

**Submissions on behalf of the Director of Public Prosecutions**

**A Introduction**

On 21 May 2003, following a trial in the Sydney Supreme Court, Kathleen Folbigg was found guilty of the following offences arising from the death of her four children:

- the manslaughter of Caleb Folbigg on 20 February 1989
- the malicious infliction of grievous bodily harm with intent to Patrick Folbigg on 18 October 1990 (in respect of an apparent life-threatening event "ALTE")
- the murder of Patrick Folbigg on 13 February 1991
- the murder of Sarah Folbigg on 30 August 1993
- the murder of Laura Folbigg on 1 March 1999

Ms Folbigg was unsuccessful in two conviction appeals to the Court of Criminal Appeal ('the CCA').<sup>1</sup> An application for special leave to appeal to the High Court was also refused.<sup>2</sup>

Ms Folbigg was successful in her sentence appeal to the CCA where her sentence was reduced to 30 years imprisonment with a non-parole period of 25 years. The current sentence expires on 21 April 2033 with Ms Folbigg eligible for release to parole on 21 April 2028.

On 22 August 2018, an inquiry by a Judicial Officer into the convictions of Kathleen Folbigg was directed by the Governor of NSW pursuant to section 77(1)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW) (the "Act").<sup>3</sup> This followed a petition presented to the Governor on 10 June 2015 by Ms Folbigg seeking an inquiry into her convictions.

The fundamental question for the Judicial Officer in this Inquiry is whether there is a reasonable doubt as to the guilt of Ms Folbigg. If the Judicial Officer is of the opinion that there is a reasonable doubt then pursuant to section 82(2)(a) of the Act, the matter may be referred to the CCA for consideration of the question of whether the conviction should be quashed. Further, if there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence, then under section 82(2)(b) of the Act the Judicial Officer may refer to the matter to the CCA for review of the sentence imposed.

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<sup>1</sup> The first conviction appeal was heard in 2005 and the CCA rejected each ground of the appeal: *R v Folbigg* [2005] NSWCCA 23. The second conviction appeal was heard in 2007 and the CCA rejected the new grounds of appeal as to jury irregularities: *Folbigg v R* [2007] NSWCCA 128, *Folbigg v R* [2007] NSWCCA 371.

<sup>2</sup> The application was heard and refused on 2 September 2003: *Folbigg v The Queen* [2005] HCATrans 657.

<sup>3</sup> Exhibit A tendered at first directions hearing on 25 October 2018.

### Scope of the Inquiry

The Judicial Officer determined the scope of the Inquiry with a focus on any new research or advances in medical science relevant to the causes of death of the four children and any new evidence or research as to the incidence of reported deaths of three or more infants in the same family attributed to natural causes.

The scope of the Inquiry was extended to allow Ms Folbigg to give evidence about the diary entries, possession of the diaries and her disposal of the diaries. Ms Folbigg decided to give evidence before the Inquiry and did so on 29 April 2019, 30 April 2019 and 1 May 2019.

The fresh evidence admitted and heard by the Inquiry is to be considered in the overall context of the evidence led in the 2003 trial. It is noted that the transcript of the trial proceedings and exhibits tendered in the 2003 trial were admitted as exhibits in the Inquiry.<sup>4</sup>

### Coincidence Evidence

A significant aspect of the Crown case in the 2003 trial was the coincidence evidence led against Ms Folbigg. The Crown relied upon coincidence evidence pursuant to section 98 of the *Evidence Act 1995*. This allowed all five counts on the one indictment to be heard by the same jury, with evidence on each count admissible as coincidence reasoning to the other counts. The Crown argued that the similarities between the circumstances of the five events (the deaths of the four children and Patrick's ALTE), proved that Ms Folbigg caused these five events on the basis that it is improbable they occurred coincidentally.

The defence application to separate the counts relating to the murders of Caleb, Sarah and Laura, to be heard individually and separately from the counts relating to Patrick, was refused by the trial judge, Wood CJ at CL.<sup>5</sup> Ms Folbigg applied to the CCA for leave to appeal from that decision which was dismissed.<sup>6</sup> Subsequently, there was an application to the High Court for a stay of the trial until the hearing of a special leave application, which was also dismissed.<sup>7</sup>

In reviewing the decision of the trial judge and ultimately refusing leave to appeal the pre-trial ruling, Hodgson JA agreed there was an "extreme improbability of four such deaths and one ALTE occurring to children in the immediate care of the mother" particularly in circumstances where asphyxiation was a substantial possibility and in light of the diary entries.<sup>8</sup> Hodgson JA indicated that the jury should be asked to consider whether there is any reasonable possibility

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<sup>4</sup> Exhibit E tendered at second directions hearing on 12 December 2018 and amended on 18 March 2019. Exhibit F (full set of transcripts) tendered at fourth directions hearing on 11 February 2019.

<sup>5</sup> *R v Folbigg* [2002] NSWSC 1127 [application for separate trials refused by trial judge].

<sup>6</sup> *R v Folbigg* [2003] NSWCCA 17 [application for leave to appeal refusal of separate trials application].

<sup>7</sup> The application was heard and dismissed on 19 February 2003: *Folbigg v The Queen* [2003] HCATrans 589.

<sup>8</sup> *R v Folbigg* [2003] NSWCCA 17 at [32]

that all deaths and the ALTE occurred by natural causes without any contribution from Ms Folbigg. If the jury considered there was a reasonable possibility, that would be the end of the matter.<sup>9</sup>

The Crown case at trial, and indeed the position before this Inquiry, was that there was no reasonable possibility that the children died of natural causes, or that Patrick's ALTE was the result of natural causes. The jury, who saw and heard the evidence in the 2003 trial, must have agreed with this position given they returned verdicts of guilty.

In the first CCA conviction appeal, Sully J opined that: "*It was possible that each of the five events had been caused by an unidentified natural cause, but only in the sense of a debating point possibility and not in the sense of a reasonable possibility. The evidence of the appellant's episodes of temper and ill-treatment, coupled with the very powerful evidence provided by the diary entries, was overwhelmingly to the contrary of any reasonable possibility of unidentified natural causes. So were the striking similarities of the four deaths.*"<sup>10</sup>

The rulings as to the admissibility of the coincidence evidence has already been the subject of extensive judicial consideration, both before and after the 2003 trial. The CCA accepted that coincidence reasoning was permissible and found there was no miscarriage of the trial as a result of the five counts on the indictment being heard jointly.<sup>11</sup>

For the purposes of this Inquiry, it is submitted that the rulings as to admissibility of coincidence evidence should not be reargued. There has been nothing raised during the Inquiry to cause any concern as to the correctness of the decisions made about the admissibility of the coincidence evidence in the 2003 trial.

#### Standing of the Director of Public Prosecutions

The DPP sought and was granted leave to appear in the Inquiry at the second directions hearing on 12 December 2018. The basis on which the DPP sought leave to appear in the substantive hearings was to cross-examine Ms Folbigg if she decided to give evidence about the diary entries, her possession and disposal of the diaries.<sup>12</sup> The DPP therefore appeared at the substantive hearings days on 29 April 2019, 30 April 2019 and 1 May 2019 when Ms Folbigg gave evidence and was cross-examined about her diary entries and her possession and disposal of the diaries.

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<sup>9</sup> *R v Folbigg* [2003] NSWCCA 17 at [33]

<sup>10</sup> *R v Folbigg* [2005] NSWCCA 23 at [143]

<sup>11</sup> The CCA rejected this ground of the appeal: *R v Folbigg* [2005] NSWCCA 23 at [145]-[160].

<sup>12</sup> Transcript of second directions hearing on 12 December 2018, pg 4 line 3-25, Transcript of third directions hearing on 20 December 2018, pg 6, line 6-10, 40-45.

The submissions to be made by the DPP will focus on the evidence given by Ms Folbigg in the Inquiry and how her evidence in relation to the diary entries should be assessed against the backdrop of the circumstantial evidence led in the 2003 trial. It is the position of the DPP that certain diary entries made by Ms Folbigg should be viewed as confessions or admissions of guilt to causing the death of her four children by smothering them.

It is the ultimate submission of the DPP that upon consideration of all of the available evidence, the Judicial Officer would not have any reasonable doubt as to the guilt of Ms Folbigg. Indeed, it is submitted that the circumstantial case against Ms Folbigg is even stronger than it was at the 2003 trial as a result of the evidence given by her before the Inquiry.

## **B Evidence from the 2003 trial**

In the 2003 trial, the Crown presented to the jury a circumstantial case reliant upon the combination of four main bodies of evidence:

- The circumstances of each child's death and Patrick's ALTE.
- The striking similarities between the circumstances of each child's death and Patrick's ALTE (this was the basis of the coincidence evidence led at trial following the rulings as to admissibility of this evidence).
- The medical evidence in relation to the death of each of the four children which did not leave open the *reasonable possibility* that there was, in the case of any individual child, an identified natural cause of death. This allowed the jury to find there had been an unnatural cause of death, that is the deliberate smothering of each child by Ms Folbigg.
- The diary entries and the interpretation to be given of things written and recorded in the diaries by Ms Folbigg.

### Tendency to lose control

The Crown also submitted at trial that the evidence showed Ms Folbigg had a tendency to "become stressed and lose her temper and control with each of her four children and to react to it by smothering (them)."<sup>13</sup> Evidence was given at trial about the stress and anger which Ms Folbigg expressed towards Patrick, Sarah and Laura. In particular, Ms Folbigg was angry and irritated with Sarah and Laura in the lead up to their deaths, with Mr Folbigg giving evidence about particular incidents that happened shortly before the deaths of Sarah and Laura.

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<sup>13</sup> Transcript of the Trial, 20 May 2003, Judge's summing up, page 113.

In his evidence at trial, Craig Folbigg described that Ms Folbigg did not cope well with caring for Patrick after his ALTE and she would “sort of would lose her temper a bit”<sup>14</sup> and “get frustrated.”<sup>15</sup> He demonstrated how Ms Folbigg would express how she was cranky and make a sound “like a growl.”<sup>16</sup>

Craig Folbigg gave evidence about an incident on Sunday 29 August 1993, the night that Sarah died at about 1am in the morning. When Ms Folbigg was trying to get Sarah to sleep, Craig Folbigg could hear Sarah crying and grumbling. He heard Kathy growl using “that growl.”<sup>17</sup> He walked into the bedroom to find Kathy on the bed with Sarah pinned to her in a one arm bear hug, patting the child hard on the bum which he demonstrated to the Court.<sup>18</sup> Craig Folbigg told Kathy to mellow out, she told him to go away and he returned to the lounge room.<sup>19</sup> Shortly afterwards, Kathy walked into the lounge room and threw Sarah at Craig (he caught her) saying “you fucking deal with her”<sup>20</sup> before she stormed off back to the bedroom.

In cross-examination, Craig Folbigg maintained that Kathy had thrown baby Sarah at him, saying “she didn’t hand her to me; she didn’t hand her to me abruptly. She launched her at me, which was a throw.”<sup>21</sup> He was questioned about the distance and he replied “a foot, six inches, three foot, or three metres, a throw is a throw and having to catch a baby is having to catch a baby.”<sup>22</sup>

During his evidence at trial, Craig Folbigg described how from when Laura was about 11 months old, Kathy started to get “cranky and frustrated” about Laura not doing what she was told.<sup>23</sup> In the months before Laura’s death, Kathy would “growl” on a daily basis<sup>24</sup> when she was frustrated, for example with Laura not having dinner at the right time or going to bed.<sup>25</sup>

The day before Laura died, on Sunday 28 February 1999, Craig Folbigg noticed that Kathy and Laura appeared to be avoiding contact. Craig asked Kathy about this and she said “It’s probably over what I did to her last night... I lost it with her.”<sup>26</sup> Kathy described how she had knocked Laura over and “screamed at her”<sup>27</sup> before settling her down and putting her to bed.

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<sup>14</sup> 2 April 2003 T112.39.

<sup>15</sup> 2 April 2003 T112.42.

<sup>16</sup> 2 April 2003 T112.50.

<sup>17</sup> 2 April 2003 T126.10-15.

<sup>18</sup> 2 April 2003 T126.17-34.

<sup>19</sup> 2 April 2003 T127.30.

<sup>20</sup> 2 April 2003 T127.50-57.

<sup>21</sup> 8 April 2003 T324.40-41.

<sup>22</sup> 8 April 2003 T325.22-25.

<sup>23</sup> 3 April 2003 T162.5-22.

<sup>24</sup> 3 April 2003 T173.49-50.

<sup>25</sup> 3 April 2003 T174.1-5.

<sup>26</sup> 3 April 2003 T171.23-26.

<sup>27</sup> 3 April 2003 T171.31.

In cross-examination, Craig Folbigg agreed that Kathy had inadvertently knocked over the child (Laura) who had become upset as a result of that.<sup>28</sup>

On the morning that Laura died, 1 March 1999, Kathy was trying to give Laura breakfast and Craig Folbigg described how he and Kathy got into an argument. Craig said that “Kathy grabbed Laura and just pulled her out of the highchair and plonked her on the ground and said “go to your fucking father”. Laura started to come towards me and at the time Laura was crossing the floor towards me, I heard this guttural growl and Kathy screamed... “I can’t handle her when she’s like this.”<sup>29</sup> Later that morning, Kathy called Craig at work and said “I just wanted to ring you to have a talk. I think when you get home we have to have a talk about our life, us.”<sup>30</sup> Kathy also wanted to apologise for that morning for having lost her temper and Craig replied “well you know, you can’t go on like this. It’s not healthy.”<sup>31</sup>

This evidence establishes that Ms Folbigg had a tendency to become stressed, lose her temper and lose her ability to control her anger with the children, in particular with Sarah and Laura. Ms Folbigg was irritated by Sarah and Laura shortly before their deaths and, it is submitted, it is apparent she was getting very angry and frustrated by her young children and the demands of caring for them.

#### Circumstances of each child’s death and the ALTE

The similarities around the circumstances of each child’s death and Patrick’s ALTE, which the Crown relied upon as coincidence evidence can be summarised as follows:<sup>32</sup>

- All five events occurred suddenly, the events were over in a matter of minutes. There was no lingering illness or medical problem that went on for any length of time.
- All five events occurred unexpectedly. No child had any health problem that preceded the sudden deaths or ALTE, or had any sort of warning sign or previous symptom.
- All five events occurred at home, in circumstances where the children spent a proportion of their time away from the home – at the gym, relatives, at friends, out shopping, at Craig’s workplace, going for a drive.
- All five events occurred during a sleep period rather than while the child was out and about, in the garden, playing at home, watching television, in the bath or playing with mum and dad.

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<sup>28</sup> 9 April 2003 T407.10-12.

<sup>29</sup> 3 April 2003 T172.56 – T173.7.

<sup>30</sup> 3 April 2003 T174.21-23.

<sup>31</sup> 3 April 2003 T174.27-29.

<sup>32</sup> 13 May 2003, Crown’s Closing Address, T1362.40 – T1364.28.

- All five events occurred when the child was in a bed, cot or bassinet rather than while asleep on the floor or sitting, standing, running, jumping, skipping, eating or watching television.
- All five events occurred when the only person effectively at home or awake was Ms Folbigg which gave her the opportunity to have done them harm. They were either alone at home with their mother or it was at home at night when Craig was asleep. It is noted that Mr Folbigg was a deep sleeper.
- Each child was discovered dead or moribund by Ms Folbigg.
- Each child was discovered by Ms Folbigg during what she claimed was a normal check on their wellbeing during their sleep period. On three occasions it happened when Ms Folbigg said she was on her way to the toilet.
- Each child was discovered dead or moribund at around or shortly after death when they were still warm to touch and two of them still had a heartbeat. They were found literally minutes after the cessation of breathing.
- In relation to four of the five events (all except for the death of Laura), Ms Folbigg failed to render any assistance at all after discovering them dead or moribund to the extent that she did not even lift them up out of their beds.

The commonality between the deaths of the four children and Patrick's ALTE is undoubtedly Ms Folbigg. It was argued by the Crown in the 2003 trial that this is because she was responsible for what happened to them and their deaths. The same position is adopted before this Inquiry.

#### Medical evidence at the 2003 trial

The prosecution medical evidence led in the 2003 trial was summarised in MFI 39 which was provided to the jury<sup>33</sup> and has become an exhibit in the Inquiry.<sup>34</sup>

The medical evidence from the 2003 trial can be summarised as follows:

- The absence of any genetic or metabolic abnormality in any of the children, let alone a common abnormality.
- The absence of any sleeping abnormality in the three children (Patrick, Laura and Sarah) who were tested and/or monitored.
- The infrequent incidence of SIDS and the rarity of repeat incidents of SIDS/unexplained infant deaths or ALTE's within the one family.
- The cause of death for each child was not able to be medically established:

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<sup>33</sup> 13 May 2003, Crown's Closing Address, T1315.17-26.

<sup>34</sup> Exhibit AP tendered on 17 April 2019 at substantive hearing day.

- Caleb's death and Sarah's death were diagnosed as SIDS deaths (sudden death of an infant under one year of age which is unexplained). It is noted that the main risk factors giving rise to a SIDS death were not present for either Caleb or Sarah.
- Patrick's death and Laura's death were the result of undetermined causes, although they each had underlying health issues that could have been related to their deaths. Patrick developed epilepsy following the ALTE and Laura was diagnosed with myocarditis (inflammation of the heart).
- Each child effectively died from a catastrophic asphyxiating event, or the cessation of breathing, of unknown causes. Patrick's ALTE was also the result of a catastrophic asphyxiating event, or the cessation of breathing, for which there was no known medical cause.
- There were no signs of deliberate smothering to any of the children (except potentially in relation to Sarah – who had 2 pinpoint abrasions below her lower lip and little bleeds/haemorrhages to her lungs and the surface of her heart).
- One would not necessarily see signs of the child having been smothered as opposed to suffering from any other asphyxiating event, or SIDS.
- Each child could have died from deliberate smothering or suffocation and that could have been the cause of the asphyxiating event or cessation of breathing that lead to its death.

In the 2003 trial proceedings when the trial judge summed up to the jury the following general medical opinion, about which there was no dispute, was noted:

*"...except in cases where there are obvious signs of deliberate or accidental asphyxiation, as where one finds bruising or other marks around the face, the nose or the mouth, or where the child is found in a position which suggests accidental suffocation, it is virtually impossible to distinguish between a death resulting from asphyxiation and a death resulting from natural but unidentified causes."*<sup>35</sup>

In the first CCA conviction appeal Sully J said at [128] after reviewing the medical evidence from the 2003 trial: *"The whole of the foregoing analysis of the medical evidence establishes, in my opinion, that it was amply open to the jury, which saw and heard the witnesses, to reject the defence hypothesis that each of the five relevant events could be explained away as having derived from identified natural causes; and so to be satisfied beyond reasonable doubt that the Crown had demonstrated that the five events could not be so explained away. I am myself, and as a matter of independent assessment of the evidence, of the same opinion."*<sup>36</sup>

<sup>35</sup> 19 May 2003, Judge's summing up, bottom of page 25-top page 26.

<sup>36</sup> *R v Folbigg* [2005] NSWCCA 23 at [128].



### The diary entries

The diary entries and the interpretation to be given of things written and recorded in the diaries by Ms Folbigg formed a significant part of the circumstantial case against Ms Folbigg in the 2003 trial.

The jury had before them various diaries/journals with entries recorded by Ms Folbigg between 1989 and 1998. The most significant diary entries were contained in two notebook diaries tendered as Exhibit J in the 2003 trial. These diaries covered the period June 1996 to April 1998 during Ms Folbigg's pregnancy with Laura, the birth of Laura and the first 9 months of Laura's life.

Exhibit J at trial consisted of the following:

- The first notebook diary covering the period June 1996-June 1997 was handed to police by Craig Folbigg on 19 May 1999 (along with the 1989 diary Exhibit L). Craig Folbigg had found this diary at Millard Close, Singleton inside a bedside table in early May 1999.
- The second notebook diary covering the period from June 1997-April 1998 was found by police in a search warrant at Millard Close, Singleton on 23 July 1999. It was hidden inside a built-in wardrobe in the bedroom. Police also seized the 1999 diary extracts after Ms Folbigg handed over this diary during the search warrant.

Ms Folbigg was questioned in her ERISP interview conducted on 23 July 1999 about the 1989 diary entries and the first notebook diary covering the period from June 1996-June 1997. This interview was played before the jury and the transcript was tendered as an exhibit in the trial.<sup>37</sup>

A portion from a diary entry on 14 October 1996 which read "Obviously I'm my father's daughter" was redacted following legal argument as to the admissibility of this entry. This entry was accepted to be a reference to Ms Folbigg's birth father, Thomas Britton. Ms Folbigg's father killed her birth mother, Kathleen Britton, in December 1968 by stabbing her multiple times with a knife.

The trial judge ruled out any evidence which would tend to show that Ms Folbigg's father murdered her mother given the danger of unfair prejudice.<sup>38</sup> The Crown accepted that portion of the diary entry could cause a jury to speculate and that it would be preferable for the words to be blacked out from the diary.<sup>39</sup> The words were therefore redacted from the diary entry and the questioning about this portion of the diary entry in the ERISP interview was also deleted.

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<sup>37</sup> ERISP transcript tendered at trial as Exhibit AJ and included in Exhibit E tendered in the Inquiry.

<sup>38</sup> 3 April 2003 T195.37-47.

<sup>39</sup> 3 April 2003 T196.31-36.

This evidence was not therefore led before the jury in the 2003 trial. It was however tendered in the sentence proceedings as Crown Exhibit C on Sentence.

One of the grounds of the second conviction appeal to the CCA was that the trial had miscarried because the jury had obtained information from the internet which revealed that Ms Folbigg's father had killed her mother.<sup>40</sup> This ground of the appeal was ultimately dismissed with McCellan CJ at CL stating at [55]: *"Even though the appellant was the child of a person who killed another I do not believe there was any likelihood that a juror would reason that it was more likely that the appellant would kill her own children. The killing of a spouse may tragically occur in circumstances of the break down of a relationship or be occasioned by temporary loss of control accompanied by a violent and fatal act. The circumstances and motive for the killing are likely to be quite different from those which will exist if a mother has killed her own children. There could be no suggestion that the killing of the appellant's mother by her father indicated any tendency in the appellant to kill her own children. In my judgment the knowledge obtained by the juror did not lead to a miscarriage of justice."*

The diary entries themselves will be considered in more detail below in the part of the submissions that address the evidence given by Ms Folbigg in the Inquiry. For present purposes, what is adopted is the view taken by Sully J in the first CCA conviction appeal at [132] when he described the entries as "chilling reading" with "damning" probative value. Sully J said at [132] *"The picture painted by the diaries was one which gave terrible credibility and persuasion to the inference, suggested by the overwhelming weight of the medical evidence, that the five incidents had been anything but extraordinary coincidences unrelated to the acts done by the appellant."*<sup>41</sup>

## **C Evidence from the Inquiry**

### **Medical Expert Evidence**

The Inquiry considered medical expert evidence by reference to the evidence led at the trial with a focus on new research, medical advances and literature in relation to the following matters:

- The general health of each child and of Ms Folbigg.
- Any metabolic abnormality, or recognised genetic variant, able to be identified in any of the children or Ms Folbigg.

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<sup>40</sup> *Folbigg v R* [2007] NSWCCA 128, *Folbigg v R* [2007] NSWCCA 371.

<sup>41</sup> *R v Folbigg* [2005] NSWCCA 23 at [132].

- The categorisation of SIDS and the common risks factors associated with SIDS.
- The incidence of reported deaths of three or more infants in the same family attributed to unidentified natural causes/SIDS.
- The cause of death of each of the children and of Patrick's ALTE.

The submissions of Counsel Assisting the Inquiry comprehensively address the fresh medical evidence heard before the Inquiry on substantive hearing days when the DPP was not present. For the purposes of these submissions, the conclusions made by Counsel Assisting in Chapter 11 of the submissions are adopted, that is:

*Health of each child and Ms Folbigg*

- Each child was before their death or ALTE, a healthy, well grown, normally developing child who was normal in appearance.
- The genetic testing on each child and on Ms Folbigg revealed no disease causing variant related to genes associated with sudden death in infancy/childhood, childhood neurological disorders, immunology or metabolics.
- The medical experts found that Ms Folbigg does not have any cardiac related conditions.
- The Judicial Officer should be satisfied that there is no medical cause identified for the deaths of the children, based on a genetic predisposition to a disease process or any pre-existing identified condition.

*SIDS*

- Each child's risk factors for SIDS should be regarded as even lower than it was viewed in 2003 (noting that each child was found in a safe sleeping position and their mother did not smoke).
- Caleb's and Sarah's deaths were outside the age at which SIDS usually occurs, that is two to four months with a peak of 6 months.
- SIDS is virtually indistinguishable from smothering of a child and the current categories of SIDS cannot exclude deaths from unnatural causes.

*Recurrence*

- There have been reported cases in the literature involving the deaths of three or more infants in the same family attributed to unidentified natural causes, or at least not attributed to unnatural causes.
- However, the instances of recurrence are rare and any increased risk is affected by genetic and environmental factors. It is noted that within the Folbigg family, no genetic

factor has been identified and the environmental factors give rise to a low risk of SIDS death.

- Although the jury in the 2003 trial were incorrectly told by the Crown Prosecutor there had never been recorded a family where three or more children have died from natural causes/SIDS, the trial Judge’s summing up stated that such events are not impossible and SIDS deaths are rare, which accurately reflects the scientific evidence.

*Causes of death/ALTE*

- **Caleb:** There is no identified natural (including) genetic) cause of death. Death from unnatural causes including smothering cannot be excluded.
- **Patrick’s ALTE:** There is no identified natural (including) genetic) causes of the ALTE. That this occurred from unnatural causes cannot be excluded.
- **Patrick’s death:** The cause of death cannot be firmly established or agreed upon by the medical experts. No genetic variant has been identified as contributing to his death. It is possible that an epileptic seizure caused death. Death could have been the result of an asphyxiating event. The possibility that his death was caused by smothering cannot be excluded.
- **Sarah:** There is no identified natural (including) genetic) cause of death. Death from unnatural causes including smothering cannot be excluded.
- **Laura:** The cause of death cannot be firmly established or agreed upon by the medical experts. No genetic variant has been identified as contributing to her death. It is possible that myocarditis caused Laura’s death. The possibility that her death was caused by smothering cannot be excluded.

Diary Entries

In the Inquiry, a bundle of material relevant to the diary entries made by Ms Folbigg, her possession of the diaries and her disposal of the diaries was tendered.<sup>42</sup>

A summary showing a timeline for the births and deaths of the four children and the diary entries available is below:

Year	Baby	Diary
1989	Caleb born 1 February 1989 Caleb died 20 February 1989	1989 diary ( <a href="#">Tab 1</a> ) <i>Covers period of Caleb’s life (19 days)</i>
1990	Patrick born 3 June 1990 ALTE occurred on 18 October 1990	1990 diary ( <a href="#">Tab 3</a> ) <i>Covers period from 1 February – 5 Oct 1990 (ends before Patrick’s ALTE occurred)</i>

<sup>42</sup> Exhibit AZ tendered on 29 April 2019 at substantive hearing day.

1991	Patrick died on 13 February 1991	No diary entries available
1992	Sarah born 14 October 1992	1992 diary included in tender bundle <i>Records pregnancy and birth of Sarah</i>
1993	Sarah died 30 August 1993	Only calendar page available ( <a href="#">Tab 4</a> ) <i>Records death of Sarah - "Sarah left us 1:00am"</i>
1994		No diary entries available
1995		No diary entries available
1996		Notebook diary from June 1996-June 1997 ( <a href="#">Tab 5</a> )
1997	Laura born 7 August 1997	Notebook diary from June 1996-June 1997 ( <a href="#">Tab 5</a> ) Notebook diary from June 1997-April 1998 ( <a href="#">Tab 6</a> ) <i>Records pregnancy and birth of Laura</i>
1998		Notebook diary from June 1997-April 1998 ( <a href="#">Tab 6</a> )
1999	Laura died 1 March 1999	Single diary entries from 1999: 1 & 3 Jan 1999 - <a href="#">Tab 8</a> 19 June 1999 - <a href="#">Tab 10</a> July 1999 - <a href="#">Tab 11</a>

### *Disposal of the Diaries*

Ms Folbigg gave evidence in the Inquiry about her possession and her disposal of the diaries.

During her evidence in the Inquiry, Ms Folbigg said that she "kept diaries on and off my whole life since I was a teenager."<sup>43</sup> Whilst she may not have written in the diaries regularly, she accepted that she wrote in diaries for the 10 years during which the deaths of her children occurred.<sup>44</sup>

There were however no diaries located for the years 1991, 1993, 1994, 1995, the first half of 1996 and the second half of 1998. Only a couple of single diary entries from 1999 were located.

Ms Folbigg was interviewed by police on 23 July 1999 after her first notebook diary covering the period June 1996-June 1997 and the 1989 diary were handed to police by Craig Folbigg on 19 May 1999. During the ERISP interview, Ms Folbigg was asked questions about the diaries she kept and her disposal of them. An extract from the ERISP transcript is below:

<sup>43</sup> Transcript of the Inquiry, 29 April 2019 T622.18.

<sup>44</sup> Transcript of the Inquiry, 29 April 2019 T622.20-26.

<p>Q 456 – Craig tells me that some time after Patrick was diagnosed as being blind...he found a handwritten diary that you kept. What can you tell me about that?</p>	<p>“Yeah, I used to write in diaries as basically they were sort like a vent or a release. I used to sort of write things that I was doin’ that day, or anything that might have bothered me in the slightest I used to write in a diary rather than talk to him, which I’ve learnt now not to do. And it could be something totally stupid as I’ve forgotten to go and pay a bill down the street or go and get the milk, or at the end if I had a spare minute it’ll be just whatever popped into my head at the time and I’d write it down. So it was, yeah I used to, I don’t do it anymore.”</p>
<p>Q 459 – You said that you learn now not to do. What do you mean by that?</p>	<p>“Because we had an altercation once where he’d actually, I dunno if it was that diary or not, but he’d actually read one and I struck that as invading my space and that’s a personal thing that he probably shouldn’t have done. I wouldn’t say that there was anything in that should have upset him too much, it was, I used to call them babble books cause that’s exactly what I used to do in them sort of thing. And, but just the mere fact that he’d sort of not asked me first. If he’d come around and said to me, “can I read this?”, I probably would have said yeah... I sprung him reading it, well that’s a different kettle of fish. Or find out after the fact that he’s read it, that was. <u>So it was probably only, to be truthful, Mother’s Day this year I decided not to write in them anymore, so yeah. ‘Cause I had written in a few and on Mother’s Day this year I sort of pulled one out to have a look and I’ve flicked back at what I’d written and pretty much decided that life’s pretty crappy and I shouldn’t be writing it down and reminding myself of all these things, and I just got rid of them all. I haven’t written in one since.</u>”</p>
<p>Q 460 – Where are they now?  Q 461 – And who did that?  Q 462 – Do you remember what bin you threw it in?</p>	<p>“They were thrown away in the bin, probably dumped by now as far as I know.”  “Me.”  “It was at Andrew Street, this Mother’s Day just gone.”</p>
<p>Q 463 – How many were there, Kathy? How many books?</p>	<p>“I had three I think. I dunno what’s happened to the others. I’d say with all our moves and that I probably lost them along the way or whatever. But I had three books that I had written in.”</p>

Ms Folbigg effectively told the police that she had disposed of three diaries on Mother’s Day that year, which was Sunday 9 May 1999.

It is not known if the three diaries said to be disposed of included the second notebook diary from June 1997- April 1998. This notebook diary was subsequently found by police in a search warrant at Millard Close, Singleton on the evening of 23 July 1999 after the ERISP interview was concluded.

During cross-examination in the Inquiry, Ms Folbigg was asked about her ERISP interview when she told police she had thrown away three diaries/books that she had written in that

Mother's Day. Ms Folbigg claimed she only had a clear recollection of throwing one out.<sup>45</sup> She said that she only remembered throwing one out, but maybe having lost some of the others along the way.<sup>46</sup>

Ms Folbigg agreed with the proposition put to her by Mr Maxwell QC that when she said in the ERISP interview "I just got rid of them all" she actually meant to say "I just got rid of one."<sup>47</sup> Here Ms Folbigg is changing her position between what she said in the ERISP interview and what she is saying now. It is a direct attempt by Ms Folbigg to re-frame matters so as to cast her conduct and her evidence in a more favourable light – one that minimises the seriousness and the gravity of her actions.

Ms Folbigg did not agree with the proposition that her memory regarding the events around disposal of the diaries on 9 May 1999 would be better when she gave the ERISP interview on 23 July 1999 than it is now.<sup>48</sup> Such a position is contrary to common sense and to the experience of courts and witness recall. It demonstrates Ms Folbigg's evasive approach and her unwillingness to agree with any proposition adverse to her interests. This response is one of many powerful indicators of her lack of credibility.

Counsel Assisting also asked Ms Folbigg questions about the disposal of her diaries. Ms Folbigg acknowledged that she had told the police in the ERISP interview that she had gotten rid of more than one, but maintained that she could only remember getting rid of one on Mother's Day.<sup>49</sup> Ms Folbigg eventually and reluctantly conceded to Counsel Assisting that what she told the police in 1999 was more likely to be accurate, given that one remembers things better closer to the time than years later.<sup>50</sup>

Ms Folbigg was asked by Counsel Assisting for assistance in terms of what diaries for what years had been disposed of and the following exchange took place:<sup>51</sup>

*Q. On Monday Mr Maxwell took you through the years of the diaries that were found, and have been before this Inquiry, and it was clear that there were some years missing?*

*A. Yes.*

*Q. Your evidence is that you've been writing in diaries for decades?*

*A. Correct.*

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<sup>45</sup> Transcript of the Inquiry, 29 April 2019 T623.13-18.

<sup>46</sup> Transcript of the Inquiry, 29 April 2019 T623.31-33.

<sup>47</sup> Transcript of the Inquiry, 29 April 2019 T624.44-49.

<sup>48</sup> Transcript of the Inquiry, 29 April 2019 T624.35-42.

<sup>49</sup> Transcript of the Inquiry, 1 May 2019 T798.1-7.

<sup>50</sup> Transcript of the Inquiry, 1 May 2019 T798.19-25.

<sup>51</sup> Transcript of the Inquiry, 1 May 2019 T798.27-47.

Q. *You'd expect there to be a diary, at least part of a diary, for most years, is that right?*

A. *Yes.*

Q. *So there were various diaries that have gone?*

A. *Yes.*

Q. *Can you help us with the diaries that you say you got rid of, from what years they were?*

A. *No, I can't help you with that at all. I, I'm not recalling. As I said, I remember giving the one, getting rid of the one, and that was the Mother's Day, one of the very last ones I wrote, but I'm not recalling so I don't actually can't help you with what happened to the others.*

Ms Folbigg said that the one she got rid of was one she was writing in at the time, in May 1999, and it could have extended back to 1998.<sup>52</sup> This diary is likely to have covered the period of Laura's death in March 1999.

It is submitted that the Judicial Officer would find that Ms Folbigg had disposed of more than one diary and she was not truthful in her evidence before the Inquiry when she asserted she could only remember getting rid of one. Ms Folbigg was characteristically and deliberately vague in her evidence about how many diaries she got rid of and what had happened to her diaries. Her answers to questions about how many diaries she had disposed of, or what happened to the missing diaries, were unsatisfactory. She was clearly trying to downplay the significance of the disposal of the diaries and reduce the number of diaries that she had thrown away or perhaps hidden (ie the notebook diary from June 1997- April 1998). It is well open to this Inquiry to find that she realises the significance of her disposal of the diaries and is seeking to minimise the impact by saying she now remembers it was only one diary that she got rid of.

#### *Reasons for the disposal*

In her ERISP interview at A459, Ms Folbigg claimed that she had gotten rid of the diaries because she had *"pretty much decided that life's pretty crappy and I shouldn't be writing it down and reminding myself of all these things."*

Ms Folbigg also claimed in her ERISP interview that after she got rid of the diaries on Mother's Day in 1999, that she had not written in a diary since that time, stating firmly *"I haven't written in one since."*

These claims were plainly incorrect given the single diary entries from 19 June 1999 and July 1999 seized by police in the search warrant executed on the evening after the ERISP interview on 23 July 1999. The 1999 diary extracts were handed over by Ms Folbigg during the search

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<sup>52</sup> Transcript of the Inquiry, 1 May 2019 T799.2-8.



warrant. Ms Folbigg did not know when she gave her answers to police in the ERISP interview that there would be a search warrant and that the 1999 diary (and the second notebook diary from June 1997- April 1998) would be seized by police to use in their investigation of her.

Of note is the diary entry of July 1999 when Ms Folbigg wrote: *Decided to start writing in a diary again. Have missed being able to vent regularly. I just pray it doesn't come back to bite me like my 97 one has.* In this diary entry written in July 1999 expressing her need to vent and write about her life in a diary, Ms Folbigg did precisely what she said in her ERISP interview she would not and did not do after Mother's Day in 1999. This was done with the knowledge that her first notebook diary from June 1996-June 1997 had been given to the police and with some appreciation of what the contents of it could do – they could come back to 'bite her'.

At the time of the ERISP interview, Ms Folbigg had gotten rid of some diaries and it is submitted that the reason she gave to police in her ERISP interview for doing so, and the reasons she gave before the Inquiry, were not the truth.

When Ms Folbigg was cross examined before the Inquiry, she reluctantly agreed that her answer in the ERISP interview was false, but would not agree that she lied:<sup>53</sup>

*Q. The answer you gave that you hadn't written in one since 9 May was false, wasn't it?*

*A. It was what I had intended. It was my intention at the time, so I'm not going to say it was false.*

*Q. The answer that you gave in the interview that you hadn't written in a diary since 9 May was false wasn't it?*

*A. Considering there are now diaries stating so, then all right, yes I would agree.*

*Q. You gave a false answer to that question?*

*A. I gave an answer that I believed at the time to be correct.*

*Q. But now you realise it was wrong?*

*A. Well, obviously yes.*

*Q. I put it to you that you knew that you had written in a diary since 9 May at the time you gave that answer to the police?*

*A. No, I'm not going to agree to that.*

Ms Folbigg was also questioned by the Judicial Officer about this aspect and what she told the police in her ERISP interview:<sup>54</sup>

*Q. No, you're missing the point. "I haven't written in one since"?*

*A. Because that was my intention at the time, to not--*

*Q. That's what you told the police?*

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<sup>53</sup> Transcript of the Inquiry, 29 April 2019 T628.46-T629.14.

<sup>54</sup> Transcript of the Inquiry, 30 April 2019 T700.33 - T701.1.

A. Yeah. Yes, yeah.

Q. But you, in fact, had written in one since?

A. Yes, it turns out I had, yes. I'd changed - I said, I'd changed my mind and decided to.

Q. Yes, but did you lie to the police about it?

A. No, at the time I hadn't been writing in one.

Q. I'm sorry, but you said to the police, "I threw them out and I haven't written in one since". But you had, in fact, written in one since and the police found it when they went to the house?

A. Yes, your Honour and, as I said, I - at that particular time I - when I got rid of or lost those diaries, I'd made a decision that I wasn't going to write in them but, as it turned out, I'd changed my mind and I decided to and I did.

It is submitted that the Judicial Officer would find that Ms Folbigg lied to the police in the ERISP interview about not writing in a diary since she disposed of her diaries on Mother's Day in 1999. Ms Folbigg would not admit this lie before the Inquiry and was typically evasive in trying to avoid honestly answering the questions.

In her evidence before the Inquiry, it was suggested to Ms Folbigg that she didn't throw out the diaries because she didn't want to write in them anymore, but for a different reason. Ms Folbigg disagreed saying "...I threw the - they weren't a purposeful thing done. They were simply thrown because I'd finished with them. That's how I viewed my diaries; once full I was finished with them."<sup>55</sup> It was suggested to Ms Folbigg that she got rid of the diaries because there was significantly incriminating material in the diaries and she said "Won't agree with that at all. No."<sup>56</sup>

It is submitted that the Judicial Officer would not accept Ms Folbigg's reasons for getting rid of the diaries as being either because she had decided to stop venting and writing in the diaries as it reminded her of her problems, or because she had simply finished with them. Ms Folbigg got rid of the diaries for a different reason, being that she didn't want Craig Folbigg, or indeed the authorities, to find and read her diaries given the incriminating evidence they contained.

#### *Timing of the Disposal*

It is submitted that Ms Folbigg most likely got rid of the diaries after Craig Folbigg had found the first notebook diary from June 1996-June 1997 diary at Millard Close, Singleton inside a bedside table in early May 1999. Whilst the notebook diary was not handed to police until 19 May 1999, it had been found earlier.

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<sup>55</sup> Transcript of the Inquiry, 29 April 2019 T629.41-43.

<sup>56</sup> Transcript of the Inquiry, 29 April 2019 T630.7-9.

Craig Folbigg said in evidence at the 2003 trial that when he read the diary “it made me want to vomit”.<sup>57</sup> He didn’t know what do with the diary as “It frightened me. It worried me. It sickened me.”<sup>58</sup> Craig Folbigg rang Detective Bernie Ryan and arranged a meeting on 13 May, before giving his statement and handing over the diary on 19 May 1999.

In her ERISP interview, Ms Folbigg was asked further questions about what had happened on Mother’s Day, when she said she got rid of the diaries. Ms Folbigg was also asked if she destroyed or threw the diaries away after Craig had told her that he had given the police a diary. The relevant extract from the ERISP transcript is below:

<p>Q 853 – Tell me about Mother’s Day, what happened at Mother’s Day this year?</p>	<p>“Mother’s Day was just depressing, and I tried to make it as normal as possible without paying any attention to it. And I was gonna write in my diary again and sort of let loose but I sort of flicked back a few pages and was sort of reading things that I had written and got the shits with my life and got the shits with writin’ it all in here and sort of thought how stupid is this, I should be talking to Craig, not writing in a bloody book and I just threw them all and decided I’d never write in them again. So, basically, so that I could start to learn to communicate with Craig. He was going to the doctors and then finally sort of communicatin’ with each other and saying we need some help here as in the line of a therapist again.”</p>
<p>Q 862 – Did you destroy or throw the diaries away after Craig had told you that he had given the police a diary?</p>	<p>“No, he didn’t tell, if was after that ‘cause he told me that he had given you a diary and he said that he told you he saw one on my night stand and I said, ‘well I haven’t got it anymore’, and I told him that I had gotten rid of it that day, so, Mother’s Day.</p>

Ms Folbigg’s response in A862 is not entirely clear. In her evidence before the Inquiry, Ms Folbigg was taken to Q862 by Counsel Assisting and asked the same question, she answered effectively “no” albeit her full response was again confusing and evasive.<sup>59</sup>

Ms Folbigg was then asked by Counsel Assisting: *“It’s more likely, isn’t it, that you threw it away after you heard that Craig had given a diary to the police, isn’t it?”* She responded by saying “no” and explained *“See I’m not - at that time when Craig told me he’d given them a diary, I didn’t like that he had, but I hadn’t placed too much importance on the fact that he did, because I wasn’t thinking there was anything in them that I had to be highly concerned about.”*<sup>60</sup>

It should not be accepted that Ms Folbigg was not “highly” concerned about Craig Folbigg or anyone else reading her diaries. Craig Folbigg had such a strong, sickening response when

<sup>57</sup> 3 April 2003 T180.38-40.

<sup>58</sup> 3 April 2003 T181.9-11.

<sup>59</sup> Transcript of the Inquiry, 1 May 2019 T800.6-17.

<sup>60</sup> Transcript of the Inquiry, 1 May 2019 T800.28-36.

he read the first notebook diary from June 1996-June 1997 that he contacted the police and handed over the diary.

Ms Folbigg wrote in her diary entry from July 1999: "I just pray it doesn't come back to bite me like my 97 one has..." This is a likely reference to Craig Folbigg finding her notebook diary from June 1996-June 1997 and raising concerns about it. Ms Folbigg effectively acknowledged in this July 1999 diary entry that her diaries could get her into trouble. She was indeed concerned about her diary entries and how they would be interpreted.

When the timing of events is considered, it is submitted that Ms Folbigg knew that Craig Folbigg had found her first notebook diary from June 1996-June 1997 and was concerned about this when she disposed of other diaries on Mother's Day 1999. Even if Crag Folbigg had not physically handed it over to police, Ms Folbigg surely realised this was a possibility and was concerned, hence she disposed of other incriminating diaries. It is also significant that it was Mother's Day when the diaries were disposed – a day which no doubt reminded Ms Folbigg of her four children who had died.

*The notebook diary from June 1997- April 1998*

The second notebook diary covering the period from June 1997-April 1998 was found by police in a search warrant at Millard Close, Singleton on 23 July 1999 on the evening after the ERISP interview was conducted.

Sergeant Gralton was a searching officer during the search warrant. He searched through a built-in wardrobe in the main bedroom of the house, looked through a blue plastic container which was on the floor inside the wardrobe and found a crocheted carry bag which was wrapped in some clothing. He looked inside the bag and found a personal diary (the second notebook diary from June 1997-April 1998). He held this diary as Detective Ryan walked into the room with Ms Folbigg. Detective Ryan said "Sgt Gralton has just found another diary in your wardrobe. Is that something would you like to make a comment in relation to that?" and Ms Folbigg said "I didn't know it was here. I thought it was gone."<sup>61</sup>

Later that evening, a listening device installed in the bedroom at 8 Millard Close, Singleton recorded a number of conversations:

23/7/99 at 21:40<sup>62</sup>

*Craig: I came home to get the diary and, and take it back to work and I couldn't find it.*

*Kathy: ... I couldn't find it and they found it.. and I've gone, I didn't have it so.*

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<sup>61</sup> Statement of Sgt John Gralton dated 24 August 1999 at paragraph 6, Tab 19 of Exhibit AZ.

<sup>62</sup> Transcription No 2 of listening device (bedroom) at 8 Millard Close, Singleton, Tab 16 of Exhibit AZ.

23/7/99 at 22:12<sup>63</sup>

*Kathy: "... she mentioned the walls that I bring up. I said Lee prime example now as to why I shouldn't drop the fuckin' walls because I dropped them enough just to write stuff and now it's comin' back to bite me in the arse, how much more proof do I need? I used to put the walls up to protect myself ... to protect myself from this... I don't wanna put it up... if I put a wall up again, then I'll fuck up..... about walls.... alarm bells goin' off in my head like you wouldn't believe, that's what you get from talking and confiding what you get for writing any errors you thought with yourself... doing any of it that's what you get. How my supposed to stop that thought?*

The next morning, the listening device recorded the following incident which the investigating police believed was Ms Folbigg was talking about the diary police found during the search warrant.

24/7/99 at 07:53<sup>64</sup>

Mrs Folbigg enters bedroom and appears to open a cupboard or drawer causing a loud noise.

*Kathy: I should have fucking done what I was gonna do, stuck it underneath that"*

Ms Folbigg was questioned about this incident during cross-examination before the Inquiry:<sup>65</sup>

*Q. Do you know what, have you got any idea what you're talking about there?*

*A. I've got no idea what I'm talking about.*

*Q. I suggest what you're talking about is hiding one of the diaries and you didn't hide the diary well enough and that you should've "stuck it underneath that", now does that refresh your memory?*

*A. No, no it doesn't.*

*Q. So you don't have a clue what--*

*A. I don't have a clue what I could--*

*Q. --you were talking about?*

*A. --have been talking about there.*

*Q. Could it have been a concern about not having hidden the diary well enough, could it have?*

*A. No, because my diaries were not a concern to me that I had to hide them anyway.*

It is submitted that Ms Folbigg's suggestion that she had "no clue what I could have been talking about there" should be rejected. It is clear from the listening device conversations, recorded after the second notebook diary from June 1997-April 1998 was found in the search warrant, that they are referring to the police finding this diary. Ms Folbigg is clearly concerned and angry that police found the second notebook diary from June 1997-April 1998. It would

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<sup>63</sup> Transcription No 3 of listening device (lounge) at 8 Millard Close, Singleton, Tab 17 of Exhibit AZ.

<sup>64</sup> Transcription No 4 of listening device (bedroom) at 8 Millard Close, Singleton, Tab 18 of Exhibit AZ.

<sup>65</sup> Transcript of the Inquiry, 29 April 2019 T634.15-32.

appear that she thought the diary was gone (perhaps disposed of along with the others on Mother's Day) and not happy when she realised it was not disposed of or hidden properly and the police therefore found it.

It is submitted that Ms Folbigg had intended to either dispose of or hide this diary and did not want it found, because she knew it contained a number of entries that were incriminating and could be viewed as admissions to her being responsible for the deaths of her children.

#### *Overall Submissions*

It is respectfully submitted that the Judicial Officer should find that Ms Folbigg disposed of, or tried to dispose of, a number of diaries because of a realisation by her that to keep them would run the risk that Mr Folbigg or the authorities would read them. It demonstrates a consciousness by her that the contents of her diaries held material that would incriminate her. Her disposal of the diaries is evidence of a consciousness of guilt because of the contents of the diaries.

The probative force of the damaging evidence about the disposal of the diaries is increased by a) Ms Folbigg's very unsatisfactory evidence about the number of diaries disposed, b) that she got rid of them on Mother's Day, c) the unacceptability of the reasons she gave for the disposal and d) the listening device conversation where she is clearly talking about not having hidden a diary better and was angry about this.

As will be discussed further below, Ms Folbigg's varied efforts to minimise her actions around the disposal of her diaries and the reasons for doing so in her evidence before the Inquiry are demonstrative of a deliberate attempt to minimise the damage she now knows, and could not have known at the time of her ERISP interview, was done to her case at trial given the incriminating nature of the diaries that did come into the possession of the police.

#### **D Evidence of Ms Folbigg – interpretation of the diary entries**

Ms Folbigg gave evidence before the Inquiry about a number of different diary entries, their meaning and interpretation. This part of the submissions will consider the evidence given by Ms Folbigg and how it should be assessed. It is the submission of the DPP that the diary entries provide very powerful evidence implicating Ms Folbigg in the killing of her children.

Ms Folbigg's overall contention in her evidence was that she was suffering after the deaths of her children and in that state of mind, she wrongly blamed herself as being responsible for their deaths because she was their mother. She argued that the diary entries must be read and interpreted in that context. Ms Folbigg explained this in her evidence in different ways, but

essentially she said that any diary entries which might be interpreted as admissions she killed the children, should not be interpreted in that way.

Ms Folbigg claimed that she felt an overriding guilt for the deaths of her children, not because they died at her hand, but rather she had not met their needs sufficiently and for this reason in some unexplained way they died. Any entries that look like admissions of killing should be interpreted in this way, she urged upon the Inquiry.

Ms Folbigg suggested that her depressive moods impacted on the children and if she managed her moods better and was a better mother, they would not "leave her" by dying. She acknowledged this was a "warped belief". Ms Folbigg said when she lost control or "snapped her cog" this was her feeling frustrated and angry that she could not meet the needs of her child, but did not mean any external reaction or physical response towards the child.

It is submitted there is an inconsistency between the benign meaning of her words and actions contended by Ms Folbigg, compared with the outward behaviours of frustration and anger that Mr Folbigg described seeing in his evidence at the 2003 trial. Mr Folbigg's observations are however consistent with the feelings and emotions that Ms Folbigg was pouring into her diaries which will be explored in this section of the submissions.

For a number of reasons it is submitted that the position adopted by Ms Folbigg should be rejected by the Judicial Officer. The relevant diary entries fairly interpreted are strongly inculpatory. The most important reason is that when read and understood according to the meaning of words in ordinary English language, they are clearly admissions of guilt. The many attempts by Ms Folbigg to explain them away in an exculpatory fashion are far-fetched and fly in the face of the meaning of the words used and written in her diaries.

The argument advanced by Ms Folbigg is that wherever an entry might be interpreted as an admission to her causing the death of her children (or a particular child), the ordinary meaning of the words should be rejected and rather the meaning is simply an assumption of guilt in the way she explained. The analysis of the relevant entries which follows demonstrates that this position should be firmly rejected by the Judicial Officer.

Another reason why Ms Folbigg's evidence should not be accepted is that when tested in cross examination about particular entries and their meanings, she gave explanations that both stretch credulity and were very often inconsistent.

Another important observation now available is that she is an intelligent woman who understands word use and language very well. She demonstrated that throughout her evidence. It cannot be argued that she may have used language loosely in her diary without fully understanding what she was saying.

The Judicial Officer was able to closely observe Ms Folbigg when tested in cross examination before the Inquiry. It is submitted both her explanations and her demeanour should combine to reach an adverse conclusion as to her credibility. She was untruthful in her evidence about the disposal of the diaries. It is submitted that the Judicial Officer would find that overall Ms Folbigg has been untruthful in much of her evidence before the Inquiry.

It is submitted that the case against her, always a strong one as recognised both in the CCA and then in the High Court, has become even stronger as a result of her giving evidence.

Analysis of relevant diary entries

It is important to acknowledge that these entries are part of the ‘strands in the cable’ circumstantial case. The entries are not viewed separately and in isolation but in accordance with long established principle are to be viewed in combination with all other circumstances. The analysis which follows necessarily deals with them individually but against the backdrop of this principle.

For the purpose of these submissions a selection of the most incriminating diary entries have been extracted, together with references to Ms Folbigg’s explanations in her evidence before the Inquiry. These diary entries have been numbered (in accordance with the list of relevant diary entries relied upon by the DPP in the Inquiry) and the analysis which follows deals with the selection of diary entries chronologically.

<p><u>Diary Entry 3 – 18 June 1996</u></p> <p>Baby plans still on the go. Could be preggy. Won't find out until next month though. That could create a problem if my body's not in peak condition - may not accept pregnancy. Must have sex more if wanting to get pregnant. I'm ready this time and I'll have help and support this time. <u>When I think I'm going to lose control like the last times, I'll just hand over baby to someone else and not feel so totally alone.</u> Getting back into my exercise, after will help my state of mind, and sleeping whenever possible as well. <u>I have learnt my lesson this time.</u></p> <p><u>ERISP Q 597</u></p> <p>What did you mean by lose control?</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 26-50 pg. 642 Line 1-50 pg. 643 Line 1-50 pg. 644 Line 1-20 pg. 645</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 47-50 pg. 682 Line 1-50 pg. 683 Line 1-50 pg. 684 Line 1-50 pg. 685 Line 1-50 pg. 686 Line 1-50 pg. 687 Line 1-6 pg. 688</p>
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This entry was written when Ms Folbigg was trying to become pregnant with her fourth child. From a general reading of the passage, it is clear that she is introspectively attempting to tell herself that she “is ready this time”. This infers that she, in fact, was not ready for motherhood on the three previous occasions when she had her children Caleb, Patrick and Sarah.



Following on, Ms Folbigg writes that *"when I think I'm going to lose control like last times, I'll hand over baby to someone else and not feel so totally alone"*. Ms Folbigg denied the suggestion that there is a contemporaneity in this entry between losing control and handing her baby over, stating *"No, I'm recognising there that my thought was I had to have control of just about the whole universe and if I was losing any and slipping any control whatsoever, then it cross my mind, as a fleeting though, would it be better if I'd left my child with Craig"*.<sup>66</sup>

In cross-examination by Ms Cunneen SC, Ms Folbigg accepted that the entry is effectively about losing control in relation her children, stating *"Yes, I was the mother, they died, I must have lost control of something, and that's how I viewed and believed it be"*.<sup>67</sup> She suggested that losing control meant the *"feeling I had lost control of the whole situation and my whole life, not just a bit of them"*.<sup>68</sup> With the end result being the death of her children because she had lost control of her life. Ms Folbigg denied under cross-examination that when she lost control she brought about the deaths of her children, saying *"I didn't bring about their deaths, so I didn't lose control in that fashion at all."*<sup>69</sup>

It is submitted that the Inquiry should reject these explanations. Ms Folbigg's reasoning is an attempt to minimise the actual meaning of the phrase; that she had lost control with her babies on the 'last times' and this led to them being in danger from herself. The only rational explanation is that Ms Folbigg is telling herself that she will hand over the baby to prevent herself from harming it, as she did to the previous three when she lost control the 'last times'.

It is submitted that a proper analysis of the passage supports the inference that Ms Folbigg was desperate to not lose control and harm her fourth child, as she did to the previous three that led to their deaths.

The last sentence of the diary entry states, "I have learnt my lesson this time". Ms Folbigg said under cross-examination by Ms Cunneen SC, *"I have learnt my lesson this time, it's a desperation statement. It's not, it's not because I thought I'd done all these - I believed I'd done a lot of mistakes and errors of judgment, and my inability and I decided I hadn't been a very good mother, and I haven't learnt my lesson this time is simply me telling myself I have to get this right."*<sup>70</sup> Ms Folbigg explained that the line is *"simply me reaching out and going okay, whatever things went wrong in the past, they're not going to go wrong this time and it's all going to work out"*.<sup>71</sup>

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<sup>66</sup> Transcript of the Inquiry, 29 April 2019 T645.10-13.

<sup>67</sup> Transcript of the Inquiry, 29 April 2019 T685.7-10.

<sup>68</sup> Transcript of the Inquiry, 29 April 2019 T684.46-48.

<sup>69</sup> Transcript of the Inquiry, 29 April 2019 T685.13.

<sup>70</sup> Transcript of the Inquiry, 29 April 2019 T687.19-23.

<sup>71</sup> Transcript of the Inquiry, 29 April 2019 T688.3-6.

This explanation does not make sense if it is accepted that Ms Folbigg believed that her three previous children died of natural causes, as there is no possible way she could say with any certainty that nothing will go wrong unless she had something to do with how things went wrong in the past, i.e. physically harming her children and causing their deaths. Learning a lesson suggests that a mistake of the past will not be repeated.

It is submitted that if Ms Folbigg’s three previous children had died of natural causes, then the expected position or feeling of a mother would be to think there was nothing she could do, especially if she innocently found them either dead or moribund in their beds. The inference that can be drawn from the passage in the context that it is written is that the lesson learned is, in fact, how to deal with her anger, how to not lose control, and to pass on the baby to someone else if she were to lose control. These traits were not present when she had lost control with her three previous children and as a result, they died.

<p><u>Diary Entry 4 – 22 June 1996</u></p> <p>I watched a movie today about schizophrenia, wonder if I have a mild curse of that. I change moods really quickly. <u>In my most dangerous mood, I'm not nice to be around</u> &amp; always want to be anywhere, but where I am. As long as it has music &amp; men to show off too. Then there are times I wish to be more of a home body &amp; please my hubby. Am I strange or is this behaviour normal? Guess I'll never know.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 22-45 pg. 645</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 8-37 pg. 688</p>
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This entry highlights Ms Folbigg’s awareness of her mood swings and how they can affect the people around her. When put to her that the word dangerous suggests she might hurt someone or somebody could suffer, Ms Folbigg replied *“if you’re referring to someone suffering, then yes, that was me, I was suffering”*.<sup>72</sup> When suggested in cross-examination that the phrase talks of being a danger to someone else, Ms Folbigg denied this interpretation, explaining that, *“No, I’m talking of being in a very depressive mood and I wouldn’t be a very nice person to be around”*.<sup>73</sup>

It is submitted that the Inquiry would reject this explanation as the word ‘depressive’ has a substantially different meaning to the word ‘dangerous’. It is yet another example of Ms Folbigg attempting to change the ordinary meaning of words to interpret the entry in her favour. If the passage is read taking into the account the ordinary meaning of the word ‘dangerous’, it shows that Ms Folbigg acknowledges that she can become dangerous – that is likely to cause harm

<sup>72</sup> Transcript of the Inquiry, 29 April 2019 T645.36-39.

<sup>73</sup> Transcript of the Inquiry, 29 April 2019 T645.41-45.

or injury, and not nice to be around as a result. It is submitted that these dangerous moods were a contributor to her children's deaths.

<p><u>Diary Entry 7 – 26 August 1996</u></p> <p>I suppose my heart isn't really in it. Because I want a baby. Yes I actually do want one!! Went to clairvoyant last week – so did Craig. I always believed there is more going on than just human nature. <u>I seem content now because I now know that even though I'm responsible. It's alright. She accepts and is happy their (sic).</u> I've always felt her strongly and now I know why. She is with me. I think my mother is too.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 47-50 pg. 645 Line 1-50 pg. 646 Line 1-50 pg. 647 Line 1-37 pg. 648</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 6-50 pg. 693 Line 1-50 pg. 694</p>
<p><u>ERISP Q 610</u> What do you mean by that, 'even though I'm responsible'?</p>		

Ms Folbigg accepted in her evidence that she is writing about Sarah in this diary entry. She asserted that her being “responsible” should be interpreted in the same exculpatory fashion as in other entries. It was put to her in cross-examination by Mr Maxwell QC that “even though I could have done more” would be more accurate than “even though I'm responsible” and she answered: *“It may have but it's still along the same line of thought. I felt responsible because I was their mother and I had failed at being that mother”*.<sup>74</sup>

It is submitted that Ms Folbigg's acceptance of responsibility combined with the other entries should be read as her being directly responsible in the sense of taking the lives of her babies, not simply failing as their mother.

In this diary entry, the clairvoyant seeing Sarah in a happy place where she accepts what has happened to her, is Ms Folbigg's way of justifying that she has not done the wrong thing in taking Sarah's life as she has been forgiven.

<p><u>Diary Entry 8 – 8 September 1996</u></p> <p>Feel now is the time for us to have another baby. Have finally realised it's the right time for me. I have Craig and he wants a child that I can give him. And I have enough friends now, <u>not to loose (sic) it like before.</u></p>		<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 18-50 pg. 701 Line 1-50 pg. 702 Line 1-22 pg. 703</p>
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This entry is another example of Ms Folbigg being acutely aware that a loss of control led to the deaths of her previous children. It is submitted that the meaning of this phrase can be

<sup>74</sup> Transcript of the Inquiry, 29 April 2019 T647 38-41.

ascertained by a simple reading of the passage. That is, she realises that she now has the support and friends to stop her from losing it like before. The word *before* is a clear reference to what occurred when she had Caleb, Patrick and Sarah. It is submitted that “losing it like before” is an acknowledgement of a loss of control that led to Ms Folbigg killing her children.

The overriding theme behind this entry is one that is repeated throughout her diary entries; a loss of control leading to catastrophic outcomes for her children. Throughout her evidence in the Inquiry, Ms Folbigg tries to explain this loss of control by attributing it to a loss of control of her life and situation, and divert it away from her children. It is submitted that the Inquiry should not accept this position. It is clear that whenever Ms Folbigg references losing control in her diaries, it is in the context of her children and their deaths.

<p><u>Diary Entry 9 – 11 September 1996</u></p> <p>Feeling inadequate because I'm not pregnant yet. Feel as though its my fault. Think its deserved after everything that's happened. I suppose I deserve to never have kids again. I am just so depressed don't know what to do.</p>		<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 24-50 pg. 703 Line 1-50 pg. 704 Line 1-30 pg. 705</p>
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This entry is significant as it shows Ms Folbigg's consciousness of guilt. She openly suggests that she deserves to never have kids again, and this is linked to her feeling like it is her fault that she is not pregnant again. It is submitted that the correct, straightforward interpretation of this passage is Ms Folbigg expressly outlining her guilt, by recording that she does not deserve to have kids again as a type of recompense for her actions towards Caleb, Patrick and Sarah and the killing of them.

Under cross-examination by Ms Cunneen SC, Ms Folbigg asserted that the meaning of the passage was that she did not deserve to have children again because she felt she was a major failure as she had not successfully reared the last three.<sup>75</sup> The Inquiry should only accept this explanation as an acknowledgment by Ms Folbigg that she unsuccessfully reared her previous three children because she had caused their deaths by smothering them. This interpretation stems from the guilt she betrays in this passage by stating it is her fault and she deserves it after everything that she has done.

<p><u>Diary Entry 10 – 14 October 1996</u></p> <p>Children thing still isn't happening. Thinking of forgetting the idea. Nature, fate and the man upstairs have decided I don't get the fourth chance, and rightly so I suppose. I would like to make all my mistakes and terrible thinking be corrected and mean something though. Plus, I'm</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 8-50 pg. 670 Line 21-50 pg. 672 Line 1-50 pg. 673 Line 1-5 pg. 674</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 5-50 pg. 709 Line 1-48 pg. 710</p>
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<sup>75</sup> Transcript of the Inquiry, 30 April 2019 T704.9-14.

<p><u>ready to continue my family time now. Obviously, I'm my father's daughter. But I think losing my temper stage and being frustrated with everything has passed.</u> I now just let things happen and go with the flow, an attitude I should have had with all my children. If given the chance I'll have it with the next one.</p> <p><u>ERISP Q 644-656</u> What did you mean by, 'obviously I'm my father's daughter?'</p>		
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This entry is significant. It is submitted that it should be viewed as an admission that Ms Folbigg had a tendency to kill when she lost her temper and in her mind, she inherited this trait from her father.

The line which reads "Obviously, I'm my father's daughter" was excluded in the 2003 trial because the probative value was outweighed by the danger of unfair prejudice. This was a recognition by the Court that this evidence could be misused by the jury proceeding on a basis logically unconnected with the issues in the trial.

Ms Folbigg was asked about this line in the ERISP interview and claimed she meant her natural father was "a total big loser" and she thought she was also "a loser". This section of the ERISP interview again did not go before the jury.

The line from the diary entry and extract from the ERISP interview were however admitted into evidence before this Inquiry. When considering the probative force of both pieces of evidence, it is important to look at the entry both in context, and to also determine what is meant based upon an ordinary and logical understanding of the English language. It is submitted that the explanation given by Ms Folbigg is unacceptable on both bases.

The context for this entry found by considering the number of entries about Ms Folbigg losing her temper, "snapping a cog" or getting angry at a time when she is under pressure looking after her babies.

The three most significant sentences further refine the context. They do so by putting together three interrelated thoughts that form the stream of consciousness of her concerns when Ms Folbigg is writing the entry. The first is that she feels she is ready to have another baby. The second considers a trait of her father that she feels she may have as well. The third, which follows directly from the second appears to inform the reader what that trait is. It must be the trait of losing her temper.

In evidence before the Inquiry she takes issue with this interpretation and explains it under cross-examination by Mr Maxwell QC:

*Q. As to what you were referring to when you said obviously you're your father's daughter?*

*A. Yes, I believed and thought at the time that my father's actions ruined my life and my life never seemed to go right from there. And it was a thought of, along the lines of sins of the father being on the daughter. Was I paying the price?<sup>76</sup>*

She says that the reference to her father is about blaming him a lot “for most of my life just going wrong”. It may be that she does blame him for this, but this meaning of the phrase “Obviously I’m my father’s daughter” does not fit into the context in which she has used these words. The plain English does not read as though she is blaming him – rather it reads as Ms Folbigg acknowledging their similarities and expressing that she feels she has moved past their shared trait of ‘losing’ her temper. The phrase, simply understood in the context it is written, acknowledges that she is like her father and they carry the same traits. It is an acceptance, in Ms Folbigg’s mind, of this fact. The word “but” which starts the third sentence is referring to the trait she is identifying she has taken from her father, that she feels at the time of writing she has overcome. It is the characteristic of losing her temper. The overriding significance her father has in her life is that he killed her mother when he had lost his temper.

She was asked “*What was the sin of your father?*” And she replied “*My father killed my mother.*” She says that action “*ruined her life which did not seem to go right from there.*”<sup>77</sup> Again it maybe that she sees this action as ruining her life, but that is not the logical or readily acceptable meaning of the phrase “*obviously I’m my father’s daughter.*” She would be expected to say something like “*my father ruined my life.*” If that is what she really meant. The language of her answers is as simple and straightforward as the language of her diaries. This is an example of attempts she made all through her evidence to innocently explain inculpatory entries.

The Inquiry would reject her explanation of the meaning of the phrase because it so clearly flies in the face of the context, the plain, uncomplicated English meaning of the words, and common sense. A rejection of her evidence is particularly significant for this diary entry, considering the damaging material it reveals, and generally, because it is a finding adverse to her credibility.

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<sup>76</sup> Transcript of the Inquiry, 30 April 2019 T672.34-39.

<sup>77</sup> Transcript of the Inquiry, 30 April 2019 T672.36

<p><u>Diary Entry 12 – 4 December 1996</u></p> <p><u>I'm ready this time. But I've already decided that if I get any feelings of jealousy or anger too much I will leave Craig and baby rather than answer being as before.</u> Silly but will be the only way I will cope. I think support and not being afraid to ask for it will be a major plus. Also, I have and will change my attitude and try earnestly not to let anything stress me to the max. I will do things to pamper myself regularly and just deal with things. If I have a clingy baby, then so be it. A cat napper so be it. That will be when I will ask help and sleep whenever I can to keep myself in a decent mood. <u>I know now that battling wills and sleep depravaision (sic) were the causes last time.</u></p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 41-50 pg. 648 Line 1-50 pg. 649 Line 1-50 pg. 650 Line 1-23 pg. 651 Line 34-50 pg. 651 Line 1-50 pg. 652 Line 1-50 pg. 653 Line 1-5 pg. 654</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 26-50 pg. 712 Line 1-50 pg. 713 Line 10-50 pg. 714 Line 1-50 pg. 715 Line 1-50 pg. 716 Line 1-50 pg. 717 Line 1-50 pg. 718</p>	<p>Judicial Officer</p> <p>Line 27-30 pg. 651 Line 1-6 pg. 714 Line 5-25 pg. 719</p>
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This entry is significant as a plain reading interpretation of the passage suggests that Ms Folbigg was acknowledging that she was responsible, in the sense of causing, the deaths of Caleb, Patrick and Sarah. The entry is bookended with this very fact – she refers to the prior occasions ‘as before’ and ‘last time’. The inculpatory significance of this is inescapable.

Firstly, Ms Folbigg writes that if she “*gets any feelings of jealousy or anger too much, she will leave Craig and the baby rather than answer being as before*”. It is submitted that ‘answer being as before’ is a reference to Ms Folbigg having killed her previous three children. She is acknowledging to herself that her feelings of jealousy and anger put her in a position where she acted upon this anger in a physical way that led to the deaths of her children. Her stated desire that she would rather leave Craig and the baby implies that the feelings of jealousy and anger would be too much to control if she had remained in the family home. The only way that these feelings could be contained and not acted upon was if she left.

It is submitted that the essence of this particular passage shows that Ms Folbigg had a heightened sense of understanding that she could pose a great deal of harm to her newborn child if the feelings of anger and jealousy reared their head as they did on the previous occasions where her children died at her hand.

Under cross-examination by Ms Cunneen SC and in questioning by the Judicial Officer, Ms Folbigg stated that the phrase, ‘answer being as before’ was a reference to walking in and

discovering a dead child in their bed.<sup>78</sup> It is submitted that the Inquiry should reject this explanation. The 'answer' is inextricably linked to her fears about feeling jealousy or anger – so much so that she contemplates (apart from her 'answer as before') leaving her marriage and her home. If Ms Folbigg's explanation is accepted, it makes no sense – that is, if she was feeling anger or jealousy, she would wake in the night and find her child dead. There would be no way to anticipate such an event apart from her feelings – that is, on her evidence, that the death of the child follows on the heels of Ms Folbigg's feelings of anger and jealousy. Ms Folbigg's attempt to cast this entry in an innocuous light collapses upon itself as soon as her asserted meaning is followed to its conclusion.

On a proper, straightforward and plain English construction, these phrases are written in the same sentence and must be read as such. It is an express statement that she would rather leave Craig and the newborn rather than give in to her feelings of anger and jealousy. These feelings were answered 'as before' through the actions of smothering her children when her anger lead to a loss of control.

Ms Folbigg writes that leaving Craig and the baby would be silly, but "will be the only way I will cope". This sentence clearly demonstrates the drastic action that Ms Folbigg would have to take in order remove herself from a situation where the feelings of jealousy and anger could arise. The fact that she believes that the only way she could cope was if she left the home, shows the seriousness of the situation. It is submitted that Ms Folbigg's acknowledgement of having to leave as the only way she would cope shows that she is desperately trying not to repeat what happened with her previous children.

At the bottom of the entry, Ms Folbigg wrote that "*I know now that battling wills and sleep deprivation were the causes last time*". This sentence is highly probative and inculpatory in the sense that she is admitting that battling wills with her children and her own sleep deprivation were the causes of her children's deaths. When questioned by the Judicial Officer on what the causes were, she said "*the causes of their – yeah, the causes of them dying*".<sup>79</sup> The passage can then only be construed as follows, "I know now that battling wills and sleep deprivation were the causes of their deaths". In her evidence in the Inquiry, Ms Folbigg explained this passage as she believed that the battling of wills and her sleep deprivation led to her children deciding that they would not stay with her anymore.<sup>80</sup> It is submitted that this explanation should be rejected. Children do not just decide to leave their mother.

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<sup>78</sup> Transcript of the Inquiry, 30 April 2019 T714.1-6.

<sup>79</sup> Transcript of the Inquiry, 30 April 2019 T719.16-18.

<sup>80</sup> Transcript of the Inquiry, 30 April 2019 T719.10-14



Regardless of Ms Folbigg’s spiritual/metaphysical beliefs at the time, and the supernatural beliefs she told the Inquiry she still believed at the time of giving her evidence, the only rational meaning that can be interpreted from this passage is that Ms Folbigg is acknowledging the battle of wills and sleep deprivation got to such a point that it led to her anger spiralling out of control and this was the causes of the deaths of her children. Her battling of wills with her children, especially in the case of Sarah, and her constant sleep deprivation contributed to a state where Ms Folbigg could not cope, and ultimately led to her smothering her children.

<p><u>Diary Entry 13 – 1 January 1997</u></p> <p>Another year gone and what a year to come. I have a baby on the way which means major personal sacrifice for both of us, but I feel confident about it all going well. <u>This time I am going to call for help, this time I'll not attempt to do everything myself anymore. I know that that was the main reason for all my stress before and stress made me do terrible things.</u> I had a talk to Craig while in the bath tonight, our favourite talking spot. Haven't really cleared anything, just told him how I feel and what vibes I'm receiving from him.</p> <p><u>ERISP Q 705</u></p> <p>It's a very strong expression isn't it, 'terrible things'?</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 7-50 pg. 654 Line 1-50 pg. 655 Line 1-38 pg. 656</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 31-50 pg. 719 Line 1-50 pg. 720 Line 1-50 pg. 721 Line 1-50 pg. 722</p>
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This entry was written whilst Ms Folbigg was pregnant with Laura. She is reflecting on how she feels confident, and that she is going to call for help this time if she becomes too stressed. She makes a reference to stress making her do 'terrible things'. This an example of Ms Folbigg admitting to herself that she did 'terrible things' to her three previous children because of her stress.

Ms Folbigg has been consistent in trying to downplay the phrase 'terrible things'. In her ERISP interview in 1999, she attributed 'terrible things' to an "odd angry thought or the odd stress or the odd frustration".<sup>81</sup> She gave evidence at the Inquiry that she did not differentiate between a slight frustration or an angry thought from being a terrible thing.<sup>82</sup> The repeated use of certain words by Ms Folbigg in an endeavour to cast an innocent gloss over her diary entries will be examined below.

The Inquiry should reject Ms Folbigg’s explanation that “terrible things” is some slight or odd angry thought or frustration. It is another example of Ms Folbigg relying upon an interpretation

<sup>81</sup> Exhibit E, ERISP of Kathleen Folbigg Q706.

<sup>82</sup> Transcript of the Inquiry, 29 April 2019 T654.35-41

of the words written that is different to their plain and ordinary meaning. The phrase ‘made me do terrible things’ implies that something really bad or serious happened and it was a physical reaction, not just an odd angry thought or slight frustration.

When plainly asked what she meant by ‘terrible things’ by Cunneen SC, Ms Folbigg replied, *“For me the terrible things are anything. As I said, it’s a broad spectrum of things that I’m using the word terrible for. It could be me placing my child down to let her cry for even 30 seconds. That’s a terrible thing in my view”*.<sup>83</sup> This description of the phrase is Ms Folbigg attempting to minimise and downplay the actual inculpatory meaning that rationally infers ‘terrible things’ were deliberate physical actions that caused the deaths of her children. She speaks in this extract of a ‘broad spectrum’, and yet the examples that she repeatedly gave to the Inquiry to the most damning entries in her diary, such as this entry, are all cast by Ms Folbigg as the least severe aspect of the emotion or action, such as the response to ‘terrible things’ that she has given above. They are cast in this manner by Ms Folbigg in her endeavour to explain away the material that she well knows played a significant part in her being found guilty for the deaths of all of her children and the malicious infliction of grievous bodily harm upon Patrick.

It is submitted that the phrase ‘terrible things’ should be interpreted by the Inquiry as anger and frustration physically manifesting itself into action that caused Ms Folbigg to harm her children and ultimately cause the death of her children by smothering them.

<p><u>Diary Entry 15 – 4 February 1997</u></p> <p>Still can’t sleep. Seem to be thinking of Patrick, Sarah and Caleb. Makes me seriously wonder whether I’m stupid or doing the right thing by having this baby. <u>My guilt of how responsible I feel for them all haunts me, my fear of it happening again haunts me. My fear of Craig and I surviving it if it did haunts me as well.</u> I wonder wether (sic) having this one wasn’t just a determination on my behalf to get it right and not be defeated by my totally inadequate feelings about myself. <u>What sort of mother am I, have I been – a terrible one, that’s what it boils down to. That’s how I feel and that is what I think I am trying to conquer with this baby. To prove that there is nothing rong (sic) with me, if other women can do it, so can I.</u> Is that a wrong reason to have a baby? Yes, I think so but it’s too late to realise now. I’m sure with the support I’m going to ask for I’ll get through. <u>What scares me most will be when I’m alone with the baby. How do I overcome that? Defeat that?</u></p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 18-50 pg. 655 Line 1-38 pg. 656</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 20-50 pg. 723 Line 1-50 pg. 724 Line 1-50 pg. 725 Line 1-50 pg. 726 Line 1-44 pg. 727</p>
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The phrase, “my guilt of how responsible I feel for them all haunts me” is significant as the plain interpretation of the passage is that Ms Folbigg feels guilty because her children had

<sup>83</sup> Transcript of the Inquiry, 30 April 2019 T721.33-36.

died at her hands. It is submitted that Ms Folbigg was racked by guilt about being directly responsible for the deaths of her children, and she expressed her guilt by stating it in the passage. Ms Folbigg attempted to explain the passage by saying she took *“the onus of responsibility of their deaths because she was their mother”*<sup>84</sup>, and that she did not mean she felt guilt for a physical response or action. This explanation should be rejected.

It would be expected that if Ms Folbigg did not do anything active to bring about the children’s deaths, then she would not expressly and repeatedly write how guilty and responsible she feels. If she did nothing to cause the deaths of her children, one would think it would be a matter where Ms Folbigg could express that in her diaries in the same manner that she expressed it in the Inquiry – again, in plain and straightforward English.

The fact that the passage goes on to Ms Folbigg describing herself as a terrible mother is directly linked to the previous phrase of guilt and responsibility. It is important to note that the context clearly outlines a direct correlation between responsibility, guilt and being a terrible mother. The thoughts are interrelated and connected as they are written in a back-to-back fashion.

It is submitted that Ms Folbigg describes herself as a terrible mother in the context of feeling responsible and guilty for causing her children’s deaths. That she writes she is trying to conquer this feeling and prove there is nothing wrong with her, infers that on the previous three occasions, she failed in a way that led to the deaths of her children through her own physical actions.

The last part of the diary entry is an example of Ms Folbigg expressing her fear of being awake and alone with the baby when she has no one else around to help suppress her anger and frustration towards her children. She is directly asking herself how she can overcome and defeat these urges if she is alone. Again, there is nothing complex about the plain English she uses in this entry to express her feelings and inner turmoil.

At the Inquiry, Ms Folbigg stated that she was actually expressing *“the fear that I was scared to death of finding my child not alive”*.<sup>85</sup> It is submitted that the Inquiry should outright reject this explanation. The entry is written in the context whereby Ms Folbigg admits that her guilt makes her feel responsible for them ‘all’ and that she has been a terrible mother, and as a result she is scared about being left alone with the new baby. This is another example of Ms Folbigg endeavouring to explain away a plain English diary entry with a straightforward

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<sup>84</sup> Transcript of the Inquiry, 30 April 2019 T724.20-36.

<sup>85</sup> Transcript of the Inquiry, 29 April 2019 T656.35-38.

answer, also in plain English, that carries a vastly different meaning yet is just as simply expressed.

<p><u>Diary Entry 18 – 16 May 1997</u></p> <p>I think that she will be a great help in preventing me from stressing out as much as I've done in the past. Night time and early morning such as these will be the worst for me. That's when wishing someone else was awake with me will happen purely because of what happened before. Craig says he will stress and worry but he still seems to sleep OK every night and did with Sarah. <u>I really needed him to wake up that morning and take over from me. This time I've already decided if I ever feel that way again I'm going to wake him up.</u></p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 40-50 pg. 656 Line 1-50 pg. 657 Line 1-24 pg. 658</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 39-50 pg. 730 Line 1-50 pg. 731 Line 1-13 pg. 732 Line 35-50 pg. 732 Line 1-50 pg. 733 Line 1-50 pg. 734 Line 1-24 pg. 735</p>	<p>Judicial Officer</p> <p>Line 17-31 pg. 732</p>
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This entry is a powerful indication that Ms Folbigg was awake and with Sarah when she died. It is submitted that this entry demonstrates that Ms Folbigg is acknowledging that night time and early mornings are the periods where she feels the most stress and anger and wishing she had someone else with her to prevent her from losing control and smothering her children as had 'happened before'. She is unambiguously making reference to having needed Craig Folbigg to wake up on the night Sarah died and she was feeling 'that way again'.

The correct interpretation of the passage is consistent with a plain English reading of the entry, namely, that Ms Folbigg was awake with Sarah at the time of her death and needed Mr Folbigg to wake up and take over from her because she was having feelings of frustration and was losing control, which led her to smother the child – in this instance, Sarah. We adopt Counsel Assisting's submissions as to the interpretation of this passage and submit that it is the only interpretation available.

The Inquiry should not accept Ms Folbigg's explanations of this passage. Originally, she denies that the reference to 'that morning' was about the morning of Sarah's death.<sup>86</sup> This should be rejected, as it is abundantly clear 'that morning' is a reference to the morning when Sarah died as the sentence directly follows and is linked with the previous sentence about Craig sleeping OK 'every night and did with Sarah'. Ms Folbigg reluctantly concedes that she was, in fact, writing about the morning that Sarah died and admits that she was awake.<sup>87</sup>

<sup>86</sup> Transcript of the Inquiry, 29 April 2019 T657.17-20.

<sup>87</sup> Transcript of the Inquiry, 30 April 2019 T733.29-35.

Ms Folbigg was of course hesitant to admit that she was writing about the night that Sarah died as she knows that the only inference that can be drawn from the passage is that she wished Craig was awake to stop her from taking Sarah's life. The phrase 'take over from me' is a clear acknowledgement that Ms Folbigg was awake and attending to Sarah before she killed her.

If the Inquiry were to accept Ms Folbigg's reasoning that she had simply gone to the toilet and then discovered Sarah was not breathing, then it would need to completely disregard the phrase 'take over from me', as there is essentially nothing to take over if Ms Folbigg were being truthful about merely discovering Sarah after going to the toilet. This explanation flies in the face of the words that Ms Folbigg wrote. It should not be accepted as truthful.

The Judicial Officer was correct to point out that Ms Folbigg's explanation of wanting somebody to be there when she found the dead baby was inconsistent with writing that she wanted somebody to take over from her.<sup>88</sup> It is another example of Ms Folbigg attaching an exculpatory meaning to an inculpatory entry.

<p><u>Diary Entry 20 – 6 July 1997 [error made by KF – should be 6 June</u></p> <p>Maybe then he will see when, stress of it is getting too much &amp; save me from ever feeling like I did before, during my dark moods. <u>Hopefully preparing myself will mean the end of my dark moods or at least the ability to see it coming and say to him or someone hey, help I'm getting overwhelmed, help me out. That will be the key to this babies survival.</u> It surely will. But, enough dwelling, things are different this time. It will all work out for sure.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 34-50 pg. 658 Line 1-15 pg. 659</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 6-50 pg. 736 Line 1-50 pg. 737 Line 1-50 pg. 738 Line 1-22 pg. 739</p>
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This entry is significant as it outwardly demonstrates that Ms Folbigg is acknowledging that the key to her newborn's survival is to ensure her dark moods do not overwhelm her. Under cross-examination by Ms Cunneen SC, Ms Folbigg gave evidence that her dark moods were a reference to when she was feeling depressed. This explanation should be rejected, it is another example of Ms Folbigg minimising the meaning of a certain word to alleviate the actual intended use.

On a plain English interpretation, it is clear that Ms Folbigg is trying to tell herself that the ability to anticipate her dark moods will be critical in ensuring the survival of her newborn baby. It is submitted these darks moods were not a reference to depression, but an acknowledgement

<sup>88</sup> Transcript of the Inquiry, 30 April 2019 T732.17-31.

of Ms Folbigg’s moods where she loses control, ‘snaps a cog’ and becomes overwhelmed with anger and frustration.

Ms Folbigg explained under cross-examination by Mr Maxwell QC that she believed her dark moods caused her children to be unhappy. She, “*had a desperate weird thought that my moods contributed to my children making a choice that they didn’t want to stay, that’s how desperate I was*”.<sup>89</sup> It is submitted that the Inquiry should not accept this explanation. It is an attempt by Ms Folbigg to once again suggest her children died for some unexplained, fantastical reason, rather than by her own hand, and to divert attention from the meaning that is inescapably evident on the face of the diary entry.

These dark moods did not cause her children to suddenly decide to ‘leave’. It is submitted that these dark moods were the catalyst and key instigator behind Ms Folbigg killing her children. It is why she wrote that she was so desperate to anticipate them coming before they overwhelmed her. She knew what happened to her children when they did. Her desperation to anticipate the arrival of the dark moods was because of how they manifested on the previous occasions when her children were killed. The phrase, ‘this will be the key to this babies survival’ highlights the link between her dark moods causing the death of her previous children, and how she does not want it to happen again with the newborn, Laura.

<p><u>Diary Entry 22 – 26 June 1997</u></p> <p>This time Im positive with support from Friends etc &amp; Craig this time everything will work out fine &amp; the sight &amp; visions of the future I've been having will come true this time. <u>With the other 3 I never bothered to think of school &amp; teenage years. Maybe because I always knew they'd never get there - but this one I see myself taking her to school &amp; Craig doing homework etc with her. Therefore I assume I'm actually ready for the "Family Life" now where I wasn't before. Feeling secure, loved successful &amp; wanted by Craig has helped me. And to a degree the fact that I don't wish to die with no one really knowing I was here. At least now I know my son or daughter will. If God or that elusive higher power doesn't take them away from me once they are older to punish me.</u> I'm trying to do right this I hope that is received &amp; understood.</p>		<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 43-50 pg. 740            Line 1-50 pg. 741            Line 1-2 pg. 742            Line 29-50 pg. 743            Line 1-50 pg. 744            Line 1-43 pg. 745</p>
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This entry was written whilst Ms Folbigg was heavily pregnant with Laura. Here, she is being openly optimistic that she has the support network in place to ensure that everything will work out with the new baby. She then contrasts this view with her previous children, stating “*With*

<sup>89</sup> Transcript of the Inquiry, 30 April 2019 T659.1-3.

the other 3 I never bothered to think of school & teenage years. Maybe because I always knew they'd never get there". This passage is an odd thing to write when reminiscing on the tragic passing of three children.

It is submitted that the only way Ms Folbigg could be certain – and she writes that she 'knew' that 'they'd never get there' - is because she actively brought about their premature deaths. It is not what you would expect a grieving mother to say, especially if the children died of natural causes. It is an admission that she had this knowledge all along, because she was well aware that she could not contain her dark moods and her loss of temper that led her to take the lives of her children.

Under cross-examination, Ms Folbigg explained that *"I always knew is a separate thought again, and it is because of my depressed state and a doom and gloom aspect, I always just was expecting the worst, everything, I was always expecting the worst and I always knew refers to that"*.<sup>90</sup> Ms Folbigg is clearly trying to attribute the phrase to her being pessimistic about the fate of her children and that she had the feeling that her children would not survive. It is submitted that this is a deflection from what she actually meant; that she knew they would never get there because she had been directly responsible for bringing about their deaths.

At the bottom of the entry, Ms Folbigg worries that God or 'an elusive higher power' could take away her new baby when they are older as a form of punishment. It is submitted that Ms Folbigg is acknowledging that she is worried about receiving punishment from a supernatural/religious entity for what she did to her previous children.

The word punishment implies that a dishonest or criminal act occurred in order to bring about the punishment. It is submitted that these acts were the smothering of her previous children. The Inquiry should regard this entry as Ms Folbigg outwardly expressing her worry of her new child being taken away from her as a form of punishment for killing her three previous children.

<p><u>Diary Entry 28 – 25 October 1997</u></p> <p>Just watched video of Sarah, little upsetting, but she did some funny things. Made us laugh, think John was a little upset but he hid it well. <u>I looked at it, but have to be honest &amp; say I cherish Laura more, I miss her yes, but am not sad that Laura is here &amp; she isn't. Is that a bad way to think, don't know.</u> I think I am more patient with Laura. <u>I take the time to figure what is rong (sic) now instead of just snapping my cog.</u> Also she is a far more agreeable child &amp; is easily ... ..</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 9-50 pg. 635 Line 1-50 pg. 636 Line 1-50 pg. 637 Line 1-50 pg. 638</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 49-50 pg. 749 Line 1-50 pg. 750 Line 1-48 pg. 751 Line 41-50 pg. 752</p>	<p>Judicial Officer</p> <p>Line 1-37 pg. 752 (supernatural power)</p>	<p>Counsel Assisting</p> <p>Line 42-50 pg. 804 Line 1-50 pg. 805 (discussion about what KF meant by supernatural powers</p>
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<sup>90</sup> Transcript of the Inquiry, 30 April 2019 T741.9-14

<p>most of the time. Not sure how Craig feels about Sarah now. Know that even though he tried, he loves Laura just as hard &amp; wasn't prepared for that. Thought he could remain stand offish, but couldn't. I think Laura is beautiful compared to Sarah — she was cute but Laura has a special look about her. Her slight difference in looks gives her a beautiful face, not just pretty, cute &amp; cuddly, Gorgeous &amp; beautiful. Well so far anyway. Looking at the video, Sarah was boyish looking. <u>Laura has definite feminine features, they are chalk &amp; cheese. And truthfully just as well. Wouldn't of handled another one like Sarah. She saved her life by being different.</u></p>				<p>taking her children.)</p>
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This entry is written at some time on the evening after watching a video of Sarah. Ms Folbigg is comparing Sarah and Laura and saying that she is “*not sad that Laura is here & she isn't.*” She is saying quite clearly here that she is not sad that Sarah is no longer alive. Such a statement is entirely consistent with her having killed Sarah. This entry directly fits with the description of the diary entries given by Sully J in the NSWCCA as “chilling”. This proposition was put to her which she denied.<sup>91</sup> It is submitted that the Inquiry would find her denial unacceptable.

The following sentence increases the probative value of the entry, which speaks to her attitudes and feelings towards her children, where she poses the question to herself... “*Is that a bad way to think, don't know.*” To pose the question reveals Ms Folbigg's state of mind towards her deceased child Sarah. At best, it demonstrates indifference towards the child that Ms Folbigg – although she described her at one point as ‘wonderful’, she also described her to Dr Giuffrida as looking like a ‘squashed cabbage’ and not being as pretty as Laura, as outlined in the extract above. To pose the question at all is powerfully probative against her, but then to say she does not know the answer is even more so. It speaks to her state of mind - the indifference towards a child she had killed in circumstances where she lost her temper or was in a dark mood. It speaks to a lack of regret as to her actions.

The proposition was put to Ms Folbigg in cross examination that it is obviously bad for a mother to think she's not sad her dead daughter is not alive.<sup>92</sup> The probative force is increased by her response and explanation for this entry. She disagreed that it is obviously a bad way for a mother to think about her deceased child. Her response was there “*is nothing obvious in my*

<sup>91</sup> Transcript of the Inquiry, 29 April 2019 T635.37-38.

<sup>92</sup> Transcript of the Inquiry, 29 April 2019 T637.7-12.



*diaries, in total.*" This response encapsulated Ms Folbigg's attempts throughout her evidence to turn the meaning of the diary entries away from a straightforward and inculpatory interpretation to an interpretation that is illogical and unacceptable. When she is confronted here with a clearly inculpatory entry she seeks to obfuscate by suggesting that none of her entries are obvious. It is submitted that this Inquiry would reject her response and give to the entry the meaning that is plain upon its face.

The phrase, "she saved her life by being different", was cross examined on by Ms Cunneen SC:<sup>93</sup>

*Q. Well, why do you then say, "She saved her life by being different."?*

*A. That's a mystical representation. That's me reflecting on my beliefs as in karma and the children talking to each other and God and all of those sorts of beliefs that I had.*

*Q. That's a fanciful answer which cannot be believed I'd suggest to you.*

*A. It's of no concern to me whether it can or cannot be believed. It was my belief at the time when I wrote this diary.*

Ms Folbigg said under questioning by the Judicial Officer that she believed a supernatural power had taken her previous three children from her, but that Laura had (up until that point) saved her life by being different.<sup>94</sup> This was tied to Ms Folbigg's belief in some mystical representation and should be discounted as far-fetched and unbelievable.

It was specifically put to her that she was blaming Sarah for her own death and Laura had so far saved her life because she was different from Laura.<sup>95</sup> Ms Folbigg denied this, but it is submitted that what was put in cross examination is the only logical meaning of the entry and the meaning that this Inquiry would accept.

<p><u>Diary Entry 29 – 29 October 1997</u></p> <p>Felt a little angry towards Laura today. It was because I am &amp; was very tired. Wonder if Craig was serious about trip to Melbourne. Would be great to see Lea's face, but also scary, because it's a little to similar to what we did with Sarah. But Laura's different. Totally she doesn't push my Button anywhere near the extent she did. Which is good for her is all I can say.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 1-50 pg. 639 Line 1-14 pg. 640</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 1-50 pg. 753 Line 1-50 pg. 754</p>
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This entry is an example of Ms Folbigg comparing her children to one another. She is admitting that Laura does not push her button anywhere near the extent that Sarah did. The next sentence expressly states that it is good for Laura that she does not push Ms Folbigg's buttons.

<sup>93</sup> Transcript of the Inquiry, 30 April 2019 T751.36-43.

<sup>94</sup> Transcript of the Inquiry, 30 April 2019 T752.28-32.

<sup>95</sup> Transcript of the Inquiry, 30 April 2019 T752.41-46.

It is submitted that the Inquiry should interpret the passage as Ms Folbigg outlining her relief that Laura has not turned out to be like Sarah (who Ms Folbigg found to be a difficult baby because she did not sleep and she cried a lot). It is submitted that the phrase, '*which is good for her is all I can say*', is a reference to Laura having avoided Sarah's fate at the time; that is not to be killed as she does not push Ms Folbigg's buttons to the extent that Sarah did.

<p><u>Diary Entry 31 – 9 November 1997</u></p> <p>Craig was pretty drunk Friday nite; In his drunken stupor he admitted that he's not really happy. <u>There's a problem with his security level with me &amp; he has a morbid fear about Laura - me well I know theres nothing wrong with her. Nothing out of ordinary any way. Because it was me not them.</u> Think I handle her fits of crying better than I did with Sarah -I've learnt to ... getting to me, to walk away &amp; breath in for a while myself. It helps me cope &amp; figure out how to help her. <u>With Sarah all I wanted was her to shut up. And one day she did.</u></p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 21-50 pg. 660 Line 1-50 pg. 661 Line 1-50 pg. 662 Line 1-18 pg. 663</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 42-50 pg. 756 Line 1-50 pg. 757 Line 1-50 pg. 758 Line 1-15 pg. 759</p>
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In the first underlined passage Ms Folbigg is commenting upon Craig's "*morbid fear*" and comparing it with her own state of mind. She is saying that there is nothing wrong, nothing out of the ordinary, with Laura and that she knows this. Then she says in apparent answer to her own proposition that nothing is wrong with her .... "*Because it was me not them.*" Here she is commenting upon Craig's concern about Laura dying and then is saying that there is no worry because it was her that caused the deaths of the three children, not them. It is, inescapably, an admission of her responsibility for taking the lives of her children. It stands in stark contrast to her suggestion as outlined above that her children decided to leave her and die of their own volition. One cannot stand with the other. This proposition was of course denied by Ms Folbigg in her evidence before the Inquiry.<sup>96</sup> Again it is submitted that the Inquiry would find her answers and denials unacceptable.

The second underlined passage is talking about the death of the child Sarah. Ms Folbigg is equating the death of Sarah, with her wish that she would "*shut up.*" To describe her death in these terms is unfeeling. It carries the undercurrents of anger and frustration that are expressed in a number of other diary entries. It was put to her that this description was heartless, which she disagreed with, saying that there would not be a mother in the room with an incessantly crying baby that would not have wished the child to stop.<sup>97</sup> Ms Folbigg's answer here however is a deliberate effort to divert attention from the real meaning of the entry, which

<sup>96</sup> Transcript of the Inquiry, 29 April 2019 T662.10-26 & T757.16-40

<sup>97</sup> Transcript of the Inquiry, 29 April 2019 T663.2-3

is that Sarah stopped crying because she died. The description of this state of mind at that time is inconsistent with a mother who regrets and mourns the death of her child.

<p><u>Diary Entry 33 – 15 December 1997</u></p> <p>Caz sent a beautiful Angel &amp; Teddy for Laura. Both her &amp; Craig are convinced that Lauras soul is not her own, by the looks of it. <u>Me, well Im sure she met everyone &amp; they've told her, don't be a loud or sickly kid. Mum may you know crack it. They've warned her - good.</u> But she's still her own little person &amp; will always be — must stop calling her Sarah. She's most definitely not her.</p>		<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 44-50 pg. 762 Line 1-50 pg. 763 Line 1-27 pg. 764</p>
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This entry is an example of Ms Folbigg attaching a supernatural element to the context of her children. She writes that she believes that Laura had met and had a conversation with her deceased siblings. Ms Folbigg confirmed under cross-examination that she had a belief that Laura had met her siblings somewhere before her birth.<sup>98</sup> She also confirmed that the references to a 'loud and sickly' kid were in respect to Sarah and Patrick.<sup>99</sup> The entry is significant as it compares the negative traits of her deceased children (loud and sickly) leading to Mum 'cracking it'.

It is submitted that this passage shows that Ms Folbigg is acknowledging that she had 'cracked it' in the past with Sarah and Patrick due to them being loud and sickly. This is solidified by the next sentence, stating "They've warned her – good". The word, 'warning', implies that there was a dangerous situation to be warned about. It is submitted that this warning was the deceased children telling Laura that Ms Folbigg had killed them because of their behaviour, and to not be 'loud or sickly' or she will end up like them.

From a plain English reading interpretation of the passage, Ms Folbigg is telling herself that her previous children warned Laura in order to increase her chances of survival. It was an express warning from the deceased children to Laura to not be 'loud or sickly' or Ms Folbigg would 'crack it'.

<p><u>Diary Entry 35 – 31 December 1997</u></p> <p>Getting Laura to be next year ought to be fun, She'll realise a Party is going on. And that will be it. <u>Wonder if the battle of the wills will start with her &amp; I then. We'll actually get to see. She's a fairly good natured baby - Thank goodness, it has saved her from the fate of her siblings. I think she was warned.</u></p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 20-50 pg. 663 Line 1-50 pg. 664 Line 1-29 pg. 665</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 19-50 pg. 765 Line 1-32 pg. 766</p>
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<sup>98</sup> Transcript of the Inquiry, 30 April 2019 T763.22-24.

<sup>99</sup> Transcript of the Inquiry, 30 April 2019 T763.18-20.

Ms Folbigg here refers to the “battle of wills” and anticipates this is part of what she might face with Laura. She refers to this in the context of the other children and it is submitted that she is seeing herself as pitted against her infant children in two ‘wills’ competing, presumably with a view to one of them winning. The “battles” ended with the death of each of the children. It is a strange way for her to describe an aspect of her relationship with each of her children. It is a description inconsistent with nurture and care, but consistent with her having ended their lives in circumstances where there was a “battle” and with Ms Folbigg prone to losing her temper. In light of the arguments with Craig Folbigg and her treatment of Sarah and Laura before their deaths, this is a particularly revealing diary entry.

It is submitted that the next passage in this entry should properly be interpreted as Ms Folbigg saying that because Laura is good natured it has saved her from the fate of her siblings. That fate was their death. She then adds what is a strange observation...*“I think she was warned.”* It was suggested to her in cross examination that she is saying that Laura was warned to be good otherwise she would die.<sup>100</sup> Ms Folbigg denied this suggestion. It is submitted that this Inquiry would reject that denial and regard this as another example of Ms Folbigg unsuccessfully attempting to explain away an inculpatory entry in an exculpatory manner.

<p><u>Diary Entry 36 – 4 January 1998</u></p> <p>Sarah's missed. We watched her video. Made me realise how much I love Laura &amp; cherish her like I never did the others. I don't take her for granted. I think with age has come a lot more patience &amp; resignation that I can't fix or change things eg If she doesn't sleep all night then so be it. Sure it shits me &amp; makes me a little grumpy. But I sort of just catch up during the day some time.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 31-50 pg. 665 Line 1-5 pg. 666</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 34-50 pg. 766 Line 1-44 pg. 767</p>
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Ms Folbigg again compares her children in a manner that plainly favours Laura over Sarah. Here, she writes that she loves and cherishes Laura like she never did the others. When put to her that she is essentially saying that she preferred Laura to the others, she replied, *“No. what I'm saying there is that I felt I hadn't given enough to the others”*.<sup>101</sup> That explanation is markedly different to what she wrote and again is an example of Ms Folbigg endeavouring to explain away a plain English diary entry with a plain English response in her evidence which means something completely different.

<sup>100</sup> Transcript of the Inquiry, 29 April 2019 T664.45

<sup>101</sup> Transcript of the Inquiry, 29 April 2019 T665.39-42.

It is evident from an ordinary reading of the passage that Ms Folbigg is admitting that she never cherished Caleb, Patrick and Sarah. Ms Folbigg could not demonstrate any maternal instinct or bond to her previous children (which she herself admitted in evidence), as she did not love or cherish them. This lack of maternal bond no doubt contributed to her anger, loss of control and frustration towards her children.

<p><u>Diary Entry 37 – 28 January 1998</u></p> <p><u>Very depressed with myself, angry &amp; upset.</u>  <u>I've done it. I lost it with her.</u> I yelled at her so angrily that it scared her, she hasn't stopped crying. Got so bad I nearly purposely dropped her on the floor &amp; left her. I restrained enough to put her on the floor &amp; walk away. Went to my room &amp; left her to cry. Was gone probably only 5 mins but it seemed like a lifetime.  <u>I feel like the worst mother on this earth. Scared that she'll leave me now. Like Sarah did I knew I was short tempered &amp; cruel sometimes to her &amp; she left. With a bit of help.</u>  <u>I don't want that to ever happen again. I actually seem to have a bond with Laura It cant happen again.</u> I'm ashamed of myself. I can't tell Craig about it because he'll worry about leaving her with me. Only seems to happen if I'm too tired her moaning, bored, wingy sound, drives me up the wall. I truly can't wait until she's old enough to tell me what she wants.</p>	<p>Chris Maxwell QC for the DPP</p> <p>Line 7-50 pg. 666  Line 1-50 pg. 667  Line 1-50 pg. 668  Line 1-50 pg. 669  Line 1-6 pg. 670</p>	<p>Margaret Cunneen SC for Craig Folbigg</p> <p>Line 45-50 pg. 767  Line 1-50 pg. 768  Line 1-50 pg. 769  Line 1-50 pg. 770  Line 1-28 pg. 771</p>
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It is submitted that this entry is highly inculpatory. It is an entry that was written directly after Ms Folbigg had 'lost it' with the baby Laura. Ms Folbigg wrote that it got so bad that she almost purposely dropped Laura on the floor until she restrained herself enough to walk away. She then writes that she is scared that Laura will leave her now, as Sarah did 'with a bit of help'. Ms Folbigg compares her feelings of anger and 'losing it' with Laura to Sarah leaving with 'a bit of help'. It is submitted this comparison was done in a deliberate manner, as her feelings of anger that she just experienced with Laura is connected to Sarah leaving, that is dying, with a bit of help.

Under cross-examination by Mr Maxwell QC, Ms Folbigg was asked about the meaning the phrase "with a bit of help" and it was put to her that she meant herself:

*Q. So you're saying there that you were that bit of help?*

*A. No, I'm saying that God, higher power, or another decision, or even my children Sarah deciding that she didn't want to say was the bit of help, not me.*

*Q. What I'm suggesting to you is that that's one of the closest places that you have come in the diaries to admitting your guilt of killing Sarah. What do you say about that?*

A. *I say it's me admitting how badly responsible I felt, and I will always feel that way.*<sup>102</sup>

Ms Folbigg maintained under cross-examination by Ms Cunneen SC that leaving “with a bit of help” was a reference to “*God, fate or something else*”.<sup>103</sup>

It is submitted that Ms Folbigg was not referring to God or some higher power, but to herself in a sardonic manner. In effect, Ms Folbigg was scared that Laura would “leave” like Sarah did as she was expressing a fear that she was going to kill Laura like she killed Sarah. This fear arose out of the anger and loss of control that she had just experienced with Laura when she almost dropped her on the floor.

In this entry, Ms Folbigg says she actually seems to have a bond with Laura, unlike the other children. Under cross-examination by Ms Cunneen SC, Ms Folbigg reluctantly admitted that she did not have a maternal bond with her first three children:

Q. *Because you didn't have that bond with the others?*

A. *I've already been through all this as to how my bonds were created or not created with all three children.*

Q. *You didn't have any did you?*

A. *Not with, probably not with the last three no.*

Q. *Or a maternal instinct at all, did you?*

A. *I wouldn't say not at all but--*

Q. *Not until you had Laura did you?*

A. *Okay. Fine, I agree.*

Ms Folbigg is demonstrating her concern in this diary entry that Laura, who she actually likes and has a maternal bond with, will leave her now like Sarah and the others did. She says “it can't happen again” which can only be a reference to the deaths of her previous children. Ms Folbigg was depressed, angry and upset with herself because she had lost it with Laura. She realised her feelings of anger and frustration were dangerous, and she was concerned about what might happen if she didn't control herself. It is submitted that Ms Folbigg was rightly concerned because of what did eventually happen to Laura, as had happened to the other three children, when Ms Folbigg could not deal with the “moaning, bored, wingy sound, which drove her up the wall” and she snapped her cog, lost control and killed her child.

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<sup>102</sup> Transcript of the Inquiry, 29 April 2019 T669.48 – T670.6

<sup>103</sup> Transcript of the Inquiry, 30 April 2019 T770.1-2.

## D Evidence of Ms Folbigg – use of the psychiatric reports

### Introduction

Over the course of her evidence in the Inquiry, Ms Folbigg gave evidence of the various meanings she asserted different diary entries carried. Ms Folbigg told the Inquiry that her evidence as to the meaning of her diary entries was 'A recollection of what I thought I meant at the time as I was writing them.'<sup>104</sup>

The transcript reveals that when Ms Folbigg gave evidence of the meanings to be ascribed to various diary entries, she endeavoured to re-cast definitions of readily understood English in terms and using language that was just as readily understood and was also in plain English.

A similar observation can be made in relation to her efforts to detach sentences from their context – that is, she endeavours repeatedly to separate out sentences and divorce them from surrounding sentences in an attempt to remove the meaning that readily attaches to the straightforward expressions and use of language in the given diary entry. In doing so, she places an artificial and illogical constraint on the relevant entries.

The same can be said in relation to her repeated use of the words 'simply', 'merely' and 'an observation' for entries that on their face are damning entries as to the expression of privately held thoughts that reveal her way of thinking as at the time the respective diary entries were written.

At the conclusion of Ms Folbigg's evidence, the Judicial Officer raised the issue of whether or not the diagnosis of complex post-traumatic stress disorder ('CPTSD'), as diagnosed by Dr Michael Diamond, would have an impact on the guilt or sentence of Ms Folbigg as a result of that report.

The Judicial Officer then raised whether Dr Giuffrida should provide a report in response to the diagnosis of complex post-traumatic stress disorder as diagnosed by Dr Diamond. Dr Giuffrida subsequently provided another report, which has been tendered in the proceedings.

### Psychiatric reports tendered in the proceedings

The Inquiry has before it the reports of Dr Michael Diamond of 16 April 2019 (EX BA); the report of Dr Bruce Westmore of 16 June 2003 (EX BB); the report of Dr Yvonne Skinner of 22 January 2003 (EX BC); the first report of Dr Michael Giuffrida of 27 August 2003 (EX BD); and the second report of Dr Michael Giuffrida of 10 May 2019 (EX BR).

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<sup>104</sup> Transcript of the Inquiry, 1 May 2019, T 791.1-5.

### The use of psychiatric material tendered in the proceedings

The DPP adopts Counsel Assisting's submissions as to the use that the psychiatric material tendered in the proceedings holds when considering the sentence of Ms Folbigg. That is, there is no new matter arising in the evidence before the Inquiry, including the report of Dr Diamond, that may affect the nature or severity of the sentence imposed on Ms Folbigg.

The reports tendered in the proceedings are also instructive as to the evidence given by Ms Folbigg concerning the meaning of her diary entries, particularly when the Inquiry turns to consider the manner in which Ms Folbigg told the Inquiry that the diary entries should be deconstructed and analysed to reveal what she asserted was their real meaning. They are relevant in determining her guilt.

### Characterisation and the meaning of diary entries by Ms Folbigg in her evidence

In the course of her evidence, Ms Folbigg repeatedly stated that her diary entries contained 'separate thoughts' or 'random thoughts' within the one entry, and asserted that a plain English and straightforward reading of the relevant entries was erroneous.

The evidence Ms Folbigg gave about 'separate thoughts' in various diary entries are as follows, and are marked in bold font:

29 April 2019			
#	Evidence	Ref	Diary entry
1	<p>Q. You've said now if you feel jealousy or anger you'd just leave Craig and the baby, right?</p> <p>Jealousy is referring to - they're <b>two separate thoughts</b> there. They're broken up by the word "or", okay. Jealousy is referring to, it was a recollection of how Patrick was, even though I cared for him all the time, he was more Craig's boy, Sarah was my girl, and Laura ended up being my girl. The jealousy refers to that. It's not a jealousy as in me being jealous of my children. I was never ever jealous as such of my children.</p> <p>Q. Is the word "jealousy" in relation to you, feeling jealous?</p> <p>No, the word "jealousy" is a, is a reflection as the difference in, between the children, and how, you know, you can have a daddy's girl, you can have a mummy's girl. <b>It's a, it's a different reference.</b> Then it's broken by the word "or" and "anger too much", well as I said I didn't back then differentiate between frustration, anger, annoyance. It was all the same to me.</p>	<p>TT p651.37 - p652.10.</p>	<p>4 December 1996</p>



	<p>Q. But where does jealousy come into that explanation? I just don't understand that.</p> <p>A. As I say, if I had any feelings of the jealousy as in just with, you know, was this child going to be more Craig's or more mine, you know, and to - if it fell into any sort of frustration or an anger situation, then yes, I felt that I would leave Craig and leave the baby with Craig. Again it's another fleeting thought. These are not set in stone. They were never set in stone. All my thoughts were just <b>random thoughts</b>.</p>		
2	<p>Q. I'll go back a little bit, because you were talking about how Craig felt in relation to whether Laura was going to survive and you said, "There's a problem with his security level with me and he has a morbid fear about Laura, and he - well, I know there's nothing wrong with her, nothing out of the ordinary anyway". By that, you seem to be saying, "Well, he doesn't have anything to worry about", is that right?</p> <p>A. That, that particular extract is <b>two separate they're separate thoughts there</b>, they're not all the same thought. "There's a problem with his security level with me" is in reference to Craig's and my personal relationship. That's got nothing to do with Laura.</p>	TT p660.44 – p661.3	9 November 1997
3	<p>Q. You see, I put it to you that this reference to you just meant your father was a loser, doesn't make any sense at all in the context in which you say that, "Obviously I'm my father's daughter." What do you say?</p> <p>A. That there are <b>two separate thoughts there</b>. I'm ready for my family now and then I've randomly thought because of thinking of family I've <b>randomly</b> thought because of my father, how life has gone all wrong. And then I've jumped back to going back to did the sins of my father visit on me as in me being frustrated in any way whatsoever and then my inability to control absolutely everything in my life at the time. I have to make sure. I was preparing and had to make sure that all went well.</p>	TT p673.26 – 35.	14 October 1996
4	<p>Q. Now, you say in that entry, "I often regret Caleb and Patrick, only because your life changes so much and maybe I'm not a person that likes change". Do you agree that that entry is most likely to have been written after Patrick's death, after the death of both little boys?</p> <p>No, isn't, isn't this diary after Patrick was born?</p> <p>Q. Well, the entry is in the space for the day that he was born, but I think you've already conceded that the entry must have been written at least after that day, and perhaps considerably after?</p> <p>A. I'm not believing that it was after Patrick's death. In - you referred to, "I often regret Caleb", Caleb's a regret because he died and I was unsuccessful. Patrick was a regret because I was unsure of my ability and as to whether I'd made the right decision. <b>They're two separate things</b>.</p>	TT 679.25 - 37	3 June 1990

<p>5</p>	<p>Q. Then you say, "Probably would be just desserts for me considering." As in not having another baby straight away. I'm talking about delaying as in having a baby there.</p> <p>Q. No, you're not. I would suggest to you that you are talking about it would be just desserts to you. You would deserve having a baby with brain damage after what you had already done to your other babies?</p> <p>No, not at all. That's, that's <b>two separate thoughts</b>. One is about the medication and the concern I had for brain damage for an unborn child. The second is my criticising myself and saying could it be just desserts and I may not get to have another baby because I didn't have success in the last three.</p> <p>Q. You see, you're not talking about - you're hoping not to be pregnant this time. But you're talking about the prospect of brain damage being caused to an unborn child that you might be carrying but hope you're not, right?</p> <p>Yes.</p> <p>Q. Then you say, "It's just desserts for me considering, but not fair for Craig at all."</p> <p>Yeah, not fair for Craig if I don't have another child.</p> <p>Q. Not fair for Craig to have a baby with brain damage, but just desserts for you because of what you had done to your other children isn't it?</p> <p>No. I've just explained that they're two <b>separate thoughts</b> there. You, every time someone reads these diaries you keep extracting and dumping sentences together. And I'm trying to tell you that they're <b>two separate thoughts</b>. My thoughts are not always fluid when I'm writing these diaries. They're <b>random</b> at times.</p> <p>Q. There's nothing random about this is there?</p> <p>A. I wrote it. It's <b>random</b>. <b>I've got two separate thoughts going on there</b>. One is about the effects that it could have on a child and I am thinking to myself if I'm not pregnant that's good because damage could be done to a child if I take this medication. The second is I am being criticising myself, lamenting and saying I've just lost three. Maybe it's just desserts that I don't get to have a fourth one and then, <b>the thought flips</b> to that's not fair on Craig because he deserves to have another child.</p>	<p>TT p689.13 - 49.</p>	<p>21 July 1996</p>
<p>6</p>	<p>Q. You were acknowledging there the fact that you thought it would be just desserts for you to give birth to a baby with brain damage, because you had caused brain damage to your son, Patrick in the close call that he suffered in the early months of his life, months before he died?</p> <p>No. That's incorrect. I'm not going to say anymore on that because I've said it three times exactly what I meant when I wrote that.</p>	<p>TT p690.17 - 26.</p>	<p>21 July 1996</p>

	<p>Q. It's not a matter for you, it's a matter for his Honour to stop me if--</p> <p>A. Okay, I understand that but I'm not sure how much more I can explain this to everybody that there are <b>three separate thoughts</b> going on there and they're <b>random</b>.</p>		
7	<p>Q. Just while we're dealing with that particular passage, in the diary entry of 4 December 1996, you've written, "rather than answer being as before", could you explain to me what was the answer before that you're referring to?</p> <p>A. "Rather than answer to before", is a <b>separate thought</b> again and it is a very dark thought and it's I didn't want to answer as in being the one to discover my children, I didn't want to do that again your Honour.</p>	TT p714.1 – 7.	4 December 1996
8	<p>Q. What did you mean by "Maybe because I always knew they'd never get there"?</p> <p>"I always knew" is a <b>separate thought</b> again, and it is because of my depressed state and a doom and gloom aspect, I always just was expecting the worst, everything, I was always expecting the worst and "I always knew" refers to that.</p> <p>...</p> <p>Q. But you said you never did, you never bothered to think of it because you knew she and the others would never get there?</p> <p>A. No that's not what it's meaning at all, "I always knew" is a doom and gloom aspect to the whole thing, when I say "I always knew", it's because I just constantly was expecting the worst situations or the worst scenario or the worst scenario or the worst whatever to happen, that what "I always knew" means, it's a <b>separate thought</b> to the rest of it. It is connected but it's a <b>separate thought</b>.</p>	TT p741.9 – 14; P714.36 – 43.	26 June 1997

#### Nature of the diary entries that constitute 'separate thoughts' or 'random' thoughts

The diary extracts where Ms Folbigg told the Inquiry were 'separate' or 'random' thoughts that she had written in the same diary entry, and often in the same paragraph, are extracts that reveal her innermost thoughts about the deaths of her children.

What is perhaps most telling is Ms Folbigg's response under cross-examination by Ms Cunneen SC:

*'I've just explained that they're two separate thoughts there. You, every time someone reads these diaries you keep extracting and dumping sentences together. And I'm trying to tell you that they're two separate thoughts. My thoughts are not always fluid when I'm writing these diaries. They're random at times.'*

The difficulty with this explanation, that Ms Folbigg forcefully asserted to the Inquiry was how the entries should be read, is that sentences were not in fact being extracted and ‘dumped’ together – they were just being read to her. They were in fact markedly fluid and followed her consistent and easily understood train of thought that the DPP submits demonstrates her responsibility and guilt for killing her children.

It is submitted that this demonstrates the lengths to which Ms Folbigg was prepared to go to in order to have the Inquiry accept a meaning that was not consistent or available on the text of the diary entries, and which was in fact in stark contrast to, the manner in which certain diary entries were written and the ordinary and uncomplicated meaning that they held.

This is particularly so given the nature of the entries as extracted above where Ms Folbigg asserts that the plain English she has written in her diaries relates to difficulties with the children – for example her anger towards the children, and her thoughts about not missing or regretting her children; her own internal struggles, for example, with her ‘doom and gloom’ and always expecting the worst; and her not infrequent observations about how children have changed her life.<sup>105</sup>

These are the entries, which on their face are damning expressions of her involvement and her responsibility for the deaths of the children, where Ms Folbigg states that properly understood the entries contain ‘separate thoughts’ in an attempt to divorce the incriminating material and ordinary meaning from its context.

Ms Folbigg’s assertions as to the ‘separate thoughts’ for certain diaries is consistent with her straining to impose anything other than a plain English interpretation of her entries that are written in a straightforward manner – in our submission both are no more than manifestations of her efforts to have the Inquiry view the diary entries in a distorted way such that it removes the clear and unambiguous reading that she was responsible for the deaths of her children and that she was, at times, struggling with her guilt about this.

Following the answers given by Ms Folbigg in the Inquiry, an issue is whether the reports tendered in the proceedings can explain or illuminate answers that Ms Folbigg gave in evidence.

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<sup>105</sup> Transcript of the Inquiry, 30 April 2019, T 741.11 – 14; T 741.38 – 43.

## Diagnosis of Complex Post-Traumatic Stress Disorder ('CPTSD')

Dr Diamond provided his report, dated 16 April 2019, on behalf of Ms Folbigg. He diagnosed her with 'Complex Posttraumatic Stress Disorder' and that she had features consistent with this diagnosis, which were often seen in abused children.<sup>106</sup>

As at the time of assessment, Dr Diamond indicated that Ms Folbigg was 'receiving no psychiatric or psychological treatment and she takes no medication.'<sup>107</sup> In his report, he indicated he had a limited opportunity to interview Ms Folbigg at assessment.<sup>108</sup>

Due to time constraints, Dr Diamond did not go through the diary entries or transcripts of the diary entries in any detail with Ms Folbigg:

*'I have perused these documents but have not had the opportunity to go through them in any detail with Ms Folbigg. Without raising particular entries with her and eliciting contextual comments, it is difficult not to make assumptions or reach opinions that may be significantly skewed or misinterpreted.'*<sup>109</sup>

He was of the view that the:

*'...differences in my diagnostic views about Ms Folbigg as compared with those of Drs Skinner or Westmore arise in significant part because we have looked at different aspects of Ms Folbigg's presentation and were asked to address different issues.*

...

*Although Drs Skinner and Westmore commented upon the strange interaction they had with Ms Folbigg, and in the case of Dr Skinner, carefully documented the early developmental disruption and exposure to trauma, there was no assessment or consideration in their reports of the existence of a severe life-affecting condition such as Complex Posttraumatic Stress Disorder.*

*My assessment of Ms Folbigg, looking at her habitual ways of relating, her communication patterns, her subjective emotional connection with those around her and her habitual ways of dealing with emotional distress and trauma, demonstrated to me the longterm existence of what I believe to be her primary psychiatric diagnosis, Complex Posttraumatic Disorder.'*<sup>110</sup>

## Were any symptoms of the disorder observable/operative on Ms Folbigg according to Dr Diamond

Dr Diamond opined that Ms Folbigg did not report symptoms of re-experiencing original trauma, such as flashbacks, following what had occurred when she was a pre-verbal child, but

<sup>106</sup> Report of Dr Michael Diamond, 16 April 2019, page 38; page 40.

<sup>107</sup> Report of Dr Michael Diamond, 16 April 2019, page 40.

<sup>108</sup> Report of Dr Michael Diamond, 16 April 2019, page 43.

<sup>109</sup> Report of Dr Michael Diamond, 16 April 2019, page 38.

<sup>110</sup> Report of Dr Michael Diamond, 16 April 2019, page 43.

was of the opinion that 'she has expressed the effects of her trauma through her lifelong pattern of distancing, emotional numbing, detachment and dissociation.'<sup>111</sup>

Dr Diamond also opined that Ms Folbigg's 'personality functioning is based on creating an external picture of wellbeing. She has the advantage of being physically attractive and intelligent.'<sup>112</sup>

Dr Diamond continued:

*'She however subjectively describes herself as 's shell of a person'. She has been plagued with self-doubts, low self-esteem and anxiety about being accepted generally and particularly in relationships.*

*Her insecurities were clearly articulated in her description of her marriage and demonstrated in her conduct within the marriage where her focus was abnormally upon her insecurities, her need to be reassured by her husband that she was desirable and attractive and conversely her self-loathing and low self-esteem when she lost control of her eating patterns and gained substantial weight.*

*My understanding of her personality functioning is that she has many vulnerabilities but does not exhibit pervasive and severe dysfunction to the point of being able to diagnose a personality disorder. She clearly has deep-seated personality vulnerabilities particularly in establishing and maintaining relationships. She functions more effectively as an isolated and guarded individual.'<sup>113</sup>*

#### The diagnosis of CPTSD and Ms Folbigg's evidence

Dr Diamond, following from his diagnosis of CPTSD, was of the view that the diary entries needed to be assessed in the 'context of the existence of this diagnosis and the deep-seated psychological (but very private) subjective experiences of Ms Folbigg'.<sup>114</sup>

Dr Diamond continued:

*'Although I have perused the diary entries, I have not had an opportunity to go through them in detail with Ms Folbigg. One must be aware of the need to address specific entries with her and to make sense of the meaning of the diary entries within the proper contextual setting in which they were created.*

*I can appreciate that the entries that are documented in the material from the trial remain open to further explanation and interpretation rather than to be assessed on their face. In my opinion, one can understand the meaning of the diary entries is more likely than not to have been impacted by the psychological illness from which Ms Folbigg was suffering at the time of creating these entries.'<sup>115</sup>*

Dr Diamond does not appear to have formed a concluded view as to how the CPTSD he diagnosed affected or could affect the diary entries before the Inquiry, and his diagnosis does

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<sup>111</sup> Report of Dr Michael Diamond, 16 April 2019, page 39.

<sup>112</sup> Report of Dr Michael Diamond, 16 April 2019, page 39.

<sup>113</sup> Report of Dr Michael Diamond, 16 April 2019, page 40.

<sup>114</sup> Report of Dr Michael Diamond, 16 April 2019, page 41.

<sup>115</sup> Report of Dr Michael Diamond, 16 April 2019, page 41.

not appear to explain or highlight symptoms that may explain the manner in which Ms Folbigg answered questions about the meaning of diary entries and her efforts to re-define straightforward language.

'Complex Post-Traumatic Stress Disorder' (CPTSD) and 'Disorders of Extreme Stress not otherwise specified' ('DESNOS')

Dr Giuffrida provided a second report to the Inquiry following the tender of the report of Dr Michael Diamond, containing Dr Diamond's diagnosis of CPTSD.

Dr Giuffrida noted that the difficulty in providing an opinion about CPTSD was that 'there does not appear to be any formal or universally accepted definition of what constitutes Complex PTSD.'<sup>116</sup>

Dr Giuffrida did however note that although there was 'no formally accepted definition of what constitutes Complex PTSD, there are a multitude of studies and articles that support the concept of it as 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.'<sup>117</sup>

Dr Giuffrida referenced the DSM-IV Field Trial for PTSD that was conducted between 1990 and 1992, where 'the PTSD sub-committee thoroughly reviewed the research on the populations of victims of trauma and organised the most frequently studied systems under the rubric of 'Disorders of Extreme Stress not otherwise specified' ('DESNOS').'<sup>118</sup> Dr Giuffrida then outlined that prominent symptoms of the DESNOS concept

*'include affect dysregulation, impulsive outbursts of anger, self-destructive and suicidal behaviour, aberrant or deviant sexual behaviour and substance abuse. Significantly it involves the loss of trust, a pattern of re-victimisation, risk raking behaviour, amnesia, or dissociative type experiences and a sense of hopelessness and a loss of beliefs. All of these may be relevant in Kathleen Folbigg's mental state.'*<sup>119</sup>

Dr Giuffrida did not agree with the diagnosis of CPTSD made by Dr Diamond, although he agreed in terms of the 'causality of the condition insofar as 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.'<sup>120</sup> He outlined that the concept of CPTSD remains controversial and it is not recognised as a separate entity in its own right.<sup>121</sup>

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<sup>116</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 3.

<sup>117</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 3 – 4.

<sup>118</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 3.

<sup>119</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 4.

<sup>120</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 10.

<sup>121</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 10.

Dr Giuffrida continued:

*'The other difficulty I have with Dr Diamond's diagnoses of Complex PTSD is that although he implies that he has relied upon aspects of the history obtained from Ms Folbigg and the reports by psychiatrists who have interviewed and examined Ms Folbigg that Dr Diamond does not actually provide a formal list of reasons for such a diagnosis. I should add here that in addition to the most common features of Complex PTSD such as depression and anxiety that there is commonly a history of self-harm and suicidal ideation and attempts together with features of Dissociative Identity disorder and Dissociative Amnesia, body image disturbances, emotional dysregulation and Borderline personality disorder features, that none of these other than the anxiety and depression were readily apparent in Ms Folbigg's state in 2003 and nor indeed from Dr Diamond's interview and examination of her most recently.'*<sup>122</sup>

Was Ms Folbigg suffering from a psychological illness at the time of creating the diary entries?

Dr Diamond was asked if Ms Folbigg's diary entries were influenced by 'survivor guilt', and he indicated that it

*'is difficult to answer this question comprehensively. I have not gone through Ms Folbigg's diary entries in sufficient detail to have an emphatic view about whether or not they were influenced by survivor guilt.*

*My view at this point is that it is possible and even likely that Ms Folbigg was writing personal entries to herself, in much the same way as she has made diary entries for a large part of her life so that her private thoughts and feelings were articulated in terms of self-blame, assuming responsibility for the deaths of her children and talking about her feelings and general actions in self-deprecatory ways.'*<sup>123</sup>

Dr Michael Giuffrida, as at the time he examined Ms Folbigg in 2003, 'could find no clear evidence of psychotic illness', however noted

*'There is on the other hand a history of pervasive depression throughout her marriage which is described in her history to me and strongly confirmed by numerous references to her depressive mood, feelings of failure, shame guilt and loss of self-esteem and a profound sense of worthlessness in her diaries. ...*

*Although the episodes of depression were pervasive they certainly appeared to become more intense and long lasting after the death of each child and probably represents Mrs Folbigg's particular expression of grief and bereavement.*

*It would seem fairly clear from the history she gave me and the evidence from the diaries that Mrs Folbigg completely failed to experience any true sense of bonding or attachment to her children, although it seems to me that there were repeated despairing attempts to find what she refers to as her maternal instinct.*

*My impression is that this woman desperately attempted to achieve such an emotional bonding with her children and the very experience of failing to achieve it, of itself,*

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<sup>122</sup> Report of Dr Michael Giuffrida, 10 May 2019, page 10.

<sup>123</sup> Report of Dr Michael Diamond, 16 April 2019, page 42.



*precipitated and probably aggravated her intense feelings of failure and worthlessness as a mother and probably at the same time as a wife.*

*At the same time, Mrs Folbigg was very definitely overwhelmed by what she clearly perceived as the intense and insatiable demands of her infant children... it seems clear that she had a persisting sense of tension and anxiety at which times she described herself as 'losing it'. I expect that eh episodes of losing it was when she felt that she could not cope any further, became angry and perhaps enraged and would leave the care of her children to whoever was available.<sup>124</sup>*

It is observed that the above extract, in relation to Ms Folbigg's history of not experiencing any attachment or bonding with her children, is inconsistent with the version that she provided to Dr Diamond in his report in April this year, where she asserted that she had feelings consistent with attachment and a bond with Caleb.<sup>125</sup> It is also inconsistent with the diary entries and her evidence in the Inquiry that she didn't have a maternal instinct until she had Laura,<sup>126</sup> and she had not bonded with her first three children. Her evidence to the Inquiry was that she did not have time to bond with Caleb<sup>127</sup> and observed that when it came to a concern that she did not love or cherish him, 'he wasn't around long enough for me to form a view either way.'<sup>128</sup>

#### The absence of evidence in the psychiatric reports to explain Ms Folbigg's characterisation of the diary entries

The evidence as to Ms Folbigg's functioning, intelligence, and any symptoms or disorders operating on her that is relevant when the Inquiry considers the evidence of Ms Folbigg about 'separate thoughts', 'random' thoughts, and even the meaning of the words used in the entries is as follows.

What is remarkable and striking about the psychiatric reports is the absence of any diagnosis or symptom or other reason that could explain the way in which Ms Folbigg constantly strove to explain and characterise the diary entries in her evidence before the Inquiry.

What is significant however is the findings that a number of the psychiatrists make as to Ms Folbigg's functioning that suggests that her evidence as to separate and random thoughts, and even as to the meaning of the diary entries where she contended that words were interchangeable or should be construed in a bland and innocuous manner inconsistent with their ordinary English meaning, was no more than an effort by Ms Folbigg to have the Inquiry

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<sup>124</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 19.

<sup>125</sup> Report of Dr Michael Diamond, 16 April 2019, page 13.

<sup>126</sup> Transcript of the Inquiry, 30 April 2019, T 747.12 – 27; T 770.42 – 771.3.

<sup>127</sup> Transcript of the Inquiry, 30 April 2019, T 747.12 – 27.

<sup>128</sup> Transcript of the Inquiry, 30 April 2019, T 767.24 – 29.

cast the diary entries in an innocent light. She repeatedly endeavours to detach particular words and sentences from the meaning of the words that surround them and give them a readily understandable context. It is consistent with her evidence that she was not concerned when her husband Craig Folbigg provided a notebook diary to the police after he found it, noting the difficulties with her evidence about the disposal of three other diaries prior to being interviewed, and that she was angry when police found another notebook diary at her home, as evidenced on the listening device conversations.

It is also significant that Ms Folbigg has said and accepted that the diaries were personal. She stated that she did not expect them to be read. She treated them as a friend and confidant.<sup>129</sup> This is not consistent with her evidence about not hiding the diaries because she wasn't concerned about them,<sup>130</sup> and is another matter that points to her efforts to downplay the significance of their contents in relation to the deaths of her children.

*Dr Michael Diamond*

Dr Diamond did not specifically address diary entries with Ms Folbigg, although she did spontaneously raise keeping diaries and their purpose for her.<sup>131</sup>

Relevantly, he states in relation to her mental state examination:

*'Her thought processes were rational. There was no evidence of perceptual distortion, delusional material or hallucinations. There was no evidence of persecutory ideation. Her speech was organised and expressive. She expressed content without difficulty.*

*Her cognitive functioning suggested at least average intellect. She followed the questioning without difficulty. There was no suggestion of cognitive impairment.*

*She expressed adequate insight into her problematic life experience but this was not fully developed insofar as appreciating the probable causes for her lifelong experience of emotional disengagement in various forms.*

*She showed adequate ability to reason and exhibited sound judgment. The content of her history was non-contradictory and consistent with the material that was available to me.'*<sup>132</sup>

Dr Diamond, although he did not raise any diary entries and ask Ms Folbigg about their content and meaning, did make the following observation:

*'There are comments about diary entries that make references to supporting the opinion that Ms Folbigg was responsible for the deaths of her children.*

*The quotes from the diaries are documented on pages 8 and 9 of Ms Garbutt's report and are not repeated in this report. The opinions expressed do not appear to have been canvassed with Ms Folbigg at any stage. The quotes can be interpreted very differently*

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<sup>129</sup> Transcript of the Inquiry, 30 April 2019, T 727.9 – 29.

<sup>130</sup> Transcript of the Inquiry, 29 April 2019, T 634.31-32.

<sup>131</sup> Report of Dr Michael Diamond, 16 April 2019, page 23.

<sup>132</sup> Report of Dr Michael Diamond, 16 April 2019, page 24.

*against the backdrop of the material that was elicited when I assessed Ms Folbigg, particularly her lifelong propensity to suppress distressing emotions, produce extracting external challenges and to attempt to problem solve using simple practical proposals instead of showing ability to engage with distressing underlying emotions.*

*There are further comments about guilt and responsibility attributed to entries in the diaries that are assumed to support admissions of guilt and attribution of responsibility for the deaths once again in the absence of information derived from examination of Ms Folbigg.'*

Ms Garbutt's report is not before the Inquiry.

Dr Diamond stated that Ms Garbutt's assessment appears to have occurred without an assessment of Ms Folbigg and observes in relation to the diary entries that the interpretation of the entries was not subject to an inquiry with Ms Folbigg.<sup>133</sup>

Dr Diamond notes that in relation to the report produced by Dr Yvonne Skinner, that she had access to the diaries and diary extracts proposed to be relied upon by the Crown at trial, and, relevantly, a copy of Ms Folbigg's ERISP.

Dr Diamond noted that 'Dr Skinner went only as far as assessing the content of the diaries for any evidence that might suggest psychosis, major mood disturbance or cognitive dysfunction. These were excluded as present in the writings.'<sup>134</sup>

He observed that Dr Skinner interpreted the information given to her to

*'exclude evidence of significant psychiatric illness over the extended period, and in particular, the absence of postnatal depression in relation to the birth of each child. Further assessment of hospital notes and notes from the general practitioner produced comments to exclude any record of psychological problems or evidence to suggest any psychiatric illness associated with postnatal depression or psychosis. Dr Skinner reported in keeping with what was asked of her. She excluded any evidence of psychiatric illness such as Postnatal Depression, Major Depressive Disorder, Bipolar Disorder, psychosis of any type and the absence of any psychiatric functioning to the point of having a psychiatric defence to the charges she faced.'*<sup>135</sup>

*Dr Yvonne Skinner*

Dr Skinner prepared a report for the Crown on the question of infanticide. She did not examine Ms Folbigg in the preparation of her report.

Dr Skinner was provided with the diaries and letters written by Ms Folbigg. She examined those, and in her report she stated:

*'Kathleen Folbigg wrote entries in her diary over an extended period. The diaries describe her thoughts and feelings at the time of writing.'*

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<sup>133</sup> Report of Dr Michael Dimond, 16 April 2019, page 25 – 26.

<sup>134</sup> Report of Dr Michael Diamond, 16 April 2019, page 29.

<sup>135</sup> Report of Dr Michael Diamond, 16 April 2019, page 30.

*I have read the diary notes provided. I did not find any evidence of formal thought disorder. I did not find any evidence of cognitive dysfunction. I did not find anything in the written material to suggest that Mrs Folbigg might have been suffering a significant depressive disorder.*<sup>136</sup>

Dr Skinner also had access to a report by Dr Paul Innes.<sup>137</sup> She noted that Ms Folbigg had attended upon him on three occasions. On the third occasion, 4 March 1999, Ms Folbigg and her husband Craig attended upon Dr Innes following Laura's death. He noted that both Mr and Mrs Folbigg seemed shocked and upset. He did not find Mrs Folbigg to be suffering from any abnormality.<sup>138</sup>

#### *Dr Bruce Westmore*

Dr Westmore prepared a report on behalf of Ms Folbigg on 16 June 2003.

He assessed her twice before her trial, on 13 September 2002 and 21 January 2003, and then re-examined her on 11 June 2003.<sup>139</sup>

Dr Westmore indicated that the diary entries suggested that at time she wasn't really coping with the children and she said she had always admitted that. She denied that she had angry feelings towards some of the children and she responded 'No I don't think there were angry feelings towards the children, I think they were more directed at Craig'.<sup>140</sup>

Dr Westmore asked if she suffered feelings of inadequacy for much of her life and she said not until 1996, when there were relationship issues with Craig and the same things kept coming up all of the time. She told Dr Westmore that Craig made her feel inadequate.<sup>141</sup>

In his mental state examination, Dr Westmore observed that Ms Folbigg's mood state appeared to be subdued and despondent but he didn't think she was suffering from a major depressive illness. He stated that 'no psychotic features were evident and she again presented as being an alert and attentive historian'.<sup>142</sup>

#### *Dr Michael Giuffrida*

Dr Giuffrida prepared his first report on behalf of Ms Folbigg, dated 27 August 2003.

Dr Giuffrida had the most extensive contact with Ms Folbigg after she was incarcerated. He saw her on 22 May, 5 June, 19 June, 31 July, 12 August and 14 August 2003. On the first two occasions he saw her in his capacity as a Visiting Medical Officer Psychiatrist to Corrections

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<sup>136</sup> Report of Dr Yvonne Skinner, 22 January 2003, page 9.

<sup>137</sup> Report of Dr Yvonne Skinner, 22 January 2003, page 11.

<sup>138</sup> Report of Dr Yvonne Skinner, 22 January 2003, page 11.

<sup>139</sup> Report of Dr Bruce Westmore, 16 June 2003, page 1.

<sup>140</sup> Report of Dr Bruce Westmore, 16 June 2003, page 2.

<sup>141</sup> Report of Dr Bruce Westmore, 16 June 2003, page 3.

<sup>142</sup> Report of Dr Bruce Westmore, 16 June 2003, page 4.

Health, for the purpose of assessing her for diagnosis and treatment. The following sessions were in his capacity as an expert preparing a report for her solicitors.<sup>143</sup>

Dr Giuffrida had a 'complete copy of the available diaries written by Mrs Kathleen Folbigg which I understand were tendered at her trial.'<sup>144</sup>

He was asked to prepare a report:

*'...to assist in determining whether at the time of the commission of the offences, I believe that there were any psychiatric or psychological mitigating factors, or special defences, available to your client.'*<sup>145</sup>

During the time that Dr Giuffrida was the Visiting Psychiatrist to Mulawa Correctional Centre, where Ms Folbigg was at the time, he attended upon all of the women who were in custody, either on remand for or convicted of, killing their children. He studied the literature on women who harm, attempt to murder or murder their children. In the course of all thirteen women that he had studied extensively in the course of his attending at Mulawa Correctional Centre,

*'...they have without exception suffered from significant psychiatric disability. All of such women have suffered from either a psychotic illness, usually schizophrenia, but sometimes psychotic depression, sometimes with severe borderline personality or developmental or intellectual disability or severe post traumatic stress disorder. Most of the cases I have examined have involved a number of these diagnoses together.'*<sup>146</sup>

Dr Giuffrida's earliest impression on his first brief mental state examination on 22 May 2003 was that Ms Folbigg was 'remarkably calm and detached'; that she 'spoke clearly and without any hint of thought disorder, delusional ideas or particular preoccupation other than details for her offences' and Dr Giuffrida found her 'remarkably lacking in the expression of grief in relation to these.' Dr Giuffrida's earliest impression was that Ms Folbigg suffered no psychiatric disorder and 'there was nothing to indicate any underlying personality disorder apart of course from the apparent detachment regarding the death of her children.'<sup>147</sup>

In his meeting with Ms Folbigg on 5 June 2003, Dr Giuffrida recorded that Ms Folbigg agreed that she came across as being 'emotionally detached' and ascribed this to the deaths of her children and her recent convictions in respect of their deaths.<sup>148</sup>

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<sup>143</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 1.

<sup>144</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 1.

<sup>145</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 2.

<sup>146</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 2.

<sup>147</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 3.

<sup>148</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 4.

Dr Giuffrida then spoke with Ms Folbigg over two sessions of two hours each.<sup>149</sup>

In relation to the birth of Caleb, Ms Folbigg told Dr Giuffrida that she experienced no post-natal anxiety or depression and thought she was entirely well. She said that she felt that Caleb had fulfilled her expectations. She also told Dr Giuffrida that she had no time to form a bond or attachment to Caleb, although she thought she didn't have a problem in forming a good emotional bond with Patrick.<sup>150</sup> Ms Folbigg said that after Caleb's death she 'emotionally switched off' and withdrew from everybody and everything.<sup>151</sup>

In relation to falling pregnant with Patrick, Ms Folbigg told Dr Giuffrida that she felt that 'nothing could possibly happen the second time around, everything would be fine.' She said this pregnancy was a 'dream'.<sup>152</sup>

After Patrick's apparent life-threatening event, she again ran on autopilot. After his death, she felt a failure as a mother and 'blamed God, the doctors and everyone else. She became increasingly angry, irritable and antagonistic toward her husband Craig. Following Patrick's death, she said she was filled with doubts and insecurities and that these then stayed with her.'<sup>153</sup>

Ms Folbigg told Dr Giuffrida that the decision to have Sarah was hers and that Craig Folbigg felt he needed more time between children. Ms Folbigg said without children she felt that she and Craig would just drift apart, and she told Craig she didn't want a relationship with just the two of them. When Sarah was born Ms Folbigg described her as looking like a 'squashed cabbage and not particularly pretty looking' but said that she was 'wonderful' and she was pleased she was a girl. She said that Sarah was a catnapper and that there was continuing conflicts with Craig over the responsibilities for the child, and that he showed a lack of understanding and support at these times.<sup>154</sup>

Ms Folbigg told Dr Giuffrida that the night Sarah died it was particularly stressful as Craig had 'revved her [Sarah] up' and Sarah wouldn't sleep. Ms Folbigg got 'grumpy and shitty' with Craig, but denied being angry with Sarah. She argued with Craig about this and left him to put Sarah to bed. After Sarah's death that night, Ms Folbigg told Dr Giuffrida that she felt intense feelings of loss and sadness and 'she questioned her purpose in being, constantly criticising

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<sup>149</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 4.

<sup>150</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 4.

<sup>151</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 5.

<sup>152</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 5.

<sup>153</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 6.

<sup>154</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 6.

and analysing herself.' She put on weight and said she became pervasively depressed, but denied feeling suicidal.<sup>155</sup>

After they separated and then reconciled, Dr Giuffrida records that it seems Ms Folbigg approached Craig about another child. He was initially resistant, then less so, and they consulted with medical practitioners about Sudden Infant Death Syndrome. Ms Folbigg stopped the oral contraceptive pill, and fell pregnant with Laura after about 12 months.

Dr Giuffrida notes that Ms Folbigg 'talked about her diaries at this point in the interview saying that it gave her an opportunity to 'release all of my feelings.'<sup>156</sup>

On the morning that Laura died, Ms Folbigg argued with Craig after he got Laura up from bed and fed her and played with her before he went to work. Ms Folbigg became frustrated with Craig and they argued. Laura was being 'clingy' and staying with Craig, and she was left crying when Craig went to work. Ms Folbigg then called Craig to apologise, and then visited with Laura after attending the gym. Laura died after being put to bed when she returned home with Ms Folbigg.<sup>157</sup>

Following Laura's death Ms Folbigg told Dr Giuffrida that she felt 'totally desolate' as 'Laura's life had allowed her to gain a glimpse of a better future which had now been dashed'. Ms Folbigg became tearful at that point in the interview.<sup>158</sup> Ms Folbigg and Craig separated in July and Ms Folbigg told Dr Giuffrida that she could not cope with his grieving.<sup>159</sup>

Of the diaries, Ms Folbigg told Dr Giuffrida that the entries had been 'extracted and taken out of context in a manner that she had not intended. The extracts from the diaries were 'her own particular thoughts and feelings and represented a way of coping with her distress as she had been unable to talk about it with her husband or in counselling'<sup>160</sup>

Ms Folbigg told Dr Giuffrida that 'she had recurrent episodes and a prevailing pattern of depressive mood over a number of years but more severe in the last few months' and Dr Giuffrida noted 'there is associated with each of the episodes of depression intense feelings of worthlessness, loss of self-esteem and a sense of failure as a mother.'<sup>161</sup>

In relation to the deaths of each child, and the way that Ms Folbigg dealt with that differently to Craig Folbigg, Dr Giuffrida noted 'she repeatedly came back to the theme of the difference in the way each of them handled the death of the children. She said at first they were both

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<sup>155</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 8.

<sup>156</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 9.

<sup>157</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 9.

<sup>158</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 10.

<sup>159</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 10.

<sup>160</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 10.

<sup>161</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 11.

devastated but then Craig would “want to wallow in it”. She said she wanted to move on and “I would resort to logic.” “I would try to take a step forward and see what happened from there”.<sup>162</sup>

#### *Dr Giuffrida's assessment of Ms Folbigg's mental state*

Dr Giuffrida found Ms Folbigg's affect to be ‘particularly remarkable’ in that she related comfortably and would smile appropriately, but she had a blunted and distant quality when it came to her ability to relate.<sup>163</sup>

He was unable to illicit any symptoms of reliving the deaths of any of her children and thought this highly significant given her otherwise graphic descriptions of their deaths.<sup>164</sup>

In respect of her presentation, functioning and intelligence, Dr Giuffrida recorded the following:

*‘Throughout each of the interviews, Mrs Folbigg spoke very clearly and coherently and was able to give very detailed accounts of every aspect of her history and seemed to do so candidly and openly and I found her somewhat disarming in this respect. I could certainly find no evidence of any disorganisation of thinking nor of formal thought disorder, not was there at any time any indication of over valued or delusional ideas. There was never any evidence of perceptual abnormality.*

*After several conversations with her, I gained the impression that Mrs Folbigg was of probably at least average verbal intelligence, if perhaps having reached less than her potential in terms of education and skills.*

*Mrs Folbigg showed a certain insight into the fact that people recognised that her emotional response to the deaths of her children was at least blunted. Her judgment in relation to a range of issues discussed seemed reasonable and appropriate.*<sup>165</sup>

And later, in his first report,

*‘Whilst I do not think Mrs Folbigg suffered from a psychotic level of depression, that is to say the state accompanied by the development of psychotic phenomena such as delusional ideas, hallucinations or a serious form of thought disorder, it is nonetheless clear to me that her state of depression was serious enough and persistent enough to have strongly contributed to a state of mind that led to her killing her children.*

*I said earlier that Mrs Folbigg is a woman of probably at least average, if not above intelligence, although not having achieved her potential educationally. There is therefore no evidence of developmental disability.*<sup>166</sup>

Dr Giuffrida, after considering personality disorders suffered by women who cause the death of their children, stated:

*‘I should say in Mrs Folbigg's case that there was remarkably little to implicate any of these serious personality disorders. She certainly shows none of the usual features of*

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<sup>162</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 14.

<sup>163</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 14.

<sup>164</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 14.

<sup>165</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 14.

<sup>166</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 20.



*borderline personality disorder nor in particular of psychopathy. In relation to the latter, there is a very significant absence of antisocial conduct or behaviour in adulthood, although there is some evidence of conduct problems in childhood in the form of two episodes of stealing. There is no criminal history or antisocial behaviour in adulthood. In fact in many respects Mrs Folbigg has been remarkably conventional in terms of her lifestyle and interest and if anything had very ordinary and conservative aspirations. Despite her difficulties in her marriage, she persisted with it and continued to contribute to the family welfare in the sense of always working when she could. There is therefore very significantly a remarkable absence in terms of the historical features or the core criteria for psychopathy.<sup>167</sup>*

In addition, Dr Giuffrida noted that as far as he could determine 'Mrs Folbigg did not appear to experience any of the normal symptoms of grief or mourning, nor did she reveal any of the symptoms that I would expect of post traumatic stress disorder in these circumstances.'<sup>168</sup> Dr Giuffrida had opined that the sudden death of each child would for any woman be an 'intensively traumatic experience' that would include, amongst other symptoms, gross cognitive impairment.<sup>169</sup>

*Dr Giuffrida directly addresses the diary entries*

Dr Giuffrida had available to him as at the preparation of his first report the diary entries that comprised the Crown extracts that were tendered at trial, and a copy of 'Defence' extracts that were not tendered at trial.<sup>170</sup>

His observations and opinion as to the diaries are extracted in full, as follows:

*'My general impression having read all of the material is that Mrs Folbigg was at the time that she wrote these diaries was a greatly tormented and indeed exceedingly disturbed woman. There is throughout the diaries a prevailing theme of intensely depressed mood, expressions of worthlessness and low self esteem and repeated references to feelings of rejection and abandonment by her husband Craig and her family and friends.*

*It is abundantly clear that Mrs Folbigg had intensely ambivalent feelings and attitudes to the notion of pregnancy and motherhood. She very clearly approached childbirth with feelings of intense anxiety and for her the daunting prospect of trying to bond and attach to her baby, together with the idea that she would be challenged beyond her capacity to care for the child and overwhelmed by the task. She says for example on 25 July 1996 that the thought of having a baby and being left alone is a little frightening. A few days later on 9 August 1996, she says "if I was superstitious, I'll take it as a sign – not to get pregnant and that my body is rejecting the idea because it's not ready?". At times she feels so overwhelmed by the challenges of providing for her child that she contemplates simply leaving and abandoning her husband and child.*

*It would seem clear from the extracts of her diaries tendered by the Crown at trial, that she suffered intense feelings of shame and guilt in relation to the death of the children.*

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<sup>167</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 20.

<sup>168</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 21.

<sup>169</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 20.

<sup>170</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 18.

*I thought the diary note of 11 June 1997 in the Crown extracts is a good indication of the degree of torment that she suffered in relation to the death of her children. She writes "don't think I'll suffer Alzheimer's Disease, my brain has too much happening, unstored and unrecalled memories just waiting. Heaven help the day they surface and I recall. That would be the day to lock me up and throw away the key. Something I'm sure will happen one day". It would seem clear that Mrs Folbigg was in fact tortured by feelings of guilt, shame and remorse, although she did everything she could to suppress and contain these feelings.*

*In the Crown extracts on 25 August 1999, Mrs Folbigg describes poignantly her inability to bond with her first three children.*

*The overall theme in these diaries is of a woman who is always coping at the very margins of her capacity to bond, relate, provide and care for her children. She is easily roused to panic and readily defeated by any perception on her part that she would fail to provide for her children.<sup>171</sup>*

#### Ms Folbigg gives evidence about a letter written to Craig Folbigg

Ms Folbigg gave evidence to the Inquiry that she would write letters to her husband Craig Folbigg rather than speak to him.<sup>172</sup>

In her evidence, Ms Folbigg's counsel, Mr Morris SC, took her to a letter that she wrote to her husband after the death of Sarah.<sup>173</sup>

Ms Folbigg was asked whether she thought about the subject matter of the letter before she wrote to her husband. She told the Inquiry that 'I will say sometimes and then other times I was - had a bit of paper in front of me and then will just start writing the letter.'<sup>174</sup>

In summary, Ms Folbigg read the following to the Inquiry:

*I have so many feelings and thoughts running around in my head. I can't discuss them with you.*

*The more I think about what our lives will be like, just you and me, the more I'm scared. I don't think I could handle it. I clearly remember how close I got to leaving you before Sarah was born. I thought that having her would solve the problems. I was wrong. That was a mistake. She was by no means a mistake. I love her more than anything and wouldn't have had my life go in any other direction and am proud and grateful for the happiness and joy that she did bring into my life. But she is gone, and I ... And I am now faced with all the feelings and thoughts that I had before but worse. Having her solve the problem of fulfilling your life and making you happy with life again, but now because of cruel fate all that's happened is turn your life into misery once more. How much misery and tragic deals of life can a couple supposed to bear? I suppose this last one has broken me, I don't know about you. You said this morning that you've made my life sad. That's not true. There always will be many memories of happiness. Unfortunately they seem to be followed closely by ones of sadness. The bottom line is I don't want this life anymore. I want to have a major change. Changing the car won't*

<sup>171</sup> Report of Dr Michael Giuffrida, 27 August 2003, page 18.

<sup>172</sup> Transcript of the Inquiry, 1 May 2019, T 783.33-34.

<sup>173</sup> Transcript of the Inquiry, 1 May 2019, T 783.20.

<sup>174</sup> Transcript of the Inquiry, 1 May 2019, T 783.36 – 39.

*solve it. I can't live here, I hate it, it makes me miserable, and there's more I just can't seem to find the words to explain.*

*I think it is a case of this avenue of my life has expired. I can't find any other way to extend or repair or change it. The only two options I have left, I try life on my own or die. My survival instinct is too high for option 2.<sup>175</sup>*

It is significant that this letter was written 'quite soon after' Sarah's death; and even more so as it was written 'in the context of the grief' that Ms Folbigg was feeling.<sup>176</sup>

What is interesting about Ms Folbigg's letter to her husband, is that is expressed in a similar manner, tone, use of words and sentence construction as the entries in her diary. It explores Ms Folbigg's feelings about a topic, and explores throughout the course of the text her thoughts as to how to resolve an issue or express her feelings. In that regard the diary entries and the letter carry striking similarities – they both demonstrate how Ms Folbigg is posing questions of herself and in some instances answering them. There is nothing complex about the language she uses, and tellingly, in the letter that her Counsel had her read to the Inquiry, she makes no corrections of any of the plain English that she uses to express her thoughts and her emotions. The difference in the audience – her diaries being just for herself, and her letter being for her husband – do not and could not change the meaning of the text when the diaries and the letter are compared and their undeniable similarities are exposed. The words carry their plain English meaning; they convey exactly what Ms Folbigg, by their plain English meaning, intends them to convey.

#### The effect of the psychiatric reports upon Ms Folbigg's evidence before the Inquiry

What is revealed in the above is that even though it appears open that Ms Folbigg became increasingly depressed following the death of each child, and that she was going through at times significant degrees of inner turmoil, there is nothing to explain the evidence that she gave in the Inquiry in relation to the meanings of the entries and how certain entries contained separate thoughts on different themes that were unrelated to each other as outlined above.

All of the reports, apart from the report of Dr Diamond and the second report of Dr Giuffrida, were prepared in 2003, around the time of Ms Folbigg's trial. Dr Giuffrida in particular appears to have spent a significant amount of time assessing and treating Ms Folbigg over a longer period than any of the other psychiatrists that saw her and whom have provided reports tendered in the Inquiry.

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<sup>175</sup> Transcript of the Inquiry, 1 May 2019, T 783.25 – 784.23.

<sup>176</sup> Transcript of the Inquiry, 1 May 2019, T 784.26 – 31.

What arises from the reports is that although Ms Folbigg had a very troubled and traumatic childhood, particularly in her very early years, this has not affected her intelligence – Dr Diamond and Dr Giuffrida in particular remark on her average to above average intelligence. She has no known cognitive or developmental disability. Equally, there are repeated references, as set out above, as to her lack of any symptoms of thought disorder. Dr Westmore observes that she was an alert and attentive historian. There is in fact an absence of symptoms (irrespective of the differing opinions and diagnoses of the respective psychiatrists) that could explain or even cast some light on the manner in which Ms Folbigg gave evidence as to the meaning of particular words and the way in which she attempted to separate out and re-define different sentences of particular diary entries.

In light of the above, Ms Folbigg's evidence as to the meaning of the diary entries such that they do not carry their logical, ordinary English meaning, or that she is separating her thoughts or 'flipping' between different topics, should be rejected. Her evidence on those matters is no more than her efforts to recast the entries in a fashion such that the meaning they carry on their face is diminished to the point of being meaningless as to the subject matter she is writing about. Her evidence is no more than an attempt to divert attention from her guilt and responsibility for the deaths of her children that is evidenced in the relevant diary entries.

## **F Conclusion**

Despite the many attempts by Ms Folbigg in her evidence before the Inquiry to redefine and re-contextualise the diary entries, all of which are written in plain English, showing a logical and straightforward progression and development of theme, the Inquiry should not accept her innocent explanations. The evidence given by Ms Folbigg was an effort on her part to explain away the diary entries that formed such an inescapably damning aspect of the Crown case at the 2003 trial, but her evidence should be rejected.

At the time she gave evidence about her diary entries, Ms Folbigg knew of their significance and she knew what was at stake. The answers she gave before the Inquiry cannot be divorced from the circumstances in which she came to give evidence in the Inquiry. It is submitted that Ms Folbigg's diary entries should be viewed as confessions or admissions which are highly incriminating, and which therefore contribute to a finding that she was responsible for Patrick's ALTE and for the death of each of her four children.

In the proof of guilt, admissions against interest are often an integral and powerful part of the prosecution case. In the case against Ms Folbigg, it is submitted that the admissions made in the diary entries are available, along with the other circumstantial evidence, to prove her guilt.

Admissions and evidence of other inculpatory circumstances can only be affected by the medical evidence if that evidence is capable of establishing a hypothesis consistent with innocence.

The fresh medical expert evidence before the Inquiry has been dealt with in the submissions of Counsel Assisting and the same position is adopted in these submissions. One of the most important propositions made by Counsel Assisting is that none of this evidence excludes smothering of the children as a possible cause of death. An acceptance of this proposition means that the diary entries and combination of other evidentiary circumstances are available to separately establish Ms Folbigg's guilt. It is unaffected by any of the fresh medical evidence.

The most significant change to the evidence given at the original 2003 trial is that an account has now been given by Ms Folbigg, and it has been tested in cross examination. It is submitted that a strong Crown case against Ms Folbigg at her trial has now become very much stronger due her giving evidence about her diary entries, much of which was untruthful and should not be accepted by the Inquiry.

It is submitted that the circumstantial evidence as a whole now available before this Inquiry does not leave reasonably open an inference consistent with the innocence of Ms Folbigg. It is respectfully submitted that the Judicial Officer would be satisfied beyond reasonable doubt as to the guilt of Ms Folbigg on all five counts for which she was convicted in the 2003 trial.

Accordingly, whilst the Judicial Officer is obliged by section 82(1)(a) of the Act to cause a report to be sent to the Governor, it is submitted there is no proper basis upon which to exercise the power to refer the matter to the CCA.

Submitted on behalf of the Director of Public Prosecutions



Christopher Maxwell, QC

Rachel Swift

Elissa Costigan

Liam Betts

24 May 2019

