the jumper when it was tested in 1992.<sup>29</sup> Counsel Assisting have not identified what other testing was available, but not conducted, in 1992.
- d SAIK: DNA testing was not conducted on the swabs from the SAIK in 1992 as the corresponding smears did not contain sperm.<sup>30</sup> Due to this finding, the corresponding swabs made from the smears (in the SAIK) were not tested or stored by FASS, but were returned to police. At the time, it was necessary to have semen (containing sperm) or blood present on items to consider DNA testing. There is no evidence to suggest that the original investigators were informed that further developments in the technology for testing SAIKs was envisaged by FASS at the time the swabs were returned. The Inquiry has not sought to explore this with any of the officers involved in the initial investigation. Nor has the inquiry sought information from FASS personnel as to whether such advice was provided (or even contemplated) in 1992.

34. Counsel Assisting assert that DNA testing may have also revealed other suspects, such as Mr Strong, or **NP242** (CA, [102]).

**NP242**

- 35. Counsel Assisting state that the running sheets show that **NP242** was arrested by police at around 6.10am on 11 January 1992. This is not correct. The running sheet indicates that **NP242** was reporting on bail for a previous break and enter at that time.<sup>31</sup>
- 36. Counsel Assisting are critical of the fact that further inquiries in relation to **NP242**, such as testing the blood on his shirt, were not taken (CA, [106]). However, as **NP242** was only reporting for a previous offence and was not under arrest, it is not clear what power Counsel Assisting assert that the police officers could have lawfully exercised to seize **NP242**'s shirt. It appears that this suggestion by Counsel Assisting may have been borne out of a misreading of the running sheet. Any implied suggestion that the police officers failed to take further steps because they accepted **NP242**'s excuse regarding the stain is not correct. The running sheet records that the relevant police officer does not appear to have accepted unreservedly **NP242**'s explanation that the stain was not blood.<sup>32</sup>

<sup>29</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [27] (SCOI.83957).

<sup>30</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [29] (SCOI.83957).

<sup>31</sup> Bundle of Selected Running Sheets at page 1 (SCOI.83976).

<sup>32</sup> Bundle of Selected Running Sheets at pages 1 and 2 (SCOI.83976).

*Mr Strong*

37. Counsel Assisting criticise the fact that, while fingerprint testing was conducted on the exhibits during the initial police investigation, no match was identified until the further testing requested by the Inquiry in 2023. If a match had been identified earlier and prior to the death of Mr Strong, a line of inquiry may have been open to NSWPF to interview Mr Strong about his knowledge of the abandoned house at 6 Holden Street and whether he had witnessed any assaults or robberies at that location.
38. It appears that the Inquiry was able to match Mr Strong's fingerprints to the fingerprints located on the Tooheys Draught beer bottle as a result of a summons issued to the Commissioner of Corrective Services (**CSNSW**) which indicated that it was not possible to find Mr Strong on the CSNSW database, a hard copy file contained an undated index card for Mr Strong with his right thumbprint.<sup>33</sup> It is not clear when these fingerprints were obtained.

*Failure to retain exhibits*

39. Counsel Assisting state that police did not take the step of carefully retaining and archiving the exhibits for later testing. Rather, 11 of the 14 exhibits were destroyed. Counsel Assisting assert that if police had taken the steps for the careful retention of these exhibits, further lines of investigation may have been open to the Inquiry (CA, [104]).
40. Ms Franco's statement sets out a table which addresses when each of those 11 exhibits referred to by Counsel Assisting were destroyed. Three of the exhibits (being each of the two beer bottles and the newspaper located at the scene of the assault) were 'destroyed after examination'. This is distinguished from the other eight exhibits which were 'destroyed on 1 May 1996'.
41. Irrespective of how the exhibits were disposed of (and whether that disposal was undertaken by the NSWPF or FASS's predecessor), it is undoubtedly unfortunate that the exhibits were not retained.
42. Once again, whilst it is uncontroversial with the benefit of hindsight that the retention of the exhibits would have been desirable having regard to advances in DNA technology in the ensuing decades, consideration of the appropriateness of any criticism needs to pay attention to Ms Franco's evidence that the advances in DNA technology were simply not

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<sup>33</sup> Summons CSNSW20 dated 6 June 2023 (SCOI.83959); Index card for Percy Strong (undated) (SCOI.83960).

envisioned as at 1992.<sup>34</sup>

43. In any event, it is noted that even DNA testing with modern technology is likely to have been hampered by various issues identified in Ms Franco's statement. These include:
- a In respect of all items, 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.<sup>35</sup>
  - b In respect of the SAIK, the fact that the victim was male means that there is difficulty in recovering foreign DNA due to the presence of the victim's own DNA.<sup>36</sup> Further, the presence of any faecal material containing bacteria on any of the swabs would enhance the degradation of any DNA present, making the recovery of any foreign DNA challenging.<sup>37</sup>
  - c In respect of the red jumper, as it had been washed before police were able to obtain it, and there was no indication of any blood present when tested in the laboratory, there are no superior tests that could be conducted today.<sup>38</sup>
  - d In respect of the buttons, 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.<sup>39</sup>
  - e In respect of the brick: first, the passage of time since the skin cells deposition may have meant that the skin cells may have become too degraded for testing.<sup>40</sup> Second, the surface material coating the brick (i.e. dirt and other material) can complicate the retrieval of skin cells from the brick.<sup>41</sup> Third, any skin on the surface of the brick may have been removed during transport or storage of the brick in intervening years.<sup>42</sup> Fourth, the recovery of DNA from blood could also be challenging due to the porous nature of the brick and the inability to adequately

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<sup>34</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [17] (SCOI.83957).

<sup>35</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [34] (SCOI.83957).

<sup>36</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [31] (SCOI.83957).

<sup>37</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [32] (SCOI.83957).

<sup>38</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [27] (SCOI.83957).

<sup>39</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [28] (SCOI.83957).

<sup>40</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [19] (SCOI.83957).

<sup>41</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [20] (SCOI.83957).

<sup>42</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [20] (SCOI.83957).

capture all the material soaked into the brick.<sup>43</sup>

- a In respect of the timber, the passage of time since any skin cells were deposited may mean that the deterioration of any skin cells would have precluded effective testing and there is also a possibility that the wood may have an inhibitory effect on the DNA testing.<sup>44</sup>
- a In respect of the newspaper, trace DNA could be recovered but as the item is not worn, the amount of contact between the paper and a perpetrator may not have been lengthy and therefore the amount of any DNA present may have been insufficient for testing, especially given the long time period since deposition.<sup>45</sup>

*Failure to collect exhibits*

- 44. Counsel Assisting also criticise the original investigators based on an assertion that some exhibits appear to not have been collected (CA, [106]). The exhibits identified by Counsel Assisting are addressed in turn.
- 45. It appears that Mr Malcolm's bloodstained singlet, but not the shirt he had been wearing (which apparently was located by Constable Lyle Van Leeuwen in the courtyard at the building), was seized. It is regrettable that the bloodstained shirt was not seized. It appears that this was an oversight in the initial investigation. It appears that it may have arisen because Mr Malcolm's shirt was cut off by attending ambulance officers to allow them to undertake immediate treatment. The Inquiry does not appear to have approached Constable Lyle Van Leeuwen, the police officer who described seeing the white bloodstained shirt at the scene, to ascertain whether or not he collected the shirt and, if he did not (which on the available material appears to be the case) whether there was a reason for not doing so.
- 46. A hair in a blood stain on the verandah at 6 Holden Street photographed by Constable Van Leeuwen was not seized. Further hair also appeared to be evident on pieces of wood, according to Mr Green, but no hairs were collected and tested. It is noted that Mr Green was a suspect in respect of the murder. His evidence must be considered carefully in that context in the absence of corroboration from other witnesses, in particular evidence of Constable Van Leeuwen who appears to have conducted a thorough canvass of the scene (noting he located the hair in the blood stain referred to above).

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<sup>43</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [21] (SCOI.83957).

<sup>44</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [23] (SCOI.83957).

<sup>45</sup> Statement of Michele Franco, FASS, dated 13 June 2023 at [25] (SCOI.83957).

47. The failure to seize or retain the hair in the blood stain (and any other hair samples if there was indeed hair present as described by Mr Green) must be considered in context. As referred to above, DNA testing was a relatively novel phenomenon as at 1992. Indeed, the *Crimes (Forensic Procedures Act) 2000* (NSW), which introduced a regime for conducting forensic procedures on suspects in order to gather DNA for testing did not commence until 1 January 2001. Again, it is important to ensure that the assessment of the investigating police officer's actions is not infected by hindsight bias. Nevertheless, it is accepted that it would have been desirable for the hair to have been seized.
48. Counsel Assisting note that it appears that material from the original police investigation has been lost, such as the sketch plan prepared by Constable Van Leeuwen, and the duty book of Detective Sergeant Phillips (CA, [105]). The Commissioner of Police agrees that this is regrettable. It is noted that those records predate the electronic document management system utilised by the NSWPF. It is unlikely that a similar issue would arise in respect of modern-day investigations.

#### ***Strike Force Parrabell review***

49. There is no evidence that would positively establish that Mr Malcolm was gay.
50. SF Parrabell concluded that it was "Unlikely that sexuality or other bias was involved in the death". The academic review team categorised the case as "no bias".
51. Counsel Assisting make no criticism of SF Parrabell's review of Mr Malcolm's death. Counsel Assisting's ultimate submission regarding the lack of evidence of LGBTIQ bias aligns with SF Parrabell's conclusion.

#### ***Anti LGBTIQ bias***

52. Consistent with the position expressed by SF Parrabell, the Commissioner of Police agrees that there is no sufficient basis to conclude that Mr Malcolm's death was motivated by LGBTIQ bias (CA, [190]).
53. The Commissioner also agrees that if any of Mr Hookey, Mr Phillips and Mr Green were the perpetrators, the motive was likely financial gain (CA, [190]).
54. Again, the conclusions of Counsel Assisting regarding the possible presence of anti-LGBTIQ bias align with the conclusion expressed by SF Parrabell.

***Manner and cause of death***

55. The Commissioner of Police supports the submissions made by Counsel Assisting as to the manner and cause of the death, namely that Mr Malcolm died on 29 January 1992 at Royal Prince Alfred Hospital as a result of sequelae of head injuries inflicted during the night of 10 January or early hours of 11 January 1992 at 6 Holden Street, Redfern, by person or persons unknown (CA, [191]).



**Mark Tedeschi KC**  
Wardell Chambers



**Anders Mykkeltvedt**  
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21 July 2023

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