Prerogative of Mercy, Pardons, and Criminal Law Review Commissions: Why bother changing a system that has been in existence for 100 years?

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Introduction

This paper is written for those who are interested in the prerogative of mercy and how it can apply in New South Wales. It starts with a brief history of the prerogative of mercy as it was applied in England in the nineteenth century, and during colonial times in New South Wales. The Kathleen Folbigg case is used to highlight the main difficulties found by the author when attempting to have the prerogative of mercy exercised in the 21st century in New South Wales. At Annexure B is an abbreviated timeline of the Kathleen Folbigg case to assist the reader to understand the complexity of the case which included relevant issues of law and questions of fact spanning over 30 years. When considering Kathleen Folbigg's case some examples of the errors made prior to, at her trial and subsequently are outlined. The difficulties that were encountered when trying to obtain relief through a petitioning process with Attorneys General in New South Wales are emphasised because it shows the quagmire that exists when an attempt is being made to have considered the cogency of a petition for an inquiry, and then a pardon petition. Additionally, there is reference to an alternative system which operates in England, Wales, and Northern Ireland[1]; Scotland[2]; Norway[3]; and New Zealand[4].

As part of the examination of the prerogative of mercy as a criminal review system that can be used in New South Wales an attempt is made to answer the question: Why bother changing a system that has worked for 100 years? In summary the system that allows the exercise of the prerogative of mercy through a petitioning process for an inquiry or a pardon is excessively time consuming, complex, and fraught with significant problems. The claim that has been made by at least one Attorney General that the system is 'robust', is at best an unfortunate misunderstanding of how weak and difficult the system actually is to navigate. Nevertheless, this paper should not be read as advocating for the removal of the prerogative of mercy, or even the removal of that part of the power that allows the Governor to direct an inquiry.

A petition can be presented to the Governor for a pardon or an inquiry, a petition can also be presented to the Supreme Court for an inquiry. The detail of the law and process involved is covered under the heading *Current New South Wales Legislation*.

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1 Home page - Criminal Cases Review Commission (ccrc.gov.uk).
2 www.sccrc.co.uk.
3 2006-EN-Årsberetning (gjenopptakelse.no).
4 Home | Te Kāhui Tātari Ture | Criminal Cases Review Commission (ccrc.nz).

History of Pardons

In England royal intervention allowed the monarch who granted charters of pardon to individuals as a matter of grace. This prerogative was described by J H Baker as:

> *... essential to justice as regards to homicide, because the early common law failed to distinguish intentional murder from accidental killing. Any man who killed another, however innocently, was a felon; but the king, out of mercy, could pardon such offender, and by virtue of his coronation oath was morally bound to do so. Ironically, the existence of this prerogative perpetuated the barbaric rule itself, and what ought to have been a plain question of law remained for centuries at least nominally a matter of favour. What is worse, pardons were granted in many other cases for the wrong reasons.* [5]

The pardoning procedure by the eighteenth century became to some extent an informal system of appeal where if a trial judge doubted that a conviction should have occurred, the judge would refer the case to 'his brethren' who could recommend a pardon.[6] Judges were given the power to quash convictions in 1848, and after this time it was a matter for the Home Secretary to recommend a pardon where all avenues of appeal had been exhausted.[7]

The Governor of New South Wales from 1790 was vested with the power to remit a prisoner's sentence absolutely or conditionally. Pardons were occasionally granted especially to educated or gentlemen convicts.[8] In 1812 the Select Committee on Transportation expressed concern about the number of pardons granted to convicts upon arrival. As a result, Governor Macquarie introduced regulations setting a minimum period to be served before pardons or tickets of leave could be granted.

The New South Wales Act of 1823, *4 Geo. 4. c. 96* stated, *inter alia*, in respect of pardons:

> *And be it enacted that all instruments in writing whereby any governor or acting governor of New South Wales shall hereinafter remit or shorten the time or term of transportation of any felons or other offenders in pursuance of the said act passed in the thirteenth year of the reign of his said late Majesty King George the third shall by such governor be transmitted to his Majesty his heirs and successors for his and their approbation or allowance and in case his majesty*

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5 J H Baker, *An Introduction to English Legal History*, Butterworths, London 1979, p. 420
6 *Ibid* p. 421
7 *Ibid* p.421
8 *AGL Shaw Convicts and Colonies, Melbourne University Press, 1977.*

his heirs and successors shall through one of his or their principal secretaries of state signifies his or their approbation or allowance of any such remission or shortening of any such time or term of transportation as aforesaid then and in such case only every such instrument so transmitted as aforesaid shall have and shall be deemed to be taken from the date thereof to have had within New South Wales and the dependencies thereof but not elsewhere such and the same effect in the law to all intense and purposes as if a general pardon had passed under the great seal aforesaid on the days of the dates of such instruments respectively in which the names of such felons or offenders as aforesaid had been included.

There were conditional pardons which required the recipient to stay within the colony until their term had expired, and absolute pardons of two types, the first class being valid for Europe and the second class being valid for Australian colonies and New Zealand. In 1846 approval was given to allow the recipient to move to any place, but not approval to return to the country or colony from which they had been transported.

The granting of pardons from 1825 was done with the assistance of an Executive Council in New South Wales. The Council consisted of the Governor the Lieutenant-Governor, the Chief Justice, the Archdeacon and the Colonial Secretary.[9] The Governor had the decision making power. Timothy Castle notes that between 1826 to 1836, 363 individuals were executed in New South Wales and 260 executions occurred in Van Diemen's Land.[10] In that period 1,296 individuals had received death sentences from the Supreme Court of New South Wales.[11] Castle states: 'capital punishment and mercy [was] not a legal strategy, but part of a system of power, control and the exercise of authority in the colony'.[12]

In summary pardons came in a variety of forms: an absolute pardon granted by the governor and approved by the secretary of state remitting the entire sentence; a conditional pardon granted by the governor and approved by the secretary of state upon a condition the person remained within the colony until the original sentence had expired; and royal warrants issued by the monarch authorising the grant of a pardon. Such pardons were for offences committed other than in the colony of New South Wales. Colonial pardons were granted absolutely by the governor and approved by the secretary of state. Such pardons involved: a) reprieves from a

9 The Chief Justice was removed in 1828, and the Colonial Treasurer added in 1831.
10 Timothy D. Castle, The End of the Line: Capital Punishment and Mercy in Colonial New South Wales 1826-1836, Honours Thesis, UNE, 22 November 2006, p 5.
11 Ibid p 4.
12 Ibid p.5.

death sentence; b) the commutation of a sentence on condition the convict remained in the colony as a convict; c) conditional pardons remitting part of the sentence provided the convict remained in the colony; d) absolute pardons remitting the whole of the sentence; and e) special pardons that remitted the entire sentence.

The system remains one that can avoid questions of law and it can be reasonably suggested simply relies on the 'favour' of a politician, largely because of the secrecy involved in the decision making process; instead of as it once did the grace and favour of a monarch, which involved, very often, the arbitrary exercise of power.

Current New South Wales Legislation

The statutory basis for the exercise of the prerogative of mercy is outlined below.

The Commonwealth *Australia Act 1986* gives to the Governor of a State all the powers and functions of the King. The *Act* commences with the following words:

> *An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.*

Section 7(2) of the *Act* preserves the royal prerogative of mercy it states:

> ***7 Powers and functions of Her Majesty and Governors in respect of States***
> *(1) Her Majesty's representative in each State shall be the Governor.*
>
> ***(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.***
>
> *(3) Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.*
>
> *(4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.*
>
> *(5) The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State. (emphasis added)*

The prerogative of mercy has not been removed by statute in New South Wales, it has been specifically preserved. The prerogative of mercy is exercised by the Governor of New South Wales acting on the advice of the Attorney General and the Executive Council.[13] Similarly, the King does not exercise the power personally as noted by Lord Denning MR:

> *These courts have had occasion in the past to cut down some of the prerogatives of the Crown: but they have never sought to encroach on the prerogative of mercy. It is not exercised by the Queen herself personally. It is exercised by her on the advice of one of the principal Secretaries of State. He advises her with the greatest conscience and good care. He takes full responsibility for the manner of its exercise. That being so, the law will not inquire into the manner in which the prerogative is exercised. It is outside the competence of the courts to call it into question: nor would they wish to do so.*[14]

Section 9A of the *Constitution Act 1902* (NSW) allows for the appointment of a Governor. It states:

> ***9A Appointment of Governor***
> *(1) There shall continue to be a Governor of the State.*
>
> *(2) The appointment of a person to the office of Governor shall be during Her Majesty's pleasure by Commission under Her Majesty's Sign Manual and the Public Seal of the State.*
>
> *(3) Before assuming office, a person appointed to be Governor shall take the Oath or Affirmation of Allegiance and the Oath or Affirmation of Office in the presence of the Chief Justice or another Judge of the Supreme Court.*

Section 144 of the *Crimes (Appeal and Review) Act 2001* makes clear that the prerogative of mercy is preserved.[15] It states:

> ***114 Prerogative of mercy preserved***
> *Nothing in this Act limits or affects in any manner the prerogative of mercy.*

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13 *Constitution Act 1902* s35B 'Continuation of Executive Council
There shall continue to be an Executive Council to advise the Governor in the government of the State.'

14 *Hanratty v Lord Butler* (Unreported, Court of Appeal (Civil Division), 12 May 1971).

15 Subsections 19A(6), 19B(6), 25B(4), 61JA, and 66A(4) of the *Crimes Act 1900* state, 'Nothing in this section affects the prerogative of mercy'; Section 270 of the *Crimes (Administration of Sentences) Act 1999* states: 'Nothing in this Act limits or affects the prerogative of mercy'; and Section 102 of the *Crimes (Sentencing Procedure) Act 1999* states, 'Nothing in this Act limits or affects the prerogative of mercy'.

Petitions to Governor

Part 7, Division 2, section 76 of the *Crimes (Appeal and Review) Act 2001*, assented to on 19 December 2001, allows for a review of a conviction or sentence or the exercise of the pardoning power of the Governor. It states:

> ***76 Petitions to Governor***
> *A petition for a review of a conviction or sentence* ***or the exercise of the Governor's pardoning power may be made to the Governor*** *by the convicted person or by another person on behalf of the convicted person. (emphasis added)*

Sections 77 of the *Crimes (Appeal and Review) Act 2001* draws a distinction between directing an inquiry that considers a conviction and sentence, and the exercise of pardoning power. It also gives the Attorney General the power to refer a case to the Court of Criminal Appeal and seek an opinion about a point arising in a case. In summary s77 of the *Act* allows the following:

1. The Governor to direct that any inquiry be conducted by a judicial officer into the conviction or sentence: s77(1)(a).

2. The Attorney General to refer the case to the Court of Criminal Appeal: s77(1)(b). This is an appeal against conviction or sentence: see s86 of the Act.

3. The Attorney General to seek an opinion from the Court of Criminal Appeal about any point arising in the case: s77(1)(c). This subsection allows the Court of Criminal Appeal to determine the case pursuant to Division 5.

4. The Governor to refuse to consider the petition: s77(3). This power is not unfettered.

5. The Attorney General to refuse to consider the petition: s77(3). This power is not unfettered.

6. If the petition does not ask for a review or a pardon the Attorney General can decide to deal with it appropriately: s77(5) For example, the Attorney General can refer it to the Court of Criminal Appeal or grant a pardon.

Section 77 states:

> ***77 Consideration of petitions***
> *(1) After the consideration of a petition—*
>
> > *(a) **the Governor may direct** that an inquiry be conducted by a judicial officer into the conviction or sentence, or*
> >
> > *(b) **the Attorney General may** refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912, or*
> >
> > *(c) the Attorney General may request the Court of Criminal Appeal to give an opinion on any point arising in the case.*
>
> *(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.*
>
> *(3) **The Governor or the Attorney General** may refuse to consider or otherwise deal with a petition. Without limiting the foregoing, **the Governor or the Attorney General** may refuse to consider or otherwise deal with a petition if—*
>
> > *(a) it appears that the matter—*
> >
> > > *(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or*
> > >
> > > *(ii) has previously been dealt with under this Part or under the previous review provisions, or*
> > >
> > > *(iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or*
> > >
> > > *(iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and*

*(b) **the Governor or the Attorney General** is not satisfied that there are special facts or special circumstances that justify the taking of further action.*

*(3A) **The Governor or the Attorney General** may defer consideration of a petition if—*

(a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or

(b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the petition fails to disclose sufficient information to enable the conviction or sentence to be properly considered.

(4) The Attorney General must cause a report to be given to the registrar of the Criminal Division of the Supreme Court as to any action taken by the Governor or the Attorney General under this section (including a refusal to consider or otherwise deal with a petition).

*(5) A petition (however described) that does not expressly seek a review of a conviction or sentence or the exercise of **the Governor's pardoning power** may be dealt with as if it did if the **Attorney General is of the opinion** that it should be so dealt with. (emphasis added)*

Application to Supreme Court

Section 78 of the *Crimes (Appeal and Review) Act 2001* allows for an application to be made to the Supreme Court for an inquiry. It states that:

78 Applications to Supreme Court
(1) An application for an inquiry into a conviction or sentence may be made to the Supreme Court by the convicted person or by another person on behalf of the convicted person.

(2) The registrar of the Criminal Division of the Supreme Court must cause a copy of any application made under this section to be given to the Minister.

Section 79 of the Act states:

79 Consideration of applications
(1) After considering an application under section 78 or on its own motion—

(a) the Supreme Court may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

(b) the Supreme Court may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912.

(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.

(3) The Supreme Court may refuse to consider or otherwise deal with an application. Without limiting the foregoing, the Supreme Court may refuse to consider or otherwise deal with an application if—

(a) it appears that the matter—

(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or

(ii) has previously been dealt with under this Part or under the previous review provisions, or

(iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or

(iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and

(b) the Supreme Court is not satisfied that there are special facts or special circumstances that justify the taking of further action.

(3A) The Supreme Court may defer consideration of an application under section 78 if—

(a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or

(b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the application fails to disclose sufficient information to enable the conviction or sentence to be properly considered.

(3B) This section does not authorise a direction to be given, or a referral to be made to the Court of Criminal Appeal, if the Supreme Court is satisfied that the grounds for the direction or referral arise only from—

(a) the fact that the convicted person was—

(i) questioned under section 24 of the Crime Commission Act 2012, or

(ii) required under section 24 or 29 of that Act to produce a document or thing, or

(b) either or both of the following—

(i) evidence obtained directly from that questioning or requirement,

(ii) any further information, evidence, document or thing obtained as a result of the questioning or the production of the document or thing.

(4) Proceedings under this section are not judicial proceedings. However, the Supreme Court may consider any written submissions made by the Crown with respect to an application.

(5) The registrar of the Criminal Division of the Supreme Court must report to the Minister as to any action taken by the Supreme Court under this section (including a refusal to consider or otherwise deal with an application).

Inquiries

If the Governor[16], Attorney General or the Supreme Court directs an inquiry it needs to be dealt with as soon as practicable. Section 80, Division 4, Part 7 of the *Crimes (Appeal and Review) Act 2001* states:

80 Inquiries
An inquiry is to be conducted as soon as practicable after a direction for it has been given under section 77 or 79.

Section 81 deals with procedures for inquiries. It states:

[16] Convention dictates that the Governor will only act on the advice of the Executive Council which includes the Attorney General.

81 Procedure for conducting inquiry

(1) An inquiry under this Division is to be conducted by—

> *(a) a judicial officer appointed by the Governor, if the conduct of an inquiry was directed by the Governor, or*
>
> *(b) a judicial officer appointed by the Chief Justice, if the conduct of an inquiry was directed by the Supreme Court.*

(2) The judicial officer conducting the inquiry has—

> *(a) the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the Royal Commissions Act 1923, and*
>
> *(b) in the case of a person who is a Judge of the Supreme Court or whose instrument of appointment under this section expressly so provides, the powers and authorities conferred on a commissioner by Division 2 of Part 2 of the Royal Commissions Act 1923 (except for section 17).*

(3) The Royal Commissions Act 1923 applies to any witness summoned by or before the judicial officer conducting the inquiry (except for sections 13 and 17 and, subject to subsection (2) (b), Division 2 of Part 2).

(4) If it appears that the character of any person (being a person who was a witness at the proceedings from which the conviction or sentence arose) may be affected by the inquiry, the judicial officer must permit the person to be present at the inquiry and to examine any witness who attends the inquiry.

At the end of an inquiry the judicial officer (inquirer) decides if he or she has a reasonable doubt about the convictions being considered. If no reasonable doubt is found no further action will be taken, other than referring the report to the Governor, or if a referral is from the Supreme Court to the Chief Justice who then refers it to the Governor. The judicial officer can refer the matter to the Court of Criminal Appeal for consideration of whether a conviction should be quashed if he or she has a reasonable doubt about the conviction. If the severity of the sentence is considered, then it can be referred to the Court of Criminal Appeal for consideration of the severity. Section 82 states:

82 Action to be taken on completion of inquiry

(1) On completing an inquiry under this Division, the judicial officer must cause a report on the results of the inquiry (incorporating a transcript of the depositions given in the course of the inquiry) to be sent to—

(a) the Governor, in the case of an inquiry held on the direction of the Governor, or

(b) the Chief Justice, in the case of an inquiry held on the direction of the Supreme Court.

(2) The judicial officer may also refer the matter (together with a copy of the report) to the Court of Criminal Appeal—

(a) for consideration of the question of whether the conviction should be quashed (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to the guilt of the convicted person), or
(b) for review of the sentence imposed on the convicted person (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence).

(3) After considering a report furnished to the Chief Justice under this section, the Supreme Court must cause its own report on the matter (together with a copy of the judicial officer's report) to be sent to the Governor.

(4) The Governor may then dispose of the matter in such manner as to the Governor appears just.

Quashing of Convictions

Section 84(1) allows for the quashing of convictions following a free (unconditional) pardon. It states:

84 Quashing of conviction following pardon
(1) The Court may quash a conviction in respect of which a free pardon has been granted.

Section 84(2) does not entitle a person who has a free pardon to a quashing of a conviction. It states:

(2) However, the mere fact that a free pardon has been granted does not entitle the person to whom the pardon has been granted to a quashing of the conviction.

In *Armstrong v R* [2021] NSWCCA 311 at [31], Beech-Jones CJ at CL, with Bellew and Hamill JJ agreeing, found that the only way the Court of Criminal Appeal could quash a conviction under Part 7 was if an inquiry had been held. The Court stated:

> *On its face, s 84(1) suggests that a person such as the applicant or someone acting on their behalf can apply to this Court to quash the conviction if a free pardon has been granted and without the necessity for an inquiry under Division 4 to have been conducted. However, the balance of the provisions of Part 7 suggest that s 84 cannot be invoked without an inquiry into the conviction having been conducted and reported on. Thus, s 85(1)(b)(i) mandates the consideration of "the" report on the matter that is prepared by the judicial officer "under s 82" which can only mean the report prepared under s 82(1). Subsection 85(1)(b)(ii) also mandates consideration of "any" report prepared by the Supreme Court under s 82, which can only mean a report prepared under s 82(3). These provisions suggest that the only pathway that could have led to an application under s 84 is via an inquiry under Division 4 because such an inquiry must have yielded a report under s 82(1) and might, depending on who directed the inquiry take place, yield a report from the Supreme Court under s 82(3). If, as contended for by the applicant, there does not have be an anterior inquiry under Division 4 then there is no means by which the command in s 85(1)(b)(i) to consider the report of the inquiry can be given effect to.*

Section 84(3) allows an application for the quashing of a conviction to be made by the person who granted the pardon or by another person.

> *(3) An application for the quashing of the conviction may be made to the Court by the person to whom the pardon has been granted or by another person on behalf of that person.*

In *A reference by the Attorney General for the State of New South Wales re McDermott* [2013] NSWCCA 102 at [21], Bathurst CJ, with Hall and Button JJ agreeing, relying largely on s86 of the Act, concluded that a reference to the Court of Criminal Appeal to quash a conviction for murder could be made on behalf of a deceased person. The Court stated:

> *In the present case, it seems to me that as a matter of construction the Act both empowers the Minister to refer the conviction of a deceased person to the Court of Criminal Appeal, and requires the Court to determine that appeal notwithstanding the death of the convicted person.*

Section 84(4) provides that if the case had previously been dealt with by the Court of Criminal Appeal following a referral by the inquirer under section 82(2) then an application for quashing of conviction cannot be made. It states:

> *(4) However, such an application may not be made in respect of a free pardon arising from an inquiry under Division 4 if the matter has previously been dealt with under this Division as a consequence of a reference to the Court, under*

section 82(2) (or so dealt with under the corresponding previous review provisions), by the judicial officer conducting the inquiry.

(5) The registrar of the Court must cause a copy of any application made under this section to be given to the Minister.

Section 85 of the Act governs the application for quashing a conviction. It, inter alia, gives a right of appearance to the Crown, allows only the report of the inquiry to be considered unless leave is given, and allows the convicted person to make submissions. It states:

85 Procedure on application for quashing of conviction

(1) In any proceedings on an application under section 84—

(a) the Crown has the right of appearance, and

(b) the Court is to consider—

(i) the report on the matter that is prepared by the judicial officer under section 82, and

(ii) any report on the matter that is prepared by the Supreme Court under section 82, and

(iii) any submissions on any such report that are made by the Crown or by the convicted person to whom the proceedings relate, and

(c) no other evidence is to be admitted or considered except with the leave of the Court.

(2) The rules governing the admissibility of evidence do not apply to any such proceedings.

(3) For the purpose of enabling the convicted person to make submissions with respect to a report referred to in subsection (1), the convicted person is entitled to receive a copy of the report.

(4) The provisions of Parts 3 and 4 of the Criminal Appeal Act 1912 relating to proceedings on an appeal under section 5 (1) of that Act apply to proceedings on an application under section 84, as if—

(a) any reference to an appeal were a reference to proceedings on such an application, and

(b) any reference to an appellant were a reference to the convicted person.

Section 86 allows a reference by the Attorney General to the Court under s77(1)(b) or a reference by the Supreme Court to the Court of Criminal Appeal under s79(1)(b) to be dealt with as a conviction or sentence under the *Criminal Appeal Act 1912*. It states:

> ***86 Reference to Court under section 77 (1) (b) or 79 (1) (b) following petition to Governor or application to Supreme Court***
> *On receiving a reference under section 77 (1) (b) or 79 (1) (b), the Court is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912, and that Act applies accordingly.*

Section 87 allows the Court of Criminal Appeal to provide an opinion to the Attorney General pursuant to s 77(1)(c), and for the Governor to dispose of the matter in a way that is just. It states:

> ***87 Request to Court under section 77 (1) (c) following petition to Governor***
> *(1) On receiving a request under section 77 (1) (c), the Court is to consider, and furnish the Attorney General with its opinion on, the point raised by the request.*
>
> *(2) The Governor may then dispose of the matter in such manner as to the Governor appears just.*

Section 88 of the Act states:

> ***88 Reference to Court under section 82 (2) following inquiry***
> *(1) On receiving a reference under section 82 (2) (a), the Court is to deal with the matter so referred in the same way as if an application had been made to the Court under section 84 (3), and sections 84 and 85 apply accordingly.*
>
> *(2) On receiving a reference under section 82 (2) (b), the Court is to deal with the matter so referred in the same way as it is required to deal with matter the subject of an application under section 84 (3), and section 85 applies to proceedings on the matter so referred as if the references in that section to an application under section 84 were references to a reference under section 82 (2) (b).*

At Annexure C is a list of cases where the prerogative of mercy is discussed and applied.

Parole Petition

The *Crimes (Administration of Sentences) Act 1999* (NSW). Division 4B section 160AD states:

> ***160AD Governor may make parole order***
> ***(1) The Governor may, in exercising the prerogative of mercy, make a parole order in respect of an offender.***
>
> ***(2) The parole order may be made whether or not the offender is eligible for release on parole.***
>
> *(3) An offender may be released on parole in accordance with a parole order made by the Governor.*
>
> *(4) Division 1 of this Part (other than section 126) and Divisions 3–6 of Part 7 (the **applied provisions**) apply to a parole order made by the Governor in the same way as they apply to a parole order made by the Parole Authority.*
>
> *(5) Except to the extent that the Governor otherwise directs, the Parole Authority is to exercise functions under the applied provisions as if the parole order were a parole order made by the Parole Authority.*
>
> *(6) The Governor may revoke or vary a direction given to the Parole Authority under this section. (emphasis added)*

On 6 July 2022 a further petition was made to the Governor of New South Wales on behalf of Kathleen Folbigg for an early parole. The petition stated, inter alia:

> *This petition requests that an order be made for Kathleen Folbigg's release on early parole effective immediately. It is respectfully submitted that exceptional circumstances apply that make the release of Ms Folbigg appropriate.*

The purpose of this petition was to have Kathleen Folbigg released from gaol so she could better assist with the preparation of her case.

On 6 September 2022 a response was received from the Secretary of Department of Communities & Justice, Legal, stating that the petition was being considered. The Parole Board decided not to consider the petition.

Problems Encountered Seeking an Inquiry and a Pardon

The problems listed below are those that I have identified as a result of petitioning for an inquiry, petitioning for a pardon, and appearing at the two Kathleen Folbigg inquiries and at

the Court of Criminal Appeal. They do not fully reflect all the difficulties that were confronted. For example, I have not included in the list the views of any people who have sought to have the prerogative of mercy applied for their benefit or the benefit of their friends, although I have advised on a few cases. There needs to be significant reform of the laws and as part of that process the views of those who have become personally entangled in the system should be sought.

Some of the difficulties with the current system when petitioning for an inquiry or pardon are sought include, when an inquiry or pardon is sought include:

1. The requirement that a convicted person who is not in custody advance their case, in most instances, without any financial assistance.

2. The convicted person who is in custody very often does not have access to legal advice because they do not have money to pay legal fees, and all usual appeal avenues have been exhausted.

In the case of points 1 and 2 above, it not just legal practitioners who needed to work on a pro bono basis in an attempt to overcome a miscarriage of justice, medical and scientific experts are often required to give significant amounts of their time reviewing the evidence, gathering additional evidence, advising, and writing reports. In the Kathleen Folbigg case, some of the experts relied upon also had to appear and give evidence without payment at inquiries.

It is unacceptable to require legal practitioners to serve a client, or experts serving the interests of justice, in some cases, involving hundreds of hours of work, to do so on a pro bono basis.

The difficulty for a convicted person is succinctly put by Sir Brian Leveson[17] when he stated:

[17] President of the Queen's Bench Division (2013-2019), Head of Criminal Justice, England and Wales (2017-2019).

> *Convicted defendants, however, do not usually have the wherewithal to conduct necessary enquiries: where there is scope for further investigation, someone must generally do it on their behalf and the system can undeniably fail.*[18]

This problem has existed since colonial times.

3. The petitioner has no power to require the production of documents.

After all appeal avenues have been exhausted many years may have elapsed which can mean that even documents tendered at trial have gone missing or at least the original versions, and there is no power to subpoena or otherwise require disclosure of relevant documents. This is especially a problem when disclosure has not occurred at the trial, and where such evidence could be crucial.

4. If a petition has been submitted, the Governor and/or the Attorney General may acknowledge receipt, but after the acknowledgement silence can follow.

5. The Attorney General does not have to engage in any investigation to determine the cogency of a petition.

The most recent Communities and Justice, Fact Sheet, makes clear that only general inquiries will take place:

> The Department of Communities and Justice assists the Attorney General in considering the petition. At this time, further information may be requested from the petitioner. The Department may, with the consent of the petitioner, seek to verify the information in the petition by making enquiries with other relevant bodies or agencies. This may include the police or the courts. **Apart from making these types of enquiries, the Attorney General has no power or role in investigating issues raised in a petition. The petitioner is required to provide the evidence in support of their petition.**[19]

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[18] The Rt. Hon. Sir Brian Leveson, Forward, page xiv, Stephen Cordner and Kerry Breen, Wrongful Convictions in Australia: Addressing Issues in the Criminal Justice System, Australian Scholarly Publishing, Melbourne, 2023.

[19] Royal prerogative of mercy: Fact sheet (nsw.gov.au).

In Kathleen Folbigg's case, before the second Inquiry was announced the Attorney General did ask for grounds of appeal and additional submissions. The Attorneys General request occurred after six submissions had already been submitted.[20]

6. The petitioner may not be given an indication of when a decision will be made.

If the petitioner is persistent the Attorney General through the department may indicate that the petition is still being considered, or even that a decision will be made 'shortly'. The Governor does not advise on the progress of a petition because the decision is being made by the Attorney General. In Kathleen Folbigg's case, letters written to the Governor most often did not receive a response.

7. There is no requirement at law that the Attorney General or the Governor have to answer a petition.

So far as the petitioner and the public are concerned the activities of the Attorney General and the Governor are secret. This has remained the case since colonial times.

8. There can be extensive delays in considering any petition.

In Kathleen Folbigg's case there were extraordinary delays in considering the petitions. It took 3 years, 3 months, and 22 days to receive a positive response from the Attorney General indicating that an inquiry would be held. The petition seeking an inquiry was submitted on 26 May 2015.

It took 1 year, 4 months and 18 days to achieve a response to the petition for a pardon submitted on 2 March 2021, indicating that an inquiry would be held. The delay in consideration of the petition for a pardon was despite the fact that there was 150 scientists and medical experts endorsing the petition and substantial support from the Australian Academy of Science.

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[20] Letter from Secretary, Department of Communities and Justice, 15 October 2021, Requesting 'formally articulated grounds' and 'submissions in support of each ground'.

9. There is a difficulty with obtaining all documents generated by the police and used at trial.

Some difficulties may have been exacerbated by the fact that over 10 years had elapsed since the Folbigg trial in 2003 and when the petition for an inquiry was submitted in 2015. Some examples of the difficulties included: missing audio-visual tapes of the record of interview with Kathleen Folbigg on 23 July 1999; and a missing statement made by Craig Folbigg made on 30 December 2002.[21]

10. In Kathleen Folbigg's case there were also non-disclosure and production issues that occurred at trial, and also after the appellate process has been completed.

These issues are considered in some detail below under the heading *Non-Disclosure and Production*.

11. Having to rely on public pressure to encourage the Attorney General to consider the petitions.

Remarkably, there were long periods of silence on the part of the Attorney General even when, as was the case with the pardon petition, there were ongoing articles in numerous media outlets that pointed out the strength of the genetic causes of death and some of the problems with the trial process.

12. Constantly dealing with the suggestion that the finality principle was a paramount consideration.

This issue was raised by lawyers and some legal academics who may have made the assumption that the trial had not miscarried because the Court of Criminal Appeal and the High Court did not quash the murder convictions, or simply that the few miscarriages of justice that are not identified during the appeal process are simply not sufficient in number to be of concern. The most recent Communities and Justice, Fact Sheet, makes clear that the Attorney General

[21] Trial Transcript, 9 April 2003, page 405.

supports the finality principle and that it will only be interfered with in exceptional circumstances:

> *The first and foremost consideration against the exercise of the prerogative, is the principle of not interfering with the decisions of independent judicial officers who have fully considered matters in accordance with the law. This principle imposes a very high threshold, and only the most exceptional of circumstances would allow for the exercise of the Royal prerogative of mercy. Also, as the prerogative is typically a mechanism of last resort, it will generally be required that any existing alternative pathways, such as any statutory reviews processes or mechanisms, must first be exhausted*.[22]

Simply dismissing the need for a criminal review system because there are few cases that get past the appeal process relies on speculation because wrongful convictions are not recorded in a reliable way. As noted by Professor Stephen Cordner and Dr Kerry Breen no effort is made to document wrongful convictions.

> *We see a criminal justice system that does not take the reality of wrongful convictions seriously enough. The system makes no effort to document the incidence of wrongful convictions and is over-concerned with the principle of finality*.[23]

Problems Once Inquiries Granted

When inquiries were granted a series of new problems arose. These included:

> 1. Avoidance by the Attorney General, especially in the case of the second inquiry, to adequately fund legal representation for Kathleen Folbigg.

The Attorney General required funding decisions to be made by Legal Aid who are not equipped to deal with cases that are outside their usual protocols. Strikingly, it was pointed out by representatives of Legal Aid that they had limited funding and there was an expectation that in every case those relying on such funding could not expect that their legal representatives

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22 Royal prerogative of mercy: Fact sheet (nsw.gov.au).

23 Stephen Cordner and Kerry Breen, *Wrongful Convictions in Australia: Addressing Issues in the Criminal Justice System*, Australian Scholarly Publishing, Melbourne, 2023, p 7.

could be fully funded for the work that they performed. In other words, government had decided that it is necessary for practitioners to perform pro bono work in all criminal cases.

2. The refusal of the Attorney General to fund expert witnesses sought by the petitioner.

In a complex case such as Kathleen Folbigg's forensic pathologists, psychologists and psychiatrists, as well as world leading scientists were expected in many cases to simply provide reports and attend to give evidence at their own cost. In Kathleen Folbigg's case this problem was made even more difficult because it was necessary to obtain the assistance of geneticists from Europe, because they were the experts in the field and there were no experts in Australia. At the time of writing attempts are still being made to have experts funded for the work they did.

3. During the first Inquiry in 2019 the hearings were converted from what should have been non-adversarial proceedings into adversarial proceedings. This was most strikingly evident when Kathleen Folbigg was cross examined for three days.

4. A systemic failure, most noticeable at the 2019 Inquiry, was the assumption that there were no significant errors made at trial or by appellate courts.

5. Failure to advise Kathleen Folbigg before releasing the findings of the first Inquiry to the media.

6. An inquiry allows those conducting it a very wide discretion to include or exclude evidence. It is not governed by the *Evidence Act 1995* or any guidelines that might ensure procedural fairness or that relevant and probative evidence is heard. At the first inquiry the fresh genetic evidence that was presented during the inquiry was not fully considered when it should have been.

7. There is no clear way of challenging the merits of any findings by a commissioner. In Kathleen Folbigg's case the first inquiry was appealed to the Court of Appeal, which was not in a position to decide whether the findings were unreasonable. The commissioner at the first inquiry reached conclusions in a number of instances without providing reasons based on the evidence.

8. At both the first and second inquiries Kathleen Folbigg had to rely on the pro bono goodwill efforts of experts to advance her case.

Kathleen Folbigg Case

2003 Trial

The trial commenced on 1 April 2003 and finished on 19 May 2003 (27 days of hearings). The trial judge was Justice Barr, the prosecutors were Mr Mark Tedeschi QC and Ms J Culver, the defence lawyers were Mr Peter Zahra SC with Mr A Cook.

Kathleen Folbigg stood trial on five counts:

> **Count 1** charged the appellant with having murdered, on 20 February 1989, C [Caleb Folbigg].
>
> **Count 2** charged the appellant with having maliciously inflicted, on 18 October 1990, grievous bodily harm upon P [Patrick Folbigg] with intent to do grievous bodily harm.
>
> **Count 3** charged the appellant with having murdered, on 13 February 1991, P [Patrick Folbigg].
>
> **Count 4** charged the appellant with having murdered, on 30 August 1993, S [Sarah Folbigg].
>
> **Count 5** charged the appellant with having murdered, on 1 March 1999, L [Laura Folbigg].

On 21 May 2003 the jury found her not guilty of murder on count 1 but guilty of manslaughter, guilty of maliciously inflict grievous bodily harm on count 2, and guilty of murder on counts 3, 4 and 5.

Before the trial commenced there was an application on 13 February 2003 for separate trials that was dismissed.[24] The judge who determined the trial could be joined through the admission of tendency and coincidence evidence was Wood CJ at CL.[25] The decision to dismiss the separate trial application and allow tendency and coincidence reasoning was appealed, the judges considering this appeal were: Hodgsons JA, Sully and Buddin JJ.

Stay Application High Court 2003

An attempt was also made, by way of summons, to the High Court to have the case stayed.[26] This application was heard by McHugh J within 44 minutes on 19 February 2003 (2.15pm to 2.59pm). His Honour stated, inter alia:

> *In his submissions this afternoon, Mr Zahra recognised that this Court will only intervene to stay a criminal trial in exceptional circumstances, but he contended that the circumstances of this case are exceptional. As I have already said, his point is that, if separate trials should have been ordered and this Court subsequently finds that is so, a retrial will be required with considerable time and expense. Furthermore, he says the plaintiff's trials in the future in respect of the separate offences would be prejudiced by reason of the wide publicity that will be given to the evidence in the present case. However, the applicant's argument, in my view, is insufficient to overcome this Court's reluctance to allow special leave to appeal from an interlocutory decision and, in particular, to intervene in the criminal processes of the State before verdict.*
>
> . . . .
>
> *I do not think the prospects of special leave being granted are high. At all events, they are not sufficiently high to warrant staying the trial. Of course, a wrongful application of principle may result in a miscarriage of justice and may attract the grant of special leave to appeal by this Court. But, in determining whether the case gives rise to a miscarriage of justice, the Court is always in a better position to evaluate whether a miscarriage has occurred after examining all the evidence than it is when determining a preliminary motion on facts which are assumed will be the subject of proof at the trial.*

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24 *R v Folbigg* [2003] NSWCCA 17.
25 *R v Folbigg* [2002] NSWSC 1127.
26 *Folbigg v The Queen* [2003] HCA Trans 589, Sydney No 559 of 2003.

Folbigg Case Origin of Problems

Whilst criticism can be made of legal practitioners, juries, and judges when a miscarriage of justice occurs, the problem usually starts well before their involvement. In Kathleen Folbigg's case some of the pre-trial problems included:

1. The recording of the death of Laura Folbigg as 'undetermined' when it was open to record the death as caused by myocarditis.

2. The active recruitment of Meadow's Law adherents as expert witnesses by the police.

3. The failure to disclose and produce evidence by the police.

4. The failure to follow the advice of the Office of Director of Public Prosecutions in Newcastle, New South Wales, to have an inquest hearing.

5. The selection and use of a very small number of Kathleen Folbigg's journal/diary entries that did not contain any confessions, but were claimed to be incriminating.

6. Not obtaining expert opinions about journaling and how it is used.

7. Arresting witness Craig Folbigg for hindering a police investigation.

8. Promoting the proposition that the Folbigg children were smothered when there was no evidence of smothering.

9. Placing pressure on Kathleen Folbigg's husband and foster sister to accept the proposition that she harmed her children.

10. Promoting the idea that a caring mother hated her children and was more concerned with social activities than with their care.

In Kathleen Folbigg's case the problem began after the death of her last child, Laura. There were death certificates for Caleb, Patrick and Sarah but not one for Laura.

The death certificates reveal the following:

> **Caleb Folbigg**: The death certificate records the cause of death as 'Sudden Infant Seath Syndrome'. The certificate also shows that an inquest was dispensed with.
>
> **Patrick Folbigg**: The death certificate records the cause of death and duration of last illness as:
>
> > (A) asphxia due to airway obstruction 1 hour
> > (B) epileptic fits 4 months
>
> There is no indication if an inquest was dispensed with or not, but it is assumed it was.
>
> **Sarah Folbigg**: The death certificate records the cause of death as 'Sudden Infant Death Syndrome'. The certificate also shows that an inquest was dispensed with.
>
> **Laura Folbigg**: Laura does not appear to have a death certificate. The pathologist recorded Laura's death as 'undetermined' but found myocarditis present at autopsy.

Recording of Laura Folbigg's Death as Undetermined

The decision by the forensic pathologist, Dr Allan Cala, to record the cause of death of Laura Folbigg as 'undetermined', added to the police reasons for targeting Kathleen Folbigg. The primary reason for targeting Kathleen Folbigg was the fact that she had four children die. The police case was made easier by the use of experts who were adherents of Meadow's Law. The

origin of what has become known as 'Meadow's Law' can be attributed to D.J. and V.J.M. Di Maio, two American pathologists who stated:

> *It is the authors' opinion that while a second SIDS death from a mother is improbable, it is possible and she should be given the benefit of the doubt. A third case, in our opinion, is not possible and is a case of homicide.*

The dogma can be said a number of ways, the one often used is: 'the first death is a tragedy, the second death is suspicious, the third death is homicide unless proven otherwise'.[27] Professor Ray Hill makes it clear that the dogma had no factual basis . He stated:

> *It is clear that the statement is the authors' opinion. It is not a conclusion reached by analysis of their observations; no supportive data are presented and there are no illustrative case histories, or references to earlier publications. This is in striking contrast with the rest of the book which is replete with illustrative case histories and cites many references throughout. A recent examination of Meadow's own contributions to the medical literature has likewise failed to uncover supportive pathological evidence or references to it.* '[28]

The approach which claimed that multiple deaths in a family were not possible was coupled with the proposition before and at trial, that there were no multiple natural deaths reported. There were in fact examples of three or more infant deaths in the one family, and these examples were available at the time of the trial.[29] The Commissioner at the 2019 Inquiry acknowledged this fact but it did not affect his reasoning that:

> *It is accepted that it is clear from the work of the Inquiry that before 2003 there had been reported cases involving the deaths of three or more infants in the same family attributed to unidentified natural causes, or at least not established*

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27 Professor Ray Hill, 'Review of the Kathleen Folbigg case', *Report*, 7 April 2015.

28 R Hill, 'Multiple sudden infant deaths – coincidence or beyond coincidence?', *Paediatric and Perinatal Epidemiology (2004)* **18,** 320–326, 326.

29 For example, see: Donald R Peterson, et al, 'The sudden infant death syndrome: Repetitions in families', (1980) 97(2) *The Journal of Pediatrics* 265-267; Dorothy H Kelly and Daniel C Shannon, 'Sudden Infant Death Syndrome and Near Sudden Infant Death Syndrome: A Review of the Literature, 1964 to 1982', (1982) 29(5) *Pediatric Clinics of North America*, 1241-1261; Lorentz M Irgens, et al, 'Prospective assessment of recurrence risk in sudden infant death syndrome siblings', (1984) 104(3) *The Journal of Pediatrics*, 349-351; John L Emery, 'Families in which two or more cot deaths have occurred', (1986) *The Lancet*, 313-315; Eugene Diamond, 'Sudden Infant Death In Five Consecutive Siblings', 170(1) *Illinios Medical Journal*, 33-34; and Joseph Oren, et al, 'Familial Occurrence of Sudden Infant Death Syndrome and Apnea of Infancy', (1987) 80(3) *Pediatrics* 355-388.

> *as attributable to unnatural causes. To the extent that the Crown case as left to the jury asserted or invited otherwise, that was incorrect.*[30]

He then concluded:

> *In light of the above, I am satisfied that the treatment of the issue of recurrence at trial has not resulted in a miscarriage of justice or irregularity that gives rise to a reasonable doubt as to Ms Folbigg's guilt.*[31]

Where a forensic pathologist or other medical specialist is concluding that a third death is murder unless proved otherwise, that expert should be examined to reveal their acceptance of the dogma and judges determining the admissibility of the evidence should be made fully aware of their belief, as should any jury considering the reliability of their evidence. Not to do so is to withhold from the jury the basis for the expert opinion.

Some other reasons why revealing the basis of a Meadow's Law advocates opinion that are important include:

1. Because the dogma assumes murder in cases where there are three or more Sudden Infant Death Syndrome or undetermined deaths as opposed to the requirement that the autopsy details and findings be carefully scrutinised to determine if there are reasonable possibilities showing natural causes of death.

2. Where the expert disputes the autopsy diagnosis and concludes an unnatural cause of death their opinion should be based on fact not speculation, otherwise they should not be called to give evidence.

3. An expert who is relying on the Meadow's Law dogma is simply requiring that there needs to be clearly identified natural causes of death, accepted by them as more than incidental, otherwise they will provide an opinion that the death is a homicide. This shifts the onus of proof to an accused person to prove the cause of death.

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30 2019 Inquiry, Report, p 163, paragraph 282.
31 2019 Inquiry, Report, p164, paragraph 286.

4. Calling an expert witness to give evidence who bases their opinion on an unreliable dogma without declaring it, is advancing evidence that cannot be properly assessed and depriving the jury of one of its primary functions, determining the reliability of expert evidence. It is also allowing conscious or unconscious cognitive bias to permeate evidence that should at the very least be a theory supported by reliable scientific and statistical evidence. In the case of Meadow's Law there were no case studies supporting the theory and the statistical conclusions reached by Roy Meadow. As noted by Kirby J in *Osland v R (1998) 197CLR 316*: 'In Australia expert evidence is admissible with respect to a relevant matter about which ordinary persons are not able to form a sound judgement without the assistance of those possessing special knowledge or experience in that area and which is the subject of a body of knowledge or experience which is sufficiently organised or recognised as a reliable body of knowledge or evidence.'

Meadow's Law met none of the criteria referred to by Justice Kirby.

The Commissioner of the 2022 Inquiry took a different approach to the impact of Meadow's Law and treated the evidence of experts who promoted it with caution.

Sequence of Events Prior to Trial

Caleb was born on 1 February 1989 and died on 20 February 1989 at 19 days old, he had been at home with his parents for 14 days; Patrick was born on 3 June 1990 and died on 13 February 1991, he was 8 months 10 days old when he died; Sarah was born on 14 October 1992 and died on 30 August 1993, she was 10 months 16 days old when she died; and Laura was born on 7 August 1997 and died on 1 March 1999, she was18 months 22 days old when she died.

On 23 July 1999 police interviewed Kathleen Folbigg.[32] The interview contained no admissions of guilt, and neither did listening device transcripts. Listening devices had been placed in the Folbigg family home prior to the interview, and continued to operate after the interview. It was not until the eleventh day of the second inquiry that the legal representatives for the police advised that there were about 530 hours of cassette tapes that contained listening device

[32] 2022 Inquiry, Exhibit 2, pp 1502-1744.

recordings. [33] Counsel for the police when asked by the judicial officer if the tapes had been 'searched for the purposes of the trial?', responded:

> *My understanding is they were not. The listening device cassettes that were for the purpose of the trial were disclosed, so my understanding is they are not, but I haven't got instructions as to which at the moment.*[34]

The answer provided is unclear. In my search for whether or not the tapes were disclosed and produced prior to the 2003 trial has not been fruitful.

Gathering Meadow's Law Advocates

On 11 October 1999 Detective Ryan received an email from Dr Janice Ophoven from Minnesota USA saying she is willing to review the Folbigg brief.[35] Dr Ophoven was and is well-known for her support of Meadow's Law. On 8 December 1999, Dr Susan Mitchell Beal, Paediatrician, provided an Expert Certificate, stating, inter alia: 'I have no hesitation in saying I believe that all four children were murdered by their mother.'[36] Dr Beal was an adherent of Meadow's Law. After meeting with Professor Peter Berry in Bristol England on 22 June 2000, on 27 December 2000, Detective Ryan received an unsigned report dated November 2000 from Professor Berry which concluded:

> *The sudden and unexpected death of three children in the same family without evidence of a natural cause is extraordinary. I am unable to rule out that Caleb, Patrick, Sarah, and possibility Laura Folbigg were suffocated by the person who found them lifeless, and I believe that it is probable that this was the case.*[37]

Dr Berry appears to be a Meadow's Law follower. This possibility was highlighted in submissions by Counsel Assisting at the 2022 Inquiry, when the following was submitted:

> *At trial, Professor Berry's evidence was not as comprehensive as his report. He did not reveal the full level of detail he took into consideration in coming to his conclusions, for example, the diaries, aspects of Ms Folbigg's behaviour he*

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33 Inquiry Transcript, 24 February 2023, page 741.25
34 Inquiry Transcript, 24 February 2023, page 741.40
35 *Running Sheet*, A/S/C Ryan, Singleton, Registered Number 25495, 11 October 1999.
36 2022 Inquiry, *Expert Certificate*, p 4, paragraph 5 Exhibit 2, p 3738.
37 Running Sheet, D/S/C Ryan, Register Number 25495, 27 December 2000.

> *personally found odd and comments about Ms Folbigg's maternal stress. Put simply, Professor Berry's 'think dirty' approach was not disclosed to the jury. His explanation for the four deaths should have been contextualised by his reliance on Meadow's Law. The jury needed to know the basis for a highly qualified expert coming to a strong conclusion, despite there being no diagnosis of smothering at autopsy for any child, nor any signs of smothering.*[38]

The police officer in charge of the investigation continued to obtain the opinions of adherents of Meadow's Law. On 17 January 2002 Professor Peter B Herdson, Consultant Forensic Pathologist provided a report. He had met with Detective Ryan on 12 November 2001 and had spoken to him over several weeks. His comments were supported by other experts consulted by Detective Ryan who also accepted the validity of the supposed Meadow's Law. Professor Herdson stated, inter alia:

> *Considering these four infant deaths together, I would draw attention to the comments of other Pathologists (and in agreement with my own experience) that the first unexplained death of an infant in a family may be attributed to Sudden Infant Death Syndrome, the second should be labelled undetermined and the third should be considered homicide until proven otherwise. I am unaware that there have ever been three or more thoroughly investigated infant deaths in one family from Sudden Infant Death Syndrome.*[39]

On 28 October 2002, Professor Robert Ouvrier provided an Expert Certificate supporting the proposition that Patrick Folbigg's ALTE was 'more likely due to deliberate suffocation than any other cause' because 'of such events in four siblings'. He attached an article by Roy Meadow.[40]

The reason for seeking out experts who were adherents of Meadow's Law would need to be supplied by the police officer in charge of the investigation, and to date former Detective Senior Constable Bernie Ryan has not been asked to provide a reason. The reason why Meadow's Law adherents were used at trial would need to be provided by the lead prosecutor, and to date he has not been asked.

Failure to Hold Inquest

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38 Counsel Assisting, Final Submissions, 4 April 2023, p 361, para 344.
39 2022 Inquiry, Exhibit 2, p 3793.
40 2022 Inquiry, Exhibit 2-H, p 3803.

In a letter dated 2 February 2001, Gregory Coles, Office of the Director of Public Prosecutions, Newcastle, New South Wales to Detective Senior Constable, B Ryan said the following:

> *Thank you for your referral dated 4 April 2000, in relation to the abovementioned matter. After careful consideration of the brief of evidence it is advised that the matter should be referred to the State Coroner, in order for a full inquest to be held into the circumstances surrounding he deaths of Caleb, Patrick, Sarah and Laura Folbigg. Please advise as to what arrangements you wish to make for the return of the brief.*

A coronial hearing did not take place, and there has never been an adequate explanation of why it did not.

On 14 February 2001, Acting State Coroner, Janet Stevenson, met with Detective Senior Constable Bernie Ryan at Glebe. On 2 April 2001, Acting State Coroner Stevenson advised Detective Bernie Ryan that Kathleen Folbigg should be charged with murdering her four children. The use of a coroner to determine whether an individual should be charged with an offence, without a hearing of evidence at a properly constituted inquest, disregarded procedural fairness and the provision of the New South Wales *Coroners Act 1980* that prescribed the circumstances where an inquest should be held. Section 13 of the Act governed the circumstances where a coroner can hold an inquest. Subsection 13 (b) was sufficient to allow an inquest to occur in Kathleen Folbigg's case it states, 'The person died of a sudden death the cause of which is unknown'.

Non-Disclosure and Production

The task of determining whether there is even merit in seeking the exercise of the prerogative of mercy, especially 10 years after a trial, there was significant difficulty obtaining all relevant documentation and ensuring that what evidence was obtained was read in context. In Kathleen Folbigg case some of the steps undertaken were:

(a) Interviewing her first solicitor.
(b) Obtaining the from Legal Aid what files they still retained on the case.
(c) Searching the Supreme Court Registry files.

The prosecution was in possession at trial of a 1992 'May Gibbs' Diary.[41] This diary detailed the time leading up to Sarah's birth and after. It showed that Kathleen Folbigg's anticipation for Sarah's birth and her forward planning for Sarah, even to the extent of preparing a shopping list for Sarah's Christmas presents. This diary was not given to the jury: it was placed into evidence at the 2019 Inquiry at the insistence of Ms Folbigg's legal representatives.

The hospital records in regard to Patrick Folbigg were not supplied. The non-disclosure of listening device tapes was revealed towards the very end of the 2022 Inquiry when a representative of the police advised that they had an extra 530 hours of listening device tapes recording conversations in the Folbigg home; these tapes have still not been provided to Kathleen Folbigg.[42] This extraordinary development not only revealed a fundamental failure of the requirement to disclose and produce, it also potentially removed positive evidence being presented at trial on behalf of Kathleen Folbigg.

Appeals

In February 2005, the first appeal against the convictions occurred and was dismissed.[43] However, the leave to appeal against sentence was granted and the overall head sentence was reduced from 40 years to 30 years with a non-parole period of 25 years. The Court of Criminal Appeal judges were Sully J, Dunford J, and Hidden J. The conviction grounds of appeal were:

> Ground 1
>
> "The trials of the appellant miscarried as a result of the five charges in the indictment being heard jointly."
>
> Ground 2
>
> "The verdicts of guilty are unreasonable and cannot be supported having regard to the evidence."
>
> Ground 3

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41 As shown in the reports of Dr Janice Ophoven and Professor Peter Berry (who were given them by police to consider for their expert opinion), see Expert Certificate of Dr Janine Ophoven dated 6 October 2000 p 4; Report of Dr Peter Berry dated November 2000 p 1.

42 2022 Inquiry, Transcript, 24 February 2023, p 741.25.

43 *R v Folbigg* (2005) 152 A Crim R 35; [2005] NSWCCA 23.

> "The trials of the appellant miscarried as a result of evidence being led from prosecution experts to the effect that they were unaware of any previous case in medical history where three or more infants in one family died suddenly as a result of disease processes."
>
> Ground 4
>
> "The learned trial Judge erred in his directions as to the use the Jury could make of coincidence and tendency evidence."

Justice Sully emphasised the way he viewed the journal/diaries and that he thought the medical evidence was overwhelming. He stated, inter alia:

> *132 These entries make chilling reading in the light of the known history of Caleb, Patrick, Sarah and Laura. The entries were clearly admissible in the Crown case. Assuming that they were authentic, which was not disputed; and that they were serious diary reflections, which was not disputed; then the probative value of the material was, in my opinion, damning. The picture painted by the diaries was one which gave terrible credibility and persuasion to the inference, suggested by the overwhelming weight of the medical evidence, that the five incidents had been anything but extraordinary coincidences unrelated to acts done by the appellant.*

Justice Sully did not consider alternate explanations for the small number of journal/diary entries used by the prosecution. Moreover, he did not seem to take into account that there was no evidence of smothering and that there was available evidence to support the natural causes of death for two of the children, Patrick and Laura Folbigg. He also gave a positive emphasis to the evidence given by experts who were followers of Meadow's Law. His reasoning seems to have had an impact on the High Court.

Special Leave Application High Court

On 2 September 2005 a Special Leave Application by Kathleen Folbigg was heard by the High Court. Justices McHugh ACJ, Kirby and Heydon JJ heard the application within 21 minutes (9.29am to 9.50am).[44] The time spent on receiving oral submissions does not reflect the time spent reading submissions and trial transcript. The transcript reveals a number of interesting insights to the reasoning of the Court. Of particular interest is the mechanism of death promoted

[44] [2005] HCATrans 657, No S94 of 2005.

by the Crown prosecutor that claimed each child was smothered. One of the methods of smothering that could have applied was with a pillow, however, the prosecution had no evidence of smothering and was only speculating about how smothering might have occurred. Justice McHugh was influenced by the claim that there was no 'clear, natural cause of death', and that the deaths were 'consistent with smothering with a pillow', and that the diary entries were enough to leave it 'open to the jury to conclude the applicant had murdered the children'. He stated on these points:

> ***McHUGH ACJ**: You have to look at the positive similarities. Two deaths occurred during the day, two deaths and the acute life-threatening event occurred in the early hours of the morning. In each case the applicant was alone with the child, the child ceased breathing, the husband was either absent or asleep and there was no clear, natural cause of death and **all the children showed signs that were consistent with smothering with a pillow.** When you add the diary entries to those facts, why was it not open to the jury to conclude that the applicant had murdered the children? When you have things like, "Wouldn't of handled another like Sarah", talking about the last child, "She's saved her life by being different", and, "my fear of it happening again haunts me", and I am going to get my husband if I feel like this again.* (emphasis added)

There were in fact no signs of smothering and no evidence of the involvement of a pillow in any of the deaths. There were also no confessions of having smothered any of her children, let alone with a pillow. Additionally, there was a very clear natural cause of death in the case of Laura Folbigg, and a reasonable possibility as to the cause of death of Patrick Folbigg and of his acute life-threatening event.

Justice McHugh may have found the prospect of being smothered with a pillow from the Crown opening, when it was first raised. The Crown in his opening stated:

> *It is extremely easy for an adult to deliberately smother a young child, a baby, and to leave no trace of external injury, whatsoever, such as bruising. This is especially so if a pillow or other soft object is used.*[45]

Dr Allan Cala, who performed the autopsy on Laura Folbigg, was similarly asked about smothering with a pillow.

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[45] Trial Transcript, 1 April 2003, p32.5.

Q. What do you say as to whether or not it is easy for an adult to smother an infant or a small child with a hand, pillow, soft toy or other similar object?

A. It may be easy if the child is very young or very small, but as the child grows and matures, if that occurs it may be quite a difficult process that actually takes some time.[46]

The first expert to give evidence about smothering with a pillow was Dr Barry John Springthorpe, Consultant Paediatrician, who was asked by the Crown about smothering with a hand, and responded by adding a pillow. A relevant question and answer are:

Q. What about a hand?
A. Well, because of the baby's age, there wouldn't be very much pressure involved. It's possible, but certainly a pillow over the face would not have any marks on at all.[47]

Professor Hilton, who conducted the autopsy on Sarah Folbigg and found the cause of death to be SIDS, gave the following evidence about a pillow:

Q. What do you say to the proposition that if a 10-month-old child were deliberately suffocated with a pillow, that you would not necessarily expect to find any signs present on postmortem?
A. I would agree with that.[48]

The evidence of smothering with a pillow was undermined by the evidence of Dr Virgina Friedman, who worked at the Division of Analytical Laboratories of the New South Wales Department of Health. The Division of Analytical Laboratories was provided with a pillow that was relevant to Laura Folbigg and which had a stain on it that appeared to be blood. It turned out not to be the blood of Laura, but rather that of a male who was unlikely to have been her father. Some of the relevant questions and answers are:

Q. In particular from an area that appeared to be stained on the pillow?
A. Yes, we tested an area that appeared to be what looked like a blood stain on the pillow case.

Q. Is this the case, that you were able to extract some human DNA from the what (sic) period to be a stain?
A. Yes.

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46 Trial Transcript, 15 April 2003, p711.10.
47 Trial Transcript, 7 April 2003, p268.10.
48 Trial Transcript, 14 April 2003, p656.35.

Q. Is this the case: That you compared that DNA with the DNA of Laura Folbigg?
A. That's correct.

Q. And you came to the conclusion that it was not the DNA of Laura Folbigg?
A. That's correct.

Q. And in fact did it appear that it was the DNA of a male?
A. Yes.[49]

Journal/Diary Entries

Justice Kirby, during the special leave application stated:

> ***KIRBY J**: . . . . that additional powerful evidence from the diary, which the Court of Criminal Appeal, I think, described as chilling.*

There was no attempt at trial to obtain expert opinions about the meaning that could be attributed to the few cherry-picked journal/diary entries chosen by the prosecution to advance its case for the purpose of showing guilt. This fact bears some reflection because the entries were held out as a strong part of the prosecution case. The Commissioner at the 2019 Inquiry refused to allow expert opinions about the meaning of the entries. Relevantly, the Crown at trial, however, based his submissions about Kathleen Folbigg losing self-control before smothering her children on the opinion of a police psychologist who seems to have chosen the entries used by the prosecution at trial. Rozalinda Garbutt, was employed in a section of the New South Wales Police Service called Health and Workplace Services. In a report dated 4 February 2000, provided at the request of Detective Senior Constable, Bernie Ryan on 11 October 1999, she engaged in an analysis of some diary entries.

Garbutt advanced Meadow's Law when she stated under the heading 'Homicide Implications':

> *A quote by Linda Norton, Forensic Pathologist highlights the need to examine the explanation of homicide.*
> *"There are some who say one infant death is SIDS, two leaves a big question mark and three you yell murder."*[50]

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49 Trial Transcript, 5 May 2003, p1154.5.
50 Garbutt, *Report*, 4 February 2000, page 7.

In her conclusion section she qualifies her final opinion with the words:

> *The question of natural death is a debate open to medical experts. If natural causes is under question this then leaves accidental or homicide as remaining modes of death.*

Her conclusion was:

> *From all the information reviewed within this report, the deaths of the four Folbigg children seem to be more logically explained by deliberate homicide.*[51]

Garbutt's conclusion was given without speaking to Kathleen Folbigg and absent review by other psychologists. It may be that police officer Ryan chose Garbutt because she was a no cost option. What is unacceptable, was the Crown advancing its case based on the speculative untested views of a forensic psychologist without even seeking other opinions. The failure to have Garbutt's opinion considered by other experts before advancing it is the same approach police and Crown adopted when they advanced Meadow's Law advocates without fully considering the impact this might have on the ability to achieve a fair trial.

In the section 'Summary of My Conclusions' Garbutt provides the prosecution with its motive for killing:

> *. . . Kathleen Folbigg became angry and frustrated with her children's crying and need for constant attention to a point where it overwhelmed her and she lost control and consciously ended the lives of each child.*[52]

What the prosecution does not use is that Garbutt makes clear that her opinions are dependent on the elimination of natural causes.

> *My opinion is dependent upon the elimination of natural causes to explain the death of the four Folbigg children. If natural causes are eliminated then in my opinion Kathleen Folbigg became angry and frustrated with the children's crying and the need for constant attention to a point where it overwhelmed her and she lost control and consciously ended the lives of each child.*[53]

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51 Garbutt, *Report*, 4 February 2000, page 12.
52 Garbutt, *Report*, 4 February 2000, page 12.
53 Garbutt, *Report*, 4 February 2000, page 1.

For the prosecution to advance at all it needed an absence of natural causes, *ergo* the choice of smothering, the use of the term 'consistent with' and the word that is not a diagnosis 'asphyxiation'. It also needed 'undetermined' in the case of Laura Folbigg, and Meadow's Law in all cases.

Justice Kirby's comment about the journal/diary entries failed to consider the alternative explanations and were probably made without the benefit of having considered Garbutt's report. Furthermore, it seems that Kirby J was influenced by the reasoning of Sully J in the Court of Criminal Appeal.

Justice Michael McHugh ACJ, fell into error when he concluded that there were no authenticated record of three or more SIDS deaths in a single family. He stated:

> *When the trial judge dealt with at the bottom of 26 and 27, he said: SIDS deaths are rare in the community. There is no authenticated record of three or more such deaths in a single family. This does not mean, of course, that such events are impossible. It is an illustration of the rarity of deaths diagnosed as SIDS.*

Patrick and Laura Folbigg were not categorised as SIDS deaths, and there were cases of three or more natural deaths in the one family that had been recorded. Justice McHugh engaged in the same faulty reasoning that permeated the 2003 trial and the first inquiry into Kathleen Folbigg's convictions in 2019.

Acknowledgement of Error

The Honourable, Michael Kirby AC CMG, in a foreword to the book, *Wrongful Convictions in Australia*, referred to the Kathleen Folbigg case and made the following comment:

> *I participated in the first application for Special Leave to appeal to the High Court in the case of Mr Mallard. I also participated in the application for special leave to appeal to that Court in Mrs Folbigg's case. Admittedly, the later cases were re-expressed with new and different arguments. Old evidence was viewed in a different light, including by the advent of compelling new forensic evidence. However, the fact remains that I failed to conceive new and different arguments. I denied relief. I contributed to the substantial extension of the incarceration of Mr Mallard and Mrs Folbigg. These were*

> *later declared by inquiries, conducted by highly experienced judges, to be 'unsafe' outcomes. I accept those conclusions.*[54]

The difficulty for the High Court was that it accepted evidence given at trial that was also accepted by the Court of Criminal Appeal, when that evidence either did not exist, as in the case of the claimed possible use of pillows, was based on a discredited dogma, and was based on the assumption that it was obvious what a grieving mother would write in her journals if she was not guilty of murder.

Court of Criminal Appeal 16 May 2007

On 16 May 2007, the Court of Criminal Appeal granted an application for leave to reopen the appeal against the convictions.[55] This appeal involved consideration of the following two grounds:

> 1. The trial miscarried by reason of a juror or jurors obtaining information from the internet, which revealed that the appellant's father had killed her mother.
>
> 2. The trial miscarried as a result of a juror or jurors informing themselves, away from the trial, as to the length of time an infant's body is likely to remain warm to the touch after death.

On 21 December 2007, the Court of Criminal Appeal dismissed the appeals against conviction.[56] The Court of Criminal Appeal judges were McClellan CJ at CL, Simpson and Bell JJ.

An interesting aspect of this appeal can be found in the case of *HCF v The Queen* [2023] HCA35 at [112], where justices Edelman and Steward state:

> *An illustration of the danger of imposing two difficult a task on an appellant can be seen from one of the cases in this line: Folbigg v The Queen. In that*

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54 Stephen Cordner and Kerry Breen*, Wrongful Convictions in Australia: Addressing Issues in the Criminal Justice System,* Australian Scholarly publishing, Melbourne, 2023, p xi.

55 *R v Folbigg* [2007] NSWCCA 128.

56 *Folbigg v R* [2007] NSWCCA 371.

case a juror obtained impermissible information from the internet showing that the appellant's father had killed her mother. The Court of Criminal Appeal did not ask whether the juror's intentional, and prohibited, research had led to the discovery of material that had the capacity to prejudice the jury's consideration of the defendant's case, irrespective of whether the material might, or was likely to, actually have been used in that way. Instead, applying the wrong test, the Court of Criminal Appeal placed itself in the position of the jury (but not the position of the juror who had deliberately disobeyed the directions) and considered whether the information would have actually influenced the jury's consideration of whether the appellant killed her own children. That effectively reversed the usual onus and treated the requirement for a miscarriage of justice as though it were a requirement for a substantial miscarriage of justice. In summary, determining whether jury misbehaviour has resulted in practical injustice does not require an appellant to demonstrate that the irregularity in fact caused any actual prejudice. The focus is on whether the incident was of such a character or nature that it gave rise to a capacity to prejudice the jury's consideration in the accused's case, thus casting a shadow of injustice over the verdict. The presence of that capacity is sufficient to demonstrate the irregularity constitutes a miscarriage of justice.

In total there were 10 Supreme Court Justices and three High Court Justices who considered the Kathleen Folbigg case, before the 2019 Inquiry.

Petition for Inquiry

In February 2014 the University of Newcastle Legal Centre with the assistance of barristers Isabel Reed and Nicholas Moir, began assisting Kathleen Folbigg. In July 2014 I was asked to draft a petition to the Governor of New South Wales seeking an inquiry into her convictions. On 13 December 2014 I provided a merits advice after reading the trial transcript and the Court of Criminal Appeal judgements. My advice was that there was no evidence of smothering and no confessions that she had smothered her children.

On 26 May 2015 a petition was sent to the Governor for review of the convictions pursuant to s76 of the *Crimes (Appeal & Review) Act 2001* which was signed by me, and barristers Nicholas Moir and Isabel Reed. Attached to the petition, were the following reports:

(1) Professor Stephen Cordner, Forensic Pathologist, he clearly pointed out that there were identifiable causes of death for both Patrick and Laura and found SIDS for Caleb and Sarah;

(2) Professor Michael Pollanen, Chief Forensic Pathologist for Ontario, who reviewed Professor Cordner's work and agreed with his findings;

(3) Professor Ray Hill, Professor of Mathematics, University of Salford, who was highly critical of the Meadow's Law approach; and

(4) Dr Shamila Betts, Clinical Psychologist, who placed the journal/diary entries in context.

There was very little communication with the Governor or the Attorney General of that time, Gabrielle Upton. Gabrielle Upton was replaced as Attorney General by Mark Raymond Speakman SC who was sworn in as Attorney General on 30 January 2017. Communication with Mr Speakman was no better than that with his predecessor. On 10 August 2018 an episode of the ABC Australian Story went to air. It raised a number of issues that were contained in the petition. On 22 August 2018 the Attorney General announced an inquiry into the convictions of Kathleen Folbigg.

The first petition was not based on fresh evidence. It relied on the substantial number of errors made during the trial process, some of which have been detailed above. Unlike cases like Ziggy Pohl there was no confession made by anyone that could show Kathleen Folbigg had not killed her children.

2019 Inquiry

An inquiry was granted by the Governor of NSW on 22 August 2018, and the evidence was heard from March 2019 for three weeks. Reginald Blanch, a former Chief Justice of the District Court of New South Wales and before that Director of Public Prosecutions in New South Wales, was appointed as the Commissioner of the Inquiry. His report, the transcript of hearings and tendered documents can be found on the internet (surprisingly the petition for an inquiry is not available on this site and much of it was not considered by the Commissioner).

During the Inquiry, forensic pathologists Professors Stephen Cordner, Johan Duflou and John Hilton were in consensus about how the children died, that is, of natural causes. This was also

supported by the leading forensic pathologist of Ontario, Professor Michael Pollanen in a review of Professor Cordner's report. Dr Allan Cala performed the autopsy on the last child Laura and concluded that her death was "undetermined" in light of the deaths of her previous siblings. At the Inquiry he said, 'I think, with Laura, there's undoubtedly myocarditis and I've said I can't exclude that as being the cause of death'. Even during the trial Dr Cala acknowledged there was no evidence of smothering in any of the children. This paper does not detail what happened at the Inquiry, suffice to say it did not find in Kathleen Folbigg's favour. The full report of the Inquiry is available online.

Pardon Petition

On 2 March 2021 a Pardon Petition was submitted seeking an unconditional pardon for Kathleen Folbigg which was sent to the Governor of New South Wales. It was substantially based on new genetic evidence showing additional causes of death for Sarah and Laura Folbigg. The petition was endorsed by 90 leading scientists, doctors and prominent science advocates. It was also further endorsed by 66 fellows of the Royal Society of NSW. The petition requested that the Governor exercise the pardon power pursuant to s 76 of *Crimes (Appeal and Review) Act 2001* (NSW). The main grounds for the Pardon were that Kathleen Folbigg should be granted a pardon based on the significant positive evidence of natural causes of death for Caleb, Patrick, Sarah, and Laura. The further developments to support were:

1. Professor Schwartz (a leading cardiac geneticist) concluded that the *CALM2* mutation found in Sarah and Laura Folbigg is 'likely pathogenic'. Whenever a sudden death occurs without obvious causes and a 'likely pathogenic' mutation of this nature is found, it is scientifically appropriate to consider the mutation as the likely cause of death. This important evidence was not given the opportunity to be heard at the 2019 Inquiry as the Commissioner declined to reopen the hearings to consider the evidence of Professor Schwartz.

2. The likely role of the novel *CALM2* mutation in Sarah and Laura Folbigg's deaths was confirmed in a world study by Professor Toft Overgaard, Professor Schwartz, Professor Vinuesa and colleagues published on 17 November 2020. The research of the authors concluded that a fatal cardiac arrhythmia was caused by the *CALM2* mutation.

> They further concluded that the cardiac arrhythmia was triggered by intercurrent infections, and that this was a reasonable explanation for Sarah and Laura's deaths. This paper has been published in *EP Europace* (Oxford University Press), a highly respected, peer reviewed journal. This indicates that the international medical and scientific communities find the role of the *CALM2* mutation in cardiac death a reasonable and likely explanation for Sarah and Laura's deaths.

As a result of an article published in Oxford University Journal *EP Europace* about the *CALM2* G114R mutation, it was identified as pathogenic with a 99 percent certainty of causing the deaths of Sarah and Laura Folbigg.

Through 2021 seven submissions totalling 143 pages (not including attachments) were forwarded to the Governor and Attorney General supporting the petition and providing additional expert reports. The final submission on 5 November 2021, made at the request of the Attorney General, particularised the grounds and made additional submissions. The grounds were:

1. New genetics findings in relation to the CALM2 mutation provide an updated natural cause of death for both Sarah and Laura Folbigg.

2. The evidence provided by forensic pathologists shows natural causes of death for Caleb, Patrick, Sarah and Laura Folbigg.

3. Expert evidence about Kathleen Folbigg's diaries/journals shows: they should be read in context; the language used by her cannot be construed as admissions that she killed or physically harmed her children; and the only appropriate interpretation that can be applied to them is that provided by Ms Folbigg.

4. One of the fundamental propositions advanced by the prosecution at trial – that three or more children in the same family could not die of natural causes – has been refuted.

5. Circumstantial evidence advanced at trial did not meet the necessary standard for its acceptance of proof of guilt beyond reasonable doubt.

6. Coincidence and tendency evidence, that was wrongly admitted, allowed the introduction of misleading evidence resulting in the promotion of flawed inferences.

7. The rejection of the sworn testimony of Ms Folbigg at the 2019 Inquiry should not have happened.

8. Ms Folbigg is suffering ongoing abuse by the State through her continued incarceration despite overwhelming evidence pointing to innocence.

On 18 May 2022, the Governor on the advice of the Attorney General ordered a second inquiry into Kathleen Folbigg's convictions. The second inquiry received expert reports and heard approximately two weeks of evidence from experts in cardiology, genetics, neurology, psychiatry, and psychology. The expert opinions dealt with the cause of death of the Folbigg children and Kathleen Folbigg's diaries and journals. The evidence was overwhelmingly in favour of natural causes of death of her children.

On 6 July 2022 a Parole Petition was submitted on behalf of Kathleen Folbigg. The same basic procedure for the granting of a pardon applies to the granting of early parole.

Court of Appeal

At around the time the pardon petition was provided to the NSW Governor, Ms Folbigg's other legal team went to the NSW Court of Appeal for judicial review of the 2019 Inquiry. The Court dismissed the review.

Grounds of Summons Relied Upon

On 21 October 2019, solicitors for Kathleen Folbigg, filed a summons in the Common Law Division of the Supreme Court. They sought the exercise of the supervisory jurisdiction of the court pursuant to s69 of the *Supreme Court Act 1970*. The Court of Appeal commenced hearing the matter on Monday 15 February 2021 and oral argument was heard over two days.

The procedural errors ultimately relied upon were summarised by the Court of Appeal as:

i. failing to accept the tender of the listening device transcripts of Craig Folbigg;

ii. failing to accept the tender of the Goldwater report unredacted;

iii. failing to accept the tender of Professor Clancy's report unredacted;

iv. redacting parts of all the documents referred to in paragraphs (i) – (iii) above, prior to accepting their tender;

v. failing to re-open the inquiry after the receipt of further material from Professor Schwartz and Professor Vinuesa;

vi. failing to reconsider the whole of the genetics evidence after the receipt of the further material from Professor Schwartz and Professor Vinuesa;

vii. alternatively, rather than reconsidering the whole of the genetics evidence after the receipt of the further material from Professor Schwartz and Professor Vinuesa, proceeding to publish his findings that were formulated prior to the receipt of that material and publishing an addendum purporting to address that evidence;

viii. failing to consider the submission of Professor Clancy provided to the inquiry;

ix. failing to consider evidence as to the good character of the applicant including that admitted in the form of lay witness statements and that of Dr Diamond;

x. limiting the scope of Ms Folbigg's evidence, and failing to address submissions for Ms Folbigg as to the interpretation of her diaries;

xi. failing to accord procedural fairness in unilaterally redacting documentary evidence without consultation with those parties given leave to appeal in the inquiry;

xii. failing to accord procedural fairness in redacting documentary evidence that was relevant to the statutory function of inquiry.

The summons sought an order 'quashing the report', or alternatively a declaration that 'the findings contained in the report' were legally flawed.[57]

Summary of Court of Appeal Findings

The Court of Appeal ultimately found:

[57] Paragraph 15

> *The girls' deaths were thus "outliers" when compared with those reported in the literature. Further, the boys' genomes provided no common cause. When these matters were weighed with the inculpatory inferences derived from Ms Folbigg's diary entries and her evidence in seeking to present innocent explanations of them, there was an ample basis, consistent with the scientific evidence, for the judicial officer to conclude that there was no reasonable doubt as to Ms Folbigg's guilt.*[58]

The findings strengthened the prosecution case that had been advanced at trial by effectively dismissing a rare genetic variant with the word 'outliers', when of course they must have been outliers because the mutation was rare; and requiring a common genetic variant also be found for all the children. Otherwise, the Court of Appeal's emphasis on the inculpatory nature of the selected journal diary entries was similar to that emphasised at trial. The words 'are evidence in seeking to present innocent explanations of them' seems to either dismiss those explanations provided by Kathleen Folbigg, or imply that they reinforced her guilt.

Nature of Judicial Review Proceedings

The Court of Appeal clearly stated that the review they were undertaking was not a fact-finding exercise, they cited: *AAI Ltd t/as AAMI v Chan [2021] NSW CA 19 at [47] (Leeming JA).* Baston JA, Leeming JA and Brereton JA stated:

> *The supervisory jurisdiction of this Court is under s69 of the Supreme Court Act is available to correct jurisdictional error, or error of law on the face of the record; it is not available to review exercises in fact-finding, or exercises of discretion vested by statute in the judicial officer, ...*[59]

The Court of Appeal made clear that the thoroughness of the inquiry 'was attested to by the careful and comprehensive Report which resulted'.[60] It also made clear that it was not required or permitted to intervene unless there could be demonstrated an error of law on the part of the judicial officer; however, there may have been no error of law, that is the application of a legal

58 Paragraph 161
59 Paragraph 12
60 Paragraph 9

principle, but that fact may be of no consequence in a miscarriage of justice case where the facts found are mistaken or based on lies, or the analysis of the facts is flawed.

The Court of Appeal stated, 'The Court has had the opportunity to consider the whole of the Report.'[61] There are a number of extracts from the 2019 Inquiry report that are included in the judgement, but the court did not have the opportunity of determining if the extracts contained in the report were properly based upon the evidence, or what weight should have been given to the evidence.

The Court of Appeal cited *Latham CJ in The King v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407; [1944] HCA 42,* to support the proposition that the Court of Appeal had no power to form an opinion for itself and 'The opinion-forming function is vested by statute in the judicial officer appointed to conduct the inquiry, and no one else'.[62]

Application to State Coroner

The Pardon Petition submitted on 2 March 2021 had been with the Attorney General for one year without receiving a satisfactory response from him. An application was therefore made to the State Coroner on 3 March 2022 for an inquest into the deaths of Kathleen Folbigg's children. This application made by me, Ms Rhanee Rego and David Bennett AC QC.

We asked the coroner to make findings of natural causes of death based on the opinions of Australia's leading forensic pathologists and experts in the field of genetics, who have provided the following diagnoses for all four children:

1. Caleb: Sudden Infant Death Syndrome (Category II)

2. Patrick: Asphyxia due to airways obstruction, Epileptic fits, Encephalopathic disorder (underlying cause not determined on investigation)

61 Paragraph 9
62 Paragraph 18

3. Sarah: Sudden unexpected death caused by *CALM2* with the lethal cardiac arrest potentially precipitated by her concurrent infection.

4. Laura: Sudden unexpected death caused by *CALM2* with the lethal cardiac arrest likely precipitated by her myocarditis or exposure to pseudoephedrine (which can be a trigger of cardiac arrest for people with *CALM* variants).

The State Coroner was advised, inter alia:

> A coronial fact-finding exercise to determine cause and manner of the Folbigg children's deaths is required. The new compelling genetic evidence indicates the official causes of death for Sarah and Laura are now outdated, and an official finding is required so that the death certificates can properly reflect how they died. In the case of Caleb and Patrick, the 2019 Inquiry failed to appreciate the evidence given by three leading forensic pathologists all of whom concluded Caleb died from SIDS and Patrick from an epileptic/encephalopathic disorder.[63]

The State Coroner put aside whether to have an inquest until after the petitioning process had been concluded.

Result of 2022 Inquiry

On 1 June 2023, T F Bathurst AC KC in a memorandum to the Attorney General of New South Wales said, inter alia:

> *I am firmly of the view there is reasonable doubt as to Ms Folbigg's guilt.*

On 5 June 2023, the New South Wales Attorney General, Michael Daley made a recommendation to the Governor, that Kathleen Folbigg be pardoned, the Governor accepted this recommendation.

On 8 November 2023, the Report of the Inquiry into the convictions of Kathleen Folbigg was published.

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[63] Request to the New South Wales State Coroner for a Coronial Inquest into the Deaths of the Caleb, Patrick, Sarah and Laura Folbigg, 3 March 2022, p. 6.

On 14 December 2023, all of Kathleen Folbigg's convictions were quashed and verdicts of acquittal were entered by the New South Wales Court of Criminal Appeal.

The question, 'Why bother changing a system that has worked for 100 years?', is relatively straight forward: the system is incoherent, rarely works and involves considerable delay. It took 8 years from the submission of the first petition for an inquiry for freedom to be given to an innocent person.

What is also striking is that it took a further 8 years from the last failed Court of Criminal Appeal for the petitioning for the exercise of the prerogative of mercy to even commence. The reason for this delay is that no one was looking at the case.

An Alternative Model

The United Kingdom, Scotland, Norway and New Zealand all have introduced a Criminal Cases Review Commission (CCRC) and Canada recently announced that they were establishing a Miscarriages of Justice Commission. The first CCRC, in the United Kingdom, was precipitated by the high-profile miscarriages of justice of the Guildford Four (1974), the Birmingham Six (1975), the Maguire Seven (1976) and Judith Ward (1974). After a comprehensive review of criminal justice, it was recommended that the UK move away from a system in which a politician, the Home Secretary, determined if a miscarriage of justice had likely occurred.

A Criminal Cases Review Commission is an independent body tasked with reviewing cases for which there is a claim that the conviction or sentence is wrong in some way. It is independent from the courts, police and government. It has powers to compel government departments and organisations to produce documents for review, interview (or re-interview) witnesses and brief experts for opinions on matters arising in a case.

It undertakes a thorough investigation into a case and takes the burden away from the convicted person and from pro bono lawyers who in rare cases assist convicted individuals. It does not, however, have power to make determinations on the case itself (e.g., to remove a conviction or

free a person from incarceration). It only has the power to investigate, and if appropriate, refer the case to an appeal court. Each Commission has a different 'test' which they apply to determine if a case should be referred to an appeal court for further examination. In the case of the UK the test is if the evidence raises a 'real possibility' that the appeal court will overturn the conviction.

In the UK during 2020/21, the courts heard appeals in relation to 34 cases resulting from CCRC referrals. Of these, 30 appeals were allowed and 4 dismissed. This means that 88% of appeals in CCRC cases were successful during the year. (CCRC-Annual-Report-and-Accounts-2020-2021.pdf) The Commission began operation in 1997.

The Law Council of Australia supports a Criminal Cases Review Commission. It states:

> *23. While this NSW model is superior to the post-conviction review mechanisms currently in place in other jurisdictions, the Law Council prefers the Criminal Cases Review Commission model for the following reasons:*
>
> *i. Before an inquiry may be ordered under the NSW provisions, the Governor or the Court must first be satisfied that 'that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'. This test has created confusion, as demonstrated in the Eastman2 case, about the extent to which evidence about a defect in the original proceedings may provide the basis of an inquiry, even where that defect does not immediately suggest doubt about the person's actual 'guilt in fact'. Regardless of the High Court's decision on the particular facts of the Eastman case, the risk remains that imposing a test of this kind may create an inappropriate procedural hurdle where a convicted person is attempting to impugn the proceedings through which a guilty verdict was secured, rather than the guilty verdict in and of itself.*
>
> *ii. By involving the Governor and including reference to his or her prerogative of mercy in the relevant provisions, the NSW legislation blurs the line between the prerogative and the introduction of an extraordinary additional appeal process. In so doing, the legislation creates the impression that prerogative of mercy is intended to be subsumed by this new review process.*
>
> *iii. These provisions are intended to be utilised in cases where a matter has already been finally disposed of by the courts. They are intended to provide a safety net in extraordinary cases, without creating the impression that a verdict or sentence of the court may be subject to ongoing questioning, review and revision. For that reason, it is preferable that an independent, objective, statutory body, which is removed from the trial process and the court system, conducts the inquiry into whether and when a matter should be able to be referred back to the appeal court. The court should not become involved in a*

matter, and a person should not be seen to have access once more to the courts to re-agitate his or her case, until an independent determination has been made that it is indeed a case where the principle of finality must be set aside in order to avert a likely miscarriage of justice.[64]

Annexures

Annexure A - Other Cases of Interest

Other cases of interest include the following:

- Johann (Ziggy) Pohl, see detail of case at injustice.law/2023/08/30/Ziggy-pohl

- Alexander McLeod Lindsay, see detail of case at injustice.law/2023/10/04/Alexander-McLeod-Lindsay

- Lindy Chamberlain, a detailed description of her case can be found in the Royal Commission of Inquiry into Chamberlain Convictions, Report, Commonwealth Parliamentary Papers (1987), Volume 15, Paper 192. See also injustice.law/lindy-chamberlain.

- Andrew Mark Mallard, see *Mallard v The Queen (2005) 224CLR 125*.

- Roseanne (Catt) Beckett, see *Beckett v State of New South Wales [2015] NSWSC 1017*.

- Gordon Wood, see *Wood v State of New South Wales [2018] NSWSC 1247*.

- Harold Eastman, see *Eastman v Director of Public Prosecutions (No 2) [2014] ACTSCFC2*.

Annexure B – Timeline

1. Caleb Gibson Folbigg:

Born: 1 February 1989

64 2012 04 21 Approved LCA Policy Statement on Cth Criminal Cases Review Commission.

Died: 20 February 1989

Age at death: 19 days old

Cause of death: The death certificate records the cause of death as "Sudden Infant Death Syndrome". The certificate also shows that an inquest was dispensed with.[65]

2. Patrick Allan Folbigg

Born: 3 June 1990

Died: 13 February 1991

Age at death: 8 months 10 days

Cause of death: The death certificate records the cause of death and duration of last illness as:

(A) asphxia due to airway obstruction 1 hour
(B) epileptic fits 4 months[66]
There is no indication if an inquest was dispensed with or not, but it is assumed it was.

3. Sarah Kathleen Folbigg

Born: 14 October 1992

Died: 30 August 1993

Age at death: 10 months 16 days

Cause of death: The death certificate records the cause of death as "Sudden Infant Death Syndrome". The certificate also shows that an inquest was dispensed with.[67]

4. Laura Elizabeth Folbigg

Born: 7 August 1997

[65] See 'Death Certificate' dated 18 January 2000: 'Forensic Pathology Tender Bundle' page 3: https://www.folbigginquiry.justice.nsw.gov.au/Documents/Exhibit%20H%20-%20Forensic%20Pathology%20Tender%20Bundle.pdf
[66] See 'Death Certificate' dated 17 January 2000: 'Forensic Pathology Tender Bundle' page 36 https://www.folbigginquiry.justice.nsw.gov.au/Documents/Exhibit%20H%20-%20Forensic%20Pathology%20Tender%20Bundle.pdf
[67] See 'Death Certificate' dated 17 January 2000: 'Forensic Pathology Tender Bundle' page 87 https://www.folbigginquiry.justice.nsw.gov.au/Documents/Exhibit%20H%20-%20Forensic%20Pathology%20Tender%20Bundle.pdf

Died: 1 March 1999
Age at death: 18 months 22 days

5. On **8 July until 4 August 1999** telephone interception occurred.

6. On **16 July 1999** listening devices were placed in the Folbigg home (Singleton New South Wales).

7. On **23 July 1999** police interviewed Kathleen Folbigg.

8. On **13 December 1999** Dr Allan Cala provided an autopsy report for Laura Folbigg (nine months after conducting an autopsy).

9. In a letter dated **2 February 2001**, Gregory Coles, Office of the Director of Public Prosecutions, Newcastle, New South Wales advised Detective Senior Constable B Ryan, 'the matter should be referred to the State Coroner, in order for a full inquest to be held'.

10. On **2 April 2001**, Acting State Coroner Stevenson advised Detective Senior Constable Ryan by telephone that Kathleen Folbigg should be charged with murdering her four children.

11. On **6 April 2001**, Detectives Ryan, Firth, Deputy State Coroner Stevenson and Crown Prosecutor agreed there was sufficient evidence to charge Kathleen Folbigg with murder.

12. On **19 April 2001**, Craig Folbigg, the husband of Kathleen Folbigg, was arrested for hindering police and interviewed by Detectives Ryan and Firth.

13. On **19 April 2001**, Kathleen Folbigg was arrested and charged with four counts of murder.

14. On **20 April 2001**, a magistrate refused a bail application.

15. On **24 April 2001**, at Maitland Local Court before Magistrate Richard Wakeley, Newcastle solicitor Brian Doyle, sought bail and was refused.

16. On **18 May 2001**, a successful Supreme Court bail application was made by barrister Doug Timmins and solicitor Brian Doyle.

17. In a letter dated **19 June 2001**, Dr Allan Cala wrote to Detective Senior Constable Bernie Ryan stating, inter alia, 'If I had examined the body of Laura Folbigg in isolation, without the knowledge I had at the time of previous infant deaths in the family, I might give the cause of death as Myocarditis' (emphasis added).

18. On **24 May 2002**, solicitor Brian Doyle appeared at the committal of Kathleen Folbigg, before magistrate Railton. She was committed for trial.

19. On **25 October 2002**, the Crown presented an ex efficio indictment laying an additional charge of maliciously inflicting grievous bodily harm with intent to do grievous bodily harm on Patrick Folbigg on 18 October 1990.

20. On **22 November 2002** in the Supreme Court before Wood CJ at CL an application for separate trials refused, and tendency and coincidence evidence admitted.[68]

21. On **13 February 2003** separate trial applications were made before the Court of Criminal Appeal and were dismissed.[69]

22. On **1 April 2003** the jury was empanelled, the charges were read, and pleas entered:

> CHARGE 1: For that she on 20 February 1989 at Mayfield in the State of New South Wales did murder Caleb Gibson Folbigg.
>
> PLEA: Not guilty.
>
> CHARGE 2: Further for that she on 18 October 1990 at Mayfield in the State of New South Wales did maliciously inflict grievous bodily harm to Patrick Allan Folbigg with intent to do grievous bodily harm.

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68 *R v Folbigg* [2002] NSWSC 1127.

69 *R v Folbigg* [2003] NSWCCA 17.

PLEA: Not guilty.

CHARGE 3: Further for that she on 13 February 1991 at Mayfield in the State of New South Wales did murder Patrick Allan Folbigg.

PLEA: Not guilty.

CHARGE 4: Further for that she on 30 August 1993 at Thornton in the State of New South Wales did murder Sarah Kathleen Folbigg.

PLEA: Not guilty.

CHARGE 5: Further for that she on 1 March 1999 at Singleton in the state of New South Wales did murder Laura Elizabeth Folbigg.

PLEA: Not guilty.

23. On **1 April 2003** the trial commenced and finished on 19 May 2003 (27 days of hearings). The trial judge was Justice Barr, the prosecutors were Mr Mark Tedeschi QC and Ms J Culver, the defence barristers were Mr Peter Zahra SC with Mr A Cook.

24. On **21 May 2003** the jury found Kathleen Folbigg not guilty of murder on count 1 but guilty of manslaughter (Caleb), guilty of maliciously inflict grievous bodily harm on count 2 (Patrick), and guilty of murder on counts 3 (Patrick), 4 (Sarah) and 5 (Laura).

25. In **February 2005**, the first appeal against the convictions occurred and was dismissed.[70]

26. On **2 September 2005** a Special Leave Application was heard by High Court failed.

[70] *R v Folbigg* (2005) 152 A Crim R 35; [2005] NSWCCA 23.

27. On **16 May 2007**, the Court of Criminal Appeal granted an application for leave to reopen the appeal against the convictions.[71]

28. On **21 December 2007**, the Court of Criminal Appeal dismissed the appeals against conviction.[72]

29. On **26 May 2015** a petition was sent to the Governor of New South Wales for a review of Kathleen Folbigg's convictions pursuant to s76 of the *Crimes (Appeal & Review) Act 2001.*

30. An inquiry was granted by the Governor of New South Wales on **22 August 2018**.

31. The Inquiry hearings began on **18 March 2019**, and the evidence was heard over 11 days ending on 1 May 2019.

32. Kathleen Folbigg was questioned at the Inquiry over three days. She was questioned on Monday **29 April 2019**, by Christopher Maxwell QC, Queens Counsel for the New South Wales Office of Director of Public Prosecutions, and Margaret Cunneen SC, Senior Counsel for Craig Folbigg. She was further questioned by Margaret Cunneen on Tuesday **30 April 2019**. On Wednesday **1 May 2019** she was questioned by her counsel Jeremy Morris SC, and Gail Furness SC, Senior Counsel assisting the Inquiry.

33. In **July 2019** the Report of Inquiry into the Convictions of Kathleen Megan Folbigg was published. The inquiry was not successful for Kathleen Folbigg.

34. On **21 October 2019**, solicitors for Kathleen Folbigg, filed a summons in the Common Law Division of the Supreme Court. They sought the exercise of the supervisory jurisdiction of the court pursuant to s69 of the *Supreme Court Act 1970*. This application was unsuccessful.

35. On **2 March 2021** a Pardon Petition was submitted seeking an unconditional pardon for Kathleen Folbigg was sent to the Governor of New South Wales.

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71 *R v Folbigg* [2007] NSWCCA 128.
72 *Folbigg v R* [2007] NSWCCA 371.

36. An application was made to the State Coroner on **3 March 2022** for an inquest into the deaths of Kathleen Folbigg's children. This application was unsuccessful.

37. On **18 May 2022**, the Governor of New South Wales, on the advice of the Attorney General, ordered a second inquiry into Kathleen Folbigg's convictions.

38. On **6 July 2022** a Parole Petition was submitted on behalf of Kathleen Folbigg. This petition was unsuccessful.

39. On **30 May 2023** his Honour Tom Bathurst KC AC telephoned the Attorney General and advised he had formed a firm view about the matters heard during the inquiry. Mr Bathurst suggested that rather than waiting another two months until he had completed writing the Inquiry Report, he would provide a summary to the Attorney General that outlined his views.

40. On **1 June 2023**, TF Bathurst AC KC, in a Memorandum to the Attorney General of New South Wales said, inter alia, 'I am firmly of the view that there is reasonable doubt as to Ms Folbigg's guilt'.

41. On **5 June 2023** the New South Wales Attorney General Michael Daley made a recommendation to the Governor, Her Excellency the Honourable Margaret Beazley AC KC that Kathleen Folbigg be pardoned, and the Governor accepted the recommendation.

42. On **8 November 2023** the Report of the Inquiry into the convictions of Kathleen Megan Folbigg was published.

43. On **14 December 2023**, all of Kathleen Folbigg's convictions were quashed, and verdicts of acquittal entered by the New South Wales Court of Criminal Appeal.[73]

Annexure C – List of cases were Prerogative of Mercy discussed and applied

R v Milnes and Green (1983) 33 SASR 211; 8 A Crim R 61

The Queen v Secretary of State for the Home Department [1993] EWHC Admin 2

[73] *Folbigg v R* [2023] NSWCCA 325.

AG of Trinidad and Tobago v Phillip [1995] 1 AC 396; 1 All ER 93

R v Robinson [1999] NSWCCA 186

Eastman v Director of Public Prosecutions (ACT) [2003] HCA 28

Attorney – General (Cth) v Huynh [2023] HCA 13

Armstrong v R [2021] NSWCCA

Annexure D – Kathleen Folbigg Cases

R v Folbigg [2002] NSWSC 1127

R v Folbigg [2003] NSWCCA 17

Folbigg v The Queen [2003] HCA Trans 589, Sydney No 559 of 2003

R v Folbigg (2005) 152 A Crim R 35; [2005] NSWCCA 23

Folbigg [2005] HCA Trans 657, No S94 of 2005

R v Folbigg [2007] NSWCCA 128

Folbigg v R [2007] NSWCCA 371

Folbigg v R [2023] NSWCCA 325