

SECOND INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

Submissions on behalf of Craig Folbigg

A. INTRODUCTION

1. There has been minimal involvement on behalf of Craig Folbigg in the hearings of the Inquiry as the view was taken that it was not his role to prosecute or to pursue a specific outcome to the Inquiry. That position has not changed. However, he does have an interest in ensuring that the investigations and report of the Inquiry are comprehensive and objective. In the light of the hearings and the submissions of Counsel Assisting there are a number of concerns in that regard, which are outlined below.

B. CAUSES OF DEATH OF THE CHILDREN

2. The submissions of Counsel Assisting in relation to the evidence relating to the causes of death of the children are summarised in paragraph 7. In essence it is submitted that the evidence shows: –
 - (a) in relation to Sarah and Laura as a matter of reasonable possibility the CALM2-G114 variant cannot be excluded as the cause of their sudden death.
 - (b) in relation to Laura, myocarditis also cannot be excluded as a possible cause of death.
 - (c) in relation to Patrick, as a matter of reasonable possibility, an underlying neurogenic disorder cannot be excluded as the cause of his death.
3. It is later submitted [para 85] that the cause of Caleb's death remains undetermined.
4. While additional medical and scientific evidence has been introduced before the Inquiry, the basic structure of the case against Ms Folbigg has not changed. In particular, the fundamental implausibility of the hypothesis that four children in the one family died of natural causes before reaching the age of two years remains the dominant feature.

5. The issues concerning the approach to drawing inferences in relation to the causes of the deaths of the children were directly considered by the Court of Appeal in its review of the report of the Blanch Inquiry (*Folbigg v Attorney General of New South Wales* [2021] NSWCA 44). The Court laid down specific bases upon which the hypothesis of deaths by natural causes is to be assessed but no attempts have made to demonstrate compliance with the standards enunciated by the Court. In fact, even accepting the specific submissions in relation to the evidence concerning the circumstances of each child, the standards set by the Court of Appeal are clearly not met and there is no justification for a different finding to that of the Blanch Report.

6. Notwithstanding that the so-called Meadows Law has been discredited, the Court of Appeal proceeded on the presumption that the rarity of four unexplained deaths due to natural causes in one family was a relevant consideration [52-54].

7. The Court then specifically stated: –

“[84] Of more importance to the outcome of the inquiry was the discussion of “Genetics evidence” in Ch 7. In so far as the evidence established a particular natural cause as a reasonable possibility in relation to the death of each child, taken separately the likelihood of such natural causes, each in itself a rare event, in four consecutive children in one family was vanishingly small. The conclusion would, of course, be quite different were there a real possibility of a common cause. The common cause might, in theory, be environmental or genetic. In practical terms the question was whether there was evidence to support a common genetic link.”

and

“[86] However, before dealing with the more detailed issues, some further general observations are in order. First, although the discovery of a plausible cause of death in any of the children would in theory reduce the degree of improbability of four deaths occurring naturally in one family, unless the causal hypothesis for a natural cause in one case was strong, it would have limited effect. Similarly, different indications in each of the four cases, lacking strong causal links, would have limited effect. However, the identification of a common genetic factor providing a possible explanation as to why more than one death occurred in the one family, would be, subject to the other evidence, an important step in demonstrating a reasonable doubt as to the applicant having caused those deaths.

[87] Secondly, despite extensive investigations, no common genetic element has been identified as present in all four children. What was identified, after the trial, was a variant of the CALM2 gene associated with certain cardiac conditions, the genetic variant being common to the girls (Laura and Sarah) and the applicant. As will be noted below, the causal significance of this was contestable.”

and

“[89] The significance of the material was that it provided a common genetic link associated with pathogenicity in the two female children. However, the males were not affected. There therefore remain at least three separate causes, as there was no common link between the deaths of the babies.”

8. The reality is that there has been little change in the substance of the evidence relating to the causes of death. A great deal of time has been spent dealing with the genetic evidence relating to the deaths of the girls but much of it was before the Blanch Inquiry, and the Court of Appeal, in the material belatedly provided after the hearings of the Inquiry had concluded.
9. It is clear that the Court of Appeal’s requirements for the acceptance of the hypothesis of deaths by natural causes, are not met. Whilst the evidence during this inquiry has strengthened the theories in relation to the individual deaths, in none of the cases has it prompted Counsel Assisting to propose findings of a level higher than a reasonable possibility, which clearly does not meet the test of an individual case being “strong” as identified down by the Court of Appeal.
10. To the contrary, by focusing on enhancing the evidence of separate theories as to the causes of death of the children, in reality, it damages Ms Folbigg’s campaign as it serves to eliminate the common cause which the Court regarded as a feasible basis for overcoming the likelihood of natural causes of four consecutive deaths in one family as “vanishingly small”.
11. There is no recommendation as to the action to be taken but presumably the submissions are directed at having the convictions set aside one way or another. To do so in defiance of the dicta of the Court of Appeal would be perverse. It also seems

irrational to deal with the evidence in isolated segments, one dealing with causes of death and the other with the entries in the diaries, with no attempted correlation. The Governor should be informed that the theories that the deaths were due to different natural causes find no support in Ms Folbigg's real world as revealed by the diaries. She makes no reference to the children displaying different symptoms. In fact she shows no curiosity or interest in the circumstances of the causes of their deaths – presumably because she knows – and the defects in the ingenuity of the medical practitioners coming up with theories as to natural causes, is exposed by the reality of her entries admitting doing terrible things, being the daughter of a murderer needing to be able to control her temper, but failing, continuing to lose it and her daughter still being at risk.

C. DIARY ENTRIES

12. The entries in Ms Folbigg's diaries have been the foundation of the findings of guilt against her, and that continues to be the case despite the additional evidence which has been led concerning the cause of death of each of the children. The best part of two weeks was spent receiving evidence concerning the possible natural causes of death of the children and less than two days was dedicated to evidence affecting the diaries. At no stage in the hearings was one single diary entry out of the 458 which have been transcribed, the subject of examination or scrutiny, other than those raised by Counsel for the DPP. Similarly, notwithstanding the summaries in the submissions of Counsel Assisting of some of the entries and the evidence broadly relating to them, no attempt is made to explain or rationalise them or make recommendations about the advice to be given to the Governor concerning the entries which have been identified as admissions of guilt.

13. When the Court of Appeal reviewed the Blanch Report, with regard to the diaries it stated: –

“[103] Similarly, an understanding of the meaning of the diary entries was not to be undertaken on a day by day so basis but having regard to knowledge of the applicant and her personal history and circumstances, and the explanations of them advanced by the applicant in her oral evidence to the inquiry.” (emphasis added).

14. Little reference has been made during the hearings, and none in the submissions of Counsel Assisting that I can find, in relation to the full details of the personal history of Ms Folbigg. [REDACTED]

15. Her personal history was the subject of detailed consideration by Justice Barr on sentence, and should be reflected in the Report of the Inquiry to the Governor. In his remarks on sentence, he referred in detail to the information relating to her childhood, namely:

- her mother seems to have spent little time caring for her [36].
- her father, who was to all accounts a violent man, murdered her mother [37].
- as a child she was displaying severe temper tantrums and being extremely aggressive, particularly to other children and seem to have a preoccupation with her sexual organs [38].
- she been reported as being virtually uncontrollable and a disruptive influence on the foster parents marriage, and indulged in excessive sex play and masturbation [39].
- she had been very brutal to other children and destructive in the home [40].
- she was a seriously disturbed and regressed little girl [51].

The judge accepted that it was well-established that children who are neglected and suffer serious physical and sexual trauma may suffer a profound disturbance of personality development [52].

16. Psychiatric evidence was given on her sentence in relation to her mental state from psychiatrists, Doctors Giuffrida and Westmore who had direct involvement with her and whose opinions are set out in more detail in the judgement. Doctor Giuffrida, unlike most of the psychiatrists who have provided reports to this Inquiry who have either not

seen her or only did so nearly 20 years after the relevant events, had interviewed Ms Folbigg five times after the conclusion of the trial and Doctor Westmore had assessed her twice before trial and once after trial. It is noteworthy that they dealt with her on the basis that she was not responsible for the deaths of her children.

17. As Justice Barr noted [61] Doctor Giuffrida had found the diary entries revealing and thought that they were the writings of a greatly tormented and exceedingly disturbed woman, with 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 family and friends, resulting from the effects of the experiences she had undergone as a little child. Justice Barr also noted that Doctor Westmore had thought that the childhood history of Ms Folbigg was likely to have influenced her personality development and that she probably experienced significant disturbances from time to time. The doctor considered that she was probably suffering from depression which expressed itself as anger and aggression [69].

18. In conclusion, Justice Barr stated:

“[94] I think that notwithstanding the stable family environments afforded by the Platt and Marlborough families and by Mr Folbigg the effects on the offender of the traumatic events of her childhood operated unabated. She was throughout these events depressed and suffering from a severe personality disorder. I accept the evidence of Doctor Westmore that her capacity to control her behaviour was severely impaired.

[95] I accept that throughout marriage the offender was affected by the abuse perpetrated upon her during her first 18 months of life. The effects included an inability to form a normal, loving and forbearing relationship with her children. Although she realised that shortcoming, she lacked the resources to remedy it. She was unable to confide in Mr Folbigg. He never knew that she was at the end of her tether. The result was that he continued to leave everything to her and her fear of the consequences became settled. Her depression went unrelieved and on occasions turned into anger. The offender was not my inclination the cruel mother. She did not systematically abuse her children. She generally looked after them well, fed and clothed them and had them appropriately attended to by medical practitioners. Her condition and her anxiety about it left her unable to shrug off the irritations of unwell, wilful and disobedient children. She was not fully equipped to cope.”

19. Dr. Giuffrida made a later report dated 10 May 2019 (Exhibit 2-BR) presumably for the Blanch Inquiry in which he firmed up on the opinion he had expressed earlier. In particular he said:

“The answer to your second question is necessarily somewhat complex given that whilst on the one hand having interviewed and examined Ms Folbigg extensively in 2003 and found no clearly identified psychiatric disorder and indeed was at pains to exclude the more serious ones known to be commonly associated with women who harm or kill their children, it is nonetheless clear on the history provided to me by Ms Folbigg and which was strongly confirmed by my reading of her diaries that she had long suffered from a pervasive depression which could be best described as a chronic Dysthymia which may have at times reached the intensity of all Major Depressive Episode.

Given the information available from the Department of Community Services file including the reports of a child psychiatrist, Doctor Spence and a clinical psychologist, it seems highly likely that Ms Folbigg was subject to a repeated, probably continuous early childhood sexual, physical and emotional abuse and neglect by both her mother and father and on Ms Folbigg’s known history appears to have been at least emotionally and probably physically abused by her foster mother Mrs Marlborough.”

20. It was made clear that the diagnoses were not dependent upon findings of guilt but were opinions based upon the information available concerning Ms Folbigg’s childhood which the Court of Appeal expressly included as matters to be taken into account when assessing the meaning of diaries. The entries in the diaries reflect the personality traits identified by Justice Barr and are also indicative of a mental illness he found. It is submitted that the report to the Governor would be clearly deficient if the issues are not addressed.
21. There are a number of other observations should be made which have not been referred to in evidence or in the submissions which require recognition in the report of the Inquiry to assist the Governor in considering action to be taken.
22. The evidence provided by the psychiatrists to the Inquiry provides interesting hypothesis concerning the interpretation of the entries in the diaries. However, as was

readily conceded by them, and in the submissions, it is not their function to determine what amounted to an admission. The entries are written in plain English and capable of being understood by anyone familiar with the language, particularly when taking into account the context in which the words appear. The obvious example is the reference to being her father's daughter in the entry of 14 October 1996 [240] to which no reference was made in the hearings all the submissions. The entry relevantly reads:

“..... Children thing still isn't happening. Thinking of forgetting the idea. Nature, fate & the man upstairs have decided I don't get the 4th chance. And rightly so I suppose. I would like to make all my mistakes & terrible thinking be corrected and mean something though. Plus, I'm ready to continue my family time now. Obviously, I'm my father's daughter. But I think losing my temper stage & being frustrated with everything has passed. I now just let things happen & go with the flow. An attitude I should have had with all my children if given the chance..... ”

23. The context of her making the comparison to her father comes from the words that follow, which refer to her propensity of losing her temper, to which she makes a number of “I lost it” references in later entries in the diaries. The information concerning her childhood contextualises the reference to her father as being someone who caused harm upon losing his temper and she is clearly likening herself to him. The futile effort by Ms Folbigg to explain the entry by reference to her father being a loser, which on any view, does not explain it because it is clearly directed to the trait of losing control, should be drawn to the attention of the Governor as a manifestation of consciousness of guilt.
24. The report to the Governor should also bring to her attention several other significant personality traits which clearly emerge from the entries in the diaries which were generally accepted by the psychiatrists but receive little attention in the submissions. In that regard, notwithstanding the attempts at neutralising the meaning of the entries by the psychiatrists, it should be noted that many entries are not references to rationalising events of the past but are statements of fact relating to current events, such as the “I lost it” entries disclosing her loss of temper at the time, which cannot be explained on the basis of expressions of retrospective maternal guilt.

25. A small part of the existing evidence which shed some light on the meaning of some of the statements in the entries in the diary came from Lea Brown which receives short mention in the submissions [941]. Ms Brown referred to Ms Folbigg on one occasion losing her temper and gave a disturbing description of Ms Folbigg “yanking” Laura out of a highchair by one arm. Any parent would be appalled at the thought of a young child being hauled out of the chair by one arm and it is a small but informative illustration of the violent actions of Ms Folbigg when she lost her temper. It is not dissimilar to the reference in the diary entry of 28 January 1998 [345] when Ms Folbigg recorded that she was so angry that she had nearly purposely dropped Laura onto the floor. Again any parent would be appalled to think that a mother would even consider such action and it is a further manifestation of what appears to be Ms Folbigg’s mental illness which would be entirely consistent with her murdering her children.
25. It is submitted that there are several outstanding characteristics of the entries in the diaries which provide an insight into the personality disorder of Ms Folbigg responsible for her causing the deaths of her children, which should also be drawn to the attention of the Governor.

Lack of curiosity concerning the cause of deaths of her children

26. As has been acknowledged, it is remarkable that in the 458 entries transcribed there is not one expression by Ms Folbigg of uncertainty or curiosity concerning the causes of the deaths of any one her four children. There is an overwhelming expectation that a mother would be anxious to ascertain why her child had died, particularly where history was continuously repeating itself with a child dying and then another on the way. Yet not once in the diaries does Ms Folbigg express a desire for information concerning the causes of death even when she was about to have another. Despite creative attempts to explain the situation by the psychiatrists, the inescapable explanation is that she was fully aware of the cause of the death of the children and in no state of uncertainty or curiosity because she was responsible for the way they died.
27. The clearest entry in which Ms Folbigg seemed to refer to the cause of the deaths of her first 3 children was: –
- 09.11.1997 [321]

“... He has a morbid fear about Laura..... well I know there’s nothing wrong with her. Nothing out of the ordinary any way. Because it was me not them. Think I handle her fits of crying better than I did with Sarah. I have learnt once it’s getting to me to walk away. Breathing for a while myself. It helps me cope & figure out how to help. With Sarah all I wanted was her to shut up. And one day she did....”

28. The entry confirms why Ms Folbigg showed no interest in taking steps to ascertain the cause of the deaths of her children even though she kept having them – “it was me not them”. Given that she continuously reflected on the past, usually in the context of what would happen in the future, it is striking that she never indicated any interest in or desire for information concerning the causes of the deaths of her children. It is certainly not the conduct of a normal person and should be brought to the attention of the Governor for her consideration in determining what action she should take.

Absence of expressions of grief over the deaths of her children

29. It is also telling that the entries do not contain any expressions of grief over the deaths of her children, as Doctors Giuffrida and Westmore observed in their original diagnoses and has been acknowledged in the more recent reports. Notwithstanding the efforts of the psychiatrists to interpret the entries as ambiguous references to feelings of maternal guilt, the fact is that in terms or in a manner which one would expect from a mother truly grieving over the loss of a child on four occasions, not a word was written to express any regret or sorrow about their passing. Where she does make a comment about past events, in the criminal justice environment the observations would be more accurately described as expressions of remorse for the criminal acts which she has perpetrated, than an indication of a feeling of maternal guilt. Again, on any view it is not the reaction of a normal person.

Lack of affection for her children

29. The entries also reflect an unnatural lack of empathy or love or affection of a normal mother for her children, particularly when they have died. The first hint of affection comes after 291 entries: –

26.06.1997 [292]

“.... With the other 3 I never bothered to think of school & teenage years. Maybe because I always knew they’d never get there-but this one I see myself taking her to school & Craig doing homework etc with her. Therefore I assume I’m actually ready for the “Family Life” now where I wasn’t before.....”

Then, not until –

04.01.1998 [338]

“... Made me realise how much I love Laura & cherish her like I never did the others...”

28.01.1998 [345]

“.... I don’t want that to ever happen again. I actually seem to have a bond with Laura. It can’t happen again. I’m ashamed of myself...”

And later –

29.03.1998 [360]

“... Her smiles & giggles bring a warmth to me I never thought I’d feel...”

31. A lack of empathy is a common symptom of mothers who murder their children, which is logical. It is to be expected that mothers who have affection for the children are unlikely to cause the deaths. It is another symptom of the personality disorder from which Justice Barr found that she suffered.

32. There are many specific incriminating entries in the diaries which have not been mentioned during the hearings of the Inquiry and are not the subject of recommendations or interpretations in the submissions. It is submitted, they should be brought verbatim to the attention of the Governor for her consideration, undistorted by psychiatric translation. It may assist the Governor to decide whether to reject the diary entries as admissions on the basis of the superficial assessment by the psychiatrists retained if the Report informs her that the entries in the diaries, more or less in the same form, have been considered by the jury, the psychiatrist witnesses at the trial, the trial judge, judges of the Court of Criminal Appeal, the Blanch Inquiry and then judges of the Court of Appeal and each time have been assessed and accepted as admissions by Ms Folbigg of the murder of her children. Any suggested basis for departure or deviation from the conclusions of many eminent jurists would be radical and need to be identified for the benefit of the Governor with clarity, which has simply not occurred.

Inquiry Recommendation

34. It is submitted that the Governor should be informed that, not only does the evidence of possible causes of death still fail to meet the test set by the Court of Appeal, bearing in mind the factors identified by the Court for considering the evidentiary value of the diaries there are compelling grounds for continuing to treat the diary entries as admissions of Ms Folbigg's guilt, which once again serve to negate the plausibility of the various hypotheses put forward for the death of the children due to natural causes.
35. If it be the case that Ms Folbigg was suffering from a mental disorder which prevented her from exercising restraint when provoked by the behaviour of the children, resulting in her bringing about their deaths, they were circumstances beyond her ability to control and would be a significant factor in mitigation. If her behaviour was [REDACTED] [REDACTED] activated by the childhood trauma of sexual abuse, she is deserving of some sympathy. It is reasonable to conclude that her criminal conduct was not premeditated and was a circumstance which required being taking into account on sentence.
36. Accordingly, it is submitted that consideration be given, in addition to the report to the Governor, to the matter being referred to the Court of Criminal Appeal for review of the sentence imposed on the basis that there are reasonable grounds for concluding that the personality disorder from which Ms Folbigg suffered reduced her level of culpability and affected the severity of the sentence.

Date: 19 April 2023

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