SECOND INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

BEFORE THE HONOURABLE TF BATHURST AC KC

CLOSING SUBMISSIONS ON BEHALF OF THE DIRECTOR OF PUBLIC PROSECUTIONS

1. The Director of Public Prosecutions (the Director) has been an active participant in this second inquiry (the Inquiry) into the convictions of Kathleen Megan Folbigg before the Honourable TF Bathurst AC KC (the Inquirer).

2. Throughout the Inquiry, the Director has sought to maintain a position of independence and objectivity in accordance with her prosecutorial function, to assist the Inquirer in obtaining, reviewing and testing the substantial body of evidence now available to the Inquiry. From the early stages of the Inquiry, and in light of the long history preceding this Inquiry, the Director has endorsed the importance of ensuring that new evidence to be received by the Inquiry is obtained from independent and reliable sources.[1]

3. In particular, the Director has endorsed the engagement by the Inquiry of the eminent and world leading expert witnesses called to give evidence, for the first time, on the centrally important 'doubt or question' concerning the CALM2-G114R genetic variant affecting Sarah and Laura Folbigg, as identified in the Governor's direction for the Inquiry, pursuant to s 77(1)(a) of the *Crimes (Appeal and Review) Act 2001*.

4. The evidence from these eminent expert witnesses in relation to the CALM2-G114R genetic variant, that is only now available pursuant to the Inquiry, presents a critical new development. That evidence has been supplemented by significant new evidence on other issues, including pathology evidence relevant to each of the Folbigg children, neurology evidence in relation to Patrick Folbigg, and expert psychiatric and psychological evidence concerning the interpretation of Ms Folbigg's diaries.

5. This substantial and extensive body of new evidence was unknown at the time of Ms Folbigg's trial, some twenty years ago. Indeed, the most critical new evidence concerning the CALM2-G114R genetic variant was beyond the contemplation of science at that time.

[1] Directions hearing 6 September 2022, Transcript at 7.

6. Similarly, the new evidence now before the Inquiry was not available to the appellate courts that dismissed various challenges to Ms Folbigg's convictions. Centrally important aspects of the new evidence were also unavailable to the previous inquiry into Ms Folbigg's convictions conducted by the Honourable Reginald Blanch AM KC during 2018 and 2019.

7. In light of the evidence now available to the Inquiry, the Director has carefully reviewed the written submissions of counsel assisting the Inquirer. Those submissions are comprehensive and thorough.

8. In general, the Director does not seek to be heard against the various and detailed written submissions made by counsel assisting the Inquiry, subject to the following limited qualifications and observations.

Some qualifications and observations

9. In general, the Director submits that it is preferable that the Inquiry does not proceed to findings on matters that are unnecessary to consider, particularly given the very broad breadth of material and issues that must be determined, in order to discharge the Inquiry's function.

10. In the submissions of counsel assisting (CAS) at [506] it is submitted that *'…for these ten experts, there is at least a reasonable possibility that CALM2-G114R caused the deaths of Sarah and Laura Folbigg, whatever be Ms Folbigg's phenotype'.*

    a. It appears from the context that the reference to these 'ten experts' includes Professor Wilde. As such, this statement may be taken to mean that Professor Wilde ultimately concluded that there is 'at least a reasonable possibility' that CALM2-G114R caused the deaths of Sarah and Laura Folbigg.

    b. That is not correct, because when Professor Wilde was specifically directed to this question in terms of reasonable possibility, his evidence was that it could not be excluded, but he considered it 'unlikely, maybe even highly unlikely' that the two girls died as a result of natural causes associated with CALM2-G114R.[2]

[2] Transcript of the Inquiry (TS) 16 February 2023 at 471.42-47.

c. It may be that this meaning arising from this submission of counsel assisting was unintentional, particularly given that Professor Wilde's ultimate conclusion on this topic is correctly stated earlier in the CAS at [501].

11. In the CAS at [512] it is stated that *'Only Professor MacRae has expressed the view that while there was a "possibility" that Sarah and Laura died as a result of CALM2-G114R, the evidence did not "suggest that it's a reasonable possibility".'*

    a. This is not correct because, as noted immediately above, Professor Wilde also gave evidence to the effect that he would not go so far as to characterise the natural death of the two girls, for reasons associated with CALM2-G114R, to be a 'reasonable possibility'.

12. However, and in any event, these qualifications in relation to the ultimate conclusion of Professor Wilde do not in any material way detract from the effect of submissions by counsel assisting more generally, particularly with regard to the analogous application of principles, derived from *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 and *Velevski v The Queen* (2002) 76 ALJR 402, concerning differences of opinion between expert witnesses in matters of difficult and sophisticated areas of scientific knowledge.[3]

13. In the CAS at [529] counsel assisting submit that the *'overwhelming majority view of the cardio-genetic experts was that CALM2-G114R presented a reasonably possible cause of death for Sarah and Laura Folbigg*'. On that basis, counsel assisting go on to observe at [530] that *'it is unnecessary for the Inquiry to go further and decide whether or not CALM2-G114R was likely to have caused the deaths of Sarah and Laura Folbigg'*.

    a. The Director endorses the caution expressed here by counsel assisting, that it is *'unnecessary for the Inquiry to go further and decide whether or not CALM2-G114R was likely to have caused the deaths of Sarah and Laura Folbigg'*.

14. In the CAS at [560] counsel assisting submit *'for completeness'* that it would be open to the Inquirer to consider and make findings as to the *'relevant similarities'* relied upon by the Crown at trial in relation to the application of coincidence reasoning.

[3] As extracted in submissions of counsel assisting at [972].

a. Given the fundamentally different evidence and circumstances at the time of trial, in 2003, the Director submits that it is unnecessary to engage *'for completeness'* in analysis of the specifics of the similarities identified at that time, some twenty years ago. Indeed, this would now be a somewhat academic endeavour.

15. In the CAS at [871] - [908] counsel assisting summarise the evidence given by the psychologist, Mr Sheehan, and the psychiatrists, Dr Eagle and Dr Dhansay, in relation to the interpretation of Ms Folbigg's diaries.

a. The Director generally agrees with the summary of this evidence by counsel assisting and adds the following observations.

b. The expertise of these witnesses was brought to bear upon the context in which the diary entries were made by Ms Folbigg, from a psychiatric and psychological perspective. It was made clear throughout the evidence given by these expert witnesses that they were *not* purporting to express any opinion as to what, *in fact*, was meant by Ms Folbigg when diary entries were made. More specifically, each of these witnesses gave evidence on the basis that the question as to whether any diary entries were admissions, of Ms Folbigg harming her children, was a question of fact to be determined by the Inquirer.[4]

c. Dr Eagle was especially careful to make clear that 'from a psychiatric perspective' it was beyond her expertise to interpret the meaning of diary entries.[5] Dr Eagle applied similar caution in relation to whether Ms Folbigg's conduct during and shortly after her interview by police on 23 July 1999 could be interpreted as consistent with a consciousness of guilt.[6]

d. Although their evidence remained qualified, as noted above, Dr Dhansay and Mr Sheehan were less circumspect.

e. Both Dr Dhansay and Mr Sheehan accepted that, although the diaries were open to an innocent interpretation which they considered to be more likely having regard to the relevant psychological and psychiatric context, it was also

[4] TS 23 February 2023 at 665.21-39; 707.2-12; 723.21-27; TS 24 February 2023 at 749.24-27; 762.50 - 763.6.
[5] TS 23 February 2023 at 722.3-32; 723.21-27.
[6] TS 23 February 2023 at 726.38-43.

possible to interpret certain diary entries to be consistent with Ms Folbigg's guilt arising from harm to her children.[7]

f. Similarly, both Dr Dhansay and Mr Sheehan accepted that, although they considered that an innocent explanation was more likely, it was also possible to interpret Ms Folbigg's conduct during and shortly after her police interview on 23 July 1999 as evincing a consciousness of guilt in relation to the unlawful deaths of her children.[8]

16. In the CAS at [910] counsel assisting submit that although the Inquiry is not bound by the rules of evidence, *'the expert psychiatric/psychological evidence of Dr Eagle, Dr Dhansay and Mr Sheehan would satisfy the tests of admissibility in ss 56, 59 and 79 of the Evidence Act 1995 (NSW)'* and this *'informs the weight to be given to this evidence'*. This topic is developed in the following portion of the CAS at [911] - [921].

a. The Director submits that it is unnecessary and potentially distracting for the Inquiry to consider and make findings as to the notional and hypothetical admissibility of this evidence pursuant to the *Evidence Act*.

b. The inquisitorial function and purpose of the Inquiry, which is designed to be free from the rules of evidence, is entirely different to the accusatorial and adversarial context of criminal trials, for which the rules of evidence are essential.[9]

c. It is within that inquisitorial context, that these expert witnesses have been engaged, provided with a very large volume of materials from wide and various sources, and permitted to confer amongst themselves.

d. In these circumstances, the Director submits that the Inquiry should be cautious about then proceeding to consider the hypothetical admissibility of this evidence upon application of the rules that would otherwise apply in a criminal trial.

e. Moreover, if the rules of evidence were to be applied, greater care and scrutiny would have been required in identifying which materials ought to have been

[7] TS 23 February 2023 at 689.25-39; 691.3-10; 694.6-14; TS 24 February 2023 at 766.4-20.
[8] TS 23 February 2023 at 700.24-41; TS 24 February 2023 at 770.26-45.
[9] Compare *Folbigg v Attorney General of NSW* [2021] NSWCA 44 at [106].

made available to these witnesses and whether it was appropriate for them to confer amongst themselves. There is some tension between generally engaging with these witnesses with the benefit of the freedoms available within the inquisitorial context, and then proceeding to closing submissions seeking to add weight to their evidence via the notional and hypothetical strictures of the *Evidence Act*.

f. This suggested approach by counsel assisting also tends to raise further unnecessary questions. For example, if the *Evidence Act* is to be notionally applied, a question may arise as to why this should be confined only in relation to the evidence of these three witnesses. Questions may also arise as to the potential for the notional application of the discretionary exclusions pursuant to ss 135 and 137 of the *Evidence Act*.

g. In any event, it is inherent to the inquisitorial nature of the Inquiry that it is for the Inquirer to determine the weight of this evidence (as with all other evidence) irrespective of any hypothetical application of the rules of evidence.

h. The Director submits that considerations such as these expose why it is unnecessary and undesirable for the Inquiry to consider and make findings as to the notional and hypothetical admissibility of this evidence pursuant to the *Evidence Act*.

Conclusion

17. The Director does not otherwise seek to be heard against the various and detailed written submissions made by counsel assisting the Inquiry.

18. Subject to the limited qualifications and observations noted above, the Director accepts that the analysis summarised at the conclusion of the CAS at [961] - [976] is open to the Inquirer on the evidence that has now become available pursuant to this Inquiry.

Dean Jordan SC

Victoria Garrity
Crown Prosecutor

Elissa Costigan
Solicitor

For the Director of Public Prosecutions
19 April 2023