*The Hon. T F Bathurst AC KC*
*6th Floor Selborne Wentworth Chambers*
*174 Philip Street, Sydney NSW 2000, Australia*

**Re: KATHLEEN MEGAN FOLBIGG**

**MEMORANDUM TO THE ATTORNEY GENERAL**

## A. Introduction

I refer to the Direction of the Governor of New South Wales, pursuant to s 77(1)(a) of the *Crimes (Appeal and Review) Act 2001* (NSW). By that direction, I was appointed to conduct an inquiry into the convictions of Kathleen Megan Folbigg on 21 May 2003 for the manslaughter of Caleb Folbigg, maliciously inflicting grievous bodily harm upon Patrick Folbigg, and the murders of Patrick, Sarah and Laura Folbigg. The first hearing block in the Inquiry commenced on 14 November 2022, and a second hearing block commenced on 13 February 2023. Oral closing submissions in the Inquiry were delivered on 26 and 27 April 2023 (following an exchange of written submissions).

Since the conclusion of oral submissions, I have been reviewing the extensive submissions of the parties and the evidence with a view to completing my report. Because of the extent of the submissions and the volume of the evidence it will take some time for the report to be finalised. Nevertheless, I have a reached a firm view as to the result of the Inquiry. As discussed with you, in the particular circumstances of this case, I felt it appropriate to notify you of that view prior to the delivery of my report to the Governor pursuant to s 82 of the *Crimes (Appeal & Review) Act 2001* (NSW).

My task is to consider the evidence at the trial and the conduct of the trial in light of the further evidence received at the Inquiry, to determine whether overall there is a reasonable doubt as to Ms Folbigg's guilt of the manslaughter of her child Caleb, the infliction of grievous bodily harm on her child Patrick, and the murder of her children, Patrick, Sarah and Laura.

I have reached the view that there is reasonable doubt as to the guilt of Ms Folbigg for each of these offences. Set out below is a summary of the basis I have reached that conclusion. My detailed reasons for each of the matters referred to will, of course, be contained in my report to the Governor.

## B. The Crown case at trial

The Crown case was that Ms Folbigg smothered her children, either intending to kill them during a fit of anger, resentment or hatred against her child, alternatively, she deliberately sought to render them unconscious in an attempt to put them to sleep either so that she could get to sleep herself, or that she could have some time to herself.

There was no physical evidence that the children were smothered. Rather, the Crown relied on evidence that an infant can be smothered without signs being shown. The Crown case was entirely circumstantial. It was based essentially on the following matters:

(a) the coincidence of the four deaths and the Apparent Life Threatening Event (**ALTE**) suffered by Patrick Folbigg. In a coincidence notice the Crown alleged:

  (i) that each of the children died or had an ALTE in a similar way;

  (ii) that each of the children died/had an ALTE from the same cause;

  (iii) that the accused killed/caused an ALTE to each of the four children by asphyxiating them with an intent to do grievous bodily harm to them;

  (iv) that the four children did not die from Sudden Infant Death Syndrome or any other illness, disease or syndrome;

(b) the evidence of the relationship Ms Folbigg had with her children, the particular circumstances surrounding Sarah's death and the circumstances of the discovery of Ms Folbigg's diaries and journals;

(c) the statements in selected entries from Ms Folbigg's diaries which were said to amount to admissions of guilt as to having harmed her children, and Ms Folbigg's statements in her electronically recorded interview concerning the deaths of the children; and

(d) the medical evidence to the effect that there was nothing to suggest the children died as a result of known natural causes.

The Court of Criminal Appeal, in dismissing the appeal against Ms Folbigg's conviction,[1] found there was compelling evidence to justify the findings reached by the jury beyond reasonable doubt. Sully J, with whom the other members of the Court agreed, made the following remarks (*Folbigg v R* [2005] NSWCCA 23, 152 A Crim R 35 at [143]):

> [1] None of the four deaths, or Patrick's ALTE, was caused by an identified natural cause.
>
> [2] It was possible that each of the five events had been caused by an unidentified natural cause, but only in the sense of a debating point possibility and not in the sense of a reasonable possibility. The evidence of the appellant's episodes of temper and ill-treatment, coupled with the very powerful evidence provided by the diary entries, was overwhelmingly to the contrary of any reasonable possibility of unidentified natural causes. So were the striking similarities of the four deaths.
>
> [3] There remained reasonably open, therefore, only the conclusion that somebody had killed the children, and that smothering was the obvious method.
>
> [4] In that event, the evidence pointed to nobody other than the appellant as being the person who had killed the children; and who, by reasonable parity of reasoning, had caused Patrick's ALTE by the same method."

[1] A subsequent appeal against conviction, alleging a miscarriage of justice by reason of juror misconduct, was also dismissed: see *Folbigg v The Queen* [2007] NSWCCA 371.

## C. My task

My task is to enquire and form an opinion whether on the material before me there is reasonable doubt as to the guilt of Ms Folbigg on any of the charges. In undertaking that task it is necessary for me to consider whether the circumstances are consistent with any reasonable hypothesis other than the guilt of the accused.

I am of the opinion that there is a reasonable possibility that three of the children died of natural causes, namely:

(a) in the case of Sarah and Laura Folbigg, there is a reasonable possibility a genetic mutation known as CALM2-G114R occasioned their deaths;
(b) in the case of Laura Folbigg, there is a reasonable possibility she died from myocarditis identified at autopsy and in subsequent investigations;
(c) in the case of Patrick Folbigg, there is a reasonable possibility an underlying neurogenic disorder caused his ALTE and subsequent death.

Further, I am unable to accept the proposition that the evidence establishes that Ms Folbigg was anything but a caring mother for her children. Nor am I able to accept Mr Folbigg's version of the events on the night Sarah died, namely that he woke and observed that Ms Folbigg had taken Sarah from her bed.

I am also of the view that whilst some of the entries in Ms Folbigg's diary could be considered as constituting admissions, the psychological and psychiatric evidence at the Inquiry suggests that they were, rather, the writing of a grieving and possibly depressed mother, traumatised by the unexplained deaths of three children (noting that the relevant portions of the diaries were written before the death of Laura). In my view, informed by the expert evidence before the Inquiry, the diaries reflect Ms Folbigg blaming herself for the death of each child, as distinct from admissions that she murdered or otherwise harmed them.

Once these matters are taken into account, the coincidence and tendency evidence which were central to the Crown case at trial falls away, and reasonable doubt exists as to Ms Folbigg's guilt. Because the evidence of Ms Folbigg's guilt in relation to the manslaughter of Caleb Folbigg depends on the availability of coincidence and tendency reasoning, there is necessarily a reasonable doubt in relation to her guilt in respect of his death. In the sections below, I will elaborate on each of these matters.

## D. The medical and genetic evidence

### *(i) Sarah and Laura*

Of the cardiac and genetic experts who gave evidence at the Inquiry, all but possibly two clearly expressed the view that the genetic mutation CALM2-G114R could have caused arrhythmic dysfunction in the children, which in turn caused their death. Although not all agreed it was a likely cause, none were prepared to exclude it as a reasonable possibility.

The two remaining experts were ambivalent on the question. One was asked whether he could exclude, as a reasonable possibility that the two girls died as a result of natural causes

associated with the CALM 2-114R mutation. He responded, "I think you cannot exclude it but I consider it unlikely, maybe even highly unlikely."

The only other cardiologist who unequivocally rejected the CALM2-G114R mutation as a reasonable cause of Sarah and Laura's death based his opinion on a probability analysis of four unexplained deaths in one family from multiple different unknown natural causes. He stated, however, that had Laura and Sarah's two brothers not died in similar circumstances, the possibility that CALM2-G114R mutation occasioned their death became "totally reasonable". Thus, looking at Sarah and Laura in isolation, he would support the possibility that the deaths were caused by the CALM2-G114R mutation. As will appear below, applying probability theory to this question is unhelpful to my task.

For these reasons, I am of the view, that there is at least a reasonable possibility that the CALM2-114R mutation was the cause of Sarah and Laura's death.

*(ii) Laura's myocarditis*

All of the forensic pathologists who gave evidence at the Inquiry (and at a previous Inquiry conducted in 2018 and 2019 (**2019 Inquiry**)), with one exception, expressed the view that the myocarditis discovered in Laura on examination subsequent to her death could have caused her death. One expert could not exclude it as a possibility, but he did not agree it was a reasonable possibility. Having regard to the preponderance of evidence, it seems to me that Laura's myocarditis cannot be excluded as a reasonably possible cause of her death.

*(iii) Patrick*

The evidence of each of Professor Monique Ryan (paediatric neurologist) and Professor Peter Fleming (paediatric intensivist), both highly qualified in their respective fields, was that it was extremely unlikely that Patrick had suffered a severe hypoxic-ischaemic injury on 18 October 1990 (the date of Patrick's ALTE). Associate Professor Fahey, who gave evidence at the 2019 Inquiry but not at the present Inquiry, agreed that there were matters that required explanation to enable it to be concluded that Patrick's ALTE resulted from such an injury. However, placing particular reliance on the article, Constantinou et al, "Hypoxic-ischaemic encephalopathy after near miss Sudden Infant Death Syndrome", he concluded that Patrick's presentation after the ALTE was consistent with a severe hypoxic-ischaemic injury. The relevance of this article to the present case was extensively criticised by Professor Ryan in her evidence to the Inquiry, and her criticism went unchallenged.

I accept the evidence of Professor Ryan and Professor Fleming. Taken in isolation it leads to the conclusion that it cannot be established beyond reasonable doubt that Patrick's ALTE was the result of being smothered. Professor Ryan expressed the view that it was more than likely that Patrick's initial presentation on 18 October 1990 was due to an "as yet unexplained epileptic encephalopathy that resulted in progressive neurological dysfunction and his death". No expert disputed the possibility that Patrick subsequently died of an encephalopathic disorder.

In these circumstances, there is reasonable doubt that the ALTE and Patrick's subsequent death were caused by smothering.

## E. The Crown's reliance on the relationship Ms Folbigg had with her children and the particular circumstances surrounding Sarah's death

The Crown case was that Ms Folbigg deliberately smothered her children in a fit of anger or put them to sleep, either so she could sleep or to have time to herself. Her relationship with her children were said to support this.

I cannot agree with this contention. Apart from the evidence of Mr Folbigg, the only suggestion of ill-tempered behaviour was given by one witness, who gave evidence that Ms Folbigg, on one occasion, yanked Laura out of the highchair when Laura refused to eat and got angry on another occasion when Laura did not go to sleep. The witness stated they were the only two occasions she saw Ms Folbigg lose her temper with Laura and Sarah. These isolated incidents taken at their highest do not, in my opinion, support the Crown case. Neither does it assist the Crown case that Ms Folbigg left her daughters with neighbours occasionally and displayed different manifestations of grief for her children from time to time. None of the behaviours of Ms Folbigg can be described as anything but normative of young mothers of infant children. Moreover, the balance of evidence at the trial and the Inquiry was to the effect that she was a loving and caring mother.

Although Mr Folbigg gave evidence to the effect that Ms Folbigg was ill-tempered with her children and growled at them from time to time, a number of inconsistencies in his evidence means it must be treated with caution. However, even if, as Mr Folbigg suggests, Ms Folbigg got upset or angry when Sarah did not stick to what was considered the appropriate sleeping regime, that lends no support to the proposition that Ms Folbigg killed Sarah much less any of her other children.

Further, I am unable to accept Mr Folbigg's evidence that on the night Sarah died, Ms Folbigg had taken her out of her bed into another room shortly before she found Sarah dead. My report will review his evidence in detail. Suffice to say on this issue, I am unable to accept that version of what happened on that night in preference to that of Ms Folbigg.

## F. The diaries

Heavy reliance was placed on what was said to be admissions in the diaries and journals, by the Crown at the trial and by the Court of Criminal Appeal and, for that matter, Mr Blanch in the 2019 Inquiry, in reaching their conclusions that Ms Folbigg was guilty of the charges. I am unable to reach the same conclusion as to the effect of the diary entries for the following summary reasons:

(a) Although I accept that a number of entries in the diaries could be characterised as admissions of guilt, there is no direct statements made by Ms Folbigg in any of them that she killed any of her children.

(b) The conclusion apparently reached by the jury and by the Court of Criminal Appeal as to their probative value as admissions, was in the context where no identified natural causes of death for any of the children, except Laura, was propounded. In that context it is relatively easy to infer that what was said would constitute admissions. However, read

in the context where there are identifiable causes of death in relation to three children, the entries in the diary can be readily considered as the words of a grieving mother seeking to come to grips with the unexpected and unexplained deaths of her four children.

(c) Ms Folbigg was questioned on the diaries in an eight hour interview with Detective Bernard Ryan. At the 2019 Inquiry she was not only cross-examined extensively on the diaries by the Senior Crown Prosecutor but Senior Counsel for Mr Folbigg was permitted to traverse the same ground. Throughout the interview and the cross-examinations she denied what she had written were admissions of guilt and explained them as expressions of parental responsibility for the deaths (however they occurred), and her fear that Laura, with whom she was pregnant, at the time may of the entries were written, would suffer the same fate.

(d) The evidence given by Ms Folbigg as to the circumstances of and motivation for writing the diaries was supported by the psychological and psychiatric evidence adduced at the Inquiry, none of which was substantially challenged and which I accept. The evidence was that rather than being admissions of murder, the entries were explicable as the words of a grieving, depressed and traumatised mother, feeling guilt at the unexplained deaths of her four children, and were typical cognitions of parents of children who have died from SIDS or other unexplained or accidental causes.

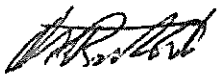
## G. The conduct of the trial and the coincidence evidence

I have set out the four matters relied upon in the coincidence notice above. The second matter in the notice, namely that each of Ms Folbigg's children died or had an ALTE from the same cause and the fourth, namely that Ms Folbigg's four children did not die from Sudden Infant Death Syndrome or any other illness, disease or syndrome fall away once it is accepted that there was a reasonable possibility that three of the four children died of identifiable natural causes. The third, namely that Ms Folbigg asphyxiated the children in an attempt to kill them or do grievous bodily harm to them is simply a statement of the Crown's contention.

That leaves the first matter in the coincidence notice that each of Ms Folbigg's children died or had an ALTE in a similar way. Taken in isolation, that is simply a restatement of Meadow's Law, namely that in a single family one sudden infant death is a tragedy, two is suspicious and three is murder until proved otherwise. That so-called law, which in effect reverses the onus of proof, has been discredited as a matter of legal principle and statistically. Taken in isolation, the four deaths, absent any other evidence, do not prove murder of any one of the deceased children. Regrettably, as I will point out in my report, the jury were invited, at least implicitly, to accept the assumption that the four then unexplained deaths could only be due to unnatural causes, namely smothering. Meadow's "law" also ignores the fact that it would similarly be a remarkable coincidence if over a period of ten years the mother of four children smothered them without leaving any trace on each occasion, and in circumstances in which two of them carried an extreme rare, potentially life-threatening genetic variant, of whom one also had myocarditis, and a third presented, at the least, atypically for a case of suffocation.

## H. Conclusion

For these summary reasons, I am firmly of the view that there is reasonable doubt as to Ms Folbigg's guilt. Although this is not a report pursuant to s 82 of the *Crimes (Appeal and Review) Act 2001* (NSW), I have no objection that this memorandum be either published or that the Attorney make use of it in such matter as he thinks fit.



**T F Bathurst AC KC**

1 June 2023