SPECIAL INQUIRY

THE HONOURABLE THOMAS BATHURST AC KC

TWELFTH DAY: WEDNESDAY 26 APRIL 2023

INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG

JUDICIAL OFFICER: We have the appearances. Are there any matters before you commence addressing, Ms Callan?

CALLAN: Yes, your Honour. It's a short matter of tendering some final documents which were received after the close of oral evidence in February. They comprise two reports. One is a report of Professor Wilde dated 14 March 2023. It's proposed that would be received into evidence as Exhibit 9-04, and a revised report of Professor Cordner received on 1 March 2023 which is proposed would be received into evidence as Exhibit tab 13-02C. I note that at the time of receipt, on or about the dates of those reports, those assisting your Honour circulated these documents to the parties and no objection has been indicated to their tender.

EXHIBIT #9-04 REPORT OF PROFESSOR WILDE DATED 14/03/23, ADMITTED WITHOUT OBJECTION

EXHIBIT #TAB 13-02C REPORT OF PROFESSOR CORDNER RECEIVED 01/03/23, ADMITTED WITHOUT OBJECTION

Can I hand up accompanying the two reports a List of Exhibits as at 26 April 2023. I suggest that might be marked MFI 13.

MFI #13 LIST OF EXHIBITS AS AT 26/04/23

Your Honour has been directed to undertake this Inquiry and furnish a report for the purpose of the Governor's consideration as to whether she will exercise the prerogative of mercy by pardoning Kathleen Megan Folbigg in respect of the crimes for which she was convicted in 2003, being manslaughter of her first child, Caleb; maliciously inflicting grievous bodily harm and murder in respect of her second child, Patrick; and of murdering her subsequent two young daughters, Sarah and Laura.

The ultimate submission of Counsel Assisting is that on the whole of the body of evidence before this Inquiry there is a reasonable doubt as to Ms Folbigg's guilt. Our reasons for that may be distilled to five propositions.

Dealing first with the CALM2-G114R genetic variant which was carried by Sarah and Laura Folbigg, this is the variant specifically referred to in the Governor's direction for this Inquiry to be conducted. In our submission, the weight of the expert evidence in the disciplines of cardiology and genetics is

that the CALM2-G114R genetic variant is a reasonably possible cause of the sudden deaths of Sarah Folbigg and Laura Folbigg.

In relation to Laura Folbigg, myocarditis is a reasonably possible cause of her death.

Third, in relation to Patrick Folbigg, there is persuasive expert evidence that as a matter of reasonable possibility, an underlying neurogenetic disorder, eg, epilepsy, was the cause of Patrick's apparent life-threatening event and subsequent sudden death.

These three propositions give rise to a fourth, namely, that this creates doubt as to Ms Folbigg's guilt in relation to inflicting grievous bodily harm on Patrick and the deaths of Patrick, Sarah and Laura Folbigg. This also materially undermines the tendency and coincidence reasoning giving rise to doubt as to Ms Folbigg's guilt in relation to the death of her first baby, Caleb Folbigg.

The fifth proposition is that as to the diaries and journals made by Ms Folbigg, certain entries are capable of being interpreted as admissions of having killed her fourth children. However, the expert evidence in the disciplines of psychology and psychiatry which draws upon the DSM-V and relevant peer reviewed literature uniformly indicates that it would be unreliable to interpret the entries in this way. This is because the nature of a diary or journal warrants a careful approach to interpretation, including care as to the so-called ordinary and natural meaning of words. Furthermore, having regard to Ms Folbigg's mental conditions at the time of writing her diaries, namely major depressive disorder and with the successive deaths of her children, maternal grief which, concordant with the typical psychological effects of sudden infant death on parents, features guilt and self-blame. This casts Ms Folbigg's expression of guilt and responsibility for the deaths of her children in her diary and journal entries in a very different light. Overall, this evidence undermines the probative value of the entries in the diaries and journals, tending to render them neutral, that is, neither inculpatory nor exculpatory.

Your Honour, my oral submissions today supplement the detailed written submissions furnished by the Counsel Assisting team on 4 April 2023 and to the extent relevant address certain points made in the written submissions of the parties which were received last week. In this regard, can I note in short form Ms Folbigg's representatives served closing written submissions of some 545 pages in length on 18 April 2023. Ms Folbigg urges your Honour to conclude there is a reasonable doubt as to her guilt and, indeed, there is a strong probability to the contrary, that is, a strong probability of innocence. Ms Folbigg's written submissions contain a detailed analysis of the evidence before this IInquiry. Whilst certain areas of emphasis and some of the conclusions contended for differ from the approach in the submissions of those assisting your Honour, there is material common ground as to the significance of the new evidence before this Inquiry and the conclusions which follow from that new evidence as to reasonable doubt regarding her guilt.

Written submissions have been received on behalf of Craig Folbigg dated

19 April 2023. Those submissions say the dominant feature which remains in this case is the fundamental implausibility of the hypothesis that four children in one family died of natural causes before reaching the age of two years. It is submitted there are "compelling grounds for continuing to treat the diary entries as admissions of Ms Folbigg's guilt" which serves to "negate plausibility of the various hypotheses put forward for the deaths of the children due to natural causes".

JUDICIAL OFFICER: That information reflects the approach taken by the Crown at the trial.

CALLAN: Yes, your Honour.

JUDICIAL OFFICER: It doesn't give any weight, on one view, to the additional evidence which was tendered in this Inquiry.

CALLAN: Correct, your Honour. The New South Wales DPP in closing written submissions dated 19 April 2023 confirms that her position as the Director of Public Prosecutions in this Inquiry has been one of independence and objectivity in accordance with her prosecutorial function. The Director raises some discrete matters which I will address. Subject to those discrete matters, the Director accepts the analysis summarised at the conclusion of Counsel Assisting's written submissions that on the evidence now available it is open to the Inquiry to conclude there is reasonable doubt as to Ms Folbigg's guilt.

The New South Wales Commissioner of Police and the New South Wales Ministry of Health have not furnished closing written submissions. I note written submissions on behalf of Dr Cala were circulated this morning.

Finally, the Australian Academy of Science, by letter of 19 April 2023, indicates it does not wish to be heard on the conclusions reached in Counsel Assisting's closing written submissions. The Academy identifies a small number of corrections pertaining to scientific accuracy which Counsel Assisting accept and are grateful for. I anticipate the closing submissions of all parties will be made available to the public on the website of this Inquiry expeditiously.

Can I commence by dealing with what we contend is the proper approach to assessing reasonable doubt in this case. This Inquiry commences with the fact that a conviction has been recorded and that questions or doubts have been raised sufficient to justify the Governor to direct for this Inquiry to be conducted. Your Honour's task is to consider the evidence at trial and the conduct of the trial in light of the evidence received in the 2019 Inquiry, and the further evidence and submissions received in this inquiry in order to determine whether overall there is reasonable doubt as to Ms Folbigg's guilt.

JUDICIAL OFFICER: When you say the conduct of the trial as distinct from the evidence of the trial, is what you're referring to the possibility that the trial was - I emphasise I am not criticising the prosecution for saying this - conducted on a basis which would seem to be, on the present state of knowledge, a false basis?

CALLAN: Yes, your Honour. What is required of your Honour is, essentially, a fact-finding exercise, that is, consideration of the extensive evidence before you as to whether there is a real possibility that one or more of the deaths resulted from natural causes so as to provide a factual basis for a finding of reasonable doubt as to Ms Folbigg's guilt. The Court of Appeal in the matter of *Folbigg v Attorney General* [2021] NSWCA 44 held the application of the standard of "reasonable doubt", as found in s 82(2)(a) of the *Crimes Appeal and Review Act*, inform the process of reasoning and the basis of your Honour's final conclusions.

The case against Ms Folbigg was and remains circumstantial. Evidence in a circumstantial case is not to be looked at in a piecemeal fashion. It is necessary to consider and weigh all of the circumstances in considering whether there is an inference consistent with innocence reasonably open on the evidence.

As the Court of Appeal also observed at para 86, the identification of plausible natural causes of death in each of the four children is not the end of the task as to whether there is a reasonable doubt as to Ms Folbigg's guilt. The Court considered that while a plausible cause of death in any one of the children would, theoretically, reduce the degree of improbability of four deaths occurring naturally, the mere identification of a plausible cause in one case may have limited effect. The Court of Appeal went on to state that even four different possible causes where none has a strong causal link may be of limited effect. However, so the Court of Appeal observed, if there is a strong causal link in one case or a plausible cause common to two or more deaths, this would be "an important step in demonstrating a reasonable doubt".

In my submission, the Court of Appeal's general observations ought not be understood as suggesting that a reasonable hypothesis consistent with innocence must reach a threshold of "strong" in order to give rise to a reasonable doubt as to guilt. That would be contrary to well-established standards and principles of criminal law. Nor is the Court of Appeal reversing the onus or adopting "Meadow's Law" type reasoning to suggest Ms Folbigg has some onus to disprove the improbability of four naturally occurring deaths. Rather, in my submission, the Court of Appeal there is commenting upon features of the exercise of factual finding in the circumstances of a case such as this. The stronger the evidence suggesting of a natural cause of death in one or more of the children is, the harder it will be for a hypothesis consistent with guilt to be the only rationally available hypothesis.

JUDICIAL OFFICER: Does it boil down to any more than this? I have to consider the reasonably possible hypotheses available, and on the whole of the evidence consider whether the Crown has excluded any reasonable probability inconsistent with the claim they made in the trial.

CALLAN: Yes, subject to this variation, your Honour. This being the nature of an inquiry, the use of the descriptor of the Crown having to do that may not be apt.

JUDICIAL OFFICER: I appreciate that. To what extent do I have regard to the verdict of the jury, given the well-established constitutional position of the jury?

CALLAN: As I said a moments ago, your Honour, the Inquiry commences with the fact that that conviction has been recorded. So the task for your Honour is whether there is a reasonable doubt as to Ms Folbigg's guilt on the whole of the evidence before you.

JUDICIAL OFFICER: Does that mean that I ignore the fact that the jury, on the evidence before them, found Ms Folbigg guilty?

CALLAN: No, your Honour. In my submission that is why it is the new further and additional evidence which has the significance it does in the conclusions that we arrive at in our submissions.

Your Honour, applying those general observations of the Court of Appeal to the evidence before this Inquiry, it is the submission of Counsel Assisting that there is now not only a plausible natural cause of death in respect of each child, but a strong causal link in at least two cases, and a common cause in at least two cases. By that I mean the evidence before this Inquiry in respect of Patrick's initial presentation and progression of his neurogenetic disorder gives rise to a strong causal connection to his death.

Furthermore, the evidence in respect of Laura's myocarditis, including in the context of her having the CALM2 variant gives rise to a strong causal connection to her death; and the CALM2-G114R variant, which is common to Sarah and Laura Folbigg establishes at least a reasonably possible cause of their deaths. A number of experts gave evidence that the variant was a likely cause of their deaths. In our submission, this provides an evidentiary basis for this Inquiry to conclude that there is a strong causal connection between the CALM2-G114R variants and the girls' deaths; notwithstanding that not all experts shared that view.

The next question to complete the exercise is whether the balance of the evidence when considered together is sufficient to displace such reasonable hypotheses consistent with innocence. In our submission, the bare fact of the coincidence of four unexplained infant deaths alone is not proof of guilt beyond reasonable doubt. That would be to apply the discredited “Meadow's Law”, and in our submission, such reasoning fails as a matter of logic.

In the absence of other evidence pointing towards guilt on the part of Ms Folbigg there is no evidential or other statistical foundation to suppose that the likelihood of her having killed her children is greater than that they were killed by natural causes. Let me explain. There is, on the one hand, the likelihood that a mother would spontaneously smother her infant child, and do so four times, in each case without leaving a trace. An inherently unlikely prospect. On the other hand, is the likelihood within a family of four natural deaths of either unknown common cause or a mixture of known and unknown partially connected causes. Also an inherently unlikely prospect. The relative unlikelihoods in those scenarios are opposing and largely unquantifiable.

On any view of this case, guilt or innocence, we're in the realms of the remote and the rare. The fallacy underpinning “Meadow's Law” was that the relevant comparison was between the probability of four unconnected deaths each having the separate probability of a SIDS death, and there being no deaths at all. Put colloquially, it was asked “what are the chances a family would experience four separate cases of SIDS?” Of course that is a remote possibility, but that reasoning did not involve the relevant comparison, which is between the unlikely circumstance of a mother murdering four children in the manner described, and their having died of some combination of known and unknown, connected and unconnected, natural causes.

Even then, an analysis that seeks simply to compare the respective probabilities of these two scenarios would risk error, given the test is whether there is a reasonable doubt, and would risk reversing the onus of proof.

The question for the Inquiry is ultimately whether the balance of the whole of the evidence now available negates the reasonable hypothesis consistent with innocence, available with respect to the death of each child; not whether those hypotheses are more or less likely than guilt. Such analysis necessarily takes account of the strength of those reasonable hypotheses, and whether the whole of the evidence renders homicide the only rational hypothesis.

As I've said, in our submission, the additional evidence presented to this Inquiry has altered the balance from trial in a number of key respects. In particular, eminent expert evidence relating to the CALM2-G114 variant, which is, as the DPP suggests in her written submissions, critical new evidence. That evidence supplements new evidence on other issues, including pathology evidence relevant to each of the four Folbigg children on the question of smothering without leaving a trace; neurology evidence in relation to Patrick Folbigg; and expert psychiatry and psychological evidence which as I've said, diminishes entirely the probative force of the so-called virtual admissions in Ms Folbigg's diaries and journals.

Your Honour, I propose now to outline key features of this evidence.

JUDICIAL OFFICER: Do I have to go so far as to find that the psychological evidence diminishes entirely the probative force of the so-called virtual admissions?

CALLAN: Your Honour does not. We say it does.

JUDICIAL OFFICER: If it went that far the whole of the material couldn't have been admissible at all.

CALLAN: Your Honour, the test for admissibility as an admission, we recognise would be satisfied. The question is what's the reliability of that, and what does it convey as a matter of interpretation?

Can I first deal with evidence before this Inquiry on the topic of smothering, being the mechanism by which the Crown contended Ms Folbigg had killed her

children. The evidence is that to the extent each child was examined upon their death there were no positive signs of smothering detected, such as petechial haemorrhaging or facial injuries. I should note for completeness that in relation to the two tiny puncture abrasions on Sarah's face observed by Professor Hilton at autopsy, there has been broad consensus in the evidence of forensic pathologists, who have variously given evidence at trial, in the 2019 Inquiry, as well as this Inquiry, that no significance would be ascribed to those two tiny puncture abrasions.

However, the absence of any sign of smothering is not dispositive of whether or not the four children were in fact smothered. That is because the evidence at trial, before the 2019 Inquiry, and before this Inquiry remains that an infant can be smothered without leaving signs. That being said, the evidence, including further evidence before this question, emphasised that the likelihood of an infant being smothered without leaving physical signs diminishes in infants with fully erupted teeth, and the strength and capacity to struggle, which is perhaps most relevant in considering the death of Laura Folbigg; and it is increasingly unlikely that four children in the same family might be smothered without leaving any physical signs. Nevertheless, it is possible, and in our submission the medical evidence neither proves nor disproves whether the Folbigg children were smothered.

No forensic pathologist has excluded the possibility that each instance of death, or Patrick's ALTE, could have been caused by smothering. As expressed in our written submissions, this is a circumstance which must be considered with the balance of the evidence by your Honour on the ultimate question of guilt.

Can I then turn to deal specifically with the evidence related to the death of Caleb Folbigg. He was born on 1 February 1989 at 40 weeks, when Ms Folbigg was 21 years old. On 20 February 1989, Caleb died aged 19 days. Kathleen had fed Caleb at about 1pm, and he was asleep by 2am. She awoke at 2:50am to check on Caleb. Craig Folbigg awoke to Kathleen screaming "My baby, there's something wrong with my baby." At 2:59am, ambulance officers established that Caleb was in cardiac arrest. The Final Autopsy Report dated 9 May 1989 listed the cause of death as SIDS, that is, Sudden Infant Death Syndrome, with no external signs of injury.

There is very limited medical evidence about Caleb, and the position has not advanced beyond the time of the trial. The cause of Caleb's death at 19 days remains undetermined. That must be considered with the balance of the evidence on the ultimate question of guilt.

Can I then turn to Patrick Folbigg. Nearly 18 months after Caleb's death, on 3 June 1990, Patrick Folbigg was born at 39 weeks. Ms Folbigg was 22 years old. A sleep study was conducted on 15 June 1990; that is 12 days after Patrick's birth, with normal results. On 18 October 1990, Patrick suffered an apparent life-threatening event, or ALTE. He was four months and 15 days old. At about 12 or 1am, Ms Folbigg had heard Patrick coughing. At about 4:30am, Mr Folbigg awoke to Ms Folbigg screaming at the end of Patrick's

cot. Mr Folbigg commenced CPR. Patrick was taken to Mater Hospital where Dr Dezordi recorded that he was lethargic, cyanosed, and responsive only to painful stimuli. On initial examination, he had an oxygen saturation level of 88%, and he was treated with oxygen. He became more alert after about 15 minutes, even when oxygen in high concentration was not being administered.

Between 19 and 20 October 1990, Patrick had approximately 15 fits. He was responsive to an anticonvulsant drug and Valium. By 23 October 1990, Patrick's progress was recorded as slow with occasional fitting. Dr Dezordi thought the seizures were focal - that is, localised - and so ordered a CT scan. The report indicated some brain abnormalities in the occipital lobes at the back, and temporal lobes at the side. On 29 October 1990, Patrick was discharged. The diagnosis recorded was “intractable seizures, probably viral encephalitis”, meaning an inflammation of the brain, and also “bronchiolitis”.

Patrick was subsequently admitted to hospital on 4 November 1990 following a further seizure. A CT scan conducted on 5 November demonstrated deterioration at the back of his brain. An EEG indicated abnormalities potentially indicative of encephalitis or epilepsy. By November 1990, Patrick was unable to fix on a face and was responsive only to bright lights. He was again admitted to hospital on 14 November 1990 following a further seizure, and discharged on 22 November 1990.

On 13 February 1991, Patrick died, aged eight months and ten days. At about 10am, Craig Folbigg received a call from Kathleen Folbigg, stating "It's happened again. I need you to come home." Ambulance officers arrived at 10:10am and at that time Patrick was warm to touch. At 10:40am, Patrick was pronounced dead.

Dr Gurpreet Singh-Khaira, a histopathologist, conducted the autopsy. The Final Autopsy Report recorded a clinical diagnosis of “Encephalopathic Disorder leading to intractable seizures. The underlying cause of encephalopathy not determined on investigation” and “Asystolic Cardiac Arrest at home leading to death”. Dr Singh-Khaira gave evidence at trial that he could not exclude the possibility that a seizure led to asphyxiation and ultimately cardiac arrest.

Dr Cala's evidence was that it was possible Patrick's ALTE had resulted from deliberate smothering, and the cause of Patrick's death was “undetermined”, with suffocation “not ruled out”.

A number of other experts gave evidence at trial to similar effect; that is, they could not exclude an epileptic disorder as a cause of Patrick's death.

In the 2019 Inquiry, the evidentiary position in relation to Patrick can be distilled as follows. It was unlikely that herpes simplex encephalitis, an initially speculated cause of Patrick's ALTE, was ever present. Further, the cause of Patrick's ALTE was unknown or unexplained and it was common ground between the forensic pathologists that Patrick had an encephalopathic disorder

at the time of his death. Professors Cordner and Duflou, both forensic pathologists, attributed Patrick's death to the consequence of the encephalopathic disorder but both also considered epilepsy alone a possible cause. Professor Hilton considered the death was a result of an epileptic-type illness. Dr Carla considered the cause of death was “open”. Patrick did not have any genetic variant associated with neurological disorders. The death was not considered by the paediatric neurologists, namely Professor Monique Ryan and Professor Michael Fahey, to exclude unrecognised genomic causes of Patrick's presentation. Professor Ryan had some doubt that Patrick necessarily experienced a single hypoxic ischaemic episode on the night of his ALTE, whereas Professor Fahey concluded his presentation was ultimately consistent with a severe hypoxic event. If there had been a severe hypoxic ischaemic injury on 18 October 1990, Professor Ryan could not exclude a seizure as the cause. Professor Fahey agreed this was possible but considered it less likely. Finally, Sudden Unexpected Death in Epilepsy, of SUDEP is a recognised phenomenon afflicting one in 2,500 to one in 10,000 children with epilepsy, usually occurring during sleep in the prone position. Definitionally, it occurs in children older than the age of one.

In this Inquiry, Professor Ryan provided a further report and gave oral evidence. Professor Ryan maintained her view that features of Patrick's initial presentation and clinical course were inconsistent with a hypoxic ischemic brain injury on 18 October 1990, and that it was more likely he had an “as yet uncharacterised epileptic encephalitic condition that resulted in progressive neurological dysfunction and in his death”. She did not exclude the possibility that he experienced a single hypoxic ischaemic brain injury on that day but considered his clinical course to be overall inconsistent with that, referring to evidence of both his immediate treatment in hospital after the ALTE as well as the absence of damage to other organs in subsequent tests. Professor Ryan considered the autopsy changes may or may not have been due to a hypoxic ischemic injury and that even if they were they could have reflected an injury sustained during the prolonged seizures seen in the days after 18 October 1990. Professor Ryan considered it likely Patrick experienced his first seizure on that date, 18 October 1990.

Other aspects of Patrick's history which were significant to Professor Ryan's views were reports of torticollis and back arching. In her view, in isolation they may not be significant but in a child presenting with an atypical neurological condition they are suggestive. Furthermore, the initial normal imaging with subsequent evolution of progressive abnormalities on his neuro imaging. Furthermore, the apparent fluctuating subsequent clinical course with times when he appeared to have visual responsiveness and other times when he was felt to be cortically blin, and a description of his episodic events, some were clearly focal seizures but others were felt to be oculogyric crises, which are not seen after a hypoxic-ischaemic brain injury. In circumstances in which Patrick had an uncontrolled seizure disorder, which was refractory in medication, Professor Ryan considered it “more likely than not” it occasioned his death on 13 February 1991, being consistent with SUDEP.

I note that Professor Fahey, who gave evidence in the 2019 Inquiry, relied on a

particular article to support the view that Patrick's presentation after the ALTE was consistent with a severe hypoxic-ischaemic injury. That article is a Constantinou and others, titled “Hypoxic-ischaemic encephalopathy after near-miss Sudden Infant Death Syndrome”, which was published in 1989. The Constantinou article reported on 14 infants between three and 26 weeks of age who presented to the Royal Alexandra Hospital for Children in Sydney between 1982 and 1985 with presumed severe hypoxic episodes as a result of near-miss Sudden Infant Death Syndrome. In Professor Ryan's view, the sample in the study were infants with unusual and atypical presentations and patterns which were not repeated in the literature spanning the 34 years since publication nor which had been seen in Professor Ryan's own career. On that basis she considered it could be discounted.

Professor Ryan was also not troubled by difference in presentation between the presumed initial seizure of Patrick on 18 October 1990 and those observed subsequently. She explained that in infant epileptic encephalopathy very often there is more than one seizure type. Very often, the first seizure will occur in a context of a temperature which makes it a very long or very severe seizure more likely. I should not there was no evidence Patrick had a fever on 18 October 1990 although he was noted to have a mild respiratory illness. Patrick did have a fever on the day of his death.

Professor Ryan also clarified that she did not reject Patrick had a brain injury by the time of his death. However, she considered the absence of pathology in the basal ganglia and thalami which are deep nuclei in the brain, “pretty much always affected” if acute severe hypoxic ischemic brain injury has occurred. She regarded this as significant evidence against an acute severe hypoxic brain injury being the cause of Patrick's subsequent course. She agreed in this respect with Professor Fleming, a paediatric intensivist from the United Kingdom who provided a report to this Inquiry.

With respect to Dr Cala's observation that the post-mortem brain examination did not show any features of an underlying metabolic encephalopathy, Professor Ryan observed that many such disorders would leave no specific markers, but would create stroke-like damage which was consistent with the damage in Patrick's brain. Such a disorder would also be consistent with Patrick's presumed oculogyric crises. Professor Ryan considered Patrick's case consistent with other cases she had seen in her career.

Professor Peter Fleming, to whom I have just referred, gave evidence to the effect that in his view Patrick's presentation on 18 October 1990 was inconsistent with a severe hypoxic-ischaemic brain injury.

The common position of Professors Fahey, Ryan and Fleming appears to be that Patrick's presentation at the time of his ALTE was at the least atypical of a severe hypoxic-ischaemic brain injury. Both Professor Ryan and Professor Fleming conclude a severe hypoxic-ischaemic injury on 18 October 1990 extremely unlikely.

With respect to the genomic evidence, the opinions of Professor Fahey and

Ryan also do not materially diverge. Professor Fahey's evidence was that known “pathogenic changes” or “genomic causes” of conditions associated with genetic epilepsy, encephalopathy, cardiac arrhythmia or sudden death, as of the time of that testing in 2019, had been excluded by whole genome sequencing. The absence of a recognised “genomic cause” or “pathogenic change” is not the same as there being no recognised “genetic condition”. The former simply means that the specific genetic variant associated with a known or suspected genetic condition is unknown. Phenotypic analysis still permits the recognition of neurogenetic conditions both established and novel notwithstanding that its genomic cause is unidentified.

Professor Fahey observed that as of 2018, whole exome and whole genome sequencing was able to give an explanation for epileptic encephalopathies in “between 28% and 67% of cases depending on group studies and technique used”. Professor Ryan said genetic testing was unable to identify the cause of presumed infantile degenerative neurogenetic disorders in as many as two-thirds of cases.

JUDICIAL OFFICER: What, in summary form, were the ultimate differences which appear from Professor Fahey and the ultimate position taken by Professor Ryan?

CALLAN: They differ slightly as to the number of identified genetic causes for this group of conditions. But otherwise, there is very little that divides them once it is understood that where Professor Fahey's evidence spoke about known pathogenic changes, that is considered against Professor Ryan who more explicitly recognised the category of unknown genomic causes.

JUDICIAL OFFICER: Is there any difference between them of any significance in relation to the cause of the ALTE?

CALLAN: No. There was some distinction between them as to the extent to which Patrick's presentation was atypical of hypoxic injury. In that respect, Professor Fahey used the Constantinou article to temper what Professor Ryan described as a wholly atypical prestation.

JUDICIAL OFFICER: Does Professor Fleming refer to the Constantinou article?

CALLAN: No, your Honour. We can check. Can I come back to that, your Honour? A number of variants of uncertain significance have been identified in Patrick's genome which have been speculated as having a role in causing or aggravating seizures or other neurological disorders. It is not submitted that any of these specific examples rise beyond mere conjecture at this stage.

JUDICIAL OFFICER: I shouldn't take them into account, is that what you're--

CALLAN: Not those specific variants because they are of uncertain significance. However, in our submission the whole of the evidence with respect to Patrick, including that his presentation at the time of his ALTE was

atypical of hypoxic-ischaemic injury gives rise, we say, to a reasonable possibility that his ALTE was occasioned by an unknown neurogenetic disorder. Furthermore, in circumstances in which no expert has excluded the possibility that Patrick's death was the result of his encephalopathic disorder, it would be open to conclude this raises doubt as to Ms Folbigg's guilt in respect of Patrick's death on 13 February 1991. That must be considered with the balance of the evidence on the ultimate question of guilt.

I turn then to Sarah Folbigg. Twenty months after Patrick's death, on 14 October 1990, she was born at 39 weeks. Ms Folbigg was 25 years old. Like Patrick Folbigg, she also had a sleep study conducted with normal results. When Sarah was taken home, she slept on an apnoea mat in her cot although use ceased before her death. On 16 November 1992, the results of the sleep study showed Sarah had “quite long hypoventilation, hypopnea event, one of them about 40 seconds”.

In late August 1993, Sarah suffered a cold or flu. On 30 August 1993, Sarah died aged 10 months and 16 days. There were conflicting accounts as between Mr and Ms Folbigg about what occurred between 1 and 1:30am on the night Sarah died. The evidence about these conflicting accounts is dealt with comprehensively in our written submissions.

In short, Sarah's bed was in the same bedroom as Mr and Ms Folbigg. Mr Folbigg originally indicated that Sarah was in her bed when he woke at 1:10am. However, his evidence at trial was that he woke at 1:10am, noticed Sarah and Ms Folbigg were not in the bedroom where he, Ms Folbigg and Sarah slept and that a light was on. That maybe contrast with Ms Folbigg's account which was that Sarah had not left her bed. She had noticed Sarah was not breathing when she returned from going to the toilet at 1:30am. She denied that she was feeding Sarah or had left the room prior to going to the toilet.

In our submission, noting that both Craig Folbigg and Kathleen Folbigg were first asked by police about the events of the night of 29 August 1993 many years after the event, the vagaries of memory must be brought to account in assessing the reliability of the two versions.

Craig’s evidence was given at a point in time at which he had awoken from sleep, and he says immediately fell back to sleep. He was not, to use his description, “awake awake”. His evidence was not unequivocal as to whether Sarah was in the room or not. In his interview with police he used language of assumption, or being “fairly sure”. At trial, Craig described feeling emotional stress at the time of his police interview. Overall, his credibility and reliability is impacted, having regard to the differing versions he has given as to what he observed of Sarah in bed that night.

By contrast, Ms Folbigg has given a consistent account that she did not take Sarah out of the room on the night of her death. Her evidence was in large measure, consistent with that of Lea Bown, who gave an account of what Ms Folbigg told her within hours of Sarah's death. We submit there is no

rational basis for preferring the evidence of Craig Folbigg over the evidence of Ms Folbigg in relation to those events on the night of Sarah's death.

JUDICIAL OFFICER: Can I ask you this. First, there were some listening device transcripts which may on one view be said to cast doubts on Mr Folbigg's credibility - or perhaps more accurately his reliability.

The second is this: the Crown at the trial, I think, adopted Mr Folbigg's version as far as their case. What was the case theory? That Ms Folbigg got up, took the child out of the room, smothered the child, then put her back in bed, and then screamed?

CALLAN: Yes. That would have to be the sequencing.

JUDICIAL OFFICER: Is that what they suggested, or did they suggest, for example, she took the child out of the room, put her back in bed and then smothered her? I'm just wondering how they put the case.

CALLAN: Your Honour, I would prefer to check the closing of the Crown at trial so that I can fairly indicate.

JUDICIAL OFFICER: But on one view it could be said there's a degree of improbability of that course being adopted - taking the child out of the room; smothering the child; and then bringing it back to the bed.

CALLAN: On one view, resolution of that factual question has limited relevance.

JUDICIAL OFFICER: So I should resist the temptation to go there?

CALLAN: Well, where there is degree of speculation as to the events.

JUDICIAL OFFICER: But it is relevant in the circumstances where the Crown apparently placed considerable reliance, at least initially, on the discrepancy between the version of Mr and Ms Folbigg.

CALLAN: Yes. Your Honour, when paramedics arrived at 1:30am they observed Sarah was cyanosed around her mouth, and that her airway was obstructed. At 2:10am Sarah was asystolic, meaning her heart had stopped, and ambulance officers ceased treatment. The Final Autopsy Report by Professor John Hilton listed the cause of Sarah's death as SIDS. As I've said a few moments ago, relevantly Professor Hilton's external examination included noting two tiny puncture abrasions on her face. Otherwise, he observed the uvula was of normal size, but appeared congested or haemorrhagic on its anterior surface, and one section of the larynx showed a light mixed lymphocytic inflammatory infiltrate deep to the respiratory--

JUDICIAL OFFICER: SIDS involves, to the extent of diagnosis, more accurately a conclusion, that the child died from an unknown natural cause. Is it still part of your submission that I should regard that as a reasonable

possibility?

CALLAN: It remains a reasonable possibility, yes.

JUDICIAL OFFICER: So if for example I excluded, hypothetically, the CALM2 variant in relation to Sarah as a reasonable possibility, SIDS would remain a reasonable possibility?

CALLAN: Yes, and it must be considered with the balance of the evidence, and your Honour that pertains to all the children. If your Honour excluded, or was not satisfied by other natural type causes.

JUDICIAL OFFICER: Let me cut to the chase. I was going to ask you this at the end: let it be assumed your submission about the diaries is correct. Leaving everything else out, where does that leave the current case? I put that badly.

Assume that at the end of the day I came to the view that you are correct as to the diaries providing no or little probative evidence of Ms Folbigg's guilt, but I came to the view that any of the hypotheses propounded by the various experts were not a reasonable possibility of the cause of death, so the cause of death remained unknown. Where would that leave the case?

CALLAN: In circumstances where the cause of death remains unknown, and where there is a body of evidence as to the instances of unknown natural causes of death in children, then that would, in our submission, give rise to reasonable doubt.

JUDICIAL OFFICER: Yes, thank you.

CALLAN: Your Honour, Professor John Hilton gave evidence at trial to the effect that the findings of the internal examination on post mortem were consistent with an asphyxia mode of death, which would include deliberate smothering. In his view, the location of the petechiae and changes to Sarah's lungs tended to favour a diagnosis of SIDS, as compared to intentional suffocation, and he regarded the inflamed uvula as a factor in a SIDS diagnosis, that could have had some role in Sarah's death; but he could not say for certain its position at the time of death as compared to at the time of the post-mortem.

Professor Hilton gave evidence at the 2019 Inquiry that he considered Sarah's inflamed uvula was possibly significant. He would have ascribed the cause of Sarah's death as SIDS. In this Inquiry, Professor Hilton provided an affidavit of 26 July 2022, in which he stated that he would now say the cause of death of Sarah as sudden unexpected death in an infant, with a novel functional calmodulin variant, G114R, and evidence of a respiratory infection. He also confirmed he did not consider there were any signs of smothering of Sarah. Your Honour, his view in that respect turns on the extent to which the G114R variant is relevant, an issue to which I'll return.

Dr Cala's evidence in the 2019 Inquiry was that he would ascribe the cause of death of Sarah as undetermined. He was unconvinced that Sarah died of SIDS. Dr Cala's evidence to this Inquiry remain unchanged. He considered SIDS was not appropriate due to her age and the abrasion on her lower lip. She said there was a "possibility" she died of an acute catastrophic asphyxiating event. I will come shortly to the significance of Sarah having the CALM2-G114 variant.

Can I deal now with the next child, Laura Folbigg, in terms of the medical evidence. Four years after Sarah's death, on 7 August 1997, Laura Folbigg was born at full term. During the first year of her life, Laura was often monitored during sleep using a Corometrics home cardiorespiratory monitoring device, which was a sleep mat designed to record and download breathing and heart information during Laura's sleep. Use of the monitor ceased when she was about 12 months old.

In the days prior to 1 March 1999, Laura had a cold and had been administered the medication Demazin, with the last dose on 27 February. On 1 March 1999, Laura died at 18 months and 22 days. That morning, Ms Folbigg took Laura to Mr Folbigg's workplace for a visit. She left at about 11:30am and Laura fell asleep in the car on the way home, and was put to bed for a nap. Ms Folbigg subsequently discovered Laura unresponsive, so placed her on the breakfast bar, commenced CPR and called triple-0. At 12:14pm, ambulance officers arrived and Laura was not breathing and had no pulse. Laura was taken to hospital, arriving at 12:32pm. She was pronounced deceased at 12:45pm that day.

Forensic pathologist Dr Allan Cala conducted the post-mortem on 1 March 1999, and undertook subsequent examinations. He issued a Final Autopsy Report on 13 December 1999, listing the cause of death as "undetermined", with "incidental" findings of myocarditis and inflammation of the muscular walls of the heart.

The issue of Laura's myocarditis was of significance at trial, and also in the 2019 Inquiry, and again in this Inquiry. Evidence on this topic was given by forensic pathologists, Professors Duflou, Hilton and Cordner, and Doctors Cala and Orde. Their views were based on the histological slides which were prepared using blocks of tissue from Laura's heart taken at autopsy.

In broad summary, all forensic pathologists who had examined the slides observed the presence of acute myocarditis. The terms used by these forensic pathologists to describe the intensity of appearance have ranged from mild and patchy, to moderate, to florid. It is possible, albeit not likely, that the variation in characterisation may be due in part to different slides having been examined by different pathologists; however, more fundamentally the variance in characterisation does not affect the ultimate conclusion that myocarditis was a likely cause of Laura's sudden unexpected death.

JUDICIAL OFFICER: Didn't one of the pathologists reject the proposition that the variations were due to the difference in the slides?

CALLAN: Yes, your Honour. There was a report in the form of an email, I think, from Professor Duflou, that was received by this Inquiry.

At trial, there was general consensus between the experts, who gave evidence that myocarditis was a well-known cause of sudden and unexpected death in children, and it was a possible explanation for Laura's death; and that remains the case. In this Inquiry, the evidence of the forensic pathologists can now be summarised as follows: Dr Cala considers that if Laura's death was considered in isolation, he might give the cause of death as myocarditis; however, he considered the myocarditis was patchy and mild; that Laura's heart did not depict other features that may be found in a death caused by myocarditis; and he considered it was incidental to her death, but could not positively exclude it as the cause of death.

JUDICIAL OFFICER: You said earlier that all forensic pathologists who examined the slides observed the presence of acute myocarditis, but Dr Cala considered the myocarditis was patchy and mild. Is there a degree of inconsistency in those propositions?

CALLAN: Your Honour, use of the word "acute" refers to its presence.

I'm assisted by Ms Wootton, and back to the question you asked about the Crown case at trial in relation to Sarah. The Crown case was that Ms Folbigg had removed Sarah from the bed, smothered her, and then put her back in bed. The references to that are Exhibit 2-F at red p 3143, transcript T1339.44 to 51, and also Exhibit 2-F at red p 3135, transcript page T1331.51.

Your Honour, Professor Cordner considered that Laura's myocarditis was widespread, and at least moderate in degree, and he was comfortable ascribing myocarditis as a cause of death.

Professor Hilton gave evidence at trial which he maintained in written evidence to this Inquiry, that myocarditis was the highly probable cause of Laura's death.

Professor Duflou considered the slides he inspected showed significant myocarditis of a severity and extent capable of causing death; however, he noted that even severe myocarditis can be incidental; and conversely, relatively mild myocarditis can cause death.

Dr Orde considered the slides he inspected showed somewhat patchy and variable myocarditis, but with an overall intensity of inflammation which was moderate. He considered the degree of cardiac inflammation together with the presence of identifiable damage to the heart muscles provided a plausible explanation for Laura's death.

In our submission, the weight of the medical evidence renders it open to your Honour to conclude that as a matter of reasonable possibility, myocarditis was the cause of Laura's death. No forensic pathologist has excluded it as a possible cause of death, and the weight of the forensic evidence appears to

favour it as the cause.

JUDICIAL OFFICER: When you say no forensic pathologist has excluded it; did any other of the experts who were called exclude it as a possible cause of death?

CALLAN: It's only the forensic pathologists who were asked the question. That's appropriate, your Honour, having regard to their domain and expertise.

Can I then turn to deal with the genetics evidence and in particular the CALM2-G114R variant. This Inquiry has received evidence from leading experts in cardio-genetics from world-renowned institutions. The majority of these experts accepted, at the least, the reasonable possibility that the CALM2-G114R variant was responsible for the deaths of Sarah and Laura Folbigg. In our submission, the experts were more evenly divided as to whether the CALM2-G114R variant was likely to have caused their deaths in the circumstances in which Sarah and Laura died. In our submission your Honour would not likely reject expert evidence that the CALM2-G114R variant was likely to occasion deaths in a manner consistent with how Sarah and Laura Folbigg were found.

In the words of Professor Hugh Watkins, "reasonable, thoughtful and authoritative experts are all looking at the same data but are drawing different inferences. This is because there is substantial uncertainty and so judgment, rather than interpretation of indisputable facts, is needed to reach a conclusion." He further observed that this is not a case in which the specific interpretation put on the data by each of the experts can be definitively refuted.

JUDICIAL OFFICER: Let's assume I only found it was a reasonable possibility as distinct from likely, does it make a difference?

CALLAN: Not in the sense that that would be sufficient, your Honour.

Can I address, in some greater detail, the material aspects of the genetic evidence. We have already canvassed this extensive body of evidence in our written submissions and, for instance, I don't propose to deal orally with the state of the genetics evidence as it was at trial or before the 2019 Inquiry, nor do I propose to deal orally with foundational matters regarding genetics generally, the classification of variants and concepts such as variable expressivity, penetrance, modifier genes and environmental triggers. I do not propose to deal orally with specific features of the CALM genes including matters of conservation and the extreme rarity of CALM variants.

JUDICIAL OFFICER: You've dealt with those matters extensively in your written submissions and from what I've read of the other parties' submissions there doesn't seem to be any dispute as to the accuracy of and the way that's been dealt with.

CALLAN: That is the case, your Honour. I should also say I don't propose to

deal orally with the Brohus article in circumstances where we deal with that in our written submissions and its contents has largely been, in a sense, superseded by the more--

JUDICIAL OFFICER: It is really no more than the springboard for this Inquiry, is it?

CALLAN: Yes, your Honour. In terms of new evidence, your Honour received 24 written reports from 14 genetic and cardio-genetic experts, 11 of whom gave oral evidence occupying almost seven hearing days. This new evidence includes the following four central concepts and issues which I will address orally. First, the results of a series of laboratory tests known as functional assays relevant to this variant, other data and research relevant to the variant and CALM variants more generally. We had expert views as to what is known of Ms Folbigg and Laura Folbigg's possible phenotypes, and there are the ultimate opinions expressed by these experts as to the possible causative role of the CALM2-G114R variant in the deaths of Sarah and Laura. I propose to deal with each of those four issues in turn.

The first issue or category is that of functional assays. For obvious ethical reasons, it is not possible to prove the effects of a genetic variant by inserting it into a human embryo and observing the results. The effects of newly discovered variants are, therefore, examined through staged laboratory examinations called functional assays. A number of pathogenic CALM variants have been the subject of functional assays which have demonstrated damaging effects on the calmodulin protein's capacity to bind to calcium and so to activate or de-activate calcium channels in the heart cells. The CALM2-G114R variant has been the subject of a number of functional assays relevant to calcium binding. Some of those were reported in the Brohus article and subsequent assays were conducted specifically in the context of this Inquiry. All support that the variant would have a damaging effect. Preliminary results of a functional assay suggest the CALM2-G114R variant would have a damaging effect on the sodium channel, and that was reported to this Inquiry by Professor Toft Overgaard.

However, your Honour, many of the genetic experts were hesitant as to the weight to be placed on the results of the functional assays in this case. This was for a number of reasons but most prominent was that these functional assays are generally not used to identify pathogenicity, but rather to identify the mechanism through which a variant that is already matched to a clear phenotype might have had that effect. There are myriad reasons why functional effects in a petri dish, particularly in different types of cells and in different ratios to that in a human, will not necessarily translate to a particular phenotype. This may be particularly true for a protein like calmodulin which has so many different interactions and roles in the body.

A number of experts, including some who were co-authors of the Brohus article, which predicted an intermediate phenotype on the basis of the calcium assays, expressed caution about the predictive value of functional assays alone. For some experts, without clear evidence of a genotype phenotype

connection, functional assays are highly suspect.

Here there is no clearly established genotype phenotype connection. To include the fact of Sarah and Laura's sudden deaths as a phenotype would be to engage in circular reasoning. While Kathleen Folbigg's phenotype is a matter of some disagreement, on no view does she present with a manifest, severe cardio-arrhythmia. To be clear, in our submission, the evidence indicates the functional assays conducted in this case were carried out to the highest standard. The concern of a number of experts was as to the inherent limitations in any research assay of the kind used in this case. Of course, the evidence in the nature of these functional assays has value but the limitations must be appreciated.

With that in mind, in summary, the relevant functional assays showed that, in vitro, CALM2-G114R produced an adverse effect on the function of both calcium channels in the heart cell, that is Cav1.2 which is associated with Long QT Syndrome and RyR2 which is associated with CPVT. The effect is different from wild type, that is, from the function of the CALM genes without a variant and from a CALM variant not thought to occasion serious cardiovascular disease, suggesting the assay results are not false positives.

The calcium binding functional effects considered alone are more consistent with the effects of other variants associated with CPVT or milder Long QT Syndrome phenotypes which tend to be less associated with an increased likelihood of sudden cardiac death at a very young age. The calcium binding effects considered alone are not quite as pronounced as the effects occasioned by the CALM variant in N98S which is otherwise associated with a mixed Long QT Syndrome, CPVT phenotype. Therefore, to the extent these functional assays are treated as predictors of phenotype, there is something of a “mismatch” between the phenotype predicted by reference only to the calcium channel effects and the deaths of Sarah and Laura Folbigg at 10 and 18 months of age. This is a point that Professor Wilde made.

However, ultimately, all experts agree the functional assays associated with CALM2-G114R could not be used to reliably predict a specific phenotype notwithstanding the majority remained of the view that these assays predicted some detrimental cardio-arrhythmic effect occasioned by the variant.

A first round of tests has also shown a functional effect of CALM2-G114R on the sodium channel. There are other reasons to think the CALM2-G114R variant would have a deleterious effect on sodium binding, which I will come to, however this is the first time a CALM variant has been tested for this effect, and unlike with CALM affinity, where a substantial body of work had from most experts' perspectives established a link between specific functional effects associated with established LQTS and CPVT phenotypes, there is no such comparable body of work in connection with sodium, albeit variants in the sodium channel gene are associated with a different arrhythmogenic disorder associated with sudden deaths of infants whilst asleep, Brugada Syndrome. In short, the majority of experts agree the functional assay showed the CALM2-G114R variant was likely to have some detrimental cardio-arrhythmic

effects in a person, but exactly what or how severe that effect was likely to be was not possible to determine.

The second category to which I will address is additional data and research which has been placed before this Inquiry. I wish to highlight three aspects in particular. First, Professor Nyegaard and Toft Overgaard modelled the calmodulin protein with the G114R variant and identified a number of relevant features. Those included that the variant sits at the terminating location of one of the EF-hand motifs, and they observed that variants in the “EF Hand” motifs which contain binding sites for calcium tend to be associated with more severe LQTS. Further, the variant sits at a binding site with sodium increasing the chance of an adverse effect on sodium binding and associated cardio-rhythmic function and furthermore the specific amino acid structural change occasioned by G114R is in the words of Professors Toft Overgaard and Nyegaard "dramatic" and, therefore, more likely to adversely affect the protein's function. It is notable that G114W at CALM-3, being a different variant but of the same amino acid residue as the G114R, also creates a dramatic change. These structural matters were all supportive of a potentially detrimental effect of the variant.

This Inquiry also received updated data from the International Calmodulin Registry, or “IcalmR” which Professor Schwartz is responsible for maintaining. While Professor Schwartz furnished certain updated data including in response to specific request of this Inquiry, the full set is still being reviewed for publication and has not been made available to the Inquiry or other experts so as to permit interrogation and consideration.

The body of data in the Calmodulin Registry reinforces the association between a range of CALM variants and severe cardia arrhythmias including sudden cardiac death in infants. It is also limited in that, even updated, the total number of identified cases remains low at 134 and the understanding of the mechanisms of observed genotype-phenotype correlation remains speculative in many cases. Notwithstanding its limitations, the International Calmodulin Registry data represents some of the best available evidence of genotype-phenotype correlation. A number of experts regarded it as particularly significant that the majority of cases on the Registry remain *de novo* and the vast majority, likely all cases associated with the deaths of children under the age of two involved an LQTS phenotype. They considered it difficult to reconcile the circumstances of the deaths of Sarah and Laura Folbigg which, according to Registry data, would suggest an LQTS phenotype and Ms Folbigg's relative health.

Putting the Folbigg family to one side there is only one recorded instance of an inherited variant with incomplete penetrance, that is, where a parent carrier who is non-mosaic has no phenotype and the child who is also a carrier has a severe phenotype. Nevertheless, at the time of the 2019 Inquiry, there were no such instances. At that time in order for calmodulinopathy to be accepted as a possible cause of death for Sarah and Laura Folbigg on the assumption Ms Folbigg does not have a calmodulinopathy, which I will address shortly in a moment, it would have to have been accepted as the first recorded case of

incomplete penetrants of a calmodulin phenotype. That is no longer the position, based on this updated Registry data.

Those assisting your Honour submit that, having regard to the available evidence, the position with respect to the International Calmodulin Registry data is this. The Folbigg scenario still sits towards the outer margins of the range of presentations recorded in other known CALM variant cases. There remains a "mismatch", to use Professor Wilde's words, between the deaths of Sarah and Laura Folbigg, while asleep at age ten and 18, being most consistent with the severe Long QT Syndrome phenotype responsible for every death of a child under two years on the Registry to date, and the lack of a severe LQTS phenotype in Ms Folbigg. However, no expert asserts that the International Calmodulin Registry represents a reliable measure of all possible or even probable phenotypes which might come to be associated with CALM variants, given the relatively small numbers and early stage of scientific and medical investigation.

There are a range of explanations based in sound genetic science as to why it might be that CALM2-G114R could be responsible for the deaths of Sarah and Laura, without manifesting a severe phenotype in Ms Folbigg. While the presence on the Registry of other families with incomplete penetrance or greater ranges of variable expressivity would have conferred comfort that the CALM2-G114R variant was likely causative of Sarah and Laura Folbigg's deaths, no experts suggest the International Calmodulin Registry data can be used to exclude the possibility that this explains the Folbigg scenario. Finally, to the extent the Calmodulin Registry data has expanded since 2019, the changes tend more in favour of demonstrating a phenotypic expression and range of the kind capable of including the Folbigg family's scenario than against it.

Your Honour, the third area of new evidence in this domain is that of the interpretation and opinions of cardiologists regarding test results pertaining to Ms Folbigg and Laura Folbigg's phenotype. This has come from amongst other experts, some of the world's pre-eminent cardiologists, with specialisation in calmodulinopathies. The results of their analysis is detailed in our written submission.

To summarise with respect to Ms Folbigg, she does not present with manifest, severe calmodulinopathy. However, there were a number of borderline or ambiguous features of her various ECG results. Professors Wilde, Abrams and Raju agree her exercise test was "compatible with" but alone not "diagnostic of" CPVT. Professor Schwartz considered the test demonstrated a "not full blown" CPVT phenotype. Professor Skinner considered it could be normal for age but also deferred to Professor Wilde.

There was some debate as to whether there was also mild QT prolongation in this exercise test. Professors Abrams and Raju considered it normal. Professor Wilde considered it, at most, modest prolongation which could be compatible with the functional data in this respect. Professor Skinner appeared to also measure mild prolongation, although the Inquiry was not able

to confirm this. Only Professor Schwartz considered there was clear prolongation not normally seen in a healthy individual.

Finally, Ms Folbigg did not present with a hint of Brugada Syndrome; however, in the experts' view, it could not be excluded as a possibility and it was agreed that an ajmaline test, which is a drug-induced ECG, could be informative. Overall, Professor Raju considered it more likely that Ms Folbigg did not have a CALM phenotype, but it was possible she had a disguised phenotype. Professor Wilde described Ms Folbigg's phenotype as, "If she shows anything, it's very discreet. If it's there, it's compatible with CPVT and not with LQT phenotype." Professor Abrams considered Ms Folbigg did not have “a significant or definitive phenotype associated with many of the conditions that we know to date have been described as caused by calmodulin variants.” Professor Skinner considered it was possible that Ms Folbigg had a partially concealed CPVT phenotype but it was also possible she did not. Professor Schwartz considered “the only rational conclusion would be that Kathleen Folbigg's phenotype is exactly that of a CALM-LQTS/CPVT overlap.” Your Honour, I note that as to Ms Folbigg's history of syncope, including at a swimming carnival, ultimately, it was considered this history could generally not be clearly distinguished from vaso-vagal syncope.

JUDICIAL OFFICER: Professor Schwartz is somewhat of an outlier in his views, is he not?

CALLAN: Yes, he is. Your Honour might recall there were some challenges in the oral evidence of Professor Schwartz in engaging him on some of these areas where his view departed from others.

Your Honour, it seems, in short, based on the range of views from expert cardiologists, that Ms Folbigg may have a mild CPVT or LQTS phenotype, but the position is uncertain. While a clear phenotype would have bolstered, or certainly informed, the potential causal link between the variant and the girls' deaths, the recognised phenomenon of variable expressivity, incomplete penetrance, modifier genes and environmental triggers can, we submit, individually or collectively explain the different presentations, and your Honour has received a body of evidence on that.

As for Laura Folbigg, Professors Skinner and Wilde both considered the single relevant ECG available for her was difficult to interpret but did show some possible QT lengthening. However, on any view, it would not be a very pronounced QT prolongation typical of severe LQTS. The balance of the medical evidence with respect to Ms Folbigg and Laura Folbigg was generally consistent with overall wellness and otherwise uninformative.

Your Honour, the fourth and final issue in this area of the CALM2-G114 variant that I wish to address is by way of highlighting the ultimate opinion of each of the experts as to the possible causative role of that variant. At the conclusion of oral evidence, it is our submission that ten cardiogenetic experts had expressed the opinion that the CALM2-G114R variant was at least a reasonably possible cause of the deaths of Sarah and Laura Folbigg, and a

number went further. Their evidence may be summarised as follows. Professor Nyegaard and Professor Toft Overgaard concluded, "From where we stand and what we can see, selection pressure combined with a functional assay, it looks like a bad variant." They would not necessarily have predicted that it would've caused the girls deaths at their respective ages; however, those deaths having occurred in the presence of the variant, they considered it a likely cause. Professor Schwartz emphasises that, notwithstanding the significant uncertainty which remains around the CALM phenotypic spectrum, the presence of the variant provided a “very valid and medically sufficient explanation” for the deaths of Sarah and Laura Folbigg.

JUDICIAL OFFICER: Go back to Professor Nyegaard and Professor Toft Overgaard. Do they reach their conclusion in reliance on the fact that the two girls had this variant and nothing else?

CALLAN: They, to my understanding, were looking only at the fact of the girls' deaths and what is known about those girls' deaths, and they were having regard to, as they say, the selection pressure combined with the results which have emerged on the functional assays.

JUDICIAL OFFICER: That's why you say it's not circular reasoning.

CALLAN: Exactly. It's not circular reasoning, we say, because they are looking at the probabilities of a variant causing a death in these circumstances.

Your Honour, Professor Schwartz said, as I mentioned, by reference to his experience with other cardio-genetic variants, particularly those associated with LQTS, that the “co-existence of a largely asymptomatic mother with infants who die suddenly carrying the same mutation is not at all rare”. Professor Schwartz clarified that when he says the CALM2-G114R variant sufficiently explains the deaths of the two girls, this is not equal to demonstrating that they caused the two deaths, but he expressed that it unquestionably creates reasonable doubt.

Professor Vinuesa considered the “logical conclusion” when presented with two sudden unexpected deaths in a family carrying a novel variant in a gene that does not tolerate substitution, shown to be damaging to the protein function in assays, and where the phenotypic spectrum for other gene variants includes sudden cardiac death, is that this variant was causative.

JUDICIAL OFFICER: Was Professor Vinuesa influenced in her view by the fact that she, I think more than any of the other experts, was of the view that Ms Folbigg had been affected by this variant?

CALLAN: Professor Vinuesa doesn't nominate that as a consideration to which she gives particular weight. Her reasoning focuses on the various considerations by which that variant was classified, using the approach--

JUDICIAL OFFICER: Not on her view of the swimming pool episode of

Ms Folbigg?

CALLAN: No, your Honour. As I've said, the way that we suggest the views have been expressed by these various experts is that whilst a clear phenotype in Ms Folbigg would have informed and potentially bolstered views as to the potential causal link, the absence of that clear phenotypic expression in Ms Folbigg was ultimately not material or determinative of the views that they're expressing.

JUDICIAL OFFICER: Professor Vinuesa ultimately did not say there was a clear phenotype in Ms Folbigg?

CALLAN: The way that I read and understood Professor Vinuesa's evidence is that she raised the possibility of that by reference to certain indicators, but she was also cognitive of the extent of her expertise in circumstances where there were cardiologists upon whose views that question really needed to turn.

Your Honour, Professor Arsov, who furnished a joint report with Professor Vinuesa, considered the role of the variant in the girls' deaths “probabilistic”, and noted that “rare genetic variants are, by definition, responsible for exceptional clinical scenarios”.

Professor Cook considered the case for a “genetically determined arrhythmia” as the cause of death of the two Folbigg girls had only strengthened since 2019 and, together with Professors Arsov and Vinuesa, expressed that there was a “strong presumption that the sudden unexpected death of Sarah and Laura were due to a fatal cardiac arrhythmia caused by the G114R variant.”

Professor Raju maintained his agreement with the conclusions in the Brohus article which included that the variant “likely precipitated the natural deaths of the two children”.

Professor Wilde maintained that, “almost by definition, one cannot exclude a causal role for this pathogenic variant”. In his view, there remained “quite strong arguments to favour CPVT as the most likely phenotype to be associated with this variant,” but said that, at the same time, he considered CPVT not a very likely candidate for a sudden cardiac death at a very young age. In oral evidence, Professor Wilde agreed or otherwise accepted the possibilities presented by a number of other experts to explain the apparent “mismatch”, and those are detailed in our written submissions. Ultimately, though, he considered each rose only to a level of speculation which, at best, raised a question. Your Honour, I note the written submissions on behalf of the DPP were that because Professor Wilde considered it maybe even unlikely that the variant occasioned the deaths of Sarah and Laura Folbigg, it was wrong to include him in the list of ten experts who considered the CALM2 variant a reasonably possible cause of Sarah and Laura's deaths.

In my submission, Professor Wilde's evidence on this ought be considered in complete context. When asked by Senior Counsel for the Director whether he could exclude a reasonable possibility that the two girls died as a result of

natural causes associated with the CALM2-G114R mutation, Professor Wilde answered "I think you cannot exclude, but I consider it unlikely, and maybe even highly unlikely." Your Honour, that evidence should be considered bearing in mind the information presently available about the variant, and Professor Wilde's clear view that the CALM2-G114R variant was pathogenic.

In our submission, Professor Wilde can be included in this cohort of experts I am addressing on, because he stated that he cannot exclude the reasonable possibility that the two girls died as a result of natural causes associated with the variant, albeit he regarded this as unlikely, maybe even highly unlikely, which pertains the probability of that possibility.

JUDICIAL OFFICER: Whether you include him in the cohort or not, that's his evidence, which I have to take into account here. It would be fair to say, I would have thought, that he didn't exclude it as a possibility, but unlike a number of the other experts he was a little more sceptical about it.

CALLAN: Yes, and your Honour should recognise there is no, in a sense, magic in the number of experts who fall into this category.

JUDICIAL OFFICER: Precisely.

CALLAN: Professor Kirk's evidence was that he could not exclude--

JUDICIAL OFFICER: It really depends on the convincing of the reasoning of those who do and those who don't, doesn't it?

CALLAN: Yes, your Honour.

Professor Kirk's evidence was that he could not exclude the reasonable possibility that CALM2-G114R caused the deaths of Sarah and Laura Folbigg; stating "I think it's possible it could have caused the deaths. I think it's plausible that it could have caused the deaths. I don't have enough evidence on which I can say I think it is likely that it caused the deaths."

JUDICIAL OFFICER: Professor Kirk to some extent moved from the opinion he expressed in the 2019 Inquiry, did he?

CALLAN: Yes.

JUDICIAL OFFICER: And on what I might describe as reconsideration, for want of a better expression, moved far more strongly towards - well, as he said, that it's plausible that it caused the death, which seems to me to be - having regard to this evidence - something of a slightly higher relevant possibility, but something less than likely; to the extent one graduates these things.

CALLAN: Yes, your Honour, and that of course is in circumstances where material further and work has been done, particularly for instance with respect to the functional assays, since the 2019 Inquiry.

JUDICIAL OFFICER: Quite. There was a reason for his change.

CALLAN: Yes. Your Honour, to complete the tour through these ultimate views as they've been expressed. Professor Watkins' evidence was that it is "certainly plausible but not, on the current state of knowledge provable, that the CALM2-G114R variant was responsible for the sudden deaths of Laura and Sarah Folbigg"; and he says that "it is completely plausible that a pathogenic variant in CALM2 could produce sudden death from a syndrome that does not comply with standard expectations."

The remaining experts who provided evidence on this topic before this Inquiry are these: Professor Skinner and Dr Guicheney, notwithstanding both being eminently qualified, and both of whom having furnished considered reports to assist the Inquiry; were not in possession ultimately of the full body of the material, and did not give oral evidence. For those reasons it's submitted the Inquiry would place limited weight on their opinions.

JUDICIAL OFFICER: Professor Skinner gave a joint report with Professor Kirk, did he not?

CALLAN: He did.

JUDICIAL OFFICER: For reasons which we needn't go into, he was unavailable to give evidence.

CALLAN: Yes.

JUDICIAL OFFICER: But his co-author expressed a concluded view.

CALLAN: Yes. Recognising, of course, that they fall within slightly different disciplines.

Professor Abrams, your Honour, did not expressly answer whether he considered the CALM2-G114R variant was a reasonably possible cause of the deaths of Sarah and Laura Folbigg. He maintained that the likelihood the variant was responsible for the deaths was low, but considered it is was possible and could not be definitively excluded. He said it would certainly be a reasonable assumption, "based on identification of the variant in a deceased individual; based on everything we know about the gene, the pathogenicity of variants in that gene and the associated phenotypes which have a very high risk of life-threatening ventricular arrhythmias." However, for him, the absence of a significant or definitive phenotype in Ms Folbigg shifted weight away from it being a pathogenic variant responsible for the deaths of the two girls.

Only Professor MacRae definitively expressed the view that while there was a "possibility" Sarah and Laura died as a result of the variant, the evidence did not "suggest that it was a reasonable possibility." Your Honour, it seems though that his view was informed by the fact of the deaths of Caleb and Patrick. Had Sarah and Laura not had two brothers die in similar circumstances, the possibility that CALM2-G114R occasioned the deaths

became in his view “totally reasonable.” Professor MacRae explained he considered it “probabilistically unlikely” that a relatively uniform set of deaths could be explained by a variant specific to two of the children, and that “a completely unrelated phenomenon” could be responsible for the other two.

JUDICIAL OFFICER: I recall asking him some questions about his probabilities, and he moved away from this position to some extent in light of that, didn't he?

CALLAN: He did, your Honour, including recognising the inherent difficulties with assuming that there was a uniformity in the deaths of each of the children.

JUDICIAL OFFICER: It's always seemed to be the great problem with probabilities.

CALLAN: Yes. Your Honour, we address this in our written submissions. Whilst Professor MacRae is an eminently qualified cardiologist and geneticist who expended significant efforts to assist the Inquiry in a very short timeframe; ultimately, in particular given the criminal context of this matter and the nature of your Honour’s task, we say that weight ought not be placed on that aspect of Professor MacRae’s opinion in assessing the predicate question of whether there is a reasonable possibility the variant was responsible for the deaths of Sarah and Laura Folbigg.

I do note that in subsequent oral evidence, Professor MacRae said “it's very difficult to come up with a high likelihood that this is the explanation for the events in the family. Is it possible? Absolutely. Absolutely possible. Is it more likely that it is some other unrelated, shared cardiac, shared genetic variant, or shared environmental variant? That's just a simple statement of probability.”

Your Honour, finally on Professor MacRae's evidence, I note that in the context of Laura's myocarditis, he considered that it was a “more reasonable possibility” that the variant “contributed” to her death. Indeed, he was the only expert who considered the variant may have caused the myocarditis, as well as being aggravated by it.

In our submission, the weight of the evidence of the cardio-genetic experts was that the CALM2-G114R variant presents a reasonably possible cause of death for Sarah and Laura Folbigg, and it is submitted the Inquiry should so find.

Counsel Assisting's primary submission is that it is strictly unnecessary for the Inquiry to go further, and decide whether or not the variant was likely to have caused the deaths, particularly having regard, in our submission, to the balance of the evidence. However, if the Inquirer considered it desirable, in assessing whether there is a reasonable doubt as to Ms Folbigg's guilt, to consider whether the CALM2-G114R variant was likely to have caused the deaths in Sarah and Laura Folbigg, in circumstances in which the pre-eminent experts were “all looking at the same data” but “drawing different inferences” by reason of their application of professional judgment in the face of

substantial uncertainty, and specific interpretations put on the data by each of the experts; cannot be definitively refuted, also, having regard to the requisite standard of proof applicable to the ultimate question of guilt. In our submission, there would not be a sufficient basis for the Inquiry to prefer the evidence of experts who considered the variant unlikely--

JUDICIAL OFFICER: I have to consider the overall onus in relation to this. As soon as you get into questions as to whether it's more likely than not, or less likely, then you're getting very much into that area, and as you start asking questions, well, did the prosecution satisfy beyond reasonable doubt that it was not likely? That's not the test either. It's a fairly dangerous road to go down, I think.

CALLAN: It is, your Honour, insofar as your Honour's pointed out, it creates risk about shifting an onus. We address it in circumstances where this is difficult territory, and it is highly desirable that rigour and care be applied to consideration of this evidence.

It's for that reason that, in our submission, there would not be a sufficient basis for the Inquiry to prefer evidence of those experts who considered the variant unlikely to be responsible for the deaths of the girls, over experts who considered it likely. That submission is in part, your Honour, informed by what was said in the High Court's decision in Lindy Chamberlain; about the scenario that presents here in terms of experts giving opinions on matters of science, within disciplines of which all are a master, and having regard to the difficulty and sophistications of that area of knowledge.

It is in those circumstances that those assisting submit that in addition to a reasonably possible cause of death common to two of the four children, there would be a basis for your Honour to find a strong causal link between the variant and the two girls' deaths, which cannot be definitively refuted.

Finally on genetics, I note that the new genetics evidence before this Inquiry was not limited to the CALM2-G114R variant. There was evidence raised as to a possible genetic cause of death for Caleb and Patrick Folbigg; there was also evidence given to this Inquiry relevant to assessing the baseline reasonable possibility that an unidentified genetic cause was responsible for the deaths in any or all of the Folbigg children. Those topics are addressed in our written submissions, and I don't propose to deal with them orally.

JUDICIAL OFFICER: Is this a convenient time to take a short adjournment?

CALLAN: Yes, your Honour.

SHORT ADJOURNMENT

Your Honour, in the context of my submissions in respect of Patrick Folbigg, your Honour asked whether Professor Fleming, who's the paediatric intensivist, had been taken to the Constantinou article. Your Honour, I should say this, Professor Fleming was not specifically asked about the Constantinou

article, certainly not in his oral evidence, and he makes no reference to it in his report. His opinion was given, amongst other things, having reviewed or had access to the 2019 Inquiry report which makes more discreet reference to Dr Fahey's view and the literature that he based that view upon. Ultimately, the way that Professor Fleming expressed his opinion was that the clinical features at the time of Patrick's hospital admission do not suggest a significant episode of hypoxic-ischaemic insult, and he noted and agreed with the views expressed by Dr Ryan that the features seen were more suggestive of an underlying condition rather than a hypoxic-ischaemic injury.

JUDICIAL OFFICER: I recall him giving that evidence. I was just wondering whether he made any specific reference to the article.

CALLAN: No, your Honour. Your Honour, can I turn then to coincidence reasoning. At trial, the Crown was permitted to rely on evidence relating to the deaths of each child and the ALTE in the case of Patrick in proof of the other counts. That is, the evidence was cross-admissible in support of both tendency and coincidence reasoning.

Coincidence reasoning concerns the improbability of two events happening just by coincidence, and tendency reasoning rests on reasoning that a person has a tendency to conduct themselves in a particular way. I propose to address tendency reasoning after my submissions about Ms Folbigg’s diaries and journal entries.

As to coincidence reasoning, I've already dealt at the outset of these submissions with difficulties in relation to notions of probability and coincidence in this case, but I should also address the Crown's argument at trial that there were relevant similarities in the circumstances of the four deaths and Patrick's ALTE that were so substantial and remarkable it was improbable the deaths were merely coincidental. The Crown's case was that, when taken in conjunction with other evidence, including expert medical evidence, the presence of hypoxia, and the absence of clear medical reason for the occurrence of the ALTE or sudden death, the only reasonable hypothesis left open was that Ms Folbigg asphyxiated them with intent to kill or do grievous bodily harm.

JUDICIAL OFFICER: The first difficulty with that now is that the jury did not appear to have made a finding that she asphyxiated Caleb with that intention.

CALLAN: Correct, that sounds in the manslaughter verdict. Your Honour, as to what the Crown described as relevant similarities which founded the coincidence reasoning that was propounded at trial, I wish to say something briefly about each. This is dealt with in further detail in our written submissions. The first relevant similarity relied upon by the Crown was that all four were children of Kathleen and Craig Folbigg. In our submission, this does not advance coincidence reasoning short of an approach grounded in “Meadow's Law”. Indeed, it also increases the possibility of a shared genetic cause.

JUDICIAL OFFICER: When you say that, in the absence of any shared possible genetic cause being shown, even as a matter of possibility after a very thorough investigation, can you really say that these deaths increase the possibility of such a shared cause?

CALLAN: I might be misunderstanding the import of your Honour's questions.

JUDICIAL OFFICER: No, I didn't make myself clear. The specific genetic causes have been shown as a possibility in relation to Sarah and Laura, and different possible genetic causes have been shown in relation to Patrick. The investigations didn't discover any potential shared genetic cause.

CALLAN: Known. Shared known genetic causes, yes.

JUDICIAL OFFICER: Do you say, notwithstanding that, that the fact that four died, there remains the possibility of a shared genetic cause?

CALLAN: Yes. It is for that reason that the fact that all four were children of Kathleen and Craig Folbigg really can't advance the position in terms of coincidence reasoning. Your Honour, another circumstance relied upon by the Crown was that all four children were under two years of age. In our submission, that does little to advance coincidence reasoning, amongst other things.

JUDICIAL OFFICER: Just going back to (a) for a minute, does it really boil down to this: that there was always a possibility they died of natural causes which could include a shared genetic cause?

CALLAN: Yes.

JUDICIAL OFFICER: That's a possibility that the Crown had to exclude?

CALLAN: Yes. Your Honour, the third feature the Crown relied upon was that the deaths occurred suddenly and unexpectedly, and the children were otherwise healthy. In our submission, while that might be relied upon to advance coincidence reasoning, it would only be if reasonable, possible natural causes of death are excluded. Furthermore, the fact that the children all died at home during sleep when in a bed, cot or bassinet again might advance coincidence reasoning but must--

JUDICIAL OFFICER: Just going back to (c) for a moment. Isn't there a difficulty with that, having regard to the fact that Laura suffered from myocarditis and that certainly Patrick, at the time of his death, could hardly have been said to be in the best state of health?

CALLAN: Correct.

JUDICIAL OFFICER: As a matter of fact, they weren't necessarily healthy at the time of their death.

CALLAN: The ALTE in relation to Patrick had its obvious consequences--

JUDICIAL OFFICER: Yes, I'm talking about Patrick's death as distinct from the ALTE.

CALLAN: As to Laura, the presence of myocarditis was detected after she died, but I've already addressed the relevance that it played.

JUDICIAL OFFICER: It was detected before the time of trial.

CALLAN: Correct, yes. To contend that those two children were healthy would not be apt.

JUDICIAL OFFICER: It's somewhat a stretched view of "health".

CALLAN: Yes. Your Honour, as I was saying, the fourth relevant circumstance the Crown relied upon was that the children all died at home during sleep when in bed, cot or bassinet. In my submission, that consideration must be regarded with at least a degree of circumspection, given the amount of time a child under the age of two spends at home, asleep in a bed, cot or bassinet. Furthermore, this indeed is characteristic of SIDS and of SUDEP. The other relevant similarity the Crown relied upon was the fact that all deaths occurred when the only person at home or awake was Ms Folbigg.

JUDICIAL OFFICER: She was the fulltime carer, wasn't she?

CALLAN: That's the point that we make, your Honour, which is that it was clear that she was overwhelmingly the person who attended to the children as their carer. Your Honour, the same point can be made about the further similarities so contended for by the Crown that each child was discovered dead or moribund by Ms Folbigg during what she claimed was an ordinary check on their wellbeing. In circumstances where she was the one who overwhelmingly attended to the children, that does little to advance the coincidence reasoning. Your Honour, finally, the Crown relied upon the fact that, except for Laura, Ms Folbigg failed to render the children any assistance at all after discovering them. It's not clear how that can be relied upon, in my submission, as relevant coincidence reasoning, and I'd take the point no further.

JUDICIAL OFFICER: The fact is that on each of the occasions, except for Laura, Mr Folbigg was in the immediate vicinity and rendered such assistance.

CALLAN: Yes, your Honour. Can I turn then to Ms Folbigg's diaries and journals. At trial, the Crown characterised certain entries in her diaries and journals, particularly in combination, as admissions of guilt, suggesting the diaries were the “strongest evidence you could possibly have for Ms Folbigg having murdered her four children.”

JUDICIAL OFFICER: The Court of Criminal Appeal, of course, took a similar view.

CALLAN: Yes. Those diaries and journals don't span the entire decade from the birth of Caleb in 1989 to the death of 1999, but they do cover the period February to March of 1989, and the year 1990; so that is the period of time covering Caleb's birth and death, and Patrick's birth and ALTE.

Then there are entries in journals and diaries for the period from June 1996 to April 1998, and the year 1999. So that is the period leading up to Laura's birth in August of 1997, through to her death on 1 March of 1999 and subsequently. As your Honour's aware, this Inquiry has a complete typed transcription of the diaries, and this Inquiry has Ms Folbigg's explanations about her diary entries, given in a police interview in July of 1999, and given over three days of cross-examination in the 2019 Inquiry. Finally, this Inquiry has a body of expert and other evidence relevant to consideration and interpretation of the contents of her diary and journal entries.

What I propose to do orally is to outline first our submissions regarding the approach to the interpretation of her diary and journal entries. I will then address the reliability of those diaries as admissions in light of the expert psychiatric and psychological evidence which has come before this Inquiry, and I propose to focus on the evidence of three experts who furnished reports and gave oral evidence; they being the experts engaged by this Inquiry for that task.

After dealing with that overarching question and evidence as to reliability, I propose to deal with some of the diary entries which have assumed particular importance at trial, and in the 2019 Inquiry. Finally, I will address upon some residual issues arising from the submissions of other parties, by reference to the expert evidence.

Your Honour, first on the approach to interpreting Ms Folbigg's diary and journal entries, it should be made clear and recognised at the outset that there is no diary entry which contains an unequivocal or unambiguous statement that Ms Folbigg harmed her children, or was directly responsible for their deaths. Rather, there has always been a process of interpretation which has led to submissions that the diaries can and should be read in that way. For this reason, in our submission, consideration of how the diaries might or should be interpreted is pertinent.

At trial, the Crown Prosecutor urged the jury to read entries in the diaries by giving the words their ordinary English meaning, as you would interpret any document you read - a letter or a newspaper article, for instance. In our submission, when interpreting the diaries, your Honour ought consider both the overarching written context of the whole of the diaries in evidence, as well as broader matters of context including Ms Folbigg's mental and emotional state at the time of writing the entries.

JUDICIAL OFFICER: You certainly have to consider any work, including a letter or newspaper extract or anything else in context. I mean, that's a pretty basic rule of interpretation, and I understand the rest of it.

CALLAN: And, your Honour, with an eye to the expected or intended audience. As your Honour said, any text must be interpreted in context. The ordinary meaning of language cannot be interpreted sensibly in any other way; and that proposition is axiomatic in the context of statutory interpretation.

JUDICIAL OFFICER: It's also a matter of what people do.

CALLAN: Yes. Of course, your Honour, these diaries and journals are not in the form of a newspaper article, or in the form of pieces of legislation created by parliament.

JUDICIAL OFFICER: But the very context in which they're written has to be taken into account. As you say, the fact they're not written for publication to third parties.

CALLAN: Yes. Some might suggest that that is double-edged.

JUDICIAL OFFICER: That can work both ways.

CALLAN: Exactly, but it does bear on the contention that only the plain or ordinary meaning of a word ought be the approach taken.

The Inquiry has before it a report of Associate Professor Janine Stevenson, who's conducted research into the use of journals by clients undergoing psychotherapy. She indicates that diaries are a particular kind of text which are not written for outside consumption, and may not represent ordered, factual accounts, but rather, disordered thoughts. That is, a person writing in a diary might record one thought, not record a number of sequential thoughts, and then record a later thought. The appearance of one statement next to another does not necessarily mean there was any link between the two statements. Diaries plainly contain unusual features not present in other texts, which in our submission should be brought to bear in how they are approached.

JUDICIAL OFFICER: Would that evidence be admissible in a trial?

CALLAN: We would say it would be, your Honour.

JUDICIAL OFFICER: I can understand that evidence is admissible from psychological or psychiatric experts as to how the words might be interpreted in light of the particular emotional state of Ms Folbigg at the time. Whether some general body of expertise, such as Associate Professor Stevenson undoubtedly has, falls within that spectrum I'm not entirely sure at the moment.

CALLAN: Your Honour might recall Dr Eagle also made certain observations within the limits of her clinical experience and expertise about the way in which diaries and journals might be used; and amongst other things emphasised the point that whether someone thinks something is different to whether they write it down, but also whether they think it is different to whether they believe it, or what it reveals.

I think this is evidence in a similar category, and we're not in this territory because we're in this Inquiry, and as the DPP has pointed out, that shaped the body of evidence before this Inquiry; but it would really come down to a judge being persuaded that this was a topic which was relevant, and upon which admissible expert evidence ought be received.

JUDICIAL OFFICER: An established area of expertise would have to be established, and that what I'll call the general opinion, as distinct from the opinion distinct to Ms Folbigg was relevant to the proceedings.

CALLAN: Yes. The judge for instance might need some persuading that that view is, as you said, an area of expertise, and that which falls beyond what might be understood to be general knowledge about the nature of the diary or journal.

As I said, and I just mentioned on this topic of interpretation, the fact that diaries are used to record thoughts or feelings also means that caution must be attached before assuming that those thoughts reflect a particular fact.

JUDICIAL OFFICER: It depends on the nature of the diary as well. One sort - I won't use the word "anal" - is the sort of person who records the detail of everything that happens on a holiday. That's a very different diary to a diary of this nature, where you're almost talking to yourself.

CALLAN: And that's why I think we use "diaries" and "journals" are used, because this is not a ship's log, and in particular, the journals that were maintained and the evidence before your Honour is that this was a method used by Ms Folbigg to record her thoughts, and to duck her negative emotions, as she--

JUDICIAL OFFICER: Ms Folbigg said that, didn't she?

CALLAN: She did. As I was saying, Dr Eagle gave evidence to this Inquiry which might be thought to reflect ordinary human experience; and that is "thoughts are not facts, and emotions are not intentions." In our submission, it's necessary to keep that in mind. That is, that recording of thought doesn't necessary reflect the recording of a fact. I'll come to this in more detail in a moment, but insofar as there are expressions in Ms Folbigg's diaries and journals of feeling guilt or responsibility for the deaths of her children, in our submission - particularly informed by the balance of the expert evidence to which I will turn in a moment - real care has to be taken about what those thoughts in fact should be understood as implying.

Those assisting your Honour also emphasise that, of course, when an individual reads and interprets texts they bring their own particular experiences, background and the context and cultural world from which they come. Here, these are the diaries and journals of a new mother, around the age of 20 to 30 years, in the years 1989 to 1999, with the particular life experiences of Ms Folbigg. And, for example, there is expert evidence before this Inquiry from Mr Sheehan that fantasies of escape are normative

experiences for women during early parenting. Such experiences may not be shared amongst all demographics; indeed, may not subsist in memory once the immediacy of parenting a young child has passed.

The process of interpretation, in my submission, must ensure that for instance, expressions of frustration or resentment by Ms Folbigg towards her children are considered against the background of what the evidence suggests are normative for a young mother of children under the age of two.

Finally, we submit consideration of the content of these diaries in their context ought include the times at which they were written. Frequently, the entries were written in the middle of the night or in the early hours of the morning, and the evidence, for instance, from Mr Sheehan suggests that as is ordinary human experience, thoughts experienced in the middle of the night are not necessarily thoughts which are maintained during the day.

JUDICIAL OFFICER: Just remind me. The diaries which contained what I'll call the bulk of the admissions, for want of a better expression, were written between the time of the death of Sarah and the birth of Laura.

CALLAN: Yes, and much closer to the birth of Laura. It's apparent, in my submission, that they were in a context where Ms Folbigg was desirous of having another child, and was focused on--

JUDICIAL OFFICER: And was also worried about it at the same time.

CALLAN: Yes. I wish to turn now to the evidence relevant to the question of whether certain of Ms Folbigg's diary and journal entries can be treated as admissions of having harmed, if not killed, her children.

As your Honour is aware, comprehensive reports and oral evidence has been provided by Forensic Psychiatrists, Dr Kerri Eagle and Dr Yumna Dhansay, and Forensic Psychologist, Mr Patrick Sheehan. Each of the experts addressed whether Ms Folbigg had a mental health condition during the time she was writing the diaries; as well as the causative effect of any mental health condition on the content of her diaries; and whether the entries were consistent or not with features of any such mental health condition.

They all accepted that whether or not as a matter of fact the diary contained admissions as to Ms Folbigg harming her children was a matter for your Honour, not expert evidence, but said that it was within their area of expertise to opine on whether the statements were reliable as admissions. Dr Eagle, Dr Dhansay and Mr Sheehan uniformly expressed the view, based on their expertise, in psychiatry and psychology that Ms Folbigg's statements in her diaries were not reliable as admissions of guilt. In coming to that view the experts each relied heavily on the body of evidence in relation to parents of children who have died of sudden infant death.

JUDICAL OFFICER: Can I just ask you this? In the submission you just made you just said that whether the diaries contained admissions was a matter for

me, not for expert evidence. Is the distinction this; that it's up to me to determine whether or not there was in fact an admission in anything in particular that was said or written by Ms Folbigg in her diary, but to determine whether it was in fact of its reliability I take into account the expert evidence.

CALLAN: That's correct. I think to be sure about what's meant by "admissions" because of course--

JUDICIAL OFFICER: That's basically what I'm asking you.

CALLAN: Yes, what is being acknowledged it seems is that there are statements in Ms Folbigg's diary and journal entries which reflect guilt or a sense of responsibility for the deaths of her children. But the question, ultimately as a matter of fact for your Honour, is whether those diary entries comprise admissions that she in fact harmed her children.

JUDICIAL OFFICER: Do I have to deal with each of them individually?

CALLAN: Your Honour, in a moment I'll deal with some of them in a more global sense. In my submission, with the work that the evidence of psychologist and psychiatrist does is, in form, the manner in which your Honour considers the reliability of these admissions on that question.

JUDICIAL OFFICER: That’s going to reliability as to whether in fact they are admissions.

CALLAN: Yes.

JUDICIAL OFFICER: Take, for example, one I think which was relied on in relation to Caleb, "Asleep at last!", with an exclamation mark. Do I have to determine whether standing alone that constitutes an admission that she attempted to use unlawful means to put Caleb to sleep, depending what sort of manslaughter charges.

CALLAN: Your Honour has asked about whether or not you need to deal with them seriatim. On one view your Honour has the balance of all of the entries before you.

JUDICIAL OFFICER: I've got them all, yes.

CALLAN: The question is whether or not your Honour considers any one or more of those entries rises to the level that I articulated which is that it is, in your view, an admission of guilt of having killed the children.

JUDICIAL OFFICER: Just take that first one as an example, in considering that one, do I consider it in the context, for example, of other things all written subsequently. For example, "Sarah left us with a little help" to deal with one of them, or do I deal with it in isolation? Because, quite frankly, as presently advised, my preliminary view is that first one couldn't on any view constitute an admission that she intended to harm the child. But if you look at it in light of all

the others, leaving aside the psychiatric evidence, perhaps someone might come to a different view.

CALLAN: It certainly seems that could be the only basis upon which at trial it was contended that that carried with it an implication that otherwise does not appear. Certainly, in my submission, your Honour would place emphasis on the point in time at which that was written in order to arrive at a view as to what was intended to be conveyed. Of course, it is the case that on a body of evidence subsequent statements or pieces of evidence can shed colour or light onto earlier evidence. Particular care, in my submission, must be made in respect, given the nature of these diaries and journal entries, because what has to be focused upon is what this reveals or is suggested to be revealed as to the state of mind of the author at the point in time it is written.

As I was saying, Dr Eagle, Dr Dhansay and Mr Sheehan each relied heavily on a body of evidence in relation to parents of children who have died of sudden infant death, and that body of literature demonstrates that such parents tend to express feelings of self-blame and excessive guilt in relation to the deaths of their infants. All three experts also relied on their diagnosis of Ms Folbigg as suffering from a depressive disorder and experiencing cognitions of grief, bereavement and post-partum adjustment.

There is a significant volume of literature before the Inquiry in the form of peer-reviewed journal articles about the psychological effects on parents of sudden infant death. That literature uniformly suggests that bereaved parents of sudden unexpected infant deaths suffer from feelings of guilt and self-blame as part of the ordinary process of grief. Dr Joanna Garstang, a Consultant Community Paediatrician from the United Kingdom who works with families who have experienced sudden unexpected death of an infant, and she did a PhD on that topic, provided a report to this Inquiry which explained:

> "Parents often go over and over in their minds everything they did or did not do, which they worry, could have caused the death. They sometimes blame themselves or each other, or feel angry with the doctor, or health visitor or anyone who has seen the child recently. These feelings of guilt and blame are normal, very common and will lessen with time."

This evidence and accompanying literature, we say, is of considerable significance in assessing the entries in Ms Folbigg's diaries. It was not in evidence at trial, or in the 2019 Inquiry. Those assisting your Honour submit that where Ms Folbigg is expressing in her diary or journal feelings of guilt or responsibility for the deaths of her children, the question is whether in light of this body of evidence indicating that parents in Ms Folbigg's position commonly engage in self-blame and guilt, her entries can reliably be treated as admissions of guilt in respect of causing the deaths of the children. In this regard it is relevant, and I will shortly outline this by reference to come of the entries, that Ms Folbigg has consistently given explanations both in interviews with police in 1999 and her evidence to the 2019 Inquiry that the entries in her diary reflected that she felt she had not tried hard enough or done enough as a

mother, and thereby felt herself responsible for the deaths of her children.

Ultimately, in our submission, it is open to your Honour to conclude that having regard to this body of evidence before the Inquiry, the entries in Ms Folbigg's diaries and journals which express responsibility or guilt are not reliable as admissions by her of harming her children.

It is furthermore also important to note that there has been detailed consideration in the evidence about Ms Folbigg's childhood background and whether she might have suffered or suffer from a mental condition including a psychotic disorder or personality disorder. Insofar as it has been suggested in the submissions on behalf of Mr Folbigg, at para 14, that insufficient attention has been paid to the “childhood trauma to which Ms Folbigg was subjected” which is, "generally accepted as a foundation for a personality disorder which would explain many of the entries in the diaries as well as her behaviour in murdering the children”, those assisting note that each of the experts engaged by the Inquiry in the fields of psychology and psychiatry make detailed reference to Ms Folbigg's childhood background in their reports. Each of these experts gave evidence that they considered whether Ms Folbigg suffered from a personality disorder and each said they did not consider that was so. Dr Eagle stated in oral evidence that she did not consider Ms Folbigg satisfied the criteria for a borderline anti-social other personality disorder.

JUDICIAL OFFICER: I just want to ask you about Mr Folbigg's submission for a moment. Am I misreading it, in your submission, as when I understood it to say because she had a seriously disturbed childhood, and perhaps a personality disorder, that tends to support the proposition that she murdered the children. Is that your understanding of the submission?

CALLAN: That's my understanding of the submission.

JUDICIAL OFFICER: Do you know any legal basis for that type of submission could be put?

CALLAN: I don't understand that could be contended by a Crown in a criminal trial.

JUDICIAL OFFICER: Was any cross-examination directed to any of the psychiatrists in support of that proposition?

CALLAN: No, your Honour. The only questions were those raised by those assisting which enquired as to whether of the three experts - what their view was as to whether she suffered from a personality disorder.

JUDICIAL OFFICER: I think the psychological and psychiatric evidence relied upon by Mr Folbigg involved the assessments after conviction. Is that right?

CALLAN: Yes.

JUDICIAL OFFICER: Presumably, on the assumption that she had been guilty

of this offence? So in other words, it's quite the obverse to what I was putting was the thrust of Mr Folbigg's submissions, that they were seeking an explanation for what she had, in fact, been found to have done.

CALLAN: Yes, that's where real care must be taken, in my submission. Whilst features of traumatic childhood or a personality disorder might be identified as informing or an explanation for an instance of conduct in this scenario for which someone might have been convicted, it's quite another thing to suggest that those have a predictive quality, or predetermine the way a person might make--

JUDICIAL OFFICER: Putting it simply, just because in respect of a person found guilty of a crime that a prior background may be relevant to the reason to do it in mitigation. You can't take the obverse of it, that a person with a prior background is more likely to commit a crime.

CALLAN: Correct. As I said, Dr Eagle in oral evidence stated that she did not consider Ms Folbigg satisfied the criteria for a borderline anti-social or other personality disorder, or a psychopathic disorder, or a psychotic mental illness. Mr Sheehan stated in oral evidence that he did not consider Ms Folbigg suffered from a psychotic mental illness, a psychosis or a personality disorder. Dr Dhansay stated in her report that she did not consider Ms Folbigg suffered from psychosis, nor did she satisfy the criteria for the diagnosis of a borderline personality disorder.

JUDICIAL OFFICER: Is the force of their opinions weakened by the fact they fact they didn't see Ms Folbigg? Didn't interview Ms Folbigg?

CALLAN: Your Honour might recall each of them was asked and specifically addressed the implication of not having seen her. A primary factor mitigating the limitation of not seeing Ms Folbigg was that they were being asked to express a view about her mental state historically, that is, between the years 1989 and 1999 and furthermore they pointed to the comprehensive accounts which had been captured in that of other treating and assessing practitioners who had interviewed her. Also, on your point about the presence or otherwise of a traumatic childhood or a disorder which might be relied upon in mitigation, your Honour might recall in his report Mr Sheehan recognised that, for instance, events in childhood pertaining to Ms Folbigg might potentially inform a risk of her committing an offence but he was very clear both in writing and also when I took that up with him orally to make plain why that observation couldn't be taken any further than the potential risks that that imposed. Of course, his work is informed by his work as a forensic psychologist which, amongst other things, does involve consideration of recidivism risk and, amongst other things, under the various pieces of statute in this state where courts are called upon ultimately to assess risk in informing and resolving applications which are made. It was in that context, it seems, that he recognised that those matters might inform an assessment of risk, but he was very careful--

JUDICIAL OFFICER: Mostly in the case of persons whose guilt for a particular

offence has been established, though.

CALLAN: Yes, and he also emphasised that whilst risk might arise, there are a number of more pertinent features - in particular, antisocial behaviours - which you would expect. Your Honour, it is pertinent, in our submission, when considering the diaries to note the expert evidence of Dr Eagle, Dr Dhansay and Mr Sheehan, and others, was to the effect that during the time Ms Folbigg wrote the diary entries - namely, between 1989 and 1999 - she was likely suffering from depressive episodes due to major depressive disorder as well as typical cognitions associated with grief and postpartum adjustment following the deaths of each of her children. Dr Eagle noted that Ms Folbigg had been exposed to significant and repeated childhood trauma, that she displayed features of an anxious attachment type and possible additional psychological vulnerabilities including anxious attachment style, emotional instability, fragmented sense of self, dissociative phenomena, and difficulty tolerating relationships. Dr Dhansay and Mr Sheehan made similar observations.

In my submission, this is of particular relevance, amongst other things, to the suggestion that Ms Folbigg's diaries contain a notable absence of expressions of grief over the deaths of her children and that the suggestion or the idea that this is not the reaction of a normal person. In our submission, your Honour would not consider the absence, so it's said, of expressions of grief in Ms Folbigg's diaries as probative for two reasons. First, the diaries don't span the entirety of the lives or the aftermaths of the deaths of the children. Second, and more significantly, is the expert evidence which uniformly suggested that Ms Folbigg suffered from emotional detachment which is routinely misinterpreted as an absence of grief expression. For example, Dr Eagle explained that individuals who are emotionally detached due to trauma can appear emotionless or cold; however, the reality for those persons is that their emotions are so unbearable, they cannot be tolerated. Dr Eagle explained:

> "Mental health clinicians and lots of individuals, family members, friends, in my experience, can often misinterpret somebody who controls their emotions because they are unable to bear to express them, and it's a defence mechanism to control the emotions as opposed to display them. It's a well-recognised emotional coping mechanism, and it is particularly the case when people have experienced trauma because they have less ability to tolerate emotional responses, but, unfortunately, to society and even to mental health clinicians in some cases, that can appear cold and it can appear like the person isn't experiencing the emotions, but, in fact, they are definitely experiencing those emotions. They just can't bear to express them in a normal way."

JUDICIAL OFFICER: Can I just take you back for one moment to what you say about the diaries not spanning the entirety of the lives or the aftermaths of the deaths of the children. The first diary entry, which was, I think it's fair to infer, written around the time that Caleb died –

CALLAN: Yes.

JUDICIAL OFFICER: Possibly before or certainly simultaneous - in circumstances where there's no finding that she intended to kill him. All the others were written, as I understand it, at a period somewhat after a particular death occurred, so there are no entries almost contemporaneous, except with the death of Sarah; is that right?

CALLAN: Your Honour, there are entries in 1999 which are contemporaneous with Patrick's birth and the ALTE --

JUDICIAL OFFICER: That's right, yes.

CALLAN: and then the latter--

JUDICIAL OFFICER: 1999?

CALLAN: Sorry, 1990. The latter corpus of diaries, as I've addressed, really deal with the period leading up to Laura's birth in August of 1997.

JUDICIAL OFFICER: They were closer to Laura's birth than Sarah's death, were they not?

CALLAN: Yes, they were. Your Honour, can I return to this topic of what's been suggested as normal in the context of experience of maternal grief. Like Dr Eagle, Mr Sheehan explained in his oral evidence that there was a connection between early childhood trauma, which is what he considered Ms Folbigg had suffered, and patterns of distancing, emotional numbing, detachment and dissociation, being mechanisms by which humans can cope with extreme hardship, which can generate problems later on. In his view, criticism of Ms Folbigg as appearing emotionally callous and avoiding normal grief expression or not engaging in musings about loss were explicable by reference to her patterns of distancing, emotional numbing, detachment and dissociation. He observed a pattern in Ms Folbigg's diaries which reflected this mental condition of shifting from a very sad event, such as Patrick's death, and then a discussion of ordinary household tasks. He observed this could be quite "jarring" but that it made more sense to him as being a result of avoidance and shutting down, that Ms Folbigg would go straight from a terrible loss to thinking about the gym or losing weight. He considered that this was consistent with an avoidant psychopathology by which Ms Folbigg sought to circumvent grief as a coping mechanism.

Having regard to this area of expert evidence - which I note, your Honour, was not challenged - it's submitted your Honour would not consider an absence of "normal" grief expression in the diaries is probative of the conclusion that she did not suffer grief from the deaths of her children, nor probative of her having caused the deaths of those children. Your Honour, I now propose to address specific diary entries which have been given particular emphasis over the years as probative of Ms Folbigg's guilt. There are a number of diary entries in which Ms Folbigg refers, in the context of parenting her children who have

died, to being stressed out, losing control "like last time", losing her temper, getting frustrated or jealous, snapping her cog, and, in one entry, for instance, she wrote that stress made her do terrible things.

In the 2019 Inquiry, in reference to an entry of 3 June 1990 in which Ms Folbigg writes of “mixed feelings” she had on the day Patrick was born and whether she was going to “cope” or instead “get stressed out like last time”, Ms Folbigg explained that she was a first-time mother with Caleb and was worried and doubted whether she was doing the right thing. She felt she had failed at being a mother, given he died at 19 days, and she “couldn't say what it was so I therefore doubted my ability." She says she knew that something had gone wrong with Caleb and medical practitioners could not find any reason, so she felt she had failed. She explained that, as a result, she was doubtful of her ability to be a mother to Patrick. She was doubting herself as to whether she was a “good enough mother” with Caleb because he had died, and now she was doubting whether she'd made the right decision in giving birth to Patrick.

Your Honour, on the entries about losing control, I observe that in the context of questions about her diary entry of 18 June 1996, Ms Folbigg explained in the 2019 Inquiry that, at that time - that is, June 1996 - she believed she had to control everything, from herself - including weight and dietary concerns - to her relationship and her whole life, but she felt as though she had lost control. It was put to Ms Folbigg that the only meaning that could be derived from the entry was that, at a time she lost control, the baby was in danger and she had to give them to someone else. Ms Folbigg rejected that. She explained that “loss of control” meant she had decided, because her children had died, that she had lost control. Further, she believed that if she felt she was losing control, it would be better to “leave the child with Craig because Craig had family, Craig had support, Craig had everything that could help him.”

In the 1999 police interview, in the context of questions about a diary entry of 8 September 1996, Ms Folbigg said she was expressing that she felt she had failed as a mother. When police put to Ms Folbigg that a mother or father who loses a child through natural causes does not fail, Ms Folbigg stated that she did not know how her children died so she was looking for answers.

In cross-examination of Ms Folbigg in the 2019 Inquiry about that same diary entry of 8 September 1996, it was put to Ms Folbigg that she knew she was responsible for losing control of her temper and causing the children's deaths. In answer, Ms Folbigg stated:

> "I took the responsibility and the onus of the responsibility for the deaths of my children extremely hard, because I had worked so hard in preparation and in my attempt to succeed at being a mother. I deem it as a personal failure that I had lost my children and I was not succeeding where I thought I was supposed to be."

She gave a similar answer in relation to the diary entry which included her saying, "I know now that battling wills and sleep deprivation were the causes

last time." In the 1999 police interview, Ms Folbigg explained:

> "When I wrote that, I was sort of taking everything into consideration with Laura coming along, pretty much telling myself that the battle of wills just wasn't an option, just didn't count, didn't really matter. There's no use having children and having the will battles anymore about anything."

She was asked what she meant by "they were the causes", which she explained as, "Probably a little lack of sleep used to cause the frustration levels and high stress levels." Ms Folbigg was cross-examined extensively about this entry in the 2019 Inquiry. She said that she was referring to the causes of her children's deaths, as she was searching for reasons. In relation to that part of her entry where she wrote "rather than answer being as before", it was suggested to Ms Folbigg that she was referring to having killed the babies, which Ms Folbigg rejected and stated that she never wanted to be in a position where she found the baby dead. Ms Folbigg explained that she was convinced her negative emotions caused her children to leave her, and that she blamed herself for the death of her children, but not because she had caused it. Ms Folbigg explained that her belief at the time was that her children decided not to stay with her anymore - that was the cause of their deaths - due to her frustration and inability to be a successful parent.

As to her diary entry, "Stress made me do terrible things", of 1 January 1997, Ms Folbigg said in the 1999 police interview that stress made her “have an angry thought here or there” and that "terrible things" referred to “just the stress and frustration and growlingand anything of that sort of nature.”

In her evidence in the 2019 Inquiry, Ms Folbigg explained that “doing terrible things” meant that she had frustration or an angry or bad thought, and it included leaving her children to cry for a second or not meeting her child's needs. It was suggested to Ms Folbigg that "terrible things" is more consistent with her killing her children rather than having an angry thought. Ms Folbigg disagreed, stating that "terrible things" were not terrible actions and also included negative thoughts that she was not coping or not good enough. It was put to Ms Folbigg that the terrible things were referring to her smothering her children under great stress. Ms Folbigg did not accept that.

Your Honour, the explanations Ms Folbigg gives in her 1999 police interview and again in the 2019 Inquiry on these topics find some reflection in her contemporaneous diary entries; for instance, the entry of 4 February 1997, where she writes:

> "Still can't sleep. Seem to be thinking of Patrick and Sarah and Caleb. Makes me seriously wonder whether I'm stupid or doing the right thing by having this baby. 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. I wonder whether having this one wasn’t just a determination on my behalf to get it right and not be defeated by my total inadequate feelings

> about myself. 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'm trying to conquer with this baby; to prove that there is nothing wrong with me. If other women can do it, so can I. 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. What scares me most will be when I'm alone with the baby. How will I overcome that, defeat that?"

In her interview with police, Ms Folbigg was asked about her reference to guilt and responsibility. She said that it related to her questioning, “did I do enough? Was I where I was supposed to be? Was I not trying hard enough? Was I all the things that I thought responsibility was?” In relation to "My fear of it happening again haunts me", she explained that she was referring to death and the overwhelming feeling that she'd failed somewhere along the line. "You can't have something like this happen without somewhere along the lines thinking it's got something to do with you."

She explained that she was scared to be alone with the baby, because she'd decided that “since these terrible things keep happening when I was by myself, I didn't want to be by myself. It was a way of self-protecting", and that she feared "The whole situation recurring again." She clarified that she was not “afraid” of the “stress or frustration or any of that sort of thing.”

JUDICIAL OFFICER: In the entry you just read, she talked about "it happening again", and Craig and her surviving if it did. She certainly doesn't suggest that she killed them, it's rather that something happened to these children, and if the same thing happened to Laura, and whether Craig and her would survive it.

CALLAN: Exactly, your Honour. The use of the word "it" contains, in my submission, no suggestion, in terms, that she played a hand.

JUDICIAL OFFICER: Yes.

CALLAN: Ms Folbigg was also taken to this entry in the 2019 Inquiry. She further explained that her reference to being scared when she was alone with the baby was “purely because when she found the children she was always alone.” When pressed in cross-examination that this entry indicated an expression of guilt for the children's deaths, Ms Folbigg explained that she felt responsible for their deaths as their mother, but had no direct part in the killing of her children. She stated:

> "I constantly blame myself for everything, including the responsibility. I took the onus of responsibility because I was their mother, and because being their mother was very important to me, and the idea of being a mother was very important to me. The idea of family was important to me. The constant need of me wanting a family was important to me."

She stated she only used the word "guilt" to describe the responsibility she took on herself. In my submission, that sense of responsibility finds repeated expression in Ms Folbigg's diary entries. For instance, in her entry of 9 November 1997, she writes of Craig having a morbid fear about Laura. She wrote, "Well, I know there's nothing wrong with her. Nothing out of ordinary anyway. Because it was me not them."

When Ms Folbigg gave evidence in the 2019 Inquiry about that line, she said it was “totally” her blaming herself. Ms Folbigg explained that she “constantly” blamed herself and took responsibility and onus of responsibility for the deaths of Caleb, Patrick and Sarah, as a reflection of her “inability and failure as a mother.” When pressed in cross-examination on the question of whether she knew there was “nothing wrong” with Laura, because "it was me, not them", Ms Folbigg gave evidence that she was expressing “two separate thoughts”:

> "One is where I'm noting there is nothing wrong with my child at that particular time; she's very healthy. I had hoped for a future with her. The second thought, I'm always blaming myself for everything, so if anything was to go wrong I would instantly blame myself anyway, because I was their mother."

Your Honour, in our submission these various diary and journal entries about anger and frustration, about losing control, and of Ms Folbigg expressing her sense of responsibility for her children having died, when read with an eye to context, having regard to her explanations as well as the expert evidence I have already outlined, should not be treated as admissions of guilt in the sense of Ms Folbigg having actually killed Caleb, Patrick or Sarah, and that has obvious implications for the position as to Laura.

Your Honour, there are five further entries that I wish to address squarely. The first is the entry of 14 October 1996, in which Ms Folbigg wrote:

> "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 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. I now just let things happen and glow 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. Painting the house is going along fine."

Your Honour, I note this entry was excluded from evidence at trial. In her interview in 1999 with police, Ms Folbigg explained that she felt that fate and the man upstairs had determined she would not get the fourth chance, because "Maybe I just thought there was supposed to be our limit. Maybe I thought fate had, you know, that was it."

In relation to the "and rightly so I suppose", she said she felt she had not been

diligent enough in caring for her previous children. She explained that her "mistakes and terrible thinking" were the "frustrations she might have felt with Pat, and the occasional battle of wills that she would have had with Sarah." She confirmed she never hated her children.

In relation to "Obviously I'm my father's daughter", Ms Folbigg told police she felt her "natural father" was "a total big loser", which caused her to have a "passing thought" that she too may be "a loser of some kind", who was "destined to have some sort of tragic life."

In relation to the line "I think losing my temper stage and being frustrated with everything that's passed", Ms Folbigg referred again to the frustration levels she used to feel "every now and then." In the 2019 Inquiry, Ms Folbigg explained that she believed her father's actions ruined her life, because that was a turning point for the worse in her life, and she thought that perhaps she was paying the price for the sins of her father, as he had killed her mother.

In that entry, Ms Folbigg explained she had three thoughts. The first was that she might have been ready to continue her family; her second was about her father and how her life never went right; and the third regarding her temper and frustration, about her lamenting and desperately trying to seek answers about taking control.

It was put to Ms Folbigg that she was similar to her father; she would get angry and kill another person. Ms Folbigg reiterated that thoughts of her father rarely entered her head, and this entry was one of the few times that he did, and she reflected upon it. It was then suggested to her that she was reflecting on inheriting this sin of killing when she was angry. Ms Folbigg stated she did not think people could inherit being able to kill people.

Ms Folbigg gave evidence that she believed in nature, fate, karma and destiny, and it appeared to her that she was not deserving of the chance to have another child because she had lost three children.

In relation to correcting all of her "mistakes and terrible thinking", it was suggested that Ms Folbigg there was referring to losing her temper and smothering her children. Ms Folbigg rejected that proposition and explained that her terrible thinking was not an action, but she conceded it did mean getting frustrated and losing her temper. In relation to the final part of the entry, Ms Folbigg's evidence was that if she had another child she would change her approach and attitude.

In our submission, this entry of 14 October 1996, read in context, having regard to Ms Folbigg's evidence, as well as to the expert evidence I have already outlined, ought not be regarded by your Honour as an expression of guilt, in the sense of having actually killed Caleb, Patrick or Sarah Folbigg, and that has obvious implications in respect of Laura.

I note the time, your Honour.

JUDICIAL OFFICER: Ms Callan, when you say it ought not be regarded as an expression of guilt, are you putting to me that it should not be regarded as such because of the circumstances in which it was written, and the context in which it was written? Or rather because it was affected by the psychological or psychiatric conditions identified by the experts?

CALLAN: Your Honour, it's all of those things. To the extent that she --

JUDICIAL OFFICER: You say you don't bifurcate.

CALLAN: I'm not bifurcating, but I'm saying that those separately but cumulatively, we ultimately say colour in a material way the expressions that are found in these entries.

JUDICIAL OFFICER: Yes, thanks. We'll adjourn til 2 o'clock.

LUNCHEON ADJOURNMENT

JUDICIAL OFFICER: Yes, Ms Callan.

CALLAN: Your Honour, I next address an entry of 25 October 1997 in which Ms Folbigg was speaking of Laura - who, by that stage, had been born – and comparing her to Sarah. She, amongst other things, records in that entry, "I think I'm more patient with Laura. I take the time to figure what is wrong now instead of just snapping my cog." She goes on to say, "Sarah was boyish looking. Laura has definite feminine features. They are chalk and cheese. And, truthfully, just as well. Wouldn't have handled another one like Sarah. She saved her life by being different."

In cross-examination during the 2019 Inquiry, in relation to a line which appears there - "I am not sad that Laura is here and she isn't" - Ms Folbigg explained she may not have conceived Laura had Sarah survived. She gave evidence that the line, "I think I'm more patient with Laura," reflected her "always thinking I'd done something wrong" and that "snapping her cog" could've referred to “showing slight frustration.” In relation to the line, "She saved her life by being different," Ms Folbigg explained it was “mystical representation” and her “reflecting” on the belief she held at the time “in karma, and the children talking to each other and God.” She went on to say:

> "At the time when writing these, because I was searching for questions so hard and always wanting to know why I had a belief that fate, karma, God, a spiritual thing going on, that there was another reason as to why all this was happening. And when I went to a clairvoyant, which was mentioned in the last 24 hours, that clairvoyant gave me the peace that my children and Sarah were happy, and it was a belief that was just ingrained in me, that there was other things going on beyond my control and all the answers that I was seeking all the time. 'She saved her life by being different' is my hope and dream that Laura being different would have saved her life, but in the end it didn't."

Ms Folbigg provides similar explanations for subsequent diary entries. For instance, on 15 December 1997, when she wrote of Laura, "They've told her, 'Don't be a bad or sickly kid. Mum may, you know, crack it.' They've warned her – good." In cross-examination, Ms Folbigg explains the words "crack it" refer to not coping, not handling or being upset, and the words "They've warned her" refer to her belief that her children could talk to one another. She denies that entry conveyed that Caleb, Patrick and Sarah had warned Laura, if she was loud, Ms Folbigg would crack it and kill her.

In an entry to similar effect on 31 December 1997, Ms Folbigg wrote of Laura, "She's a fairly good-natured baby, thank goodness. It's saved her from the fate of her siblings. I think she was warned." In the 2019 Inquiry, Ms Folbigg gave evidence that the entry was explicable by reference to her belief that "there is a spiritual or something else going on, fate, karma, destiny" and the possibility she entertained from time to time that her children were able to communicate with each other from the afterlife. She went on to give the following evidence:

> "A. I believed and felt that my moods at any given time affected my children. Yes, I believed, as far out there as it is, that whatever bad mood I might have been in was a negative thing I was putting onto my children, and I didn't like it.
>
> Q. And because you're in a bad mood, in some way that led to their death but you can't really say how or why?
> A. That's right. I was always searching for why. It never stops.
>
> Q. I suggest you know why, and that is because you smothered them?
> A. No."

Your Honour, next I want to address an entry of 28 January 1998 in which Ms Folbigg wrote:

> "Very depressed with myself, angry and upset. I've done it. I've lost it with her. 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 and left her. I restrained enough to put her on the floor and walk away, went to my room and left her to cry. Was gone probably only five mins, but it seemed like a lifetime. I feel like the worst mother on this earth, scared that she'll leave me now, like Sarah did. I know I was short-tempered and cruel sometimes to her, and she left with a bit of help. I didn'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. 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, whingey sound drives me up the wall. I truly can't wait until she's old enough to tell me what she wants."

Your Honour, Ms Folbigg gave evidence that she yelled at Laura occasionally,

and only in circumstances where Laura was "Frustrating to the point of me not being able to figure out how to help her." She denied that she ever acted in anger towards her other children, explaining that at the time she wrote the entry she never differentiated between frustration and anger.

As to the line "I nearly purposely dropped her on the floor", Ms Folbigg gave the following evidence: "This is hard to explain. If you're that frustrated with a child and you can't figure out why they won't stop crying, you've got them in your arms, you go to put them on the floor. In my belief, in my mind, putting them on the floor is almost dropping her on the floor."

In relation to the description "short-tempered and cruel", which you might recall Ms Folbigg used to describe herself, in how she treated Laura; Ms Folbigg gave the following evidence.

> "Cruelty, the word cruelty, I need to also clarify that to me that's like if you leave your child to cry for too long. I figured that and deemed that as being cruel. I'm not talking cruel as in a cruel physical action or anything. Short-tempered, yes. It goes with being frustrated. If you're frustrated you get a little short-tempered."

As to the expression of belief that her cruelty and short temper caused Sarah's death, Ms Folbigg explained that at that time her thoughts were “dark, and they weren't very pleasant.” As to the words "a bit of help", she explained, "referring to God, a higher power, or another decision, or even my children, my child Sarah deciding she didn't want to stay, was the bit of help, not me." She denied the entry constituted an admission of guilt in relation to Sarah's death, explaining "It's me admitting how badly responsible I felt, and I always feel that way."

As to the line "It didn't happen, it can't happen again", Ms Folbigg gave evidence that "I don't want anything like that to happen again. I was ashamed of myself, as in being a failure as a mother, and not thinking I was good enough at this job." She denied she felt ashamed of herself because she knew she had come close to killing Laura, which is what was put to her.

In our submission, these entries, including those particular ones that I've just referenced, of 25 October, 31 December and 28 January, when they're read, as I've said, in context, having regard to Ms Folbigg's evidence as well as the expert evidence of the psychologists and psychiatrist, in our submission your Honour ought not regard these entries as expressions of guilt in the sense of Ms Folbigg having actually killed or contemplated killing any of her children. Indeed, in my submission, with the benefit of the insight that has come with the evidence of the psychiatrist and the psychologists, the expressions in these diary entries are almost entirely explicable by reference to the normative experiences of parenting, but also the particular expressions of self-blame and guilt which are so common for parents who experience sudden infant death.

In our submission, it is open to conclude that these entries do involve

Ms Folbigg taking responsibility for the deaths of her children, but to use the language of Dr Kerri Eagle:

> "The cognitions and themes demonstrated by Ms Folbigg in her diaries including guilt, shame and responsibility for her children's deaths, and feeling like a terrible and cruel mother, are consistent with the expected and documented thought processes of a person experiencing maternal grief and depressive symptoms."

Your Honour, in light of that evidence from Dr Eagle, and evidence of like effect from the other experts, which was unchallenged, in our submission these statements in Ms Folbigg's journal and diary entries are not reliable as admissions of guilt by Ms Folbigg as to having actually physically killed her children.

JUDICIAL OFFICER: Would I have to be satisfied beyond reasonable doubt that these entries, taken in context, constituted an admission of guilt?

CALLAN: Not beyond reasonable doubt, your Honour, because they form part of the circumstantial case.

JUDICIAL OFFICER: So you say I'd have to be comfortably satisfied only that they--

CALLAN: Yes, your Honour.

JUDICIAL OFFICER: To put it in the negative, before we could use them as admissions, if I was going to do so, I'd have to be comfortably satisfied that they were.

CALLAN: Yes, your Honour. The warnings, for instance, that a jury are given in the nature of an *Edwards* direction; the caution that's expressed to a jury would, in equivalent terms, apply.

Your Honour, can I deal then with tendency reasoning. The tendency contended for by the Crown at trial was that Ms Folbigg had a “tendency to become stressed and lose her temper and control with each of her children, and then to asphyxiate them.” The Crown accepted that before evidence could be used for tendency reasoning, the jury would need to be satisfied beyond reasonable doubt that in relation to any one of the children, the accused had caused his or her ALTE or death. Then, so the Crown said, the jury could use that conclusion and the remaining circumstantial or tendency evidence to assist in deciding whether Ms Folbigg was responsible for the other deaths or ALTE.

Your Honour's already made the point about the position with respect to Caleb's death and the jury's verdict in relation to that. Otherwise, your Honour, I've addressed on the evidence which gives rise to reasonably possible natural causes of death in respect of the other children.

In terms of the evidence the Crown relied upon, of the suggested tendency by Ms Folbigg to become stressed and lose her temper and control with each of her children, the Crown relied on two primary sources of evidence. The first was evidence of Craig Folbigg that detailed, in relation to each of Patrick, Sarah and Laura, instances in which Ms Folbigg had lost her temper, become frustrated or growled at her children. And the second source of evidence relied upon by the Crown was the contents of diary and journal entries written by Ms Folbigg. In our submission, your Honour --

JUDICIAL OFFICER: Just dealing with the first, the fact that she might have become cross with her children from time to time hardly shows a tendency to asphyxiate them.

CALLAN: Correct, your Honour. In our submission, your Honour would take into account two particular considerations in assessing the probative force of the diaries as evidence of that tendency. The first is the extent to which the emotions expressed in Ms Folbigg's diaries are normative of mothers with infant children.

JUDICIAL OFFICER: That's also fathers from time to time.

CALLAN: Yes, fathers too. Second, your Honour, it is relevant to consider the balance of the evidence relating to Ms Folbigg's behaviour towards her children. And your Honour, that picks up on your Honour's question. The evidence establishes the diaries were used by Ms Folbigg primarily to express negative emotions and so, for instance, it would be fallacious to rely only on the diaries as evidencing the full spectrum of Ms Folbigg's feelings towards her children. Those diaries were not used by her in that way. Furthermore, the literature available to the Inquiry suggests that caution should be taken in the idealisation of motherhood and mothers as exclusive caretakers who are universally present, nurturing and kind not absent, selfish and aggressive. Your Honour might recall that Dr Dhansay gave evidence in particular about that concept of matrescence, the transition to motherhood and the suggestion that most mothers experience guilt, frustration and anger as well as fear during the early years of a child's life.

Your Honour, as to the second consideration, there was a volume of evidence at trial which has been supplemented before this Inquiry that Ms Folbigg was observed to be a loving and caring mother towards her children. This included evidence at trial from Mr Craig Folbigg, as well as various other people. Craig Folbigg's sister, neighbours, friends, and a childcare worker from the gym that Ms Folbigg attended. There was also the evidence of the general practitioner who was consulted with Patrick and Sarah Folbigg, as well as other friends of the Folbiggs. Critically, we observe there is an absence of evidence that any person who gave evidence about Ms Folbigg having expressed anger and frustration towards her children harboured concerns as to the welfare of any of those four children during their lives. In our submission, your Honour would be cautious in reasoning that because Ms Folbigg experienced and expressed anger and frustration towards her children on some occasions that this translates into a tendency to become angry towards her children and harm

them, including by way of asphyxiation. The evidence in the Inquiry suggest that anger and frustration are normative experiences of parenting young children. As your Honour has pointed out, both applicable to fathers and mothers, and further the weight of the evidence tends to suggest that insofar as it was observed, Ms Folbigg was a loving and caring mother towards her children.

The submissions on behalf of Mr Folbigg recite two instances in which Ms Folbigg demonstrated some anger or frustration towards her children including the event which is referred to in that diary entry of 28 January 1998, that I have referenced in which Ms Folbigg records that she nearly purposefully dropped Laura onto the floor. Your Honour might recall using this as an example of normative behaviour. Dr Dhansay gave oral evidence that new mothers are given advice to walk away from a baby or put the baby in a room for five minutes alone when the baby is crying and the mother is experiencing negative thoughts or losing their temper. Dr Dhansay, who has considerable expertise in working with new mothers in the adjustment to motherhood stated:

> "I would say the majority of mothers have some negative thought or thoughts about their baby and how they might lose their temper because they are just so exhausted, they haven't slept and the baby, as the babies do, they just keep crying."

Your Honour, in our submission you would accept this unchallenged evidence of Dr Dhansay as to what is normative behaviour for parents, particularly mothers, of infant children. In our submission, your Honour would be cautious to reason that an expression on occasion of frustration because a child was in that instance not eating is probative evidence of a tendency on the part of Ms Folbigg to lose her temper and control with each of her children and then suffocate them. Experiences of frustration or anger with children as the evidence suggests are not aberrant or unusual behaviours in mothers of infant children.

JUDICIAL OFFICER: Mr Folbigg said on a number of occasions in his evidence that Ms Folbigg was a good mother, and that seems to have been the general impression of everybody. Even the best of mothers or parents get irritated by their children from time to time.

CALLAN: Yes. Your Honour, finally and for completeness I note that it's submitted on behalf of Mr Folbigg that overall Ms Folbigg's journal and diary entries reflect an unnatural lack of empathy or love or affection of a normal mother for her children. In that respect all I do is reference what I've already point to, which was the use to which Ms Folbigg put her diaries, that is, to record negative emotions. She indicated that in a letter to Tracy Chapman which was written in May 2005 where she spoke of the diaries being used to dump every negative emotion and that's consistent with what she said in her 1999 interview with police; that she used to write in the diaries as basically they were a sort of a vent or release. In our submission, your Honour would not draw any adverse inference against Ms Folbigg by reason by what is said to be an absence of expression of affectionate feeling towards the children in

her diaries and, as your Honour has observed, there is a body of evidence from numerous witnesses including Mr Craig Folbigg that Ms Folbigg was observed to be a loving and caring mother of each of her four children.

I will come to these remarks by way of conclusion. Your Honour, as has been recognised from the outset, Ms Folbigg's convictions have always been based on a circumstantial case. It is, therefore, necessary to consider and weigh all of the evidence in considering whether there is a hypothesis consistent with innocence reasonably open on the evidence. The circumstantial case should not be dissected in a piecemeal fashion.

In our submission, having regard to the whole of the evidence before this Inquiry, there is a reasonable doubt as to Ms Folbigg's guilt. This evidence as a whole includes the specific possibility that the CALM2-G114R variant was the cause of the deaths of Sarah and Laura Folbigg, the evidence as to myocarditis being a reasonably possible cause of Laura Folbigg's cause, and the neurologic evidence with respect to Patrick's ALTE and death. Our submission also takes account of the psychiatric and psychological evidence to which I've just referred relating to the behaviours and diary entries of Ms Folbigg which place those entries within the ordinary range of behaviours experienced during the adjustment to motherhood and by reason of bereavement. In our submission, the evidence also tends to cast doubt on the possibility that Ms Folbigg could have smothered all four of her children, and particularly Laura, without leaving any physical signs in any of the cases.

It is in all of these circumstances, my submission is that the evidence at trial, in light of the further evidence received in the 2019 Inquiry and the additional further new material evidence received in this Inquiry render it open to your Honour to conclude that there is a reasonable doubt as to Ms Folbigg's guilt. That concludes the substantive submissions I propose to make orally.

The only remaining question is what course should be taken upon conclusion of this Inquiry. Pursuant to s 82(1)(a) of the *Crimes (Appeal and Review) Act*, your Honour is required to cause a report on the results of the Inquiry incorporating a transcript of the hearings to the Governor. In our submission, if your Honour accepts the submissions and the contentions that we have advanced, the appropriate course is for you to report to the Governor to that effect in accordance with s 82(1)(a) and, in so doing, report that there is, in relation to each of the five offences as to which Ms Folbigg was convicted, a reasonable doubt as to her guilt, and that there is a proper basis upon which the Governor could exercise her pardoning power to grant a free pardon to Ms Folbigg in relation to each of the convictions.

If a free pardon is granted by the Governor consistently with any such recommendation, Ms Folbigg can apply to the Court of Criminal Appeal for her conviction to be quashed, pursuant to s 84(3) of the *Crimes (Appeal and Review) Act*. I do note, though, that Ms Folbigg seeks orders that your Honour exercise the discretion under s 82(2)(a) of the *Crimes (Appeal and Review) Act* to refer the matter to the Court of Criminal Appeal for consideration of the question of whether the conviction should be quashed. That course is open to

your Honour and, having regard to Ms Folbigg's position - that is, it is her preference that the matter be referred simultaneously to both the Governor and the Court of Criminal Appeal - we submit that is a course your Honour would take if ultimately persuaded that there is reasonable doubt as to Ms Folbigg's guilt.

JUDICIAL OFFICER: There's nothing to prevent the Governor dealing with the pardon aspect of it before the Court of Criminal Appeal reaches its decision, is there?

CALLAN: Not at all. Indeed, your Honour, the processes inherently are different.

JUDICIAL OFFICER: Thank you, Ms Callan. Yes, Mr Hastings.

HASTINGS: Thank you Mr Commissioner. As I've mentioned in my submissions, it is not my purpose here today to pursue a particular line of guilt or innocence. Mr Folbigg has a neutral approach to the outcome of the Inquiry. What his concern is, is to ensure that the process by which the outcome is reached is comprehensive and objective. Against that background, there are a number of matters which we have raised, some of which have been dealt with today but, until then, seemed to require attention but had not received it. In the context of the causes of death and the hypothesis that the causes were natural, I drew attention to the fact that the matter had been the subject of consideration by the Court of Appeal only two years ago in relation to an evidentiary framework which was, in substance, no different than that which continues to exist.

JUDICIAL OFFICER: That was, of course, in the context of an administrative law challenge to Mr Blanch's decision; correct?

HASTINGS: Report, yes.

JUDICIAL OFFICER: It was, in no way, a merits appeal?

HASTINGS: No, nor is this.

JUDICIAL OFFICER: Mr Hastings, it's necessary for me to consider the matter on the merits. It was necessary for the Court of Appeal to consider whether there was an error in the process of reasoning by which Mr Blanch came to his conclusion. They're very different matters, as you know.

HASTINGS: Except that the primary step for Mr Blanch was to do precisely what you should be doing now, and his approach was then reviewed by the Court of Appeal which, in my submission, would seem to make it very relevant to observe what the Court of Appeal thought was the appropriate approach to analysing the facts.

JUDICIAL OFFICER: Can you take me to where you say the Court of Appeal laid down the appropriate approach and how Counsel Assisting's submission

has deviated from that approach? Perhaps it might be helpful, if you're referring to it, if you could let me have a copy of the judgment.

HASTINGS: It's in evidence, your Honour.

JUDICIAL OFFICER: I'm told it's not.

HASTINGS: I'm not surprised. I thought the transcript of the trial, which is in evidence--

JUDICIAL OFFICER: The transcript of the trial's certainly in evidence, but you're talking, are you not - let me make it quite clear--

HASTINGS: I'm sorry, about the Court of Appeal. Yes, quite. I gave the reference in my submissions. 2021--

JUDICIAL OFFICER: Just bear with me a moment while I get it.

HASTINGS: I set out sections in the submissions.

JUDICIAL OFFICER: In your submissions?

HASTINGS: Yes.

JUDICIAL OFFICER: So they're the paragraphs on which you rely, are they?

HASTINGS: Yes.

JUDICIAL OFFICER: Why don’t you go on. Can you tell me--

HASTINGS: Your Honour, it's of concern, and if these matters aren't even available, this is a consideration of a matter which has a substantial history.

JUDICIAL OFFICER: What matters aren't available?

HASTINGS: The judgment. One would have thought in the light of the history of this matter, where these issues precisely have been canvassed two years ago--

JUDICIAL OFFICER: What do you mean the judgments--

HASTINGS: --by a superior Court--

JUDICIAL OFFICER: Excuse me, Mr Hastings. What do you mean that the judgment is not available?

HASTINGS: I gather your Honour doesn't have it.

JUDICIAL OFFICER: I don't have it on the bench in front of me. I don't have it on the bench in front of me because I wasn't aware that you were going to

refer to it. It's been already referred to by Senior Counsel Assisting. I don't really see what your concern is in relation to that. My concern is that I have the whole of the judgment so I can deal with any submission you want to make in relation to it. Now, what submission do you want to make?

HASTINGS: Your Honour, the submission I want to make is that the Court of Appeal, a superior Court, looked at the factual scenario which is the same as this, and laid down some principles by which the issues need to be determined.

JUDICIAL OFFICER: Where do they lay down these principles?

HASTINGS: In paragraph 84, followed by paragraph 86. It's a matter of concern to Mr Folbigg that until today at least these matters have not been the subject of reference. In paragraph 84 the Full Bench said, "Of more importance to the outcome of the Inquiry was the discussion of genetic evidence in Chapter Seven. Insofar 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."

JUDICIAL OFFICER: Do you say that the Court of Appeal adopted “Meadow's Law” as the guiding principle?

HASTINGS: I'm sure the Court of Appeal wouldn't your Honour, given it's been expressly excluded.

JUDICIAL OFFICER: That passage, taken in isolation, may well tend to suggest that their Honours did so. What do you say the Court of Appeal laid down as the relevant principle which I'm obliged to follow in determining the outcome of this Inquiry?

HASTINGS: It requires a real possibility of a common cause.

JUDICIAL OFFICER: Why does it require a common cause?

HASTINGS: I'm just quoting the Court of Appeal, your Honour. I have an intellect --

JUDICIAL OFFICER: No, I'm asking you to show me the principles. You say that I could not find, would have reasonable doubt, unless I could establish a common cause in respect of each of these children.

HASTINGS: I'm saying what the Court of Appeal said. I’m just an ordinary mortal.

JUDICIAL OFFICER: Is that your submission, Mr Hastings?

HASTINGS: I’m saying, as a statement of authority from the superior appellate Court –

JUDICIAL OFFICER: It's a very simple question. Do you say to me that the New South Wales Court of Appeal has laid down that for the purpose of this Inquiry I would be unable to have a reasonable doubt unless I could establish the likelihood of a common cause?

HASTINGS: Yes, but there's more to it than that, your Honour, if I could go on–-

JUDICIAL OFFICER: Do you say that?

HASTINGS: There's more to it than that.

JUDICIAL OFFICER: Do you say that, for a start? Please, can you do me the courtesy of answering my questions.

HASTINGS: I say that is what the Court of Appeal says.

JUDICIAL OFFICER: That's your proposition.

HASTINGS: Yes, and I'd be concerned if your Honour took a different view than that set by a superior Court. In any event, I'm sure that can be explained to the Governor.

The other paragraph, your Honour, is paragraph 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."

JUDICIAL OFFICER: Let's just look at these important steps for a moment. You would agree, I assume, that a great deal of the evidence before this Inquiry in relation to the genetic variant in Sarah and Laura was not before Mr Blanch.

HASTINGS: Yes.

JUDICIAL OFFICER: You would also agree that there was a separate explanation for the cause of death of Patrick.

HASTINGS: Yes.

JUDICIAL OFFICER: Therefore, does it not follow that there was at least a possible explanation in relation to the deaths in relation to at least three of the children?

HASTINGS: No, your Honour, because in principle--

JUDICIAL OFFICER: Why?

HASTINGS: --that was the scenario contemplated by the Court of Appeal, and covered by the--

JUDICIAL OFFICER: No, no, I'm asking in this case. I'm probably not making myself clear. Do you accept that in this case a considerable body of expert evidence to a varying degree has said that the existence of the CALM2 variant in Sarah and Laura was a possibly a cause of their deaths?

HASTINGS: Yes.

JUDICIAL OFFICER: So looking at what the Court of Appeal says, that means that at least in the case of those two, there was a possible explanation as to more than one death occurred in one family. It's just a matter of mathematics; one and one makes two.

HASTINGS: Yes, but we're talking about four children, not two.

JUDICIAL OFFICER: Now, let's go to the third child, Patrick. There's a possible explanation for his death given by two fairly eminent paediatricians, Professor Ryan and Professor Fleming. Do you agree with that?

HASTINGS: Yes.

JUDICIAL OFFICER: So there's a possible explanation for the deaths of three of the four children.

HASTINGS: Yes.

JUDICIAL OFFICER: Do you agree that in those circumstances that in relation to at least those three children one has the important step in demonstrating reasonable doubt that the Court of Appeal refers to?

HASTINGS: I'm sorry, I missed the last bit.

JUDICIAL OFFICER: Do you accept that in relation to at least those three children there is the important step referred to by the Court of Appeal in para 86 of the joint judgment has been taken or achieved?

HASTINGS: No.

JUDICIAL OFFICER: Why not?

HASTINGS: Because they say although the discovery of a plausible death in any of the children would in theory would reduce the improbability unless the causal hypothesis for a natural cause in one case was strong it would have limited effect. All the submissions of Counsel Assisting are to the effect there's a reasonable possibility in relation to these cases, not that the case is strong.

JUDICIAL OFFICER: Do you suggest that in dealing with this matter I have to be satisfied that there is a strong likelihood that particular genetic variant or other disease caused the deaths?

HASTINGS: No, I'm using the words of--

JUDICIAL OFFICER: No, I'm asking you the question, Mr Hastings.

HASTINGS: I'm not saying anything.

JUDICIAL OFFICER: Please answer.

HASTINGS: I'm just quoting the Court of Appeal and recommending that--

JUDICIAL OFFICER: I'm asking what your proposition is.

HASTINGS: My proposition is that you should apply the principles enunciated by the Court of Appeal, a superior Court who dealt with facts on all squares with this.

JUDICIAL OFFICER: Mr Hastings, I know the Court of Appeal is a superior Court. I've been conscious of that for some time. What I want to know from you is what are the propositions which you derive from paras 84 to 86?

HASTINGS: That there is not a common cause suggested or demonstrated. In the absence of that there's the “vanishingly small” prospect of four deaths occurring in the one family for unrelated causes. That's step one. One might ask, I suppose, what "vanishingly small" means but it's pretty obvious that the Court had in mind there was almost negligible prospect of four deaths occurring in one family without explanation. That's really it. I know we can't apply “Meadow's Law” and there's a disinclination to engage in statistical analyses, but if one applied Bayes Theorem, this happens in the outside world, one would calculate the odds of this occurring as about one in a thousand, multiplied by one in a thousand, multiplied by one in a thousand, which would be one in a billion according to the general principles upon which the community operates.

JUDICIAL OFFICER: I'm familiar with Bayes Theorem. Rather than applying Bayes Theorem I would prefer to apply the principle governing the ascertainment of guilt in criminal cases. Do you accept firstly and as a matter of general principle that in a criminal case - leave aside the Inquiry for the moment - the onus is on the prosecution to prove the case beyond a

reasonable doubt?

HASTINGS: Yes.

JUDICIAL OFFICER: Do you accept this is a circumstantial case?

HASTINGS: Yes.

JUDICIAL OFFICER: Do you accept that in a circumstantial case--

HASTINGS: Well no, with respect, no.

JUDICIAL OFFICER: You don't accept that?

HASTINGS: No, the diaries--

JUDICIAL OFFICER: What's the direct evidence--

HASTINGS: The diaries are admissions.

JUDICIAL OFFICER: That doesn't alter the fact it's a circumstantial case, Mr Hastings. There's no direct evidence that Ms Folbigg killed these children.

HASTINGS: Yes, I accept that.

JUDICIAL OFFICER: Yes, it's a circumstantial case. Do you accept that in a circumstantial case the prosecution has to exclude all reasonable hypothesis inconsistent with guilty?

HASTINGS: Yes.

JUDICIAL OFFICER: In doing so, it will be necessary to look, having regard to the coincidence evidence, at each child and see if there is an alternative hypothesis, a reasonably possibly alternative hypothesis inconsistent with guilt.

HASTINGS: For the deaths of four children.

JUDICIAL OFFICER: For each child first.

HASTINGS: No, for four children. That's the facts. There were four children who died.

JUDICIAL OFFICER: Mr Hastings, if there was a reasonable possibility that there was an alternative hypothesis in respect of one child, is it not necessary for me to look at it, taking into account whether you call it coincidence evidence or otherwise, the fact that three other children died.

HASTINGS: Yes.

JUDICIAL OFFICER: And, if I come to the view that notwithstanding the fact

that three other children had died, the alternative hypothesis remained, then that it would follow I would have reasonable doubt. Do you agree with that?

HASTINGS: Your Honour, I wouldn't accept that. The fundamental premise is the case was that there were four children who died in one family--

JUDICIAL OFFICER: I know you keep saying that.

HASTINGS: -of unexplained causes.

JUDICIAL OFFICER: I know you keep saying that.

HASTINGS: The case isn't to be compartmentalised.

JUDICIAL OFFICER: When you say that four children died of unexplained causes, there's now been - whether I accept it or not is another question, even as a reasonable possibility - that there now have been possibilities hypothesised as causes of the deaths of at least three of the children.

HASTINGS: Yes.

JUDICIAL OFFICER: Do you say I don't take that into account? I simply ignore it because four children died?

HASTINGS: What I say is you should follow the Court of Appeal--

JUDICIAL OFFICER: No, answer my question, please, if you would.

HASTINGS: I'm not here to agitate for a particular outcome.

JUDICIAL OFFICER: If the best answer you can give is that I should follow the Court of Appeal I will accept that as your answer. I don't want to take up too much time over this.

HASTINGS: Your Honour, I just want to emphasise I'm not here to achieve a particular outcome. My main goal is to draw attention to matters which exist in the outside world and which don't seem to have been taken into account.

JUDICIAL OFFICER: What do you mean by "the outside world"?

HASTINGS: Outside of this vacuum in which the hearing is being conducted. There are aspects of it which just haven't been mentioned and require attention.

JUDICIAL OFFICER: If there are aspects which haven't been mentioned which required attention, it would be very helpful to me to know what they are so I can give them attention and so Counsel Assisting can deal with them.

HASTINGS: That's my point and what I'm trying to do, your Honour.

JUDICIAL OFFICER: Do it, then.

HASTINGS: Point one is there are statements in the Court of Appeal directly applicable to this matter and they have been ignored.

JUDICIAL OFFICER: In fairness to Counsel Assisting, she referred to them directly this morning. You say what she said about them is incorrect; is that right?

HASTINGS: Yes, because she didn't--

JUDICIAL OFFICER: Why do you say that what she said was incorrect?

HASTINGS: Didn't follow the terminology used in paras 84--

JUDICIAL OFFICER: Why do you say what Counsel Assisting the Commission said was incorrect?

HASTINGS: Because, first of all, there's an absence of a suggestion of a common cause which was requirement one of the Court of Appeal, or, in the absence of that, the possibility of one death according to a strong case, which hasn't been established either.

JUDICIAL OFFICER: Is there any other matters that weren't taken into account that have led this Inquiry to be conducted in a vacuum?

HASTINGS: Not out of the Court of Appeal's judgment.

JUDICIAL OFFICER: That's the only one?

HASTINGS: Yes. I will come back to it within a different context. Your Honour, the other point I make about the hypotheses concerning causes of natural death is to assess their credibility by reference to the diaries. Leaving aside whether the diaries amount to admissions or anything else, the question that needs to be asked, in my submission, is whether there is a single word in the diary which would be compatible with the hypotheses of a child dying of possibly a soft larynx, another one dying by an epileptic seizure and two dying by a heart condition. Is there one single word in the diaries consistent with those events? All I'm asking is that someone undertake the exercise to find somewhere in 450 entries a single reference to any sort of death of that category.

JUDICIAL OFFICER: Why would there be, in a lay person's diary? I don't quite understand the submission.

HASTINGS: Because presumably the children died with symptoms of their conditions, and is there something in the diary that reflects the existence of a symptom which in any way is consistent with the causes of death which have been hypothesised? In my submission, there's not a single word. But it's just a matter that needs to be addressed. If this is a serious proposition being

advanced, does it fit the diaries? The answer is, in my submission, probably not.

JUDICIAL OFFICER: You say that for the genetic evidence - to take one example - which was discovered in 2020 to be considered as a reasonable possibility, it would have to have been mentioned in diaries which were written in 1999?

HASTINGS: No, what I say is there should be a check against the diary entries which were, in large part, statements of fact.

JUDICIAL OFFICER: To check to see if it is there? I understand that. What else?

HASTINGS: And look for any statement of fact which in any way manifested a symptom of one of the four causes of death.

JUDICIAL OFFICER: I understand.

HASTINGS: It's not for me to answer it but I suggest that exercise ought to be undertaken. Similarly, your Honour, moving on then to the diaries more broadly, as to whether they're admissions of fact or not, I make a number of points which, in my submission, have been subject to little or no attention. Firstly, can I just say in relation to much of the psychiatric theorisation about the prospect of Ms Folbigg rationalising her conduct, in large part, the entries reflect statements of contemporaneous fact like, "I lost it. I lost it. I nearly dropped her on the floor." These are not retrospective accounts of days gone by.

JUDICIAL OFFICER: They were retrospective, weren't they, because they were written sometime after the deaths of the children?

HASTINGS: Yes, but they're recording the events of the day. "I lost it. I lost it. I nearly dropped her on the floor." These are not rationalisations of events of ten years ago. They're expressions of her current state of mind and her physical inclinations. So in my submission, that's one factor that needs to be taken into account in the light of the suggestion that these are expressions of guilt; they are more statements of fact. And then, in broad terms, there are a number of other characteristics of the diary entries which have received scant attention. The fact that she never expressed any grief has been recognised and dealt with. The fact that she showed absolutely no affection for the children until Laura was nearly six months old, I think and she grudgingly conceded that she was starting to feel warmth —

JUDICIAL OFFICER: I didn’t quite catch that.

HASTINGS: I’m sorry?

JUDICIAL OFFICER: I didn’t quite hear what you said, Mr Hastings, I’m so sorry.

HASTINGS: My second point, there was no grief, there was no affection, until Laura was nearly six months old and she suddenly said “I’m starting to feel warmth”, as if by surprise, towards the children. The relevance of that is that it makes sense in the hypothesis of her killing the children that she'd be more inclined to kill children for whom she had no affection than those to whom she had a close attachment. And in that sense, there's absolutely no indication from anywhere in her diaries that she had any attachment to the first three children, at least, and then only grudgingly to Laura. The other point I make is that the entries in the diary are significant because at no point does she show any interest or curiosity in relation to the causes of deaths of the children. That strikes me as extraordinary, given the trouble that has been gone to to come up with hypotheses as to why the children died. One would think that a mother, particularly when she was expecting another child or endeavouring to become pregnant for the fourth time with Laura, would have an insatiable curiosity to know why the other children had died before she committed to having a fourth. With respect, there's just nothing in the diaries which in any way reflects any interest by her in the causes of death or any curiosity.

JUDICIAL OFFICER: The alternative hypothesis which has been put to me here is having regard to the psychological - firstly, having regard to the nature of the diaries to express negative emotions; and secondly, having regard to the psychiatric and psychological evidence, that she would have had feelings of guilt and depression irrespective of whether she had killed the children. That becomes explicable, doesn't it? I accept that I have to take into account the context in which the diary entries are made when considering their effect, but there has been alternative explanation given by the psychiatric witnesses as to why these so-called deficiencies to which you refer exist. Am I entitled to accept those explanations?

HASTINGS: The matter I'm referring to is different. I'm not talking about her expressions of guilt or whatever. What I'm saying is that there's a complete absence of any curiosity--

JUDICIAL OFFICER: I understand that.

HASTINGS: --about why the children died, and particularly in the context where she's planning to have a fourth. One would think that there'd be an overwhelming need to investigate the sensitivity of having a fourth child if you didn't know why your first three had died.

JUDICIAL OFFICER: What follows, you say follows, that because she didn't express any curiosity in the diary, she had no curiosity, and because of that it can be inferred she killed her children.

HASTINGS: Yes. It would be a logical step to note that she was not in the slightest bit uncertain about the causes of death because she knew because she was responsible. One would have thought that was an obvious inference that followed.

JUDICIAL OFFICER: I understand the submission.

HASTINGS: I just want to briefly go to some of the entries. I know Counsel Assisting has just done so, but to make good the points I've been making there's a couple of groups that I would like to draw attention to. I think we're talking about Exhibit 18-07, and if I can go to entry 240, to which Ms Callan went earlier, for 14 October 1996. The "father's daughter" entry, with which no doubt we're all very familiar.

The point I make about this, in anticipation, is that the context of the reference to her being her father's daughter, comes from the words which follow: "But I think losing my temper stage and being frustrated with everything has passed." It's not because her father's a loser. That doesn't make sense.

Going back two lines, it starts off "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." Again, there's no suggestion there about any unknown medical cause which is relevant. "I would like to make all my mistakes and 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 the losing my temper stage and being frustrated with everything has passed."

So the characteristic of being the daughter of her father, I would suggest, clearly is a reference to him losing his temper and killing her mother, and her then equating her behaviour but trying to reassure herself that her losing her temper stage is passing. It was suggested in Counsel's submissions--

JUDICIAL OFFICER: She gave an explanation about that entry, of course. You say I should reject that explanation.

HASTINGS: Yes, and in my submission it was puerile, to use a term, and in a sense reflected her consciousness of guilt. What she explained was, no, I was referring to my father cause he was a loser. That's not what's being said; she's referring to her father because of her temper, but she's learning how to control her temper. That was the nexus with her father, and in my submission these matters need to be reflected in reality.

There's more over the page. I won't go through all of it, but the same theme continues in item 244, 4 December 1996. Thursday, 4:30am, the last six or eight lines; "But having already decided if I get any feelings of jealousy or anger too much I will leave Craig and baby rather than answer as being before." Again--

JUDICIAL OFFICER: Sorry, whereabouts is this, Mr Hastings?

HASTINGS: I've got p 172, the last four lines, item 244. "I've already decided if I get any feelings of jealousy or anger too much I will leave". So again, it's a reflection of the theme of concern being her anger.

Again, on the next page, at the beginning of January, 247, 1 January:

"Another year gone, 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 this time. I'm going to call for help this time, and not attempt to do everything myself anymore. I know that was the main reason for all my stress before, and stress made me do terrible things."

Again, it's the stress/anger theme which is continuing. It goes on the next page, 249. 14 January 1997, halfway through that entry:

> "I feel once you know your baby is doing well you hear the heartbeat and see your child you relax with life and get on being the protector and provider without doubts of any kind."

Would that be the statement of someone who had lost four children to natural causes which she's never been able to understand? Again, it just doesn't fit with this hypothesis that the children have died in strange circumstances because why would she be saying that?

> "Once you see your child you relax with life and get on being the protector and provider without doubts of any kind."

This is in the face of a hypothesis that four of her children got on with life and then died for reasons which had never been made clear to her. It goes on:

> "My skin problem I think must be emotional when bored. I scratch more if upset. I think it was stress-related. I must learn to calm down and be rational and worry about things as they happen not if they do."

JUDICIAL OFFICER: When you say the cause of death hadn't been conveyed to her, she you can assume or would you accept that she was familiar with the autopsy reports and other pathology reports that had been done in respect of Caleb, Patrick and Sarah? Would you agree with that?

HASTINGS: Yes.

JUDICIAL OFFICER: So she was aware that the experts at that time, not the experts at the trial, those medical practitioners who dealt with the children during their lives and at the time after their deaths had expressed views as to the causes of death. In the case of Caleb it was SIDS, in the case of Sarah it was SIDS, and of course in the case of Patrick I can't recall what it was but it was SIDS, I think, coupled with the encephalopathic disease.

HASTINGS: But SIDS is hardly an informative diagnosis of the cause of death.

JUDICIAL OFFICER: I accept that. That's quite correct, Mr Hastings. SIDS is a diagnosis, if you can call it that, of death by an unknown natural cause.

HASTINGS: By default.

JUDICIAL OFFICER: Why if medical practitioners had diagnosed SIDS, and I'm using it in a loose way, should Ms Folbigg have not only speculated as to what the experts weren't able to find out but more so write that in her diary. What would you expect her to write? "Maybe it was this? Maybe it was that? It's awful that I don't know?"

HASTINGS: I would expect her to say, "I know I had two cases of SIDS and one of something else but I'm hoping it won't happen again." She doesn't say that at all. She doesn't express any indication of there being any uncertainty about the cause of death, with the obvious inference that she knew very well what it was. And then 252 at the bottom of that page, 2 February 1997:

> "Tired. So tired but haven't written in here for a while. Caleb's birthday yesterday. He would have been seven. God seems so long ago, it was. Baby seems fine. Coughing fits. I have worry me a little. Scared I'll do harm. The known silence or anything wrong. So all's well, I suppose."

Then finally over the page on 4 February 1997:

> "Can't sleep. Seem to be thinking of Patrick and Sarah and Caleb, makes me seriously wonder whether I'm stupid or doing the right thing by having this baby. My guilt of how responsible I feel for them haunts me. My fear of it happening again haunts me."

Can I just say, "it" - "my fear of it happening again". It's not "them" like three different causes of death, or even two, SIDS and something else. She expresses it in terms of "my fear of it happening again haunts me". Again, the interpretation which fits that perfectly is that "it" is a reference to her inability to maintain control and lose her temper. She goes on:

> "My fear of Craig and I surviving if it did haunts me as well. I wonder whether having this one wasn't just a determination on my behalf to get it right and not be defeated by me. Totally inadequate feelings about myself. 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's what I think I'm trying to conquer with this baby to prove that there is nothing wrong with me. If other women can do it, so can I."

It goes on about being scared et cetera. So again, that would be a point at which one would expect there to be an expression of concern about the unknown causes of death or the SIDS diagnoses and the possibility of it happening again. But there's nothing that she anticipates happening again which will be relevant except for "it" under her control.

I said earlier the point made by many of the psychologists and psychiatrists and adopted by Counsel Assisting that these are entries in the diary retrospectively rationalising her past behaviour and events is not consistent with the constant expressions of her reference to current events. There are a few that make good my point. I suggest at p 203, the top, an entry of

3 November 1997 right at the end:

> "Someone's awake. Yet to go. Lost it with her earlier. Left her crying in our bedroom and had to walk out. That feeling was happening."

JUDICIAL OFFICER: Page 203?

HASTINGS: 203. Entry 318.

JUDICIAL OFFICER: I have it.

HASTINGS: Last few lines: "I think it was because I had to clear my head and prioritise, as I've done in here now. I love her. I really do. I don't want anything to happen." Again, my point about this is it's not an expression of what's happened in the past. She's dealing with a scenario which is then current in which she lost it and left her crying, and had to walk out to control herself. Again, that appears in the entry at the bottom of the page, 8 November: "Had a bad day today. Lost it with Laura a couple of times. She cried most of the day. Why do I do that? I must learn to read her better. She's pretty straightforward. She either wants to sleep or she doesn't," et cetera. Again, my point about it is that it's a statement of contemporaneous events and feelings, the substance of which is that she keeps losing it; namely, her temper. The efforts to excuse the entries or rationalise them on the basis of them only being historical references, in my submission, don't fit the evidentiary value that one gleans from her references to her current behaviour. And, your Honour, in the last –

JUDICIAL OFFICER: I rather thought that Senior Counsel's submission was not referring to her references to what might be described as contemporaneous notes - that is, things that were happening with Laura at the relevant time - but on her ruminations as to the three children who had already died.

HASTINGS: Yes, but she's equating the current situation with events in the past. The statement about the current situation is not some passive rationalisation of what's happened before; it's what's happening then and there, that she's losing her temper to the point that she can't control herself. Your Honour, I think it comes out of my next little group that I wanted to finally take you to at p 212. I think Counsel Assisting have taken you to this, because it's a well-known entry on 28 January 1998:

> "Very depressed with myself. Angry and upset. I've done it. I lost it with her. 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 and left her. I restrained enough to put her on the floor and walk away. Went to my room. Left her to cry. Was gone," et cetera. "Scared she'll leave me now like Sarah did."

Now again, I'm referring to this in the context of my suggestion that these

entries can't be dismissed as historic or summaries of what's happened in the past. This is an expression of her mood contemporaneously on 28 January 1998. It's quite marked, in my submission, for a person to be contemplating dropping her on the floor. One only has to be a parent, even from time long ago, to be mortified by the prospect of a woman even contemplating dropping a child on the floor, but it's also a measure, I suppose, of the extent to which she gets angry. It's a current mood that she's referring to, not sometime in the past. She's losing it then and there to the point that she nearly dropped the child on the floor. In that sense, it's an insight into her personality and traits and consistent with a snippet of evidence that Counsel Assisting drew to my attention, which I didn't know about, from a Leah Brown who gave evidence referring to a circumstance in which she saw Ms Folbigg lose her temper and yank Laura out of a high chair by the arm. Now again, it's a small but meaningful illustration of her temperament and a result of her losing her calm.

JUDICIAL OFFICER: It's a long way to go to say, leave aside the admissions for the moment, as you have done. It's a long way to go to say from these instances that they would tend to support a proposition that Ms Folbigg killed her four children. You go to a shopping mall at any given day and you'll see parents getting frustrated with young children to a greater or lesser extent. It's not exceptional conduct, I don't think. It may not be desirable, I accept that, but it does happen.

HASTINGS: Standards may differ. I must say, I found the prospect of hauling a child out of a high chair by an arm in a fit of anger to be quite illustrative in this case of her true temperament and her propensity to act quite violently at a time when she lost her temper. It's not earth shattering by any means, but it's a small insight into the true character and personality which, your Honour, takes me to my final point, I think, and that is that one is entitled to ask, if that's the hypothesis applied to the diaries, that she was a person who couldn't control her temper and resorted to physical force in order to maintain control which resulted in her killing her children, why would that be so? It brings to the fore the fact that, at the time of sentence, Justice Barr made certain findings in relation to her personality disorder based on the evidence that had been adduced at the time.

JUDICIAL OFFICER: Those findings, of course, were made in the context where she had been found guilty of the offence.

HASTINGS: Yes. One can discount the views on that basis, I accept that, but when one reads Justice Barr's bases for doing it and the medical evidence which was produced from Dr Giuffrida and Dr Westmore is based on background rather than the finding of guilt.

JUDICIAL OFFICER: As I suggested to Senior Counsel, it was yesterday, I think, it's common for evidence of deprived background, psychiatric difficulties - or deprived background more relevantly, to be raised in mitigation of established guilt. The obverse doesn't follow; namely, if there's a deprived background is a factor supporting the guilty verdict. That's the problem, I think, Mr Hastings; you're in effect turning it on its head.

HASTINGS: Well, I'm adopting your phrase that you would receive evidence, psychiatric evidence, which would explain the diaries. This seems to fit to a T, which was the findings by Justice Barr that she suffered from a personality disorder derived from the traumatic childhood which she endured, which in turn would explain the anger to which she refers to in the diaries, and some of the other behaviour for which she obviously issues regret. It's highly relevant, in my submission, that these findings were made, and again, my concern is that these findings are on the record, based on evidence received by the trial judge from psychiatrists. One of Dr Giuffrida, I think, had seen her five times. Dr Westmore had seen her twice before the verdict and once afterwards, and there's a whole bevy of witnesses, psychiatric witnesses who haven't even met her. Even Dr Eagle, I think, conceded when she gave evidence that she was disadvantaged because she hadn't met or seen Ms Folbigg, and those who have, have seen her 25 years after the relevant conduct. It adds to the value that needs to be given to Justice Barr's conclusions based on contemporaneous evidence as to her personality disorder condition which he found existed.

Your Honour, I understand there's a problem and the proposal to redact what I said in my submissions about Ms Folbigg's genetic background. I wasn't in any way intending to traverse issues which had been canvassed earlier in February and which are the subject of a non-publication order. It's a more general observation about children inheriting the genetics of their father, which I would have thought was a simple fact of the human race.

JUDICIAL OFFICER: Whether you inherit genetics is a simple fact, it's somewhat given light to by the evidence in this case. If you're putting the proposition that I can take into account the conduct of the father and assume that that was due to some genetic condition, some genetic variant which was passed on to Ms Folbigg, all I can say to you, rightly or wrongly in the plainest possible terms; I'm not going to do so. I'm not going to do so (a), because there's no evidence of it; (b), because there's no evidence of any single gene variant between Mr Folbigg and Ms Folbigg even if Mr Folbigg had some of sort gene which might have predisposed him to violence. The material is, with all due respect, great speculation and I don't propose to have any regard to it. If I'm in error in doing that, so be it.

HASTINGS: Except that it adds plausibility.

JUDICIAL OFFICER: It doesn't, because there's no evidence of it.

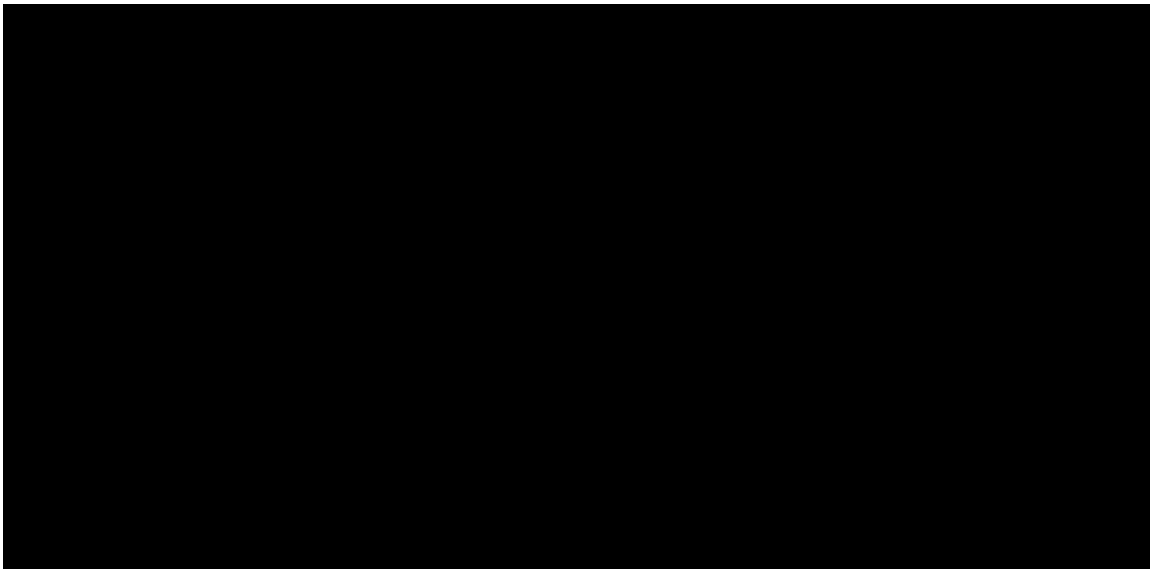
HASTINGS: You're quite right; there is no evidence and that's not my fault.

JUDICIAL OFFICER: You're the one who's putting the proposition, Mr Hastings, and normally if you don't put any proposition, effectively there's no evidence.

HASTINGS: The proposal to do a genetic investigation was denied. It gives me the opportunity to carry out a threat that I made to Counsel Assisting in saying, it's so obvious that people take after their parents that one only had to

watch a game of football yesterday on TV and see Collingwood play Essendon, and the man of the match was a young man who's the son of a Collingwood champion. They're peas in a pod. One can obviously see that--

JUDICIAL OFFICER: I'm the son of a three times Australian tennis champion, and I can assure you, I didn't take after my mother. I mean, surely - and add, regrettably a little bit my daughters. This is really verging on the absurd, Mr Hastings.



HASTINGS: Well I'm sorry, your Honour. It's my point again, these matters are being ignored, and that's why I'm raising it.

JUDICIAL OFFICER: They're being ignored because there's no evidence of it, and because it's a scandalous submission.

HASTINGS: Well, there is evidence of it. It's in the police file.

HASTINGS: No, it wasn't--

JUDICIAL OFFICER: Then why can you possibly say--

HASTINGS: Because you've denied it.

HASTINGS: There is evidence. It just hasn't been gathered.

JUDICIAL OFFICER: Mr Hastings, I'm not going to tolerate this submission in

the absence of any evidence.

HASTINGS: I'm sorry, your Honour. I'm only drawing attention to the fact that it seems to me significant that there be a sense of confidence that this is a comprehensive Inquiry which takes into account all relevant factors and not--

JUDICIAL OFFICER: It will take into account all relevant factors before the Inquiry. It won't take into account rank speculation except to reject it. Yes, go on.

HASTINGS: Anyway, the point I was also making was the findings of Justice Barr in relation to sentence which identified significant factors leading to what appeared to be, according to the medical evidence and the conclusion reached by him, compelling evidence that the offender was seriously disturbed at 18 months of age, and then maintained the condition which was not psychotic but resulted in her having a personality disorder as an adult. My point about all of that and it's set out in Justice Barr's remarks on sentence, need to be taken into account and can't be just ignored when it comes to identifying her personality disorder and possible explanation for not only - it's not more her conduct, it's an explanation for the entries in the diary and gives them credibility, to note what Justice Barr found to be her personality disorder. At para 95 his Honour said:

> "The offender was not by inclination a cruel mother. She did not systematically abuse her children. She generally looked after them well and 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 equipped to cope."

He refers earlier to the effects of the traumatic events of her childhood which left her depressed and suffering a severe personality disorder. Again, one would think that is a very relevant observation in the context of giving sense to the diaries rather than going off on some retrospective rationalisation.

They are my submissions, apart from one other factor and that is that again, the history of the matter, apart from Justice Barr looking at the diaries and forming a view as to their veracity and probity, there was then consideration given by three judges of the Court of Appeal who also looked at the diaries and treated them as credible and admissible. There was then an appeal to the High Court or application of leave to the High Court. Justices McHugh and Kirby looked at the diary entries and made a ruling, when they rejected leave. Justice Blanch looked at them again and then three more judges from the Court of Appeal. On my count ten superior Court judges have looked at the diaries--

JUDICIAL OFFICER: I'm conscious of that, Mr Hastings.

HASTINGS: I'm sorry?

JUDICIAL OFFICER: I'm conscious of that.

HASTINGS: I'm sorry, your Honour will then explain to the Governor why her colleagues lacked the competence that is now being suggested to identify alternative explanations for the diaries. The fact is, what is now being suggested about feelings of guilt and separation and all that is not rocket science. If anyone was reading the diaries particularly with a legal background and experience in criminal matters, they would be precisely the sort of factors that one would look for as the alternative to what was being suggested by the prosecution. That's been done ten times and apparently no one within that group has had the expertise to identify what's now being suggested.

JUDICIAL OFFICER: No one in that group of course had the evidence, the psychiatric evidence, which is before the Inquiry. That may not alter the force of the submission but it's a relevant factor I have to take into account.

HASTINGS: It's as I said, your Honour. It's not science. Common sense would bring into play consideration of that or those factors as an explanation of the entries in the diary, and I suggest that ten judges lacked that common sense to identify those factors seems like a rather extraordinary proposition.

JUDICIAL OFFICER: Thank you, Mr Hastings.

WOODS: Your Honour, with your permission, I will just take this course. My learned friend, Dr Cavanagh will make an opening summarising, in effect, relatively briefly, the written submissions that we've already presented and then with your permission I would follow to respond to the various submissions made by other parties. I'm sorry, in terms of timing, your Honour, are we going into tomorrow?

JUDICIAL OFFICER: We're not going to finish today.

CAVANAGH: The submissions you've just heard, I'm not going to address in detail. That will be done by Dr Woods. Just some brief comment before I get into the submissions that I have prepared. Mr Hastings has mentioned common sense. He's mentioned anger. He's referred to the anger of Kathleen Folbigg. He's referred to the need for her to have behaved in a particular way. His submissions were both very Victorian in this sense. I suppose it's appropriate if you're going to believe him, or if people want to believe him, that there has to be--

JUDICIAL OFFICER: I'm not going to believe anybody.

CAVANAGH: I know, I know, your Honour.

JUDICIAL OFFICER: I'm going to accept or reject their submissions.

CAVANAGH: Yes, I know, but his submissions are that a woman should behave in a particular way and not express anger. Indeed, that is just about the full scope of his submissions. I make this point.

JUDICIAL OFFICER: I don't know if that's right. He's made certain submissions as to the effect of the Court of Appeal judgment which need to be dealt with. He's made certain submissions about the absence of curiosity as to the deaths, which is a relevant factor. He's made submissions about genetics, which I've made plain I'm not going to accept. So you can't say it's just limited to what you've described as Victorian.

CAVANAGH: Yes, your Honour. In terms of curiosity about their deaths, if we take Patrick alone, she was the person who recorded, following his ALTE, very detailed notes about what he was suffering and the treatment being given. She was fully and completely aware of what was going on with each child, and the evidence contained in the diary is only part of the evidence in that regard or any other regard. It's only a very small part of it. She rejects completely the idea that she did not care for her children, that she expressed uncontrolled anger towards them or in any way behaved inappropriately or in a harmful way towards them. The words used were, "I nearly dropped her on the floor." The word's "nearly". She didn't drop any child on the floor. I come to the submissions that I've prepared on her behalf. Kathleen Folbigg comes before this Inquiry, as she did at her 2003 trial and the 2019 Inquiry, saying very clearly that she committed no crimes against her children. She comes before this Inquiry knowing that she did her best to protect her children and that she loved each one of them, despite what the public has been led to believe over a 20-year period.

The truth was told by Kathleen Folbigg to the police on 23 July 1999 and, as pointed out by Counsel Assisting, under extensive cross-examination at the 2019 Inquiry, and in the many letters she wrote to her friend, Tracy Chapman, over 20 years. She was also open and honest with psychotherapist, Dr Kamal Touma, whose recordings of some of their sessions together have been tendered at this Inquiry. You have those to consider, your Honour, as well as the other evidence that was before a previous Inquiry and before the trial in an extensive record of interview with the police. It is submitted that her evidence should be believed and a reasonable doubt found for each conviction. A *Liberato* type direction can be given. If she is believed, that is the end of the matter. It's our submission that she should be believed, and there are good grounds for it found throughout the evidence. We rely on our 545 pages of submissions, but I intend to detail a few key points. It's been suggested that the sentencing judge made reference to a mental illness. I say this. No woman gaoled in New South Wales has been subjected to as much mental health examination than Kathleen Folbigg.

She is not a mentally ill person in any way that would possibly relate to harming her children. She's obviously suffered grief and depression. It would be exceptional if she had not, because she is a woman who loved her children. On the point of suggesting that she didn't, she's then suffered vilification in the media for what was said in some journal entries. She's been labelled all sorts of things, and they're all rejected. Her privacy has been demolished. Every moment of her life since birth has been recorded and put on the internet for people to read about. Her privacy has been treated with disdain by those seeking public acclaim. She has suffered these attacks while

in an environment that is notoriously dangerous, constantly fearing for her safety. She has been very seriously assaulted for being a baby killer, which she is not. This would be enough to break any person, but she maintains strength and the belief that one day the truth would be revealed.

JUDICIAL OFFICER: Dr Cavanagh, I'm sorry to interrupt you. My task is set out in the *Crimes (Appeal and Review) Act*, to consider whether I have reasonable doubt as to the guilt of your client. I appreciate the matters that you have raised, and irrespective of the view I ultimately come to, can understand the stress that Ms Folbigg has suffered over the years from her incarceration, the publicity, and the other matters to which you have referred, but they are simply not relevant to my determination. I think you've made it clear, as Ms Folbigg has for many years, that she's always maintained her innocence. I understand that.

CAVANAGH: Your Honour, it goes somewhat further, with respect, than that, in this sense: that throughout her period of time in gaol, and there's evidence of this, she's maintained her good character, and that's a matter you need to take into account, in my submission. Her character is a matter, as in every criminal case, that can and should be taken into account. And we detail that in our written submissions, and why that should be taken into account, and fundamentally it simply means that a person with a good character is a person who can be believed - put in brief form.

Throughout our submissions we've detailed how her character is shown in respect of the death of each child, and how she looked after, carefully, each child. The diaries entries have also been detailed. Her explanations have been provided, and Counsel Assisting has also provided clear explanations, and she has been examined by experts over a long period of time. The journals need to be, in my submission, your Honour, viewed in a context. Part of that context is that she was told to engage in the process of journaling to help deal with problems, and she'd also done it most of her life.

The reasons for her doing it are quite straightforward, because she had to deal with the death of her children. The demons that had come with that, on the loss of one child, in this case, she lost four. She had to deal with multiple tragedies. Very few people would be able to relate to what she had to endure. To suggest she had to endure it in a particular way or say particular words to herself when she was dealing with those tragedies, is just wrong. She was writing to herself, and that has been very, very clearly explained by the experts, and we'd ask your Honour to take that into account, as Counsel Assisting has.

I should at this point put on the record that we've received Counsel Assisting's submissions. We had not had discussions with Counsel Assisting as to what would be in those submissions at any point of time. Our exercise, and those of Counsel's have been completely separate, but we do support strongly their submissions, and we add to them in ours. As Counsel Assisting has made clear at least nine experts all agree on the diary entries.

The diaries at trial - I'll leave that part of it, except to say that there was no expert evidence brought at trial; that's well known. There was no expert evidence about the diaries brought at the last Inquiry, because the Inquiry did not want it; but there has been evidence about the diaries from experts for a very long time. Your Honour is the first one to properly consider such evidence, and Ms Folbigg is cognisant of that fact.

In terms of the “Meadow's Law” dogma, that has been carefully dealt with by Counsel Assisting, but Kathleen Folbigg has had to confront that dogma, and again as said today, you can't have four children die. You can't have three. One way of putting the dogma is when one of your children die, we can feel sad for you. If a second child dies, you're a murder suspect. If you're unfortunate enough to have a third or subsequent child die you are a murderer unless you can prove otherwise. I think it stops at that point. This is a very dangerous nonsense that people keep saying. It's compounded by the myth that in the 20th Century Australia, now the 21st, more than two children can't die of natural causes in the one family. The dogma, as we've seen during this Inquiry and before once embraced is not shifted easily. Even many of those followers who say they no longer believe are still infected and cannot resist the desire to rely on the speculation.

Our submissions are detailed on this most important reason why Ms Folbigg was convicted, because without it the likelihood of her conviction in 2003 we say was very low. We state in our written submissions, you'll find in the introductory part at para 8, the presumption that multiple apparently unexplained deaths of infants in one family necessarily pointed to unlawful homicide underpinned the 2003 prosecution. This has now been discredited. Key evidence as to the multiplicity of deaths in a family comes from Professor Fleming, Professor Schwartz, Professor Ray Hill, the English Court of Appeal cases of Sally Clark in 2003, and Angela Canning in 2004. Chapter 5.5 of our submissions provides our most detailed reasoning why “Meadow's Law” should be rejected and has no place in any court room in Australia today and didn't in 2003. Proof beyond reasonable doubt is what is required for the prosecution to obtain a conviction in New South Wales. The State needs to disprove any reasonable hypotheses consistent with innocence. It is always been our position that the State did not prove their case beyond reasonable doubt at the trial in 2003.

This is because prosecution had no forensic pathology evidence of smothering, nor did they have any evidence which is sometimes considered in a murder trial. I will go to some points on that briefly. There is no eye witness evidence of alleged acts causing deaths. There is no CCTV or other electronic evidence of alleged acts causing deaths.

JUDICIAL OFFICER: I think it's common ground, Dr Cavanagh, that this is a circumstantial case. Mr Hastings ultimately accepted that when I asked him about it.

CAVANAGH: We go further than that, your Honour, and say that there is no credible motive to kill and you will see in our written submissions, especially in

the Chapter 5.1 to 11 that we deal with the way the Crown presented the motive which they are certainly entitled to do and how that can readily be rejected. The main motive at least also formed the tendency reasoning. Importantly, no one who knew Kathleen during the lifetimes of her children over a decade including her husband, Craig, ever had concerns about the children's welfare. Indeed, the weight of the evidence, and we particularise it, it's been identified in Counsel Assisting's submissions, supports that Kathleen Folbigg is a loving and caring mother towards all her children.

As I've said, the absence of a motive to kill is detailed in Chapter 5 of our submissions. Your Honour, because of the need to take into account all of the evidence, we have added that chapter generally called to detail what we say how you can look at the evidence given at trial. Part of the motive apart from rage and anger at particular points of time, was that Kathleen Folbigg killed her babies because she preferred to indulge some form of vanity, such as going to the gym, going dancing on occasions with her husband. Not only did Kathleen take her children with her to the gym, she only went dancing a handful of times with her husband, Craig. It's a very ordinary, normal life that she had, and that life was construed in a way as to be damning to her. That is an important matter for your Honour to look at, in our submissions, because her level of behaviour after the death of her children, before the death of her children, at all times, was normal. To suggest that somehow it wasn't would need more than has ever been suggested at trial or anywhere else, other than to put up a fanciful suggestion that she shouldn't have gone to the gym or shouldn't have gone dancing or was worried about her weight. I'd be surprised if, in any trial now, the prosecution would suggest that a woman had to behave in a particular way. Our position has always been, the speculation involving smothering based on absence of any signs of smothering, the acceptance of that is illogical. For the Crown to prove the case of smothering, and apart from saying you could smother without leaving a sign, they had no evidence. Never did. Don't now. Didn't then.

JUDICIAL OFFICER: There was evidence that you could smother a baby without leaving a sign.

CAVANAGH: Yes, of course. Yes, you can, but the proposition we'd put up is, why would you even raise it if you have no evidence of it? Because you have no evidence of harm having been committed, so you have to come up with something. They didn't have anything, and that, we say, is illogical.

JUDICIAL OFFICER: In fairness to the Crown, they had, did they not, the fact that Ms Folbigg was the one who discovered the babies dead or, in the case of Patrick the first time around, suffering an ALTE? The second was that there was evidence - whether it was right or not - that the possible cause of death was smothering. The third base strand was Mr Folbigg's evidence as to Ms Folbigg's relationship with the children, and the fourth was the diaries, including the discovery of them. Now, whether that was sufficient to have the jury convict is another question, and whether it was enough to have the case go to the jury is probably another question also, but it was open to the Crown to put the proposition on the evidence, as it was at the trial, that these children

were smothered. I'm not saying the proposition was right. What I've got to determine is if there's reasonable doubt as to that proposition.

CAVANAGH: I accept, obviously, that the mother who cared for the children found the children. Most of the other propositions, as you'll see in our submissions, put forward by the prosecution as particulars relevant we deal with in quite some detail. It goes to coincidence evidence.

JUDICIAL OFFICER: I understand that, but I think it remains important to bear in mind that my task is not to sit as a Court of Criminal Appeal. It may well be that if I find that I have reasonable doubt, it'll go back to the Court of Criminal Appeal, but it's not my function to necessarily determine whether the result or the outcome of the trial was correct as at the time, as distinct from determining whether, on the basis of the new evidence - taking into account what occurred at the trial - I have a reasonable doubt as to your client's guilt.

CAVANAGH: I accept that, your Honour. I'm not cavilling with you about that, and I certainly am not suggesting that your Honour should make a determination that the verdict of the jury was unreasonable because that's not what you're doing. I'm making the submission as a fact that you can take into account that, without the approach adopted by a number of experts which incorporated the type of “Meadow's Law”, that the jury would not have convicted. I can make that submission. It might be helpful, it might not to you, but I make it.

JUDICIAL OFFICER: It's relevant, I think, that the medical experts who gave evidence at the trial, even though they didn't necessarily say so expressly, adopted approaches somewhat similar to “Meadow's Law”, and certainly the prosecutor did. I'm not criticising for that; it's a fact. Now, it may be, and I'll accept that in evaluating the words of those experts' evidence, I have to consider it against the evidence which has emerged more recently. But it's not my task to say that jury's verdict on the material before them was unreasonable.

CAVANAGH: I don't think we're suggesting you do that.

JUDICIAL OFFICER: A lot of these submissions seem to be going to that point, that's why I raised some concern.

CAVANAGH: I'm sorry, I don't mean to do that. I don't want to mislead you into the proposition that I'm saying that you need to determine that the jury verdict was unreasonable. I don't do that.

But in context, your Honour can look at how previous decisions made, the people making those decisions, could have been misled because of the basis of the way the evidence was presented, and in this case there were a number of experts - and I don't think they hid it - who were clearly advocates of “Meadow's Law”. A matter for your Honour whether that's helpful or not, but it's there, and it should have been there even in 2003, we say.

I also say, your Honour, that each of the Folbigg infants had a natural cause of death, even if unidentified but accepted as SIDS, diagnosed at autopsy, except in the case of Laura. In the case of Laura, the pathologist who did that, put the cause of death as undetermined. I'm not going to take your Honour to the particulars of that because we've done it in our written submissions, but the position we put is that myocarditis was always available as a natural cause of death for Laura, and a highly likely cause of death for Laura.

Once that was found - this has always been our position - as a natural cause, then because of the coincidence and tendency reasoning, all the other matters collapsed in on themselves because the Crown ran coincidence and tendency to support its position. Once it lost in terms of myocarditis, coincidence and tendency does not matter, and the cases should fall, each one of them.

The fact that each child had a natural cause of death was very clearly presented by Australia's leading forensic pathologist, Professor Stephen Cordner in 2015. Professor Stephen Cordner gave evidence at this Inquiry and at the 2019 Inquiry; took a year reviewing, carefully reviewing, the details of each of the deaths of the children, which you have before you in evidence, a 120 page submission. His conclusion was that ultimately and simply, there is no forensic pathology support for the contention that any or all of these children have been killed, let alone smothered. His position has been backed by other leading forensic pathologists, including the late Professor John Hilton, who performed the autopsy on Sarah, and has maintained that the Folbigg children died from natural causes.

Their evidence, in our submission to you, should be accepted. The evidence of all the forensic pathologists, as I've said, it's very detailed, in our submission. As part of the background for Professor Cordner, he was in the first instance inspired by some work done by Professor Emma Cunliffe, who's a leading academic, and the first person to question Kathleen Folbigg's conditions; that's just on background, your Honour. Her analysis was important.

At Chapter 5.10, the greatest detail is provided by us about the role of myocarditis in the death of Laura Folbigg. This, as I've said, was available in 2003. The cause of Patrick's ALTE and later death has been carefully detailed by Counsel Assisting. Her detail doesn't require me to repeat what we have in our submissions, and I don't do that except to say that there was a clear non-criminal causes of Patrick's ALTE and later death. Again, Counsel Assisting has very carefully over quite some time detailed the genetics, so I won't go into the detail I was going to go to in respect of that, but we have the very great detail in our written submissions.

The genetics, although raised in a general sense at the trial, was first raised at the 2019 Inquiry, and later in the yet to be answered pardon petition presented on behalf of Kathleen Folbigg in March 2021. Many internationally respected experts have provided evidence to this Inquiry. Professor Carola Vinuesa was the first eminent scientist to say that genetics was likely the cause of death of Sarah and Laura. The work of her and the other experts is recognised by

Kathleen Folbigg, and the cause of death as a reasonable possibility of the CALM2-G114R variant should be accepted. Your Honour will see the very detailed analysis in Chapter 3 of our written submissions in that regard.

Counsel Assisting has said what we are seeking, and Dr Woods will undoubtedly repeat it tomorrow, but I'll do it very briefly. Obviously we're seeking that your Honour find a reasonable doubt as to the guilt in each case, and we ask you to report to the Governor that there's a proper basis for Her Excellency to exercise her pardoning power. We also ask that you refer the matter to the Court of Criminal Appeal to quash the convictions.

Your Honour, those are my very brief submissions. I hope they were helpful, and again I commend our written submissions to you.

JUDICIAL OFFICER: I'll be reading them very carefully, I assure you. Court will adjourn til tomorrow morning.

ADJOURNED PART HEARD TO THURSDAY 27 APRIL 2023