

**2022 Special Commission of Inquiry
into LGBTIQ hate crimes**

**Before: The Commissioner,
The Honourable Justice John Sackar**

**At Level 2, 121 Macquarie Street,
Sydney, New South Wales**

**On Monday, 26 June 2023 at 2.05pm
(Day 67)**

Ms Kathleen Heath	(Counsel Assisting)
Mr Michael Tanazefi	(Solicitor)
Ms Aleksandra Jez	(Solicitor)

Also Present:

Mr Aurhett Barrie for the NSW Police

1 THE COMMISSIONER: Yes.

2

3 MS HEATH: Commissioner, I appear as Counsel Assisting,
4 I'm instructed by Mr Tanazefiti and Ms Jez.

5

6 THE COMMISSIONER: Thank you.

7

8 MR BARRIE: Commissioner, my name is Barrie. I appear for
9 the Commissioner of Police.

10

11 THE COMMISSIONER: Thank you.

12

13 MS HEATH: Commissioner, the death of Mr Anthony Cawsey
14 has been determined to fall within Category B of the
15 Inquiry's Terms of Reference. So, that is, Mr Cawsey's
16 death is an unsolved suspected hate crime death in New
17 South Wales that occurred between 1970 and 2010, where the
18 victim was, or was perceived to be, a member of the LGBTIQ
19 community and the death was the subject of a previous
20 investigation by the NSW Police Force.

21

22 Mr Cawsey's death was not one that was examined by
23 Strike Force Parrabell, which, by its coordinating
24 instructions, limited its examination to deaths from 1976
25 to the year 2000, and Mr Cawsey died in 2009.

26

27 Commissioner, I will start by dealing with some
28 documents. First I hand up short minutes of order in
29 relation to orders that the parties seek be made pursuant
30 to section 8 of the Special Commissions of Inquiry Act.
31 I understand that is by consent.

32

33 THE COMMISSIONER: Thank you.

34

35 MR BARRIE: Yes, that's by consent.

36

37 THE COMMISSIONER: Thank you very much.

38

39 Thank you. I have made those orders.

40

41 MS HEATH: Thank you, Commissioner.

42

43 Commissioner, there are two volumes of material in
44 this matter that comprise the tender bundle. I point out
45 that in volume 1 of the tender bundle there is an envelope
46 containing a USB. That USB has audio-visual material on
47 it. Commissioner, we tender that bundle and I understand

1 that it is exhibit 39.

2
3 THE COMMISSIONER: Thank you.

4
5 **EXHIBIT #39 TWO-VOLUME TENDER BUNDLE**

6
7 MS HEATH: Commissioner, while that is in front of you,
8 could I briefly draw your attention to the index to that
9 tender bundle.

10
11 In June and July of last year summonses or requests
12 were issued to both the NSW Police Force and also the
13 Coroners Court of New South Wales. The material you will
14 see at tabs 1 to 74, as well as the audio-visual material
15 that has been given tab numbers 79 to 85 are extracted from
16 those records.

17
18 THE COMMISSIONER: Thank you.

19
20 MS HEATH: Some additional material was served on the
21 Inquiry last week from the NSW Police Force. That has been
22 reviewed by staff of the Inquiry and no additional
23 documents were required to be added to the tender bundle.

24
25 The material at tabs 75 to 78 is material that relates
26 to investigative steps taken by this Inquiry. It includes
27 the expert certificate of David Bruce of the Forensic and
28 Analytical Science Service in relation to some retesting of
29 exhibits that was caused by the Inquiry and also an expert
30 report from forensic psychiatrist Dr Kerri Eagle, and
31 I will come to each of those documents in due course.

32
33 Commissioner, also before you should be my written
34 submissions. These will be more comprehensive than the
35 oral submissions that I make today and I seek to rely upon
36 those submissions.

37
38 Finally, Commissioner, before you should be a family
39 statement. It is dated 23 June 2023. I tender that
40 statement and I understand that now is exhibit 40.

41
42 THE COMMISSIONER: Thank you.

43
44 **EXHIBIT #40 FAMILY STATEMENT IN RELATION TO ANTHONY CAWSEY**

45
46 MS HEATH: Commissioner, Anthony Cawsey, known to his
47 family as Tony, was 37 years old at the time of his death.

1 He was the youngest son of Esmond and Laurie Cawsey, each
2 of whom is now deceased, and has three older sisters.

3
4 I would like to start by acknowledging his sisters
5 Christine and Kerry who are here in person today and all of
6 Mr Cawsey's family and friends who may be watching on the
7 live stream.

8
9 Commissioner, as I just tendered, Christine and Kerry
10 have jointly prepared a statement on behalf of the Cawsey
11 family. The statement sets out the impact that losing
12 Mr Cawsey has had on them, both from the first moments when
13 they learned of their brother's death and then in the
14 months and years that followed. They describe the
15 helplessness and frustration of grief, particularly through
16 the protracted criminal and coronial processes that
17 followed Mr Cawsey's death, and that I will detail in due
18 course.

19
20 Commissioner, I will not read the family statement in
21 full today but I would like to just read a short extract
22 from it that describes something about who Tony was as
23 a person, and I'm reading, Commissioner, from page 3 of the
24 family statement.

25
26 *It should also be noted that Tony was*
27 *loved. He displayed, like many gifted*
28 *people, eccentric behaviour and he always*
29 *walked to the beat of his own drum, and he*
30 *was a perfectionist. But his ability to*
31 *make a room brighter, to be able to talk to*
32 *anyone about their own profession with*
33 *equal knowledge, to include people and make*
34 *them feel important, was just what came*
35 *naturally to Tony. He could tell a story*
36 *better than most and fill the air with*
37 *laughter. So when he died, it was*
38 *a devastating loss, a loss to his family,*
39 *to his extraordinary and large circle of*
40 *friends, to his work colleagues and, as we*
41 *later found out, to the much broader*
42 *members of the community who knew him.*

43
44 Commissioner, later the statement goes on to say:

45
46 *We want people to know that he was loved,*
47 *important to us, and that, as we stand up*

1 *as his family, we want him to have a voice,*
2 *as we let people know he has not been*
3 *forgotten.*

4
5 Commissioner, on behalf of the Inquiry, I extend my
6 sincere condolences to all of Mr Cawsey's family and
7 friends, and I, in particular, thank Kerry and Christine
8 for sharing those words about their brother and for their
9 ceaseless advocacy for him.

10
11 Commissioner, my oral submissions will cover five
12 topics.

13
14 First, I'll outline the circumstances of Mr Cawsey's
15 death and the police investigation of it.

16
17 Secondly, I will spend some time outlining the
18 prosecution of and the case against a man named Mr Moses
19 Kellie. As I will come to, Mr Kellie was charged with the
20 murder of Mr Cawsey but the charges were ultimately
21 withdrawn by the Office of the Director of Public
22 Prosecutions. Mr Kellie is now deceased.

23
24 Thirdly, I will make submissions on the question of
25 bias.

26
27 Fourthly, I will set out the forensic analysis of
28 exhibits that has been conducted at the request of the
29 Inquiry.

30
31 Finally, I will conclude by making submissions as to
32 the manner and cause of Mr Cawsey's death and
33 recommendations.

34
35 So turning first to the circumstances of Mr Cawsey's
36 death, on the morning of Saturday, 26 September 2009, at
37 5.56am, Mr Cawsey's body was discovered lying prone and
38 outstretched on a path that ran along the southern bank of
39 Busbys Pond in Centennial Park, Sydney.

40
41 A detailed timeline of Mr Cawsey's movements prior to
42 his death was created by investigating police. They
43 compiled it by interviewing witnesses, reviewing CCTV and
44 reviewing Mr Cawsey's phone charge records, and what
45 follows is a summary of the timeline that they prepared.

46
47 At 4.24am on the morning of 26 September, Mr Cawsey

1 left his apartment in Redfern and walked to Centennial
2 Park. Mr Cawsey's communications suggest that this was an
3 unplanned trip and that he did not have a prearranged
4 meeting with any individual.

5
6 At 4.44am, while walking to Centennial Park, Mr Cawsey
7 connected to a gay chat line, Mediatel Services.
8 Commissioner, Mediatel Services allowed callers to dial in
9 to an access number. Once they called in, they're prompted
10 to record their name and a brief description of themselves,
11 which can then be listened to by other users. They can
12 listen to messages recorded by other users and either
13 record a message to send in return or request that there be
14 a live chat.

15
16 Now, once connected, two people may swap numbers and
17 try and connect outside of the system. Messages are
18 generally deleted after 24 hours.

19
20 I also note here, Commissioner, that Mr Cawsey was
21 considered by many of his friends and family to be
22 heterosexual, but investigations revealed that he also
23 engaged in sexual activities with men. There is no
24 evidence as to how Mr Cawsey himself identified.

25
26 So, Commissioner, returning to the chronology of the
27 morning, while Mr Cawsey was connected to Mediatel
28 Services, Mr Cawsey recorded a message that could be
29 accessed by other users of Mediatel.

30
31 In my written submissions at paragraph 61, I have set
32 out the message that he recorded, and I don't propose to
33 read it in full in oral submissions. In summary, Mr Cawsey
34 described that he was "in a park on the edge of the city in
35 Sydney", he described what he was wearing and indicated
36 that he was interested in engaging in sexual activities
37 with a man.

38
39 Importantly for the investigation, Mr Cawsey did not
40 reveal his specific location details. Call charge records
41 showed that Mr Cawsey was connected to the chat line until
42 5.01am.

43
44 Now, if it is assumed that he walked the most direct
45 route from his apartment in Redfern to Centennial Park at
46 a moderately brisk walking pace, he would have arrived at
47 the Snake Bank path where his body would eventually be

1 found at approximately 4.54am.

2
3 Between 5.12am and 5.24am, Mr Cawsey used his mobile
4 to call the landline of another man, who he had connected
5 with by Mediatel. That man was interviewed by police. He
6 told them that they had spoken to each other about sex and,
7 it would seem, engaged in mutual masturbation. That man
8 was investigated by police but excluded as a suspect after
9 a CCTV review showed that he never left his home.

10
11 At 5.56am, the body of Mr Cawsey was discovered by
12 several park users who separately notified police. So
13 accordingly, Commissioner, the evidence establishes that
14 Mr Cawsey met his death in the 32-minute window between the
15 end of his phone call - that's at 5.24am - and the
16 discovery of his body at 5.56.

17
18 Commissioner, Mr Cawsey's body, as I have said, was
19 found on a bath along Snake Bank on the southern side of
20 Busbys Pond.

21
22 I ask that a map of Centennial Park be placed on the
23 screen at this time [SCOI.84137_0001]. Commissioner,
24 you'll see Busbys Pond indicated on the map, and there is
25 a marker with the number 2, and that marker indicates the
26 approximate location of Mr Cawsey's body, and I will return
27 to this map in due course to explain the other markers on
28 the map.

29
30 Police made the following observations upon their
31 attendance at the scene. Mr Cawsey was lying prone and
32 outstretched. He was partially positioned on the track.
33 On his upper body, Mr Cawsey was dressed in a blue,
34 short-sleeved shirt, with a cut-off black top underneath.
35 The black T-shirt was soaked through with blood.

36
37 The upper body garments were lifted at the crime scene
38 revealing a single stab wound to his lower left chest. On
39 his lower body Mr Cawsey was wearing navy blue tracksuit
40 pants with parallel white stripes running down each leg,
41 pink women's underpants and a black G-string. The
42 tracksuit pants and the pink underpants were pulled down
43 and positioned just above his knees. The G-string remained
44 in place, covering his genitalia but leaving his buttocks
45 exposed.

46
47 Mr Cawsey's wallet, with his driver's licence, his

1 keys and his mobile phone, were all left on his person.
2 The property found on his body tends against a hypothesis
3 that he was the victim of a robbery offence.
4

5 Police concluded that Mr Cawsey had been stabbed
6 proximate to where his body was located as there was no
7 blood trail in the vicinity and blood pooling was confined
8 to the body and area immediately surrounding it.
9

10 Commissioner, an autopsy report was performed by
11 Dr Rebecca Irvine on 29 September 2009. Her report is at
12 tab 2 of the tender bundle, and I don't need to take you to
13 it now. Her report is dated 14 December 2009 and Dr Irvine
14 determined that Mr Cawsey died of haemopericardium - that
15 is, an accumulation of blood in the pericardial cavity.
16 That was due to a single stab wound to the left chest. The
17 knife punctured the right ventricle of the heart and the
18 injury would have been quickly disabling.
19

20 The stab wound was approximately 2.7cm long and 10cm
21 deep and caused by a single-edged blade. There were two
22 small abrasions at the end of the wound, which possibly
23 could indicate that the knife had been pushed deep enough
24 that the handle was touching the skin.
25

26 Commissioner, again I will briefly depart from my
27 chronological structure to note that an expert report was
28 obtained at the time of the coronial inquest as to whether
29 those measurements were indicative of the size of the blade
30 used to inflict the wound. A report under the hand of
31 Dr Dufrou dated 1 November 2017 is at tab 5 of the tender
32 bundle. In short, that report concluded that the
33 measurement of the wound cannot be used to reliably
34 estimate the size of the blade as the human body is elastic
35 and deformable and the blade may not have entered the body
36 cleanly or fully.
37

38 Commissioner, in addition to the knife wound,
39 Mr Cawsey had various small superficial abrasions and
40 toxicology samples indicated a modest concentration of
41 alcohol and the presence of cannabinoids and
42 methamphetamine.
43

44 Several items were found near Mr Cawsey's body,
45 including a rollie cigarette butt, or a roll-your-own
46 cigarette butt, and a red plastic disposable cigarette
47 lighter. These items were forensically examined - they

1 were collected by police and forensically examined -and
2 there were two results that are of particular note.

3
4 Firstly, on a section of the rollie cigarette,
5 forensic analysts recovered a mixed DNA profile. That
6 mixture was deconvoluted, so that is, it was run through
7 software that separates the mixed profile, and it revealed
8 two partial profiles. Those partial profiles at the time
9 of the original investigation and now have not been
10 identified, and can be referred to as "Unknown Male A" and
11 "Unknown Male B".

12
13 The black G-string that was worn by Mr Cawsey screened
14 positive for both blood and semen. Again, a mixed DNA
15 profile was obtained. Mr Cawsey and a second individual,
16 this time Unknown Male C, could not be excluded as
17 contributors to this mixture.

18
19 These profiles have not been matched to any person on
20 the national DNA database, nor, importantly, are they
21 a match to any person for whom the police collected
22 a reference sample, and this includes, as I will come to,
23 Mr Kellie.

24
25 Commissioner, it is important to note that it is
26 unknown whether these unidentified DNA profiles were
27 deposited at the scene during the murder of Mr Cawsey. The
28 cigarette butt may have been left by any member of the
29 public who used Centennial Park. The DNA profile on the
30 G-string may have been deposited during an earlier sexual
31 encounter. Nonetheless, identification of any of these
32 unknown profiles could generate important investigative
33 leads.

34
35 So turning to the police investigation of the death,
36 on 26 September 2009, Strike Force Annand was set up by the
37 Homicide Squad to investigate Mr Cawsey's death. The
38 investigation was led by then Detective Sergeant Leggat and
39 Detective Senior Constable Frame, and in November 2013,
40 Detective Senior Constable Staples assumed carriage of the
41 investigation. She remained the officer in charge at the
42 time of the coronial hearing in 2017.

43
44 Commissioner, the original police investigation was
45 thorough and it appears that all appropriate lines of
46 inquiry were pursued.

47

1 It should also be acknowledged that Christine and
2 Kerry, in their family statement, commented on the respect
3 and compassion of the officers with whom they worked most
4 closely after the death of their brother and expressed
5 their thanks to the police officers involved in the
6 investigation, especially Detective Senior Constable
7 Staples.

8
9 Detective Staples' statement, which is dated
10 24 February 2017, is at tab 13 of the brief. It is close
11 to 100 pages long and summarises the lines of inquiry that
12 were followed during the course of the initial
13 investigation and subsequently at the coronial hearing.

14
15 Now, without intending to be exhaustive of what those
16 lines of inquiry entailed, it included inquiries such as,
17 firstly, inquiries relating to Mr Cawsey's movements, and
18 I have already outlined the summary of that, but there was
19 a detailed timeline that was created in relation to the
20 days and hours leading up to his death.

21
22 Secondly, inquiries relating to his use of gay chat
23 lines. So in this regard, police considered, reasonably,
24 that the absence of a specific location in Mr Cawsey's
25 message made it unlikely that he was killed by a person
26 from that service, but nonetheless, in order to fully
27 investigate that possibility, extensive inquiries were
28 undertaken to identify all men who were using either
29 Mediatel or Manhunt around the time of the murder to obtain
30 volunteer DNA samples from them and to interview them as to
31 their movements, and this line of inquiry ultimately
32 developed no persons of interest.

33
34 Thirdly, there were inquiries relating to Mr Cawsey's
35 background and associates. So police obtained a large
36 number of statements from friends, family, co-workers and
37 associates of Mr Cawsey. This included people who may have
38 been thought to have some animosity towards Mr Cawsey. The
39 statements pertained to their relationship with Mr Cawsey,
40 their movements on 25 and 26 November, and in some cases,
41 witnesses' movements were confirmed by review of call
42 charge records and/or CCTV footage. Ultimately, these
43 inquiries did not reveal any conflicts, debts or other
44 interpersonal issues which could have provided a motive to
45 kill Mr Cawsey, nor did any persons of interest emerge.

46
47 Fourthly, there was forensic analysis that was

1 conducted. So, as noted above, there were exhibits seized
2 from the scene and this revealed unknown DNA profiles. In
3 the course of following various lines of inquiry, police
4 obtained a large number of volunteer DNA samples that could
5 be used as comparison to exclude these people from the
6 investigation, and ultimately, no match was identified.

7
8 Police also considered the possibility that Mr Cawsey
9 was killed as a result of a gay hate crime, and that line
10 of inquiry I will come to in due course and address
11 separately.

12
13 So, Commissioner, after pursuing these multiple lines
14 of inquiry, ultimately, police narrowed in on one key
15 person of interest, a Sierra Leone national named Moses
16 Kellie. Mr Kellie was a homeless man who was living in
17 Centennial Park at the time of Mr Cawsey's death. The
18 evidence established that he had a borderline IQ level and,
19 further, while there is a contest as to the evidence of his
20 mental state, there is, I would submit, a likelihood that
21 Mr Kellie suffered from a psychotic illness.

22
23 The prosecution of Mr Kellie and the evidence against
24 him is the second topic that I intend to now turn to.

25
26 It is instructive to begin by setting out the
27 procedural history in relation to the investigation and
28 prosecution of Mr Kellie.

29
30 Mr Kellie became a suspect in relation to the death of
31 Mr Cawsey relatively early in the police investigation. He
32 was interviewed on multiple occasions in 2009 and in early
33 2010 in relation to the death of Mr Cawsey, as well as in
34 relation to other offences that were committed and which
35 occurred in the Centennial Park vicinity, and I'll come to
36 those in due course.

37
38 In October of 2015, police charged Mr Kellie with the
39 murder of Mr Cawsey. Commissioner, I don't require you to
40 turn to it, but at tab 9 of your tender bundle is the court
41 attendance notice which commenced the prosecution, and at
42 tab 10 is the facts sheet prepared by police.

43
44 Commissioner, one comment I will make in relation to
45 the police investigation is in relation to the delay in
46 bringing the prosecution against Mr Kellie. Much of the
47 evidence against him had already been collected by early

1 2010, but it appears that police did not charge him until
2 2015 when his release from custody on other matters was
3 imminent.

4
5 It has been observed on many occasions in the criminal
6 context that delays in prosecution can result in unfairness
7 to an accused person. Delay can result in witnesses
8 becoming unavailable, memories fading or documents, records
9 or other exhibits being lost. That's also obviously of
10 significance to the Crown case, and so delay of this
11 nature, where possible, should be avoided.

12
13 In any event, Mr Kellie was charged in 2015 and the
14 Office of the Director of Public Prosecutions took carriage
15 of the prosecution.

16
17 Nearly a year after he was charged, on 7 September
18 2016, the Office of the Director of Public Prosecutions
19 withdrew the charge against Mr Kellie. The ODPP - the
20 Office of the Director of Public Prosecutions - considered
21 that there was no reasonable prospect of conviction.

22
23 Commissioner, I will ask that tab 11 be placed on the
24 screen. [SC0I.83377_0001].

25
26 This is a letter under the hand of Kara Shead. You'll
27 see, if we scroll down, her sign-off. She was the Deputy
28 Director of Public Prosecutions at that time, and the
29 letter is addressed to Detective Chief Inspector Dickinson
30 of the Homicide Squad. This letter advises, in short
31 terms, of the decision to discontinue the prosecution.

32
33 You will see that a reason is provided. It states:

34
35 *The case against the accused Mr Kellie was*
36 *a circumstantial one.*

37
38 *In determining that there was no reasonable*
39 *prospects of conviction, there were*
40 *difficulties with the admissibility of the*
41 *tendency and coincidence evidence, as well*
42 *as the reliability of the "admissions", and*
43 *the statements made by the accused alleged*
44 *to be "lies as consciousness of guilt",*
45 *given his history of mental illness.*

46
47 Commissioner, this letter foreshadows some of the

1 topics that I will come to when I make submissions in
2 relation to the Crown case.

3
4 Commissioner, from 11 to 13 December 2017 - so this is
5 now some eight years after Mr Cawsey's death - an inquest
6 was conducted by Deputy State Coroner Magistrate Russell.
7 At that inquest, Mr Kellie remained the only person of
8 interest.

9
10 On 13 December 2017, her Honour suspended the inquest
11 and referred the matter back to the Director of Public
12 Prosecutions. I will ask that tab 8 of the tender bundle
13 now be put on the screen [SCOI.10483.00054_0001].

14
15 Commissioner, this is a letter from the Coroner dated
16 7 March 2018 that, as I said, refers the matter back to the
17 Director of Public Prosecutions.

18
19 At paragraph 2 of the letter, the Coroner expresses
20 her reason for suspending the inquest and that is that she
21 was of the opinion that there was evidence capable of
22 satisfying a jury beyond reasonable doubt that Moses Kellie
23 had committed an indictable offence and that there was
24 a reasonable prospect that a jury would convict him of that
25 offence.

26
27 Now, that letter, which is some 12 pages, I will not
28 take you to in full at this time, but it sets out some of
29 the additional evidence that had been obtained in the
30 course of the coronial investigation and inquest.

31
32 Following receipt of this letter, the matter was then
33 reconsidered by the Office of the Director of Public
34 Prosecutions. On 16 November 2018, that Office wrote to
35 the Coroner and advised of the outcome of that
36 reconsideration.

37
38 I'll ask that tab 12 be put on the screen
39 [SCOI.10483.00062]. This is, Commissioner, a letter from
40 Peter McGrath SC, Deputy Director of Public Prosecutions,
41 who advised that there would be no further prosecution of
42 Mr Kellie.

43
44 Commissioner, he explains in his letter that because
45 there had already been a decision to withdraw the charges
46 against Mr Kellie, the nature of the consideration was
47 whether there was significant new evidence to warrant the

1 reversal of that direction. Importantly, he notes that the
2 Office of the DPP considered that there remains no
3 reasonable prospect of conviction and that the new evidence
4 does not overcome the previously identified difficulties in
5 the prosecution of this matter.
6

7 Commissioner, I note that beyond these letters, the
8 reasons for discontinuing the prosecution by the Office of
9 the Director of Public Prosecutions were and remain the
10 subject of legal professional privilege.
11

12 As may be observed from this procedural history, the
13 case against Mr Kellie is a circumstantial one and the
14 sufficiency of the evidence against him is one upon which
15 reasonable minds may differ.
16

17 My ultimate submission to you, Commissioner, will be
18 that while there is a plausible argument that Mr Kellie was
19 responsible for the death of Mr Cawsey, the evidence is
20 insufficient to conclusively find on the balance of
21 probabilities that Mr Kellie was responsible for inflicting
22 the stab wound suffered by Mr Cawsey, and as I already
23 noted, Mr Kellie is now deceased.
24

25 Having set out that procedural history, I turn to set
26 out a summary of the evidence in the police case against
27 Mr Kellie.
28

29 Commissioner, I will not attempt to be comprehensive
30 in these oral submissions as to the evidence. There was
31 a significant volume of evidence, and I refer to my written
32 submissions from pages 14 to 48 for a more comprehensive
33 analysis. What I will endeavour to do is set out the key
34 planks of the case against Mr Kellie, and there are five
35 planks of evidence which I will come to in turn. These
36 are: first, the location of his camp sites; secondly,
37 sightings of Mr Kellie in close proximity to the crime
38 scheme; thirdly, the allegation that he told lies out of
39 a consciousness of guilt; fourthly, tendency and
40 coincidence evidence; and, fifthly, and arguably most
41 significantly, alleged admissions that were made by
42 Mr Kellie.
43

44 The case against Mr Kellie is a circumstantial one so
45 each of these five strands need to be considered together
46 to assess their cumulative effect.
47

1 Before I turn to these strands, it is important to
2 observe that there has never been any forensic evidence
3 linking Mr Kellie to the scene of the crime or to
4 Mr Cawsey's body. Mr Kellie was not a match to any of the
5 unknown DNA profiles recovered from the crime scene.
6

7 In addition, in the course of their investigation,
8 police seized a large number of exhibits from Mr Kellie and
9 from the places in the park where he kept his property.
10 That included clothing, knives, backpacks and shoes.
11 Analysis of all of these items failed to establish any
12 forensic link between Mr Cawsey and Mr Kellie. None of
13 Mr Cawsey's property was ever found on Mr Kellie or amongst
14 any of his property.
15

16 So, Commissioner, I turn to the first of the planks
17 that I just moments ago set out, and that is the location
18 of Mr Kellie's camp sites.
19

20 Mr Kellie was homeless and living in Centennial Park
21 at the time of Mr Cawsey's death and the evidence
22 established that he had been living there since about April
23 2009. Commissioner, I have used the language of "camp
24 site", but I hesitate and point out that this may apply
25 a degree of semi-permanency about the locations that the
26 sites did not necessarily possess. So these were locations
27 where Mr Kellie sometimes slept or sometimes stored
28 property.
29

30 Commissioner, I will ask that the map that
31 I previously took you to is put on the screen.
32

33 When Mr Kellie was first spoken to by police - and
34 that was on 3 October 2009 - he was asked to show police
35 where he had been living. He took the police to two
36 locations, the first being a sandstone pavilion situated
37 off Park Drive where he had slept the previous night
38 because it had been raining, and the second was a location
39 under a tree in an area of the park known as the
40 "South-West Paddock". That location is marker number 5,
41 which is now being pointed out on the screen.
42

43 Approximately two weeks later, that is, on 17 October
44 2009, Mr Kellie was located by police at a drainpipe that
45 opened into Busbys Pond and that was concealed from view by
46 foliage. In the drainpipe was a sleeping bag, a number of
47 backpacks, food packaging and other items. Now, that site

1 is at marker 8.

2
3 As, Commissioner, you will observe, that site was less
4 than 100 metres from the location where Mr Cawsey's body
5 was ultimately located, which is at marker 2, and Mr Kellie
6 did not disclose the location of the camp site at marker 8
7 on 3 October 2009.

8
9 On 9 November 2009, police located a third of
10 Mr Cawsey's camp sites. That is at marker 10.

11
12 Commissioner, the close proximity of Mr Kellie's camp
13 sites to the crime scene increases the likelihood of
14 Mr Cawsey and Mr Kellie crossing paths in the early hours
15 of the morning on 26 September 2009, and may be considered
16 a piece of the circumstantial evidence against Mr Kellie.

17
18 The second plank of the case is sightings of Mr Kellie
19 in proximity to the crime scene. Three witnesses provided
20 statements to police regarding a sighting of a man who
21 generally fit the description of Mr Kellie within the
22 vicinity of the crime scene the day before the murder.
23 Most significantly, a man named Mr Kay saw a man fitting
24 Mr Kellie's description emerging from bushes along Busbys
25 Pond at about 3pm on the day before the murder.
26 Commissioner, that sighting, the location of that sighting,
27 is at marker 1 that you will see on the map.

28
29 Now, as you will no doubt observe, this was very close
30 to Mr Kellie's camp site, marked by marker 8, and that
31 supports the proposition that the man that Mr Kay saw
32 emerging from the bushes was indeed Mr Kellie. It is very
33 close also to the scene of Mr Cawsey's murder, but I do
34 note that it is a sighting of Mr Kellie some 12 hours
35 before the murder was likely to have occurred.

36
37 Another witness, a man by the name of Mr Edgington,
38 gave evidence of seeing a man broadly fitting the
39 description of Mr Kellie shortly after the murder. Now,
40 that sighting was at marker 3, just off Grand Drive.

41
42 Now, there is good reason to believe that this person
43 was Mr Kellie, when it is compared to his own description
44 of what he was wearing on the morning of Mr Caswey's murder
45 and what he was doing. And I have set that out in more
46 detail in my written submissions from paragraph 87.

47

1 Now, Commissioner, as with the location of Mr Kellie's
2 camp sites, these sightings may all be considered as part
3 of the circumstantial case against Mr Kellie. However, it
4 should be noted that even if we were to assume that these
5 were, in fact, sightings of Mr Kellie, it is known that
6 Mr Kellie was homeless and living in Centennial Park at the
7 time of Mr Cawsey's death, which provides an innocent
8 explanation for him being sighted by multiple people in the
9 area. None of the purported sightings tie Mr Kellie
10 closely to the crime scene at the time of the murder.
11

12 Commissioner, the third plank of evidence relates to
13 lies that were told to police by Mr Kellie. So the police
14 sought to rely on multiple lies given in interviews by
15 Mr Kellie as evidence of his guilt. The first two of those
16 lies arise from some of the evidence that I have already
17 taken you to. The first, on the police case, was a lie by
18 omission - so that is, when Mr Kellie was asked to show
19 police his camp sites in early October, he only showed them
20 the camp site at marker 5 but failed to reveal the closer
21 camp sites at markers 8 or 10.
22

23 The second matter said to be a lie was about when he
24 was last in the area. In an interview on 17 October 2009 -
25 that is, approximately three weeks after the murder -
26 Mr Kellie said that he had been in the area around the
27 murder about one or two weeks before the murder. Now, if
28 the sighting by Mr Kay was in fact a sighting of Mr Kellie,
29 then that would, in fact, put him at the crime scene within
30 the day of the murder, the day prior to the murder, and so
31 that was said to be a second lie.
32

33 The third matter said to be lies told by Mr Kellie
34 related to his movements on the morning of Mr Cawsey's
35 murder. Commissioner, I have set these out, his
36 conflicting versions, in my written submissions at
37 paragraphs 109 to 114.
38

39 In short, there were inconsistencies between what
40 Mr Kellie described his movements to be when he was first
41 interviewed on 3 October 2009 and when he was interviewed
42 again on 17 October 2009.
43

44 On both occasions, however, he did tell police that he
45 had left the park, walked to the University of New South
46 Wales early in the morning on the day of the murder, and
47 only upon returning saw police tape near the vicinity of

1 Mr Cawsey's body.
2

3 Commissioner, the police case in respect of each of
4 these lies was that Mr Kellie made false statements to
5 distance himself from the area where the victim's body was
6 located and to remove himself from the park at the
7 approximate time of Mr Cawsey's murder.
8

9 Commissioner, the omissions or inconsistencies in
10 Mr Kellie's accounts are capable of being construed as lies
11 amounting to admissions and can be considered as one
12 element of the circumstantial case against Mr Kellie.
13 However, as your Honour would be well aware, it is
14 established that great care needs to be taken in inferring
15 guilt from lies.
16

17 As established by the High Court in the seminal case
18 of *Edwards v R*, which was a decision from 1993, for errors
19 to be treated as proof of a guilty conscious and an implied
20 admission, they would need to be deliberate falsehoods and
21 they would need to be told by Mr Kellie due to
22 a consciousness that the truth would convict him. In
23 assessing each apparent lie, it would be necessary to
24 consider other possible explanations for a lie.
25

26 In this case, it must be borne in mind that Mr Kellie
27 was homeless and itinerant and had a borderline
28 intelligence level. I will come to deal with the evidence
29 of Mr Kellie's mental health in due course, however, as
30 I said earlier, it was at least possible, if not likely,
31 that he suffered from a psychotic illness.
32

33 In these circumstances, an imperfect recollection of
34 where he was camping, his waking times, his routes, when he
35 was interviewed one week and three weeks after Mr Cawsey's
36 death, may simply reflect that he had a disorganised mind,
37 that he experienced some temporal disconnect associated
38 with his living conditions, or was generally an unreliable
39 historian.
40

41 Mr Kellie may also have had other reasons for not
42 disclosing all locations where he slept or stored his
43 property in the park, to preserve what limited privacy he
44 had and to prevent him from being moved on from those
45 places.
46

47 Another explanation is that he was aware that a person

1 had been killed and was fearful of being wrongfully
2 accused. So, in short, while these lies do form part of
3 the circumstantial evidence against Mr Kellie, great care
4 should be taken as to what reliance can be placed on them
5 in assessing Mr Kellie's involvement with Mr Cawsey's
6 death.

7
8 Commissioner, the fourth plank in the case against
9 Mr Cawsey arose from what is described as tendency and
10 coincidence evidence. So the police case against Mr Kellie
11 relied upon evidence of other offences in or around
12 Centennial Park that were said to have been committed by
13 Mr Kellie close in time to the death of Mr Cawsey.

14
15 Mr Kellie was convicted of a robbery offence,
16 a robbery with wounding, on a man who has been given
17 a pseudonym and who I will refer to in these oral
18 submissions as "JR". That robbery took place on 11 October
19 2009, and in the map that's still on the screen, you'll see
20 that there is a marker, marker number 6, and that was the
21 approximate location of that robbery.

22
23 Mr Kellie was also convicted of an assault offence
24 against a woman on 16 October 2009. Now, that offence was
25 at marker 7 on the map.

26
27 Mr Kellie was also suspected to have been the offender
28 in relation to a third assault, on 23 September 2009, on
29 Anzac Parade. However, it is important to note that he was
30 never convicted of, or even charged with, the third
31 assault, and the evidence, which I set out in my written
32 submissions, falls short of there being a positive
33 identification of Mr Kellie as the offender in relation to
34 that third assault.

35
36 The police case was that these offences demonstrated
37 a pattern of behaviour or a tendency on the part of
38 Mr Kellie to attack people in an unprovoked manner at
39 night-time in the vicinity of Centennial Park, and that
40 that made it more likely that he committed the offence
41 against Mr Cawsey. When evidence is used in this way, it
42 may be described as tendency evidence.

43
44 The police case was also that it would be improbably
45 coincidental, having regard to the similarities between the
46 offences, that a person other than Mr Kellie committed
47 Mr Cawsey's murder. When used in this way, the evidence

1 may be described as coincidence evidence.

2
3 Commissioner, my ultimate submission to you is that
4 you would not be satisfied that this evidence would be
5 admissible as tendency or coincidence evidence. If I could
6 say this by way of overview, although I rely on my written
7 submissions for a fuller development of the law, the
8 Evidence Act 1995 operates to exclude both tendency and
9 coincidence evidence unless the court thinks that the
10 evidence has significant probative value. For evidence to
11 have significant probative value, it must make it more
12 likely to a significant extent that Mr Kellie killed
13 Mr Cawsey.
14

15 Commissioner, while you are not bound by the
16 Evidence Act, by section 9(3) of the Special Commissions of
17 Inquiry Act, you shall only receive evidence, as far as
18 practicable, that, in your opinion, would be likely to be
19 admissible in evidence in civil proceedings.
20

21 The other incidents that Mr Kellie either committed or
22 was suspected to have committed, involved Mr Kellie
23 committing unprovoked attacks on strangers at night-time in
24 the vicinity of Centennial Park. In at least one of the
25 offences, it appears that robbery was a motivation, with
26 Mr Kellie having stolen the victim's property.
27

28 Now, it must be observed, the common features of the
29 assaults or robberies that Mr Kellie committed or was
30 suspected of having committed are generic to many assault
31 or robbery offences, so that is to say that it is not
32 particularly surprising that many assaults and robberies
33 would be unprovoked attacks on strangers and generally
34 committed in hours of darkness. However, there are
35 critical differences between the offences which Mr Kellie
36 did commit and the murder of Mr Cawsey.
37

38 The police case against Mr Kellie - and I will come to
39 this in due course - based on his alleged admissions, was
40 not that Mr Kellie committed an unprovoked attack on
41 Mr Cawsey; rather, it was that Mr Kellie reacted in anger
42 after being repeatedly propositioned for sex by Mr Cawsey.
43 This is reinforced by the apparent sexual components to
44 Mr Cawsey's death that can be inferred from the positioning
45 of his clothing - so you will recall his pants were
46 removed - and his stated intentions for coming to
47 Centennial Park - that is, to seek a sexual encounter.

1 This suggests that the murder of Mr Cawsey took place in a
2 different context to the other robberies or assaults.

3
4 Commissioner, there is no rule of law that demands
5 that there be a close similarity between the conduct said
6 to constitute tendency or coincidence evidence and the act
7 which is sought to be proved. However, the extent of the
8 similarity will have an impact upon whether the evidence
9 meets the threshold of significant probative value.

10
11 My ultimate submission is that given the
12 dissimilarities between the offences and Mr Cawsey's
13 murder, that threshold wouldn't be reached and you would
14 not be satisfied that the evidence would be admitted as
15 tendency and coincidence evidence when determining whether
16 Mr Kelly was responsible for Mr Cawsey's death.

17
18 Commissioner, you will recall that that is at least
19 consistent with the conclusion that was reached by the
20 Office of the Director of Public Prosecutions, albeit they
21 were considering admissibility in a criminal rather than
22 civil context.

23
24 So, Commissioner, that is what I wish to say in
25 relation to the tendency and coincidence evidence.

26
27 The final plank of the evidence, and arguably the most
28 significant, relates to alleged admissions by Mr Kellie in
29 his interview regarding the robbery of the man JR. So, as
30 I mentioned, that robbery offence occurred on 11 October
31 2009. By January of 2010, Mr Kellie was a suspect in
32 relation to that robbery and police had arrested and were
33 interviewing him.

34
35 Commissioner, a transcript of the interview
36 from January 2010 is at tab 47A of the tender bundle, and
37 the audio-visual recording of that interview has also been
38 tendered.

39
40 In the course of that interview, notwithstanding that
41 police were asking him about the robbery of JR, Mr Kellie
42 gave answers to police that led them to believe that he
43 was, in fact, describing an argument that he had had with
44 Mr Cawsey and not the interaction with JR.

45
46 It's necessary to set out the facts of the robbery of
47 JR, and I'll do so briefly. At about 2.30am, JR was

1 walking on Lang Road in a poorly lit residential area
2 opposite Centennial Park. He was talking on his iPhone to
3 a female friend.
4

5 With no apparent provocation, Mr Kellie confronted JR
6 and began to yell something at him that JR couldn't
7 understand. He then waved a silver-coloured object in his
8 left hand, believed by JR to be a knife. Mr Kellie was
9 wearing a dark-coloured hooded jacket with a centre zip.
10 The hood was up, disguising his features. JR stepped back
11 and felt his back touch the fence to Centennial Park. JR
12 held his phone out towards Mr Kellie and either handed it
13 to Mr Kellie or dropped it. Either way, Mr Kellie ran off
14 in possession of JR's phone.
15

16 The friend who JR had been on the phone to called JR's
17 phone multiple times and a male voice with a strong accent
18 answered. When JR arrived home, he realised that he had
19 received a cut to his upper left arm that required
20 suturing. He was uncertain how he received that injury.
21 In an interview with police, Mr Kellie denied carrying
22 a knife or using any weapons to cause that injury, and he
23 was not sentenced on the basis that a knife was used to
24 inflict those injuries.
25

26 So, Commissioner, I come to the interview of Mr Kellie
27 that occurred in January of 2010, and as I indicated, the
28 police case was that Mr Kellie became confused during the
29 interview and conflated the robbery of JR and the murder of
30 Mr Cawsey.
31

32 Commissioner, I've set out in my written submissions
33 significant portions of this interview, although I submit
34 that the interview must be read in full to appreciate and
35 evaluate its capacity to be construed as an admission.
36

37 Mr Kellie's accounting in the interview is confusing
38 to follow. He often rambled, he gave answers that were not
39 responsive to questions that were asked, his English was
40 heavily accented, and his grammar was imperfect. All of
41 these features mean that the version he provides in his
42 interview is open to multiple interpretations.
43

44 As a starting point, it is clear that at least at some
45 points during the course of the interview, Mr Kellie is
46 describing an incident that is clearly consistent with the
47 assault of JR. Early in the interview, he is shown

1 a photograph of JR and he says that he recognises that
2 person. He described the victim as speaking on an iPhone.

3
4 Commissioner, JR had an iPhone where Mr Cawsey had an
5 old Nokia. He described pushing the victim against the
6 fence of Centennial Park, which is consistent with what JR
7 describes. He describes taking the victim's phone. JR's
8 phone was stolen, whereas Mr Cawsey's phone was located on
9 his body. And he also describes conversations he later has
10 with a woman who called the phone and, as you will recall,
11 that is consistent with what occurred in the robbery of JR.

12
13 At other points of the interview, however, Mr Kellie
14 appears to describe an interaction that is somewhat
15 inconsistent with the robbery of JR. To take you to
16 perhaps the most striking indication, and that is that
17 Mr Kellie gave a version of events in which the victim
18 repeatedly propositioned him for "gay sex", and that is
19 what angered Mr Kellie and led to an argument.

20
21 I'll take you to just some of those portions of the
22 interview. If I ask that tab 47A [SC0I.10469.00004_0001]
23 be placed on the screen, and we'll start at page 11 and
24 question 131 to 135. I won't read that in full, but
25 Mr Kellie describes the area where he met the victim as he
26 came out of the gate, was a "popular spot, like for gay
27 people", and that the victim "start talking about
28 something" and later that he approached him.

29
30 Commissioner, I will then ask that we turn to page 13,
31 question 162. You will see that, again, there is
32 a question about the wound, that's the wound to JR's arm
33 that was shown to Mr Kellie. Mr Kellie's answer is
34 somewhat unresponsive, but he says that he told him that he
35 was "not interested", and then "he start to pretend he was
36 talking on the phone".

37
38 If I ask that we then scroll down to the top of
39 page 14, question 163, you'll see that Mr Kellie describes
40 that he "start to walk", and then following on from that:

41
42 *... he's still forcing, still forcing*
43 *himself like, I said, I'm not interested*
44 *like in gay sex, because that's where they*
45 *thought anybody they see around that*
46 *area ...*
47

1 He again reinforces that at question 164 that, "he approach
2 me".

3
4 Commissioner, the next reference I'll take you to is
5 on page 16, question 185. You'll see that the police ask
6 Mr Kellie what specifically he said what he was approached.
7 Mr Kellie said, or reportedly said, according to Mr Kellie:

8
9 *... I'm not interested ...*

10
11 and then at the very bottom you'll see:

12
13 *... he forced, he forced attempt.*

14
15 On the next page, page 17, at question 199, there is
16 a portion that was consistent and relied on by the police
17 as an admission, and you'll see that Mr Kellie described
18 that they started to argue and that Mr Kellie said:

19
20 *... if you don't, I said the F word.*

21
22 and then goes on to threaten to stab him.

23
24 The next page reference I'll take you to is at
25 page 26, question 288. And the police ask:

26
27 *... what did he confront you with that made*
28 *you end up in a struggle with him?*

29
30 And Mr Kellie answers:

31
32 *It was, it was the gay sex.*

33
34 Commissioner, there is no evidence that JR was gay or
35 that he was seeking to meet other men at Centennial Park.
36 JR's evidence was that he was walking home alone along Lang
37 Road towards Oxford Street while looking for a taxi. By
38 contrast, Mr Cawsey was in Centennial Park with the
39 expressed intention of seeking a sexual encounter.

40
41 Now, I pause to note that it is, of course,
42 speculative as to whether he, in fact, propositioned any
43 person, let alone Mr Kellie. However, it may be considered
44 more likely that Mr Cawsey was perceived to be looking for
45 a sexual encounter than JR.

46
47 Now, in one of the passages that I just took you to,

1 Commissioner, and that was at question 162, Mr Kellie
2 described the man as pretending to talk on the phone. At
3 another point in the interview he refers to the victim
4 talking about "sex stuff" on the phone. Now, this is
5 consistent with Mr Cawsey connecting to a gay chat line and
6 speaking about sex with a person he met on that chat line.

7
8 Commissioner, in assessing Mr Kellie's interview, one
9 relevant factor is his mental health at the time of the
10 incident. I will ask that tab 68 [SC0I.10488.00009.0001]
11 be put on the screen. Commissioner, this is a psychiatric
12 report prepared by Dr Clark, a forensic psychiatrist, that
13 is dated 12 April 2011. Commissioner, this was prepared at
14 the request of the court for the purposes of Mr Kellie's
15 sentencing in relation to the robbery of JR. Importantly,
16 this report was prepared over a year after the interview
17 of January 2010, so, Commissioner, even if Mr Kellie was
18 confused during the police interview as to which incident
19 he was describing, one would expect that by this time, when
20 he had pleaded guilty to the robbery of JR, he would have
21 greater clarity about the event that he was describing.

22
23 On page 1 of this report, you'll see that it says that
24 the circumstances of the offence, he said, are that he was
25 alone, when approached by the victim, who made sexual
26 advances to him. So that is consistent again with some of
27 what he describes in his interview.

28
29 It continues that at the time of his plea, it became
30 apparent that Mr Kellie suffers from a mental disorder.
31 However, he gave this version of events at a time when he
32 was "appropriately treated".

33
34 Commissioner, I would ask that we now turn to page 4.
35 Dr Clark makes comment upon his mental state at the time of
36 the robbery offence. What is said is:

37
38 *Looking back at his mental state at the*
39 *time of his offence, he was paranoid,*
40 *feeling that people were after him and that*
41 *he had experienced hallucinatory voices,*
42 *with threatening intimidating sexual*
43 *content.*

44
45 Now, I ask that we turn to page 6. There is another
46 indication of this, where it's said that he was paranoid
47 and convinced the victim was a sexual predator.

1
2 So, Commissioner, with that background in mind, with
3 the psychiatric background of Mr Kellie, it's plausible
4 that Mr Kellie's interview was in relation to the robbery
5 of JR, but that Mr Kellie was recounting his distorted
6 perception of the interaction that he had with JR.
7

8 Now, in this vein, you will recall that JR was
9 speaking on the phone to a friend, that it was a female
10 friend, and that when Mr Kellie approached him, he
11 confronted him and began to yell incoherently at him. That
12 would be consistent with the mental state that Dr Clark
13 describes.
14

15 Commissioner, alternatively, if Mr Kellie was indeed
16 confused and conflating events, a reasonable possibility
17 exists that he was conflating the robbery of JR with
18 another occasion, or multiple other occasions, on which he
19 was approached for sex in Centennial Park. There is some
20 indication of this in Mr Kellie's descriptions that he had
21 been approached for sex by the same victim up to three or
22 four times before, and his knowledge of Centennial Park as
23 a popular meeting place for men seeking to have sex with
24 men.
25

26 In evaluating whether Mr Kellie describes a sexual
27 advance by Mr Cawsey, it may be observed that in the
28 January 2010 interview, Mr Kellie never described that the
29 victim had his pants or his underpants removed. Given
30 Mr Kellie's apparent preoccupation with the sexual advances
31 made, this would be an unusual detail for him to omit and
32 something that would make it inconsistent with the murder
33 of Mr Cawsey.
34

35 So, Commissioner, in summary, there are aspects of
36 Mr Kellie's interview that give rise to a real suspicion
37 that he was conflating his interactions with Mr Cawsey and
38 with JR, and if that was the case, the interview could be
39 taken as an admission to meeting Mr Cawsey and becoming
40 angered at him after being propositioned for sex. This was
41 the interpretation favoured by the original investigating
42 police as well as later the Coroner.
43

44 However, Mr Kellie's interview is open to a number of
45 other reasonable interpretations, including that he was
46 describing a distorted perception of his interactions with
47 JR, that he was conflating the robbery of JR with other

1 occasions on which he had been propositioned by men within
2 Centennial Park, or that Mr Kellie was lying about being
3 propositioned by JR in order to try and mitigate his
4 conduct in the robbery.
5

6 Commissioner, even taking this evidence at its highest
7 and assuming that Mr Kellie was conflating encounters with
8 JR and Mr Cawsey, the problems with relying upon this
9 interview as a reliable admission are self-evident. This
10 case theory would entail that Mr Kellie was switching
11 between multiple events throughout the interview. It would
12 be necessary to identify which aspects of the interview
13 related to Mr Cawsey as opposed to JR, and also to treat
14 those aspects as sufficiently reliable.
15

16 So, Commissioner, while it is an arguable proposition
17 that Mr Kellie was conflating the murder of Mr Cawsey and
18 the robbery of JR in his January 2010 interview, it's
19 submitted that this interview does not provide a safe or
20 reliable basis, at least on its own, for a finding that
21 Mr Kellie was responsible for Mr Cawsey's death.
22

23 Commissioner, what I have described thus far
24 summarises the case against Mr Kellie as at the time he was
25 charged with Mr Cawsey's murder in 2015. You will recall,
26 as I already set out, that the DPP then discontinued
27 proceedings against Mr Kellie and that the reasons provided
28 were at least consistent with what I have set out - namely,
29 firstly, difficulties with the admissibility of the
30 tendency and coincidence evidence; secondly, issues with
31 the reliability of Mr Kellie's purported admissions; and,
32 thirdly, difficulties with the statements alleged to be
33 lies evidencing a consciousness of guilt.
34

35 In part but not exclusively, these difficulties arose
36 on the basis of Mr Kellie's mental illness.
37

38 At the coronial inquest in 2015, there was significant
39 exploration of whether Mr Kellie had a mental illness and,
40 if so, whether it affected his ability to answer questions
41 in police interviews responsively, truthfully or reliably.
42

43 Now, in part, this line of inquiry was undertaken
44 because of evidence gathered by police that suggested that
45 Mr Kellie may have been lying or exaggerating about his
46 mental illness to gain an advantage in court proceedings.
47

1 Commissioner, I have set out in my written
2 submissions, at paragraphs 207 to 231, the evidence
3 pertaining to Mr Kellie's mental illness, and there was
4 a significant body of evidence that was obtained.
5

6 While Mr Kellie's mental health presentation is
7 complex and contested, at least two forensic psychiatrists
8 who examined Mr Kellie in person in 2011 concluded that he
9 suffered from a psychotic illness. This is consistent with
10 evidence that he was diagnosed with and treated for mental
11 illness while in custody. It's also congruent with his
12 presentation while living as a homeless person in
13 Centennial Park, with various witnesses describing him as
14 not dressing according to the weather, shouting at people
15 for no apparent reason, and muttering to himself.
16

17 The forensic psychiatrist at the coronial inquest who
18 expressed the most doubt about whether Mr Kellie suffered
19 a mental illness put it no higher than that there was
20 a possibility that he feigned a psychotic illness. That
21 psychiatrist had not conducted a personal evaluation on
22 Mr Kellie.
23

24 Commissioner, perhaps more importantly, even if one
25 were to assume that Mr Kellie was not affected by
26 a psychotic illness at the time of the interview in
27 relation to the robbery of JR, many of the issues
28 identified above with relying upon the interview of January
29 2010 as an admission in relation to the murder of Mr Cawsey
30 remain.
31

32 It remains the fact that Mr Kellie did not
33 unambiguously describe an encounter with Mr Cawsey.
34 Indeed, to accept the 17 January 2010 interview as
35 a reliable admission with substantial probative weight
36 would require the walking of a fine line between
37 establishing that Mr Kellie's mental state was sufficiently
38 impacted that he would confuse or conflate two separate
39 events, but not so impacted that he could be confabulating
40 or misperceiving some details.
41

42 So, Commissioner, in short, it is submitted that the
43 new psychiatric evidence obtained at the coronial inquest
44 does not substantially change the treatment that should be
45 given to Mr Kellie's interview on 17 January 2010 as
46 a purported admission.
47

1 As I have already described, after receiving the
2 coronial referral, the Director of Public Prosecutions
3 declined to bring a further prosecution against Mr Kellie.
4 I will return briefly to tab 12 [SCOI.10483.00062_0001] and
5 ask that that be put on the screen. Commissioner, you will
6 see the final sentence:

7
8 *In particular, the newly obtained medical*
9 *opinions as to Mr Kellie's mental health do*
10 *not overcome difficulties with the*
11 *reliability of "admissions" and statements*
12 *alleged to be "lies as consciousness of*
13 *guilt".*

14
15 Commissioner, you are, of course, engaged in a
16 different task to a prosecutor called to assess whether
17 there are reasonable prospects of conviction.

18
19 A finding that Mr Kellie was responsible for
20 Mr Cawsey's death could be made consistently with a finding
21 that there was insufficient evidence to prove his guilt
22 beyond reasonable doubt or even to bring a prosecution.
23 However, any such finding would be a serious finding, and
24 consistent with the authority of *Briginshaw v Briginshaw*,
25 you would be required to feel an actual persuasion before
26 making such a finding. Mr Kellie is also now deceased and
27 cannot answer any allegations against him.

28
29 My submission is that while there is a plausible
30 argument that Mr Kellie was responsible for the death of
31 Mr Cawsey, the evidence is insufficient to establish
32 conclusively on the balance of probabilities that Mr Kellie
33 was responsible for inflicting the stab wound suffered by
34 Mr Cawsey.

35
36 Commissioner, I turn now to the third topic, and that
37 is the question of bias. Given that it is unknown or
38 cannot conclusively be determined who it was that committed
39 the murder of Mr Cawsey, but that there is a realistic
40 possibility that it was Mr Kellie, the question of bias in
41 my submissions will be considered in two ways: the first
42 will be on the assumption that it was Mr Kellie who
43 committed the murder of Mr Cawsey; the second will be on an
44 assumption that an unknown person committed the murder of
45 Mr Cawsey.

46
47 So in relation to the first of those, the Inquiry

1 sought an opinion from Dr Eagle, a forensic psychiatrist,
2 as to whether there was evidence that Mr Kellie was
3 motivated by LGBTIQ hate or bias on the assumption that the
4 interview of 17 January 2010 related to interactions
5 between Mr Kellie and Mr Cawsey.
6

7 Dr Eagle considered that, even on this assumption,
8 there was insufficient information to reliably determine
9 the motivation for Mr Kellie's behaviour, and in Dr Eagle's
10 opinion, interpretation of Mr Kellie's motivations is
11 significantly complicated by his psychotic illness and
12 traumatic experiences.
13

14 So Dr Eagle states that it is plausible that, if
15 Mr Kellie did have a chronic psychotic illness, symptoms of
16 psychosis could have impaired his judgment and resulted in
17 a misinterpretation of Mr Cawsey's behaviour, contributing
18 to the violence.
19

20 Dr Eagle sets out three possible motivations for
21 Mr Kellie's response to Mr Cawsey's alleged sexual
22 advances. This includes first, "a reactive albeit
23 excessive response to a persecutory misinterpretation of
24 Mr Cawsey's intentions"; secondly, "poorly controlled anger
25 at Mr Cawsey for propositioning him sexually but not
26 necessarily motivated by hate (arising from problems with
27 anger management, rather than hatred towards a specific
28 group due to prejudice'; or, thirdly, "anger motivated by
29 hatred due to prejudice towards a specific group."
30

31 Certainly the third of these motivations would bring
32 Mr Kellie's response to Mr Cawsey within the definition of
33 an LGBTIQ hate crime as adopted by this Inquiry - that is,
34 Mr Cawsey's sexuality as perceived by Mr Kellie would have
35 been a factor in the commission of the stabbing. However,
36 in respect of these first two motivations identified by
37 Dr Eagle, Mr Cawsey's sexuality per se would not have
38 played a factor in the Commission of the offence, as
39 opposed to Mr Kellie's perception of, or reaction to,
40 Mr Cawsey's sexual advances that Mr Kellie believed were
41 "forced".
42

43 Accordingly, even on the assumption that Mr Kellie
44 stabbed Mr Cawsey following an interaction that was
45 described by him in his interview, it is not possible to
46 conclusively determine that the killing of Mr Cawsey was an
47 LGBTIQ hate crime.

1
2 So I turn then to look at the other assumption, and
3 that is that the possibility that an LGBTIQ hate crime was
4 committed by another person. Police investigating
5 Mr Cawsey's death considered that possibility. Detective
6 Senior Constable Staples provided the opinion that
7 Mr Cawsey's death was "not a targeted gay hate attack".
8 She gave three reasons for this, which I will consider in
9 turn.

10
11 First, Detective Staples concluded that the murder
12 itself is not indicative of it being hate crime related.
13 Now, in providing this opinion, she relied principally upon
14 an email received from Ms Kimberley Ora, dated 17 February
15 2015.

16
17 Commissioner, that is at tab 63 of the tender bundle,
18 but I don't require you to go to it.

19
20 In that email, Ms Ora stated, among other things, that
21 the absence of excessive violence against the victim would
22 be the main factor that does not support this being a hate
23 crime.

24
25 Commissioner, in relation to that opinion, while it
26 may be accepted that excessive violence can indicate an
27 emotion-based motive consistent with anger, rage or hate,
28 it does not necessarily follow that the absence of
29 excessive violence can be used to exclude the fact of
30 a hate crime.

31
32 It is necessary to appreciate, Commissioner, that
33 Ms Ora's email, which was tendered at the inquest into
34 Mr Cawsey's death, was not an expert report. Ms Ora,
35 appropriately, in her email qualified her opinion as
36 preliminary and not based on a thorough review of the
37 materials. Despite Ms Ora stating in the email that she
38 would "put some of these thoughts into a report for you",
39 no report was ever prepared or tendered at the coronial
40 inquest, and so her opinion must be viewed with those
41 qualifications.

42
43 Secondly, Commissioner, Detective Staples noted that
44 the area of Snake Bank and Busbys Pond was not known as
45 being a place for male sexual activity, and that, she
46 concluded, would make it unlikely that persons intent on
47 committing violence against men would choose to focus on

1 that area.

2
3 Police took a number of statements from security
4 guards and from park rangers as to the areas of the park in
5 which sexual activity principally occurred. There are
6 parts of Centennial Park that are well-known beats.
7 However, notably, the areas that are identified as beats
8 did not include the southern bank of Busbys Pond where
9 Mr Cawsey's body was found.

10
11 Commissioner, accepting this information reduces the
12 likelihood that Mr Cawsey was the victim of a planned
13 LGBTIQ hate attack. However, it does not exclude the
14 possibility of an opportunistic attack on Mr Cawsey, nor
15 does it exclude the possibility of Mr Cawsey being followed
16 to the location where he was ultimately killed.

17
18 Commissioner, thirdly and finally, Detective Staples
19 observed that there were no police or internet records
20 indicating that gay hate offending was occurring in the
21 Centennial Park area during 2009. It's necessary to make
22 some comments as to this conclusion.

23
24 On 20 December 2016, a request for assistance was sent
25 by Detective Staples to the Bias Crimes Unit seeking
26 further information about whether there existed any
27 evidence of gay hate offending within the Centennial Park
28 area between 1 January 2008 and 31 December 2010.
29 Commissioner, that request is at tab 64 [SCOI.83353_000] of
30 the tender bundle.

31
32 In response to the Acting Sergeant Corbett of the Bias
33 Motivated Crimes Unit within Operational Programs prepared
34 a document setting out each "sexual preference prejudice
35 incident" for each month between January of 2008 and May
36 2009. No incidents in the Centennial Park area were
37 identified, and that document is located at tab 66
38 [SCOI.83355_0001].

39
40 In an email to Detective Senior Constable Staples
41 dated 9 December 2016, Sergeant Steer set out the following
42 limitations of the data that had been provided.

43
44 First, in June of 2009, the Bias Crimes Unit was
45 disbanded and no bias crime capability existed within the
46 NSW Police Force from then until September 2012. As
47 a result, there was no available data from May 2009 and

1 none in the months preceding Mr Cawsey's death.

2
3 Commissioner, this is a matter that has been the
4 subject of evidence and submissions in public hearings of
5 the Inquiry and I don't propose to say a great deal further
6 at this time, other than to note that it is regrettable
7 that that data did not exist.

8
9 Secondly, in the opinion of Sergeant Steer, hate
10 crimes were underreported by the community and "police
11 especially back then either didn't flag the associated
12 factor to identify it or didn't identify the crime as
13 a hate crime." So those limitations that were acknowledged
14 by Sergeant Steer need to be borne in mind when considering
15 the evidence that there was no hate crimes occurring in the
16 area.

17
18 It is submitted that, at most, the data produced by
19 the Bias Motivated Crimes Unit can be taken as qualified
20 evidence for there being no readily identifiable cluster of
21 "sexual preference prejudice incidents" occurring in
22 Centennial Park.

23
24 Now, each of these factors that were identified by
25 Detective Staples is relevant to the assessment of the
26 probability of Mr Cawsey being the target of an LGBTIQ
27 attack. However, in the absence of a known person
28 responsible for Mr Cawsey's death, they're not able to
29 exclude the possibility of the stabbing of Mr Cawsey being
30 an LGBTIQ hate crime.

31
32 Notwithstanding the fact as identified by Detective
33 Staples, it is difficult to ignore the confluence of
34 features of Mr Cawsey's death that make it likely that his
35 sexuality or at least his sexual conduct played a role in
36 his death. This includes: first, his purpose for
37 attending Centennial Park, namely, to engage in a sexual
38 act with another man; secondly, Centennial Park's
39 reputation as a beat; thirdly, the evidence that he engaged
40 in mutual masturbation over the phone not long prior to his
41 death; and, fourthly, the positioning of his clothing when
42 his body was located.

43
44 While the circumstance of Mr Cawsey's death remains
45 unknown, it can be inferred that Mr Cawsey was engaged in
46 an expression of his sexuality in the period preceding his
47 death and would have been seen to be doing so by any

1 offender. This gives rise to a distinct possibility that
2 Mr Cawsey was the target of an attack on the basis of the
3 expression of his sexuality.
4

5 However, ultimately, while the identity of Mr Cawsey's
6 killer cannot be proven, there is no sufficient basis for
7 a conclusion as to whether or not his murder involved
8 LGBTIQ hate or bias.
9

10 Commissioner, the next topic that I turn to is about
11 forensic testing conducted by the Inquiry. The Inquiry
12 arranged for further forensic analysis in relation to
13 a number of exhibits that were assessed to be of particular
14 forensic significance. The results in relation to this
15 analysis are as follows.
16

17 So, Commissioner, you will recall that a section of
18 rollie cigarette butt was located at the crime scene and
19 that previous testing revealed a mixed DNA profile.
20 Further testing conducted in 2023 utilised the latest
21 deconvolution software - that is software that, as
22 I explained earlier, separates out the two profiles in the
23 mixture.
24

25 Partial DNA profiles were obtained. These are of
26 better quality than the ones that were previously found.
27 These profiles have been uploaded into the New South Wales
28 database but there have been no matches to those profiles.
29

30 Similarly, in respect of the black G-string, you'll
31 recall that there was the DNA of an Unknown Male C that was
32 located on the G-string at the request of the Inquiry, the
33 original profile was upgraded using the latest DNA typing
34 system used by FASS. That upgraded typing system, which is
35 known as PowerPlex 21, increases the number of loci on
36 the chromosome tested from 10 to 21. So there is now an
37 enhanced profile. This profile has been uploaded for
38 searching on the New South Wales and national database,
39 however, it remains unidentified.
40

41 Commissioner, a penis swab was taken from Mr Cawsey
42 post-mortem. Previous testing revealed that a partial DNA
43 profile matched Mr Cawsey. There was further testing of
44 this done in 2023 by FASS in order to obtain if any further
45 information could be yielded. There was again a weak
46 partial DNA profile consistent with Mr Cawsey but no
47 further information.

1
2 Commissioner, during the crime scene examination, as
3 I've noted, a wallet containing Mr Cawsey's driver's
4 licence was located in his trackpants. Previous testing
5 had revealed the DNA, trace DNA, from at least one other
6 individual, but it was at levels that were too low for
7 interpretation.

8
9 Now, although Detective Staples would ultimately
10 conclude that there was no evidence of any property being
11 stolen from Mr Cawsey, there was evidence that he had
12 withdrawn \$650 from his bank account on the Thursday prior
13 to his death, and that money was not located in his wallet
14 or his apartment, and accordingly, the Inquiry considered
15 that an investigative lead could arise if it was possible
16 to determine the individual who deposited the trace DNA
17 identified by earlier testing.

18
19 However, consistent with the original testing and
20 notwithstanding improvements in technology, reanalysis of
21 the swab revealed a mixed DNA profile with the major
22 profile matching Mr Cawsey and the minor profile being too
23 weak for interpretation.

24
25 Commissioner, the next series of testing was on
26 property that was owned by Mr Kellie. As I noted, there
27 were, in the course of the investigation, items of clothing
28 and shoes that were collected from Mr Kellie's property.
29 Among these were a black hood and a black glove. Previous
30 testing had been negative for blood and accordingly, at the
31 time, a decision was made not to test for trace DNA.

32
33 Notwithstanding the absence of blood, the Inquiry
34 considered that any trace DNA from Mr Cawsey that was
35 located on property owned by Mr Kellie would be of forensic
36 significance as it could indicate some interaction between
37 the two men.

38
39 In 2023, FASS took a total of 43 tape lifts from the
40 inside and the outside of the hood and also 10 tape lifts
41 from the gloves. All of this testing revealed that there
42 was no DNA originating from Mr Cawsey. There was DNA
43 originating from Mr Kellie, but Mr Kellie's DNA would be
44 expected on both the hood and the glove given that they
45 belonged to him, so those results are of no forensic
46 significance.

47

1 Similarly, police seized Puma brand shoes worn by
2 Mr Kellie. Mr Kellie would later admit to wearing those
3 shoes on the morning of Mr Cawsey's death. Previous
4 testing of one of the shoes had revealed a partial DNA
5 profile, however, due to low levels of DNA, it was unable
6 to be further interpreted, and previous DNA testing was
7 unsuccessful in relation to the right shoe.

8
9 As with the hood and the glove, the Inquiry considered
10 that any trace DNA from Mr Cawsey would be of forensic
11 significance, however, again, forensic testing in 2023
12 revealed a mixed DNA profile that was too weak for further
13 interpretation.

14
15 Commissioner, I do note that DNA testing on the right
16 shoe is ongoing and supplementary submissions will be filed
17 in relation to any results.

18
19 So, Commissioner, in short, none of the forensic
20 testing yielded new lines of inquiry nor advanced any
21 theory as to who may have been responsible for the stabbing
22 of Mr Cawsey.

23
24 Commissioner, it remains only now to make submissions
25 as to the manner and cause of Mr Cawsey's death and to
26 propose any recommendations.

27
28 Commissioner, the findings as to the manner and cause
29 made at the original coronial inquest remain appropriate.
30 That is, that the cause of Mr Cawsey's death was
31 haemopericardium as a result of a stab wound to his left
32 chest. Given the conclusion I earlier expressed that the
33 evidence was insufficient to ground a positive finding
34 against Mr Kellie, it is submitted that the finding should
35 reflect that the person who inflicted the stab wound is
36 unknown or cannot be conclusively determined.

37
38 Commissioner, it is proposed that a recommendation be
39 made to FASS, the Forensic and Analytical Science Service,
40 to take steps to further enhance the profiles of Unknown
41 Males A, B and C as technological developments allow, and
42 to continue to run the unidentified profiles against State
43 and national DNA databases on a regular basis, so that the
44 NSW Police Force will be notified in the event that there
45 is an individual or familial match to any profile.
46 Commissioner, those are my submissions.

47

1 THE COMMISSIONER: Thank you. Anything at this stage?

2

3 MR BARRIE: Thank you, Commissioner. The Commissioner of
4 Police wishes to reserve her position. She would also like
5 to take an opportunity to extend her condolences to the
6 friends and family of Mr Cawsey.

7

8 THE COMMISSIONER: All right. Thank you.

9

10 Can I just direct some remarks to Christine and Kerry.
11 Your attendance here today is very much appreciated and
12 I too express my condolences to both of you and to members
13 of your family.

14

15 I will reserve my position, I will hear from the
16 police in due course and I will report on this in detail.

17

18 Thank you all. I will now adjourn.

19

20 **AT 3.39PM THE SPECIAL COMMISSION OF INQUIRY WAS ADJOURNED**
21 **ACCORDINGLY**

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