**IN THE CORONERS COURT**
**OF THE NORTHERN TERRITORY**
**AT ALICE SPRINGS** **No. 51 of 2019**

**INQUEST INTO THE DEATH OF KUMANJAYI WALKER**

# SUBMISSIONS ON BEHALF OF THE NORTHERN TERRITORY POLICE FORCE IN RESPONSE TO APPLICATION BY MR ROLFE FOR DOCUMENTS, INVITATATION BY MR ROLFE FOR RECUSAL OF TERRITORY CORONER AND OBJECTION TO NON-PUBLICATION ORDER OVER RELEVANT SUBMISSIONS

## Introduction

1. Mr Rolfe and, as of 12 October 2023, Sergeant Bauwens, seek access to two sets of materials alleged to be within possession of the coronial team, namely:
    a. Correspondence and documents relating to the Spotlight transcripts, amendment of the non-publication order made around 24 November 2022; and
    b. Records relating to the visit of the Territory Coroner to Yuendumu ("Yuendumu visit") on 14 and 15 November 2022.

2. Mr Rolfe and now also Sergeant Bauwens further allege that the impartiality of the inquest has been compromised and 'invites' the Territory Coroner to recuse herself:
    a. On the basis of the Yuendumu visit on 14 and 15 November 2022; and
    b. On the basis of an amendment to the non-publication order made on 23 March 2023.

3. Mr Rolfe and Sergeant Bauwens further object to an interim non-publication order made on 10 October 2023 over the submissions of parties in relation to this issue.

**Summary of NTPF response**

4. In summary, the position of the Northern Territory Police Force ("NTPF") is that the current application, invitation and objection appear to constitute a further attempt on behalf of Mr Rolfe (and Sergeant Bauwens) to distract from and delay the inquest process. Brought, as they are, immediately before Mr Rolfe and Sergeant Bauwens are scheduled to give evidence from 23 October, in respect of which they have already made unsuccessful objections to giving evidence before the Territory Coroner and in appellate proceedings before a single judge of the Supreme Court and the Court of Appeal of the Northern Territory, they could be seen as the adoption of another forensic tactic and should be found to be without merit.

5. The application and invitation also fundamentally misconceive the inquisitorial and flexible nature of coronial proceedings and the role of Counsel Assisting a Coroner. They should be rejected.

6. The inquest should proceed without further distraction in relation to peripheral and groundless aggrievements so that it can be brought to a conclusion without additional delay, trauma for the family members of Kumanjayi Walker and expense for the Northern Territory.

**Chronology**

7. It is of assistance to set out the following chronology relevant to these issues:
    a. On **26 May 2022,** a Directions Hearing was conducted in this matter, which settled the scope of the proceedings. The inquest was listed to commence on 5 September 2022.
    b. On **5 September 2022**, the inquest commenced. A non-publication order was made preventing disclosure of the coronial brief.
    c. On **9 and 12 September 2022**, it was argued on behalf of Mr Rolfe that the Territory Coroner should not receive evidence from his mobile phone download and the evidence of witness Claudia Campagnaro. Mr Rolfe initially objected to 13 issues as being beyond the scope of the inquest.
    d. On **13 September 2022**, the Territory Coroner ruled in relation to these matters (Ruling No. 2).[1]

[1] *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 017.

e. On **29 September 2022**, the Territory Coroner heard objections by Constable Rolfe in relation to eight discrete categories of evidence, including a renewed objection as to the use of the mobile phone evidence.

f. On **14 October 2022,** the Territory Coroner ruled in relation to these matters (Ruling No. 3).[2]

g. On **18 October 2022**, the Spotlight materials were served on the parties alongside other parts of the coronial brief.

h. On **25 October 2022,** Sergeant Kirkby objected to giving evidence on the basis of penalty privilege. On the same day, the Territory Coroner ruled against him and Sergeant Bauwens commenced judicial review proceedings.

i. On **14 and 15 November 2022**, the Yuendumu visit took place.

j. On **16 November 2022**, Mr Rolfe too objected to answering questions on the basis of the penalty privilege.

k. On **23 and 24 November 2022**, the judicial review application was heard by Justice Kelly in the Supreme Court. Mr Rolfe was joined as a party to those proceedings; Sergeant Bauwens did not ultimately take part.

l. On **24 November 2022,** the non-publication order was amended enabling material on the coronial brief to be provided to the Professional Standards Command.

m. On **30 November 2022**, the inquest adjourned for 2022, after 46 hearing days (in addition to the two days for the Yuendumu visit), during which 54 witnesses gave evidence.

n. On **12 December 2022**, Justice Kelly delivered judgment in the judicial review proceedings, dismissing the applications for declaration by Sergeant Bauwens and Mr Rolfe.[3]

o. On **5 January 2023**, Mr Rolfe filed a Notice of Appeal against the decision of Justice Kelly.

p. On or about **23 February 2023,** Constable Rolfe caused to be published an opinion piece in which he argued, inter alia, that in another state he would have received a medal for shooting Kumanjayi, that the bias in the investigation against him was blatant and obvious and that the Commissioner of Police was a clown.

q. On **27 February 2023,** the inquest resumed.

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[2] *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019.
[3] *Bauwens v The Territory Coroner* [2022] NTSC 92.

r. On **8 March 2023**, Constable Rolfe was served with a notice requiring him to show cause as to why he should not be immediately dismissed.

s. On **10 March 2023,** the inquest adjourned to 31 July 2023, after a further 10 sitting days and evidence from a further 16 witnesses.

t. On **23 March 2023**, the non-publication order was further amended for clarification.

u. On **24 March 2023,** the amendment was withdrawn.

v. On **4 April 2023**, Constable Rolfe was dismissed from the Northern Territory Police Force.

w. On **11 April 2023**, the Court of Appeal heard Mr Rolfe's appeal of the decision of Justice Kelly.

x. On **28 April 2023,** a Directions Hearing took place in the inquest, at which Counsel Assisting clarified the position regarding the non-publication order. The inquest at that stage was set to resume on 31 July 2023.

y. On **4 May 2023,** the blanket non-publication order was revoked and a limited, specific non-publication order made.

z. On **23 June 2023**, the Territory Coroner directed that the sitting week commencing 31 July 2023 be vacated and that the evidence of Sergeant Bauwens and Mr Rolfe would be taken in the week commencing 23 October 2023.

aa. On **28 June 2023**, the Court of Appeal dismissed Mr Rolfe's appeal,[4] which had the effect of requiring him to give evidence in the week commencing 23 October 2023.

bb. On **1 August 2023,** the Court of Appeal clarified its decision.

cc. On **6 October 2023,** Mr Rolfe, through his solicitors, invited the Territory Coroner to recuse herself on the basis of apprehended bias.

8. By his submissions dated 6 October 2023, therefore, Mr Rolfe invited the Coroner to consider recusing herself:

a. 325 days, or over 10 months, after the Yuendumu visit.

b. 185 days, or six months, after he was dismissed from the NTPF.

c. 161 days, or over five months, after the Directions Hearing at which the position regarding the amendment to the non-publication order was clarified.

[4] *Rolfe v The Territory Coroner* [2023] NTCA 8.

d. 100 days, or over three months, after the Court of Appeal dismissed Mr Rolfe's appeal which had the effect of requiring him to give evidence.

**Apprehended bias test**

9. The following significant principles should be taken into account in addition to those referred to in the submissions filed by Mr Rolfe.

10. Firstly, applications based on a reasonable apprehension of bias must be made promptly. Objections should be taken at the time remarks are made; a party who waits until the final judgement to take objection waives their right to do so.[5]

11. Secondly, a finding of apprehended bias should not be reached lightly[6] and a judicial officer should not automatically stand aside when requested to do so; this would amount to an abdication of the judicial function and encouragement of procedural abuse.[7] As Mason J said:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[8]

12. Thirdly, it is incumbent upon the party asserting an apprehension of bias to identify what it is said that might lead a judicial officer to decide a case other than on its legal and factual merits. There must be an "articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on is merits."[9] A mere assertion is "of no assistance;"[10] there must be a substantial ground for contending that a judicial officer cannot sit on a case or continue to do so.[11]

13. Fourthly, the hypothetical fair-minded observer:

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[5] *Vakata v Kelly* (1989) 167 CLR 568 at 572, 587-588; *Gild v The Queen* [2017] VSCA 367 at [25].
[6] *SNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [56].
[7] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294;
[8] *Re JRL, Ex Parte CJL* (1986) 161 CLR 342 at 352.
[9] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8].
[10] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [8].
[11] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [19].

a. knows that a judicial officer is a judicial officer and by his or her training is expected to discard irrelevant, prejudicial or immaterial matters.[12]

b. appreciates that the role of the coroner under the *Coroners Act 1993* (NT) is intended to be responsive to the concerns about Indigenous deaths in custody, as highlighted by the Royal Commission into Aboriginal Deaths in Custody.

c. is aware of the importance of coronial proceedings being sensitive to the grief of parties and communities, and, so far as possible, being culturally-aware and trauma-informed.

d. understands that judicial officers make decisions in accordance with the law and are usually capable of ignoring the consequential effects of their decisions.[13]

e. does not have a propensity to draw the most sinister implications from every ruling or adopt the least favourable interpretation of every judicial comment.[14]

f. is, as summarised by Kirby J:

> …. not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious [citations omitted].. [15]

g. is, as was held to similar effect, by Kiefel CJ and Gageler J:

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[12] *Honda Australia Motorcycle v Johnstone* [2005] VSC 387 at [18]; *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [259].
[13] *Ronan v Australia and New Zealand Banking Group* [2000] VSCA 77 at [43].
[14] *R v Doogan; Ex parte Lucas-Smith,* [2005] ACTSC 74 at [78], *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [61].
[15] *Johnson v Johnson* (2000) 201 CLR 488 at [53].

> "neither complacent nor unduly sensitive or suspicious." Yet the observer is cognisant of "human frailty" and is all too aware of the reality that the judge is human. The observer understands that "information [as well as attitudes] consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-making" [citations omitted].[16]

14. Fifthly, disqualification requires a reasonable apprehension that the judicial officer may not decide the case impartially. It is not sufficient that the judicial officer is expected to decide the matter in a manner adverse to a party. Any such expectation does not mean that the judicial officer will approach the matter with a prejudiced mind. As Mason J said:

> *It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than he will decide the case adversely to one party.* There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that it is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established" [citations omitted, emphasis added].[17]

15. Sixthly, an apprehension of bias must be firmly and positively established; disqualification should not be done without good cause and such a decision should not be reached lightly.[18]

16. Seventhly, in determining whether to decline to sit, or continue to sit, a judicial officer may properly have regard to factors including the stage at which the objection is raised, the practical possibility of arranging for another judicial officer to hear the case, the role of the court before which the proceedings are being conducted,[19] and the exception of necessity.[20] It has been held that requiring parties to embark on a fresh hearing before a new bench, when lengthy hearings have taken place and important evidence has been given, would not promote public confidence in the administration of justice; on the contrary, it would have the opposite effect.[21]

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[16] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 at [47].
[17] *Re JRL, Ex Parte CJL* (1986) 161 CLR 342 at 352.
[18] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348, *Honda Australia Motorcycle v Johnstone* [2005] VSC 387 at [19]; *R v Doogan* [2005] ACTSC 74 at [10]; *Re JRL, Ex Parte CJL* (1986) 161 CLR 342 at 352.
[19] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348.
[20] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 359.
[21] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 359.

**Role of the coroner**

17. Further considerations apply specifically in the coronial context:

a. A coronial investigation is an inquisitorial proceeding which operates outside the 'judicial paradigm.'[22] The Territory Coroner must make findings, if possible, about the death, and may make comments on matters connected with that death, including matters of public health or safety or the administration of justice.[23] The Coroner must not include in a finding or comment a statement that a person is or may be guilty of an offence.[24] An inquest is not a curial proceeding which can give rise to a penalty; it does not does not determine a legal or rights dispute between parties.[25] An inquest eschews the ordinary rules of evidence and procedure; its purpose is to discover the direct and systemic causes of a death.[26]

b. This is important because, as three members of the Supreme Court of the ACT stated in *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74:

> the significance of facts and circumstances from which it is suggested that an apprehension of bias might arise *must be assessed by reference to the question or questions that the judicial officer is required to decide* [emphasis added].[27]

c. It is expected and encouraged that family and community members attend and participate in inquests. Sessions directed to the airing of family impact statements are not 'remotely unusual'. They take different and flexible forms and are part of appropriate engagement by coroners with the loved ones of a deceased person and the community.[28]

[22] *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [240].
[23] *Coroners Act 1993* (NT), s34.
[24] *Coroners Act 1993* (NT), s34(2).
[25] *Rolfe v The Territory Coroner* [2023] NTCA 8 at [52]-[55].
[26] *Rolfe v The Territory Coroner* [2023] NTCA 8 at [53]-[55].
[27] *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74 at [11].
[28] *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [247].

d. As issues in inquests may arise and be refined while evidence is being adduced, matters relied upon to support allegations of apprehension of bias must be considered, not only in the context of the relevant jurisdictional limits, but also by reference to the extent to which the relevant issue has been crystallised or remains inchoate.[29] Thus, applications raising questions of apprehended bias may be premature if made before a coroner has handed down a final report, as it may be difficult before that stage to determine the potential relevance of rulings or other comments made during the course of proceedings.[30]

**Scope of inquest**

18. In this matter, it is important to recognise that the Territory Coroner is investigating systemic and cultural matters well beyond the role of Mr Rolfe (or Sergeant Bauwens) in the death of Kumanjayi Walker, the attitudes and history of use of force of Mr Rolfe and any disciplinary investigations involving Mr Rolfe. For example, the Territory Coroner has received evidence on matters as diverse as:

    a. police risk assessments and briefing processes.
    b. the 'decoy plan', initial decision to evacuate, and failure by police to tell community members of Kumanjayi Walker's death in a timely manner.
    c. the updating of various NTPF General Orders and policies, and the new police handbook.
    d. the various use of force options including the use of police dogs, and the use of firearms by police generally and in remote communities.
    e. the alleged militarisation of policing in the Northern Territory.
    f. the establishment of CREC, the ALO program, the mentoring program and mutual respect agreements.
    g. the role of ACPOs and ALOs.
    h. the training of NTPF members including in relation to use of force and matters such as unconscious bias, mental health first aid and cross-cultural training.
    i. the prevalence of racist attitudes within the NTPF.
    j. efforts by the NTPF to improve leadership and culture.

[29] *R v Doogan; Ex parte Lucas-Smith,* [2005] ACTSC 74 at [48].
[30] *R v Doogan; Ex parte Lucas-Smith,* [2005] ACTSC 74 at [12].

k. the challenges of policing in a remote community, including fatigue.
l. the challenges of running a health service in a remote community.
m. evidence from Territory Families.
n. the challenges of running concurrent criminal and coronial investigations.
o. the availability of support services and housing standards in Yuendumu.
p. police recruitment processes.

19. More significantly, there has been no suggestion that the Territory Coroner is directing her investigation to matters complained of in the submissions filed by Mr Rolfe, including whether he should have been dismissed from the police force for his role in the shooting of Kumanjayi Walker, or whether he should be subject to traditional payback practices. While it may be understandable that these matters were raised by grieving family and community members, it is plain that they are not relevant to the functions of the Territory Coroner and not within her contemplation.

**The Role of Counsel Assisting**

20. The Territory Coroner has exercised her power under s41(2) of the *Coroners Act 1993* (NT) to appoint Dr Dwyer (now SC) to assist her for the purpose of the inquest.

21. The principal authority on the relevance of the conduct of Counsel Assisting to an allegation of apparent bias by a Coroner is the decision of the ACT Supreme Court in *R v Doogan; Ex parte Lucas-Smith.*[31] In that matter, it was accepted in principle that there may be situations in which an apprehension of bias on the part of a coroner could arise from statements or conduct engaged in by Counsel Assisting.[32] However, it was observed that there is no general principle that requires a judicial officer to intervene when counsel has made an intemperate remark[33] or otherwise lacked even-handedness in their conduct.

22. While conduct by Counsel Assisting amounting to ongoing inequality of treatment of witnesses[34] could in principle give rise to such an inference if a Coroner were to take no action to prevent such unfairness, that is not a scenario arising in this case.

[31] [2005] ACTSC 74.
[32] [2005] ACTSC 74 at [159].
[33] *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74 at [60].
[34] *Firman v Lasry* [2000] VSC 240 at [248].

**The Yuendumu Visit**

23. Mr Rolfe and Sergeant Bauwens suggest that the Territory Coroner should recuse herself in part due to events that took place during the visit on 14 and 15 November 2022, almost 11 months ago. It appears that they are aggrieved that various matters were raised by members of the Yuendumu community in the presence of Counsel Assisting and the Territory Coroner, and responded to by Counsel Assisting, including matters that were not specifically prefigured in advance.

24. The purpose of the visit was partly a traditional view, including of the premises where the death of Kumanjayi Walker took place. Plainly, however, it was also to permit family and community members to take part in the coronial process and to demonstrate culturally and trauma-informed sympathy and empathy for the loss of the young man into whose death the Territory Coroner is enquiring. This was identified by Mr McMahon SC on 4 November 2022, and is consistent with the way in which the proceedings have been conducted from their outset, including initiatives such as holding a session on cultural awareness at the beginning of the inquest; ensuring that the proceedings have been live-streamed to the community, and assisted by interpreters; and leave being given to the Parumpurru Committee to participate as a party to the inquest.

25. Significantly, a forensic decision was made by Mr Rolfe's legal team for counsel not to attend the Yuendumu visit, and for Mr Rolfe's solicitor to attend on only one day, despite the fact they were invited to fully participate in the two-day visit. The fact that the visit to Yuendumu would give members of the community an opportunity to communicate less formally than in court to the Coroner was abundantly clear to all parties from the outset, as it was in the *Kontis* inquest.[35] Had Mr Rolfe's representatives or those representing Sergeant Bauwens attended, they could have listened to everything that was said, observed what took place and participated in discussions. They chose not to do so and should not now belatedly be heard to complain about the consequences of their own forensic decisions. It was always the position that the visit was not to be the subject of 'recording'.

26. Mr Rolfe suggests that the concerns expressed by community members were not ventilated 'on the sudden' given they had been listed on a whiteboard, and that on this basis, the Coroner ought to

[35] *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [246].

have been alive to the matters and should have distanced herself from the discussion. This is an unreasonable and untenable position. While community members may have determined in advance that such matters would be ventilated before the Coroner, the Coroner herself could not have known what would be raised by them.

27. In any event, the fact that Counsel Assisting reassured the community that what they were saying in the presence of the Coroner was being listened to respectfully and 'would be taken into account' does not equate it to evidence. Fairly construed, this could not give rise to a reasonable apprehension of bias. That some members of the community felt that justice had not been adequately dispensed by the criminal justice system to Mr Rolfe, or considered that he should be removed as a serving police officer, does not give such points of view any status in relation to findings to be made by the Territory Coroner, having regard to the evidence heard at the inquest and her statutory functions. That Counsel Assisting engaged with community members in an empathic and sensitive way should only be commended. This inquest is of great importance to the Yuendumu community and, more generally, to the Northern Territory. There is no legitimate basis whatsoever for drawing an inference either that Counsel Assisting was sympathetic to the view that Mr Rolfe had been dealt with unjustly, or that the Territory Coroner subscribed to such a view. Any more than in the *Kontis* matter, there can be no reasonable apprehension arising out of the Yuendumu visit that the Coroner might fail to discharge her judicial functions in an impartial manner.[36]

28. Mr Rolfe also complains that Counsel Assisting and the Coroner submitted to having their faces painted. The fact that the Coroner and Counsel Assisting participated in a cultural practice to show respect to the community and the members of Kumanjayi Walker's family could not properly lead to an inference of anything other than that they were prepared to conduct themselves in a way which was culturally sensitive.

[36] *Kontis v Coroners Court of Victoria* [2022] VSC 422 at [258].

**Recordings of Yuendumu visit**

29. Mr Rolfe complains that the recordings of the view provided to those representing him were not complete and were redacted, as well as that transcript of conversations between Counsel Assisting and the Coroner were not provided.

30. It is not normal or conventional for a view to be audio or video-recorded. The fact that a partial transcript was able to be provided is more than is normally done. The communications made by members of the community did not equate to sworn evidence that was able to be tested in court.

31. The material sought on behalf of Mr Rolfe is not of a kind that has the potential to affect the interests of Mr Rolfe (or Sergeant Bauwens). Access to it does not therefore generate a procedural fairness or natural justice right of the kind that arose in *Annetts v McCann*.[37]

32. The fact that confidential communications between the Territory Coroner and her Counsel Assisting have not been provided to those representing Mr Rolfe is proper, is not a breach of s28 of the *Local Court Act 2015* (NT). It is orthodox. It is not information that is reasonably necessary for the management of the proceedings and it could not be the subject of any inference relevant to this application. The submissions to the contrary fail to take proper account of the role of counsel assisting in inquisitorial proceedings.

33. It is correct that case law has suggested that there are limits to the involvement that Counsel Assisting can have in the writing of findings. [38] However, there is no suggestion that this is an issue in this matter, especially since the evidence in the matter is ongoing.

**Non-publication order**

34. Mr Rolfe also complains about a non-publication order made by the Coroner on 23 March 2023 and amended the following day. The effect of this order was to remove the condition that the exceptions to the order could only be for the purpose of coronial proceedings.

[37] (1990) 170 CLR 596.
[38] *R v Doogan; Ex parte Lucas-Smith* [2005] ACTSC 74 at [60].

35. A relevant chronology of this issue is as follows:

a. **5 September 2022**: An Interim NPO was made over the brief, with the Commissioner of the NTPF excepted, and incorporating the words "for the purposes of these coronial proceedings."
b. **24 November 2022**: An Interim NPO was made over the brief, with the Commissioner of the NTPF and the Professional Standards Command excepted, and incorporating the words "for the purposes of these coronial proceedings."
c. **23 March 2023**: An Interim NPO was made over the brief, with the Commissioner of the NTPF and the Professional Standards Command excepted, and omitting the words "for the purposes of these coronial proceedings."
d. **24 March 2023**: The amendment to the interim NPO of the previous day was withdrawn following objection on behalf of Mr Rolfe.
e. **28 April 2023**: A Directions Hearing was conducted, at which Counsel Assisting conceded that the phrase of "for the purposes of the Coronial proceedings" in the non-publication orders was confusing, and stated that the purpose of the 23 March amendment, which had not been the subject of application but a suggestion from her, was to clarify the capacity for statutory functions of police to be unimpeded.
f. **4 May 2023**: A new, limited interim NPO was made over specific items listed in a table.
g. **10 October 2023**: A further interim NPO was made over the application by Mr Rolfe of 16 August 2023, the application and submissions on behalf of Mr Rolfe and submissions in response or replies to them.

36. It is the amendment of 23 March 2023 (reversed within 24 hours) that is the subject of aggrievement expressed on behalf of Mr Rolfe.

37. It is the amendment of 10 October 2023 that is the subject of aggrievement expressed on behalf of both Mr Rolfe and Sergeant Bauwens.

38. Both expressions of aggrievement complain of orders having been made without the opportunity for parties to be heard on the issue. On behalf of Mr Rolfe various speculations and insinuations are made as to the motives of the Territory Coroner for making to the 23 March order.

39. A consequence of the 24 November 2022 amendment to the Coroner's non-publication order was that there was no inhibition upon material relating to an interview conducted by Mr Rolfe to be provided by a prescribed police member to the Professional Standards Command for consideration as to whether it constituted a disciplinary breach by Mr Rolfe. This was further clarified by the amendments of 23 March and then 4 May 2023.

40. A convoluted argument is mounted on behalf of Mr Rolfe that in some way the amendment had a sinister purpose or was a response to the Yuendumu community's desire for justice in relation to Mr Rolfe or its view that he should no longer be employed as a police officer. It is suggested that there could be an apprehension that the Coroner's purpose in the amendment was to "assist in remedying a potentially defence [sic] disciplinary investigation against Mr Rolfe. Moreover, it gives [sic] to an apprehension that the Coroner may approach her statutory obligations in a manner that reflects a preference for the objectives of NT Police at the expense of the rights and interests of Mr Rolfe."[39]

41. Each of the arguments on behalf of Mr Rolfe and Sergeant Bauwens has no merit and is extraordinarily strained.

42. Issues in relation to the interim NPOs were clarified by Counsel Assisting at the Directions Hearing on 28 April 2023. She explained that the interim non-publication order of 5 September 2022 was amended on two occasions at the suggestion of Counsel Assisting to remove confusion and to enable entities, including the NTPF Professional Standards Command, to carry out their investigative work.[40]

43. The fact that the Territory Coroner chose to amend the non-publication order to enable relevant material to be provided to the Northern Territory Professional Standards Command enabled investigation of whether Mr Rolfe's Spotlight interview constituted a disciplinary infraction. The amendment was appropriate, allowed ordinary processes to be followed upon discovery of material potentially relevant to a police officer's fitness to remain a member of the police force, and enabled an investigation that was not fettered by the tight time limits that otherwise had the potential to apply. The orders of the Territory Coroner cannot properly be said to have been part of any agenda to enable Mr Rolfe to be investigated. They simply removed an inhibition that may have existed in

[39] Submissions by Mr Officer, 6 October 2023, para 93.
[40] Inquest into the death of Kumanjayi Walker, 28 April 2023, pages 4905-4909.

relation to timely investigation of potential misconduct by a then-serving officer of the NTPF by the Professional Standards Command of the NTPF. It would be absurd if, during the course of a coronial investigation, concerns about a police officer or member of another profession were raised, yet could not be investigated or acted upon in a timely way by the Professional Standards Command or other relevant regulatory body.

44. Although solicitors for Mr Rolfe and Sergeant Bauwens sought to raise concerns about the evidentiary effect of the non-publication order on other proceedings, her Honour was right to state that those matters, while they might have other effects, were not relevant to the inquest. [41]

45. Significantly, Mr Rolfe was not dismissed from his employment with the NTPF as a consequence of the coronial inquest, as a result of a decision made by the Coroner, or due to concerns expressed by family or community members, either during the Yuendumu visit or at any time. Mr Rolfe lost his job as a consequence of his own conduct in writing an "open letter" in contravention of his obligations as a serving officer.[42] He was dismissed on 4 April 2023.[43]

**Conclusion on application and invitation**

46. The invitation to the Territory Coroner to recuse herself for apprehended bias should be rejected. It has no proper basis given the flexible and inquisitorial nature of the inquest process and the role of Counsel Assisting. No aspect of the Yuendumu visit was inappropriate. The relentless pursuit on behalf of Mr Rolfe for documentation about the amendment process to a non-publication order of 5 September 2022 that is now largely superseded is a matter that is utterly collateral to the inquest and should not be indulged. On a fair analysis, including by reference to when the invitation has been issued, it should be regarded as constituting a further attempt by both Mr Rolfe and Sergeant Bauwens to distract the inquest process from running to completion and, in light of its lack of merit, can be seen as another attempt to avoid giving public evidence to the inquest. It is time to return to a focus on the death of Kumanjayi Walker and the evidence yet to be given in relation to matters relevant to the scope of the inquest.

[41] Inquest into the death of Kumanjayi Walker, 28 April 2023, pages 4926-4927.
[42] Affidavit of Bruce Porter dated 31 May 2023, [36]-[46] (to be added to coronial brief).
[43] Inquest into the death of Kumanjayi Walker, 28 April 2023, page 4924; Affidavit of Bruce Porter dated 31 May 2023, [36]-[46] (to be added to coronial brief).

**Procedural matters**

47. It is understood that the Territory Coroner proposes to deal with the application by Mr Rolfe for documents prior to determining the apprehended bias issue. It is unclear whether this will involve two consecutive rulings delivered at the same time, or whether the issues will be dealt with at different times.

48. The NTPF does not object to the Territory Coroner dealing with the two matters in the order proposed. However, in the interests of procedural clarity, it is submitted that both matters should be ruled upon a suitable time before the recommencement of evidence.

**Non-publication order**

49. On 10 October 2023, the Territory Coroner made an interim non-publication order over the application and submissions of Mr Rolfe of 16 August 2023 and 6 October 2023, any submissions in response, and any replies, until further order. On the same day, parties were advised that all submissions would be released to the media and posted on the inquest website when the decision of the Territory Coroner was released.

50. Mr Rolfe and Sergeant Bauwens objected to the interim non-publication order. On 13 October 2023, parties were advised that in response, the Territory Coroner proposed to rescind the interim non-publication order, and release and upload the submissions received to the inquest website, as soon as possible after the deadline for submissions that afternoon.

51. The NTPF submits that the interim non-publication order made on 10 October 2023 is not objectionable. It could only have been made in accordance with s 41(1)(b) *Coroners Act*, which permits a non-publication order to be made if the Territory Coroner reasonably believes that publication would be contrary to the administration of justice. The order was made on an interim basis, for a limited period. It was intended to be in force only until such time as all submissions in relation to the application and recusal invitation, and the ruling, were provided. Other non-publication orders have been made in this matter from time to time to protect witnesses from having certain documentary or text message evidence published before they had an opportunity to address

these matters in their oral evidence. The purpose of the limited non-publication order made on 4 May 2023 was in part to give this same protection to Mr Rolfe and Sergeant Bauwens.[44]

52. It is apparent that the interim non-publication order made on 10 October 2023 could only have been made on the same basis: that is, to ensure that the issues raised by Mr Rolfe were treated in a balanced and even-handed matter, and the community could only be informed of the detail of the complaints once all parties, including the Territory Coroner herself, had had an opportunity to address them. This is in the interests of justice.

53. That the order will be rescinded shortly after the filing of these submissions means, however, that any further objections by any party, or any ruling by the Territory Coroner, is unnecessary.

Dr Ian Freckelton AO KC
Ms Amanda J. Burnnard
Counsel for the Northern Territory Police Force
13 October 2023

[44] Inquest into the death of Kumanjayi Walker, 28 April 2023, page 4907.