IN THE CORONER'S COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS **NO. A0051/2019**

IN THE MATTER OF: Inquest into the death of Kumanjayi Walker

NAAJA'S OUTLINE OF SUBMISSIONS ON ISSUE RELATING TO THE EXAMINATION OF MR ROLFE

1 These submissions respond to those of Mr Rolfe dated 15 February 2024 (**Rolfe submissions**). In summary, and in response to Mr Rolfe's three main contentions at [1] of his submissions, NAAJA submits:

1.1 It would be appropriate for the Coroner to manage the conduct of the cross-examination of Mr Rolfe so that there is not unnecessary repetition, including by disallowing repetitive questions. It would *not* be appropriate for the Coroner to require the parties cross-examining Mr Rolfe to provide him with a list of topics ahead of time.

1.2 Mr Rolfe ought to assume he will be cross-examined on all of the text messages which have been included in the aide memoir. If he wishes to make a claim for privilege against self-incrimination in respect of his answers about those text messages, or to otherwise object to answering questions about them, he could facilitate the Court's determination of his objections by indicating his objections in writing ahead of the hearing so as not to waste valuable sitting time with issues about which he has been on notice of for months.

1.3 In circumstances where the Northern Territory Police and any relevant prosecuting authority have long been aware of the matters about which Mr Rolfe seeks to claim the privilege against self-incrimination (see [22] of Mr Rolfe's submissions), there is little risk of Mr Rolfe's answers in these proceedings being used in a derivate way to support any prosecution of him in relation to those matters. Balanced against this speculative risk is the importance of Mr Rolfe's answers for the issues that the Coroner is considering. Accordingly, it will readily appear to the Coroner that it is 'expedient for the purposes of justice' that Mr Rolfe be compelled to answer questions on these matters: *Coroners Act 1993* (NT) (**Act**) s 38(1)(b).

REPETITIOUS CROSS-EXAMINATION

2 NAAJA accepts that it would not be appropriate for the Coroner to permit unduly repetitious cross-examination of Mr Rolfe. However, that is not an issue unique to Mr Rolfe's evidence and has been ably managed by the parties (with the occasional intervention of the Coroner and counsel assisting, and with stop-watch orders) during the many witnesses who have preceded Mr Rolfe – including witnesses who may be subject to criticism or adverse findings. As identified in Counsel Assisting's Responsive Submissions (CA Responsive Submissions),[1] Mr Rolfe is not deserving of special treatment as to require any particular regime for cross-examination where that advantage has not been enjoyed by other parties.

3 In any event, it would be rare indeed for a Court or tribunal acting judicially to require a cross-examining party to expose their proposed cross-examination to a witness ahead of time.

4 'Cross-examination is the principal method by which the capacity of a witness to observe, recollect and narrate, and by which his or her honesty, credibility and reliability, can be tested.'[2] Permitting a witness to pre-prepare for cross-examination by knowing the matters about which they will be questioned flies in the face of centuries of judicial experience.

5 Mr Rolfe's proposal also goes beyond what is necessary to avoid duplication of questions and impinges the other parties' ability to put forward their case by cross examination.[3] Substantially, Mr Rolfe's submission is that the Coroner replicate the way the Court approached Mr Lehrmann's cross examination in in *Lehrmann Network Ten Pty Ltd (Cross-Examination)* [2023] FCA 1477 (***Lehrmann***). Nothing in *Lehrmann* suggests a contrary position to the approach identified in the CA Responsive Submissions, and in any event that case was concerned with fairness in *inter-partes* proceedings.

6 Further, the basis for the approach in Lehrmann comes from the decision in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd* (1990) 20 NSWLR 15 (***GPI***). At the

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[1] 19 February 2024, paragraph 1(b).

[2] *Director of Public Prosecutions v Lenny Madina (a pseudonym)* [2019] VSCA 73, [50] (the Court), citing J D Heydon, *Cross on Evidence* (11th ed, 2017), [31020].

[3] In *Aluminium Louvres & Ceilings Pty Ltd v Xue Qin Zheng* (2006) 4 DDCR 358; [2006] NSWCA 34 it was note that restrictions on cross examination may give rise to a failure to afford natural justice (though in that particular case, the restrictions did not amount to injustice).

outset it is noted that both *Lehrmann* and *GPI* are decisions relating to adversarial civil litigation.It is open to the Coroner to consider what relevance either of these cases have on the exercise of her discretion in a coronial jurisdiction.

7 In any case, *GPI* is the primary case on the limitation of cross examination by multiple parties. It provides a guideline, rather than a set of rules,[4] for circumstances where:

7.1 multiple counsel from one party might be limited in cross examining a witness; or

7.2 when multiple counsel for other parties are limited in cross examining a witness.

8 The Court in *GPI* set out 13 guiding points which are only partially extracted in *Lehrmann* but are wholly extracted below (with our emphasis):

(1) The only actual "right" is the right to have a fair trial.

(2) It is the duty of the trial judge to ensure that all parties have a fair trial.

(3) In carrying out his duties the trial judge must so exercise his discretion in and about the examination and cross-examination of witnesses that a fair trial is assured.

(4) Ordinarily, a judge in carrying out his duty will see that the trial is conducted in the manner that is commonly used throughout the State, namely that witnesses are examined, cross-examined and re-examined.

(5) Where there is more than one counsel for the same party, then ordinarily the judge will not permit any more than one counsel to cross-examine the same witness.

(6) Where there are parties in ***the same interest****, the judge will apply the same rule as stated in (5).*

(7) Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before cross-examination begins, it may be proper for the judge to permit cross-examination of one or more witnesses by more than one counsel in the same interest notwithstanding prima facie rules (5) and (6).

(8) It may be that in the interests of time or to prevent "torture" of the witness or for other good reasons, a judge may in special circumstances limit cross-examination. Such

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[4] *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd* (1990) 20 NSWLR 15 at 24

a situation would occur where, for instance, there was only a fixed amount of time before an event occurred and a decision was essential before that event occurred.

(9) It is usually not proper to indicate at the commencement of the hearing that cross-examination will be limited to X minutes subject to the right to make an application for an extension, although such a ruling might be justified if time was limited. It would, however, appear to be proper for the judge to say, at any stage during the cross-examination, that he would, unless convinced that the cross-examiner was being of more assistance to the court, curtail cross-examination in Y minutes time. This power would of necessity be used sparingly.

(10) Group cross-examination either by all counsel cross-examining the witness at one time or a group of witnesses being cross-examined by one counsel at the same time is not a procedure that should be permitted.

(11) In all proceedings, the court has a duty to prevent cross-examination purely for a collateral purpose or to "torture" the witness.

(12) In interlocutory proceedings, especially proceedings for an interlocutory injunction, the collateral purpose rules must be looked at very closely because ordinarily it is not proper to permit counsel to go on a fishing expedition and all that the plaintiff need show is a prima facie or strongly arguable case on the merits. Cross-examination on laches, balance of convenience etc is, of course, in a different plight.

(13) ***Ordinarily a judge should permit cross-examination of all witnesses by all counsel unless one or more of the above rules apply***.

9 From this, we submit that:

9.1 The starting point is ordinarily a judge should permit cross-examination of all witnesses by all counsel unless one of the above rules apply; and

9.2 (6) is the only rule relevant and capable of application in these proceedings which is only invoked if the parties have the same interests.

10 As will be expanded upon below, the parties in this matter do not have the same interests.

11 Further, the circumstances in *Lehrmann* are distinguishable from the matter before the Coroner. In *Lehrmann*:

11.1 That decision was made in an adversarial proceeding and specifically a defamation claim;

11.2 The matter was "not legally or factually complex";[5]

11.3 There were relatively minor differences in the cases[6] and, *most relevantly*, the parties had "identical interest on the vast bulk of the issues";[7]

11.4 The Court was required to consider subsection 192(2) of the *Evidence Act 1995* (Cth), particularly (a) the extent to which the direction would be likely unduly to add or shorten the length of the hearing; (b) the extent to which the direction would be unfair to a party or a witness; (c) the importance of the relevant evidence; and (d) the nature of the proceeding.

12 In this matter, and in contrast:

12.1 This is an inquisitorial proceeding;

12.2 The Coroner has an obligation to be an active investigator of the death[8] and must pursue all reasonable lines of inquiry,[9] in our submission, and parties cross-examining witnesses will assist the Coroner in that function;

12.3 This is a complex inquiry, spanning multiple months of sitting days and voluminous amounts of documentation;

12.4 Most significantly, each party has substantially different interests that cannot easily be dissected into topics (which we expand upon below);

12.5 The Coroner is not required to consider subsection 192(2) of the *Evidence Act 1995* (Cth), but even if she were to otherwise consider the abovementioned factors relevant:

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[5] *Lehrmann v Network Ten Pty Limited (Cross-Examination)* [2023] FCA 1477 At [22]
[6] *Ibid* at [29]
[7] *Ibid* at [26]
[8] *Priest v West* [2012] VSCA 327 at [3]
[9] *Ibid* at [4]

(a) The sitting days that can be devoted to Mr Rolfe's cross-examination have been set, meaning that rejecting Mr Rolfe's proposal will not affect the length of time of the proceedings;

(b) Mr Rolfe's proposal would be unfair to the rest of the parties as it would deprive them of cross examining on topics in which they have a unique interest; and

(c) The nature of a coronial inquest requires the Coroner to actively investigate matters – suggesting that this would be a consideration against the adoption of Mr Rolfe's proposal.

13 Expanding upon the submission in paragraph 12.4 above the interests of the parties are divergent. Below is an outline of the interests of the parties who may seek to cross examine Mr Rolfe:

13.1 Counsel Assisting who assists the coroner in its function, that actively pursues the truth with the goal the attainment of justice rather than a preconceived objective;[10]

13.2 The Walker, Lane and Robertson Families who represent the interests of the maternal, paternal and in-law families of Kumanjayi Walker;[11]

13.3 The Brown Family represent the interests of Kumanjayi Walker's adoptive family based primarily in Yuendumu;[12]

13.4 The Northern Territory Police Force represents the interests of the Commissioner and certain officers in defending adverse findings and in issues, not limited to, the police conduct on 9 November 2019, the operation of the immediate response team, the IRT, in Aboriginal communities and any changes to training or practice that police have introduced since;[13]

13.5 The Paramuparu Committee representing the interests from the perspective of the Yuendumu community with a particular interest in the broader concerns of the

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10 *R v Doogan* [2005] ACTSC 74 at [162]
11 Page 4 of the Transcript of 29 March 2022
12 Page 4 of the Transcript of 29 March 2022
13 Page 5 of the Transcript of 23 March 2022

treatment of the community and concerns with respect to preventing any more deaths in the circumstances of this Inquest;[14]

13.6 NAAJA representing the interests from the perspective of all other Aboriginal people outside of Yuendumu and the WLR Families; and

13.7 The Northern Territory Police Association with an interest in promoting the welfare and the benefit of its members and particularly in the examination of the training and recruitment of police members involved in the circumstances surrounding the death and also, the conditions in which the police members were discharging their duties in and around the time of death[15].

14 Clearly the parties have separate interests and to the extent that there might be some overlap between the interests of the parties, there are a number of parties that have no overlapping interest at all.

15 Furthermore, dissecting cross-examination into topics given these diverse interests is not practical, or in the least, cannot occur with significant further consideration of these matters. For example (and purely as a hypothetical) a topic of cross examination may be the events that occurred at house 511 Yuendumu. It would be entirely reasonable for the following parties to cross-examine Mr Rolfe on this topic for the following reasons:

15.1 The WLR Families may want to probe the precise facts of what occurred;

15.2 NAAJA may want to probe Mr Rolfe on the systemic factors that led to what occurred at that point in time (such as training on use of force, the lack of unconscious bias training, culture within the Police and how that impacted on the events of that night);

15.3 The Police may want to probe the extent to which Mr Rolfe followed directions, training and procedure on that night; and

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14 Page 5 of the Transcript of 23 March 2022

15 See page 1 of the Outline of Submissions On Behalf Of The Northern Territory Police Association On Application For Leave To Appear At Inquest dated 22 May 2022

15.4 The Police Association may want to probe the extent to which resourcing, training, management and directions may have created difficult conditions for Mr Rolfe and the other officers involved in the events of that night.

16 We submit that this example demonstrates that multiple parties may easily have different interests in the same topic. Even if it were possible to construct the topics in ways so that might there is less chance that multiple parties might have different interests in the one topic, this would take considerable deliberation on behalf of the parties, and possibly even adjudication from the Coroner, which would likely further delay these proceedings. The Coroner could relevantly take into consideration the fact that all parties were invited to make applications leading up to the cross examination of Sgt Bauwens and Mr Rolfe by 6 October 2023 and decline Mr Rolfe's proposal given the potential for further delay and given that such a delay could have been avoided if this application was brought in time.

TEXT MESSAGES

17 At [13] to [21] of his submissions, Mr Rolfe appears to foreshadow an objection to the relevance of some text messages included in the aide memoire (and a related objection to being asked questions about those text messages). That should not be entertained for three reasons.

18 *First*, the Coroner has twice ruled the text messages to be relevant.[16]

19 *Second*, the mechanism that Mr Rolfe suggests for objecting to the relevance of text messages in the running is likely to be time-consuming and disruptive. The aide memoire was finalised on 7 September 2023 and Mr Rolfe has long been aware of the way in which the parties say these messages are relevant.[17] If the Coroner is considering entertaining any further objections to the text messages (and questions about them), those objections should be made ahead of time in writing by reference to individual or categories of text messages.

20 *Third*, and relatedly, the text messages being prima facie relevant the Coroner ought to hear Mr Rolfe's answer to questions about them, and the parties detailed submissions on

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[16] See *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 17 and *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019

[17] See submissions filed by NAAJA on 28 September 2022.

their relevance in written and oral closing submissions. It may be that the Coroner ultimately considers some of them to be peripheral to the issues for her Honour's consideration, but that assessment is best made when the parties have had a chance to draw the various strands of the evidence together in their final submissions – not by foreclosing questioning at this stage.

SELF-INCRIMINATION

Expedient for the purpose of justice confers a broader power of to compel witnesses to give evidence

21 We accept that a precondition of a certificate pursuant to section 38 of the *Coroners Act 1993* (the Act) is that it appears to the coroner expedient for the purposes of justice that the person be compelled to answer a question that was declined to be answered on the basis that it would criminate or tend to criminate that person.

22 Consistently with Mr Rolfe's submissions, we are not aware of any jurisprudence on the phrase "it appears to the coroner expedient for the purposes of justice that the person be compelled to answer a question".

23 We, however, submit that the use of the word 'appear' and 'expedient' in section 38 are less protective of the witness when compared with words used in some other statutes, being 'necessary in the interests of justice' which are more protective of the witness.

24 In further support of this submission, the second reading speech to the *Coroners Amendment Bill 2001* (the bill that inserted section 38 into the Act) provides:

The objective of the coronial inquest is to find the truth about all circumstances of the death.

…

The policy behind the amendment is to get to the truth.

…

In recent cases in the Territory, this objective has been frustrated by witnesses refusing to answer questions

And

The witness could still be charged with a criminal offence following the inquest, or the investigations taken with regard to civil or disciplinary action. It is just that the actual evidence given to the Coroner cannot be used in subsequent proceedings.

25 The first three passages clearly indicate the Parliament's intention to place a particular premium on ensuring that incriminating questions are asked, and the fourth passage shows that the Parliament was clearly aware that the answers might lead to a prosecution but nevertheless proceeded to insert section 38 as currently drafted.

26 Combined, this suggests that if there is a difference in the phrase "expedient for the purposes of justice" and "in the interest of justice", section 38 will allow for a more liberal use of the power to compel a witness to give evidence and be provided a certificate.

27 Additionally, the 'purposes of justice' is a phrase that – like the 'interests of justice' – has the effect of reposing a broad discretion in the Court. It has been said in another context that 'there could scarcely be a wider judicial remit' than that conferred by the words 'interests of justice'.[18] It has been said to be a phrase that is not 'capable of any precise definition or explanation'.[19]

28 In which case, when considering whether it appears expedient for the purposes of justice that Mr Rolfe be compelled to answer questions, the Coroner will not only (or even primarily) have regard to Mr Rolfe's interests (just as in a criminal case, 'the phrase "the interests" of justice involves a consideration of several things, not simply the interests of the accused'[20]). In *BHP Billiton Limited v Schultz*, it was said that 'The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered.'[21]

In the alternative: no meaningful distinction

29 Even if there is no meaningful distinction between "expedient for the purposes of justice" and "in the interest of justice", we note that the phrase "in the interest of justice" has been interpreted in the context of certificates given when evidence self incriminates as:

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[18] *Herron v Attorney General for NSW* (1987) 8 NSWLR 601, 613.
[19] *R v Munro* [2013] ACTSC 14, [15] (Refshauge J).
[20] *R v Blaker* (1983) 35 CPC 272, [18] (Craig JA).
[21] *BHP Billiton Limited v Schultz* (2004) 221 CLR 400, [15] (Gleeson CJ, McHugh and Heydon JJ).

29.1 Being "constructed broadly";[22] and

29.2 The "precondition of the exercise of the power is *not* that the interests of justice require the evidence to be given under compulsion. The precondition is merely that the Coroner be *satisfied* that the interests of justice so require"[23] (emphasis in original).

General authority of the Coroner

30 It appears that Mr Rolfe's primary submission is that it will only be expedient for the purposes of justice to compel Mr Rolfe to answer incriminating questions if they are necessarily concerned with the subject matter of what is being investigated. Mr Rolfe argues that the issues contained in paragraph 22 of his submission are beyond the authority of Coroner pursuant to sections 26 and 34 of the Act. Mr Rolfe also submits that if the Coroner is relying on paragraph 26(1)(b) as authority to investigate these issues then the parties should be put on notice of these investigations.

31 In response to Mr Rolfe's submissions at paragraphs 37 to 43, we submit that Mr Rolfe is attempting to unnaturally constrain the powers of the Coroner under sections 34 and 26 to being entirely confined to the events leading up to the discovery of Kumanjayi Walker, the conduct of Kumanjayi Walker and the response by Mr Rolfe to that conduct – which is essentially Kumanjayi Walker's time in custody. We therefore rely on, and reiterate, paragraphs 14 to 23 our submissions file on 7 September 2022 that outline the broad authority the Coroner has to investigate matters. We especially repeat our previous submission that:

Constable Rolfe's suggestion that the power should be read narrowly so as to relate only to a person's 'time in custody' has little to recommend it. To temporally constrain the power by reference to the person's time in custody ignores the glaring reality (of which Parliament can be taken to be aware) that the taking of a person into custody is often the culmination of a concatenation of events and forces stretching back considerably into the past. The artificiality of Constable Rolfe's construction, and the way in which it would blind the Coroner to important realities bearing upon the death, is evident from the fact that – if applied to the present inquest – it would preclude the Coroner from investigating

[22] *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [37]
[23] *Rich v Attorney General (NSW)* [2013] NSWCA 419 at [20]

and reporting on anything that happened prior to the few seconds before Constable Rolfe shot Kumanjayi Walker (that being the time he was first taken into 'custody').

32 There is also a further inherent contradiction in Mr Rolfe's submission wherein he essentially confines the investigation to be essentially the time that Kumanjayi Walker is in custody but, at paragraph 40(a), relies on the attempted arrest on 6 November 2019 to contextualise Mr Rolfe's conduct on 9 November 2019. If Mr Rolfe can be in contemplation of the events of 6 November 2019 during the "few seconds" of escalation, his training, attitudes to Aboriginal people and propensity to use excessive force and possible use of drugs (illicit and prescribed) can equally have affected his conduct on that evening.

Authority with respect to the specific issues

33 With respect to the specific issues outlined in paragraph 22 of Mr Rolfe's submissions, we reiterate and rely on paragraphs 25, 28 and 29 of our submissions filed on 7 September 2022 as to why:

33.1 The NTPF employment application;

33.2 Mr Rolfe's use of force;

33.3 Mr Rolfe's use of drugs; and

are issues that are within the Coroner's authority to investigate.

34 With respect to Mr Rolfe's objection to being compelled to answer requestions about recreational drug use, we note that this topic correlates to question number 44 of the Issues List. We further note that Mr Rolfe has not previously pressed an objection to this being within the authority of the Coroner to investigate.[24]

35 Further, in *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 17 (***Ruling 2***), the Coroner found that the evidence of Claudia Campagnaro is rationally capable of acceptance and is relevant to the inquiries that the Coroner is undertaking. Critically, Ms Campagnaro's evidence related in part to the use of force against Malcom Ryder and findings of Judge Borchers. It therefore stands to reason that Mr Rolfe's

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[24] For a summary of the procedural history of the Issues List, see Ms Maria Walz letter to Mr Luke Officer dated 30 August 2022

evidence regarding this use of force and findings of Judge Borchers is rationally capable of acceptance and is relevant to the inquiries that the Coroner is undertaking. Furthermore, it stands to reason that if the use of force against Malcolm Ryder is relevant to the inquiries that the Coroner is undertaking, then the remaining incidents of use of force outlined in paragraph 22 of Mr Rolfe's submissions are also relevant to the investigations that the Coroner is undertaking. We submit that to argue otherwise now is to attempt to go against the finality of the decision in *Ruling 2*.

Notice for the purposes of an investigation pursuant to paragraph 26(1)(b)

36 Mr Rolfe further submits that if these issues are to be justified under paragraph 26(1)(b), then there would need to have been notice to the parties that this formed part of the investigation. Importantly, Mr Rolfe:

36.1 does not argue that these issues cannot be justified under paragraph 26(1)(b); and

36.2 does not cite authority or a statutory provision for such a proposition.

37 Even if notice was required, we submit that this has been met by the Coroner circulating the Issues List.[25] Except for the issue relating to the dissemination of body worn video footage, all the issues outlined in paragraph 22 of Mr Rolfe's submissions are referable to a question or issue in that document. We submit that this is sufficient notice of the Coroner's investigation into these matters. Importantly, the Issues List was acquiesced to by the parties, including Mr Rolfe until he made an objection on 29 August 2022.[26]

38 Additionally, even if the Issues List was not sufficient notice, the Coroner could now give notice that those issues in paragraph 22 of Mr Rolfe's submission are part of the investigation. This would not be unreasonable given the belated point in time that Mr Rolfe has raised this as a concern. The fact that his submissions can articulate that these are issues that might be subject to cross examination indicates that in a practical sense Mr Rolfe was aware that these matters would form part of the investigation.

Importance of Mr Rolfe's evidence

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[25] For the purposes of these submissions, we refer to the Consolidated Issues List of 25 May 2022.

[26] For a summary of the procedural history of the Issues List, please see the correspondence of Ms Maria Walz to Mr Luke Officer dated 30 August 2022.

39 Mr Rolfe raises further secondary arguments as to why he should not be compelled to give evidence on the issues outlined in paragraph 22 of his submissions. One further argument is that other objective evidence, such as body worn video footage, means that Mr Rolfe's evidence would have less importance.

40 Accepting that the importance of the evidence is likely to be a relevant consideration, in response we submit:

40.1 Not all the issues outlined in paragraph 22 are wholly or even partially captured on body worn video footage;

40.2 Even to the extent they are, Mr Rolfe is capable of giving evidence on parts of those incidents that are not captured on camera, such as the context of the incident beyond what is recorded and his state of mind. Particularly with respect to the latter, he is the only person capable of giving that evidence; and

40.3 The evidence of some of these issues, such as any illicit drug use, is only by way of subjective evidence, such as text messages.

41 On this basis, Mr Rolfe is capable of provide valuable evidence on these issues.

Further consideration of right against self-incrimination

42 A further argument that Mr Rolfe raises is that when compelling him to answer incriminating questions, even where the Coroner has the power to compel him to give evidence, further consideration should still be given to the importance of the fundamental common law right of self-incrimination. Mr Rolfe does not cite any authority to support this submission.

43 In the context of considering the phrase "in the interests of justice" pursuant to subsection 128(4) of the *Evidence Act 1995* (Cth), Odgers provides (with our emphasis):

> *It would be wrong to approach the test on the assumption that the privilege against self-incrimination is "fundamental" and it would be rare to require a person who satisfies the test under s 128(2) to give evidence. Conversely, it would be wrong to assume that the protections conferred under s 128(7) create a presumption that the*

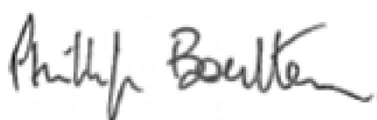
> *interests of justice will require the person to give the evidence. Each case must be assessed on the merits.*[27]

44 In the specific context of section 38 of the Act, we submit that once the right against self-incrimination is abrogated, the Parliament did not intend that any further additional consideration should be given to this right. As per our submission above, the second reading speech to the Coroners Amendment Bill 2001 shows the Parliament's particular premium on ensuring that incriminating questions are asked, in full contemplation that the answers might lead to a prosecution. In further support of this submission, we note that Odgers' above position is made with respect to section 128 of the *Evidence Act 1995* (Cth) which is concerned with civil and criminal adversarial proceedings. As noted above, the Coroner has an obligation to actively find facts, which gives further weight to interpreting section 38 as being intended to be applied with fewer constraints than in the context of section 128 of the *Evidence Act 1995* (Cth).

45 Finally, if there was a concern that the open publication of Mr Rolfe's evidence might prejudice a future fair trial, as outlined in the Second Reading Speech, the Act allows the Coroner to suppress that evidence.

CONCLUSION

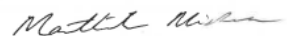
46 For the above reasons, the Coroner should accept the propositions outlined above at [2] and require Mr Rolfe to put in writing ahead of time any objections he has to being asked questions about the text messages in the aide memoire.



Phillip Boulten SC

Julian R Murphy

Matthew Derrig



Maithili Mishra

For NAAJA
20 February 2024

27 Odgers, S (2016) *Uniform Evidence Law* (12th Edition) Thomson Reuters, page 1068.