CHAPTER 10: SUBMISSIONS ON THE EVIDENCE RELEVANT TO SENTENCE: MS FOLBIGG'S MENTAL STATE

128. Pursuant to s 82(2)(b) of the CAR Act the Judicial Officer may refer the matter to the Court of Criminal Appeal for review of the sentence imposed if he is of the opinion that there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence.

129. As referred to earlier in these submissions, at the conclusion of Ms Folbigg's evidence, psychiatric reports recently prepared by Dr Michael Diamond and Dr Michael Giuffrida, together with reports previously prepared by psychiatrists at the time of trial by Dr Michael Giuffrida, Dr Bruce Westmore and Dr Yvonne Skinner were received into evidence on the basis that Ms Folbigg's evidence about the diaries had rendered expert opinion about her mental state relevant.

130. Further to this, the Judicial Officer identified that the recent report of Dr Diamond contained an opinion as to a diagnosis of Complex Post-traumatic Stress Disorder, which diagnosis had not been made in the reports tendered before the sentencing judge in determining Ms Folbigg's sentence and subsequently considered by the Court of Criminal Appeal.[208]

131. In contemplation of a potential argument that there is a reasonable doubt as to a matter that may have affected the nature or severity of the sentence pursuant to s 82(2)(b) of the CAR Act, those assisting the Inquiry obtained a further opinion of Dr Giuffrida. Dr Giuffrida prepared a further report dated 13 May 2019, expressing his opinions about Dr Diamond's diagnosis of Ms Folbigg.

132. These submissions identify and consider the evidence about Ms Folbigg's mental state as was available at sentence (including at her successful appeal against sentence) and is available in the Inquiry in considering whether there is a reasonable doubt as to any matter that may have affected the nature or severity of her sentence.

[208] Transcript of the Inquiry, 1 May 2019 T811.30-812.5.

2003 Report of Dr Michael Giuffrida

Early assessments of Ms Folbigg

133. Dr Michael Giuffrida first examined Ms Folbigg on two occasions at Mulawa Correctional Centre in his capacity as Visiting Medical Officer Psychiatrist to Corrections Health on 22 May 2003 and 5 June 2003 arising from concerns as to possible risks of self-harm.[209]

134. At the time of both examinations Ms Folbigg was 35 years old, had been separated from Craig Folbigg for three years, and was being held in isolation in an induction unit at Mulawa Correctional Centre where an assessment was being made regarding longer term placement.[210] Dr Giuffrida noted the following from his brief mental state examination of Ms Folbigg on 22 May 2003:

> *Remarkably calm and detached and able to speak at length without distress at any point, strikes me as being affectless in this situation. Spoke clearly and coherently without any hint of thought disorder, delusional ideas or particular preoccupation other than details of her offences. I found her remarkably lacking in the expression of grief in relation to these.*[211]

135. On 5 June 2003 Ms Folbigg agreed with Dr Giuffrida that she came across as being emotionally detached and noted that her mother and foster sister always said that she "built a brick wall around her emotions".[212] She explained that she had always coped with conflict and crises in this way.[213]

Engagement

136. Dr Giuffrida was formally engaged by Legal Aid to produce a "comprehensive psychiatric report" in advance of sentence.[214]

137. Dr Giuffrida was briefed with a summary of facts from police, Ms Folbigg's diaries as tendered at trial, a selection of "Defence extracts which were not

[209] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 2.
[210] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 2.
[211] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 3.
[212] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 4.
[213] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 4.
[214] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 1.

tended [sic] at the trial",[215] Ms Folbigg's medical records and her Family and Community Services file.[216]

138. He examined Ms Folbigg for the purposes of preparing a report on 19 June 2003, 31 July 2003, 12 August 2003 and 14 August 2003 and referred in particular to two long sessions,[217] "each of about two hours discussing her relationship with each of her children and her husband."[218]

139. Following these sessions, Dr Giuffrida prepared a report dated 27 August 2003, which was ultimately tendered before the sentencing Judge.[219]

Diagnosis and conclusions

140. Dr Giuffrida described his early assessment of Ms Folbigg in May 2003 as revealing no psychiatric disorder or anything to indicate any underlying personality disorder, with the exception of the apparent detachment regarding the death of her children.[220]

141. Following his further sessions with her, Dr Giuffrida came to the following conclusions:

a. Although at times Ms Folbigg could engage warmly and responsively, there was "always a somewhat blunted, distant even remote quality to her ability to relate."[221] In light of her otherwise graphic descriptions of the deaths of her children, he found it "highly significant" that there was a remarkable inertness of emotional response to such discussions about their deaths and he was unable to elicit any symptoms suggestive of her reliving the events.[222]

b. He could find no evidence of any disorganisation of thinking, formal thought disorder, over-valued or delusional ideas or perception abnormality.[223]

c. She was of at least average verbal intelligence with no evidence of development disability.[224]

[215] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 18.
[216] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) pp 1-2.
[217] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 1.
[218] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 4.
[219] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003).
[220] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 3.
[221] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 14.
[222] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 14.
[223] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 14.

d. There was no clear evidence of psychotic illness, "remarkably little" to suggest any serious personality disorder and a "remarkable absence" of historical features or the core criteria for psychopathy.[225]

e. She had a history of pervasive depression, sometimes called a chronic dysthymia, which seemed to become more intense and long lasting after the death of each child. He concluded this "probably represents Ms Folbigg's particular expression of grief and bereavement".[226]

f. He did not consider Ms Folbigg suffered from a psychotic level of depression, but that it was serious and persistent enough to have strongly contributed to a state of mind that led to her killing her children.[227]

g. Her response to the death of her children was characterised by "an extraordinary absence of any of the normal mourning or bereavement signs" and did not reveal the symptoms expected of post-traumatic stress disorder.[228]

h. He described Ms Folbigg's case as a "very significant phenomenon" following the trauma she experienced as a young girl.[229] This resulted in a profound and probably irreversible impairment of her capacity to develop any meaningful emotional bonding and attachment, which "contributed in some part at least to her total inability to relate, care for and protect her own children".[230]

Report of Dr Bruce Westmore

Engagement

142. Dr Bruce Westmore first examined Ms Folbigg on 13 September 2002 and 21 January 2003, although on the documents available the purpose of these assessments is unclear.[231]

[224] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) pp 14, 20.
[225] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 20.
[226] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 19.
[227] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 20.
[228] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 20.
[229] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 20.
[230] Exhibit BD, Report of Dr Michael Giuffrida (27 August 2003) p 22.
[231] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 1.

143. Following Ms Folbigg's convictions, Legal Aid briefed Dr Westmore to "psychiatrically re-examine Kathleen".[232] In his report dated 16 June 2003 which was tendered at sentencing, Dr Westmore noted that if he assumed Ms Folbigg did kill her children or was responsible for their deaths, he would have to "ask myself why these things occurred."[233]

144. Dr Westmore refers to being briefed with "a large number of documents relating to the trial and its outcome", which included as least some of the diary entries.[234]

Diagnosis and conclusions

145. At the time of assessment in June 2003, Dr Westmore did not consider Ms Folbigg suffered from a major depressive illness and noted there were no psychotic features evident.[235]

146. He did not consider her history to be consistent with the diagnosis of Munchausen syndrome by proxy but thought that it would be reasonable to assume that she "suffers from a severe personality disorder with anger and impulse control being central difficulties."[236]

147. It was Dr Westmore's view that at the time of the offending that Ms Folbigg's mind was not distorted or disturbed by postpartum depression and she did not suffer any other clearly identifiable psychiatric illness which led her to behave aggressively towards her children.[237]

148. Dr Westmore's conclusions are set out again here for convenience:

> *Based on the assumption that she was indeed responsible for the death of her children, it is probable in my view that she displaced onto the children her own anger and frustration with the difficulties she was having with her partner. It is unclear to me to what extent childhood difficulties played any immediate role in her behaviours although her childhood history is likely to have influenced her personality development…*

[232] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 1.
[233] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 2.
[234] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 4.
[235] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 4.
[236] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) pp 5-6.
[237] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 6.

Her own concerns about not being a good or adequate mother, combined with her personality difficulties and vulnerability and her problems dealing with emotions such as anger and depression and frustration are all likely in combination to have led her to feel she could not cope with the children and subsequently her acting towards them in a way in which caused their deaths.[238]

Report of Dr Yvonne Skinner

Instructions and briefing material

149. Dr Yvonne Skinner was briefed by the Office of the Director of Public Prosecutions prior to Ms Folbigg's trial to prepare a report presenting her "opinion as to whether an unbalance of mind arose from birth or lactation in the accused, as opposed to any other abnormality or character defect".[239]

150. She was briefed with material from trial including a statement of the prosecution case and witness statements, as well as Ms Folbigg's diaries, ERISP and DOCS file.[240] She prepared a report dated 22 January 2003 which was tendered at sentence.[241]

151. Dr Skinner did not have the opportunity to examine Ms Folbigg.

Diagnosis and conclusions

152. Dr Skinner concluded that she was unable to find any evidence to suggest that Ms Folbigg was suffering from a mental illness or mental disorder, or that she was suffering from a significant degree of depression.[242]

153. Dr Skinner acknowledged that Ms Folbigg had an "emotionally disturbed childhood" characterised by an "unsatisfactory foster placement, institutional placement and later a foster placement that proved more satisfactory".[243] In considering the significance of Ms Folbigg's chaotic early childhood, Dr Skinner states:

[238] Exhibit BB, Report of Dr Bruce Westmore (16 June 2003) p 6.
[239] Letter from ODPP to Dr Yvonne Skinner (6 December 2002) p 1.
[240] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 1.
[241] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003).
[242] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 13.
[243] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 13.

Most psychiatrists would agree the background history of such disturbance would lead to personality problems or possibly psychiatric disorder, but studies show that there is no recognisable link between such childhood emotional disturbance and a particular psychiatric disorder or psychological condition.[244]

154. Dr Skinner was not able to find any evidence that Ms Folbigg suffered from a postpartum psychiatric disorder, nor any other psychiatric condition that might have affected her judgment or ability to cope.[245]

Consideration of psychiatric evidence at sentence

155. At sentence the psychiatric reports of Dr Skinner, Dr Giuffrida and Dr Westmore were tendered before the sentencing judge.[246] The sentencing Judge also had the benefit of the oral evidence Dr Westmore.[247]

156. Noting that Dr Skinner did not examine Ms Folbigg, and the limited scope of her brief regarding the availability of a psychiatric defence before trial, the sentencing judge determined Dr Skinner's report to be of limited assistance.[248]

157. However, his Honour accepted the evidence of Dr Giuffrida and Dr Westmore, which he summarised as follows:

a. by 18 months of age Ms Folbigg was a seriously disturbed and regressed little girl, and by this stage was severely traumatised;[249]

b. antisocial personality disorder was not an appropriate diagnosis in Ms Folbigg's case;[250]

c. Ms Folbigg was not psychotic;[251]

d. the overall theme of the diaries is of a woman always coping at the margins of her capacity to bond, relate to, provide for and care for her

[244] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 13.
[245] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 13.
[246] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003); Exhibit BB, Report of Dr Bruce Westmore (25 August 2003); Exhibit BD, Report of Dr Michael Giuffrida (17 August 2003).
[247] *R v Folbigg* [2003] NSWSC 895, [71].
[248] *R v Folbigg* [2003] NSWSC 895, [50].
[249] *R v Folbigg* [2003] NSWSC 895, [51].
[250] *R v Folbigg* [2003] NSWSC 895, [56].
[251] *R v Folbigg* [2003] NSWSC 895, [57].

children, a woman roused easily to panic and readily defeated by any perception on her part that she might fail to provide for her children;[252]

e. the stresses on Ms Folbigg of looking after a young child were greater than those which would operate on an ordinary person because she was psychologically damaged and barely coping;[253]

f. throughout these events Ms Folbigg was depressed and suffering from a severe personality disorder, and her capacity to control her behaviour was severely impaired;[254]

g. throughout her marriage Ms Folbigg was affected by the abuse perpetrated on her during the first 18 months of her life and the effects of this included an inability to form a normal, loving and forbearing relationship with her children;[255]

h. her depression went unrelieved and on occasions turned itself into anger;[256]

i. Ms Folbigg's mental state and her anxiety about it left her unable to shrug off the irritations of unwell, wilful and disobedient children, and she was not fully equipped to cope;[257] and

j. on occasions she appeared cool, detached, self-interested and unaffected by the fate of her children but in truth she suffered remorse which she could not express.[258]

158. The sentencing judge considered that the above findings provided "significant mitigation of [Ms Folbigg's] criminality"[259] so as to avoid the imposition of the maximum penalty of life imprisonment. He instead sentenced her to an effective head sentence of 40 years' imprisonment with a non-parole period of 30 years.[260]

[252] *R v Folbigg* [2003] NSWSC 895, [66].
[253] *R v Folbigg* [2003] NSWSC 895, [91].
[254] *R v Folbigg* [2003] NSWSC 895, [94].
[255] *R v Folbigg* [2003] NSWSC 895, [95].
[256] *R v Folbigg* [2003] NSWSC 895, [95].
[257] *R v Folbigg* [2003] NSWSC 895, [95].
[258] *R v Folbigg* [2003] NSWSC 895, [96].
[259] *R v Folbigg* [2003] NSWSC 895, [93]-[94].
[260] *R v Folbigg* [2003] NSWSC 895, [100].

Ms Folbigg's appeal against sentence

159. Ms Folbigg appealed to the Court of Criminal Appeal against both conviction and sentence. In respect of her sentence appeal, Sully J, Dunford and Hidden JJ agreeing, confirmed that the sentencing judge's findings in respect of the objective criminality of the offending were open to him, particularly in light of the evidence of Dr Westmore and Dr Giuffrida.[261] Sully J considered that it was important to note that the:

> *Psychological damage to which Barr J refers to in paragraph 91… was not trifling or peripheral damage, but was serious, deep-seated damage caused over a period of some years commencing when the appellant was a baby. The details make sad and shocking reading. It is unnecessary now to rehearse all of the ugly and distressing particulars.*[262]

160. Ms Folbigg's appeal against sentence was allowed on the grounds that:

a. there was an identifiable error in Barr J's method of cumulation that resulted in offering Ms Folbigg a "prospect… so crushingly discouraging as to put at risk any incentive that she might have to apply herself to her rehabilitation";[263] and

b. the overall result of a head sentence of 40 years and a non-parole period of 30 years was so crushing it appeared to be a "life sentence by a different name".[264]

161. Accordingly, the Ms Folbigg was re-sentenced on two counts to result in an effective head sentence of 30 years with a non-parole period of 25 years.[265]

[261] *R v Folbigg* [2005] NSWCCA 23, [169].
[262] *R v Folbigg* [2005] NSWCCA 23, [171].
[263] *R v Folbigg* [2005] NSWCCA 23, [186].
[264] *R v Folbigg* [2005] NSWCCA 23, [189].
[265] *R v Folbigg* [2005] NSWCCA 23, [191].

2019 report of Dr Michael Diamond

Instructions

162. Dr Michael Diamond was instructed by Ms Folbigg's representatives in the Inquiry to prepare an expert report in respect of Ms Folbigg specifically addressing the following questions:

a. History taken by you;

b. Diagnosis;

c. Prognosis;

d. Please advise whether our client's treatment to date has been appropriate;

e. What is your experience in treating and assessing individuals exposed to traumatic instances or circumstances?

f. Please read the diary material provided to you. In light of your diagnosis, if any, and your experience with the treatment and assessment of individuals exposed to traumatic instances, in your opinion, are the diary entries influenced or impacted by any psychological illness from which Ms Folbigg was suffering at the time of writing them?

g. What is survivor guilt?

h. Do you have experience in treating individuals labouring under 'survivor guilt'? If so, please detail that experience.

i. Taking into account your answers to questions 7 and 8 above, in your opinion, were Ms Folbigg's entries in her diaries influenced by 'survivor guilt'? Please provide reasons for your answer.

j. Insofar as your diagnosis differs from Drs Skinner or Westmore, please advise why if you are able; and

k. Any further comments you wish to make.[266]

[266] Exhibit BA, Report of Dr Michael Diamond (16 April 2019), letter of instruction, p 2.

Material provided and assessments conducted

163. In preparing his report, Dr Diamond was briefed with over 1,000 pages of material, including the previous psychiatric reports of Drs Westmore, Skinner and Giuffrida, documents relevant to and extracts from the evidence heard at trial, and contemporary material such as Ms Folbigg's Justice Health records.[267]

164. Dr Diamond assessed Ms Folbigg on 25 and 27 March 2019 for extended periods and produced a report dated 16 April 2019.[268] This report was tendered before the Inquiry.[269]

Commentary on previous psychiatric reports

Report of Dr Skinner

165. Dr Diamond was critical of Dr Skinner for not clearly describing what he refers to as Ms Folbigg's "history of significant early life disruption of attachments and bonds".[270] He recorded that Dr Skinner's primary concern was excluding any evidence of psychiatric condition capable of producing cognitive disturbance that could impair Ms Folbigg's functioning to the extent that she would have a defence to the charges faced.[271]

166. In response to Dr Skinner's assertion that "studies show that there is no recognisable link between… childhood emotional disturbance and a particular psychiatric disorder of psychological disorder",[272] Dr Diamond dismissed these studies as "not current".[273]

Report of Dr Westmore

167. Dr Diamond noted that Dr Westmore's report was prepared in the context of guilty verdicts, and as such his focus was on attempting to gain a better understanding of the pathogenesis of Ms Folbigg's offending.[274] The questions put to Ms Folbigg during Dr Westmore's assessment assumed her guilt, and as a result she was at times unable to respond.[275]

[267] Exhibit BA, Report of Dr Michael Diamond (16 April 2019), letter of instruction, p 1.
[268] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 1.
[269] Exhibit BA, Report of Dr Michael Diamond (16 April 2019).
[270] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 26.
[271] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 30.
[272] Exhibit BC, Report of Dr Yvonne Skinner (22 January 2003) p 13.
[273] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 30.
[274] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 30.
[275] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 31.

168. According to Dr Diamond, Dr Westmore's reporting of Ms Folbigg's early life experience was inconsistent with the account Dr Diamond obtained directly from Ms Folbigg.[276] Dr Diamond claimed Dr Westmore failed to explore Ms Folbigg's "significant early life experiences",[277] but later credited Dr Westmore with acknowledging that Ms Folbigg's "early life experiences are likely to have influenced her personality development".[278]

169. Dr Diamond is critical of Dr Westmore's decision to "extrapolate" in respect of the view individuals who are over-controlled may be prone to episodes of extreme anger, and suggests Dr Westmore makes speculative comments about how Ms Folbigg's observed features may have expressed themselves in a way that resulted in the murder of her children.[279]

Report of Dr Giuffrida

170. Dr Diamond described Dr Giuffrida's report as "comprehensive"[280] and describes Dr Giuffrida's account of Ms Folbigg's history to be consistent with his own.[281]

171. Dr Diamond considered that Dr Giuffrida assessed Ms Folbigg against the backdrop of her having been convicted. He reported that Dr Giuffrida did not consider the "distinct probability that she was suffering trauma related psychiatric illness, currently identified as Complex Post Traumatic Stress Disorder" despite identifying the diagnostic features associated with this condition.[282]

172. On Dr Diamond's assessment, Dr Giuffrida acknowledged the significant and prolonged trauma in the early life of Ms Folbigg to the extent that it has influenced her personality but did not associated it with the features that are commonly observed in abused children who develop Complex Post-traumatic Stress Disorder as a pervasive, long term psychiatric disorder.[283]

[276] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) pp 35-36.
[277] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 26.
[278] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 31.
[279] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 31.
[280] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 32.
[281] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 33.
[282] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 36.
[283] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 36.

Diagnosis and conclusions

173. Dr Diamond considered Ms Folbigg's affect at the time of assessment to be unusual, describing her as relating pleasantly but in a "superficial talkative way" and at times she was "emotionally blunted to the point of being detached and disassociated".[284]

174. He assessed her thought processes as rational with no evidence of perceptual distortion, delusional material, hallucinations or persecutory ideation and she presented with at least average intellect. She also showed adequate ability to reason and exhibited sound judgment.[285]

175. Dr Diamond considered it inevitable that Ms Folbigg has been affected by the trauma of her early childhood experiences so as to reflect this in her personality.[286] While she has deep-seated personality vulnerabilities, particularly in establishing and maintaining relationships, she does not exhibit pervasive and severe dysfunction to the point of being able to diagnose a personality disorder.[287]

176. In Dr Diamond's view Ms Folbigg has had episodes of mood disturbance sufficient to make a diagnosis of Persistent Mood Disorder (Dysthymia) and at times has had episodes of Major Depressive Disorder.[288]

177. He opined that the significant and pervasive psychiatric diagnosis is that of Complex Post-traumatic Stress Disorder. Dr Diamond did not define this disorder, but noted Ms Folbigg has "lifelong symptoms of emotional detachment, emotional numbing, difficulty trusting, engaging with others and experiencing periods of severe detachment to the point of dissociation",[289] following the severe disruption of and violence in childhood.[290]

178. Dr Diamond was asked to comment on how his diagnosis differs from those advanced by Dr Skinner and Dr Westmore. He observed the differences in their diagnostic views arise because they considered different aspects of Ms Folbigg's presentation and were asked to address different issues.[291]

[284] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 23.
[285] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 24.
[286] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 39.
[287] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 40.
[288] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 40.
[289] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 39.
[290] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 38.
[291] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 43.

179. Dr Skinner and Dr Westmore conducted their assessments seeking to identify any severe psychiatric illnesses that could account for Ms Folbigg's role in her children's deaths. While Dr Diamond agreed that he could find no evidence that Ms Folbigg has suffered from psychotic illness, severe mood disorder consistent with homicidal conduct or any other brain injury that might affect her conduct so as to carry out homicidal acts, he noted that neither Dr Skinner or Dr Westmore explored the possibility of a severe life-affecting condition such as Complex Post-traumatic Stress Disorder.[292] He considered this to be supported by Ms Folbigg's habitual ways of relating, her communication patterns, and her subjective emotional distress and trauma.[293]

180. Dr Diamond notes that "the significant history regarding her underlying primary psychiatric condition is contained in the DOCS records primarily",[294] discounting a difference in briefing material as a reason for differing diagnoses.

2019 Report of Dr Michael Giuffrida

Engagement

181. Following receipt of Dr Diamond's report, those assisting the Inquiry instructed Dr Michael Giuffrida to review Dr Diamond's report and prepare a short report outlining:

a. a definition of a diagnosis of Complex Post-traumatic Stress Disorder;

b. whether his opinions as expressed in 2003 in relation to diagnosis have changed or remained the same and why; and

c. any differences between his opinions and those of Dr Diamond, and to the extent possible, the reasons for those differences.[295]

182. Dr Giuffrida prepared a report dated 10 May 2019 which was tendered in the Inquiry.[296]

[292] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 43.
[293] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 43.
[294] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 43.
[295] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019), letter of instruction, p 2.
[296] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 2.

Definition of "Complex Post-traumatic Stress Disorder"

183. In his report Dr Giuffrida recorded that what may constitute Complex Post-traumatic Stress Disorder has presented as a controversial issue for more than 30 years.[297]

184. He confirmed that there is no specific reference to Complex Post-traumatic Stress Disorder in the mental disorders section of the International Classification of Diseases.[298] Similarly, while the fifth edition (published in 2013) of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association ("DSM V") provided an updated set of diagnostic criteria for Posttraumatic Stress Disorder, there is no specific reference to Complex Post-traumatic Stress Disorder.[299]

185. However, Dr Giuffrida acknowledged that since the late 1970s there have been a large number of studies which consider and support the concept of Complex Post-traumatic Stress Disorder as being:

> *A valid entity to understand the more complex patterns of the clusters of symptoms and behaviours associated with the more extreme forms of trauma suffered particularly by young children and adolescents.*[300]

186. In particular, Dr Giuffrida referred to a 2005 paper by van der Kolk et al which noted that Post-traumatic Stress Disorder has only ever captured a limited aspect of posttraumatic psychopathology, particularly in children.[301] The paper refers to a "DSM-IV Field Trial" which was conducted between 1990 and 1992 and found that:

> *Trauma, particularly trauma that is prolonged, that first occurs at an early age and that is of an interpersonal nature, can have significant effects on psychological functioning above and beyond PTSD symptomology. These effects include problems with dysregulation, aggression against self and others, dissociative symptoms, somatization and character pathology.*[302]

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[297] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 2.
[298] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 2.
[299] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 2.
[300] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 3.
[301] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 3; Bessel A van der Kolk, Susan Roth, David Pelcovitz, Susanne Sunday and Joseph Spinazzola, 'Disorders of Extreme Stress: The Empirical Foundation of a Complex Adaptation to Trauma' (2005) 18(5) *Journal of Traumatic Stress* 389.
[302] Bessel A van der Kolk, Susan Roth, David Pelcovitz, Susanne Sunday and Joseph Spinazzola, 'Disorders of Extreme Stress:

187. Dr Giuffrida suggested the following symptoms may also be prominent: impulsive outbursts of anger, self-destructive and suicidal behaviour, aberrant or deviant sexual behaviour, substance abuse, loss of trust, a pattern of re-victimisation, risk taking behaviour, amnesia or dissociative type experiences and a sense of hopelessness and loss of beliefs.[303]

Whether Dr Giuffrida's opinion as expressed in 2003 has changed

188. Dr Giuffrida confirmed that in his 2003 report he had prepared a detailed mental state examination to exclude the likelihood that Ms Folbigg had killed one or more of her children as a result of a common psychiatric disorder, having reference to the available literature and his own experience.[304] In particular, he excluded a Borderline or Antisocial personality disorder, or that Ms Folbigg was labouring under delusional beliefs or dissociative phenomena.[305]

189. He was able however to identify a "very clear and strong history of a pervasive depression",[306] that could best be described as "chronic Dysthymia which may have at times reached the intensity of a Major Depressive Episode" which he says was "strongly confirmed by my reading of her diaries."[307]

190. In his 2019 report in relation to posttraumatic stress disorder, Dr Giuffrida opined that as a child Ms Folbigg almost certainly did experience some of the Category A symptoms of posttraumatic stress disorder as a result of the traumatic events of violence between her mother and father.[308] He also stated that she probably does satisfy some of the Category D symptoms of posttraumatic stress disorder including persistent and exaggerated negative beliefs or expectations and feelings and behaviours of detachment and estrangement from others.[309]

191. Dr Giuffrida concluded:

> *In short, Ms Folbigg's mental state does satisfy some but certainly not all of the diagnostic criteria of Posttraumatic Stress Disorder… I would firm up my opinion expressed in my report of 2003 that Ms Folbigg has suffered from a pervasive Depression which probably persists and that*

The Empirical Foundation of a Complex Adaptation to Trauma' (2005) 18(5) *Journal of Traumatic Stress* 389, 394-395.
[303] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 2.
[304] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 6.
[305] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) pp 7, 9.
[306] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 7.
[307] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 9.
[308] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 9.
[309] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.

she shows significant features of a Posttraumatic Stress Disorder both in terms of the symptoms at least to a limited extent and in terms of the high likelihood that she was subject to extreme traumatic events of early childhood in causing such a Posttraumatic Stress Disorder.[310]

Review of Dr Diamond's diagnosis

192. Dr Giuffrida stated that he agrees with Dr Diamond's diagnosis of Complex Post-traumatic Stress Disorder "in terms of the causality of the condition".[311] He considered it appears:

> *Highly likely that Ms Folbigg was the victim of repeated continuous early childhood sexual, physical and emotional abuse and neglect and almost certainly observed extreme domestic violence and possibly the murder of her mother.*[312]

193. However, Dr Giuffrida identified two difficulties with Dr Diamond's diagnosis:

a. The concept remains somewhat controversial and in any case it involves a drawing together of a constellation of co-morbidities which the DSM V and the International Classification of Diseases has not recognised as a separate independent entity of its own right;[313] and

b. Dr Diamond does not provide a formal list of reasons for such a diagnosis. In addition to the anxiety and depression experienced by Ms Folbigg, with Complex Post-traumatic Stress Disorder there is commonly a history of self-harm and suicidal ideation and attempts, features of Dissociative Identity disorder or Dissociative Amnesia, body image disturbances, emotional dysregulation and Borderline personality disorder features. These symptoms were not readily apparent in Ms Folbigg in 2003 or from Dr Diamond's most recent interview of her.[314]

[310] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.
[311] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.
[312] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.
[313] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.
[314] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.

Submissions on psychiatric evidence regarding Ms Folbigg's mental state

194. In our submission, neither Dr Diamond's nor Dr Giuffrida's 2019 report contains evidence which is substantively new or fresh in relation to Ms Folbigg's mental state as it is relevant to sentence.

195. In that regard, Dr Diamond founds his diagnosis of Complex Post-traumatic Stress Disorder in the following:

a. severe disruption of the fundamental early life necessity for attachment, nurture and security;[315]

b. a history strongly indicative of early childhood abuse and sexual and physical violence;[316]

c. lifelong symptoms of emotional detachment, emotional numbing, difficulty trusting, engaging with others and experiencing periods of severe detachment to the point of dissociation;[317]

d. a history of emotional withdrawal, disengagement from potential figures of attachment, brittle relationships and significant emotional dysregulation;[318] and

e. deep-seated personality vulnerabilities and a persistent mood disorder (Dysthmia).[319]

196. Dr Giuffrida relevantly points to many common features of the condition diagnosed by Dr Diamond which are not present in Ms Folbigg.[320] He also notes that her mental state satisfies some but not all of the diagnostic criteria for Posttraumatic Stress Disorder. Dr Giuffrida reports that the concept remains somewhat controversial and there is no specific reference to it in DSM V or the International Classification of Diseases.[321]

[315] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 16.
[316] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 38.
[317] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 39.
[318] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 39.
[319] Exhibit BA, Report of Dr Michael Diamond (16 April 2019) p 40.
[320] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.
[321] Exhibit BR, Report of Dr Michael Giuffrida (10 May 2019) p 10.

197. One of the submissions made in the sentence appeal was that the sentences did not allow adequately, or indeed at all, for the unusual personal and psychological profiles of Ms Folbigg. This argument was not successful.

198. As noted above at [157], the sentencing judge expressly referred to and accepted the evidence from Dr Westmore and Dr Giuffrida that Ms Folbigg had been traumatised by the events of her childhood, suffered from a personality disorder, depression and anxiety, and that her mental state made it difficult for her to cope and bond, relate to, provide for and care for her children.

199. In its judgment on the sentence appeal, Sully J found that the findings in turn of the sentencing judge in relation to Ms Folbigg's psychological profile were amply open to him. They were open on the whole of the evidence, but particularly the evidence of Drs Giuffrida and Westmore that was put to his Honour during the proceedings on sentence.[322] It is plain from the judgment on appeal that Sully J appreciated the full extent of the importance of the psychiatric evidence, stating,

> *I add, because the matter is very important in the present context, that the psychological damage to which Barr J refers in paragraph 91 as quoted above, was not trifling or peripheral damage, but was serious, deep-seated damage caused over a period of some years commencing when the appellant was a bay. The details make sad and shocking reading. It is unnecessary to rehearse now all of the ugly and distressing particulars.*[323]

200. Sully J continued, referring further to Ms Folbigg's psychological condition as it concerned aspects of sentencing.

201. The basis on which Ms Folbigg was resentenced to a lesser sentence was a result of error by the sentencing judge in cumulation of the sentences, and a finding that the sentence imposed ought not be so crushing so as to discourage any incentive for rehabilitation. That is, it did not result from any error in the sentencing judge's consideration of Ms Folbigg's mental state.

202. In our submission the Judicial Officer should be satisfied that in sentencing Ms Folbigg the sentencing judge had before him careful and competent expert evidence of relevant aspects of Ms Folbigg's mental state. The opinion of Dr Diamond and further opinion of Dr Giuffrida now available do not raise

[322] *R v Folbigg* [2005] NSWCCA 23, [170].
[323] *R v Folbigg* [2005] NSWCCA 23, [171].

evidence in this regard that is relevantly new. The extent to which the sentencing judge took psychiatric and psychological evidence into account was reviewed by the Court of Criminal Appeal in the sentence appeal. The new reports provide no basis to revisit that Court's findings.

203. Accordingly, we submit the evidence before the Inquiry, including the report of Dr Diamond, does not give rise to a reasonable doubt as to any matter that may have affected the nature or severity of Ms Folbigg's sentence.