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SPECIAL INQUIRY

THE HONOURABLE THOMAS BATHURST AC QC

5 WEDNESDAY 27 JULY 2022

**INQUIRY INTO THE CONVICTIONS OF KATHLEEN MEGAN FOLBIGG**

10 Ms D Tadros for the Ministry of Health  
Mr S Robinson for the Commissioner of Police  
Ms V Garrity for the Director of Public Prosecutions  
Dr R Cavanagh for the Applicant  
Mr D Eid for Craig Folbigg  
15 Mr D Graham SC for the Australian Academy of Science  
Ms S Callan SC with Ms N Wootton - Counsel assisting the Inquiry

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20 JUDICIAL OFFICER: Good morning. Can I have the appearances please.

CALLAN: Your Honour, Callan. I appear to assist your Honour, with Ms Wootton.

25 JUDICIAL OFFICER: Thank you, Ms Callan.

GARRITY: Garrity, I appear on behalf of the Director of Public Prosecutions.

JUDICIAL OFFICER: Thank you, Ms Garrity.

30 EID: Your Honour, Eid, E-I-D, for Mr Folbigg.

JUDICIAL OFFICER: Yes, Mr Eid.

35 ROBINSON: Robinson for the Commissioner of Police.

JUDICIAL OFFICER: Yes, Mr Robinson.

CAVANAGH: Cavanagh for Ms Folbigg, your Honour.

40 JUDICIAL OFFICER: Yes, Dr Cavanagh.

GRAHAM: With the Inquiry's leave, Graham for the Australian Academy of Science.

45 JUDICIAL OFFICER: Yes, Mr Graham. You have that leave. For today at least.

GRAHAM: Thank you, your Honour.

50 TADROS: Tadros for the Ministry of Health.

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JUDICIAL OFFICER: Yes, Ms Tadros. Yes, Ms Callan?

5 CALLAN: Your Honour, since the last directions hearing in this matter which was conducted on 24 June 2022, those assisting your Honour have conducted a productive all-parties meeting, and have commenced taking preliminary steps in relation to potential experts. We've also received, and I'll come back to it in a moment, but made some written submissions in respect of an application for leave to appear in the Inquiry from the Australian Academy of Science.

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There are, so far as I can identify, three issues that may be sensibly ventilated, although not necessarily determined, at today's directions hearing. The first concerns the position as to funding as that affects certain of the parties because it has become apparent over the last month that that has impacted those parties' capacity to engage substantively, as it tries to progress the work of the Inquiry. The second is that your Honour may recall orders were made on the last occasion for parties to make written submissions responsive to those articulated by myself on 24 June as to what I contended ought be the focus of this Inquiry. Submissions have been received on behalf of Ms Folbigg on Friday 22 July. I'll come back to it in a moment, but there may be some benefit in addressing what can be addressed at this stage emerging from those written submissions. The third issue which might usefully be ventilated today concerns the application by the Australian Academy of Science for leave to appear. I'm in your Honour's hands, but perhaps the position as to funding could be dealt with first.

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JUDICIAL OFFICER: Very well. I think, as I understand it, the funding problems are confined to Ms Folbigg and Mr Folbigg, and they're somewhat different. Is that correct?

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CALLAN: That's my understanding, yes, your Honour.

JUDICIAL OFFICER: Dealing with Ms Folbigg first, Dr Cavanagh, what's the position and what's the difficulty?

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CAVANAGH: Your Honour, the position has changed somewhat from last time, and if I could first inform your Honour that Dr Gregory Woods QC will be joining the Folbigg representation on 29 July. That's when he can. We also have Mr William Buxton, whose funding has been limited by Legal Aid, but he's been approved, but on a limited basis. We've had a denial of funding for Ms Rego by the Legal Aid people. I'm assuming they're acting on behalf of the Attorney-General in that, and I'm unclear as to their reasoning.

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JUDICIAL OFFICER: Well, they exercise their discretions independently.

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CAVANAGH: If I could quote from a letter as to why they've limited the funding. They've said:

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"The funding available to Legal Aid New South Wales does not allow us to match the resources of other well-resourced parties or

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5 prosecution agencies. Preparation in legally aided matters cannot be funded on the basis of actual time spent by practitioners. The scope of preparation in all legally aided matters is limited. Legal Aid New South Wales has to ensure funding remains available for the many other socially and economically disadvantaged people in New South Wales".

10 JUDICIAL OFFICER: This is a difficulty that's confronted in every case and every criminal trial which is done, for example, by private practitioners with Legal Aid. It's been a source of contention for years. I don't think I'll be able to do very much about it.

15 CAVANAGH: I'm not suggesting that your Honour can help with that. I do, however, raise the point that--

JUDICIAL OFFICER: As I understood it, the difficulty with Ms Rego is that she's not on a Legal Aid panel. Is that right?

20 CAVANAGH: That's correct, and neither is Mr Buxton, but that's been overcome. I'm the only one on a panel that's acceptable to Legal Aid. Those panels are for the purpose of complex trials and also appeals. I'm not on the appeals panel, but they fund me to appear on appeals when I want to, so it's a discretionary matter as I view it, and as I have been involved with that process over the last 20 or 30 years.

25 JUDICIAL OFFICER: You've got, as I understand it, 35 days approval for preparation.

30 CAVANAGH: That's correct.

JUDICIAL OFFICER: And that's for senior counsel and two junior counsel; is that right?

35 CAVANAGH: Yes. Two other counsel, your Honour. That's me and Mr Buxton who's coming in at a lower rate, and approved.

JUDICIAL OFFICER: When you say the lower rates, they're the Attorney-General's rates, aren't they?

40 CAVANAGH: No. Mr Buxton will be coming in on a rate of half that set by Legal Aid. He's agreed to do that yesterday, and we thank him for that agreement.

45 JUDICIAL OFFICER: You've got effectively seven weeks preparation time and there's approval for 15 days of evidence for three counsel. It's not ungenerous, Dr Cavanagh.

50 CAVANAGH: If I could make the submission this way. We don't cavil with the 15 days for hearing time.

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JUDICIAL OFFICER: No. As I understand it, you want 70 days or thereabouts, is it?

CAVANAGH: 72.

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JUDICIAL OFFICER: 72 days for preparation.

CAVANAGH: Subject to this, that is, that it has to be actually done, your Honour, and at the moment--

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JUDICIAL OFFICER: I agree with that.

CAVANAGH: At the moment I've done a carefully structured analysis of what's required for preparation, and I've spoken to the others, and my estimate is reasonable in my view, and it's conservative, but it's subject to actually doing that work. Obviously, if you do less, you don't claim for it, but at the moment I've read now the trial transcript, for example, and that in itself takes quite a long time.

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JUDICIAL OFFICER: I understand that, although you appeared in the Inquiry conducted by Mr Blanch, didn't you?

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CAVANAGH: I did.

JUDICIAL OFFICER: Presumably you read the transcript then and you had some familiarity with it.

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CAVANAGH: I read it when I wrote the first petition 13 years ago, but then I read it for a second time for the Blanch Inquiry and I'm starting to read it again for this.

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JUDICIAL OFFICER: I understand that, yes.

CAVANAGH: And each time - I have a fairly good--

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JUDICIAL OFFICER: All I'm suggesting to you is you're not commencing it from a standing start.

CAVANAGH: No, but the other two are.

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JUDICIAL OFFICER: I appreciate that.

CAVANAGH: And each time I read it I find other relevant things in it which I had not noticed. Some of them are quite striking and, obviously, I will take your Honour to them in written submissions, but they're there. For example, yesterday we took an affidavit off a Professor Hilton, who's a forensic pathologist who did the Sarah Folbigg autopsy and also was involved in the Laura Folbigg autopsy, and taking him through the evidence he gave at trial and also the evidence he gave at the Inquiry gives rise to a number of matters which will come before your Honour that weren't covered previously, and I

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don't want to labour this and I don't want to appear to be taking your Honour's time unnecessarily.

JUDICIAL OFFICER: No, that's all right.

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CAVANAGH: But the last question, the very last question in the re-examination of Professor Hilton gives rise, in my submission, to a very problematic issue, and that is - if I just find it. First of all, I say this. Professor Hilton continually said there is no evidence of smothering of any of the children. The last question asked, which is really quite an important question by the Prosecutor, was, "What do you say to the proposition that if a 10-month-old child were deliberately suffocated with a pillow that you would not necessarily expect to find any of those signs present on post-mortem?" Signs - that is, signs of smothering. He said, "I would agree with that". Smothering with a pillow. There was never any evidence of a pillow being used. The reversal - that Prosecutor reversed, and that fed through to the appeal cases.

JUDICIAL OFFICER: Let me just say two things arising out of that. I can't extend the Legal Aid. You've certainly got sufficient Legal Aid to go a fair way down the track. The other matter is that, and I'll hear from Ms Callan on this, generally speaking it will be counsel's assisting role to call witnesses before the Inquiry, and generally speaking to take statements from them. I know, obviously Ms Folbigg has got a vital interest in this Inquiry, it goes without saying, but equally that doesn't necessarily mean that you have to duplicate everything that counsel assisting will be doing, and perhaps it may be more helpful to indicate to counsel assisting who you wish to have called and what particular matters you wish them to adduce, and that would include, for example, the matter you've just raised. If there's duplication, what will happen is, not only will you be spending a great amount of time that may or may not be necessary, but also it will lead to an extension of the hearing which, if it's necessary, will happen, but I think it's in your client's interest to not happen to the extent that it's not necessary.

CAVANAGH: I agree.

JUDICIAL OFFICER: So can I suggest to you that at some stage you have regard to the directions I've already made as to indicating who you think should be called and perhaps adding to that particular matters that you want explored. You'll have an opportunity, obviously, for example using Professor Hilton as an example, if he is called, to cross-examine him on matters that you regard are of significance, but the more that can be led out in-chief, as it were, the better.

CAVANAGH: I agree. There's no doubt I agree with what your Honour has said, however, in the case of Professor Hilton, he's extremely ill, not mentally, physically. That's why we moved quickly to get further evidence from him.

JUDICIAL OFFICER: I'm not criticising you.

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CAVANAGH: I know that.

JUDICIAL OFFICER: But as a general proposition, so you can best use the money you've been allocated and progress the Inquiry most efficiently, the procedure that I've suggested a minute ago, if you generally adopt it, will be far more helpful. Ms Callan, what do you say about this?

CALLAN: Your Honour, the directions your Honour has already made are that it is counsel assisting who will call each witness to give evidence before this Inquiry. In my submission, in order to ensure that your Honour undertakes the task which you've been directed to do by the Governor, which is to form your own view as to whether there is doubt in respect of Ms Folbigg's conviction, any matter in the nature of issue or evidence which the parties consider ought be addressed should be brought to our attention so that we can consider our position, your Honour can form a view, and that can be dealt with in an orderly way. That enables the appropriate direction of resources, avoids duplication and in my submission will seek to keep the Inquiry on track.

JUDICIAL OFFICER: I think that was expressing somewhat more eloquently what I was just putting to you.

CAVANAGH: I understand, and we're certainly going to supply all the experts that we have spoken to who may be able to assist.

JUDICIAL OFFICER: But if you're doing - what I'm saying to you is, I can't give you greater resources than you've been allocated and there is a reality, Legal Aid has got funding constraints. But what I do suggest is that adopting that course will mean that your 35 days and whatever more you can extract from Legal Aid in due course, will go a bit further as it were.

CAVANAGH: Your Honour, I'm not complaining on behalf of myself. I undoubtedly--

JUDICIAL OFFICER: I know, look this is - I know you're not complaining, but the reality is at the moment you've got 35 days preparation for three counsel and a solicitor. I'll come back to the solicitor in a moment, and 15 days for hearing. If adopting the course that I suggested, 35 days becomes grossly unreasonable, no doubt you can raise it with Legal Aid, and explain it to me so if that be the case I can put something on the transcript.

CAVANAGH: Thank you.

JUDICIAL OFFICER: But quite frankly, at the moment, I can't do that because I just don't know if the course that we're proposing be adopted, 35 days will be inadequate.

CAVANAGH: All right. I accept that.

JUDICIAL OFFICER: So, I think you just proceed and if you, or Dr Woods, wants to come and complain to me some time in the future I'll listen to you.

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CAVANAGH: I thank you for that.

JUDICIAL OFFICER: Thank you.

5 CAVANAGH: Certainly, if that's necessary, we will.

JUDICIAL OFFICER: Good.

10 CAVANAGH: Coming to the issue of Ms Rego though. She's been involved in the case for five years and I need her in it because she knows the case better than anyone else and to be excluded is absolutely unacceptable.

15 JUDICIAL OFFICER: Well, all I can do as far as that is concerned is put on the transcript these propositions. First, I think it is desirable that Ms Folbigg has the solicitor of her choice, particularly one who's acted for her for a considerable number of years, including in the early Inquiry. Second, that the most efficient use of scarce resources is to have the person involved being - is to have the solicitor being someone who isn't starting afresh but has some familiarity with the matter. Those sentiments can be conveyed to the Director  
20 of Legal Aid for what they're worth. But I hope note be taken of them.

CAVANAGH: Well, they're worth a lot, and I thank you.

25 JUDICIAL OFFICER: They're on the transcript now.

CAVANAGH: I understand. Just for the record, it's the exclusion of her, specific to her, that's--

30 JUDICIAL OFFICER: I understand that. I just said why I think it would be in the interests of the Inquiry and the interests of your client that that exclusion be lifted and that can be conveyed to the Director.

35 CAVANAGH: I thank you very much for that, your Honour. I thank you very much.

JUDICIAL OFFICER: All right. Mr Eid.

40 EID: Your Honour, I've got a complicating issue that has arisen, unexpectedly, I might add.

JUDICIAL OFFICER: Yeah.

45 EID: I received at quarter to 9 this morning, that Mr Folbigg, a very exhausted and angry man, has asked me to withdraw on his behalf from participating in this Inquiry. Funding has been a significant problem. The Attorney General's office has declined to fund him. It's been referred to Legal Aid. The process did commence yesterday in terms of trying to secure funding. The platform - there were technical issues with the platform to enable a proper lodgement, but in any event, my enquiries with Legal Aid indicate that there's a  
50 significant tussle between the Legal Aid Commission and the Attorney

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General's office in terms of who should fund it, and if Legal Aid were to fund it, how much should they fund. But I suppose that's--

5 JUDICIAL OFFICER: You've heard the interchange between Dr Cavanagh  
and me, Legal Aid certainly seem prepared to fund. I would have rather  
thought, with respect, the appropriate course for you to have taken would have  
been to make an application to Legal Aid and if Legal Aid refused a grant, or  
made it a kind of grant that was grossly inadequate, then you would go to the  
10 Attorney General at that stage, but I understand you've chosen to take a  
different course. Or you chose to take a different course.

15 EID: Your Honour, not quite. If I can be a little bit more accurate. The  
original - as soon as we got notification that there was this Inquiry, the very  
same day I wrote to the Department. That letter, my letter was then forwarded  
to the Legal Aid Commission for their consideration. I had not heard from that  
Commission. There was no notice contrary to the Attorney General's letter  
where he indicated that he believed that Legal Aid wrote to me. It was never  
the case. I sent a further letter on 24 June directly to the Attorney General's  
20 office seeking that funding. The reply came back dated 14 July, which I  
received the following week, to indicate it's been sent - indicate that I should  
apply to Legal Aid. In the circumstances, I have, but the process is a little bit  
more complicated when applying because I need a considerable amount of  
details whilst I'm online and that process started yesterday, so there is a file ID  
for Mr Folbigg, but it could not be properly lodged because of--

25 JUDICIAL OFFICER: In any event, what you've indicated to me is Mr Folbigg  
doesn't wish to proceed.

30 EID: And that's the issue I've got from a practitioner's point of view. I'm  
essentially handcuffed. I need leave to withdraw from this Inquiry.

35 JUDICIAL OFFICER: I'll hear from counsel assisting in a moment, but prima  
facie, it seems to me that there is no suggestion in this Inquiry, or in the  
previous inquiries, that Mr Folbigg was in any way implicated in the death of  
the children. If that remains the position, whilst your client obviously has an  
interest in it, he's not a vital participant in that sense. What I will do, as I said,  
subject to hearing from counsel assisting or any other party who wishes to be  
heard, is not revoke the leave you've been given to appear, but leave it online  
40 on a basis that if there was anything that directly concerned your client - and I  
understand his position as the father of the children, I'm not taking away from  
that - you'll be notified, but otherwise, if you wish to appear with or without  
Legal Aid or with the limited grant of Legal Aid, that's effectively a matter for  
you and your client. Ms Callan, do you want to say anything in relation to that?

45 CALLAN: No, your Honour. In my submission, the course your Honour  
proposes is a sensible one so as to enable Mr Folbigg at a later date to  
actively participate on the basis of a grant of leave which is standing, and it  
does appear to be a practical solution to ensure that his interests are protected  
for those assisting your Honour to communicate to Mr Eid if anything changes  
50 to the effect that it appears that Mr Folbigg does become subject to potential



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criticism or otherwise.

JUDICIAL OFFICER: Yep.

5 CALLAN: Matters which, from a procedural fairness perspective, he will be entitled at least to know about and have an opportunity to address.

10 JUDICIAL OFFICER: Thank you. Does anyone else wish to say anything about this? Good. Mr Eid, what I'll simply do is having regard to what I've already said which is recorded in the transcript, not withdraw your leave, but not require you to appear at any subsequent hearings of the Inquiry or to make submissions in relation to the Inquiry, except to the extent that your client wishes to do so.

15 EID: Thank you, your Honour.

JUDICIAL OFFICER: There was another issue, I think, which I can raise with you. If you can't give an answer, it doesn't matter. That is, I think your client, there was a request for a DNA from your client. We've indicated, I think, that there's no obligation on your client to comply with that request but I'd just ask you to bear that in mind. Ms Callan, what's the position as far as that's concerned?

20 CALLAN: Your Honour's correct. A request has been made, communicated to Mr Eid, it's not something that can be compelled, but it would be of considerable assistance to the Inquiry as we are told by the relevant genetic experts to have the benefit of that DNA in order to broaden what can be analysed.

25 JUDICIAL OFFICER: Well, it's a matter for your client. One thing I would request is that there be a definitive answer one way or the other sooner rather than later.

30 EID: From my perspective, your Honour, I would have also preferred to ensure that he's properly advised before an informed decision is made, but I hear what you say and it's something I've raised.

35 JUDICIAL OFFICER: Well, I understand that. There's not much more I can do as far as that's concerned. All right, well you've got leave to withdraw from this hearing or you can stay if you want to, Mr Eid.

40 EID: May I be excused?

JUDICIAL OFFICER: Yes, by all means.

45 EID: Thank you.

JUDICIAL OFFICER: What's next, Ms Callan?

50 CALLAN: Your Honour, next is in relation to the proposed focus of this Inquiry.

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JUDICIAL OFFICER: Yes.

5 CALLAN: I use the word focus deliberately. In my submission it is not apt to  
approaching this task in a narrower way than aligns with the direction your  
Honour's been given to form your own view as to whether there is doubt in  
10 respect of Ms Folbigg's conviction. That being the case, the submissions that I  
made in the directions hearing on 24 June, as to what I suggested ought be  
the focus of the Inquiry, are designed to seek to ensure that there is a  
particular focus on what appear to be the real and material issues which are  
likely to bear on your Honour's ultimate analysis and conclusions. In response  
to the oral submissions that I made, as I said, Ms Folbigg has provided written  
15 submissions of some 17 pages received by the Inquiry last Friday,  
22 July. Can I confirm your Honour's received a copy of those?

JUDICIAL OFFICER: I have a copy of those, thank you.

20 CALLAN: Can I say, in relation to those submissions, that to the extent that  
those submissions address the proposed focus as I had articulated it, I do not  
read Ms Folbigg as taking issue in any material way with the proposed focus of  
the Inquiry being first research or advances in medical science relevant to the  
causes of death of each child, and the cause of the apparent or acute life  
threatening event in respect of Patrick.

25 A submission is developed that the term "research or advances" might  
generate a distinction which it's contended is not - ought not be made, and to  
be clear for the record, I wasn't proposing that any such distinction should be  
generated. In my submission, to be abundantly clear, the focus - the first  
focus, could be phrased as "research and/or advances in medical science" so  
30 as to make it clear that that is what is encompassed by that first area of focus.

The second area of focus is that I had articulated was expert medical opinion  
as to the causes of death of each child, and the cause of the apparent or acute  
life threatening event in respect of Patrick, in light of any relevant new research  
35 or advances in medical science. The written submissions on behalf of  
Ms Folbigg suggest the use of the term "expert medical opinion" indicates a  
focus on clinical expert opinion, and not embracing of relevant and  
scientifically credible research that has resulted in advances to medical  
science. Can I make it plain it is not intended to so limit area of focus number  
40 2. It is accepted that relevant and scientifically credible research that has  
resulted in advances to medical science is likely to relevantly bear upon expert  
medical opinion as to cause of death.

45 JUDICIAL OFFICER: Do you accept that includes psychological and  
psychiatric evidence to the extent relevant?

50 CALLAN: Yes. Although, your Honour, self-evidently, psychiatric and  
psychological evidence cannot bear directly or in any determinative way upon  
the conclusions your Honour reaches as to cause of death, but it is accepted  
that they may bear upon a category of evidence which in turn informs your

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Honour's conclusions ultimately as to cause of death.

5 JUDICIAL OFFICER: Dr Cavanagh, having read your submissions, it seems to me that, subject to the matters that counsel assisting has just cleared up, there's no real difference as to focus or scope. The bulk of what you've referred to is - I think really deals with the nature of the evidence of the Inquiry rather than that question.

10 CAVANAGH: Your Honour, the focus submissions were designed to be helpful and they're largely in agreement with what counsel assisting has said and certainly the clarification points are helpful so we're not in dispute about that.

15 JUDICIAL OFFICER: Good. There are a number of other issues, however, regarding the evidence. I'm a little bit concerned about your contentions that the conduct of Detective Ryan and Mr Tedeschi should be examined. What I was going to propose was that you be directed to particularise the extent that you say their conduct or misconduct affected the course of the trial, and I'd want those particulars within seven days because, depending on what the  
20 particulars are, the Director of Public Prosecutions may well have something to say about it, and there's a possibility that it will be necessary for Detective Ryan and Mr Tedeschi be notified that they are entitled to appear, having regard to the provisions of ss 84(1), (4) of the *Crimes (Appeal and Review) Act 2001* (NSW), so it's fairly important to know what you're particularly asserting  
25 as to conduct or misconduct.

For example, it may be something that Professor Cordner I think said in his report to the Blanch inquiry that it appeared that Mr Tedeschi cross-examined on a fundamental misconception as to asphyxiation, for example, but we need  
30 to know fairly urgently precisely what you're saying about those two people.

CAVANAGH: I accept that, and I'll do my absolute best to do it within the seven days you've given for that.

35 JUDICIAL OFFICER: I make a direction that within seven days those representing Ms Folbigg give particulars as to how the conduct of Detective Ryan and Mr Tedeschi rendered evidence given at the trial unreliable.

40 CAVANAGH: If I could just add, so that I can perhaps provide a bit more clarity to it, to what was said in the submissions. The approach taken is important, not necessarily because misconduct was engaged in.

JUDICIAL OFFICER: I understand, but what I don't want to happen is halfway  
45 through the oral hearing we have to stop because it's either that Detective Ryan and Mr Tedeschi need to be called or need to give some evidence or the Director needs to take some instructions from them. I want this issue clarified fairly early on in the Inquiry. Once again, it's in your client's interest because it means that it will be resolved, whether in her favour or against her, sooner rather than later.

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CAVANAGH: No, I accept that. I accept that.

JUDICIAL OFFICER: So the direction is that you give those particulars within seven days.

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CAVANAGH: Done, or will be.

JUDICIAL OFFICER: Does anyone else want to say anything about those issues?

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CALLAN: Your Honour, could I just add to that this observation, that the benefit of those particulars on behalf of Ms Folbigg will also inform those assisting your Honour, and in due course your Honour, as to whether any and in what sense there is utility in exploring the issue of the conduct of Detective Ryan and/or Crown Prosecutor Tedeschi. It's one thing to make complaints. They might even amount to ultimately what your Honour would regard as valid complaints, but the key question is whether and to what extent there is potential for any such concerns about conduct to bear upon the evidence and ultimately the question for your Honour as to doubt in respect of conviction.

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As I understand it, communications that have been received on behalf of the Commissioner of Police and from New South Wales Health are to the effect that they do not propose to provide submissions as to the focus of the Inquiry. Your Honour, the Director of Public Prosecutions, in a letter received yesterday, has indicated that, having considered Ms Folbigg's submissions, there is a desire to respond and a timetable is sought. Your Honour, that timetable could be set today and it would seem desirable for the DPP to have an opportunity to consider the particulars provided on behalf of Ms Folbigg before providing a response.

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JUDICIAL OFFICER: Ms Garrity, the discussion that's already taken place as to focus and scope probably may have alleviated some of the DPP's concern on this issue.

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GARRITY: It certainly has, your Honour. What your Honour has ventilated this morning does provide some comfort to the Director in respect, and with the particulars being provided to us I'm sure that that will again narrow it somewhat.

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JUDICIAL OFFICER: What I'll direct is that those particulars that I've ordered be supplied to the Director of Public Prosecutions and to the New South Wales Police. I think they've got an interest in it. If, following that, you wish to make any submissions as to those particulars or to the focus of the Inquiry, that should be done within a further seven days.

45

GARRITY: Yes, thank you.

CAVANAGH: Just a point of clarification. Those particulars will be provided by counsel assisting once we provide them or do you want us to send them?

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JUDICIAL OFFICER: Yes, probably that's the best course.

CAVANAGH: I think so. Thank you.

5 JUDICIAL OFFICER: Does that only leave the Australian Academy of Science?

CALLAN: That's my understanding, unless any parties have anything to say.

10 JUDICIAL OFFICER: That's another matter on which you wish some time, Ms Garrity, to make submissions. Is that right?

15 GARRITY: No. I have spoken to counsel assisting this morning about that and I believe that she will address the issue that the Director had, and I think we have resolved that, your Honour.

20 JUDICIAL OFFICER: In view of the fact that Mr Eid has withdrawn, I think everyone who has made submissions - who wishes to make submissions in relation to the Academy's application has made them, have they not?

25 CALLAN: Yes. The Academy's application was made on 11 July and that was circulated to the parties. Submissions on behalf of counsel assisting, that is myself and Ms Wootton, were circulated in response on 19 July, which most relevantly at para 48 expressed, or proposed, a position that the Academy be granted leave and the grant of leave be limited to three articulated categories. As I understand, and Mr Graham is here and can address it, the Academy presses a grant of leave to also permit it to address how science should be interpreted and used, including in the context of non-scientific evidence. That's expressed specifically at para 54 of the submissions on behalf of the Academy. That is resisted by counsel assisting.

30 JUDICIAL OFFICER: Mr Graham, what do you mean?

35 GRAHAM: Yes. I thought you might ask that, your Honour, and I was going to start by saying in relation to para 54, at least the second part of that, that perhaps it wasn't expressed as clearly as it could be.

JUDICIAL OFFICER: Let me just find it. Yes, go on. I have it now.

40 GRAHAM: Yes, your Honour. I'll address your Honour's question. Can I just go back historically to some material briefly which will explain where we're coming from in relation to that point, which may not ultimately be contentious or at least it might be difficult at the moment, given what your Honour has already said about not knowing what may unfold, whether it is anything to worry about or not. So if I could just go back briefly, and I apologise if there is some repetition at least in some of the written submissions, but as your Honour would have gathered, the Australian Academy of Science is interested in scientific excellence and it does that by identifying excellence in scientific research and endeavour. It does it by recognising those scientists who engage in scientific research and endeavour of that standard, and it then

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promotes, disseminates and declares what is good science.

5 So the process is identifying scientific excellence. It is setting standards about how scientific endeavour should be approached and it also is interested in maintaining the integrity of whatever relevant scientific discipline we are talking about and it does that by meetings, discussions, a code of conduct for its fellows and members. It's very difficult to become a fellow or member of the Academy. You must comply with certain rigorous standards and you can be expelled if you don't comply. So that's essentially the function in a nutshell. I mean, it's more than that, but that's sufficient, your Honour, and indeed it's recognised as a body of excellence for the purpose of higher education funding. Then I just want to go briefly to, I think, three of the annexures to Ms King's affidavit, if you have that handy, your Honour.

15 JUDICIAL OFFICER: Yes.

GRAHAM: The first is annexure A which is the letter from Professor Vinuesa (26 February 2020) to the President of the Academy, Professor Shine, expressing her concerns about the Inquiry and what had happened, and I want to draw your Honour's attention to a few paragraphs. The first is the opening paragraph. In particular, the professor's concern, third line, "Serious concerns about the way in which the genetic evidence was presented to and analysed by the Inquiry." It's the second part that is going to be relevant to what I will submit in a moment. Two lines down she also refers to the "judicial assessment of evidence". I pause there, the professor is seeking the help of the Academy as, in essence, a more powerful voice of advocacy of science and its integrity, she's a fellow of it. They're the appropriate body or persons to actually take this matter forward and promote the science. But the issue is not only identifying the genetic evidence, as in good evidence, excellent evidence, but also preserving its integrity, which I'll touch upon in a moment.

If your Honour goes to the third page of that letter, the first full paragraph on that page which starts, "In addition".

35 JUDICIAL OFFICER: Third page?

GRAHAM: Third page.

40 JUDICIAL OFFICER: Yeah, I have it. Yep.

GRAHAM: It's the final sentence that's relevant, summing-up the concern or in other words, "the likelihood that a genetic cause could be excluded with confidence." That's relevant in that it's the application of the science, and the circumstances in which the effect of the, in this case, the genetic variant can be ignored, for example, or not, whether that's permissible or not, is at the heart of the complaint by the professor seeking the help of the Academy.

50 Further down on that page in the last paragraph, perhaps puts it more clearly. "We have concerns with the way in which the Inquiry treated the genetic evidence, in particular, we are concerned that the Inquiry placed undue

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weight on the fact that it found the G114R variant to be likely pathogenic and caused the deaths of Sarah and Laura. It would be making a finding that would represent an exceptional clinical scenario." In other words--

5 JUDICIAL OFFICER: Sorry, where are you reading from now?

GRAHAM: That's the last paragraph, your Honour. On that p 3. Do you see that?

10 JUDICIAL OFFICER: Yeah, I have it.

GRAHAM: "We have concerns." Then there's further reference to the International Calmodulinopathy Registry.

15 JUDICIAL OFFICER: I read Professor Schwartz on that, so I understand what it's about.

20 GRAHAM: Yes. What he says is pretty much the same sort of thing. He, as your Honour would have noted, that his concern was some of the factors that were listed in para 161 of the Court of Appeal's decision, he thinks were impermissibly rejecting or devaluing the integrity of the genetic science when there was no basis for doing so.

25 JUDICIAL OFFICER: What the Court of Appeal was - can I say two things about it. What the Court of Appeal, rightly or wrongly was doing, and doing it in the context of a judicial review application, not a merits review, and that's important to bear in mind.

30 GRAHAM: Yes, your Honour.

35 JUDICIAL OFFICER: Was simply saying there are these factors. There were a series of matters which, for want of a better expression, weakened their strength, and they weighed that up against their views of the diary, and came to the view that Leeming JA I think - it was the Court, I'm sorry, the Court came to in those paragraphs. That seems to me to be a perfectly acceptable method of judicial reasoning, particularly on a review application. That's the first thing I wanted to say.

40 The second thing is this; that it's important that everyone here bears in mind, I'm not sitting as the Court of Criminal Appeal. I gave that up four months ago. I'm not sitting as conducting a merits review of Mr Blanch's report. Indeed, I'm not sitting on considering the jury's - whether or not the jury's verdict was unreasonable. My functions were set out by the Court of Appeal in para 97 of their judgment where they describe the task, it's  
45 considering the evidence of the trial and the conduct of the trial in light of the further evidence and submissions received in the Inquiry and I note for present purposes, and in the Blanch Inquiry, in order to determine whether overall, there is reasonable doubt as to Ms Folbigg's guilt or - and then they go and  
50 deal with sentence.

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5 In that regard the witnesses who will be called will no doubt have the opportunity of exploring why this material cannot be discounted in a manner that may have been suggested, for example, by the Court of Appeal. But it seems to me that that presently advised is a matter on which you'd be fully entitled to make submissions.

GRAHAM: Beg your pardon, your Honour?

10 JUDICIAL OFFICER: It's a matter, it seems to me that as presently advised, that's a matter that you would be fully entitled to make submissions on within what counsel assisting has suggested.

15 GRAHAM: If that's the case then there's no misunderstanding from our point of view about the grant of leave. It was only a matter of trying to clarify that concern, and your Honour has put it, with respect, much more simply than I was trying to articulate.

20 JUDICIAL OFFICER: Ms Callan, am I misunderstanding any part of your submission?

25 CALLAN: No, your Honour. It seems that with that exchange a level of clarity has emerged which, as I understand Mr Graham, gives his client comfort as to what is intended by the grant of leave as proposed by counsel assisting. In my submission, it is within the boundaries of subpara (c) of the proposed order in respect of the grant of leave that the Academy is permitted to make submissions as to how the science should be approached, that that would include, effectively, the strength of that evidence and which will in due course inform the weight your Honour gives to it.

30 JUDICIAL OFFICER: Precisely.

35 CALLAN: But what sits in my submission, and it's developed in writing, beyond that which the Academy could legitimately assert an interest in is how your Honour weighs medical and scientific evidence in the mix which includes evidence which does not fall in that category and which may or may not be compelling.

JUDICIAL OFFICER: Yep.

40 GRAHAM: Yes, and that's helpful from Ms Callan. What your Honour says about what we're legitimately interested in, in circumstances where the science, we're only interested in the science, and when it may be discounted, to use your Honour's words, we readily accept that para (c) of the suggested grant of leave, which is in very broad terms and gives one particular of an  
45 example of when that may be relevant, given what your Honour says, and the way your Honour expressed it, that satisfies us and we accept that it falls within para (c) of the proposed grant of leave.

50 JUDICIAL OFFICER: Thank you. Does anyone else want to say anything further about the grant of leave on that basis or want some more time to



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consider it?

GARRITY: If I may.

5 JUDICIAL OFFICER: Yes.

10 GARRITY: The Director's position is that we don't oppose the Academy being granted leave to appear and represented in the terms set out by counsel assisting. But our concern was in relation to non-scientific evidence, and that would include evidence such as the interpretation of the diaries, that the Academy wouldn't be entitled to make submissions and explore areas such as that. The Director's view is that the term should be limited, experts in paras (a) and (b) of counsel assisting's submissions, are confined to experts in the scientific fields of genetics, cardiology, and pathology, in order that that is strictly delineated.

15

JUDICIAL OFFICER: One issue that may arise in this case is to the extent that evidence is admissible relevant in considering Ms Folbigg's mental state at the time she wrote the diaries, and then at the extreme, whether the - I'm sorry, I mean no disrespect for this, the gentleman from Texas whose name I can never recall - evidence is relevant on the issue, if you wish to put in a submission I'm happy that you do so.

20

25 GARRITY: Yes, thank you.

JUDICIAL OFFICER: I must say, in my mind at the moment, I wouldn't want to put any specific limitation on subpara (a) if only because it will inevitably come to be or may come to be reviewed in the future, but in doing so I'm certainly not foreclosing a debate as to the extent that reliance can be placed on that evidence, both having regard to whether it's an accepted body of knowledge for the purpose of s 78, or the opinion evidence provisions; and secondly, its general relevance in any event. That's something that I will require some assistance on in due course, and it just seems to me that I've made it pretty clear to Mr Graham, where I regard the limits, and I think I've indicated to you where it is. So, as presently advised I'm happy if you want to put in a further submission and I'll write a short judgment on it if you wish it, but as presently advised, I'm inclined to agree with counsel assisting's suggestion without limitation.

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40 GARRITY: I hear what your Honour says. I'll take some instructions.

JUDICIAL OFFICER: Take, yes. Can I do this, should you wish to put on submissions, could you do it within seven days?

45 GARRITY: Yes.

JUDICIAL OFFICER: Thank you.

50 GRAHAM: We certainly would urge upon your Honour not to make any limitation on the expert evidence given who knows what might crop up, among

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other things.

5 JUDICIAL OFFICER: You'll see the submissions and you'll have an opportunity if needs be of putting some short submissions in reply within a further seven days.

GRAHAM: Yes, your Honour.

10 JUDICIAL OFFICER: All right. Anything else?

CALLAN: No, your Honour. I note under the current timetable as varied, the parties are to indicate any objections to evidence which was tendered on 24 June within the next week as I see it. So, that may well be coming but the only orders--

15 JUDICIAL OFFICER: Perhaps that should be extended for a couple of weeks in light of the debates which have occurred here today.

20 CALLAN: As I understand it, no parties expressed a difficulty with that date, other than perhaps Dr Cavanagh, having regard to his client's position as to funding.

CAVANAGH: We appreciate your Honour's suggestion of an extension because of the arrival of Dr Woods and also Mr Buxton.

25 JUDICIAL OFFICER: I'll give you a further week's extension.

CAVANAGH: I thank you for that.

30 CALLAN: Your Honour has already pronounced orders in relation to the provision of particulars on behalf of Ms Folbigg and via the parties--

35 JUDICIAL OFFICER: What I was going to ask was if either you or Ms Wootton could formulate an order to give effect to the directions that I've made on the run as we've gone through today.

CALLAN: Yes, your Honour. We'll do so and once that's in a form satisfactory to your Honour, we'll circulate it to the parties.

40 JUDICIAL OFFICER: Thank you.

CALLAN: Nothing further.

45 JUDICIAL OFFICER: Anything else? Good. I'm not going to set a time for another directions hearing. One may be necessary but we'll see what happens. We'll now adjourn.

ADJOURNED TO DATE TO BE FIXED