



## Inquiry into the convictions of Kathleen Megan Folbigg

# SUBMISSIONS OF COUNSEL ASSISTING THE INQUIRY

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## **Inquiry into the convictions of Kathleen Megan Folbigg**

### **PART 1**

## **CHAPTER 1: INTRODUCTION, TASK OF JUDICIAL OFFICER, SCOPE, SUMMARY OF PROCEEDINGS**

### **Introduction**

1. On 22 August 2018 pursuant to s 77(1)(a) of the *Crimes (Appeal and Review) Act 2001* (“the CAR Act”) the Governor of NSW directed (“the direction”) that an inquiry be conducted into the convictions of Kathleen Megan Folbigg in respect of her children for the manslaughter of Caleb, the malicious infliction of grievous bodily harm upon Patrick, and the murder of Patrick, Sarah and Laura (“the Inquiry”).

### **Task of Judicial Officer**

#### **Section 82 of the CAR Act**

2. Pursuant to s 82(1)(a) of the CAR Act the Judicial Officer appointed to carry out the Inquiry must cause a report on the results of the Inquiry to be sent to the Governor of New South Wales. The report must incorporate a transcript of the depositions given in the course of the Inquiry.
3. Section 82(2) provides:

*The judicial officer may also refer the matter (together with a copy of the report) to the Court of Criminal Appeal:*

*(a) for consideration of the question of whether the conviction should be quashed (in any case in which the judicial officer is of the*

*opinion that there is a reasonable doubt as to the guilt of the convicted person), or*

*(b) for review of the sentence imposed on the convicted person (in any case in which the judicial officer 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).*

#### *Discretion as to referral*

4. Section 77(2) of the CAR Act, which deals with consideration of petitions to the Governor, specifies that “action... may only be taken if” the relevant circumstances exist.<sup>1</sup> Such clear words of confinement are not found in s 82(2).
5. Similarly, the use of the word “may” in s 82(2) implies the Judicial Officer has the discretion to choose not to refer the matter to the Court of Criminal Appeal in circumstances where he is of the opinion set out in either s 82(2)(a) or (b). However, we submit that such discretion would be rarely exercised.

#### *Reasonable doubt as to the guilt of the convicted person*

6. Pursuant to s 82(2)(a) the Judicial Officer may refer the matter to the Court of Criminal Appeal if he is of the opinion that there is a reasonable doubt as to the guilt of Ms Folbigg. It is thus the opinion of the Judicial Officer as to whether there is a reasonable doubt which is critical.<sup>2</sup>
7. We submit that the relevant principles attending the nature and function of the Judicial Officer’s task in assessing whether he is of the opinion that there is a reasonable doubt as to guilt may be summarised as follows.

#### Meaning of reasonable doubt

8. “Reasonable doubt” should be ascribed its ordinary meaning, that is, a doubt which the Judicial Officer considers reasonable. It does not mean any doubt, no matter how slight.<sup>3</sup>

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<sup>1</sup> *Sinkovich v Attorney-General of NSW* [2013] NSWCA 383, [25].

<sup>2</sup> *Sinkovich v Attorney-General of NSW* [2013] NSWCA 383, [85].

<sup>3</sup> *The Queen v Dookheea* [2017] HCA 36, [34].

9. “Guilt” means not merely guilt in fact, but also guilt as established by the relevant conviction, referring to matters of procedure upon which the finding of guilt was dependent.<sup>4</sup>

#### Extent of inquiry

10. The Judicial Officer’s role is not that of a judge and jury engaged in a retrial on the basis of the evidence before the Inquiry.<sup>5</sup> While it will almost always be necessary for the Judicial Officer to consider the evidence given at trial, the matters for inquiry will vary. In some cases it may be appropriate to concentrate on a single aspect of the evidence or trial process.<sup>6</sup>
11. Nor are the apparent doubts or questions into which the Judicial Officer may inquire confined to such doubts or questions as were raised in the petition or in the direction giving rise to the Inquiry.<sup>7</sup>
12. In addition to evidence from trial, the Judicial Officer should consider any information that may throw light on Ms Folbigg’s guilt, whether or not that information is favourable to Ms Folbigg.<sup>8</sup>
13. The Judicial Officer’s reasonable doubt may thus be based on any question or doubt emerging at the Inquiry up to the time of presentation of the report.<sup>9</sup>
14. A reasonable doubt may be formed by the Judicial Officer whether or not the doubt or question that gave rise to the Inquiry and was raised in the petition has been resolved and found to have no substance, or remains unresolved.<sup>10</sup>
15. Where doubts or questions as to particular parts of the evidence remain unresolved, the Judicial Officer may be nonetheless satisfied overall that there is

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<sup>4</sup> *Eastman v DPP (ACT)* (2003) 214 CLR 318 (McHugh J, Gummow J agreeing at [12]-[15], [21]-[23]); *Sinkovich v Attorney General of NSW* [2013] NSWCA 383, [27].

<sup>5</sup> *Report of the Inquiry into the conviction of Patrick John O’Connor* (Ducker DCJ, 21 February 1995) p 18 (“*O’Connor Inquiry*”); *Report of the Inquiry into the convictions of Timothy Edward Anderson, Paul Shawn Alister, and Ross Anthony Dunn* (Wood J, May 1985) pp 60-62 (“*Anderson Inquiry*”).

<sup>6</sup> *Anderson Inquiry*, pp 60-62; *O’Connor Inquiry*, p 18 (on basis of Wood J in the *Anderson Inquiry*); *Report of the Inquiry into the convictions of Raymond Grant Pedrana* (Graham DCJ, 8 December 2000) [6.3] (“*Pedrana Inquiry*”).

<sup>7</sup> *Report of the Inquiry into the conviction of Kevin John Michael Gallagher* (James J, 2 May 1995) pp 15-16 (“*Gallagher Inquiry*”); *Anderson Inquiry*, p 70.

<sup>8</sup> *Anderson Inquiry*, pp 66-67.

<sup>9</sup> *Anderson Inquiry*, p 70.

<sup>10</sup> *Gallagher Inquiry*, pp 15-16.

no reasonable doubt as to guilt, by taking into account other parts of the evidence in respect of which doubts or questions have been resolved or not raised.<sup>11</sup>

### Relationship with the trial proceeding

16. The Inquiry does not involve revival of the presumption of innocence.<sup>12</sup>
17. The Inquiry does not impose an onus on the Crown to produce evidence to remove the doubt and re-establish guilt, or on Ms Folbigg to establish that her conviction was wrongly procured.<sup>13</sup>
18. The Judicial Officer is not bound by the rules of evidence applicable in a trial, but the weight to be attributed to each part of the evidence needs to be carefully considered.<sup>14</sup>
19. The Judicial Officer is not constrained by the well-recognised tests applied in the consideration of criminal appeals, such as in respect of fresh evidence.<sup>15</sup> Similarly, the fact that some issues have previously been the subject of consideration and decision as part of an appellate process is not necessarily conclusive.<sup>16</sup>
20. The Judicial Officer's task should also not be fettered by tactical or forensic decisions at trial, or by the way the Crown or defence cases were conducted.<sup>17</sup>
21. If the question or doubt concerns a possible miscarriage of justice or involves the possibility that the convictions were improperly obtained due to an error in the trial process, the Judicial Officer is to explore whether or not there was a mishap and report his conclusion as to its occurrence and significance in relation to guilt.<sup>18</sup>

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<sup>11</sup> *Gallagher Inquiry*, pp 15-16.

<sup>12</sup> *O'Connor Inquiry*, p 18.

<sup>13</sup> *O'Connor Inquiry*, p 18 (on basis of Wood J in *Anderson Inquiry*).

<sup>14</sup> *O'Connor Inquiry*, pp 16-17; *Pedrana Inquiry*, [6.4]; *Anderson Inquiry*, pp 68-70; Gleeson CJ in *R v O'Connor* (1995) 80 A Crim R 214, 222.

<sup>15</sup> *Anderson Inquiry*, pp 67-68.

<sup>16</sup> *Anderson Inquiry*, p 68.

<sup>17</sup> *Anderson Inquiry*, pp 68-70.

<sup>18</sup> *Anderson Inquiry*, pp 63-64; *Pedrana Inquiry*, [6.4]; *Report of the Inquiry into the convictions of Ronald James Suey* (James J, 6 September 2002), [5.12]; see also reports of the Inquiries into Alexander Lindsay, Andrew Kalajzich and Grahame Andrew Rogers.

22. Whether Ms Folbigg lost at trial a chance of acquittal fairly open to her would be a material aspect of the Inquiry, but would not conclude the Judicial Officer's task.<sup>19</sup>

*Reasonable doubt as to the nature and severity of sentence*

23. Pursuant to s 82(2)(b) the Judicial Officer may also refer the matter to the Court of Criminal Appeal 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 imposed on Ms Folbigg.
24. A convicted person's role in or degree of responsibility for the acts perpetrated are examples of matters that may have affected the nature and severity of the sentence handed down.<sup>20</sup>

*Overall task*

25. We submit the Judicial Officer's task is to consider the evidence at the trial and the conduct of the trial, in the light of the further evidence and submissions received in the Inquiry, in order to determine whether overall there is a reasonable doubt as to Ms Folbigg's guilt or as to any matter that may have affected the nature or severity of her sentence.<sup>21</sup>

## Scope of this Inquiry

26. The direction giving rise to the Inquiry pursuant to s 77(1)(a) of the CAR Act noted that the doubt or question which appeared as to part of the evidence in the proceedings leading to Ms Folbigg's convictions "concerned evidence as to the incidence of reported deaths of three or more infants in the same family attributed to unidentified natural causes".
27. The Judicial Officer determined the scope of the Inquiry should be expanded to include receipt of evidence relevant to the following:

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<sup>19</sup> *Anderson Inquiry*, pp 67-68.

<sup>20</sup> *Suey Inquiry*, [19.22], [20.2].

<sup>21</sup> *O'Connor Inquiry*, p 18 (on basis of Wood J in *Anderson Inquiry*).

- a. 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.
  - b. Expert medical opinion as to the causes of death of each child and the cause of the apparent or acute life threatening event (“ALTE”) in respect of Patrick in light of any relevant new research or advances in medical science.
  - c. 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.
  - d. Any other related expert medical evidence.
  - e. If she wished to give evidence, evidence from Ms Folbigg about the diary entries, possession of the diaries and her disposal of the diaries.<sup>22</sup>
28. The Inquiry received fresh evidence within this scope during the course of its public hearings.
29. 67 exhibits were tendered before the Inquiry, including:
- a. The transcript of the oral evidence<sup>23</sup> and exhibits tendered before the jury.<sup>24</sup>
  - b. The transcript of oral evidence given on the voir dire and legal argument on pre-trial and trial rulings.<sup>25</sup>
  - c. The transcript of the Crown and defence opening and closing addresses, and the summing up.<sup>26</sup>
  - d. Various other documents relevant to the scope of the Inquiry and available at the time of the trial but not tendered before the jury, including

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<sup>22</sup> Transcript of the Inquiry, 20 December 2018 T6.6-10, T6.48-7.8.

<sup>23</sup> Amended Exhibit F, Complete set of trial transcripts, including voir dire and matters heard in the absence of the jury.

<sup>24</sup> Exhibit E, Exhibits tendered at the 2003 trial.

<sup>25</sup> Amended Exhibit F, Complete set of trial transcripts, including voir dire and matters heard in the absence of the jury.

<sup>26</sup> Amended Exhibit F, Complete set of trial transcripts, including voir dire and matters heard in the absence of the jury.

documents marked for identification during the trial and pre-trial,<sup>27</sup> various medical records and expert reports,<sup>28</sup> and sentence exhibits.<sup>29</sup>

## Summary of proceedings

30. On 19 April 2001 Kathleen Folbigg was arrested and charged with four counts of murder for the deaths of her four children, Caleb on 20 February 1989, Patrick on 13 February 1991, Sarah on 30 August 1993 and Laura on 1 March 1999.<sup>30</sup>
31. On 25 October 2002 the Crown presented an ex-officio indictment laying an additional charge of one count of maliciously inflicting grievously bodily harm with intent to do grievous bodily harm, in respect of Patrick's apparent life-threatening event ("ALTE") on 18 October 1990. Ms Folbigg was re-arraigned and entered pleas of not guilty to each count.<sup>31</sup>
32. The Crown case relied wholly on circumstantial evidence. It consisted of three categories of circumstantial evidence: evidence of the circumstances of each child's death and Patrick's ALTE; medical evidence from doctors and medical experts; and Ms Folbigg's diaries.
33. In his judgment as to the pre-trial application for separate trials brought by Ms Folbigg, and in the context of assessing the probative value of the medical evidence, Wood CJ at CL conveniently summarised the circumstantial evidence:
  - a. the infrequent incidence of Sudden Infant Death Syndrome ("SIDS");<sup>32</sup>
  - b. the rarity of repeat incidents of SIDS and of unexplained infant deaths or ALTE's within one family;
  - c. the absence of any metabolic abnormality in any of the children, let alone a common abnormality;
  - d. the fact that each was a healthy child and that such physical or medical conditions, as were observed post mortem, were unlikely causes of death;

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<sup>27</sup> See Exhibits G, AO, AP, AQ, AR, AS.

<sup>28</sup> See Exhibits C, E, H, J-AC, AF-AH, AJ-AM, AT-AV, AX, AY, BA, BH, BJ-BM.

<sup>29</sup> See Exhibit BB.

<sup>30</sup> 1 May 2003 T1086.53-1087.33.

<sup>31</sup> 25 October 2002 T1-2.

<sup>32</sup> SIDS is fully canvassed at Chapter 5 of these submissions.



- e. the absence of any sleeping abnormality in the three children who were tested and/or monitored;
  - f. the fact that monitoring was provided but then ceased in relation to Sarah and Laura – a matter of some importance in view of the diary entry of 25 August 1997;
  - g. the fact that two of the children were found by the mother within the very brief window between a child being found moribund and dead;
  - h. the fact that all children were found by the mother while they were still warm, even though in four of the five relevant instances this occurred at night;
  - i. the unexplained absence of Sarah and the mother at about 1:00am, shortly before she was found dead;
  - j. the unusual behaviour of the accused in getting up from bed, leaving the room, returning, and then getting up again only to discover, in the case of some of the children, that they were moribund or lifeless;
  - k. the fact that she claimed to have observed, in the dark and from some distance away, that some of them were not breathing;
  - l. the stress and anger which the mother had expressed toward the children; and
  - m. the fact that the mother would not nurse or endeavour to resuscitate the children when they were found.<sup>33</sup>
34. The Crown case also comprised a fourth category of evidence described as “coincidence evidence”. This referred to similarities in the evidence of the circumstances of each child’s death and Patrick’s ALTE relied on by the Crown to disprove, by way of coincidence reasoning permitted under s 98 of the *Evidence Act 1995*, that the five events were merely coincidental.

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<sup>33</sup> *R v Folbigg* [2002] NSWSC 1127, [107].

35. In this regard, the Crown case relied on 10 particular features which were common across the five events, to disprove coincidence. Those features, as described during the closing address, were:
- a. All five events occurred suddenly: the events were over in a matter of minutes.
  - b. All five events occurred unexpectedly: no child had any health problem that preceded the sudden deaths or ALTE or gave any sort of warning sign or previous symptom.
  - c. All five events occurred at home, in circumstances where the children spent a proportion of their time away from the home.
  - d. All five events occurred during the child's sleep period, rather than whilst playing at home, watching television, in the bath, or in the garden for example.
  - e. All five events occurred when the child was in a bed, cot or a bassinet, rather than whilst asleep on the floor, or sitting, standing, running, jumping, skipping, eating or watching television.
  - f. All five events occurred when the only person effectively at home or awake was Ms Folbigg, noting that Mr Folbigg was a deep sleeper, which gave her the opportunity to have done the children harm.
  - g. Each child was discovered dead or moribund by Ms Folbigg.
  - h. Each child was discovered by Ms Folbigg during what she claimed was a normal check on their well-being during the course of their sleep period, including on three occasions when she said she was on her way to the toilet.
  - i. Each child was discovered dead or moribund at around or shortly after death when they were still warm to the touch, and two of them still had a heartbeat, so they were found literally minutes after the cessation of breathing.

- j. In relation to four of the five events, Ms Folbigg failed to render any assistance at all to the children after discovering them dead or moribund, to the extent that she did not even lift them up out of their beds.<sup>34</sup>
36. It was the Crown case that these features were incapable of being explained except by the common feature of Ms Folbigg, because she was responsible for all the events.
37. The Crown case relied in this regard on evidence from doctors that:
- a. there had never been recorded a family such as this where four children died of natural causes, either from the same natural cause or from different natural causes; and
  - b. there had never been three or more deaths in one family recorded from SIDS.<sup>35</sup>
38. It also relied on tendency evidence. The tendency particularised by the Crown was that Ms Folbigg had a tendency to: “become stressed, lose her temper and control with each of her four children and then to asphyxiate them”.<sup>36</sup>
39. On 29 November 2002 Wood CJ at CL had ruled evidence on each count in the Crown case admissible as coincidence evidence in relation to the other counts and dismissed Ms Folbigg’s application for separate trials on that basis.<sup>37</sup>
40. Ms Folbigg applied for leave to appeal against Wood CJ at CL’s decision. On 13 February 2003 the Court of Criminal Appeal dismissed the application for leave.<sup>38</sup>
41. Hodgson JA considered that he would find a deficiency of proof of guilt in relation to each count without the evidence concerning the other children, but that the additional evidence concerning the others would leave no rational view consistent with innocence. His Honour cited the same reasons as Wood CJ at CL for this view:

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<sup>34</sup> 13 May 2003 T1362.47-1364.21.

<sup>35</sup> 13 May 2003 T1364.30-35.

<sup>36</sup> Crown notice of tendency evidence sent to applicant’s solicitor (24 October 2002) p 1.

<sup>37</sup> *R v Folbigg* [2002] NSWSC 1127.

<sup>38</sup> *R v Folbigg* [2003] NSWCCA 17 (Hodgson JA at [1]-[35], Sully and Buddin JJ agreeing at [36]-[37]).

- a. the extreme improbability of four such deaths and one ALTE occurring to children in the immediate care of their mother... without the mother having contributed; and
  - b. asphyxiation being a substantial possibility.<sup>39</sup>
42. His Honour noted these matters were significant, particularly in light of the diary entries.
43. Ms Folbigg filed an unsuccessful application in the High Court for a stay of the trial pending hearing of an application for special leave to appeal against the decision of the Court of Criminal Appeal.
44. The trial commenced before Barr J and a jury of 12 on 1 April 2003.
45. A number of evidentiary and procedural matters were dealt with during the course of the trial in the absence of the jury.
46. In particular, and of most relevance, the parties sought a series of rulings about the evidence of individual medical expert witnesses, concerning the admissibility of opinions expressed about the cause of death (and ALTE) in the individual cases, including opinions based on the fact and circumstances of the death (and ALTE) of the other children.
47. The effect of the rulings was that the experts:
  - a. could give evidence about the possible or probable cause of death of each child and of the ALTE based on circumstances directly relevant to the event in question, namely the medical history of the child, the circumstances in which the child was found, the results of the post-mortem examination and the results of subsequent tests; and
  - b. could not give evidence about the possible or probable cause of death based on additionally the fact that each of the other children had died unexpectedly or that one had unexpectedly suffered an ALTE.<sup>40</sup>

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<sup>39</sup> *R v Folbigg* [2003] NSWCCA 17, [32].

<sup>40</sup> Judgment on Crown application for exception to earlier ruling regarding Professor Byard (NSWSC, 7 May 2003, Barr J) [1].

48. The rulings also determined that medical experts, with relevant practical and research experience, could give evidence of their knowledge of there not having been any case of three or more deaths attributed to SIDS within the same family reported in the literature, or encountered in the course of their own experience.
49. On 21 May 2003, Ms Folbigg was found guilty of three counts of murder in respect of Patrick, Sarah and Laura, one count of manslaughter in respect of Caleb and one count of maliciously inflicting grievous bodily harm in respect of Patrick. She was subsequently sentenced to an overall head sentence of imprisonment for 40 years and a non-parole period of 30 years.<sup>41</sup>
50. After the trial, Ms Folbigg appealed against the convictions and sentence to the Court of Criminal Appeal.
51. The grounds of the conviction appeal were:
  - a. Ground 1: the trial miscarried as a result of the five charges being heard jointly. (This therefore involved consideration of the admissibility of coincidence evidence);
  - b. Ground 2: the verdicts of guilty were unreasonable and could not be supported having regard to the evidence;
  - c. Ground 3: 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
  - d. Ground 4: the trial Judge erred in his directions as to the use the jury could make of coincidence and tendency evidence.
52. The Court of Criminal Appeal rejected each ground of Ms Folbigg's conviction appeal. The Court reduced her sentence to a head sentence of 30 years with a non-parole period of 25 years.<sup>42</sup>
53. Ms Folbigg then filed an application for special leave in the High Court. That application was heard and refused on 2 September 2003 by McHugh ACJ, Kirby

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<sup>41</sup> *R v Folbigg* [2003] NSWSC 895, [102]-[107].

<sup>42</sup> *R v Folbigg* [2005] NSWCCA 23 (Hodgson JA at [190]-[191], Dunford and Sully JJ agreeing at [192]-[193]).

and Heydon JJ.<sup>43</sup> Ms Folbigg raised two grounds, namely whether the tendency and coincidence reasoning was permissible and whether it was available to the prosecutor to lead evidence that three or more infant deaths in the one family from natural causes is without precedent (on the basis that such evidence reverses the onus of proof).

54. On 27 November 2007 the Court of Criminal Appeal heard a further appeal against conviction.<sup>44</sup>

55. The grounds of appeal were that the trial miscarried because:

- a. a juror or jurors obtained information from the internet which revealed that Ms Folbigg's father had killed her mother; and
- b. a juror or jurors informed themselves away from the trial as to the length of time an infant's body is likely to remain warm to the touch after death.<sup>45</sup>

56. The appeal was dismissed. McClellan CJ at CL (Simpson and Bell JJ agreeing) was satisfied that the irregularities were not material and did not give rise to a miscarriage of justice.<sup>46</sup> McClellan CJ at CL observed:

*I have reviewed the whole of the evidence. I am satisfied this was an overwhelming Crown case. I am entirely satisfied that notwithstanding the irregularities no substantial miscarriage of justice has occurred.*<sup>47</sup>

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<sup>43</sup> Transcript of Proceedings, *Folbigg v The Queen* [2005] HCA Trans 657.

<sup>44</sup> *Folbigg v R* [2007] NSWCCA 128; *Folbigg v R* [2007] NSWCCA 371.

<sup>45</sup> *Folbigg v R* [2007] NSWCCA 371, [4].

<sup>46</sup> *Folbigg v R* [2007] NSWCCA 371, [60]-[62].

<sup>47</sup> *Folbigg v R* [2007] NSWCCA 371, [64].