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SPECIAL INQUIRY

THE HONOURABLE REGINALD BLANCH AM QC

5 THURSDAY 25 OCTOBER 2018

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

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

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JUDICIAL OFFICER: Ladies and gentlemen on 10 June 2015 pursuant to s 76
 of the *Crimes (Appeals and Review) Act* of 2001 the applicant, Kathleen
 Folbigg, presented a petition to the Governor of New South Wales seeking an
 20 Inquiry into her convictions (the Application).

On 22 August 2018 I was appointed to conduct an Inquiry into the convictions
 having particular regard to the evidence as to the incidence of reported deaths
 of three or more infants in the same family attributed to unidentified natural
 25 causes.

On 21 May 2003 the applicant was found guilty of three counts of murder in
 respect of her children, Patrick, Sarah and Laura, one count of manslaughter in
 respect of her son, Caleb, and one count of maliciously inflicting grievous
 30 bodily harm in respect of her son, Patrick.

The applicant was sentenced to 40 years with a non-parole period of 30 years
 which was later reduced on appeal to 30 years imprisonment with a non-parole
 period of 25 years, that sentence to date from 22 April 2003.

35 The purpose of this directions hearing is to hear any applications for leave to
 appear and to hear submissions from Senior Counsel assisting and interested
 parties as to the scope of my Inquiry. I may hold a further directions hearing
 on 15 November to hear any further applications for leave to appear and again,
 40 if necessary, any further submissions as to the scope of the Inquiry.

The first phase of the Inquiry will be to gather first, any new research or
 advances in medical science relevant to the causes of death of each child and
 the cause of the apparent or acute life-threatening event in respect of Patrick
 45 and secondly, any research or literature concerning the incidence of the
 reported deaths of three or more infants in the same family attributed to
 unidentified natural causes.

I encourage medical experts with knowledge of or an expertise in these
 50 matters to directly contact the Inquiry. I also welcome attention being drawn to
 relevant publications and the details of experts who may be able to assist the

RSB:SND

Inquiry.

After that material has been gathered there will be a further directions hearing to outline the next steps in the Inquiry.

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The particular problem I appreciate is that many of you who might have an interest in the Inquiry won't know what that interest is until the scope is revealed and the particular problem about doing too much today is the fact that you haven't had a lot of time to think about it and we need to work out together when you might have got to a point where you can sensibly make decisions and applications, but we can discuss that in accordance with your particular needs.

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It does appear that because of the amount of material that has to be gathered together in the form of expert medical evidence that it is unlikely that actual hearings will be until perhaps the end of February or even the beginning of March next year if all the material has been gathered by that time. Yes, Ms Furness?

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20 FURNESS: Thank you your Honour. I seek leave to appear and to examine and cross-examine witnesses together with my learned juniors Ms Wright and Ms McGee and instructed by Amber Richards, Senior Solicitor for the Crown Solicitor.

25 JUDICIAL OFFICER: I grant that leave Ms Furness.

FURNESS: Thank you your Honour.

JUDICIAL OFFICER: Yes.

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FRASER: May it please your Honour my name is Fraser. At this time I seek leave to appear on behalf of the Ministry of Health encompassing New South Wales Health Pathology, public health system employees which includes pathologists, or at this time specifically Dr Cala, and also seek leave on behalf of the Hunter New England Local Health District.

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JUDICIAL OFFICER: Yes thank you Mr Fraser and I'll grant you leave, yes.

40 COFFEY: Your Honour my name is Coffey. I seek leave to appear on behalf of the Commissioner of Police for the New South Wales Police Force.

JUDICIAL OFFICER: Yes Mr Coffey I grant you the leave.

45 CAVANAGH: Cavanagh your Honour, I seek leave to appear on behalf of Kathleen Folbigg along with Ms Reed.

JUDICIAL OFFICER: Yes I grant you leave Mr Cavanagh. Yes, Ms Furness?

FURNESS: Your Honour I propose to make submissions in relation to the

scope of the Inquiry. Your Honour the application the subject of the petition is that new evidence has come to light which is contained in four reports which are attached to the application. Three of the reports concern the cause of the deaths and one is addressed to the use made of diary evidence. None of those authors gave evidence at the trial.

In order to place the application in context your Honour the Crown case was circumstantial consisting of four areas of evidence. Firstly, the circumstances of each child's death. Secondly, coincidence evidence. Thirdly, medical evidence, and finally the diaries. The Crown case was that the totality of the evidence pointed to the applicant's involvement in all five events.

The main report relied upon in the application is that of Professor Stephen Cordner, Professor of forensic pathology at Monash University. In his undated 91 page report together with annexures he concluded that there is nothing from a forensic pathology viewpoint to suggest that any of the children had been killed. He opined that there are identifiable natural causes of death for two of the children, Patrick and Laura, and natural causes are a plausible explanation for the other two deaths, Caleb and Sarah, and the acute or apparent life-threatening event concerning Patrick.

In particular Professor Cordner refers to work done since 2003 in relation to classifying and defining SIDS, Sudden Infant Death Syndrome, recent developments in medical science relevant to Caleb and Sarah's deaths and new research concerning the rarity of multiple deaths from natural causes in the one family.

Dr Michael Pollanen, Chief Forensic Pathologist for Ontario provided a five page peer review report of Professor Cordner's report. His report was dated 1 June 2015. He concluded that Professor Cordner's report transparently reconstructs the rationale for the opinions provided and that the conclusions are supported by data and are correct.

Professor Ray Hill, an Emeritus Professor of mathematics at the University of Salford in the United Kingdom was asked to review and I quote, "the statistical aspects" of the case. In a report dated 17 April 2015 he concluded that the jury was almost certainly misled by statements made by experts regarding the rarity of multiple SIDS.

Dr Sharmila Betts, a clinical psychologist, provided a report dated 18 April 2014 in which she opined that the diary entries made by the applicant did not contain any clear admission of guilt or confession of homicide.

In our submission it's a matter for your Honour to determine the scope of your Honour's inquiry. In so doing I submit that the nature and extent of the curial proceedings is a relevant consideration to your Honour's determination.

Before the trial the applicant made an application to separate the counts of the indictment. That application was heard and dismissed by Justice Wood in November 2002. The Crown had opposed that application on the basis that it

would seek at the trial to rely upon the evidence relating to the death of each child and the apparent or acute life-threatening event concerning Patrick as being admissible in relation to each count on a coincidence basis and as direct evidence.

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The material relied on by the Crown in relation to that application as coincidence evidence was the evidence of similarities in the circumstances concerning the death or apparent or acute life-threatening event of each child. Justice Wood held that the coincidence evidence was admissible under the *Evidence Act*.

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His Honour also held that any reasoning based upon an exercise of statistical probability would be potentially misleading and could not be led. That, however, his Honour said would not prevent the experts from giving evidence to the effect that SIDS is a relatively infrequent event and that multiple SIDS deaths and/or multiple unexplained deaths or life-threatening events involving infants within any one family are even more infrequent.

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The applicant appealed against that decision to the Court of Criminal Appeal which dismissed the appeal. The applicant then filed a summons in the High Court seeking a stay of the trial and an application for special leave. In February 2003 Justice McHugh dismissed the summons on the basis that the prospects of obtaining special leave were not high and not sufficiently high to warrant a stay of the trial.

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The trial commenced before Justice Barr on 1 April 2003 and the jury's verdicts of guilty were delivered on 21 May 2003. After the trial the applicant appealed against the convictions and sentence to the Court of Criminal Appeal.

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The grounds of the conviction appeal were firstly the trial miscarried as a result of the five charges being heard jointly. This involved consideration of the admissibility of coincidence evidence. Secondly the verdicts of guilty were unreasonable and could not be supported having regard to the evidence. Thirdly the trial miscarried as a result of evidence being led from prosecution experts to the effect that they were unaware of any previous case in medical history where three or more infants in one family died suddenly as a result of disease processes, and finally the trial judge erred in his directions as to the use the jury could make of the coincidence and tendency evidence.

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The Court of Criminal Appeal rejected the applicant's contentions on all grounds. The applicant then filed an application for special leave in the High Court. That application was heard and refused on 2 September 2003 and in that application two grounds were raised. Whether the tendency coincidence evidence reasoning was permissible and whether it was available to the prosecutor to lead evidence that three or more infant deaths in one family from natural causes is without precedent and that was primarily on the argument that that evidence effectively reverses or reversed the onus of proof.

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50 On 27 November 2007, the Court of Criminal Appeal heard a further appeal

5 against conviction after granting an application for leave to reopen the appeal against conviction. That appeal was dismissed and the grounds were in relation to information the jurors obtained during the course of the trial. The decision was based on the satisfaction that the irregularities in relation to the information obtained by the jurors was not material and did not give rise to a miscarriage of justice.

10 As your Honour is aware, the grounds for an inquiry into conviction include that it appears that there is a doubt or question as to any part of the evidence in the case. As your Honour has stated, the application concentrates on the medical evidence as does, as your Honour has stated, the direction.

15 As I have outlined, there was extensive consideration in curial proceedings, both prior to and after the trial of the availability of coincidence evidence. The Court of Criminal Appeal twice found that that reasoning was permissible. In my submission, the correctness of those decisions is not a matter with which your Honour is concerned in this inquiry. To the extent that the applicant now argues that the jury should not have been permitted to engage in coincidence reasoning is not an issue in our submission that forms part of this inquiry.

20 Turning then to the diaries. The Crown addressed the jury about the diaries on their own, that is separate from the other aspects of the evidence on the basis that “they are really in a category of their own”. The Crown argued that some diary entries contained admissions by the applicant. As I have indicated, the application includes a report of Dr Betts, Clinical Psychologist, to the effect that there is no clear admission of guilt in the diaries. Dr Betts questions the interpretation placed on the diaries by the Crown and proffers her own opinion as to how they should be interpreted. In our submission, your Honour, opinions may well differ as to the meaning of the diaries. However, the inferences to be drawn from them when considered with other evidence in the trial were necessarily a matter for the jury. We submit that the application does not sufficiently raise an issue, in the sense of an appearance of doubt or question as to the diaries, or warrant examination of the diaries further and in particular the permissible use of the diaries to support a conviction.

35 The remaining area, your Honour, is the medical evidence. Twenty-two experts gave evidence at the trial. They included treating doctors, pathologists and experts providing opinions as to the cause of death and other medical matters. We submit that your Honour’s inquiry should be directed to the medical evidence which was given at the trial in light of any new material which has emerged since 2003. In particular and more precisely, we submit that the inquiry should have the following scope. First, any new research or advances in medical science relevant to the causes of death of each child and the cause of the apparent or acute life threatening event in respect of Patrick. Secondly, expert medical opinion as to the causes of death of each child and the cause of the apparent or acute life threatening event in respect of Patrick in light of any relevant new research or advances in medical science. Thirdly, any new research or literature concerning the incidence of reported deaths of three or more infants in the same family attributed to unidentified natural causes and finally, any other related expert medical evidence. They are our submissions,

RSB:SND

your Honour.

JUDICIAL OFFICER: Mr Cavanagh, do you want to say anything about that at this stage?

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CAVANAGH: Not at this stage but my submissions would be a wider scope in some ways than that, although I don't disagree that the focus should primarily be on the medical evidence but we have additional reports that we're seeking that would supplement, as I understand it, the report of Professor Corder.

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We're also seeking a further report from a Dr Duflou and I understand that he has done some work on this case so I am informed back in 2015. I don't have that work that he performed then but my understanding is it may well be relevant to the causes of death of the last child, Laura, and may also relate to Patrick.

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JUDICIAL OFFICER: Where are you up to in terms of representation?

CAVANAGH: At the moment Legal Aid has given approval for today and they have given approval for a senior counsel. That only happened yesterday so we'll be advising and hopefully within the next couple of days we can make arrangements for an additional counsel.

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JUDICIAL OFFICER: The problem I apprehend that you will have of course is that you find senior counsel and then senior counsel needs to get across what has happened and be in a sensible position to make submissions as to the scope and anything else that--

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CAVANAGH: That's one of the primary reasons why I don't make submissions on scope today and would want those discussions with whoever is appointed.

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JUDICIAL OFFICER: You obviously should have enough time to be able to do that. How much time do you think you will need?

CAVANAGH: I don't think it would be more than four weeks for that. The timetable indicated, I think we can, so far as it's been indicated, it shouldn't be a difficulty but I don't think we'd be ready for it by the 15th if that was part of your question.

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JUDICIAL OFFICER: Yes, that really is part of the question and the other thing is that it might be difficult for you to speak on behalf of the senior counsel who is briefed as to how fast he can get across all the material.

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CAVANAGH: I think we can help whoever it is with that, both Ms Reed and myself and the instructing solicitor, Mr Gray.

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JUDICIAL OFFICER: Having at one stage of my life been senior counsel, sometimes a longer period is needed than the solicitor thinks.

CAVANAGH: Certainly. I will advise counsel assisting as quickly as I can on that point.

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JUDICIAL OFFICER: Obviously your interest has to be looked after in the context of the inquiry and if that's the situation, then it's probably not appropriate to fix a further date for a hearing or a mention or to have a discussion about the scope at this stage. If you get on with the business of finding the senior counsel, discussing it with senior counsel and then perhaps communicate with the counsel assisting, we can then work out what is a mutually convenient time for that next mention to occur.

10 CAVANAGH: I appreciate that, thank you.

JUDICIAL OFFICER: Mr Fraser, do you want to say anything about it?

15 FRASER: No, your Honour, I have no submissions on the scope at the moment.

JUDICIAL OFFICER: Mr Coffey?

20 COFFEY: No, thank you, your Honour.

JUDICIAL OFFICER: Yes, Ms Furness?

25 FURNESS: Your Honour, I propose to tender some documents this morning and to foreshadow the tender of documents on a later occasion and I do the latter in order to give any person an opportunity to consider their position in respect of those documents. Firstly, I tender a copy of the direction for this inquiry pursuant to 77(1)(a) of the *Crimes (Appeal and Review) Act*.

30 EXHIBIT #A DIRECTION FOR INQUIRY TENDERED, ADMITTED WITHOUT OBJECTION

35 Secondly, I tender a bundle of judgments being the pre-trial judgments, the sentencing and the various appeal judgments I have referred to. An index is available and I understand a USB is available. The material will be on the Inquiry's website shortly, however, each of the documents is publicly available.

EXHIBIT #B BUNDLE OF JUDGMENTS TENDERED, ADMITTED WITHOUT OBJECTION

40 I foreshadow that I will tender on the next occasion the report of Professor Stephen Cordner I have referred to, the review report of Dr Michael Pollanen and the transcript of the evidence which was before the jury and the transcript of the exhibits which were before the jury. In relation to those two documents or series of documents, your Honour, it may be that ultimately, depending upon your Honour's ruling as to scope that there be a more limited tender in respect of those documents. I merely foreshadow that. Thank you, your Honour.

50 JUDICIAL OFFICER: Yes, thank you. Do you have anything to say about that, Mr Cavanagh?

RSB:SND

5 CAVANAGH: No, I've had some discussions with counsel assisting. I understand what she is saying in terms of limiting scope or not and we'll continue those discussions and we advise that any materials that are relevant we will also supply to counsel assisting.

10 JUDICIAL OFFICER: Yes, thank you. I would like to have all this settled before the end of the year. As I said, there is a lot of work for you and counsel assisting in terms of getting medical opinions because any new doctors are going to have to be briefed with all the material. It is going to take them some time to get across all of that so it would be highly desirable to have it sorted out. I mean, I would prefer late November but as I have said, I wouldn't be prepared to make a hard line because you may need some more time and the senior counsel you brief may need more time but you might bear that in mind
15 that we need to get on with it.

CAVANAGH: I do.

20 JUDICIAL OFFICER: Thank you, anything else?

FURNESS: No, your Honour, other than to indicate that the parties will be made aware of the next date and the website will also contain it.

25 JUDICIAL OFFICER: Thank you.

30 REED: Your Honour, could I just raise one point? Just in relation to a transcript for today's proceedings, whether your Honour would be minded to order a transcript. It would just make it easier for senior counsel just in relation to getting across what has been said today.

JUDICIAL OFFICER: Yes, all right, I will order a copy of the transcript to be taken and I will adjourn.

35 ADJOURNED TO A DATE TO BE FIXED