

RSB:SND

SPECIAL INQUIRY

THE HONOURABLE REGINALD BLANCH AM QC

5 MONDAY 11 FEBRUARY 2019

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

NON-PUBLICATION DIRECTION

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Ms G Furness SC with Ms A Bonnor and S McGee - Counsel assisting the Inquiry

Ms J Pheils for the Director of Public Prosecutions

Ms K Richardson for Dr Cala

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Ms B Lyons for New South Wales Health

Mr T Mineo for Professor Hilton

Mr J Morris SC for the Applicant

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JUDICIAL OFFICER: Yes, Ms Furness.

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FURNESS: Thank you, your Honour. The purpose of today's directions hearing, your Honour, is to advise on progress towards the upcoming hearings. As those with an interest know your Honour has set the scope of the Inquiry to be in relation to medical advances and the extent to which those advances may be relevant in terms of the causes of death of each of the children, in addition to the question of advances in terms of knowledge of three or more deaths of children in the same family.

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So with the backdrop of that being the scope of the Inquiry, the timetable that has been set is for reports of any forensic pathologist to give evidence as to those advances, and if so the effects, if any, on their opinions, to be provided to the Inquiry by 18 February, that is next Monday. Now to that end the Inquiry has obtained reports of Professor Hilton, who conducted one of the autopsies and Dr Cala, who conducted another of the autopsies and their reports have been provided to those, with leave. There are two further reports which are effectively in the pipeline, your Honour, and they are from Professor Horne, who is a researcher in paediatrics, and Professor Elder, who is a paediatrician, whose areas of interest are relevantly SIDS and SUDI, and their reports will be in relation to any advances in the areas relevant to the Inquiry and those reports will be provided to those, with leave, on or before next Monday.

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In addition the Inquiry has provided a tender bundle in respect of the forensic pathology hearing to those with leave and a tender bundle in relation to the genetics hearing.

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We were informed, I think this morning by those representing Ms Folbigg that they either have engaged or are about to engage Professor Orde, who is the forensic pathologist, I think from Canada.

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JUDICIAL OFFICER: Professor?

5 FURNESS: Orde, O-R-D-E, and I understand that his engagement is subject to funding, so he hasn't yet been engaged, and Dr Duflou, who is a forensic pathologist in Sydney. I'm not entirely sure whether he has been engaged or is in the process of being engaged. In any event, your Honour, I note that from the timetable your Honour has set is that any reports need to be with the Inquiry on or before Monday 18 February.

10 And it has been indicated again to those with leave, your Honour, that the oral evidence will only be taken by experts who have provided a report. Now that is broadly in relation to the forensic pathologists.

15 In terms of the issue of genetics, DNA testing has been carried out in relation to each of the children and Ms Folbigg, and a panel of qualified experts has been established to interpret the data from that testing and reports are expected to be received over the coming weeks.

20 In relation to that work we ask that your Honour make a non-publication direction in terms that I think are before your Honour on the bench. Effectively, it is that information given to the Inquiry by the Australian Genome Research Facility and the Victorian Clinical Genetic Service in the form of genetic sequencing data information resulting from the interpretation of that data, and any report given to the Inquiry about that information can only be published to lawyers and employed staff assisting the Inquiry, those acting for Ms Folbigg and Ms Folbigg, and others with leave to appear and any other person approved by lawyers assisting your Honour. So I ask that your Honour make that direction.

30 JUDICIAL OFFICER: Is there any submission about that, Mr Morris?

MORRIS: No, your Honour.

35 JUDICIAL OFFICER: Who else is at the bar table? Ms Pheils I see that you are here.

MORRIS: Well just for the record I appear in the interests of Ms Folbigg again, your Honour.

40 JUDICIAL OFFICER: Are there any other appearances?

MINEO: Your Honour, I'd be seeking leave to appear in the interests of Professor Hilton, Mineo, solicitor, from Avant Law.

45 JUDICIAL OFFICER: To appear for?

MINEO: Professor Hilton.

JUDICIAL OFFICER: Yes, well I will grant you leave.

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MINEO: Thank you, your Honour.

RICHARDSON: May it please the Inquiry, Richardson, I appear with leave in the interest of Dr Cala.

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JUDICIAL OFFICER: Well I will grant you leave.

Are there any other submissions? Is anyone else making any submissions about the order that I am about to make about the non-publication direction?

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Then I make that order.

FURNESS: Thank you, your Honour. Your Honour, those assisting your Honour were advised last week that Ms Folbigg wished to be present by AVL during the Inquiry's hearings. Now that was the first occasion on which that information had been conveyed and that has affected the timetable and the place at which the Inquiry will sit. As is probably obvious to all that hearing rooms available in this building are limited in terms of technology and it will not be possible for Ms Folbigg to be present by AVL in the Chief Secretary's building and accordingly it will be necessary for the Inquiry to sit at Lidcombe at the new Coroners Court complex and that court has all the facilities available. Not surprisingly again that court has limited availability for the Inquiry to sit, therefore, it has been necessary to change the timetable, and the revised timetable now is that the forensic pathologists and the two SIDS experts I referred to will give evidence in the week commencing 18 March at the Coroner's Court at Lidcombe. The panel of geneticists and others interpreting the relevant data will be giving evidence on 15 and 16 April at the Coroners Court and in the event that Ms Folbigg gives evidence that will occur on 17 and 18 April, again at the Coroner's Court. And your Honour may wish to say more to Mr Morris in respect of whether Ms Folbigg gives evidence, but I would submit, your Honour, that those dates should remain unless your Honour is told by 18 March that Ms Folbigg is not giving evidence, which is effectively a month beforehand, to enable those who need, to make whatever arrangements to prepare for that portion of the hearing. Then a timetable will thereafter be set in relation to submissions.

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Now the final matter from me, your Honour, is to tender the complete transcript on a previous occasion, the transcript that was tendered was all of the evidence before the jury, I am seeking to exchange that document for one that has all the evidence, including the voir dire transcript. So it will remain exhibit F. However, it will now contain all of the transcript.

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JUDICIAL OFFICER: Is there any problem that anyone has with that?

MORRIS: No, your Honour.

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EXHIBIT F SUBSTITUTED BY THE ADDITION OF FULL TRANSCRIPT,
ADMITTED WITHOUT OBJECTION

FURNESS: Thank you, your Honour, that is all I wish to say by the way of progress, but I understand that Ms Richardson has an application to make to

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your Honour.

JUDICIAL OFFICER: Mr Morris, while you are on your feet, it has been mentioned the reports of Doctors Orde and Duflou, are you in a position to say
5 that they will be available by next Monday?

MORRIS: Well, your Honour, I'm definitely hoping for the Duflou report by the end of the week. With respect to Professor Orde, we are somewhat hamstrung, because we've applied for funding and that has not yet come
10 through and to that extent we are in no position to be able to clarify that situation at this stage.

I should say, your Honour, with respect to the addition of the SIDS experts to the forensic pathology conclave, as I might call it, which is to take place, we
15 have been making some enquiries with respect to experts who may be able to assist in that SIDS/SUDEP type environment and we have not yet been able to identify somebody or make contact and to be frank your Honour I was not aware that Professor Horne or Dr Elder were going to participate. So your Honour if that becomes a problem, I might get in contact with counsel assisting
20 and, if necessary, if we might have liberty to apply because we don't know what will be in those reports, we don't know the issues. Your Honour we have been preparing for this case but we're not quite sure about the issues to which those reports will be directed but your Honour rather than making a mountain out of a molehill yet if we might at least have liberty to raise the matter if it
25 should become an issue.

JUDICIAL OFFICER: Yes well I'll grant you leave to do that if that becomes an issue.

30 MORRIS: Thank you your Honour.

JUDICIAL OFFICER: While we're discussing the matter Mr Morris, the question of whether Mrs Folbigg gives evidence or not is obviously of critical interest to other parties particularly the DPP no doubt, and I appreciate of
35 course that that's an issue that you would've given thought to. What is proposed is that 17 and 18 April be set aside for the purpose of her giving evidence and whether she's going to give evidence or not is something that is obviously of critical interest to the DPP in terms of preparation. It seems to me that we really ought to have an answer to that question about a month out from
40 the date that she is if she is to give evidence. So in other words if she's giving evidence on 17 or 18 April then we really ought to have an answer as to whether she's going to be giving evidence by 17 or 18 March.

45 MORRIS: Yes your Honour.

JUDICIAL OFFICER: I could make an order now that the scope of the Inquiry will not include her evidence unless we are notified by say, 17 March, what do you say about that?

50 MORRIS: Well your Honour one of the - in terms of the timeframe your

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5 Honour, I think we'll be able to meet your Honour's convenience there. I would hope that by then the genetic testing and other enquiries will have played themselves out, that we will be fully apprised of at least the areas of dispute with respect to forensic pathology and also SIDS and SUDEP definitions and allied issues and armed with that material I expect to be in a position to be able to advise my client and seek some instructions on that issue.

10 JUDICIAL OFFICER: Yes thank you well I anticipated that might be the situation, that gives you the maximum amount of time that--

MORRIS: We're indebted.

15 JUDICIAL OFFICER: And it does - Ms Pheils is that time enough for you if you know by 17 March?

PHEILS: Yes.

20 JUDICIAL OFFICER: All right then I'll make the order now that the scope of the Inquiry will not include the evidence of Mrs Folbigg unless we are notified in writing by 17 March that she does intend to give evidence. Is there anything else you wanted to raise Mr Morris?

25 MORRIS: No your Honour. There are a couple of minor issues but they can be sorted out with counsel assisting. Thank you your Honour.

JUDICIAL OFFICER: Yes Ms Richardson?

30 RICHARDSON: Your Honour this is a matter I've only recently foreshadowed with counsel assisting Ms Furness SC, we've only just become aware of the proposed forensic pathologist and SIDS experts to be called in the forensic pathology phase of the Inquiry. I act in the interests of Dr Cala. In my respectful submission the Inquiry should be calling Professor Byard who I understand is not currently proposed to be called as a witness.

35 As we understand it, the Inquiry has the compulsive powers of a Royal Commission so the power is available to summons him to give evidence. The reason we make that submission is that he was a forensic pathologist called by the defence at the trial and he gave extensive evidence in relation to all four children. He's also a well-known expert in relation to SIDS as your Honour would be aware.

40 As your Honour would be aware in the reports that Professor Cordner has put forward to this Inquiry, he expresses a particular view about, for example, myocarditis in relation to the fourth child Laura. My client Dr Cala did the autopsy in relation to the fourth child. The evidence that he gave at trial in relation to cause of death in my submission is very similar to the evidence given by Professor Byard who was called by the defence in the hearing.

50 It's also in many respects similar to that of Professor Herdson who was an independent forensic pathologist called by the prosecutor who I understand

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has since passed away but it's also the evidence of Dr Berry or Professor Berry from the United Kingdom who gave evidence at the hearing which is also highly relevant to the views of the pathologist at the trial in relation to the cause of death of Laura in particular.

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In my submission in fairness to Dr Cala in particular and in the interests of the Inquiry coming to an informed view Professor Byard should be called because of his eminence in the field and because he was called by the defence at the hearing in circumstances where Professor Cordner is being called, who's putting forward a particular view in relation to the fourth child and Professor Hilton is also now expressing a view in relation to Laura which we will be submitting is not a view that he expressed at the trial. In fairness to my client, Professor Byard should be called as part of the week of forensic pathology evidence in our submission and that compulsive powers ought to be exercised if necessary to make sure that happens.

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JUDICIAL OFFICER: We have, of course, spoken to Professor Byard who has given some advice in relation to the enquiry and provided a compendium of studies that have been done in relation to SIDS and so on. His evidence will be before the Inquiry, the evidence that he has already given. What do you say would add to that if he were called?

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RICHARDSON: Well there's relevance in multiple experts. Firstly he was a witness at the trial as was Professor Hilton and Professor Hilton is coming along to the trial. There's also Professor Byard's recognised expertise in terms of he has the particular benefit of not only having reviewed the original histological slides in relation to relevantly, Laura, and formed a view at the time and given evidence, he's also in the position to give evidence to a key aspect of this Inquiry as I understand it which is any relevant medical advances since that time. So in my submission he's uniquely placed to give a view which is that he expressed a view at the time and was a witness called by the defence and he is also involved in academic research and could give his view to the Inquiry as to whether medical advances caused him to change his view that he has given at the trial.

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JUDICIAL OFFICER: What was the view that he gave at the trial?

RICHARDSON: Well his evidence was extensive across all four children. He was a significant witness for the defence. My understanding is that he was the only forensic pathologist called by the defence.

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JUDICIAL OFFICER: You seem to be concentrating though on the myocarditis issue.

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RICHARDSON: That is because that's the issue relevant to my client Dr Cala because--

JUDICIAL OFFICER: What does Professor Byard say about that?

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RICHARDSON: For example he gave evidence at the hearing that he put the

cause of death as undetermined for Laura Folbigg because he could not exclude myocarditis. So his position was not that the cause of death should be myocarditis but that the cause of death should be undetermined which was also the evidence of my client Dr Cala and multiple witnesses gave evidence
5 that myocarditis could not be excluded and in effect that was an outworking of the fact that the death should be undetermined which is it could not be determined, that was the view. Certainly Dr Byard for the defence was not putting it as highly as the cause of death should be the myocarditis.

10 JUDICIAL OFFICER: Well you will have that without the need for Professor Byard to be called. I think the reality of the situation is that there's very little difference between the pathologists in relation to the death of Laura and the possibility of myocarditis simply on the basis that from a pathologist's
15 point of view there was evidence present of myocarditis, so every pathologist is going to say that's a possible cause of death. The tension is whether you can say it definitely was the cause of death or whether it was simply incidental and there was some other cause of death.

And I think Professor Cordner, who spoke reasonably strongly about
20 myocarditis being the cause of death, also said that he would support a pathologist who said the cause was undetermined. That wasn't his preferred position, but he said that he would support a pathologist who said so. So at the end of the day there's very little difference between any of them. And so far as Professor Byard is concerned he has provided, as I have said, advice,
25 and in particular - and I think have you got a copy of the large compendium that he together with somebody else edited--

FURNESS: Exhibit D, your Honour.

30 JUDICIAL OFFICER: So Professor Byard has already made a very significant contribution to this Inquiry and as I have said you have got the benefit of his evidence that he gave at trial. So the question then becomes why should I exercise a power to force him to come from Adelaide to Sydney to give
35 evidence in person?

RICHARDSON: Those are the submissions I would put, your Honour. I hear what your Honour says. In turn, of course, I will be making submissions on
40 behalf of my client in relation to the very real similarities between the views he expressed and Professor Byard and a number of other pathologist at the trial.

JUDICIAL OFFICER: I understand that.

RICHARDSON: May it please the Inquiry. The only other matter, and it sounds like this ship may have sailed, that the change of the forensic
45 pathology week is - I will have to make enquiries with Dr Cala, he may be able to able to arrange his schedule to change his dates, he's already taken the week off to accommodate the 4th. I will be unavailable that entire week, but I assume that that's not enough to change anything given the number of moving
50 parts in this Inquiry.

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JUDICIAL OFFICER: Yes, well that unfortunately is the problem. It's not only an issue because of the number of people involved, but it's also where we can actually conduct the Inquiry and we only have a very limited access to the Coroners' Court at Lidcombe, which is not the most convenient place for everyone to get to, but it's the most convenient court to conduct the Inquiry. So I am afraid I can't accommodate you further than that, Ms Richardson.

RICHARDSON: May it please the Inquiry.

JUDICIAL OFFICER: Are there any other matters?

FURNESS: If I might, your Honour, in relation to my friend's submission in respect of Professor Byard, my friend, I understand, has only been in the matter relatively recently and probably hasn't had time to catch up with exhibit D, which, as your Honour has described a compendium of the latest research in SIDS that Professor Byard edited with Dr Duncan, and that contains all of what was known, is known and is expected to be known about SIDS, and it contains a very useful article by him of advances. So there is already evidence before your Honour as to the advances in SIDS which can then be readily applied in relation to the children.

JUDICIAL OFFICER: Yes, I readily understand Ms Richardson's difficulty is she has only just come into the matter and there's quite a large amount of material.

That only leaves a little bit up in the air the question of Dr Orde.

FURNESS: Doctor?

JUDICIAL OFFICER: Orde.

FURNESS: Yes, your Honour.

JUDICIAL OFFICER: But I think it's probably best left on the basis that Mr Morris suggests that if there's an issue he can come back to us with it.

FURNESS: I think that's right, your Honour. Also if Professor Orde gave evidence it would be via AVL he wouldn't be here in person I take it?

MORRIS: I'm not sure, I would think it would be by AVL, but he may be prepared to come here in person, your Honour, I'm not sure at this stage.

FURNESS: There's a logistical issue with how many AVL capacities there are in the one courtroom, so perhaps if we can discuss that in order to ensure that the technology fits purpose.

MORRIS: Yes.

ADJOURNED