

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

**NORTHERN TERRITORY POLICE FORCE SUBMISSIONS
RESPONDING TO ROLFE SUBMISSIONS OF 15 FEBRUARY 2024**

Introduction

1. This inquest is scheduled to resume on 22 February 2024. Two remaining witnesses have been scheduled to give evidence in this sitting: Mr Zachary Rolfe and Sergeant Lee Bauwens.
2. In submissions dated 15 February 2024, Mr Rolfe:
 - a. Seeks that he be cross-examined in accordance by reference to a specific procedure;
 - b. Advises that he will object to answering questions about certain topics on the basis of the privilege against self-incrimination; and
 - c. Objects to being compelled to give answers on those topics, on the basis that it would not be 'expedient for the purposes of justice' that he be so compelled.
3. Mr Rolfe contends that it would not be 'expedient for the purpose of justice' for him to be so compelled because the topics do not properly fall within the scope of the inquest. He submits that while the Coroner declined to determine the scope of the inquest at a much earlier stage:
 - a. It is appropriate for the scope to be determined now; and
 - b. The topics the subject of the objection are beyond the scope of the inquest, as they are not logically connected to the death of Kumanjayi Walker.
4. Broadly, it is the position of the Northern Territory Police Force (NTPF) that:
 - a. The specific cross-examination procedure advanced by Mr Rolfe should be adopted in part only;
 - b. It is appropriate for the Coroner to determine relevance or scope at the time the questions are asked and not at an earlier stage; and
 - c. The considerations identified in these submissions should inform the evaluation by the Coroner as to whether compelling an answer is expedient for the purposes of justice.

Procedure on cross-examination

5. The NTPF agrees that the questioning of Mr Rolfe should proceed efficiently and without excessive or oppressive duplication or time-wasting. However, it is neither necessary nor appropriate that each party provide a list of topics on the issues in respect of which it intends to cross-examine. This would be an unwarranted prescription. The issue can be managed by the Territory Coroner in the usual way, should it become necessary.
6. Likewise, it is neither necessary nor appropriate for parties to signpost questions or topics. Such a course would be highly irregular and has not occurred in respect of other witnesses. Mr Rolfe should not be placed in a position that privileges him over other witnesses in this inquest or other inquests in this regard.
7. No objection is taken to a procedure whereby when asking questions in relation to the text messages collated in the aide memoire, counsel refers to the message by identifying the place in the aide memoire where it is to be found.

Privilege against Self-Incrimination Issue

8. Section 38 of the *Coroners Act 1993* (NT) (**the Act**) provides relevantly that:
 - (1) If:
 - (a) a person summoned to attend at an inquest as a witness *declines to answer a question* on the ground that *his or her answer will criminate or tend to criminate him or her*; and
 - (b) it appears to the coroner *expedient for the purposes of justice that the person be compelled to answer the question*;

the coroner may tell the person that, if the person answers the question and other questions that may be put to him or her, *the coroner will grant the person a certificate* under this section.
 - (2) A person who has been offered a certificate under subsection (1) is *no longer entitled to refuse to answer questions* on the ground that his or her answers will criminate or tend to criminate him or her and, when the person has given evidence, the coroner must give the person a certificate to the effect that the person was summoned to attend at an inquest as a witness, the person's evidence was required for the purposes of justice and the person gave evidence. [emphasis added]
9. Thus, the steps are:
 - a. A witness can decline to answer a question on the ground of crimination;
 - b. The coroner must consider whether it is expedient for the purposes of justice that the person be compelled to answer the question;

- c. If the coroner considers it is expedient, they can (not must) tell them that if they answer the question (and other questions that may be asked) the coroner will grant them a certificate;
- d. Upon the coroner offering a person a certificate, they no longer are entitled to refuse to answer questions; and
- e. When the person gives evidence, the coroner must give them the certificate.

Mr Rolfe contends that it is not “expedient for the purposes of justice” that he be compelled to answer questions in relation to 11 topics.

- 10. The concept of expediency in the interest of justice is broad. The NTPF suggests it should be determined having regard to several considerations.
- 11. *Firstly*, it should be viewed in light of the coronial function set out in section 4A of the Act, the jurisdiction to hold an inquest as set out in section 15, and other relevant statutory responsibilities and powers, including the making of findings, recommendations and reports, namely:
 - a. The obligation to investigate and report on the care, supervision and treatment of a person while being held in custody or caused or contributed to by injuries sustained while being held in custody (s 26(1)(a));
 - b. The power to investigate and report on a matter connected with public health or safety or the administration of justice that is relevant to the death of a person held in custody or caused or contributed to by injuries sustained while being held in custody (s 26(1)(b));
 - c. The obligation in an inquest into the death of a person held in custody or caused or contributed to by injuries sustained while being held in custody to make recommendations with respect to the prevention of future deaths in similar circumstances as the coroner considers to be relevant (s 26(2));
 - d. The obligation to remit section 26 reports and recommendations to the Attorney-General (s 27);
 - e. The requirement to make findings in respect of the matters set out in section 34(1) including any relevant circumstances concerning the death (s 34(1)(v));
 - f. The power to comment on a matter, including public health or safety or the administration of justice, connected with the death being investigated (s 34(2));
 - g. The power to report to the Attorney-General on a death (s 35(1));

- h. The power to make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death (s 35(2)); and
 - i. The power to report to the Commissioner of Police or the Director of Public Prosecutions if the Coroner believes that an offence may have been committed in connection with a death (s 35(3)).
- 12. It is accepted that there is a distinction between the powers that the Coroner must exercise and may exercise. Importantly, however, the power to make recommendations with respect to the prevention of future deaths is mandatory in relation to death of a person such as Kumanjaya Walker who was held in custody or whose death was caused or contributed to by injuries sustained while being held in custody, (s 26(2)).
- 13. In order to fulfil these functions, the Coroner has extensive powers to obtain and receive evidence, such as
 - a. the power of entry (s 19);
 - b. the power to give directions to police for the purpose of the investigation (s 25);
 - c. the power to summons witnesses and order them to give evidence (s 41(1)(c)); and
 - d. the power to give directions and do anything as the coroner thinks fit (s 41(1)(d)).
- 14. Section 38 is another example of these powers. It provides the Coroner with the ability to compel a witness to give evidence over their objection while at the same time protecting them by the certification procedure against self-incrimination (s 38(3)). It enables the Coroner to discharge her statutory functions and is closely related to the issue of whether a Coroner should make recommendations, comments or reports on a matter, including as to public health, safety and the administration of justice connected with a death investigated by a coroner. It follows that the purpose of the section, and its relationship to the coronial function, should be considered in determining whether it is expedient for the purposes of justice that a witness be compelled to give evidence.
- 15. *Secondly*, the concept should be considered in light of the available evidence and the scope of the inquest. The only purpose for receiving evidence is to facilitate the making of such findings,

comments or recommendations.¹ The evidence must therefore be relevant to the coronial investigation and logically probative.²

16. The NTPF agrees that this necessarily entails consideration of the relevance of the potential evidence, its likely probative value and the scope of the inquest, as determined at the time of the decision about whether to compel evidence from a witness who has taken an objection to giving evidence. Given the link between the power to compel a person to give evidence and the coronial function, there must be a rational nexus between the potential answers and the findings, recommendations, comments and/or reports which may be made by a coroner. It will not be expedient for the purpose of justice for a coroner to compel a witness to give evidence about a matter that is beyond scope or unimportant.
17. However, as the relevance of Mr Rolfe's answers to questions posed of him to the findings, comments, recommendations and reports that the Coroner may make will depend upon the precise questions asked by Counsel Assisting and other parties,³ to rule prior to the posing of questions would be premature and inappropriate.
18. Broadly, however, the NTPF submits that depending on the nature of the question asked, it would be well open to the Coroner to find that the topics the subject of objection by Mr Rolfe fall appropriately within the scope of the inquest, given the extensive powers of the Coroner including the obligation under sections 26(1) and 26(2) to make recommendations and report with respect to the prevention of future deaths.
19. As has been canvassed multiple times during earlier rulings in this matter, the case law is replete with authorities emphasising the Coroner's investigative, reporting and recommendatory functions and the necessarily corresponding breadth of the coronial enquiry.⁴ "Relevance" does not mean "closely connected to" the death.⁵ The focus by Mr Rolfe on the immediate circumstances surrounding the death of Kumanjaya Walker, as captured on body-worn footage, is misconceived and fails to engage with the important preventive role of the contemporary coroner. As the Coroner noted in an earlier ruling, such a focus "ignores a range of decisions

¹ *Inquest into the death of Kumanjaya Walker (Ruling No. 3)* [2022] NTLC 019 at [22].

² *Inquest into the death of Kumanjaya Walker (Ruling No. 3)* [2022] NTLC 019 at [30].

³ As the Coroner observed in a related context in *Ruling No 2* [2022] 017 at [56]: "Whether or not Constable Rolfe would be compelled to give evidence about those matters is better left until the time such an application is made."

⁴ See eg *Inquest into the death of Kumanjaya Walker (Ruling No. 3)* [2022] NTLC 019 at [27]-[28].

⁵ *Inquest into the death of Kumanjaya Walker (Ruling No. 3)* [2022] NTLC 019 at [26].

made by Constable Rolfe and others prior to the entry into House 511 which led to the confrontation with Kumanjayi.”⁶

20. In the same ruling, the Coroner referred to the potential relevance of the topics the subject of objection by Mr Rolfe and determined to receive the evidence under s 39 of the Act. The Coroner determined that

The evidence is appropriately directed to my ultimate function of determining what, if any, finding, comment, or recommendation I should or must make under ss 26, 34 and 355 of the Act. To adopt Constable Rolfe’s test, there is, or may at the conclusion of the evidence be, a ‘rational connection’ between the evidence and the subject matters of those provisions.⁷

21. More specifically, the Coroner accepted that:

- a. Mr Rolfe’s prior use of force “may be probative of Constable Rolfe’s state of mind at the time of the shooting and it may be probative of his state of mind in the lead up to the shooting and whether or not there were less forceful options, or options that would have minimised the risk of use of force and been safer for Constable Rolfe and for Kumanjayi”.⁸
- b. Mr Rolfe’s drug use may have impacted on his “capacity for behavioural inhibition to threat”, as suggested by Professor McFarlane. The Coroner considered that evidence about this topic “may prove relevant to an assessment of the cause of death or constitute a relevant circumstance connected with the death.”⁹
- c. Mr Rolfe’s application to join the NTPF and the recruitment process, during which Mr Rolfe did not disclose a dishonesty offence, may “most obviously” prove relevant to his credibility and reliability.¹⁰

22. The NTPF submits that each of these matters may be relevant to a finding under section 34(1)(v) as to “relevant circumstances concerning the death” of Kumanjayi and to the recommendations which the Coroner must make under section 26(2) “with respect to the prevention of future deaths in similar circumstances as the coroner considers to be relevant.”

⁶ *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019 at [50].

⁷ *Inquest into the death of Kumanjayi Walker (Ruling No. 3)* [2022] NTLC 019 at [25].

⁸ *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019 at [74].

⁹ *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019 at [81].

¹⁰ *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019 at [41].

23. *Thirdly*, the concept of “expedient for the purpose of justice” should involve consideration of the potential consequences for the administration of justice and the person being compelled to give evidence in other proceedings. For example, there have been instances where coroners have declined to compel a person to answer a question under comparable legislation in other jurisdictions. However, these have tended to be where the person is at risk of being charged with very serious criminal offences, such as murder.¹¹
24. In this instance, Mr Rolfe has been found not guilty of murder (and other offences). The principle of *autrefois acquit* applies.
25. Mr Rolfe is not at risk of being charged with offences arising from his recruitment application. As set out in the first affidavit of Assistant Commissioner Porter, the Professional Standards Command conducted an investigation into a potential charge of making a false representation pursuant to section 154 of the *Police Administration Act 1978* (NT).¹² A limitation period applied to that charge and the Commissioner did not consent to the charge being filed. It will be recalled that the form was not a statutory declaration so other offences such as perjury were not available.¹³ Mr Rolfe cannot be charged with this offence regardless of what evidence he may give at the inquest in relation to this topic.
26. While in principle it is possible that Mr Rolfe could be charged with assault or related offences arising out of his use of force incidents (a six month limitation period applies only to summary offences), the NTPF submits that the risk is notional only and in any event could be sufficiently addressed by a certificate and the protections provided by section 38(3) of the Act.
27. In relation to Malcolm Ryder, CW, Luke Madrill, Antonio Woods and Todd Tavern, the PSC has already found that Mr Rolfe did not use excessive force.¹⁴ In relation to the allegation of perjury in the context of the Malcolm Ryder matter, the Professional Standards Command found that there was no evidence to support a breach of discipline on the basis of perjury.¹⁵ In relation to Albert Bailey, Master G and the Araluen Park incident, the PSC found that excessive force had been used.¹⁶ However, no criminal complaints have been received to date and the NTPF does not intend to file criminal charges against Mr Rolfe in relation to the use of force incidents.

¹¹ See eg *Victoria Police SOG Operators 16, 34, 41 and 64 v Coroners Court of Victoria* [2013] VSC 246.

¹² Affidavit of Bruce Porter, 7-111B, [162]-[163].

¹³ Affidavit of Murray Smalpage, 7-120A [217].

¹⁴ Inquest into the death of Kumanjayi Walker, evidence of Bruce Porter, 3 March 2023, pages 4363, 4368-4369, 4417-4419.

¹⁵ Inquest into the death of Kumanjayi Walker, evidence of Bruce Porter, 3 March 2023, pages 4370-4371.

¹⁶ Inquest into the death of Kumanjayi Walker, evidence of Bruce Porter, 3 March 2023, pages 4420, 4364-4367; Affidavit of Bruce Porter 7-111D.

28. Likewise, the NTPF submits that there is no risk of any charge being brought with respect to drug use. These matters have been the subject of investigation by the PSC. Possession of a dangerous drug in a quantity less than a traffickable quantity is a summary offence, subject to a limitation period which has expired.¹⁷
29. Similarly, there is no risk of any charge being brought with respect to dissemination of the body-worn video. Unauthorised disclosure of confidential information is a summary offence pursuant to section 155 *Police Administration Act 1978* and a limitation period applies which has expired.¹⁸
30. The NTPF submits that no ruling is currently required on the objections made on behalf of Mr Rolfe but, when the issue arises from the questions that may be asked by parties, the considerations identified in these submissions should inform the evaluation by the Coroner as to whether compelling an answer is expedient for the purposes of justice.

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20 February 2024

¹⁷ Section 52 *Local Court (Criminal Procedure) Act 1928* (NT) prescribes that a complaint must be made within 6 months from the time when the matter of the complaint arose.

¹⁸ Section 52 *Local Court (Criminal Procedure) Act 1928* (NT) prescribes that a complaint must be made within 6 months from the time when the matter of the complaint arose.