IN THE CORONERS COURT
OF THE NORTHERN TERRITORY OF AUSTRALIA
AT ALICE SPRINGS

In the matter of an inquest into the death of
KUMANJAYI WALKER

WLR FAMILIES' SUPPLEMENTRY SUBMISSIONS ON RECUSAL APPLICATION

Timing, delay and disruption

1. The Coroner initially indicated that the recusal application would be determined on the papers. This was in circumstances where the application was made when the resumption of the Inquest was imminent and the scheduling of arguments was within a tight temporal framework, such that prospect of an oral hearing was practically impossible without delaying the Inquest. That is why the WLR families did not object to that course. The temporal constraint was removed by the vacation of the scheduled hearing. Moreover, submissions both in support of the recusal and against recusal and by Counsel Assisting were received *after* the WLR submissions were filed.

2. The WLR families maintain that this crucial application, which if upheld will derail years of complex work and consideration, should be ventilated in open court.

3. It has now been confirmed by Mr Officer that a review will be filed immediately in the event Mr Rolfe's application is refused, and a stay will be sought. This will mean that the Inquest will not resume for many months and longer if an appeal from that review is pursued. This compounds the significant delay occasioned by the previous failed attempt by Mr Rolfe and Sgt Bauwens to avoid giving evidence.

4. This Inquest has an important statutory purpose to fulfil: to make findings, comments and recommendations to ensure that deaths such as that which occurred to Kumanjayi Walker do not occur again. That purpose has been frustrated by the approach adopted by Mr Rolfe, Sgt Bauwens and the others who have joined in the present application. The contention at [13] of Mr Rolfe's reply submissions (**RRS**) that it was necessary or permissible to delay making the recusal application cannot be accepted when the focus of the application is on what is said to have occurred in Yuendumu in November 2022, almost a year before the application was made.

5. This delay is consequential. Whether or not it amounted to a 'forensic tactic', the matters set out above make it apparent, if it were not otherwise, that it occurred with full knowledge of these witnesses' highly engaged legal representatives. In that context it constituted a waiver of their right to raise apprehended bias in relation to any issue that arose before the 'legal professional privilege' (**LPP**) issue in late August 2023 – in particular, of any complaint of bias arising from the Yuendumu visit.[1]

6. In any event, the submission that no application could be made until the LPP issue arose tacitly and tellingly accepts that what is said to have occurred in Yuendumu and the other events complained about that occurred before that date would not, by themselves or

[1] See, e.g., *Vakauta v Kelly* (1989) 167 CLR 568 at 572 (Brennan, Deane and Gaudron JJ); *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 449 [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

together, be sufficient to give rise to apprehended bias. For the reasons set out below, that acceptance is fatal to the application.

7. Two other preliminary points may be made.

8. First, Mr Kirstenfeldt's submission at [7.1b] and similar contention at RRS [30](a) bespeaks profound cultural insensitivity and ignorance. The empathy shown to the mother of Kumanjayi Walker by the Coroner in a culturally sensitive fashion cannot reasonably be equated with the optics of a meeting with the family of the man who killed him. Further, face painting could not reasonably be viewed as different to a handshake or embrace of a parent grieving the death of her son. In any event, this and other expressions of empathy[2] could not possibly lead a fair-mined lay observer to apprehend bias in respect of the statutory functions to be undertaken by a coroner.

9. Second, Mr Kirstenfeldt and Sgt Bauwens complain about 'limited funding' to explain some of their requests and contentions. But none of the lawyers appearing for the families and the community is being paid, and instead they are being put to considerable expense and disruption by reason of the approach that has been taken to this case by these witnesses.

Legal Professional Privilege (LPP) and NPO issues

10. RRS [15]-[20] raise new issues relating to the non-publication order (**NPO**) issue to which it is necessary to respond. The RRS also, presumably because of the spectre of waiver, place much greater emphasis on the LPP issue than appeared in their earlier submissions. It is therefore also appropriate to respond in more detail to this issue.

11. First, an NPO may be made by a coroner of their own motion and 'must' be made in (and only in) certain circumstances: s 41(1)(d) and s 43. It follows that an NPO may be amended without any involvement of the parties. The sequence of events concerning the NPO under attack need not be repeated, other than to state that they cannot be seen to have been made contrary to these provisions.

12. Second, even assuming that Mr Rolfe should have been given an opportunity to be heard on the amendment to the NPO and was not, that would not, as a matter of course, give rise to an apprehension of bias on the part of the Coroner. Context is important. The complaint is that the lifting of aspects of the NPO permitted the Professional Standards section of the NTPF to view evidence which may pertain to their consideration of Mr Rolfe's conduct given that he was then a police constable, without a real opportunity for him to be heard. However, if there was error in this course, it was immaterial. First, the proceedings which encapsulated this evidence were heard in open court and the subject of live-stream access. Senior officers from Professional Standards were in Court. Second, the amendments were probably not necessary once his conduct became known. Moreover there was nothing that could have been said which would properly inform the decision/s to amend. It was never the purpose of the NPO to restrict the capacity of the NTPF to properly view Mr Rolfe's conduct as a police officer. And most importantly, he was subsequently dismissed from the NTPF for wholly unrelated reasons.

13. Third, an ancillary aspect of the complaint is that Mr Rolfe should now see what if any communications occurred between counsel for the NTPF and the Counsel Assisting team

[2] Cf. the Coroner expressed empathic comments to witnesses Ms Fernandez-Brown (T163) and Senior ACPO Derek Williams (T259), Constable Eberl (T1905) and Senior Constable McCormack (T2263).

in respect of amendments to the NPO. The submissions on that topic at RRS [15]-[20] are speculative. And even if there were a communication with the Coroner's Counsel Assisting team about any of those topics which was not copied to Mr Rolfe's legal representatives, it is not explained why that would give rise to an apprehension of bias. An *ex parte* communication about a matter of procedure will not necessarily give rise to an apprehension of bias.[3]

14. Third, it is a matter for any member of the Counsel Assisting team (including Ms Walz) to assess whether they disclose any communications they may receive to the Coroner.

15. Fourth, if anything is said or provided to the Coroner, about any matter, it would be erroneous to think that LPP automatically attaches to such a communication. The Coroner should not accept that it does.[4] But even accepting that Ms Walz made an error when in her communications to Mr Officer (for Mr Rolfe) she cited LPP as a reason for not providing some documents, that would not give rise to apprehended bias. First, it cannot be assumed that Ms Walz's communication was premised on there being a claim of LPP *by* the Coroner. Second, even if the Coroner was aware of or claimed LPP, it is not explained why this would cause a fair-minded lay observer to think that the Coroner would not bring an impartial judgment to her statutory tasks. All that would have happened is that the Coroner made an error in articulating the reason why her private communications with her Counsel Assisting team should not be disclosed. Nothing sinister about the contents of those communications or the Coroner's relationship with Counsel Assisting could be inferred. And even if, for example, Counsel Assisting had given legal advice to the Coroner, it is unexplained why that would give rise to an apprehension of bias on the part of the Coroner.

16. That said, and despite there being no identifiable utility, in order to remove any basis for concern, the WLR families invite the NTPF and/or the Counsel Assisting team to disclose any communications with each other on this issue unless the Coroner directs that they should not. That would neutralise this issue.

Next steps

17. If the recusal application is refused, no further delay should be tolerated. If the recusal is not the subject of a stay order, the Inquest should be reconvened as soon as possible with a request made to the Chief Magistrate to adjust the current coroner's other commitments to facilitate the earliest possible resumption and finalisation of this Inquest..

[redacted] [redacted] [redacted]

Andrew Boe Dan Fuller Greer Boe

Counsel for the Walker Lane & Robertson Families
20 October 2023

[3] See generally, e.g., *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34; (2011) 276 ALR 221.
[4] Cf. Ms Huxley's submissions at CA[41]-[47]. The case cited, *Fairfax Publications Pty Ltd v Abernathy* [1999] NSWSC 826, refers to formal advice sought from the Crown Solicitor which is not the same as any 'advice' provided by a counsel assisting.