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SPECIAL INQUIRY

THE HONOURABLE REGINALD BLANCH AM QC

5 WEDNESDAY 12 DECEMBER 2018

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

10 Ms G Furness SC with Ms G Wright and Ms S McGee - Counsel assisting the
Inquiry
Mr R Coffey for Commissioner of Police
Ms J Pheils for the Director of Public Prosecutions
Mr I Fraser for New South Wales Health
Mr J Morris SC with Mr R Cavanagh for the Applicant

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JUDICIAL OFFICER: Yes.

20 FURNESS: Thank you, your Honour. The purpose of today's directions hearing is to hear submissions from any person at the bar table who wishes to make them in respect of scope, but prior to doing that I think the DPP wishes to seek leave.

25 PHEILS: Yes, your Honour, Ms Pheils. I seek leave to appear for the Director of Public Prosecutions.

JUDICIAL OFFICER: Thank you, Ms Pheils, I grant you leave to appear.

30 MORRIS: I'm sorry, your Honour, my name is Morris. I seek leave to appear, leading my junior Mr Cavanagh in the interests of Ms Folbigg.

JUDICIAL OFFICER: Yes, Mr Morris, thank you, yes I grant you leave.
No-one else?

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FURNESS: No, not as I understand, your Honour, in terms of leave.

JUDICIAL OFFICER: Yes.

40 FURNESS: Your Honour, if any party with leave wishes to make submissions in respect of the scope of the Inquiry. Your Honour will recall I made submissions on the last occasion.

45 JUDICIAL OFFICER: Yes, indeed, and on the last occasion I expanded the scope from the narrow form of the order to deal with any scientific or medical evidence in relation to the cause of death of any of the children. Mr Morris, did you want to make any--

50 MORRIS: Your Honour, in the light of your Honour's earlier observation I note that on the last occasion learned counsel assisting wished to constrain your Honour's consideration of a number of matters which we would submit

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ought not occur at this stage. Specifically, your Honour, there was a submission put that really the question of a consideration of the diaries of Ms Folbigg falls into a separate category, and it would be my submission to impose that restriction at this stage would not be profitable, and the reason that I say so is that throughout the interlocutory applications and the appeal proceedings that stem from those applications, namely the decision of the Wood CJ at CL and the Court of Appeal, one of the features about those interlocutory applications is that observations were made by Wood CJ and on appeal by Sully J that the combination of the scientific material and the diaries gave rise to a damning inference against my client. In other words they were not matters which were to be considered in isolation.

JUDICIAL OFFICER: Yes, can I just stop you there, Mr Morris. It is clear that the questions of the medical evidence will have to be looked at ultimately in the context of the whole case.

MORRIS: Yes.

JUDICIAL OFFICER: So the other aspect of that so far as the diaries was concerned is this, I would not force Ms Folbigg to come to this Inquiry. On the other hand if she wishes to come to the Inquiry, to give an explanation about the diaries and how they came to - the ones that disappear, disappear, and the ones that stayed, stayed. If she wishes to do that then I would be happy to call her, but it is a matter entirely for her, and the other thing about it of course is that this Inquiry does not have the powers under s 17 of the *Royal Commissions Act 1923* which would give the Inquiry the power to force people to give evidence incriminating themselves.

So I have taken the view that in fairness to her if she wants to give evidence then she should be allowed to give evidence and we will call her to give evidence if those are your instructions. The other aspect of that is this, and it's an important aspect, we need to know and we need to know quickly, and the reason for that is that if the diaries are going to be spoken about and if there is evidence called from her about the diaries, I'm sure that there are some people who would be interested in making an application to be present at the hearings. At the moment the applications by other parties to be here really relate to just keeping an eye on what is going on. I haven't checked with Ms Pheils about that, but I assume that's what her situation is.

PHEILS: That's correct, your Honour.

JUDICIAL OFFICER: However, if the diaries are to be the subject matter of evidence from Ms Folbigg, then I would imagine that some of the other parties would then want to seek to appear at the hearings, and we intend to have the hearings in March.

MORRIS: Yes, your Honour.

JUDICIAL OFFICER: This is the last week of term and if those parties - if I speak particularly about the DPP, who is probably the most likely person and

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5 maybe the Police, if they are to be represented at the hearings effectively they need to know right now because it is, as I said, the end of term. They won't be able to start organising representation and funding, et cetera, until the middle of January, which is getting very close to March. So I do require you to tell me either now or if you need another few days to get instructions, I need you to tell me whether you want us to call Ms Folbigg to the Inquiry. Do you have instructions about it at the moment?

10 MORRIS: I don't yet, your Honour. I'm cognisant of the issue, but I haven't yet had the opportunity to obtain those instructions, and your Honour would be well aware that there have been a large number of developments occurring behind the scenes and collation and provision of material, which somewhat not only constrains the time available but also in some ways changes the forensic picture, and that of course would influence the advice that would be given.

15 JUDICIAL OFFICER: Yes. Well it's because of that volume of material that the other parties who might be concerned to be party to the Inquiry need to know whether they're going to be--

20 MORRIS: I'm cognisant of the issue, your Honour.

JUDICIAL OFFICER: Yes. I understand Ms Folbigg's at Silverwater.

25 MORRIS: Silverwater, yes your Honour.

JUDICIAL OFFICER: So she's readily accessible.

MORRIS: Yes, your Honour.

30 JUDICIAL OFFICER: How long will it take you? Do you want a day next week? What day next week would suit you?

35 MORRIS: I would prefer a day next week but, your Honour, might I just - your Honour, our preference would be next Thursday, the 20th, but if it happened to be next Tuesday we would work towards that target, bearing in mind the state of the year, your Honour.

40 JUDICIAL OFFICER: Yes, it's difficult. I'm just trying to - I think I'd make myself available either day. Ms Pheils, what's your situation?

PHEILS: Your Honour, next Thursday would be our preference. We have an annual conference on Tuesday.

45 JUDICIAL OFFICER: I see. Anyone else got anything to say about that? Thursday of next week. Ms Furness?

FURNESS: My preference would have been for Tuesday but I understand my friend's concerns, so Thursday.

50 JUDICIAL OFFICER: Yes. I think as long as we get the answer next week.

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MORRIS: Yes, your Honour.

JUDICIAL OFFICER: Can I just explore this then. If the answer is that she would like us to call her to the Inquiry, who is likely to seek leave to appear?

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PHEILS: Without binding the Director I think it is likely that the DPP would seek leave to--

FURNESS: Sorry, I didn't hear that.

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JUDICIAL OFFICER: Yes.

PHEILS: Sorry, I think it is likely that the DPP would seek leave to appear if that is the case.

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JUDICIAL OFFICER: Yes. And if the - if she does not wish to come to give evidence would you be interested in the - you might be interested in the outcome - but would be concerned to seek leave to appear at the hearing itself?

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PHEILS: Your Honour, if the Inquiry scope stays as suggested by counsel assisting then I do not anticipate the DPP will be talking.

JUDICIAL OFFICER: All right, thank you. Neither of those answers comes as a surprise. Anyone else - is somebody here from the police?

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COFFEY: Yes, your Honour. Coffey for the police. I don't anticipate seeking leave to appear at the Inquiry ..(not transcribable)..

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JUDICIAL OFFICER: On either basis?

COFFEY: That's correct, your Honour.

JUDICIAL OFFICER: Yes, thank you. Is there anyone here from Health?

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FRASER: Yes, Fraser, your Honour, appearing again pursuant to leave granted previously. The issue of whether Ms Folbigg gives evidence would not be a matter that effects the decision making of Health. It would not be an aspect relevant to that decision. The final decision is not yet clear, because I think there's some other matters on scope yet to be submitted on, and I'll need to take some instructions. It's not yet clear.

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JUDICIAL OFFICER: All right. Well we can start by talking or setting next Thursday then as the day that we will get the answer to that. Now, did somebody else want to make some submissions about scope? Mr Morris, so far as you're concerned, I suppose if the answer is yes, then that solves your problem.

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MORRIS: It may do, your Honour.

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JUDICIAL OFFICER: Yes. If it's no then we can talk about it on Thursday I suppose.

MORRIS: Yes, I would have thought so, your Honour.

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JUDICIAL OFFICER: Does anyone want to say anything else about the scope?

FRASER: No, your Honour.

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JUDICIAL OFFICER: No? In the meantime - sorry, Mr Morris, did you want to say something?

MORRIS: Yes, your Honour. I take it from your Honour's observations that depending on the outcome of the medical evidence, the basic structure of the trial, the issue of the diaries, the issue of the summing-up, and the whole way the trial was presented will be a matter about which your Honour will permit submissions to be made.

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JUDICIAL OFFICER: Yes, certainly.

MORRIS: Yes, thank you, your Honour. That being the case, I have no further submissions to make on the scope of the Inquiry. Thank you, your Honour.

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JUDICIAL OFFICER: The other thing that I should observe is that - I've seen the transcript of a meeting of geneticists who came here. I think that was a collaborative effort to get them together. Of course from our point of view it's important to have the best evidence that we can get about genetics. It of course raises the possibility that some new evidence that would lead to the exculpation of Mrs Folbigg could come forward. So that is important but we were told I think in that meeting that it would be the best outcome if we had some DNA material from both Mrs Folbigg and from Craig Folbigg. I understand that a sample has been provided, a saliva sample or something, by Mrs Folbigg and that can be used insofar as she's concerned.

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So far as Craig Folbigg is concerned, we've received a complaint from the Commissioner for Victims Services that the solicitor for - who's appearing for Mrs Folbigg had approached him and he took an extreme exception to the way that was done, and we're told that he's lodged a complaint to the Legal Services Commissioner about it, and that as a result, he's absolutely refusing to provide a DNA sample. We will approach him again ourselves to see if we can convince him to provide a sample through the Commissioner but it would be highly desirable if the solicitor did not make any further approaches to Mr Folbigg. What's happened may deprive us of the best result that we could get, which we were interested in getting. Is there anything else then?

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FURNESS: Your Honour, there's a couple of matters. Firstly I seek your Honour to make a direction as to the procedure to be followed in this Inquiry. I seek a direction in the following terms; that counsel assisting will call each witness who is to give evidence before the Inquiry, that the usual procedure

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will be that a witness statement is prepared, tendered and adopted by the witness who will then be cross-examined. If a party wishes to place evidence before the Inquiry, that evidence should be provided to the solicitor assisting the Inquiry within a time to be specified before the relevant hearing and
5 counsel assisting will determine if that evidence is to be tendered, and if the tender is refused an application can of course be made to your Honour and counsel assisting will determine the order in which the witnesses are to be called. These directions that I seek your Honour to make have been reduced to writing and if your Honour makes that direction can be made available to my
10 friends.

JUDICIAL OFFICER: Does anyone want to say anything about those directions?

15 MORRIS: Your Honour, I would not cavil with those directions, they seem eminently sensible to me, but your Honour for my own part it does seem to me that there may be a large amount of scientific material and literature which will be relied upon by the experts to support their particular opinion. Your Honour, if the standard orders which your Honour proposes extends to the service not
20 only of a witness statement or report but also the underlying scientific material upon which the expert relies to form the opinion, that would provide the parties the greatest opportunity of being able to deal with that material in an orderly fashion. So it's really just an extension of the--

25 JUDICIAL OFFICER: What are you suggesting, Mr Morris?

MORRIS: Just that to the extent that there's scientific report, that if there's the provision of the - by a clinician that any epidemiological study, scientific literature case study, or other material is provided at the time that the
30 statement is provided, given the fairly short timeframe between now and March, your Honour.

JUDICIAL OFFICER: What do you say about that, Ms Furness?

35 FURNESS: Your Honour, the Inquiry proposes to provide all relevant material as soon as it possibly can to all the relevant parties and nothing in the directions that I've submitted are appropriate indicates otherwise.

40 MORRIS: I don't suggest that, your Honour.

JUDICIAL OFFICER: I will make those directions, and I have to say that so far as the way the Inquiry is being conducted that is in fact the way every inquiry has been conducted for the last however many years. So I will make those
45 orders. If there is a problem, if something comes up, then you can understand that I will be sympathetic to problems as they occur if they're things that create an issue.

MORRIS: Thank you, your Honour.

50 FURNESS: Your Honour, I previously indicated at the last directions hearing

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that I had some documents to tender today. I tender the undated report of Professor Stephen Cordner whose report was annexed to the petition and secondly the report of Professor Michael Pollanen dated 1 June 2015.

5 EXHIBIT #C REPORTS BY PROFESSOR STEPHEN CORDNER AND PROFESSOR MICHAEL POLLANEN TENDERED, ADMITTED WITHOUT OBJECTION

10 Thirdly, a copy of the 2018 text "SIDS, Sudden Infant and Early Childhood Death, the past, the present and the future" edited by Jhodie Duncan and Roger Byard.

15 EXHIBIT #D 2018 SIDS TEXT TENDERED, ADMITTED WITHOUT OBJECTION

EXHIBIT #E FULL SET OF EXHIBITS TENDERED AT TRIAL TENDERED, ADMITTED WITHOUT OBJECTION

20 EXHIBIT #F BUNDLE OF TRANSCRIPTS OF EVIDENCE BEFORE JURY AND TRANSCRIPT CORRECTIONS TENDERED, ADMITTED WITHOUT OBJECTION

25 Can I indicate the timetable which your Honour has set for the hearing. Firstly, the week beginning Monday 4 March 2019 to hear evidence relevant to forensic pathology and it's anticipated that that will be by way of concurrent evidence. The week beginning Monday 18 March 2019 for evidence primarily relevant to SIDS, Sudden Infant Death Syndrome, and cardiology and again by way of concurrent evidence. And the week beginning Monday 1 April 2019 to hear evidence relevant to genetics, again by way of concurrent evidence.

30 In order for those fixed days to be met there is suggested that there be a minimum of two weeks before the relevant hearing for any reports or other evidence that any person with leave seeks to be admitted into evidence two week prior to that hearing. Thus in relation to forensic pathology 18 February 35 2019, in relation to SIDS and cardiology and perhaps other matters 4 March 2019, and in relation to genetics 18 March 2019. I say these are suggested dates but I submit your Honour might wish to firm that to be required dates in order for there to be an orderly production of documents and preparation for hearings which will be complex in terms of the science.

40 JUDICIAL OFFICER: Does anyone want to say anything about that? Mr Morris?

45 MORRIS: Just excuse me a moment, your Honour. No, thank you, your Honour.

JUDICIAL OFFICER: Then I make those orders.

50 FURNESS: Thank you, your Honour.

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JUDICIAL OFFICER: That leaves in abeyance the question of Mrs Folbigg if she were to give evidence. The suggestion might be that if she were to give evidence it would be after the other scientific evidence has been given. Obviously if the extensive testing that we are doing with genetics turn up something it may not be necessary for her to give evidence. But you do need to know that I think - do you have anything to say about that?

FURNESS: Your Honour, I would agree that if Ms Folbigg was to give evidence it should occur after the conclusion of the medical evidence.

JUDICIAL OFFICER: Yes, I think you should know that at the stage that you go and get your instructions.

MORRIS: Thank you, your Honour.

JUDICIAL OFFICER: Is there anything else?

FURNESS: No, thank you, your Honour.